Does *Houchins v. KQED, Inc.* Matter?

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MATTHEW L. SCHAFER†

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Houchins v. KQED, Inc. is an enigma. It presented the question of whether the press had a special right of access under the First Amendment to a jail over that of the public. Only seven Justices participated. The lead opinion was a mere three-Justice plurality. The Court split 3-1-(3). The plurality concluded that “[n]either the First Amendment nor the Fourteenth Amendment mandates a right of access to government information.” The concurring opinion agreed with the plurality in part and with the dissenters in part, who would have found that “arbitrarily cutting off the flow of information at its source abridges the freedom of speech and of the press.”

But, as recounted in Part I, this was just the beginning of the Court’s access jurisprudence. A year later, in Gannett Co., Inc. v. DePasquale, the Court reserved judgment on the question the Houchins plurality foreclosed, namely, whether there is a First Amendment right of access to government information held equally by the press and the public. A year after that, in Richmond Newspapers, Inc. v. Virginia, seven Justices agreed for the first time that the First Amendment guarantees some level of access—in that case, to a criminal trial. And, later, in Globe Newspaper Co. v. Superior Court, a majority of the Court held that the First Amendment encompassed a right of access that “ensure[d] that the individual citizen can effectively participate in and contribute to our republican system of self-government.”

These later cases seemingly displaced Houchins. Yet, still other cases suggested that Houchins had continuing

2. Id. at 15.
3. Id. at 38 (Stevens, J., dissenting).
viability. Thus, as explained in Part II, while many federal courts of appeals have found that Richmond Newspapers and Globe Newspaper control claims for a right of access, just as many have concluded that Houchins’ contrary rule controls. In doing so, these courts have characterized Richmond Newspapers and Globe Newspaper as mere exceptions to Houchins’ general rule that there is no constitutionally protected right of access.

In light of this split, Part III asks Does Houchins matter? On its way to answering that question, it makes four observations. First, the premises of Houchins were exceedingly narrow, despite courts characterizing them as quite broad. Houchins was not about the constitutionality of total bans on access. In fact, the warden in Houchins provided substantial access to the jailhouse at issue in that case. Houchins also was not a case about freedom of speech; it dealt only with the question of whether the press had a special right of access under the Press Clause. It, thus, left open the question of whether—generally—the First Amendment protects an access right.

Second, Houchins lacks precedential value despite courts of appeals’ insistence to the contrary. It was decided by a seven-Justice Court. No single opinion garnered a majority, even on the short Court. Nor, under the Court’s least common denominator approach adopted in Marks v. United States,7 is there a controlling plurality opinion. And, as a prudential matter, a three-Justice plurality should not have purported to announce a new constitutional rule—let alone an absolute one—without a full complement of Justices.

Third, the Court’s later access cases displaced Houchins; they were not exceptions to it. Richmond Newspapers and Globe Newspaper speak directly to the constitutionality of a complete exclusion of the press and the public from government information. The holdings in these cases, i.e., that the press and the public have a qualified, constitutional

right of access to some government information, dispel the contrary one in *Houchins*. Moreover, the Court’s later access case law, unlike *Houchins*, is consistent with the Court’s contemporary understanding of the First Amendment.

Finally, the practical effect of *Houchins* is highly anti-democratic. Its absolutist rule cuts off all access no matter the countervailing interests. A humanitarian crisis at the border in Texas, like that that occurred in 2018, or in a freezing jail in New York in 2019, are insulated from public accountability. Under *Houchins*, the government can carry away Black Lives Matter protestors under the cover of darkness outside the eye of the press, like it attempted to do in 2020. This all has little to commend it.

Having exhaustively reviewed the history of the right of access and *Houchins*’ place in it, this Article concludes that the *Houchins* plurality’s no-access rule should be recognized for what it is: *dicta* of three Justices in a case that lacks any precedential value or normative sense. On these bases, it urges federal appellate courts to follow *Richmond Newspapers* and *Globe Newspaper* instead. Unlike *Houchins*, these cases speak directly to the issue, command the views of a majority of the Court, have precedential value, and, importantly, recognize the centrality of access to republican self-government.

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I. The Court’s Access Jurisprudence

In the wake of the Attica prison riots in the early 1970s, courts recognized that the news media had a protected First Amendment interest in interviewing prisoners. Implicit in the First Amendment, they held, was a right of access to information “antecedent to . . . [the] First Amendment right to publish.” In 1974, however, the Supreme Court decided *Pell v. Procunier* and *Saxbe v. Washington Post Co.* by 5-(4) margins. In each, it rejected arguments that the enforcement of generally applicable regulations limiting interviews with prisoners violated press rights. Emphasizing that the government had not limited access to conceal poor prison conditions and that the press had substantial alternative means of gathering information, five Justices found that the “Constitution does not . . . require government to accord the press *special access* to information not shared by members of the public generally.”

The dissenters disagreed. According to Justice Lewis Powell, “[a]t some point official restraints on access to news sources, even though not directed solely at the press, may so undermine the function of the First Amendment that it is both appropriate and necessary to require the government to justify such regulations in terms more compelling than

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12. *Pell*, 417 U.S. at 830, 834 (emphasis added). *Pell* was two consolidated cases. One involved an appeal by California prison officials from an opinion concluding that interview restrictions violated the prisoners’ First Amendment rights. *Id.* at 821. The decision in that case was 6-(3) with Powell agreeing that the prisoners lacked a “constitutional right to demand interviews with willing reporters.” *Id.* at 836 (Powell, concurring in part and dissenting in part). The second involved an appeal by members of the media from an opinion concluding that regulations limiting prison interviews were constitutional. *Id.* at 829. Powell joined the dissenters in the second appeal, making that decision 5-(4). *Id.* at 835 (Powell, concurring in part and dissenting in part).
discretionary authority.”13 And, as Justices William Douglas, William Brennan, and Thurgood Marshall explained, the press sought to vindicate not its rights but “the right of the people, the true sovereign under our constitutional scheme, to govern in an informed manner.”14 Thus, the interview ban was “an unconstitutional infringement on the public’s right to know protected by the free press guarantee of the First Amendment.”15

A. The Early Cases

Beginning in 1978, the Court revisited its holdings in Pell and Saxbe, specifically, and the right of access, generally. In quick succession in 1978, 1979, 1980, and 1982, it heard four cases that would come to form the foundation of the Court’s access jurisprudence. Yet, it was not until 1982 that the Court spoke in one voice, finding that the First Amendment protected a right of access—and, even then, the implications of its holding were unclear. As a result, today, litigants, lawyers, and judges must resort to a hodgepodge of majority, plurality, concurring, and dissenting opinions for guidance.

1. Houchins v. KQED, Inc.

After a Black inmate committed suicide at a Santa Rita jail, KQED, a San Francisco television and radio station, requested access to and the ability to record areas of Little Greystone—“the scene of alleged rapes, beatings, and adverse physical conditions.”16 Sheriff Thomas Houchins denied the request. KQED, along with local branches of the

13. Saxbe, 417 U.S. at 860 (Powell, J., dissenting); see also Pell, 417 U.S. at 835 (Powell, J., concurring in part and dissenting in part) (“California’s absolute ban against prisoner-press interviews impermissibly restrains the ability of the press to perform its constitutionally established function of informing the people on the conduct of their government.”).


15. Id. at 841.

NAACP, sued and sought a preliminary injunction enforcing access.\textsuperscript{17} Within a month of the suit being filed, Houchins opened the jail and Little Greystone to the public “for the first time in three years” for monthly tours.\textsuperscript{18} As one journalist on the three-hour tour reported, for example, “[i]n the men’s dorm, in a section of ‘Little Greystone,’ tour members walked through a barracks housing newly sentenced male prisoners.”\textsuperscript{19} In December, Houchins expanded the tours to semi-monthly.\textsuperscript{20} Still, he did not permit recording.

i. The Lower Courts’ Decisions

In November 1975, after hearing the evidence, the district court granted KQED a preliminary injunction, concluding that a “more flexible press policy at Santa Rita is both desirable and attainable.”\textsuperscript{21} The court ordered Houchins, in addition to the semi-monthly tours, to give journalists “access to Santa Rita ‘at reasonable times and hours’” and to permit their use of “photographic and sound equipment.”\textsuperscript{22} It added, however, that he “may, at his discretion, deny access to news media during periods of jail tension when such access would be dangerous.”\textsuperscript{23}

The Ninth Circuit affirmed. In an opinion by Judge Harry Pregerson, it found that “the First Amendment grants the news media a constitutionally protected right to gather

\begin{table}
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17. Station Barred From Jail, KQED, NAACP Sue Sheriff, THE ARGUS, Jun. 20, 1975, at 5.  \\
19. Id.  \\
20. Santa Rita Tours, OAKLAND TRIBUNE, Dec. 21, 1975, at 19.  \\
23. Newsmen Win Round Over Santa Rita Jail, ASSOCIATED PRESS, Nov. 22, 1975, at 4.  \\
\hline
\end{tabular}
\end{table}
news.”24 This right was “indispensable” especially where “the information sought concerns governmental institutions, including prisons.”25 But, under Pell, the “news media’s constitutional right of access to prisons or their inmates is co-extensive with the public’s right.”26 Nevertheless, it construed the lower court’s opinion as “finding that the First Amendment rights of both the public and the news media were infringed by appellant’s restrictive policy.”27

Applying the abuse of discretion standard, the Ninth Circuit concluded that the lower court “applied the proper test to determine whether these rights [of access] were infringed.”28 That test was well-established: “a governmental restriction on First Amendment rights can be upheld only if the restriction furthers an important or substantial governmental interest unrelated to suppressing speech and the restriction is the least drastic means of furthering that governmental interest.”29 The injunction walked that line because “while protecting First Amendment rights,” it also satisfied “the governmental interests in security of the jail and privacy of inmates.”30

The court then turned to the problem of Pell in light of the injunction’s command that Houchins provide greater access to the press than to the public generally: “Pell v. Procunier does not stand for the proposition that the correlative constitutional rights of the public and the news media to visit a prison must be implemented identically.”31 The “access needs” of each might differ: “[m]edia access, on

25. Id. (citing Mills v. Alabama, 384 U.S. 214, 219 (1966)).
26. Id. at 285–86.
27. Id. at 286.
28. Id.
29. Id. (citing United States v. O’Brien, 391 U.S. 367, 377 (1968)).
30. Id.
31. Id.
reasonable notice, may be desirable in the wake of a newsworthy event, while the interest of the public in observing jail conditions may be satisfied by formal, scheduled tours.”  

Judges Ben Duniway and Shirley Hufstedler both concurred. Duniway wrote to express his “serious doubts about the result,” though he did not think it “wrong in principle.” Still, he had “great difficulties in reconciling the result with Pell and Saxbe” because the injunction granted “KQED and other media greater access to the Santa Rita Jail than is granted to the public.” He went on to explain:

I happen to believe that, as to most issues of public importance, and assuming that one accepts the media-created notion that there is such an animal as a constitutionally protected “public’s right to know” and further assuming that the media somehow embody that “right,” then the media have a protected preferred right to access to information about the public’s business. This is based on the proposition that, in our modern, urban, overpopulated, complex and somewhat intimidating and alienated society, only the media, as distinguished from the submerged, often alienated, and often frightened, individual, can be counted on to dig out and disseminate the facts about the public’s business. Witness “Watergate” and its remarkable consequences.

While Duniway could not “reconcile these notions with the express basis for the decisions in Pell,” he “would like to assume that those decisions are not to be taken literally.” But even of that he was not sure. Pell seemed to “expressly disregard” different “access needs” and different administrative burdens of the press and the public. Thus, he “express[ed] doubt, not because I think that I ought to, but because I think that the Supreme Court’s decisions require

32. Id.
33. Id. at 294 (Duniway, J., concurring).
34. Id.
35. Id.
36. Id. at 294–95.
37. Id. at 295.
Hufstedler concurred to explain that the holdings of *Pell* and *Saxbe* were “not directly involved on this appeal.” Rather, she saw the “thorny question” to be “the interpretation of the broad statement in *Pell* that ‘newsmen have no constitutional right of access to prisons or their inmates beyond that afforded to the general public.’” On that question, she believed that *Pell* and *Saxbe* stood for the proposition that “the First Amendment does not give news media any special right of access to prisons or to prisoners and none that is not reasonably necessary to serve the public interest in being informed about prisons and prisoners.” This followed from the issues at stake in those cases. Neither concerned “the application of regulations imposing the same standards on news media personnel and members of the general public.” Rather, in each “the press had greater latitude than the general public.” As such, the Court had not addressed “the question whether news media could be confined constitutionally to regulations controlling access to prisons or to prisoners that govern group tours by the general public.”

For Hufstedler, the observation in *Pell* and *Saxbe* that “the news media’s constitutional right of access to prisons or their inmates is co-extensive with the public’s right” could not be given effect “in absence of any description of what the public’s right is or how the right is to be vindicated.” A court had to ask: what kind of information does the public have a right to know?; and what kind of limitations could be
imposed on “the means by which the information to which the public is entitled can be gathered?” 46 Finding that the public had a “very extensive” right to know about the conditions of its prisons, Hufstedler saw no constitutional problem in differentiating between “public tours and media access” because the media’s “mission” was “different in degree, though not in kind, from the display to a tour group.” 47 For example, the public had a right to know how food is prepared in its prisons, but it would have been impractical to fill the kitchen with members of the public. 48 A member of the media, however, could observe the kitchen and inform the public about information that it had a right to know.

ii. At the Supreme Court

Houchins applied to then-Justice William Rehnquist for a stay of the injunction pending the filing of a petition for a writ of certiorari. 49 The dispute, Rehnquist said, was limited to a question of law: “the interpretation of [the Court’s] opinion in Pell” and whether Houchins was, like Saxbe, “constitutionally indistinguishable” from Pell. 50 Or, whether Houchins’ regulations were, as the Court had observed might matter in Pell, “an attempt by the State to conceal the conditions in its prisons or to frustrate the press’ investigation and reporting of those conditions.” 51 Acknowledging that the access allowed by Houchins was less than in Pell and Saxbe, Rehnquist distilled what he believed to be the issue in the case:

If the “no greater access” doctrine of Pell and Saxbe applies to this

46. Id.
47. Id. at 295–96.
48. Id. at 296.
50. Id. at 1342–43.
51. Id. at 1343 (quoting Pell v. Procunier, 417 U.S. 817 (1974)).
case, the Court of Appeals and the District Court were wrong, and the injunction was an abuse of discretion. If, on the other hand, the holding in *Pell* is to be viewed as impliedly limited to the situation where there already existed substantial press and public access to the prison, then *Pell* and *Saxbe* are not necessarily dispositive, and review by this Court of the propriety of the injunction, in light of those cases, would be appropriate although not necessary.52

Rehnquist, believing that four Justices would grant certiorari to resolve that issue, granted the stay.53 And, in May of 1977, Justices Rehnquist, Byron White, and Potter Stewart, along with Chief Justice Warren Burger, voted in favor of granting review.54 Marshall took no part in the consideration of the petition in light of the NAACP’s involvement in the case.55

The Court held oral argument on November 29, 1977. Justice Harry Blackmun, who had just had surgery, was absent.56 Kelvin Booty, Jr., counsel for Houchins, explained that the “question presented in this case is, must the sheriff give greater access to his county jail facility to the media than he gives to the public?”57 Justice John Paul Stevens interrupted. He wanted to know whether the Court should consider the limited access at the time the lawsuit was filed or the access, like the public tours, instituted after.58 Booty demurred, pointing out that even before the tours the public could learn of prison conditions by mail and phone. He added that Houchins contemplated public tours prior to the lawsuit.

52. *Id.* at 1344.
53. *Id.* at 1344–45.
55. *Houchins*, 431 U.S. at 928.
58. *Id.* at 1:34.
too. Houchins was also willing to organize in the future special tours for the press with cameras.\textsuperscript{59}

What the district court did, Booty said, was to require Houchins also to “permit random interviews on the tours and to permit the use of cameras and tapes and plainly not on the schedule tour, but on a demand tour.”\textsuperscript{60} The court did so without making “any finding of any intention to conceal conditions in the jail,” which \textit{Pell} suggested might be important.\textsuperscript{61} The errors did not end there. The district court also treated the case as raising a question of what special rights were owed to the press without in any way, address the “public’s rights” of access.\textsuperscript{62} This approach, Booty argued, was contrary to \textit{Pell} and \textit{Saxbe}’s teaching that the press and the public had the same access rights.

The mention of the public’s right prompted Rehnquist to interject, “When you say the public right, are you talking about some term that has meaning in constitutional law?”\textsuperscript{63} To which Booty said, “Yes, I think I am. I think the public does have some rights of access.”\textsuperscript{64} Booty said he did not read \textit{Pell} as holding that “the public access is zero.”\textsuperscript{65} “That [question] is not resolved in any decision of this Court that I am aware of.”\textsuperscript{66}

Stevens then interjected, “[Y]ou do not seriously contend that the whole problem could be solved by having zero access to public and press both?”\textsuperscript{67} “Certainly not,” Booty

\begin{itemize}
\item\textsuperscript{59} Id. at 2:07.
\item\textsuperscript{60} Id. at 11:25.
\item\textsuperscript{61} Id. at 11:09.
\item\textsuperscript{62} Id. at 12:09.
\item\textsuperscript{63} Id. at 12:16.
\item\textsuperscript{64} Id. at 12:27.
\item\textsuperscript{65} Id. at 14:12.
\item\textsuperscript{66} Id. at 14:16.
\item\textsuperscript{67} Id. at 14:25.
\end{itemize}
responded.\textsuperscript{68} Pressing the point, Stevens said, “[Y]ou would not urge the Court to take that extreme position, would you?”\textsuperscript{69} Again, Booty demurred: “No, I am not urging that.”\textsuperscript{70}

Booty, apparently not willing to assume the votes on that point were in his favor, emphasized that the whole issue of a general right of access under the First Amendment was irrelevant to the matter before the Court where access was already being provided: “[W]ith respect, that is not before you.”\textsuperscript{71} Nor was it raised below: “KQED’s position in the District Court which the District Court adopted was that, we have to have special things for the media, we tried it as a media access case, not a public access case.”\textsuperscript{72}

William Bennett Turner argued the case on behalf of KQED. As soon as he began, Burger asked whether access was a matter of prison administration or of a constitutional dimension.\textsuperscript{73} Turner responded, “A constitutional question arises when as in this case the Sheriff limits access by reporters either to zero as before this case was filed or to these antiseptic guided tours that he initiated right after we filed suit.”\textsuperscript{74} While Turner thought it would “trivialize” the First Amendment to say that it required a specific number of tours, or photographs, or interviews, “[w]hat the First Amendment does is prohibit a government official from unjustifiably interfering with the acquisition of information for the publication.”\textsuperscript{75} Whether certain interference was justifiable, he said, was a question for the courts. In some cases, press exclusion would easily be justifiable because the

\textsuperscript{68} Id. at 14:33.  
\textsuperscript{69} Id. at 15:39.  
\textsuperscript{70} Id. at 15:43.  
\textsuperscript{71} Id. at 15:49.  
\textsuperscript{72} Id. at 16:15.  
\textsuperscript{73} Id. at 23:49.  
\textsuperscript{74} Id. at 25:40.  
\textsuperscript{75} Id. at 26:45.
information at issue had “some claim to confidentiality.”  But there could be no claim of confidentiality to prison conditions.

Turner then turned to the problem of Pell and Saxbe to argue that counsel for Houchins misread the import of those cases: “Now the Sheriff in answering why should not reporters be allowed to do their job . . . points to the Court’s decisions in Pell and Saxbe and his core position is that all that he needs to do is provide equality of access, not access, but equality.”  When Burger asked Turner how he read those cases, Turner responded, “We think that the whole assumption of the Pell and Saxbe decisions is that there be reasonably sufficient access to prevent concealment of conditions.”  “If there is that, then equality is fine,” he added.  But equality in complete exclusion is not.

Stewart then pressed Turner on that point, asking what happens where no access at all is provided? As Stewart explained, the Oval Office was not open to the public, nor was the CIA, nor the war room at the Pentagon. Could the press seek access to each? No, Turner said, because there were two key differences between those places and the jail at issue. First, there was no claim of confidentiality to jail conditions, unlike deliberations at the White House, CIA, or Pentagon. Second, a jail is “an institution whose purpose is the

76. Id. at 28:20.
77. Id. at 35:25.
78. Id. at 35:56.
79. Id. at 36:08.
80. Id. at 38:36. Before Houchins, Stewart took an interest in access cases. In 1974, he said in an address to Yale Law School, “The press is free to do battle against secrecy and deception in government.” Potter Stewart, Or of the Press, 26 Hastings L.J. 631, 636 (1975). But “the press cannot expect from the Constitution any guarantee that it will succeed. There is no constitutional right to have access to particular government information, or to require openness from the bureaucracy.” Id. Instead, “[t]he public’s interest in knowing about its government is protected by the guarantee of a Free Press, but the protection is indirect.” Id.
involuntary confinement of people, with an opportunity for overreaching of liberties of the people who are involuntarily confined and very little opportunity for that to come to public knowledge unless reporters are permitted in.”

Stewart and, later, Rehnquist continued to pepper Turner about the logical end to his argument. Could the Court force the President to sit down with the press? A senator? A representative? As Rehnquist asked, “How do you know what should be properly made public and what has no claim to confidentiality under the First and Fourteenth Amendments?” Exasperated, Turner responded, “We are not trying to use the First Amendment as a Freedom of Information Act.” “We are not,” he said, “saying the Sheriff has to come out and meet the press or open his files or tell us when anything happened.” What he was saying was that Houchins “just cannot shut the door to us on the ground that all that is required is equality, even if that equality is zero.”

iii. The Court Votes to Affirm

Three days after the argument, the Court—with Marshall voting despite having suggested he would not do so—affirmed the Ninth Circuit. Powell wrote himself a note, “Affirm 5-3.” Brennan, Stewart, Marshall, Powell, and Stevens made the five; Burger and Rehnquist dissented, and White reserved his views while expressing doubt as to KQED’s position. Blackmun remained absent.

82. Oral Argument, supra note 57, at 44:47.
83. Oral Argument, supra note 57, at 48:00.
84. Oral Argument, supra note 57, at 41:10.
86. Oral Argument, supra note 57, at 48:16.
89. Id. at 1–3.
90. Id. at 1.
Burger spoke first, saying that the Ninth Circuit “misread” or “ignored” Pell and Saxbe.\textsuperscript{91} Brennan voted to affirm, but offered no reasoning.\textsuperscript{92} Stewart spoke at length. He said that the First Amendment did not confer a “greater right of access on press than on public,” nor did it create a “right on [the] part of [the] public to know.”\textsuperscript{93} But, he said, “equal access to which press is entitled may require different arrangements (opportunities) from the public.”\textsuperscript{94} “Equality,” he said, was “not served simply by allowing [the] press to march through with gen[eral] public.”\textsuperscript{95} In some cases, he believed, the First Amendment may require the press be given preferential treatment because it “represents broader public.”\textsuperscript{96}

White was ready to vote to reverse. According to him, there was “no right of access by anybody if prison authorities chose to keep everyone out.”\textsuperscript{97} And he expressed his frustration with Stewart: “[I]f there is no right of public generally, [I] can’t understand [Stewart’s] position.”\textsuperscript{98} Marshall then voted to affirm, without discussion as well—despite not voting on the original petition and not asking any questions at argument.\textsuperscript{99} Powell too voted to affirm and said he “agree[d] with” Stewart “if I understand him.”\textsuperscript{100} Rehnquist voted to reverse, and Stevens, the junior justice, voted to affirm, saying that the Court should decide the case based on the near-complete lack of access prior to KQED
filing the lawsuit. That limited access, he said, violated the First Amendment because a prison’s interest is “in ‘security’”—“not in ‘confidentiality.’”

Brennan, the senior Justice in the majority, then made a fatal error: he assigned the opinion to Stevens. In doing so, he violated the unwritten rule that it is best to give the most reticent Justice the pen in close cases to ensure they stay with the majority. Four months later, Stevens circulated a draft opinion for the Court equally as bullish as his comments at conference, stating that “[i]t is not sufficient . . . that the channels of communication be free of governmental restraints.” He believed that “[w]ithout some protection for the acquisition of information about the operation of public institutions such as prisons by the public at large, the process of self-governance contemplated by the Framers would be stripped of its substance.” If joined by a majority of the Court, as Powell’s clerk observed in a memo to the Justice, it would be a “landmark precedent.” But, the clerk presciently added, “I would be a little surprised if he can get a majority to join his opinion, since other Members of the Court may not be eager to announce what may come to be a general ‘right of access to information’ under the First Amendment.”

There was another problem too. Stevens already lost a vote as his draft opinion noted: “Mr. Justice Marshall . . . took no part in the consideration or decision of this case.”

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101. Id.
102. Id.
106. Id. at 61.
107. John Paul Stevens, Majority Opinion, 1st Draft (Mar. 15, 1978), in
According to Powell’s notes, at conference Marshall voted in favor of affirming the Ninth Circuit, and there is no correspondence from December to March showing that he would drop out of the case. The only correspondence on that point is a June 13, 1978, letter to the conference reminding it that he would not be participating. Whenever Marshall dropped out, the import would have, or at least should have, been clear to Stevens: he could not afford to lose a single vote.

Stevens, however, did not write an opinion to save a majority. Instead, he began by explaining, at the time the lawsuit was filed, Houchins’ policy was one “of virtually total exclusion of both the public and the press from those areas within the Santa Rita Jail where the inmates were confined.” As such, he believed that the case posed a broad question never decided in *Pell*: whether “a nondiscriminatory policy of excluding entirely both the public and the press from access to information about prison conditions would avoid constitutional scrutiny.”

In *Pell*, Stevens explained, the Court did not simply ask whether the right to interview specific inmates was one also held by the public. On the contrary, it “canvassed the opportunities already available for both the public and the press to acquire information” and concluded that there was no effort to conceal prison conditions. The narrow issue in *Pell* was thus a demand for *additional access* for the press where it had already been “accorded full opportunities to

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110. *Id.* at 42.

111. *Id.* at 43.
observe prison conditions.” 112 As a result, Pell did not “imply that a state policy of concealing prison conditions from the press . . . could have been justified simply by pointing to like concealment from . . . the general public.” 113

Having distinguished Pell, Stevens went to work on the general principle. Citing the “full and free flow of information to the general public” as a “core objective of the First Amendment,” 114 he wrote that it was for that “reason that the First Amendment protects not only the dissemination of information but also the receipt of information and ideas.” 115 The right to receive information extended beyond simply the right of one individual to communicate to another; rather, the right “serves an essential societal function.” 116 It was not enough that the government be prohibited from limiting speech: “[w]ithout some protection for the acquisition of information about the operation of public institutions such as prisons by the public at large, the process of self-governance contemplated by the Framers would be stripped of its substance.” 117

This was not a right of the press, however. On the contrary, Stevens wrote, the right existed “to insure that the citizens are fully informed regarding matters of public interest and importance.” 118 That the right of access was one held by the public generally—as opposed to the press

112. Id.
113. Id. at 43–44.
115. Id. (citing Virginia Pharmacy Bd., 425 U.S. at 756; Procunier v. Martinez, 416 U.S. 396, 408–09 (1974); Kleindienst v. Mandel, 408 U.S. 753, 762–63 (1972)).
116. Id. at 46.
117. Id. at 46–47.
118. Id. at 47.
specially—was also consistent with Pell’s doctrine that “newsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public.”119 But, unlike Pell, where it was “unnecessary to consider the extent of the public's right of access” in light of the substantial public access to the prison in that case, that question had to be considered in Houchins because the pre-suit restrictions imposed by Houchins “cut off the flow of information at its source.”120

Stevens then explained that the constitutional question was not the degree of access that must be allowed, though. Such questions, “generally must be resolved by the political branches of government.”121 And he recognized that there were some government proceedings, like grand juries, conferences among judges, or government meetings held in executive session, that must be held in secret.122 Prison conditions, however, were “wholly without claim to confidentiality.”123 And no one claimed “that there is any legitimate, penological justification for concealing from citizens the conditions in which their fellow citizens are being confined.”124 KQED simply sought an end to Houchins’ “policy of concealing prison conditions from the public.”125

Turning to the facts of the case, Stevens pointed out that

119. Id. at 48 (citing Pell v. Procunier, 417 U.S. 817, 834 (1974)).
120. Id. at 49.
121. Id.
122. Id.
123. Id.
124. Id.
125. Id. at 50. The access right applied with special force to prisons, Stevens wrote. Prisons, were “public institutions, financed with public funds and administered by public servants.” Id. They were “an integral component of the criminal justice system.” Id. The Constitution itself recognized the importance of a “public trial” in the Sixth Amendment, Stevens noted, and “[t]hat public interest survive[d] the judgment of conviction and appropriately carrie[d] over to an interest in how the convicted person is treated during his period of punishment and hoped-for rehabilitation.” Id. at 51.
the record demonstrated that “the public and the press had been consistently denied any access to the inner portions of the Santa Rita jail,” “that there had been excessive censorship of inmate correspondence,” and “that there was no valid justification for these broad restraints on the flow of information.” 126 In other words, an “affirmative answer to the question whether [KQED] established a likelihood of prevailing on the merits did not depend . . . on any right of the press to special treatment beyond that accorded the public at large.” 127 Instead, “the probable existence of a constitutional violation rested upon the special importance of allowing a democratic community access to knowledge about how its servants were treating some of its members who have been committed to their custody.” 128

Stevens thus weaved together existing ideas about the First Amendment and its relationship to self-governance on the way to recognizing a new First Amendment right: a right of access to information antecedent to the right to speak. He stitched together prior observations in the Court’s jurisprudence that “informed public opinion is the most potent of all restraints on misgovernment,” that “news gathering is not without its First Amendment protections,” and that the First Amendment protects the receipt of information. 129 Together, these cases stood for the proposition that the “preservation of a full and free flow of information to the general public has long been recognized as a core objective of the First Amendment to the Constitution.” 130 And where the government sought to interrupt this flow, it had to do so consistently with the First Amendment.

126. Id. at 52.
127. Id.
128. Id.
129. Id. at 45–48 & n.20 (citations omitted).
130. Id. at 45.
iv. Stewart Switches Sides

Within hours, Brennan wrote to Stevens, copying the conference: “I agree.”131 A few days later, Powell expressed his “special interest and admiration” of the draft.132 Adopting his clerk’s views, he wrote: “If your draft becomes the opinion of the Court, as I hope, it will be a landmark precedent.”133 “It will be the first time,” he said, “that the Court has held that both the press and the public share a First Amendment right of access to information in the government’s hands, subject to appropriate safeguards.”134

Powell also added a point of caution. Citing issues with the Freedom of Information Act, he feared the opinion’s administrative burdens and threat to “forthright candor” by government officials stemming from a fear of disclosure.135 So he suggested qualifying language that the right would not intrude on “confidentiality and secrecy where these are necessary to the proper functioning of government.”136 Stevens responded the next day, saying that he was “most gratified” by Powell’s letter, and he proposed changes to address Powell’s concerns.137 After Powell agreed to the proposed changes, Stevens circulated a new draft on March 23.138 Powell joined Stevens’ draft the same day.139

133. Id.
134. Id.
135. Id. at 1–2.
136. Id. at 3.
137. Letter from John Paul Stevens to Lewis Powell (Mar. 21, 1978), in POWELL PAPERS: HOUCHINS V. KQED, INC., supra note 54, at 68.
But Stevens’ opinion had its detractors. As Blackmun wrote to himself, the opinion was “awkward” and cited “too many dissents.”140 Burger then wrote to the conference: “I will be writing in this case. If my position does not cover the views of Byron and Bill Rehnquist, they, too, may have something to say.”141 The silence from Stewart, the lynchpin vote, must have concerned Stevens. But apparently, Stevens did not attempt to politic. Then, nearly a month later, on April 24, Stewart wrote to the conference:

Try as I may, I cannot bring myself to agree that a county sheriff is constitutionally required to open up a jail that he runs to the press and the public. Accordingly, I shall not be able to subscribe to the opinion you have circulated, affirming the judgment of the Court of Appeals. My tentative view, which may not stand up, is that it would be permissible in this case to issue an injunction assuring press access equivalent to existing public access, but not the much broader injunction actually issued by the District Court. I shall in due course circulate an expression of these views.142

Stevens had lost his majority. Burger, seeking to capitalize on the development, quickly wrote to the conference to report that he had “devoted a substantial amount of time on a dissent in this case with some emphasis on systems of citizen oversight procedures which exist in many states.”143 Some of these systems that dated back to the Founding had “fallen into disuse.”144 But, he thought them preferential to “pushy TV people interested directly in the sensational.”145 He concluded, “I agree with Potter’s view that media have a right of access but not beyond that of the

144. Id.
145. Id.
v. The Court Votes to Reverse

On May 19, Burger circulated an “alternative” opinion. He signaled that it was “in less than final form,” and he was committed to refinements if “there is enough support for this result.” In that opinion, Burger accepted that prisons were “clearly matters of great public concern.” And, in lines that would not survive the editing process, he agreed that without “information, the public cannot participate intelligently in political decisions” and that “the media is a powerful force, contributing to the function of an open society.”

These amorphous principles, though, did not translate into a constitutional right of access. Much like Stevens’ broad opinion in favor of access, Burger went on to write a broad opinion against it. He posed the question presented not as one of the media’s special right of access, but as “whether the First Amendment gives the news media the right of access to a county jail” at all. The short answer: No. A right of access, he wrote, “was not essential to guarantee the freedom to communicate or publish.” He then put a fine point on it: “We hold that the First Amendment does not provide a right of access to government information or sources of information within the government’s control.” If any access was to be provided, it must come from the political

146. Id.
148. Id.
149. Id. at 107.
150. Id. at 108.
152. Id. at 12.
153. Id. at 16.
Despite Burger’s attempt, Stewart did not join him. Three days after Burger circulated his opinion, Stewart circulated an opinion concurring in judgment only. He agreed with Burger that the “First and Fourteenth Amendments do not guarantee the public a right of access to information generated or controlled by government.” Yet, he parted company when it came to “applying these abstractions to the facts of this case.” Unlike the plurality, Stewart believed “the concept of equal access must be accorded more flexibility in order to accommodate the practical distinctions between the press and the general public.” Thus, he said that, while not required to provide access, once a government official does, the media may well be entitled to accommodations above and beyond the public.

The next day, Burger wrote to Stewart, copying the conference, to let him know that he would “add some thoughts” in response to his opinion. Burger raised the problem, as he saw it, of what to do with non-journalists, like professors, penologists, and writers: “I’m sure you will agree they have the same rights as a TV reporter doing a ‘documentary.’ Can they have greater First Amendment rights than these others whose form and certainty of communications is not so fixed?” He added: “This, of course, goes to the ‘debate’ on the ‘special’ status of those who regularly or semi-regularly use newspapers or broadcast

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154. Id. at 15.
156. Id.
157. Id.
158. Id.
160. Id.
facilities and reach a larger audience.”  

As the conference waited for Burger’s revised opinion, there was a relative lull with only Rehnquist joining Burger’s opinion. Meanwhile, White’s clerk wrote to White that the “Chief’s recent circulation claiming that physical access to prisons is without any First Amendment protection whatsoever” was not “analytically defensible on the basis of the Court’s prior First Amendment decisions.” The clerk pointed to, among other things, the Court’s decision in Procunier v. Martinez where it had found that “the public has a First Amendment interest in receiving information about prison conditions from prisoners.” Moreover, while the clerk was “no fan of criminals,” he doubted that the political process was likely to be as effective as Burger believed: “If First Amendment protection is to depend on the extent to which the political process is cognizant of a group’s legitimate grievances, prisoners probably need more protection than most groups.”

Although there is no evidence of a conversation between White and Burger along the lines outlined by his clerk, it seems possible that White, who had not yet joined Burger, advocated that he pull back on some of his language. Equally possible is that Burger decided to do so on his own, sitting at the edge of summer with only Rehnquist having joined. Whatever the case, on June 9, Burger wrote to the conference, explaining that, in the Court’s “common effort to ‘clear the docket,’” he was making “another effort to dispose

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161. Id.
163. Letter from Jeffrey Glekel to Byron White (Houchins v. KQED, Inc.) (undated) (on file with author).
164. Id. (citing 416 U.S. 396 (1974)).
165. Id.
of this case.” Foreshadowing a more conciliatory opinion, he wrote: “As a legislator I would vote for a reasonably orderly access to prisons, etc., by media, because it would be useful. But that is not the issue.” Instead, he explained: “The question is whether special access rights are constitutionally compelled.”

In Burger’s new draft, the question presented no longer was whether there was a right of access at all to government information. It was whether the press had a right of access “over and above that of other persons,” i.e., a special right of access. Similarly, no longer was the holding about whether the First Amendment provided a right of access to government information generally. Instead, Burger’s proposed holding was “that the First Amendment does not provide a right of access . . . different from or greater than that of the public generally.” And, consistent with White’s clerk’s thoughts, Burger expanded the discussion of Procunier v. Martinez and limited some of the discussion of legislative substitutes.

With those changes, three days later, White wrote to Burger to join the opinion and expressed his “hope” that the draft “commands a majority.” White added: “If the First Amendment requires a government to turn over information about its prisons on the demand of the press or to open its files and properties not only to routine inspections but for filming and public display, it would be difficult to contain
such an unprecedented principle.” 172 All sorts of government processes “are as important for the public to know about as prisons.” 173 While he believed that access was important, he would “resist taking over what is essentially a legislative task and by reinterpreting the First Amendment assigning to ourselves and other courts the duty of determining whether the state and Federal Governments are making adequate disclosures to the press.” 174

Rehnquist was less pleased with Burger’s more conciliatory opinion. Writing the same day as White, he told Burger that he was “a solid join with respect to your earlier draft,” but that the new draft left him “much less convinced.” 175 Rehnquist did not appreciate a new paragraph about alternative forms of access to information about the jail that were, unlike physical access, constitutionally required, nor did he believe it was wise to add in an observation about the privacy rights of inmates. Nevertheless, he said he would “certainly not jump ship” but “would be happy to offer any suggestions that might both satisfy me and accomplish your goal of getting a Court.” 176

Burger’s changes still did not convince Stewart, who, on June 12, circulated a second draft opinion concurring only in judgment. 177 In the newest draft, Stewart added an introductory paragraph summarizing his disagreement with the plurality: “I agree that the preliminary injunction issued against the petitioner was unwarranted, and therefore concur in the judgment. In my view, however, KQED was

172. Id.
173. Id.
174. Id.
176. Id.
entitled to injunctive relief of a more limited scope."

Stewart also expanded on his logic, explaining that the media was not touring the prison for their own sake but to inform the public about matters of public affairs. Courts should thus recognize that, in some cases, the media should be treated differently than the public by, for example, allowing audio/visual recording.

Finally, on June 14, Burger, defeated in marshalling a majority too, circulated his final draft opinion with further refinements. Evidencing his defeat, no longer did Burger conclude with a “hold[ing] that the First Amendment does not provide a right of access.” Rather, he concluded only that “[t]he judgment of the Court of Appeals is . . . reversed and the case is remanded for further proceedings consistent with this opinion.” Then, on June 15, Stevens circulated a repurposed majority opinion as a dissent. Stewart, who would have held that although there was no First Amendment right to access there was a First Amendment interest in the terms of access once access was provided, stood alone.

vi. The Court Announces its Opinion

On June 26, 1978, the Court announced its opinion. Reflecting the internal tumult, Burger, Stewart, and Stevens each explained their positions orally from the bench, largely

178. *Id.* at 1.
179. *Id.* at 2.
180. *Id.* at 3.
tracking their written opinions. Burger, writing for himself, White, and Rehnquist, posed the question narrowly: "whether the news media have a constitutional right of access to a county jail, over and above that of other persons, to interview inmates and make sound recordings, films, and photographs for publication and broadcasting by newspapers, radio, and television." Echoing the exchange at oral argument, he explained that, on the one hand, Houchins invoked the holding of *Pell* that the news media has no special right of access above that of the public and further that "the District Court had departed from *Pell* and abused its discretion because it had ordered that [Houchins] give the media greater access to the jail than he gave to the general public." On the other hand, KQED argued that the Ninth Circuit’s decision "flow[ed] logically" from the Court’s earlier decisions, including *Pell*: "From the right to gather news and the right to receive information, [KQED] argue[d] for an implied special right of access to government-controlled sources of information."

While not as full-throated as his earlier drafts, Burger began his opinion agreeing with many of KQED’s points: prison conditions were matters of public interest. The more information the public has the better its decision-making may be, and the important role of the media in informing the public was “[b]eyond question.” Still, the media was not “an adjunct of the government” and was “ill-equipped to deal with problems of prison administration.” Nor could “public importance” of prisons or “the media’s role of providing information” serve as a “basis for reading into the

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188. Id. at 7.
189. Id. at 7–8.
190. Id. at 8.
191. Id.
Constitution a right of the public or the media to enter these institutions, with camera equipment, and take moving and still pictures of inmates for broadcast purposes." The Court had “never intimated a First Amendment guarantee of a right of access to all sources of information within government control.”

He also rejected KQED’s authority as irrelevant. Neither *Grosjean v. American Press Co.* nor *Alabama v. Mills* concerned access to information; rather, those cases were about “the freedom of the media to communicate information once it is obtained.” On similar grounds Burger distinguished the Court’s observation in *Branzburg v. Hayes* that “news gathering is not without its First Amendment protections.” None of these cases, he wrote, “implied a special privilege of access to information” for the media. He also distinguished cases concerning the right to receive information. Citing *Zemel v. Rusk*, *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, *Procunier v. Martinez*, and *Kleindienst v. Mandel*, he explained that *Houchins* did not put in issue “[t]he right to receive ideas and information.” The issue in *Houchins* was the “claimed special privilege of access which the Court rejected in *Pell* and *Saxbe*, a right which is not essential to guarantee the freedom to communicate or publish.”

Burger devoted the rest of his opinion to the other flaw

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192. *Id.* at 9.
193. *Id.*
194. *Id.*
195. *Id.* at 10 (quoting *Branzburg v. Hayes*, 408 U.S. 665, 707 (1972)).
196. *Id.*
197. *Id.* at 11 (citing 381 U.S. 1 (1965)).
198. *Id.* at 12 (citing 425 U.S. 748 (1976)).
199. *Id.* (citing 416 U.S. 396, 408–09 (1974)).
200. *Id.* (citing 408 U.S. 753 (1972)).
201. *Id.*
202. *Id.*
in KQED’s case: it invited “the Court to involve itself in what is clearly a legislative task which the Constitution has left to the political processes.” This was especially so where there were a number of alternatives to monitoring by the press, including citizen task forces, grand juries, prosecutors, judges, and legislatures—all of which could serve as checks on prison conditions.

Based on all of these flaws, Burger concluded: “Neither the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government’s control.” And, he added, “Under our holdings in Pell . . . and Saxbe . . . , until the political branches decree otherwise, as they are free to do, the media have no special right of access to the Alameda County Jail different from or greater than that accorded the public generally.”

Stewart’s opinion concurring in judgment was similar to his final draft. He agreed with Burger that there was no First Amendment “right of access to information generated or controlled by government.” Nor did the First Amendment “guarantee the press any basic right of access superior to that of the public generally.” Stewart “part[ed] company” with the plurality, however, in applying those principles to the present case. As he said in announcing his opinion from the bench, “I agree that the preliminary injunction issued . . . was unwarranted and therefore I concur the judgment, but in my view KQED which is a television station was clearly entitled to injunctive relief of somewhat more limited scope than that granted by the District Court.”

203. *Id.*
204. *Id.* at 13.
205. *Id.* at 15.
206. *Id.* at 15–16.
207. *Id.* at 16 (Stewart, J., concurring in judgment).
208. *Id.*
209. See Opinion Announcement at 7:17, Houchins v. KQED, Inc., 435 U.S. 1
News organizations unlike private citizens, he wrote, did not tour jails for their own “edification.”\textsuperscript{210} They were “there to gather information to be passed on to others, and this mission is protected by the Constitution for very specific reasons.”\textsuperscript{211} The press “awaken[ed] public interest in governmental affairs, expos[ed] corruption among public officers and employees and generally inform[ed] the citizenry of public events and occurrences.”\textsuperscript{212} Because of the importance of these functions, the Constitution required “sensitivity to that role, and to the special needs of the press in performing it effectively.”\textsuperscript{213} As such, Stewart would have ordered audio/visual access because the First Amendment required prison administration “to give members of the press \textit{effective} access.”\textsuperscript{214}

Stevens, along with Brennan and Powell, observed in dissent that, despite \textit{Pell}, “the Court has never intimated that a nondiscriminatory policy of excluding entirely both the public and the press from access to information about prison conditions would avoid constitutional scrutiny.”\textsuperscript{215} \textit{Pell} did not “impl[y] that a state policy of concealing prison conditions from the press . . . could have been justified simply by pointing to like concealment from . . . the general public.”\textsuperscript{216} Indeed, in \textit{Pell}, there were substantial avenues to public access beyond the interviews at issue. As Stevens said in announcing his opinion, “This Court has never squarely answered the question, whether a state may pursue a policy of entirely excluding both the public and the press from any

\textsuperscript{210} \textit{Houchins}, 438 U.S. at 17 (Stewart, J., concurring in judgment).
\textsuperscript{211} \textit{Id.}
\textsuperscript{212} \textit{Id.} (quoting \textit{Estes v. Texas}, 381 U.S. 532, 539 (1965)).
\textsuperscript{213} \textit{Id.}
\textsuperscript{214} \textit{Id.}
\textsuperscript{215} \textit{Id.} at 27–28 (Stevens, J., dissenting).
\textsuperscript{216} \textit{Id.} at 29; \textit{see also id.} (“If that were not true, there would have been no need to emphasize the substantial press and public access reflected in the record of that case.”).
access to information about prison conditions.”217 Yet, in case before the Court, he wrote, “broad restraints on access to information” existed prior to the lawsuit.218 These restraints offended the “core objective” of the First Amendment to preserve “the full and free flow of information to the general public.”219 This was vital to a “system of self-government”: “Without some protection for the acquisition of information about the operation of public institutions such as prisons by the public at large, the process of self-governance contemplated by the Framers would be stripped of its substance.”220

This logic applied with special force to prisons. Prisons are “public institutions, financed with public funds and administered by public servants” and are an “integral component of the criminal justice system.”221 As Madison said, “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.”222 Further, Stevens argued, the Constitution recognized the importance of a transparent justice system. The Sixth Amendment required a public trial, and the public interest in monitoring the government survived “the judgment of conviction and appropriately carry[d] over to an interest in how the convicted person is treated during his period of punishment and hoped-for rehabilitation.”223 Prisons also were home to pretrial detainees in whom society had “a special interest in assuring that unconvicted citizens are treated in accord with their


219. *Id.*

220. *Id.* at 31–32.

221. *Id.* at 36.

222. *Id.* at 31–32 (quoting 9 *WRITINGS OF JAMES MADISON* 103 (G. Hunt ed. 1910)).

223. *Id.* at 36–37.
status.”

On remand, there would be no additional opinions in the lower federal courts testing the import of the plurality decision. Instead, KQED settled with Houchins, who, in a stroke of irony, wanted to continue the public tours all along. According to Turner, who acted as KQED’s counsel, Houchins saw the tours as an opportunity for good publicity and agreed to allow television cameras into the prison pursuant to Stewart’s demand that press access be “effective.” At the end of the day then, Stewart’s opinion for himself was, practically speaking, the controlling one.

2. *Gannett Co., Inc. v. DePasquale*

Before the dust settled on *Houchins*, the Court granted certiorari in another right of access case, *Gannett Co., Inc. v. DePasquale*. That case concerned the exclusion of the press and the public from a pre-trial criminal suppression hearing, including a Gannett reporter. Contesting the reporter’s exclusion, Gannett argued that the trial court’s order ran afoul of the Sixth Amendment’s public trial guarantee, as well as the First Amendment’s implicit protection of a right of access. While the Court decided the case on Sixth Amendment grounds, it reserved judgment on whether, despite *Houchins*, the First Amendment independently protected a right of access to government information.

i. The Lower Courts’ Rulings

In Seneca County, New York, two individuals were charged with murder, robbery, and larceny, after they dumped their fishing partner into a lake. Authorities caught up with them in Michigan and sent them to New York

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224. *Id.* at 37–38.
to stand trial. The prosecution was said to be “unique” because no body was found. At a pre-trial hearing, the defendants made a motion to suppress statements they made on their trip back to New York and requested that Judge Daniel DePasquale clear the courtroom of the press and public. He agreed. The concern, he said, was the potential prejudice to the defendants if what might ultimately be suppressed was reported in the newspapers. Gannett later objected, but DePasquale overruled it.

On appeal, the intermediate appellate court said the case presented “a basic conflict between [Gannett’s] First and Sixth Amendment right to attend criminal proceedings and publish information with regard thereto and the constitutional right of the defendants to receive a fair trial before an impartial jury.” Here, the balance tipped in favor of Gannett. First, the Sixth Amendment public trial right did “not inure to the benefit of the accused alone” but to the public as well. And the trial judge failed to cite any “compelling factual circumstances” overcoming the public’s right. Second, the order infringed Gannett’s “First Amendment rights in that it constituted a violation of the right of the press to publish free from unlawful governmental interference.” The order restricted “media access to information ordinarily made available to the general public,” and, by doing so, it “effectively prevent[ed] the publication of testimony.”

228. Id.
229. Id.
230. Id.
231. Id.
232. Id.
233. Id. at 109.
234. Id.
235. Id. at 110.
236. Id.
237. Id.
New York’s Court of Appeals modified that judgment. In an ambiguous opinion, it admitted that criminal trials were presumptively public, apparently under the Sixth Amendment. But the right to public trials was “primarily that of the accused.” Thus, courts must be sensitive to prejudice flowing from openness. The court also questioned the lower court’s First Amendment finding. The tension between the fair trial rights in the Sixth Amendment and free speech rights in the First is “the greatest” when “a restraint is imposed to prevent commentary on known facts about a pending criminal case.” But the order only restricted reporting of as-of-yet-unknown facts.

ii. At the Supreme Court

The Court held oral argument in November 1978, about five months after it issued its opinion in Houchins. Questioning Robert Bernius, Gannett’s lawyer, Powell asked, “Do you place your argument principally on one amendment as against the other or on both?” Bernius said that he believed their “argument is based first on the First Amendment, secondly on the public trial clause of the Sixth Amendment.” Powell pressed, “Which do you prefer?” Bernius demurred, “I prefer neither Your Honor. I think they’re both—both equally important.”

Burger then asked Bernius whether the Sixth Amendment public trial right had any application at all to

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239. Id.
240. Id. at 548.
241. Id. at 549 (emphasis added).
243. Id. at 00:43.
244. Id. at 00:54.
245. Id. at 00:56.
Gannett’s application as it sought access to a pre-trial suppression proceeding, not a public trial under the Sixth Amendment. Bernius said that it did because the suppression hearing was “an important stage in the process.” It might be the “critical stage” of the prosecution that results in the charges being dropped or the defendants pleading guilty. Pushed further, Bernius said, “I don’t think the fact that a jury is selected is a mystical concept that precludes the public’s right to attend and to observe and be aware of the entire gamut of the proceedings.”

When Bernius made the argument that both the defendant and the public had interests in a public trial, Rehnquist joined in. “Why then did the Framers cast the language of the Sixth Amendment in saying the accused shall enjoy the right of a public trial?,” he asked. And, “Why didn’t they say the press shall have access to the trial?” Bernius argued that although not explicit the public right was “inherent” in the Sixth Amendment’s guarantee and that history demonstrated that, at common law, there was “no indication that . . . a public trial accrued to the defendant at all.”

Brennan then stepped in and asked, “Mr. Bernius, you argue anyway, don’t you, that independently of the Sixth Amendment public trial that the press at least has the First Amendment right to be present?” Bernius responded that he did and that he claimed only a right of access owed to the public generally, aiming to head off attacks based on Pell,
Saxbe, and Houchins.\textsuperscript{254} When asked for authority for the right of access generally, Bernius pointed to the Court’s statement in \textit{Branzburg v. Hayes} that newsgathering is not without First Amendment protection:

I know that the right to gather information is not without limits but I would submit that if there is any sort of right to gather information it must exist at trials. It must exist in the streets and other public forums, and I think that for the purposes of the right to gather information the public forum test which . . . gives very pertinent guidance.\textsuperscript{255}

The public forum analogy was useful, Bernius argued, because it also operated as a limiting principle on the access right. In other words, the right of access was better described as a “right to be present” in a public forum “to exercise [other] First Amendment freedoms.”\textsuperscript{256}

Bernard Kobroff, counsel defending DePasquale’s order, dodged the constitutional questions. Instead, the lion’s share of his argument was tied up in the potential prejudice to the defendants. One exception, however, was a question from Rehnquist when he asked whether the New York legislature could adopt a statute mandating closure of trials unless a defendant wants a public trial.\textsuperscript{257} Kobroff thought that would pose a constitutional issue: “Public is the ultimate sovereign. The public has a right to know.”\textsuperscript{258} Still that was not this case, he argued: “Petitioner’s error is in equating a temporary denial of public access to potentially inadmissible evidence where the Court ordered direct restraint on publication.”\textsuperscript{259}

\textsuperscript{254} Id. at 17:35.
\textsuperscript{255} Id. at 18:24.
\textsuperscript{256} Id. at 18:16.
\textsuperscript{257} Id. at 50:26.
\textsuperscript{258} Id. at 51:12.
\textsuperscript{259} Id. at 57:29.
iii. Drafting the Opinion

At conference, Burger voted to affirm. He said that neither the First nor the Sixth Amendment supported Gannett’s position. The Sixth Amendment’s public trial right was irrelevant because the suppression hearing was not part of a trial; the First Amendment argument, he said, was just wrong.\(^{260}\) Stewart largely agreed. As to the First Amendment, he said, “I don’t think the First Amendment claim is valid, since the press has no greater rights than the public.”\(^{261}\) Rehnquist and Stevens fell in line too—Stevens being concerned about demands that “electronic media” be allowed access to courtrooms if they found a right of access in this case.\(^{262}\)

But an affirmance lacked a fifth vote. Brennan, Powell, White, Marshall, and Blackmun were all in favor of reversal.\(^{263}\) Brennan, White, and Marshall all agreed that the “suppression hearing was part of the trial.”\(^{264}\) As Marshall put it, the public had a right of access “because, if the accused is done dirt, the public interest is hurt. The public is entitled to know what happens, when it happens.”\(^{265}\) Blackmun said that he liked “the Sixth Amendment approach” too, explaining that the public “indirectly had an interest in preventing the abuse of public business.”\(^{266}\) Powell also said that the case was about the Sixth Amendment—although his view was tentative.

Brennan assigned Blackmun to write the opinion. His draft opinion was a “broadside rejection of the decision below” that read a “broad right of public and press access to


\(^{261}\) Id.

\(^{262}\) Id.

\(^{263}\) Id.

\(^{264}\) Id.

\(^{265}\) Id.

\(^{266}\) Id.
all criminal proceedings into the Sixth Amendment’s public trial guaranty.”267 Foreshadowing an analysis employed in future cases, Blackmun’s opinion bolstered its recognition of a Sixth Amendment right of access by pointing to the long history of access to criminal trials and recognizing that access advanced the public’s interest in monitoring the trial process.268

Blackmun, however, rejected the First Amendment challenge. While Gannett argued that the First Amendment protected “the free flow of information about judicial proceedings,” the draft majority did “not agree.”269 The case, Blackmun wrote, did not involve a “restraint upon publication” nor did it involve a restraint “upon comment about information already in the possession of the public or the press.”270 Rather, it involved only “an issue of access to a judicial proceeding.”271 At any rate, in light of the Sixth Amendment’s protection of the public’s access to a trial, Blackmun said the Court “need not reach the issue of First Amendment access.”272

As in Houchins, the original draft majority was destined to be a dissent. After Blackmun circulated it in early April 1979, Brennan wrote to him to say that he was “delighted to join this particularly fine opinion.”273 That same day, however, Stewart said he would circulate a dissent.274 White

267. Id. at 416.
268. Id.
269. Id. at 462.
270. Id. at 463.
271. Id.
272. Id.


then said he would “await the dissent.” 275 In a spot of good news, Marshall joined Blackmun’s opinion a few days later. 276

On April 18, Stewart circulated his dissent, arguing that there was no public right of access inherent in the Sixth Amendment. But—importantly—his draft reserved judgment on the question of whether there was a First Amendment right of access, finding that any such right had been given all due deference in the case. 277 It did so despite the plurality in Houchins seemingly closing that very door. The same day, Stevens joined that opinion. 278 The following day, Blackmun told his colleagues that the dissent merited only “a mild response,” which he distributed that day, after which White joined the majority. 279 Powell remained quiet.

On May 9, Powell broke his silence. In a letter to Blackmun, he wrote that at the conference he had “expressed agreement with some of what was said by Potter, Byron and you.” 280 But “there were differences. Indeed, I do not think a majority of the Court agreed as to exactly how the competing interests in this case should be resolved.” 281 The more he had

280. Letter from Lewis Powell to Harry Blackmun (May 9, 1979), in The Burger Court Opinion Writing Database: Gannett Co. v. DePasquale, supra note 273, at 34.
281. Id.
thought about it the more he was “inclined to view it as being closer to presenting the classic First Amendment issue of fair trial/free press, although the Sixth Amendment also is implicated in light of defendant’s right to a public trial.”\textsuperscript{282} He said these views remained “tentative” and that he would have to “write something out.”\textsuperscript{283} What was certain was that he found the case to be “difficult.”\textsuperscript{284}

While Blackmun waited on further word from Powell, Rehnquist wrote to the conference to join Stewart’s dissent.\textsuperscript{285} And, a week later, Powell again wrote to Blackmun to say that his views were no longer tentative: “I was inclined to view this case as presenting primarily a First Amendment rather than a Sixth Amendment issue. This thinking goes back to my dissent in \textit{Saxbe}, and to my join in John’s dissent last year in \textit{Houchins}.”\textsuperscript{286} After writing out a dissent, Powell said, he was persuaded that his “views as to the Sixth Amendment coincide[d] substantially with those expressed” by Stewart, but he “would not rest the case on that Amendment alone.”\textsuperscript{287} As Powell explained, Stewart appropriately recognized “the possible relevance of the First Amendment claim” too.\textsuperscript{288} Powell’s switch to Stewart’s opinion would also allow him to turn his dissent into a concurring opinion where he could address “the First Amendment issue” in greater detail.\textsuperscript{289} “I am sorry to end up

\begin{itemize}
\item \textsuperscript{282} Id.
\item \textsuperscript{283} Id.
\item \textsuperscript{284} Id.
\item \textsuperscript{285} Letter from William Rehnquist to Potter Stewart (May 23, 1979), in \textit{The Burger Court Opinion Writing Database: Gannett Co. v. DePasquale}, supra note 273, at 40.
\item \textsuperscript{286} Letter from Lewis Powell to Harry Blackmun (May 31, 1979), in \textit{The Burger Court Opinion Writing Database: Gannett Co. v. DePasquale}, supra note 273, at 36.
\item \textsuperscript{287} Id.
\item \textsuperscript{288} Id.
\item \textsuperscript{289} Id.
\end{itemize}
being the ‘swing vote,’” he concluded.290

Upon hearing the news of Powell’s defection, Burger quickly reassigned the opinion much as he had when Stewart defected in *Houchins*. This time, Burger assigned the opinion to Stewart, with whom he already knew Powell, Rehnquist, and Stevens agreed.291 While some cleanup remained—including the drafting of a number of concurring opinions, the lineup of the Court would not change. To add insult to injury, in turning the dissent into a majority opinion, Stewart “unabashedly plagiarized” the recitation of the facts Powell had drafted for his original majority opinion.292

iv. The Court Issues its Opinion

On July 2, 1979, the Court issued its opinion rejecting Gannett’s arguments and affirming the New York Court of Appeals. Powell and Rehnquist concurred. Blackmun concurred in part (as to whether the case was moot) and dissented in part (on the substance). Brennan, White, and Marshall all joined him. On the Sixth Amendment, the Court concluded that the “Constitution nowhere mentions any right of access to a criminal trial on the part of the public; its guarantee, like the others enumerated, is personal to the accused.”293

On the First Amendment, the Court observed that *Pell*, *Saxbe*, and *Houchins* all upheld “prison regulations that denied to members of the press access to prisons superior to that afforded to the public generally.”294 It then explained, however, that in Stevens’ dissenting opinion in *Houchins*,

290. *Id.*


294. *Id.* at 391.
Powell’s dissenting opinion in *Saxbe*, and Stewart’s concurring opinion in *Houchins*, some “Members of the Court . . . took the position . . . that the First and Fourteenth Amendments do guarantee to the public in general, or the press in particular, a right of access that precludes their complete exclusion in the absence of a significant governmental interest.”295 Thus, despite *Houchins*, the Court suggested that the question of a First Amendment right of access remained open. But, it added, it was unnecessary to answer it because even assuming a First Amendment right of access, it was “given all appropriate deference” by the trial court.296

Powell, as promised, concurred and took the opportunity to address the First Amendment question that the Court reserved.297 “I would hold explicitly,” Powell wrote, “that petitioner’s reporter had an interest protected by the First and Fourteenth Amendments in being present at the pretrial suppression hearing.”298 For Powell, it was “the importance of the public’s having accurate information concerning the operation of its criminal justice system” that meant that it must also have “an interest protected by the First and Fourteenth Amendments in being present at the pretrial suppression hearing.”299 Harkening back to his dissenting opinion in *Saxbe*, Powell wrote that “this constitutional protection derives, not from any special status of members of the press as such, but rather because ‘[i]n seeking out the news the press . . . acts as an agent of the public at large.”300

Powell then advocated for a “flexible accommodation” between the public’s First Amendment access right and the

295. *Id.*
296. *Id.* at 392.
297. *Id.* at 397 (Powell, J., concurring).
298. *Id.*
299. *Id.*
300. *Id.* at 397–98.
defendant’s Sixth Amendment fair trial right. 301 He suggested that “where a defendant requests the trial court to exclude the public,” a court “should consider whether there are alternative means reasonably available by which the fairness of the trial might be preserved without interfering substantially with the public’s interest in prompt access to information.” 302 Nor should an exclusion be broader than necessary to “achieve the goals” of ensuring a fair trial. 303 And, the press must be “given an opportunity to be heard on the question of their exclusion.” 304 Yet, because the trial court generally honored these principles, closure in the case was proper.

Rehnquist also wrote a concurrence “to address the First Amendment issue that the Court appears to reserve.” 305 In it, he criticized the Court’s “reservation of the question whether the First Amendment guarantees the public a right of access to pretrial proceedings.” 306 Citing Pell, Saxbe, and Houchins, Rehnquist wrote that it was “clear that this Court repeatedly has held that there is no First Amendment right of access in the public or the press to judicial or other governmental proceedings.” The Court had been “emphatic” on this point, he said. Thus, because it now held that there was also no Sixth Amendment public right of access, Rehnquist believed there were “no constitutional constraint[s]” on courts excluding the press and the public. 308

This caused Powell to take a “jab” at Rehnquist. 309

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301.  Id. at 400.
302.  Id.
303.  Id.
304.  Id.
305.  Id. at 403 (Rehnquist, concurring).
306.  Id. at 404.
307.  Id.
308.  Id. at 405.
309.  Letter from William Rehnquist to Lewis Powell (Jun. 25, 1979), in THE BURGER COURT OPINION WRITING DATABASE: GANNETT CO. V. DEPASQUALE, supra
way of a footnote, Powell wrote, “Contrary to Mr. Justice REHNQUIST’s suggestion, lower courts cannot assume after today’s decision that they are ‘free to determine for themselves the question whether to open or close the proceeding’ free from all constitutional constraint.” 310 As Powell explained, “For although I disagree with my four dissenting Brethren concerning the origin and the scope of the constitutional limitations on the closing of pretrial proceedings, I agree with their conclusion that there are limitations and that they require the careful attention of trial courts before closure can be ordered.” 311

Blackmun dissented on behalf of himself, Brennan, White, and Marshall, in his repurposed majority opinion. 312 He argued that the Court reached “for a strict and flat result” and that it ignored “the important antecedents and significant developmental features of the Sixth Amendment.” 313 Blackmun believed that the Sixth Amendment prohibited “the States from excluding the public from a proceeding within the ambit of the Sixth Amendment’s guarantee without affording full and fair consideration to the public’s interests in maintaining an open proceeding.” 314 As to the First Amendment issue, Blackmun noted only that “this Court heretofore has not found, and does not today find, any First Amendment right of access to judicial or other governmental proceedings.” 315

In the aftermath of the Court’s decision, Stevens, in a public speech, presciently said that the majority’s decision to reserve judgment on the First Amendment question was the

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310. Gannett, 443 U.S. at 398 n.2 (Powell, concurring).
311. Id.
312. Id. at 406 (Blackmun, dissenting).
313. Id.
314. Id. at 433.
most important aspect of the case. By doing so, it placed the Court’s then-extant “general rule” that there was no First Amendment right of access “on the firing line.”\textsuperscript{316} This “rule,” Stevens said, drew a “sharp distinction between the dissemination of information or ideas, on the one hand, and the acquisition of newsworthy matter on the other.”\textsuperscript{317} While the Court had “accorded virtually absolute protection to the former,” it had “never squarely held that the latter is entitled to any constitutional protection whatsoever.”\textsuperscript{318} After \textit{Gannett}, the open questions were numerous:

Is there indeed an unequivocal general rule that will require rejection of every attempt to find constitutional protection for a right of access to information? Or is this the kind of general rule that . . . may not mean exactly what it seems to imply in every conceivable situation? Are there situations in which a rule denying access to information about how the Government is serving its master is so plainly unsupported by any legitimate interests that it may be fairly characterized as an abridgment of free speech?\textsuperscript{319}

In this regard, Stevens said, the Court’s progression from \textit{Pell}, \textit{Saxbe}, and \textit{Houchins} to its reservation of the First Amendment question in \textit{Gannett} was “worthy of note.”\textsuperscript{320}

Reflecting the consternation among the Justices, Stevens was not the only one to opine on \textit{Gannett} that summer. Burger, Blackmun, and Powell also did so, and each disagreed as to what it meant.\textsuperscript{321} Blackmun said that \textit{Gannett} allowed courts all over the country to close entire

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\textsuperscript{317} \textit{Id.}

\textsuperscript{318} \textit{Id.}

\textsuperscript{319} \textit{Id.} at 604–05.

\textsuperscript{320} \textit{Id.} at 601.

trials without concern. Powell said that it was “premature” to read too much into the case, especially because of the outstanding First Amendment question. Burger simply said any confusion over Gannett’s meaning was the fault of the media’s coverage of the opinion.

3. Richmond Newspapers, Inc. v. Virginia

Gannett kept “everyone guessing.” Within a month, judges approved half the requests to close courtrooms, others excluded just the press but not the public, and still others construed the case as applicable only to pre-trial criminal proceedings like that in Gannett. To stem the confusion, in late 1979, the Court docketed another case challenging closure. That case, Richmond Newspapers v. Virginia, presented the question squarely: “Do the First, Sixth, and Fourteenth Amendments to the Constitution of the United States, singly or in combination, give members of the public a judicially enforceable right of access to criminal trials that can be asserted independently of the participants in the litigation?”

i. The Lower Courts’ Decisions

Virginia tried to convict John Stevenson for murder on three occasions; each time the verdict was vacated or a mistrial declared. At his fourth trial, the defense counsel made a motion to close the courtroom, which the court granted. Richmond Newspapers then made a motion to

322. Id.
323. Id.
324. Id.
325. Id.
326. Id.
328. Richmond Newspapers, 448 U.S. at 559 (plurality opinion).
329. Id. at 559–60.
vacate the order, arguing that the court failed to make required evidentiary findings and failed to consider alternatives to complete closure. The court denied that motion. After the defendant was found not guilty, Richmond Newspapers sought appeal to the Virginia Supreme Court. That court denied review, however, writing that there was “no reversible error” under Gannett.

ii. At the Supreme Court

In early 1980, the Court heard oral argument. Lawrence Tribe appeared on behalf of Richmond Newspapers. Mirroring Powell’s first question in Gannett, Stewart asked him “what provision of the Constitution” he thought the Virginia statute violated. Tribe responded that it violated the Sixth Amendment and the First. Stewart rejected the Sixth Amendment out of hand, telling Tribe that Gannett had “disposed of” that possibility. And for the next several minutes, Tribe tried, unsuccessfully, to resuscitate that argument.

Stevens then stepped in to say that he hoped Tribe would turn to his First Amendment argument. Tribe relented, saying that he thought it was his “stronger argument.” Anticipating a Houchins problem, Tribe explained that it was “quite clear that the First Amendment is not a sunshine

330. Id. at 560.
331. Id. at 561.
332. Id. at 562.
335. Id. at 16:13.
336. Id. at 16:17.
337. Id. at 20:47.
338. Id. at 20:48.
law; that material in the unilateral control of government, generated by government, internal to government deliberation, is not automatically accessible to people who invoke the First Amendment.”\(^{339}\) He also said it did not matter that his clients were reporters: “I’m making nothing special of their status as members of the press.”\(^{340}\)

Rehnquist then started pressing Tribe on the logical end to his argument. Tribe tried to head off that too, distinguishing a trial at issue from other government proceedings. As he explained, “[When] you’re dealing with a context which is truly internal to government, in which government has unilateral control to begin with, then the First Amendment is far harder to apply.”\(^{341}\) In that context, “you don’t have the government exercising control over the flow of information, which is in the public domain.”\(^{342}\) Tribe said that the First Amendment right he contemplated was more limited because it was in reference to the Sixth Amendment: “This information was of that [public] character by the express command of the Sixth Amendment.”\(^{343}\)

Marshall Coleman, the Virginia Attorney General, argued for Virginia. Coleman failed to engage, and in response to repeated questioning about what constitutional issues were presented by the closure of a trial, he refused to acknowledge any. Gannett had decided there was no Sixth Amendment right, he said. And, as to the First Amendment, he said, he would “not concede that the First Amendment would [be implicated by closure].”\(^{344}\) Unmoved, Burger asked whether the Court could, right then and there, dismiss everyone from the courtroom. Coleman saw no constitutional issue with that:

\(^{339}\). Id. at 21:14.
\(^{340}\). Id. at 21:57.
\(^{341}\). Id. at 27:57.
\(^{342}\). Id. at 28:09.
\(^{343}\). Id. at 28:16.
\(^{344}\). Id. at 36:56.
I think if you opened the First Amendment application to the Sixth Amendment it becomes an unending proposition. How do you cut any governmental functioning or operation off from the public’s right to observe it once you enter into that thicket? It seems to me that the idea of a right to know being founded in the Constitution is not legally or historically correct.\textsuperscript{345}

On rebuttal, Tribe weaponized the breadth of Coleman’s argument, noting that a defendant could simply waive his right to a public trial and with the judge’s agreement or even indifference prevent public access altogether. While the case before the Court did not present such a situation, Tribe persuasively implored, “This Court should articulate what the Constitution has traditionally meant, and it has traditionally meant what was perhaps too obvious to put in so many words that criminal trials are to be public.”\textsuperscript{346} He added, “The First Amendment provides a perfect textual home for that principle, due process would do as well.”\textsuperscript{347}

Stewart then interrupted to ask, “And the reason you say the First Amendment provides an appropriate home for that concept is that this case is distinguishable from such cases as \textit{Saxbe}.”\textsuperscript{348} To which Tribe said, “\textit{Pell} and even \textit{Houchins}.”\textsuperscript{349} Stewart pressed, “By reason of the fact that somebody [\textit{i.e.,} the defendant] has a right to open up these proceedings?”\textsuperscript{350} “Exactly,” Tribe responded.\textsuperscript{351} Before sitting down, Stewart then asked if the argument would apply to civil proceedings. Wary to be knocked off the tracks so close to the station, Tribe demurred: “That would be much broader and one would have to know more than I have discovered

\textsuperscript{345.} \textit{Id.} at 39:26.
\textsuperscript{346.} \textit{Id.} at 57:35.
\textsuperscript{347.} \textit{Id.} at 57:40.
\textsuperscript{348.} \textit{Id.} at 57:53.
\textsuperscript{349.} \textit{Id.} at 58:06.
\textsuperscript{350.} \textit{Id.} at 58:08.
\textsuperscript{351.} \textit{Id.} at 58:12.
about the tradition in civil cases to be absolutely sure, but
the Court needn’t decide that in this case.”\textsuperscript{352}

iii. Drafting the Opinion

In late May, Burger, who had assigned the lead opinion
to himself after the conference voted in favor of reversing,
distributed his first opinion “of the Court” overturning the
trial court order.\textsuperscript{353} That opinion reflected Burger’s
admission at conference that he believed there was a right of
access to criminal trials but lacked an answer to the
question, “What’s the constitutional handle?”\textsuperscript{354} Burger told
the others, “I’m not persuaded it’s in the First Amendment
. . . as an access right or an associational right.”\textsuperscript{355} Instead,
he thought he would rely on the historical provenance of the
right, that “it was part of judicial procedure before adoption
of the Bill of Rights.”\textsuperscript{356} “The Ninth Amendment,” he said, “is
as good a handle as any.”\textsuperscript{357}

Burger ended up grabbing all the handles. According to
his draft, “The question presented in this case is whether the
right to attend criminal trials is guaranteed under the
Constitution.”\textsuperscript{358} To answer that question, he turned first to
the historical record relating to open trials.\textsuperscript{359} As he
explained, “[W]hat is significant for present purposes is that
throughout its evolution, the [criminal] trial has been open

\textsuperscript{352} Id. at 1:01:23.
\textsuperscript{353} Warren Burger, J., Majority Opinion, 1st Draft (May 27, 1980), in Powell
\textsuperscript{354} Schwartz, supra note 260, at 486.
\textsuperscript{355} Id.
\textsuperscript{356} Id.
\textsuperscript{357} Id.
\textsuperscript{358} Warren Burger, J., Majority Opinion, 1st Draft (May 27, 1980), in Powell
\textsuperscript{359} Id. at 27.
Switching gears, he observed that this was not a “quirk of history.” Instead, openness was long considered “an indispensable attribute of an Anglo-American trial.” It “gave assurance that the proceedings were conducted fairly to all concerned, and it discouraged perjury, the misconduct of participants, and decisions based on secret bias or partiality.” Moreover, these public trials delivered a “significant community therapeutic value.” He added, “People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.”

Nearly twenty pages in, Burger finally invoked the First Amendment in response to Virginia’s argument that nothing in the Constitution explicitly provided for public attendance at trial. While Burger had just explained that the press attended trials as surrogates for the public, he did not anchor the access right in the press clause alone. Rather, he said that the case also implicated the First Amendment’s right of assembly. The assembly right included the right to assemble to “listen, observe, and learn” and was an “independent right which is not merely cumulative” of the speech and press rights. Burger ended with a flourish, invoking speech, press, and assembly, which together he called the “amalgam of First Amendment guarantees.”

Burger finally turned to the Ninth Amendment. That Amendment “was intended to function as a sort of

360. Id.
361. Id. at 31.
362. Id.
363. Id. at 33.
364. Id. at 34.
365. See id. at 37.
366. See id.
367. Id. at 38.
368. Id. at 41.
constitutional ‘saving clause.’” 369 The Court, he said, had long recognized “certain unarticulated rights are implicit in enumerated guarantees.” 370 Like the right of privacy, the right to a presumption of innocence, and the right to travel, the right of access was an “unarticulated right[]” that shared “constitutional protection in common with explicit guarantees.” 371 Through the Ninth Amendment, the Court has recognized that such “fundamental rights” were “indispensable to the enjoyment of rights explicitly defined.” 372

In the end, Burger’s opinion was shockingly progressive—a remarkable endorsement of the Ninth Amendment. It was also cumbersome. While Powell had recused himself, upon receiving the opinion, he told his assistant to open a file on the case. On his copy of Burger’s draft opinion, he mocked it, marking the draft with question marks and marginalia like “Bull!” and “I said this in Saxbe” and “I’ll be surprised if this commands a Court w/o substantial changes.” 373 Powell turned out to be right.

A day after Burger circulated his opinion, Brennan, possibly sensing an opening, circulated an opinion concurring in judgment. 374 *Richmond Newspapers*, he wrote, presented “the question whether the First Amendment, of its own force and as applied to the States through the Fourteenth Amendment, secures the public an independent right of access to trial proceedings.” 375 The Court, he wrote, broadly protected speech from suppression. But, it had not viewed the First Amendment “in all settings as providing an

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369. Id. at 42.
370. Id. at 43.
371. Id.
372. Id.
373. Id. at 34, 36, 21.
375. Id.
equally categorical assurance of the correlative freedom of access to information.”376 In making that observation, Brennan cited Burger’s plurality opinion and Stewart’s opinion concurring in judgment in Houchins as well as cases like Pell, Saxbe, and Gannett.377 Citing the dissenters as well in these cases, Brennan hastened to add that he did not think these cases foreclosed a First Amendment right of access:

Yet, the Court has not ruled out a public access component to the First Amendment in every circumstance. Read with care and in context, our decisions must therefore be understood as holding only that any privilege of access to governmental information is subject to a degree of restraint dictated by the nature of the information and countervailing interests in security or confidentiality.378

These cases, Brennan said, reflected only “the special nature of a claim of First Amendment right to gather information.”379 Certainly, the First Amendment made prior restraints “almost insurmountable,” but stopping there ignored that it embodied “more than a commitment to free expression and communicative interchange for their own sakes.”380 Instead, it had a “structural role to play in securing and fostering our republican system of self-government.”381 And, “[i]mplicit in this structural role” was “the antecedent assumption that valuable public debate—as well as other civic behavior—must be informed.”382 In other words, the scope of the First Amendment’s protections is defined by the

376. Id. at 50.
377. See id. He also noted that “a conceptually separate, yet related, question is whether the media should enjoy greater access rights than the general public.” Id. at n.2. That issue was not presented in Richmond Newspapers, however. See id.
378. Id. at 50–51.
379. Id. at 51.
380. Id.
381. Id.
382. Id. at 51–52.
Amendment’s purpose, namely, ensuring “communication necessary for a democracy to survive,” which may require protecting “not only the communication itself” but the “indispensable conditions” for such communication to be “meaningful.”

Brennan recognized, however, that a right of access in service of First Amendment values could be “endless.” After all, there “are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow.” As such, a constitutional access right “must be invoked with discrimination and temperance.” Accordingly, the scope of the right of access must “be assayed by considering the information sought and the opposing interests invaded.” This task, he wrote, “is as much a matter of sensitivity to practical necessities as it is of abstract reasoning.”

But, agreeing with Burger, Brennan described “two helpful principles” to reference in determining when an access right existed. First, “the case for a right of access has special force when drawn from an enduring and vital tradition of public entree to particular proceedings or information.” Indeed, the Constitution carried with it “the gloss of history.” Second, courts must ask “whether access to a particular government process is important in terms of that very process.” Thus, courts “must consult historical and current practice” and then “weigh the importance of

383. Id. at 52.
384. Id.
385. Id. (citing Zemel v. Rusk, 381 U.S. 1, 16–17 (1965)).
386. Id.
387. Id.
388. Id. at 53.
389. Id.
390. Id.
391. Id.
392. Id.
publication access to the trial process itself.”

Within the week of the circulation of Burger’s and Brennan’s opinions, White wrote to the conference to express his frustration that the Court could not decide the case on the Sixth Amendment. Nevertheless, White said he would join Burger’s opinion “and would expect to stay hitched if three or more Justices in addition.” He added, however, that Burger’s “invocation of the Ninth Amendment is unnecessary, and in any event, it may be that I shall disassociate myself from that portion of the opinion.” Marshall, a few days later, circulated a letter noting that he would join Brennan’s opinion. The count was 2-2.

A few days later, Stevens circulated a concurring opinion praising the Court’s judgment. In a cover letter, he said he “may end up joining another opinion after the dust has settled” but “thought it best” to go ahead and circulate his position. The case was, he wrote in the concurrence, a “watershed.” Houchins “implied that any governmental restriction on access to information, no matter how severe and no matter how unjustified, would be constitutionally acceptable, so long as it did not single out the press.” But, because neither Marshall nor Blackmun were able to sit for

393. Id.


395. Id.


400. Id.
the case a “majority of the Court neither accepted nor rejected that conclusion or the contrary conclusion.”

In *Richmond Newspapers* though, Stevens saw a new beginning: “for the first time, the Court unequivocally holds that an arbitrary interference with access to important information is an abridgment of freedom of speech protection by the First Amendment.” Under the impression that *Richmond Newspapers* upended the prior regime, he explained that, based on his *Houchins* opinion, he agreed that “the First Amendment protects the public and the press from abridgment of their rights of access to information about the operation of their government, including the Judicial Branch.”

Hearing nothing else, on June 11, Burger circulated a new draft, saying that it was prompted by “reaction to the typed draft.” Taking a cue from White, he trimmed back the Ninth Amendment discussion. He did the same with the assembly clause. Meanwhile, borrowing from Brennan, he added that the First Amendment’s speech and press clauses “must be taken as a command of the broadest scope that explicit language, read in the context of a liberty loving society, will allow.” For the first time, he also dealt with the prison access cases: “[*Pell*] and [*Saxbe*] are distinguishable in the sense that they were concerned with penal institutions which, by definition, are not ‘open’ or public places. Penal institutions do not share the long

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401. *Id.*
402. *Id.*
403. *Id.* at 96.
406. See *id.* at 39.
tradition of openness, although traditionally there have been visiting committees of citizens, and there is no doubt that legislative committees could exercise plenary oversight and ‘visitation rights.’” Saxbe noted that “limitation on visitations is justified by what the Court of Appeals acknowledged as ‘the truism that prisons are institutions where public access is generally limited.’ . . . See Adderley v. Florida, 385 U.S. 39, 41 (1966) [jails].” See also Greer v. Spock, 424 U.S. 828 (1976) (military bases).

The revisions did not have the effect he hoped. Five days later, Stewart circulated a concurring opinion. With it, he sent the conference a letter, explaining, “If it turns out that there is no possibility of a Court opinion in this case, I shall change the last paragraph [of the attached opinion] so as to join only the judgment.”409 Stewart referred back to his opinion in Gannett and noted that “the Court explicitly left open the question whether such a right of access may be guaranteed by other provisions of the Constitution.”410 Whatever the answer may have been in the context of the suppression hearing at issue in Gannett, Stewart believed that there was a First Amendment right of access to the trial in Richmond Newspapers.411

Unconvinced by the other circulated opinions, on June 17, the day after Stewart circulated his opinion, Stevens wrote to Burger to confirm that he would be joining Burger’s opinion.412 That gave Burger three votes: himself, White, and


411. See id.

Stevens. Two days later, Burger wrote to Stevens, and copied Blackmun and Stewart—two outstanding votes, letting him know that he adopted certain of his suggestions.413 Then, on June 19, Rehnquist circulated a dissenting opinion, arguing that there was no “prohibition in the First, Sixth, Ninth, or any other Amendments” against excluding the press and public from trial.414

While it is unclear when Blackmun told the conference that he would only join the judgment of the Court, on June 23, Burger circulated a letter explaining additional changes to his opinion.415 But the real purpose was to chastise his colleagues. He wrote that it was “most unfortunate that, although seven of us are of one mind on the essentials of this case—the openness of criminal trials—we fail, apparently, to clarify the confusion that followed in the wake of Gannett.”416 He added, “I think we fall short if the present lack of a ‘Court’ prevails.”417 Besides Rehnquist’s opinion, he had seen no other opinion that was “so at odds with the assigned opinion that the author of that separate writing could not also join the assigned opinion.”418 If differences existed they should be raised and accommodated because an “unnecessarily ‘fractionated’ Court serves no good purpose; it causes those reading our opinions to find differences of substance which are not actually there.”419

It did not work. On June 24, Blackmun circulated an


416. Id. at 10.

417. Id.

418. Id.

419. Id.
opinion concurring only in judgment.420 Blackmun called the resolution of the case “gratifying for two reasons.”421 First, he appreciated that the Court had relied on history as a reference point, as Blackmun had in his Gannett dissent.422 Second, Blackmun thought that Richmond Newspapers had “wash[ed] away at least some of the graffiti that marred the prevailing opinions in Gannett.”423 While he remained convinced that the Sixth Amendment was the better approach, he admitted that the Court had “eschewed that approach.”424 Instead, it had turned “to other possible constitutional sources,” invoking “a veritable potpourri of them—the speech clause of the First Amendment, the press clause, the assembly clause, the . . . Ninth Amendment, and a cluster of penumbral guarantees recognized in past decisions.”425 Blackmun noted that this course was pocked with “uncertainty,” but since this was the path it had chosen, he was forced to admit it as a “secondary proposition.”426

iv. The Court Issues its Opinions

Burger never got his majority, and the fallout spanned fifty some pages. While seven Justices found that closure was improper, Burger announced only the judgment of the Court and delivered an opinion for himself, White, and Stevens. White also filed a concurring opinion, as did Stevens. Brennan filed an opinion concurring in judgment, in which Marshall joined. Stewart and Blackmun filed opinions concurring in judgment too. Rehnquist was the lone dissenter. Powell remained sidelined.

421. Id.
422. See id.
423. Id. at 181.
424. Id. at 182.
425. Id. at 183.
426. Id. at 182.
It is true, as Stewart observed, that Burger’s and Brennan’s opinions shared similarities. They focused on whether trials had historically been open to the public and on the logic of openness.\(^{427}\) But the similarities stopped there. Brennan established a republican theory of access constrained by reference to the historical openness of the proceeding and whether that openness played a positive role. Burger’s opinion recognized a limited right of access to criminal trials based on the “unbroken, uncontradicted history [of access to trials], supported by reasons as valid today as in centuries past.”\(^{428}\)

For Burger, what he began his opinion with—the historical openness of trials—was most important. So, it is not surprising that his theoretical grounding was muddled. Burger made no apologies for this, as he wrote that he did not believe it was “crucial” to describe the access right in reference to any specific part of the First Amendment.\(^{429}\) Instead, he broadly invoked speech and press, and wrote that assembly “is not without relevance” either.\(^{430}\) It was this last right he invoked apparently to limit future right of access claims to already public places: as with streets, sidewalks, and parks, a “trial courtroom also is a public place where the people generally—and representatives of the media—have a right to be present.”\(^{431}\)

Brennan, on the other hand, declared that the First Amendment had “a structural role to play in securing and fostering our republican system of self-government.”\(^{432}\) “Implicit in this structural role” was “not only ‘the principle that debate on public issues should be uninhibited, robust,
and wide-open,’ but also the antecedent assumption that valuable public debate . . . must be informed.”433 This model linked “the First Amendment to that process of communication necessary for a democracy to survive, and thus entails solicitude not only for communication itself, but also for the indispensable conditions of meaningful communication.”434 For Brennan, history and logic were simply “two helpful principles” to constrain the “theoretically endless” stretch of the access right.435

Nor did the other Justices resolve the friction between the two. Stevens read Burger’s opinion broadly as a “watershed” that protected “the public and the press from abridgment of their rights of access to information about the operation of their government.”436 White, however, thought the opinion was very narrow.437 Stewart was of a similar mind, distinguishing attempts to other government proceedings and places.438 And, Blackmun suggested a similar limitation, characterizing the right of access as “right to know about the administration of justice in general.”439

While Richmond Newspapers was, then, historic insofar as it recognized for the first time some kind of right of access, it suffered as had Houchins and Gannett before it from considerable indeterminacy. As one commentator observed the year the case was handed down, “[T]he several opinions in the case leave the existence of a general right of access to governmental information an open question.”440 The lingering question: “Toward what ultimate constitutional

433. Id.
434. Id. at 588.
435. Id. at 588–89.
436. Id. at 584–84 (Stevens, J., concurring).
437. Id. at 581–82 (White, J., concurring).
438. Id. at 599–600 (Stewart, J., concurring in judgment).
439. Id. at 604 (Blackmun, J., concurring in judgment).
objective is the instrumental value of this access right directed?" Would Burger’s doctrinally agnostic view or Brennan’s doctrinally broad view of a right of access win out?

4. Globe Newspaper Co. v. Superior Court

As Richmond Newspapers had followed quickly on the heels of Gannett, Globe Newspaper Co. v. Superior Court followed quickly on Richmond Newspapers. The case arrived at the Court in 1981, just a year later. The question presented was whether a Massachusetts statute requiring exclusion of the press and public from the courtroom when a minor victim of sexual assault was constitutional.

i. Lower Courts’ Decisions

In April 1979, the Globe Newspaper Company challenged an order closing the courtroom in a rape prosecution. It failed. In February 1980, some five months before the Court published its decision in Richmond Newspapers, the Massachusetts Supreme Judicial Court dismissed the appeal as moot because the underlying prosecution had concluded. That court refused to reach the constitutionality of the statute requiring closure, noting that Richmond Newspapers was pending before the U.S. Supreme Court and it would be improvident to do so. After Globe filed a petition for a writ of certiorari, the Supreme Court

441. Id. at 153. There were three potential outcomes. First, a “narrow reading of the case would limit the reach of access rights rather strictly to contexts in which access is sought to an institution traditionally open to public scrutiny.” Id. at 157. Second, a “less tradition-bound approach along structural lines might limit access rights to information (or forums) with respect to which the government could claim no interest requiring exclusivity of control.” Id. at 157–58. And, finally, an “even more liberal theory would adopt an ad hoc balancing approach, asking in each case whether access is compatible with the functioning of the institution to which access is sought.” Id. at 158.


444. Id. at 372.

445. Id. at 366.
vacated the Massachusetts judgment and remanded the case for further consideration in light of *Richmond Newspapers*.\footnote{Globe Newspaper Co. v. Superior Ct., 449 U.S. 894 (1980).}

On remand, the Massachusetts high court concluded that the statute was constitutional under *Richmond Newspapers*.\footnote{Id.} That case, the court said, “recognized for the first time that the First Amendment to the United States Constitution guarantees a right of public access to criminal trials.”\footnote{Id. at 776, n.6.} Nevertheless, the court said that the basis for the decision *Richmond Newspapers* was “somewhat unclear.”\footnote{Id. at 776–77.} Still, it wrote, “[a]lthough there was no majority opinion, two themes were stressed by all.”\footnote{Id. at 778.} The first was the history of access to criminal trials; the second was that closure might be appropriate in certain circumstances.\footnote{Id. at 781.}

Considering these themes, the court saw no infirmity in the statute. There was a notable exception to the history of open trials: “cases involving sexual assaults.”\footnote{Id. at 778.} And, the court found that the Commonwealth’s “special solicitousness for the interests of minors” outweighed any corresponding rights of the press.\footnote{Id. at 781.} In short, although there was “some temporary diminution of information,” the court could not “say that *Richmond Newspapers* requires the invalidation of the requirement, given the statute’s narrow scope in an area of traditional sensitivity to the needs of victims.”\footnote{Id.}

\hspace{1cm} ii. At the Supreme Court

Globe again sought review in the Supreme Court, and, at
a November 1981 conference, Brennan, White, Blackmun, Stevens, and the newly seated Sandra Day O'Connor (who replaced Stewart) noted probable jurisdiction. That left Burger, Powell, Rehnquist, and Marshall voting against. While Powell viewed the Massachusetts statute as "worrisome," he also thought the Massachusetts Supreme Judicial Court was a "strong one" and upheld the statute twice, including once after remand.

The Court heard argument in March 1982. Unlike prior ones, it was not focused on whether the right of access existed. That much had been decided. Instead, it proceeded uneventfully with a focus on whether the mandatory closure requirement in the Massachusetts statute was constitutional under *Richmond Newspapers*. Burger and Rehnquist dominated questioning when Globe’s counsel James McHugh argued, and Marshall did the same when Mitchell Sikora, the assistant attorney general for Massachusetts, argued.

The most illuminating part came from Sikora and was aimed at Brennan. “I would like to stress just one more point,” he said, “and that is a mode of analysis which Mr. Justice Brennan introduced in the *Richmond Newspapers* case, when he suggested that we should test statutes of this kind by inspection as to whether they interfere seriously with the flow of information to citizens about their courts or about their political institutions more generally.” Based on the narrow reading of the statute given to it by the Massachusetts Supreme Judicial Court, he argued that the statute did not interfere with that flow of information. As he explained, “[a]ll pre and post-trial proceedings remain open, presumptively open,” and, almost all of the trial, except for


456. Id.

the testimony of the minor victim, was also presumptively open.\textsuperscript{458}

At the conference, Burger voted to affirm. He told his colleagues that there was a substantial “public interest in protecting minors and encourage victims” to report crimes that openness would “frustrate.”\textsuperscript{459} Brennan, then the next most senior justice, voted to reverse, explaining that the statute’s mandatory closure requirement made it unconstitutional: “there must be circumstances where press need not be excluded.”\textsuperscript{460} He would leave “courts free to decide on [a] case-by-case basis.”\textsuperscript{461} Both White and Marshall fell in line with Brennan, as did Blackmun.\textsuperscript{462} Then came Powell who said he would go along with Brennan, but on one condition: if the Court made “clear that the trial judge may determine, in each case, whether the interests of the victim—and of the public—requires closure during testimony of victim.”\textsuperscript{463}

The rest was a mix bag. Rehnquist said that he agreed with Burger.\textsuperscript{464} Stevens thought the case should be dismissed because the trial was over and, thus, there was no case or controversy.\textsuperscript{465} The Court, he said, was “being asked for an advisory opinion”—a strange position for Stevens who had, in \textit{Houchins}, maintained the opposite position.\textsuperscript{466} If he was forced to decide though, he suggested that he would go with Brennan.\textsuperscript{467} Finally, O’Connor said that \textit{Richmond

\textsuperscript{458} Id. at 54:28.


\textsuperscript{460} Id.

\textsuperscript{461} Id.

\textsuperscript{462} Id. at 16–17.

\textsuperscript{463} Id. at 17.

\textsuperscript{464} Id.

\textsuperscript{465} Id.

\textsuperscript{466} Id.

\textsuperscript{467} Id.
iii. Drafting the Opinion

Brennan assigned himself the opinion. He wrote that Richmond Newspapers “firmly established . . . that the press and general public have a constitutional right of access to criminal trials.” Despite no majority, in Richmond Newspapers, “seven Justices recognized that this right of access is embodied in the First Amendment.” True enough, he said, the access right “is not explicitly mentioned in terms in the First Amendment,” but the Court had “long eschewed any ‘narrow, literal conception’ of the Amendment’s terms.” This made sense as the Founders “were concerned with broad principles, and wrote against a background of shared values and practices.” The Amendment was “thus broad enough to encompass those rights that, while not unambiguously enumerated in the very terms of the Amendment, are nonetheless necessary to the enjoyment of other First Amendment rights or are implicit in the very structure of self-government established by the Constitution.”

On this point, after citing the plurality opinion and his own in Richmond Newspapers, Brennan dropped Footnote 13. That Footnote, which will prove important, approvingly cited large swaths of Stevens’ dissent in Houchins and Powell’s dissent in Saxbe. Invoking themes from those

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468. Id.


470. Id.

471. Id. at 25 (quoting NAACP v. Button, 371 U.S. 415, 430 (1963)).

472. Id.

473. Id.

opinions, he wrote that the right of access was not simply a question of access to criminal trials.\textsuperscript{475} Rather, “[u]nderlying the First Amendment right of access to criminal trials is the common understanding that ‘a major purpose of that Amendment was to protect the free discussion of governmental affairs.’”\textsuperscript{476} By protecting the access right, the Amendment “ensure[d] that the individual citizen can effectively participate in and contribute to our republican system of self-government.”\textsuperscript{477} Invoking his \textit{Richmond Newspapers} theory, he wrote that to the extent “the First Amendment embraces a right of access to criminal trials, it is to ensure that this constitutionally protected ‘discussion of governmental affairs’ is an informed one.”\textsuperscript{478}

Expanding on the point, Brennan explained that in \textit{Richmond Newspapers} the “various opinions” cited “[t]wo features of the criminal justice system” that showed “why a right of access to criminal trials in particular is properly afforded protection by the First Amendment.”\textsuperscript{479} First was the history of openness to criminal trials. Second was that access to criminal trials played “a particularly significant role in the functioning of the judicial process and the government as a whole.”\textsuperscript{480} Hammering this theme, he added, “in the broadest terms, public access to criminal trials permits the public to participate in and serve as a check upon the judicial process—an essential component in our structure of self-government.”\textsuperscript{481}

Brennan then turned to the showing necessary to

\textsuperscript{475} Id.
\textsuperscript{476} Id. (quoting Mills v. Alabama, 384 U.S. 214, 218 (1966)).
\textsuperscript{477} Id. (citing Thornhill v. Alabama, 310 U.S. 88, 95 (1940); \textit{Richmond Newspapers, Inc. v. Virginia}, 448 U.S. 555, 587–88 (1980) (Brennan, J., concurring in the judgment)).
\textsuperscript{478} Id. at 8.
\textsuperscript{479} Id.
\textsuperscript{480} Id. at 9.
\textsuperscript{481} Id.
overcome the access right. Departing from Burger’s view in *Richmond Newspapers*, he wrote that the access right could only be overcome in “limited” circumstances where it could “be shown that the denial is necessitated by a compelling governmental interest” and that closure was “narrowly tailored to serve that interest.” He concluded that the statute did not pass the test because it mandated closure in all cases. While safeguarding the “physical and psychological well-being of a minor” was compelling, it was “clear that the circumstances of the particular case may affect the significance of the interest.”

The opinion caused a flurry of correspondence. Burger sent a letter saying he would “circulate a dissent,” and Marshall sent a letter joining Brennan. The next day, Powell joined too. White also responded, telling Brennan that he “satisfied” with the opinion. But, he said he could not join “the words ‘or are implicit in the very structure of self-government established by the Constitution.’” If White had his way, the opinion would read only that the First Amendment was “broad enough to encompass those rights that, while not unambiguously enumerated in the very terms of the Amendment, are nonetheless necessary to the

482. *Id.* at 10.
483. *Id.* at 11.
488. *Id.*
enjoyment of other First Amendment rights.” White also said he could not join Footnote 13 that approvingly cited the *Houchins* dissenters. “Perhaps,” he wrote, “these items are not critical to your opinion.” He added, “[i]f they are, I shall indicate my disagreement.”

Brennan had three solid votes to join, and a fourth conditional vote from White. Knowing the ill-fated history of draft opinions in *Houchins*, *Gannett*, and *Richmond Newspapers*, he must have been concerned about his own. Then, more bad news came. He would not get any help from Stevens or O’Connor. On June 8, Stevens circulated a dissenting opinion despite his comments to the contrary at conference that he would go along with Brennan. And on June 17, O’Connor circulated an opinion concurring in judgment only, criticizing the breadth of some of the language in Brennan’s opinion—some of the same language attacked by White. By that time, Burger had also circulated his promised dissent, which Rehnquist joined.

That left only Blackmun’s vote. The same day O’Connor circulated her opinion, Blackmun wrote to Brennan, “Dear


491. *Id.*

492. *Id.*


Bill, Please join me. I hope you will be able to give sympathetic consideration to the points Byron raises in his note of May 25. I agree with him that footnote 13 is perhaps not critical to the opinion.” In light of Blackmun’s letter, Brennan had little choice as to what to do to secure a majority.

That same day, Brennan promptly distributed a revised draft of his opinion sympathetic to White and Blackmun’s views. He removed Footnote 13 that had endorsed the dissenters in Houchins and Saxbe. He also removed his note about the First Amendment protecting rights that were implicit in the structure of self-government established by the Constitution. With that, while not speaking as emphatically as he may have liked, Brennan did what no Justice had done before: wrote a majority opinion upholding a constitutional right of access.

iv. The Court’s Opinion

In Globe Newspaper, the Court largely distanced itself from Burger’s approach in Richmond Newspapers. In its place, it adopted Brennan’s republican understanding: “Underlying the First Amendment right of access to criminal trials is the common understanding that ‘a major purpose of that Amendment was to protect the free discussion of governmental affairs.’” And by “offering such protection, the First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government.” Thus, “to the
extent that the First Amendment embraces a right of access to criminal trials, it is to ensure that this constitutionally protected ‘discussion of governmental affairs’ is an informed one.” 500 Access, as such, empowers “the public to participate in and serve as a check upon the judicial process—an essential component in our structure of self-government.” 501

Although Brennan did not need her vote for the majority, O’Connor questioned the implications of the republican theory of access. 502 Unlike the majority, she did not interpret Richmond Newspapers as “shelter[ing] every right that is ‘necessary to the enjoyment of other First Amendment rights.’” 503 Instead, she said the plurality in Richmond Newspapers rested its decision on “our long history of open criminal trials and the special value, for both public and accused, of that openness.” 504 She thus did not interpret that case or the Court’s decision in Globe Newspaper as carrying “any implications outside the context of criminal trials.” 505 Yet, because Globe Newspaper was a criminal case, she was forced to concur with the majority. 506

Burger also questioned the majority’s approach, calling it an “expansive interpretation of Richmond Newspapers” and criticizing its “cavalier rejection” of Massachusetts’ interest in protecting minor sex victims. 507 Richmond Newspapers, he wrote, did not establish a “right of access to all aspects of all criminal trials under all circumstances.” 508 On the contrary, because there was no uniform history of

500. Id. at 604–05 (quoting Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 589 (1980) (Brennan, J., concurring)).
501. Id. at 606 (emphasis added).
502. Id. at 611 (O’Connor, J., concurring).
503. Id. (quoting id. at 604).
504. Id.
505. Id.
506. Id.
507. Id. at 613 (Burger, C.J., dissenting).
508. Id.
access to the testimony of minor sex victims, he believed that considerations present in* Richmond Newspapers* were absent. Even if the right attached, he disagreed with the standard adopted to overcome the access right. The Court’s compelling interest standard, he wrote, was too “rigid,” especially where the purpose of the law was not “to deny the press or public access to information.”

Stevens mostly stayed out of the fight. Anticipating an issue that would find its way to the Court again, Stevens argued in dissent that Globe essentially mounted a facial attack on the statute. But, Stevens suggested that facial attacks on statutes denying access were inappropriate because “statutes that bear on this right of access do not deter protected activity in the way that other laws sometimes interfere with the right of expression.” In other words, “the right of access is plainly not coextensive with the right of expression.” Still, his broad understanding of the access right as evidenced by his concurring opinion in* Richmond Newspapers* remained on display. For example, he noted that the Court had “only recently recognized the First Amendment right of access” not just to trials but “to newsworthy matter.”

The next day, the* New York Times* reported that* Globe Newspaper* “erased any doubts about the durability” of* Richmond Newspapers*, while providing “a firmer constitutional basis for the result.” In one of the first

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509. *Id.* at 614.
510. *Id.* at 616.
511. *Id.* at 615–16.
512. *See id.* at 619 (Stevens, J., dissenting).
513. *See id.* at 621.
514. *Id.*
515. *Id.*
516. *Id.* at 620 (emphasis added).
scholarly assessments, one commentator noted that, while “initial attempts to extend the right to receive information to a right of access to public institutions were unsuccessful,” *Globe Newspaper* breathed “new life into the quest for an affirmative view of the first amendment.” 518 It reflected “a first amendment theory incorporating the values of access and self-government.” 519 And *Globe Newspaper* “reiterate[d] and extend[ed] the *Richmond Newspapers* analysis.” 520 The implications of Brennan’s victory were clear: “although both *Richmond Newspapers* and *Globe* are concerned with courtroom access, the rationales underlying [them] can be extended to many other situations as well.” 521 Indeed, “[j]ust as the press and public require courtroom access in order to make informed self-governing decisions, so too they require statements of reasons in order to evaluate and react to governmental decisions.” 522

B. *The Later Cases*

In the end, the Court never took a case to test the implications of the republican theory of the First Amendment it adopted in *Globe Newspaper*. In fact, it assiduously avoided doing so. While it decided two additional cases—the *Press-Enterprise Cases*—in short succession in 1984 and 1986, these cases only raised issues relating to access to criminal proceedings. 523 In 1993, it issued a short *per curiam* opinion again addressing access to criminal proceedings. 524 The Court would never again grant a petition

519. *Id.*
520. *Id.* at 315.
521. *Id.* at 315–16.
522. *Id.* at 316.
for writ of certiorari to delineate the First Amendment right of access to government proceedings or information. Instead, it would offer only *dicta* about the access right in related cases.


In January 1983, the Court granted certiorari in *Press-Enterprise, Co. v. Superior Court*. At issue was whether the right of access applied to *voir dire* in a criminal trial. Burger, writing for the unanimous majority, returned to his roots: as he had in *Richmond Newspapers*, he focused on whether *voir dire* was traditionally open and whether openness played a beneficial role in the process of *voir dire* itself. Thus, the Court largely ignored—but left unchallenged—the structural theory it adopted in *Globe Newspaper*.

As to history, the Court first concluded that *voir dire* had long took place in public. On the second prong, consistent with the theoretical indifference of *Richmond Newspapers*, Burger wrote that how the Court “allocate[d] the ‘right’ to openness as between the accused and the public” or whether it was viewed “as a component inherent in the system benefiting both” was “not crucial.” And while he noted in a footnote that “the question we address . . . focuses on First . . . Amendment values,” he failed to mention the First Amendment in the body of the Court’s opinion. Instead, he listed the procedural benefits of openness: openness ensures that individuals unable to attend trials would have “confidence that standards of fairness” were observed and

527. *Id.* at 505–10.
528. *Id.* at 507.
529. *Id.* at 508.
530. *Id.* at 509 n.8.
that they ensured that the community knows “that offenders are being brought to account.”

Turning to the standard to overcome the right, in the Court’s lone citation to Globe Newspaper, it applied the compelling interest standard adopted in that case. Specifically, it found that “[c]losed proceedings, although not absolutely precluded, must be rare and only for cause shown that outweighs the value of openness.” The interest in favor of closure must be “weighty” and supported by “findings specific enough that a reviewing court can determine whether the closure order was properly entered.” While the lower court identified the fair trial right and privacy interests of jurors as interests to be served by closure, that conclusion, Burger said, was “unsupported by findings showing that an open proceeding in fact threatened those interests.” Even if the trial court made such a finding, it failed to “consider whether alternatives were available to protect the interests of the prospective jurors that the trial court’s orders sought to guard.”

Stevens concurred to point out “that this is a First Amendment case.” The issue before the Court was not “simply ... how a criminal trial is most efficaciously conducted,” nor how “effective judicial administration” should be handled. On the contrary, “the First Amendment’s concerns are much broader.” Its mission was to secure “meaningful public control over the process of governance.”

531. Id. at 509.
532. Id.
533. Id. at 509–10 (quoting Globe Newspaper, 457 U.S. at 606–07).
534. Id. at 510–11.
535. Id. at 511.
536. Id. at 529 (Stevens, J., concurring).
537. Id. at 516–17.
538. Id. at 517.
539. Id. at 519.
Newspapers, Stevens explained that the access right implicated the “common core purpose of assuring freedom of communication on matters relating to the functioning of government.” The Court “endorsed” this position in Globe Newspaper. A right of access then “cannot succeed unless access makes a positive contribution to this process of self-governance.” Because access to voir dire “cannot help but improve public understanding” of that process and enable “critical examination of its workings to take place,” Stevens concluded that the access right attached.


In October 1985, the Court again granted certiorari in a petition brought by Press-Enterprise. Burger would again assign the opinion to himself. The dispute arose from a murder prosecution of a nurse accused of killing twelve patients. At the preliminary hearing, the defendant made a motion to exclude the public pursuant to a California statute that allowed closure to protect a defendant’s fair trial right. That hearing lasted over a month. After it concluded, Press-Enterprise made a motion to unseal the transcript, which was denied. It then appealed without success, after which it sought and the Court granted a writ.

540. Id. at 517 (quoting Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575 (1980) (plurality opinion)).
541. Id. (citing Globe Newspaper Co. v. Superior Ct., 457 U.S. 596 (1982)).
542. Id. at 518.
543. Id. Marshall concurred in judgment to make clear that “the constitutional rights of the public and press to access to all aspects of criminal trials are not diminished in cases in which ‘deeply personal matters’ are likely to be elicited in voir dire proceedings.” Id. at 520 (Marshall, J., concurring). Blackmun concurred too, emphasizing that the Court was not passing on a juror’s right of privacy. Id. at 513–14 (Blackmun, J., concurring).
546. Id. at 4.
547. Id.
548. Id. at 5.
The question presented was whether Press-Enterprise had a “right of access to the transcript of a preliminary hearing growing out of a criminal prosecution.” The Court found that it did. It observed that the “right to an open public trial is a shared right of the accused and the public.” While the Sixth Amendment right to a public trial might raise different issues, the First Amendment’s right of access “cannot be resolved solely on the label we give the event, i.e., ‘trial’ or otherwise.” Instead, Burger returned again to the “two complimentary considerations” of history and logic. Unlike Press-Enterprise I, however, Burger did mention the First Amendment. And, in parts, he suggested, as the Court had in Globe Newspaper, that the right of access was a generally applicable one: “These considerations of experience and logic are, of course, related, for history and experience shape the functioning of governmental processes. If the particular proceeding in question passes these tests of experience and logic, a qualified First Amendment right of public access attaches.” Rather than ignore Globe Newspaper, he invoked it: “The considerations that led the Court to apply the First Amendment right of access to criminal trials in Richmond Newspapers and Globe and the selection of jurors in Press-Enterprise I lead us to conclude that the right of access applies to preliminary hearings as conducted in California.”

Having found the right of access to apply, the Court then pivoted to the question of whether the right of access had
been overcome. It found that it did not. The California Supreme Court concluded that the courtroom could be closed so long as there was a “reasonable likelihood of substantial prejudice.”\textsuperscript{556} This standard, however, “placed a lesser burden” on the party seeking closure than the compelling interest test outlined in \textit{Globe Newspaper} and \textit{Press-Enterprise I}.\textsuperscript{557} As such, Burger rejected it and reaffirmed the test requiring a showing “that closure is essential to preserve higher values and is narrowly tailored to serve that interest.”\textsuperscript{558}

While Brennan did not write separately, he worked in the background to protect his majority opinion in \textit{Globe Newspaper} and its endorsement of a republican theory of the First Amendment. After Burger circulated a first draft, Brennan wrote to Burger asking if he would consider “two small suggestions.”\textsuperscript{559} Burger adopted both. One was a request for an additional sentence: “These considerations of experience and logic are, of course, related to one another, for historical practice and experience shapes the functioning of governmental processes.”\textsuperscript{560} Next, Brennan suggested that in discussing the standard that must be overcome to justify closure that Burger add in a cite to \textit{Globe Newspaper}.\textsuperscript{561}

\textsuperscript{556} Id. at 14 (marks and citation omitted).
\textsuperscript{557} Id.
\textsuperscript{558} Id.
\textsuperscript{561} Id.
Stevens, joined in part by Rehnquist, dissented. He emphasized that he had “long believed that a proper construction of the First Amendment embraces a right of access to information about the conduct of public affairs.” 562 He thus continued to believe that government officials could not “abridge the free flow of information simply to protect their own activities from public scrutiny.” 563 Rather, they had to identify “some legitimate justification that serves the interest of the public office.” 564 But, for Stevens, the devil was in the details. It had “always been apparent that the freedom to obtain information that the government has a legitimate interest in not disclosing is far narrower than the freedom to disseminate information.” 565 Thus, as in Pell, where there were legitimate penological reasons for limiting access, in the present case, there was another legitimate reason: “the risk of prejudice to the defendant’s right to a fair trial.” 566


In 1993, the Court issued a short per curiam opinion in El Vocero v. Puerto Rico. 567 El Vocero, as Press-Enterprise II before it, concerned a preliminary hearing, this time in Puerto Rico. 568 The Supreme Court of Puerto Rico found that no access right attached to the Territory’s preliminary hearings based on, in part, “the unique history and traditions of the Commonwealth, which display a special concern for the honor and reputation of the citizenry.” 569

The Supreme Court reversed, finding that conclusion “irreconcilable with Press-Enterprise[] for precisely the

562. Id. at 18 (Stevens, J., dissenting).
563. Id. at 19.
564. Id.
565. Id. at 20 (citation omitted).
566. Id. (quoting Pell v. Procunier, 417 U.S. 817, 830 (1974)).
568. Id. at 148.
569. Id. at 149.
reasons stated in that decision.” The preliminary hearings in Puerto Rico had, in fact, been modeled on California’s and they too were “sufficiently like a trial’ to require public access.” Nor was the reliance on Puerto Rican tradition appropriate. Instead, the Court said, “the ‘experience’ test of Globe Newspaper does not look to the particular practice of any one jurisdiction, but . . . ‘to the experience in that type or kind of hearing throughout the United States.’”


United Reporting had, for years, provided the names and other identifying information of recent arrestees to subscribers to its services. In 1996, however, the California legislature amended the open records law through which United Reporting obtained that information. As a result, it would be more difficult, if not impossible, for United Reporting to obtain the arrestee information for delivery to its subscribers.

According to the district court, the case presented the question of whether the amendment “was an unconstitutional limitation on plaintiff’s commercial speech.” While the district court concluded in light of Houchins that United Reporting had no First Amendment right of access to the information, it went on to ask whether the amendment passed the Court’s commercial speech test as the amendment amounted to a “content-based indirect

570. Id.
571. Id. at 149–50 (citation omitted).
572. Id. at 150 (quoting Rivera-Puig v. Garcia-Rosario, 983 F.2d 311, 323 (1992)).
574. Id.
575. Id.
limitation on commercial speech.” The court then found that the statute did not survive intermediate scrutiny, and the Ninth Circuit affirmed.

The case then went to the Supreme Court on the question of whether “the government violates the First Amendment when it releases records only for limited, noncommercial purposes.” In briefing, the LAPD argued that the Ninth Circuit erred in considering the law as a restriction on speech rather than access to information. Citing Houchins, it asserted that the restriction on the release of records was constitutional because restrictions “on access to government information do not run afoul of the First Amendment.” It then characterized Richmond Newspapers as the “lone qualification to the state’s ability to limit public access to government proceedings.” And, it went on to argue that, unlike criminal trials, there was “no similar historical pedigree or interest supports a right of access to the home addresses of arrestees and victims.”

At oral argument, Stevens doubted if the case was even an access case. Questioning LAPD’s counsel, he noted that below the LAPD “agreed that Central Hudson was the test.” He explained, “I think if you assume that Central Hudson applies, you’re assuming it’s an abridgement of speech case rather than a denial of access case.” And according to United Reporting’s counsel, it did “not have to

577. Id. at 826.
578. Id.; see also United Reporting Publ’g Corp. v. Cal. Highway Patrol, 146 F.3d 1133 (9th Cir. 1998).
580. Id. at 9.
581. Id. at 16–17 (quoting Houchins v. KQED, Inc., 438 U.S. 1, 14 (1978) (plurality opinion)).
582. Id. at 17.
583. Id.
585. Id. at 15:28.
establish a raw right of access in order to prevail in this case.”586 Instead, he argued that the case hinged “on the discrimination among speakers when access is granted for governmentally approved purposes, including speech purposes, journalism, and is denied when access is withheld for governmentally disapproved speech purposes.”587

The Court ended up deciding the case on neither ground. Instead, it found that United Reporting could not bring a facial challenge to the statute. The statute, the Court explained, was “not an abridgment of anyone’s right to engage in speech . . . but simply a law regulating access to information in the hands of the police department.”588 While the Court had allowed facial attacks on statutes that limited speech, it had not done so for statutes that limited access to information.589 The statute at issue “merely require[d] that if respondent wishes to obtain the addresses of arrestees it must qualify under the statute to do so.”590 United Reporting, however, “did not attempt to qualify and was therefore denied access to the addresses.”591 It could not now bring a facial challenge in lieu of being denied access itself.

In dicta, the Court offered an aside as emphasis. Citing the Houchins plurality as a “cf.” cite (although not noting that Houchins was a plurality opinion), it wrote, “California could decide not to give out arrestee information at all without violating the First Amendment.”592 The Court added nothing further on that point. Yet, it seemed that most other justices agreed. Ruth Bader Ginsburg concurred, and was joined by O’Connor, David Souter, and Stephen Breyer: “California could, as the Court notes, constitutionally decide

586. Id. at 56:35.
587. Id. at 56:46.
588. L.A. Police Dep’t, 528 U.S. at 40.
589. Id.
590. Id.
591. Id.
592. Id.
not to give out arrestee address information at all.”

Even Stevens, dissenting with Anthony Kennedy, agreed: “the majority is surely correct in observing that ‘California could decide not to give out arrestee information at all without violating the First Amendment.” But, he added, “A different, and more difficult, question is presented when the State makes information generally available, but denies access to a small disfavored class.”

5. Sorrell v. IMS Health Inc. (2011)

In Sorrell v. IMS Health Inc., a group of data miners and pharmaceutical manufacturers challenged a Vermont statute restricting “the sale, disclosure, and use of pharmacy records that reveal the prescribing practices of individual doctors.” These records were received by pharmacies when they processed prescriptions. Pharmacies then sold the records to data miners who would lease them to pharmaceutical companies that used them to inform their sales of drugs.

One argument Vermont raised in defending the statute was a twist on the Court’s right of access jurisprudence. It argued that the law only regulated “access to information” rather than speech itself, and, under the Court’s prior precedents like United Reporting, that presented no constitutional issue. While the records were not themselves government records in the traditional sense, Vermont asserted that they were “generated in compliance with a legal mandate . . . so could be considered a kind of

593. Id. at 43 (Ginsburg, J., concurring).
594. Id. at 45 (Stevens, J., dissenting).
595. Id.
597. Id. at 558.
598. Id.
599. Id. at 567.
governmental information." Thus, Vermont was only putting limitations on access to records that the government could decide never to require the creation of in the first place.

The Court found “some support” for this argument in United Reporting but rejected it. First, it clarified that United Reporting was “about the availability of facial challenges” to laws limiting access to information, and the “Court did not rule on the merits of any First Amendment claim.” An “even more important reason” for distinguishing it was that the “plaintiff in United Reporting had neither ‘attempt[ed] to qualify’ for access to the government’s information nor presented an as-applied claim in this Court.” Thus, “the Court assumed that the plaintiff had not suffered a personal First Amendment injury.” In Sorrell, however, the respondents claimed that the statute burdened “their own speech.” This argument, the Court said, found support in the individual opinions in United Reporting asserting that selective government disclosures of information to certain recipients “can facilitate or burden the expression of potential recipients and so transgress the First Amendment.” The Court then went on to strike the law down.


At issue in McBurney v. Young was Virginia’s state freedom of information law and whether its requirement that a requester be a citizen of the Commonwealth violated the

600. Id. at 567–68.
601. Id. at 568.
602. Id.
603. Id. (quoting L.A. Police Dep't v. United Reporting Pub'l'g Corp., 528 U.S. 32, 41 (1999)).
604. Id. at 569.
605. Id.
606. Id.
607. Id. at 580.
Privileges and Immunities Clause. The Court rejected what it called “petitioners’ sweeping claim that the challenged provision of the Virginia FOIA violate[d] the Privileges and Immunities Clause because it denie[d] them the right to access public information on equal terms with citizens of the Commonwealth.” Citing *Houchins* and *United Reporting*, the Court said that it had “repeatedly made clear that there is no constitutional right to obtain all the information provided by FOIA laws.”

II. THE COURTS OF APPEALS AND THE FIGHT OVER A “GENERAL RULE”

On its face, this history begs as many questions as it answers. In cases like *Houchins*, *United Reporting*, and *McBurney*, the Court or its members concluded that there is no constitutional right of access. Yet, in *Richmond Newspapers*, *Globe Newspaper*, and the *Press-Enterprise Cases*, the Court expressly recognized such a right. It, however, never reconciled these apparently disparate results. As Solicitor General Archibald Cox observed shortly after the Court decided *Richmond Newspapers*, Burger’s plurality opinion in that case made “no effort to square the ruling with the rationale of *Pell v. Procunier* and *Saxbe v. Washington Post Co.*” Nor did it refer to “the Chief Justice’s own opinion just two years before in *Houchins v. KQED, Inc.*” “Surely,” he wrote, “some effort to explain the

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609. *Id.* at 232.
610. *Id.* (citing *Houchins v. KQED, Inc.*, 438 U.S. 1, 14 (1978) (plurality opinion); *L.A. Police Dep’t v. United Reporting Publ’g Corp.*, 528 U.S. 32, 40 (1999); *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 588 (2011) (Breyer, J., dissenting)).
611. *El Dia, Inc. v. Hernandez Colon*, 963 F.2d 488, 494 (1st Cir. 1992) (admitting that the constitutional issues surrounding the right of access were “fuliginous”).
relation between the decision in *Richmond Newspapers* and those earlier cases was required.*613

The Court, however, left litigants and lower courts with mixed signals. For example, while Stevens recognized in *Richmond Newspapers* that “the Court unequivocally holds that an arbitrary interference with access to important information is an abridgment of the freedoms of speech and of the press protected by the First Amendment,” this observation was, at best, “wishful thinking.”*614* *Richmond Newspapers* did not speak for “the Court”; it was a plurality, five concurring opinions, and a dissent—hardly the kind of bedrock in which to bury a constitutional principle. And, certainly, other Justices did not believe that the opinion reached so far. As one court aptly observed just months after the decision came down, “Because the seven opinions . . . are so badly fragmented on the precise rationale of the Court’s holding,” it was “impossible to predict” the effect of *Richmond Newspapers.*615

Still, two years later in *Globe Newspaper*, the Court recognized a right of access under the First Amendment based on republican values.*616* The access right, the majority declared, existed “to ensure that this constitutionally protected ‘discussion of governmental affairs’ is an informed one.”*617* In doing so, the *Globe Newspaper* majority must have overruled the *Houchins* plurality’s contrary conclusions albeit implicitly. But on the facts, *Globe Newspaper*, like *Richmond Newspapers*, dealt only with the right of access to

613. *Id.*


617. *Id.* at 605.
criminal trials. While its reasoning is not obviously limited to such facts, the Court never applied it outside that context. And although Brennan helpfully sought to put an end to *Houchins* by endorsing the *Houchins* dissenters in Footnote 13, he was forced to excise it when White and Blackmun protested.

Nor do the Court’s later cases offer much in way of clarification. In the *Press-Enterprise Cases*, Burger did not always speak in the same doctrinal language as Brennan had in *Globe Newspaper*. This reticence foreshadowed the Court’s later concern over the theoretical reach of the access right, as evidenced by *United Reporting* and *McBurney*. But as the Court explained in *Sorrell*, the “*United Reporting* . . . Court did not rule on the merits of any First Amendment claim.”\(^{618}\) And, in *McBurney*, the question was not whether the First Amendment right of access existed, but rather whether it was protected by the Privileges and Immunities Clause.\(^{619}\) True enough, the Court said that it had “repeatedly made clear that there is no constitutional right to obtain all the information provided by FOIA laws.”\(^{620}\) But, as in *United Reporting*, this appears to be nothing more than *obiter dictum*.

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\(^{620}\) Id.
So it is not surprising that circuit splits and even intra-circuit splits exist concerning whether the *Houchins* line of cases or the *Richmond Newspapers* line provides the general rule for assessing claimed rights of access. This split pits the First, Fourth, Fifth, Seventh, Tenth, D.C. Circuits against the Second, Third, Sixth, Eighth, Ninth, and Eleventh Circuits. What is more, both the Sixth and the Ninth have issued conflicting decisions over the years.621 In short, the considerable ambiguity in the Court’s jurisprudence makes ad hoc decision-making commonplace—obfuscating the underlying doctrine and inhibiting its development.

A. The Richmond Newspapers Line as the “General Rule”

The Second, Third, Sixth, Eighth, Ninth, and Eleventh Circuits have all found that the *Richmond Newspapers* line of cases control to the exclusion of *Houchins*. As a result, these circuits have applied the reasoning of *Richmond Newspapers*’ history and logic test to all sorts of government information and proceedings outside of the limited context of criminal trials: police operations on public streets, a town planning meeting, a quasi-judicial administrative proceeding, horse roundups on federal lands, executions and information relating to them, voter lists, search warrant information, deportation proceedings, and judicial review boards, among others. In doing so, they have not felt constrained by *Houchins* or the Court’s later cases endorsing it.

For example, in the 2020 case *Index Newspapers LLC v. U.S. Marshals Service*, the Ninth Circuit confronted the question of whether legal observers and reporters had a right of access to the streets and sidewalks during Black Lives

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621. The Third Circuit similarly issued an opinion seemingly conflicting with its prior decisions. See Marinaccio v. East Hanover Bd. Police Dep’t, No. 20-2677, 2022 WL 964000, at *1 (3d Cir. Mar. 30, 2022). That case, however, was brought pro se and resulted only in a non-precedential per curiam opinion. As such, it is not separately reviewed herein.
Matter protests. In denying the government’s motion for a stay pending appeal, the court found that it had not shown that it was likely to defeat the claimed right of access. According to the panel, Richmond Newspapers and its progeny “articulated a two-part test to determine whether a member of the public has a First Amendment right to access a particular place and process” and that test controlled the case. This resolution was consistent with the Ninth Circuit’s broad application of the Richmond Newspapers line to “government activities” generally but inconsistent with Houchins, which the panel did not address.

In Whiteland Woods, L.P. v. Township of West Whiteland, the Third Circuit invoked the Court’s observation in Globe Newspaper that “a ‘major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.’” Applying that logic, the court concluded that the plaintiff had a “constitutional right of access to the Planning Commission meeting.” In so holding, it found that whether such a right existed depended on whether the history and logic test from the Richmond Newspapers was satisfied. And, it reframed Houchins not as setting forth a general rule that no right of access existed, but as not presenting a context that satisfied the later-

622. 977 F.3d 817, 829 (9th Cir. 2020).
623. Id. (citing Press-Enter. Co. v. Superior Ct., 478 U.S. 1 (1986)).
624. See, e.g., Leigh v. Salazar, 677 F.3d 892, 898 (9th Cir. 2012) (“To provide this First Amendment protection, the Supreme Court has long recognized a qualified right of access for the press and public to observe government activities.”) (horse roundups on federal land); Cal. First Amend. Coal. v. Woodford, 299 F.3d 868, 877 (9th Cir. 2002) (executions); Cal-Almond, Inc. v. U.S. Dep’t of Agric., 960 F.2d 105, 109 (9th Cir. 1992) (voter lists); see also Wood v. Ryan, 759 F.3d 1076 (9th Cir. 2014) (access to information relating to execution), vacated, 573 U.S. 976 (2014).
625. 193 F.3d 177, 180 (3d Cir. 1999) (quoting Globe Newspaper Co. v. Superior Ct., 457 U.S. 596, 604 (1982)).
626. Id. at 180–81.
627. Id. at 181.
adopted two-part test.\textsuperscript{628} The Third Circuit would later reaffirm this view: “\textit{Richmond Newspapers} is a test broadly applicable to issues of access to government proceedings.”\textsuperscript{629} As it later said, “These three cases—\textit{Richmond Newspapers}, \textit{Globe}, and \textit{Press-Enterprise}—set out a balancing test for evaluating whether a right of access to information about government bodies, their processes, and their decision exists.”\textsuperscript{630}

The Second Circuit, in \textit{New York Civil Liberties Union v. N.Y.C. Transit Authority}, also found that \textit{Richmond Newspapers} controlled over \textit{Houchins}.\textsuperscript{631} There, in finding the right of access applied to New York City Transit Authority proceedings, the court observed that \textit{Globe Newspaper} read “\textit{Richmond Newspapers} broadly.”\textsuperscript{632} It mattered not that the proceedings at issue in the present case were not “trials,” because the “public access cases” focused “not on formalistic descriptions of the government proceeding but on the kind of work the proceeding actually does and on the First Amendment principles at stake.”\textsuperscript{633} In other words, the \textit{Richmond Newspapers} test controlled because what mattered was “the importance of access to public participation and to government accountability—values, the courts have emphasized, that are central to democracy.”\textsuperscript{634} The panel never cited \textit{Houchins}.

In \textit{In re Search Warrant for Secretarial Area Outside Office of Gunn}, the question for the Eighth Circuit was whether a right of access applied to documents relating to

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\item \textsuperscript{628} \textit{Id.} at 182; see also First Amend. Coal. v. Jud. Inquiry & Rev. Bd., 784 F.2d 467 (3d Cir.1986) (applying two-part test to judicial review board materials).
\item \textsuperscript{629} N. Jersey Media Grp., Inc. v. Ashcroft, 308 F.3d 198, 208–09 (3d Cir. 2002) (deportation proceedings).
\item \textsuperscript{630} PG Publ’g Co. v. Aichele, 705 F.3d 91, 104 (3d Cir. 2013) (voting process).
\item \textsuperscript{631} 684 F.3d 286 (2d Cir. 2012).
\item \textsuperscript{632} \textit{Id.} at 298.
\item \textsuperscript{633} \textit{Id.} at 299.
\item \textsuperscript{634} \textit{Id.}
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the issuance of a search warrant.\textsuperscript{635} While the documents at issue were “not part of the criminal trial itself,” the panel found that the right of access nevertheless applied because “public access to documents filed in support of search warrants is important to the public’s understanding of the function and operation of the judicial process and the criminal justice system and may operate as a curb on prosecutorial or judicial misconduct.”\textsuperscript{636} Like the Second Circuit, the panel did not cite \textit{Houchins}. Consistent with \textit{In re Search Warrant}, the Eighth Circuit would later assume that the history and logic test applied to other contexts, like information relating to executions.\textsuperscript{637}

In \textit{Detroit Free Press v. Ashcroft}, the Detroit Free Press sought access to deportation proceedings in the aftermath of 9/11, and the Sixth Circuit held that “\textit{Richmond Newspapers} is a test of generally applicability.”\textsuperscript{638} The court distinguished \textit{Houchins}, a case “decided two years before \textit{Richmond Newspapers},” as deciding only whether the press had a special right of access to prisons.\textsuperscript{639} Moreover, \textit{Houchins} rested on “the Court’s interpretation of the press clause,” was merely a plurality opinion, and the “policy reasons underlying the Court’s plurality opinion in \textit{Houchins}” were all addressed by the two-part history and logic test.\textsuperscript{640} The Sixth Circuit’s ruling was in line with its historically broad interpretation of the access right.\textsuperscript{641}

Finally, in \textit{Wellons v. Commissioner, Georgia}

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\item \textsuperscript{635} 855 F.2d 569 (8th Cir. 1988).
\item \textsuperscript{636} \textit{Id.} at 573.
\item \textsuperscript{637} Zink v. Lombardi, 783 F.3d 1089, 1112 (8th Cir. 2015) (assuming two-part test applied to execution materials, but not deciding the question).
\item \textsuperscript{638} 303 F.3d 681, 694 (6th Cir. 2002); \textit{see also In re Search of Fair Fin.}, 692 F.3d 424, 430 (6th Cir. 2012) (applying two-part test to search warrant documents).
\item \textsuperscript{639} Detroit Free Press v. Ashcroft, 303 F.3d 681, 694 (6th Cir. 2002).
\item \textsuperscript{640} \textit{Id.} at 694–95.
\item \textsuperscript{641} \textit{See, e.g.}, United States v. Miami Univ., 294 F.3d 797, 824 (6th Cir. 2002).
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Department of Corrections, an Eleventh Circuit case, an inmate argued that the refusal of the state to provide him with information about his execution denied “him his First Amendment right of access to governmental proceedings.”

Citing the Richmond Newspapers line of cases, the Eleventh Circuit explained, “When determining whether the public has a First Amendment right of access to a particular governmental proceeding, reviewing courts must inquire into two ‘complementary considerations’ of history and logic. But it found that the inmate had not demonstrated a likelihood of success.

B. Houchins as the “General Rule”

On the other side of the balance, the First, Fourth, Fifth, Seventh, Tenth, and D.C. Circuits have found that Houchins controls. Both the Sixth and Ninth Circuits have also applied Houchins despite contrary precedent in those circuits. And, in many instances, these courts have been outright hostile to any suggestion that a constitutional right of access might exist.

The D.C. Circuit has been the most skeptical. In Center for National Security Studies v. U.S. Department of Justice, various non-profits sought access to information in the possession of the federal government relating to post-9/11 arrests. While the case was primarily a Freedom of Information Act case, the plaintiffs also argued that the First Amendment provided a right of access. The panel, however, characterized the right of access in Richmond Newspapers as a “narrow” one that did “not extend to non-judicial documents that are not part of a criminal trial, such

642. 754 F.3d 1260, 1266 (11th Cir. 2014).
643. Id.
644. Id. at 1267.
645. 331 F.3d 918, 932 (D.C. Cir. 2003).
646. Id. at 934.
as the investigatory documents at issue here.” Relying on the *Houchins* plurality and the Stewart concurrence, it added that “the First Amendment does not ‘mandate[] a right of access to government information or sources of information within the government’s control.’”

Although it went on to admit that the Court “expanded this limited right” after *Richmond Newspapers*, the Court never “applied the *Richmond Newspapers* test outside the context of criminal judicial proceedings.” It added (inaccurately) that neither it nor the Court ever indicated that the *Richmond Newspapers* two-part test applied outside of criminal proceedings. Citing *United Reporting*, moreover, it explained that “to the extent the Supreme Court has addressed the constitutional right of access to information outside the criminal trial context, the Court has applied the general rule of *Houchins*, not *Richmond Newspapers*.” Thus, the panel concluded, “We will not convert the First Amendment right of access to criminal judicial proceedings into a requirement that the government disclose information compiled during the exercise of a quintessential executive power—the investigation and prevention of terrorism.”

The Fifth Circuit has also found *Houchins* controlling. In *Calder v. IRS*, a university professor sought access to IRS records relating to Al Capone. The professor argued under *Richmond Newspapers* that the First Amendment included

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647. Id.
648. Id. (quoting *Houchins v. KQED*, 438 U.S. 1, 15 (1978) (plurality opinion); id. at 16 (Stewart, J., concurring in the judgment)).
651. *Ctr. for Nat’l Sec. Stud.*, 331 F.3d at 935 (citing *L.A. Police Dep’t v. United Reporting Publ’g Corp.*, 528 U.S. 32, 40 (1999)).
652. Id.; see also *Flynt v. Rumsfeld*, 355 F.3d 697, 704 (D.C. Cir. 2004) (characterizing *Houchins* as the “general rule”).
653. 890 F.2d 781 (5th Cir. 1989).
“a right of access to records in the hands of an administrative agency which have historically been available for public perusal.”654 The Fifth Circuit disagreed. While it recognized that Richmond Newspapers indicated that the First Amendment prohibits the “government from limiting the stock of information from which members of the public may draw,” it pointed to O’Connor’s concurring opinion in Globe Newspaper where she explained that Richmond Newspapers carried no implications outside of criminal trials and that the Court had never applied the two-part test outside the criminal context.655 Finally, pointing to Houchins, it concluded that there was “no constitutional right to have access to particular government information.”656

In 2019, the Fourth Circuit agreed that Houchins sets forth the “general rule.”657 In a case seeking access to voter lists, the panel explained that “there is no general First Amendment right to access a government record.”658 Rather, citing Houchins, it observed, “The Supreme Court has ruled that the First Amendment does not guarantee the public a right of access to information generated or controlled by government.”659 It explained that Richmond Newspapers only created a “narrow exception” to Houchins.660 But that exception, it held (inconsistent with its prior precedent), was limited to criminal proceedings and, therefore, had “no

654. Id. at 783.
655. Id.
656. Id. at 784 (quoting Houchins v. KQED, Inc., 438 U.S. 1, 14 (1978) (plurality opinion)); see also Bonnet v. Ward County, Tex., 539 Fed. Appx. 481, 483 (5th Cir. 2013) (relying on Houchins); Sullo & Bobbitt, P.L.L.C. v. Milner, 765 F.3d 388, 392 (5th Cir. 2014) (same); ACLU of Miss., Inc. v. Mississippi, 911 F.2d 1066, 1071–72 (5th Cir. 1990) (same).
658. Id.
659. Id. at 249 (quoting Houchins, 438 U.S. at 31 (Stewart, J., concurring in the judgment)).
660. Id. at 250.
bearing” on the claimed right of access in that case.661

Other circuits have taken this approach too. In Travis v. Reno, the Seventh Circuit upheld the constitutionality of the Driver’s Privacy Protection Act, which limited disclosure of certain driver licensing records.662 Pointing to Houchins, the panel explained that “[p]eering into public records is not part of the ‘freedom of speech’ that the first amendment protects.”663 It added, “No one thinks that the Privacy Act violates the first amendment. Well, maybe these plaintiffs do think this, but the position is untenable.”664 Distinguishing Richmond Newspapers, the panel explained that perhaps “in the future,” i.e., in litigation, some records might become subject to the “access rights connected to the judicial process.”665 But, the facial attack on the law was “not the time or place to explore the subject.”666 The Seventh Circuit reaffirmed this holding in 2015, emphasizing in light of United Reporting and McBurney that Travis was correctly decided.667

In 2016, the Sixth Circuit departed from its holding in Detroit Free Press that Richmond Newspapers provided the general rule.668 In Phillips v. Dewine, death row inmates challenged a law that secreted information relating to lethal injections. Rejecting that claim, the panel (in violation of the

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661. Id. But see Doe v. Pub. Citizen, 749 F.3d 246, 265 (4th Cir. 2014) (noting that it was “well settled” that Richmond Newspapers applied to civil proceedings).
662. 163 F.3d 1000, 1000 (1998).
663. Id. at 1007.
664. Id.
665. Id.
666. Id.; see also United States v. Blagojevich, 612 F.3d 558, 562 (7th Cir. 2010) (citing Houchins for the proposition that “there is no general constitutional ‘right of access’ to information that a governmental official knows but has not released to the public”); City of Chicago v. U.S. Dep’t of Treasury, 423 F.3d 777, 784 (7th Cir. 2005) (citing Houchins as support for the general proposition).
667. Dahlstrom v. Sun-Times Media, LLC, 777 F.3d 937, 947 (7th Cir. 2015).
prior precedent rule) said that *Houchins* “sets the baseline principle for First Amendment claims seeking access to information held by the government.” The panel added that *Richmond Newspapers* created only an “exception” to *Houchins*. It then concluded, “Finding that the Plaintiffs have stated a valid claim under *Richmond Newspapers* would, of necessity, disregard the general applicability of *Houchins* and represent a significant—and unwarranted—expansion of the right of access under the First Amendment.”

In 2020, the Ninth Circuit did the same, issuing two opinions within two weeks arriving at two different results. First, it issued *Index Newspapers LLC*, mentioned above, which broadly applied the *Richmond Newspapers* framework to a right of access to public streets during protests. But then, it issued *Boardman v. Inslee*, a case about a right of access to certain state records. There, it adopted *Houchins* as the general rule, explaining that the plaintiffs acknowledged “(as they must) that they have no First Amendment right of access to Provider Information and that Washington lawmakers have the political prerogative to ‘decide not to give out [this] information at all without violating the First Amendment.’”

The First Circuit has also limited *Richmond Newspapers*...
Newspapers’ application. In *El Dia, Inc. v. Hernandez Colon*, the issue was whether a law signed by the governor of Puerto Rico abridged a newspaper’s “First Amendment right of informational access.”\textsuperscript{675} The panel found that it did not. It distinguished the right of access in *Richmond Newspapers*, which it said governed access to “records and proceedings connected to the criminal justice system,” and *Houchins*, which governed the “right of access to Executive Branch documents.”\textsuperscript{676} The panel then “seriously question[ed] whether *Richmond Newspapers* and its progeny carry positive implications favoring rights of access outside the criminal justice system.”\textsuperscript{677} Future panels agreed.\textsuperscript{678}

The Tenth Circuit came to a similar conclusion in *Lanphere & Urbanik v. State of Colorado.*\textsuperscript{679} There, the issue was whether a statute prohibiting disclosure of agency records relating to driving while intoxicated charges was constitutional.\textsuperscript{680} Concluding it was, the panel found that *Houchins* set forth the general rule: “there is no constitutional right, and specifically no First Amendment right, of access to government records.”\textsuperscript{681} Distinguishing *Richmond Newspapers*, the panel said that the limited right of access recognized in that case was only “implicated in relation to the Sixth Amendment right to a fair and public trial.”\textsuperscript{682} It then stated, “To hold that these principles provide for access to any criminal justice record which happens to

\textsuperscript{675} 963 F.2d 488, 491 (1st Cir. 1992).
\textsuperscript{676} Id. at 494–95.
\textsuperscript{677} Id. at 495.
\textsuperscript{678} In re Bos. Herald, Inc., 321 F.3d 174, 180 (1st Cir. 2003) (“There is no general constitutional right of access to information in the government’s possession.”); Lu v. Emergency Shelter Comm’n of Bos., 2 Fed. Appx. 12, 14 (1st Cir. 2001)
\textsuperscript{679} 21 F.3d 1508 (10th Cir. 1994).
\textsuperscript{680} Id. at 1510.
\textsuperscript{681} Id. at 1511 (citing Houchins v. KQED, Inc., 438 U.S. 1, 9 (1978) (plurality opinion)).
\textsuperscript{682} Id. at 1512.
contain a defendant’s address and/or phone number and which is sought for that reason alone would stretch them well beyond their current bounds.”683 Subsequent precedent in that circuit is in accord.684

III. DOES HOUCHINS V. KQED, INC. MATTER?

This circuit survey demonstrates that while many circuits have held that the Richmond Newspapers line of cases controls and establishes the general rule for constitutional right of access cases, arguably more have held that the Houchins line of cases controls. In other words, a three-Justice plurality opinion is prevailing over several majority opinions. Surprisingly, Houchins’ import has, rarely, been interrogated.685 True, as one publication noted early on, “Much constitutional [access] jurisprudence has poured over the dam since [the 1970s].”686 But there is little critical analysis in this torrent as courts often just invoke the absolutist rule in Houchins much as courts before them had been seduced by the “strict and flat result” in Gannett.687 And, true, there is also much scholarship relating to the constitutional right of access. But much of it is outdated.688

683. Id.
684. See Animal Legal Def. Fund v. Kelly, 9 F.4th 1219, 1237 (10th Cir. 2021) (crediting Houchins as “precedent”); Allen v. Lang, 738 Fed. Appx. 934, 939 (10th Cir. 2018); Smith v. Plati, 258 F.3d 1167, 1178 n.10 (10th Cir. 2001) (finding Richmond Newspapers “not particularly relevant” where request was not for civil or criminal judicial records); United States v. Gonzales, 150 F.3d 1246, 1260 (10th Cir. 1998) (“[T]here is no First Amendment right of access to government processes in general.”).
685. See Heidi Kitrosser, Secrecy in the Immigration Courts and Beyond: Considering the Right to Know in the Administrative State, 39 Harv. C.R.-C.L.L. Rev. 95, 168 (2004) (observing that “few scholarly works . . . critically” examine the right of access cases).
688. See infra note 804. The most cited of these assessments is Eugene Cerruti’s “Dancing in the Courthouse”: The First Amendment Right of Access
Moreover, this scholarship largely fails to undertake a searching examination of *Houchins* and its interplay with the *Richmond Newspapers* line of cases.

This Part fills that gap. First, it scrutinizes *Houchins* itself. It observes that *Houchins* related only to the existence of a special right of access held by the media, its analysis was limited to the Press Clause, and it presupposed some level of public access. Second, this Part explores what precedential weight should be given to *Houchins*. It asserts that *Houchins* provides no binding rule as it lacks a controlling opinion under *Marks v. United States*. It also questions the precedential weight of a three-Justice plurality in a case where only seven-Justices participated. Third, it assesses *Houchins* within the Court’s broader right of access cannon and suggests that subsequent case law displaced *Houchins*. Finally, it contends that *Houchins* should not, as a normative matter, be viewed as controlling because it is staggeringly undemocratic.

A. The Narrow Premises of *Houchins*

There are three reasons to doubt that *Houchins* matters on its own terms. Initially, a general right of access was not at issue in *Houchins*. Instead, the case was about the existence of a special right of access for the press above that of the public. Relatedly, the issue was not whether a right of access existed under the Free Speech Clause or the First Amendment generally, but instead whether the press was owed special treatment under the Press Clause. Moreover, *Houchins* was not a case about the total exclusion of the

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*Opens A New Round*, 29 U. RICH. L. REV. 237 (1995). Cerruti’s treatment of these issues is dealt with sporadically in the margins. Another influential piece is Lillian BeVier’s digest of *Richmond Newspapers* shortly after the Court issued that opinion, which deals with the tension between that case and *Houchins*. See BeVier, *supra* note 614. And, there is David Ardia’s article, which assumes that *Houchins* matters without interrogating whether it should. See Ardia, *supra* note 618, at 865.

press. The press in Houchins, in fact, had substantial access to the jail so the case should not be viewed as greenlighting the complete exclusion of the press and the public from government proceedings or information.

1. A General Right of Access Was Not at Issue in Houchins

The issue in Houchins was whether the news media, which, along with the public, already had access to the Santa Rita jail, could force Houchins to provide it special access to still more of the jail. The Court found that it could not. Thus, the holding in Houchins is this: “the media have no special right of access to the Alameda County Jail different from or greater than that accorded the public generally.”690 Houchins, however, is rarely cited for this proposition. Instead, Houchins’ lasting contribution to access jurisprudence is what it did not hold, namely, as the plurality put it, that “[n]either the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government’s control.”691 Or, as Stewart explained in his opinion concurring in judgment: “The First and Fourteenth Amendments do not guarantee the public a right of access to information generated or controlled by government.”692

But both statements are dicta. As an unsigned student note for the Harvard Law Review explained at the time, “General pronouncements in the plurality opinion that seem to deny any public right clearly should be read in context as denying anyone special rights, since only this latter issue was argued and analyzed, and the district court’s order granted injunctive relief only to representatives of the media.”693 Nor is this wishful spin from a pro-access academic in waiting.

690. Houchins v. KQED, Inc., 438 U.S. 1, 16 (1978) (plurality opinion).
691. Id. at 15.
692. Id. at 16 (Stewart, J., concurring).
693. Media Right of Access, supra note 185, at 183–84 (emphasis added).
Instead, it was to-be Chief Justice John Roberts who wrote that note, recognizing that \textit{Houchins' dicta} was nothing more than “tangential” treatment of a question otherwise avoided in the case.\footnote{William Bennett Turner, \textit{Chief Justice Roberts' Surprising Views on the Public's Right to Know}, \textit{BLOOMBERG LAW} (Feb. 19, 2020), https://news.bloomberglaw.com/us-law-week/insight-chief-justice-roberts-surprising-views-on-the-publics-right-to-know; see also \textit{Media Right of Access}, supra note 185, at 180.}

This analysis is supported by language in \textit{Houchins} itself. On nearly a dozen occasions, these opinions remind the reader that the plurality and Stewart viewed the issue solely as a special right of access case:

“The question presented is whether the news media have a constitutional right of access to a county jail, \textit{over and above that of other persons};”\footnote{\textit{Houchins}, 438 U.S. at 3 (emphasis added).}

“From the right to gather news and the right to receive information, they argue for an implied \textit{special right of access} to government-controlled sources of information;”\footnote{\textit{Id.} at 7–8 (emphasis added).}

“[N]othing in the Court’s holding [in \textit{Grosjean}] implied a \textit{special privilege of access to information} as distinguished from a right to publish information which has been obtained;”\footnote{\textit{Id.} at 10 (emphasis added).}

“[T]he Court [in \textit{Mills}] did not remotely imply a constitutional right guaranteeing anyone access to government information \textit{beyond that open to the public generally};”\footnote{\textit{Id.} (emphasis added).}

“[T]he First Amendment does not guarantee the press a constitutional \textit{right of special access} to information not available to the public generally;”\footnote{\textit{Id.} at 11 (emphasis added) (citation and quotation marks omitted).}
“In [Pell and Saxbe,] the Court declared, explicitly and without reservation, that the media have ‘no constitutional right of access to prisons or their inmates beyond that afforded the general public,’”\(^{700}\)

“The issue is a claimed *special privilege of access* which the Court rejected in Pell and Saxbe, a right which is not essential to guarantee the freedom to communicate or publish;”\(^{701}\)

“Under our holdings in *Pell v. Procunier*, supra, and *Saxbe v. Washington Post Co.*, supra, until the political branches decree otherwise, as they are free to do, the media have no *special right of access* to the Alameda County Jail different from or greater than that accorded the public generally;”\(^{702}\) and

“The First and Fourteenth Amendments do not . . . guarantee the press any basic right of access *superior to that of the public generally.*”\(^{703}\)

Burger’s and Stewart’s emphasis on the special right of access is also consistent with their questioning at oral argument. Beginning the argument, counsel for Houchins, Kevin Booty, explained that the question presented was “must the sheriff give greater access to his county jail facility to the media than he gives to the public?”\(^{704}\) When asked whether Houchins could have entirely excluded the press and the public, Booty responded, “[W]ith respect, that is not before you.” He added, “KQED’s position [below] . . . was that, we have to have special things for the media, *we tried it as a media access case, not a public access case.*”\(^{705}\)

Other Justices agreed. As White said at argument, “The

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700. *Id.* (emphasis added).
701. *Id.* at 12 (emphasis added).
702. *Id.* at 15–16 (emphasis added).
703. *Id.* at 16 (Stewart, J., concurring in the judgment) (emphasis added).
only issue is whether this injunction is giving a special privilege to the press is constitutionally required?"706 Turner attempted to reframe those questions by saying that “we do not want a special privilege, what we want is access sufficient to prevent concealment of the conditions.”707 White, however, rebuffed him, “Oh! I know but that is what you have got and if you say you are defending the Court of Appeals opinion you must defend that proposition.”708

The drafting process also confirms that Houchins was a case about a special right of access for the media.709 Burger originally posed the question presented in his first draft opinion as “whether the First Amendment gives the news media the right of access to a county jail” at all.710 In his later draft, however, he changed the question presented from a general right of access to whether the press had a right of access “over and above that of other persons.”711 He also changed the holding in his first draft from one rejecting a right of access to government information to a holding in later drafts that the First Amendment did “not provide a right of access . . . different from or greater than that of the public generally.”712

While to-be Chief Justice Roberts did not have the benefit of insight into the drafting process, he was correct in his assessment: “In Houchins v. KQED, Inc., the Court once again announced that the press enjoyed no special right of access beyond that of the public, but did nothing to clarify what right, if any, the public had.”713 Simply, in Houchins, the Court did “not dispose of the more fundamental issue of

709. See supra notes 169–82 and accompanying text.
712. Id. at 16 (emphasis added).
713. Media Right of Access, supra note 185, at 175.
what must be open to the public generally.” 714 In fact, to Roberts, “far from rejecting any first amendment right of public access, certain characteristics of the plurality opinion seem to imply the existence of such a right.” 715 Burger, he wrote, “went to considerable lengths . . . to list the range of alternative means of access to information about prisons available to the public,” which “would have been irrelevant if there were indeed no right of access, and the sheriff could have completely sealed off the prison from the public.” 716

Moreover, within a year of Houchins being handed down, a majority of the Court in Gannett Co., Inc. v. DePasquale ratified the belief that Houchins decided only whether there was a special right of access of the news media. 717 Citing Pell, Saxbe, and Houchins, the Court observed that in each case it had “upheld prison regulations that denied to members of the press access to prisons superior to that afforded to the public generally.” 718 It then explicitly reserved judgment on the question of whether to recognize a First Amendment right to attend criminal trials. In fact, citing the Houchins dissenters and his own opinion in Houchins, Stewart explained that some “Members of the Court . . . took the position in those cases that the First and Fourteenth Amendments do guarantee to the public in general . . . a right of access that precludes their complete exclusion in the absence of a significant governmental interest.” 719 If Houchins really had decided the question of whether a right of access existed at

714. Id. at 184.
715. Id.
716. Id. at 184–85; see also supra text accompanying note 216; Closure of Pretrial Proceedings, 93 Harv. L. Rev. 62, 68 n.50 (1979) (citing Houchins v. KQED, Inc., 438 U.S. 1 (1978)); see also Elizabeth Alexander, The New Prison Administrators and the Court: New Directions in Prison Law, 56 Tex. L. Rev. 963, 1001 (1978) (“The Court has not yet ruled definitively on whether the first amendment encompasses a public right of access to information within the control of the government.”).
718. Id. at 391.
719. Id. at 391–92.
all, there would be no reason for the Court to later reserve that question in Gannett.720

Stewart, Gannett’s author and an author of the Houchins dicta seemingly foreclosing the question reserved, was in a better position than anyone to say what Houchins meant. Yet, lower courts have largely overlooked Gannett’s effect on any interpretation of Houchins. In one rare example though, a group of dissenting judges sitting en banc in Capital Cities Media, Inc. v. Chester, explained, “[I]t is clear from [Gannett] that there was no majority support for any dicta in Houchins that the first amendment did not protect the public’s right of access to governmental information.”721 The only issue at stake in Houchins, they said, was whether the First Amendment mandated “a preferred position for the press.”722

Commentators have come to the same conclusion. For example, one observed of Houchins’ broad dicta: “Although it has been suggested that ‘[t]he Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act,’ . . . the Court has neither persuasively argued this idea nor relied on it in the holding of a case; statements of this idea can be found only as conclusory dicta.”723 As another noted, “the Houchins approach has never been adopted by a majority of the Court.”724 At most, as Heidi Kitrosser has explained, Houchins “inched closer to an outright rejection of access” in some of its “bolder dicta.”725 But, she too agreed that “Houchins’ holding . . . can be construed simply as

720. Id. at 405 (Rehnquist, J., dissenting) (“this Court emphatically has rejected the proposition”).
721. 797 F.2d 1164, 1188 (3d Cir. 1986) (Gibbons, J., dissenting).
722. Id.
725. Kitrosser, supra note 685, at 104.
rejection of ‘special’ press access rights.”

Still, the fact remains that few courts have ever recognized that Houchins’ statements about a constitutional right of access generally—separate from a special right of access for the press—are dicta. True, the same group of Third Circuit judges in Capital Cities Media characterized those broader statements as such, but their colleagues in the majority elevated these statements to a holding: “A majority of the seven judge Court in Houchins held that there is no First Amendment right of press access to government-held information and, in the process, rejected the idea of a First Amendment right of public access.” In fact, every federal appellate court has carelessly bandied around Houchins’ dicta as a holding of the Court at one time or another.

This is problematic. Dicta is a “judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive).” It thus eschews Article III’s case and controversy requirement. As RonNell Andersen Jones has explained, issuing dicta is beyond the Supreme Court’s “constitutional job description.” Nor should dicta be “given the

726. Id.
728. See In re Bos. Herald, Inc., 321 F.3d 174, 180 (1st Cir. 2003); Ladeairous v. Att’y Gen. of N.Y., 592 F. App’x 47, 48 (2d Cir. 2015); Bonnet v. Ward County., 539 F. App’x 481, 483 (5th Cir. 2013); Capital Cities Media, Inc. v. Chester, 797 F.2d 1164, 1167, 1171–73 (3d Cir. 1986); Fusaro v. Cogan, 930 F.3d 241, 249–50 (4th Cir. 2019); Sullo & Bobbitt, P.L.L.C. v. Milner, 765 F.3d 388, 392 (5th Cir. 2014); S.H.A.R.K. v. Metro Parks Serving Summit Cty., 499 F.3d 553, 560 (6th Cir. 2007); City of Chicago v. U.S. Dep’t of Treasury, 423 F.3d 777, 784 (7th Cir. 2005); Entler v. McKenna, 487 F. App’x 417, 418 (9th Cir. 2012); Smith v. Plati, 258 F.3d 1167, 1178 (10th Cir. 2001); Haitian Refugee Ctr., Inc. v. Baker, 953 F.2d 1498, 1513 (11th Cir. 1992); Flynt v. Rumsfeld, 355 F.3d 697, 704 (D.C. Cir. 2004).
731. Id.
precedential weight of holdings precisely because of this substantial justiciability flaw.”\textsuperscript{732} For good reason: the Court is in a particularly poor position to decide questions that are not directly before it.

The point need not be belabored. It is settled that excessive use of \textit{dicta} “presents risks to the accuracy, authority, and legitimacy of the law.”\textsuperscript{733} Such \textit{dicta} are “less carefully considered and less thoroughly reasoned than holdings and are, by definition, less accurate reflections of the state of the law.”\textsuperscript{734} They also “undermine[] the rule of law, first by reducing predictability and legal clarity, and second by inhibiting the emergence of nuanced doctrine.”\textsuperscript{735} As Chief Justice John Marshall explained long ago: “It is a maxim not to be disregarded, that general expressions, . . . [i]f they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.”\textsuperscript{736}

An overreliance on the \textit{Houchins dicta} proves precisely why \textit{dicta} should be treated as such. \textit{Houchins} speaks in absolutist terms: “Neither the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government’s control.”\textsuperscript{737} This is potent \textit{dicta}. If followed uncritically, colorable claims of access must be rejected out of hand irrespective of whether competing interests in one case are different than those in \textit{Houchins}. For example, what if the exclusion of press access came only after allegations of mistreatment were made public? But absolute rules leave little room for nuance. This is exactly why the Court should “not decide important questions of law by cursory \textit{dicta},”

\textsuperscript{732} Id. at 720–21.
\textsuperscript{733} Id. at 721.
\textsuperscript{734} Id.
\textsuperscript{735} Id.
\textsuperscript{737} Houchins v. KQED, Inc., 438 U.S. 1, 15 (1978) (plurality opinion).
especially cursory but sweeping dicta.\textsuperscript{738}

2. Houchins Was a Press Clause Case

A consequence of properly situating Houchins as a case about the special right of access is the concomitant recognition that Houchins was not a case about the First Amendment generally—as were Richmond Newspaper and Globe Newspaper—but rather about the Press Clause. Specifically, it was a case about whether the Press Clause provided special constitutional protection to the press as an institution. As the plurality framed KQED's argument at the outset, “They argue that there is a constitutionally guaranteed right to gather news . . . . From the right to gather news and the right to receive information, they argue for an implied special right of access to government-controlled sources of information. This right, they contend, compels access as a constitutional matter.”\textsuperscript{739}

In Houchins then, the Court focused its analysis on other Press Clause cases like Grosjean v. American Press Co., Mills v. Alabama, and Branzburg v. Hayes.\textsuperscript{740} For example, it explained that while Branzburg observed that “news gathering is not without its First Amendment protections,” it “in no sense implied a constitutional right of access to news sources.”\textsuperscript{741} Instead, the Branzburg Court found that “the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally” and that “[n]ewsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded.”\textsuperscript{742}

Burger and the plurality also found Pell v. Procunier and Saxbe v. Washington Post Co., two other Press Clause cases,

\textsuperscript{738} Permian Basin Area Rate Cases, 390 U.S. 747, 775 (1968).
\textsuperscript{739} Houchins, 438 U.S. at 7–8 (first and second emphases added).
\textsuperscript{740} 297 U.S. 233 (1936); 384 U.S. 214 (1966); 408 U.S. 665 (1972).
\textsuperscript{741} Houchins, 438 U.S. at 10.
\textsuperscript{742} Id. at 11 (quoting Branzburg, 408 U.S. at 684–85).
controlling.743 As the plurality explained, “In those cases the Court declared, explicitly and without reservation, that the media have ‘no constitutional right of access to prisons or their inmates beyond that afforded the general public.”744 It was “on that premise” that the Court found against the press in those earlier cases.745 As Burger emphasized quoting Stewart’s law review article Or of the Press: “‘The public’s interest in knowing about its government is protected by the guarantee of a Free Press, but the protection is indirect.”746

Stewart too rested on the Press Clause in his concurring opinion, invoking what he called the “constitutional role of the press.”747 Emphasizing a point made in his law review article, he wrote, “That the First Amendment speaks separately of freedom of speech and freedom of the press is no constitutional accident, but an acknowledgment of the critical role played by the press in American society.”748 As to the press, he explained, the inclusion of the Press Clause in the Constitution required “sensitivity” to “that role.”749

At least one federal appellate court has cabined Houchins on these grounds. In Detroit Free Press v. Ashcroft, the Sixth Circuit found that Richmond Newspapers provided the controlling standard because “Houchins rested its holding on the Court’s interpretation of the press clause, a First Amendment clause distinct from the speech clause,” which was at issue in that case.750 Similarly, a district court

743. Id. (citing 417 U.S. 817 (1974); 417 U.S. 843 (1974)).
744. Id.
745. Id.
746. Id. at 14 (quoting Potter Stewart, Or of the Press, 26 Hastings L.J. 631, 636 (1975)). It was that guarantee that Stewart spoke about in what he called “an inquiry into an aspect of constitutional law,” separate from the Free Speech Clause, “that has only recently begun to engage” the Court’s attention. Stewart, supra, at 631.
747. Houchins, 438 U.S. at 19 (Stewart, J., concurring).
748. Id. at 17.
749. Id.
750. 303 F.3d 681, 694 (6th Cir. 2002) (citation omitted); see also Phillips v.
recognized the narrow question addressed in Houchins: “The Supreme Court has ruled out a right of access based on the freedom of the press guarantee standing alone. This court will follow the Supreme Court, as it must, and not base the right of access solely on the freedom of the press guarantee of the first amendment.”

Houchins thus answers a different question (the existence of a special right of access for the press) than the Richmond Newspapers line of cases does (whether there exists a right of access at all). This distinction is important. As Brennan recognized in his Richmond Newspapers concurrence, “A conceptually separate, yet related, question is whether the media should enjoy greater access rights than the general public.” But, Brennan added, “no such contention is at stake here.”

Still, it is not surprising that courts conflate the two. As Brennan also recognized, “As a practical matter . . . the institutional press is the likely, and fitting, chief beneficiary of a right of access because it serves as the ‘agent’ of interested citizens, and funnels information about trials to a large number of individuals.” It was, ultimately, the press bringing the claims in both cases, and the underlying remedy sought in each was more access. That the cases appear similar in these generalities makes it easy to lose sight of

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DeWine, 841 F.3d 405, 427 (6th Cir. 2016) (Stranch, J., dissenting).


753. Id.

754. Id. (Brennan, J., dissenting).
their differences in the specifics. Nevertheless, it is in those specifics that we find that *Houchins* and *Richmond Newspapers* resolved different questions, the former relating to special access, the latter relating to access generally.

3. *Houchins* Presupposed Some Level of Access

Other facets of *Houchins* further diminish its precedential reach: *Houchins* did not condone the complete exclusion of the press—the holding for which it is so often cited today. On the contrary, as the plurality catalogued, *Houchins* adopted regulations that provided “various means by which information concerning the jail could reach the public.” 755 This included corresponding through mail, participating in visitation, and making phone calls to inmates. Inmates could “send an unlimited number of letters to judges, attorneys, elected officials, the Attorney General, petitioner, jail officials, or probation officers,” and “all persons, including representatives of the media, who knew a prisoner could visit him.” 756 And *Houchins* had established tours for both the public and the press, providing “limited access” to the jail, including Little Greystone. 757

Not only was public access provided in *Houchins*, but *Houchins*’ counsel did not even argue that *Houchins* could simply revoke access *entirely* and avoid constitutional scrutiny. In fact, in an exchange with Rehnquist during argument, he contended the opposite:

**Rehnquist:** When you say the public right, are you talking about some term that has meaning in constitutional law?

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756. *Id.*

Booty: Yes, I think I am. I think the public does have some rights of access . . . . In the *Pell* case, what the Court did, as I read it any case is, the Court found that there was no intention to conceal any conditions. The Court found that there was public access and that was enough, those two factors, there was plainly no—nothing being swept under the rug, nothing being hidden . . . .

Rehnquist: Was not *Pell* really a decision that said whatever the public access is the media access need to be no greater?

Booty: Indeed, that is exactly what the Court said. *But I do not read the decision they are saying that means necessarily that the public access is zero. That is not resolved in any decision that this Court that I am aware of. It was not placed an issue in that case.* That is my point. 758

In additional questioning, Stevens asked of Booty, “[Y]ou do not seriously contend that the whole problem could be solved by having zero access to public and press both?” 759 Booty responded, “Certainly not.” 760 Stevens pressed, “[Y]ou would not urge the court to extreme position, would you?” 761 Again, Booty said, “No I am not urging that.” 762

Because *Houchins* presupposed some level of access, courts should be especially wary of elevating its *dicta* to condone the complete exclusion of the press and public from government proceedings in all circumstances. What if a sheriff excludes the public completely from a prison to conceal routine beatings of inmates? Or if a small-town judge seals whole civil dockets as a favor to a friendly lawyer? What if the government enforces a curfew against journalists to hide illegal conduct? The competing interests in these cases of complete exclusion are much different than those in *Houchins* where there were substantial alternatives to the access sought.

The Court has itself recognized as much. In *Pell*, it left

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open the question of the constitutionality of the total exclusion of the press as “part of an attempt by the State to conceal the conditions in its prisons or to frustrate the press’ investigation and reporting of those conditions.” In *Globe Newspaper*, Burger and Rehnquist argued that the compelling interest standard adopted in that case was too high where “[n]either the purpose of the law nor its effect is primarily to deny the press or public access to information.” In *Press-Enterprise II*, Stevens argued that the Court never blessed the exclusion of the press to conceal impropriety. On the contrary, the Court suggested that “[n]either our elected nor our appointed representatives may abridge the free flow of information simply to protect their own activities from public scrutiny.” As one contemporary account observed, “Even while denying requests for access to prisons [in *Pell*, *Saxbe*, and *Houchins*], . . . the Supreme Court has consistently taken pains to point out that the challenged restrictions did not foreclose all access, implying that some form of access is required.”

In short, the Supreme Court has never applied the *Houchins dicta* to condone the complete exclusion of the press and the public from a government proceeding or from government records. Yet, because of the undisciplined use of broad *dicta* in *Houchins* and lower courts’ misplaced reliance on that *dicta*, *Houchins*, a case that presupposed some meaningful level of public access, looms large even over cases concerning the complete exclusion of the press and the public. The *dicta* should have never been included in the plurality and concurring opinions, and it should not be (indeed, is not) binding on lower courts today.

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B. Houchins Lacks Precedential Weight

Moving from the facts to the law, there are at least two additional reasons to question the import of *Houchins*. Initially, there is no majority opinion. Instead, Burger mustered only a three-Justice plurality. Nor is there a controlling rationale under the framework established in *Marks v. United States* to assess the precedential value of a plurality. Next, even if one were to consolidate the plurality and Stewart’s concurrence in judgment, that would represent only a minority-majority decision, where four Justices constituted a majority on a short bench. This is not, under the Court’s traditional approach, the kind of Court that should be declaring far-reaching constitutional principles.

1. There Is No Majority or Controlling Opinion in *Houchins*

Because *Houchins* was decided by a splintered seven-member Court in a 3-1-(3) decision, there is the question of what opinion should be treated as the controlling, and, therefore, the precedential one. Does the plurality control? Stewart’s opinion concurring in judgment? Are there controlling portions of both the plurality and the dissent in light of Stewart agreeing with the plurality that there is no constitutional right of access to information in the hands of the government, while also agreeing with the dissenters that some injunctive relief should be provided?

Courts have rarely confronted these questions. They have rarely recognized that the lead opinion in *Houchins* was a plurality opinion, let alone a three-judge plurality opinion.767 And although Stewart did not sign on to the

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767. See, e.g., S.H.A.R.K. v. Metro Parks Serving Summit Cty., 499 F.3d 553, 559 (6th Cir. 2007); Rice v. Kempker, 374 F.3d 675, 680 (8th Cir. 2004); Smith v. Plati, 258 F.3d 1167, 1178 (10th Cir. 2001); Senate of Cal. v. Mosbacher, 968 F.2d 974, 976–77 (9th Cir. 1992); ACLU of Miss., Inc. v. Mississippi, 911 F.2d 1066, 1071–72 (5th Cir. 1990); United States v. Yonkers Bd. of Educ., 747 F.2d 111, 113 (2d Cir. 1984).
plurality opinion, some courts have construed his opinion as transforming the plurality into a majority. As the California Supreme Court explained in *Copley Press, Inc. v. Superior Court*, “Justice Stewart’s concurring opinion in *Houchins* agreed with what the lead opinion said regarding an alleged First Amendment ‘right of access to information generated or controlled by government.’”768 Based on this reasoning, the California court concluded that *Houchins* was not a 3-1-(3) decision with a plurality, an opinion concurring in judgment, and a dissent, it was a “four-member majority” of a seven-member Court.769 Other courts have invoked similar judicial license to transmute the *Houchins* plurality into a majority opinion.770

This judicial alchemy is misguided. Stewart did not join the plurality, and Burger’s opinion was not an opinion of the Court. Burger only “announced the judgment of the Court,” while what followed was “an opinion, in which Mr. Justice WHITE and Mr. Justice REHNQUIST joined.”771 “STEWARD, J., filed an opinion concurring in the judgment” only.772 This was a considered choice. Stewart could not “bring [himself] to agree” with the dissenters; nor could he bring himself to agree with the plurality that no injunctive relief should be granted.773 This matters: there is a difference between joining an opinion and what Blackmun once called “a mere concurrence in the Court’s judgment.”774


769. *Id.* (quoting *San Jose Mercury-News v. Mun. Ct.*, 638 P.2d 655, 658 (Cal. 1982)).


772. *Id.*


In light of Stewart’s vote, several courts have, thus, emphasized that the lead opinion in *Houchins* was a plurality opinion. As the Sixth Circuit explained, “*Houchins* represented a plurality opinion of the Court, and as such, the conclusion that the First and Fourteenth Amendments do not guarantee the public a right of access to information generated or controlled by the government was neither accepted nor rejected by a majority of the Court.” 775 Other courts agree: “the case resulted in a plurality opinion.” 776 Or, as another put it, “*Houchins* was merely a plurality opinion.” 777 In short, Burger’s “opinion was joined by only two other justices . . . and thus did not command a majority of the full Court.” 778

Nor is there a “single rationale explaining the result” that “enjoys the assent” of a majority of Justices that would provide a binding rule of law on lower courts. 779 True enough, in his published concurrence, Stewart noted that he “agree[d] substantially” with the legal principles in the plurality opinion, perhaps suggesting that there was a single rationale. But then he “part[ed] company” in applying those “abstractions to the facts of [the] case.” 780 As a result, while the plurality found no right at all to be vindicated, Stewart believed that KQED was “entitled to” some injunctive relief. 781 In so finding, he endorsed an understanding of the Press Clause inconsistent with the plurality’s views: “That

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(Blackmun, J., concurring in judgment).


781. *Id.*
the First Amendment speaks separately of freedom of speech and freedom of the press is no constitutional accident, but an acknowledgment of the critical role played by the press in American society.”

In vindication of that role, Stewart agreed with the dissenters that “KQED was clearly entitled to some form of preliminary injunctive relief” and refused to “foreclose the possibility of further relief for KQED on remand.”

Absent a majority opinion or single rationale shared by the plurality and Stewart, *Houchins* presents a *Marks v. United States* problem: “When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices” (or four on a Court of seven Justices) “the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .” This rule is “intended to limit the precedential reach of plurality decisions, while ensuring that they are followed by lower courts.”

Despite *Houchins* presenting a classic *Marks* problem, courts rarely confront the question of which opinion in *Houchins* is properly understood to be the controlling one under *Marks*. In fact, only four decisions even cite *Houchins* together with *Marks*. The rest are largely rudderless with

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782. *Id.* at 17.
783. *Id.*
784. *Id.* at 18.
785. For the purpose of argument, this Article assumes that *Marks* applies to plurality opinions issued in cases with fewer than nine Justices participating.
one even resorting to the awkward exercise of trying to discern what it called the “feeling of the majority” in Houchins.\textsuperscript{789} Rather than engage in jurisprudential psychology, courts would be better served by relying on Marks to discern Houchins’ holding, if any.

Lower courts have interpreted Marks’ “narrowest grounds” requirements differently, but commentators have distilled three approaches.\textsuperscript{790} The first is the “implicit consensus” approach. As described by the D.C. Circuit, “[O]ne opinion can be meaningfully regarded as ‘narrower’ than another . . . only when one opinion is a logical subset of other, broader opinions.”\textsuperscript{791} Under this approach, “the narrowest opinion must represent a common denominator of the Court’s reasoning; it must embody a position implicitly approved by at least five Justices [or four on a seven-Justice Court] who support the judgment.”\textsuperscript{792} That is, “the rationales for the majority outcome” must be able to fit “within each other like Russian dolls.”\textsuperscript{793}

Second is the “fifth vote” approach, which instructs lower courts to “treat as controlling ‘the opinion of the Justice or Justices who concurred on the narrowest grounds necessary to secure a majority,’ even if the opinion reflects the views of only one Justice.”\textsuperscript{794} This approach “views Marks as an instruction to search for the opinion reflecting the views of the Court’s median or ‘swing’ Justice—typically, the fifth

\textsuperscript{947} (6th Cir. 2018).


\textsuperscript{792}. Id.

\textsuperscript{793}. Lewis A. Kornhauser & Lawrence G. Sager, The One and the Many: Adjudication in Collegial Courts, 81 CAL. L. REV. 1, 46 (1993); see also Williams, supra note 790, at 808 (quoting same).

\textsuperscript{794}. Williams, supra note 790, at 813–14 (quoting Planned Parenthood of Southeastern Pennsylvania v. Casey, 947 F.2d 682, 694 n.7 (3d Cir. 1991)).
vote—and accord that decision full precedential effect.”

While this approach “promises guidance with respect to a broader range of plurality decisions than does the implicit consensus approach,” it suffers drawbacks; among others, it treats as binding “the opinion reflecting the median Justice’s views, including propositions that no other participating Justice explicitly or implicitly assented to.”

Third is the “issue-by-issue” approach. Under this approach, a court must parse “each of the various opinions in the plurality case—including the plurality opinion, concurrences, and dissents—to determine each proposition where five [or less on a short Court] or more Justices agree.” This “avoids the fifth vote approach’s uncomfortable conclusion that the views of a single Justice can establish binding precedent for the Court” and “looks for specific propositions that have actually been explicitly or implicitly assented to by a majority of Justices, though perhaps not the same majority whose votes were necessary to the judgment in the precedent case.”

Courts have invoked each of these approaches in construing *Houchins*. Those taking the “implicit consensus” approach (albeit without citing *Marks* specifically) have observed that the *Houchins* plurality opinion, in light of Stewart’s noted “substantial[] agree[ment]” with it, should be viewed as the controlling opinion. In *Center of National Securities Studies v. U.S. Department of Justice*, for example, the D.C. Circuit strung together the plurality and concurrence to find that “the First Amendment does not ‘mandate[] a right of access to government information or

795. Id. at 814.
796. Id. at 815.
797. Id. at 817.
798. Id.
sources of information within the government’s control.”800

It then went on to describe Houchins as an opinion of “the Court.”801

Others have treated Stewart’s concurring opinion as controlling under the “fifth vote” approach (or, on this short Court, the “fourth vote” approach). In Fusaro v. Cogan, the Fourth Circuit explained:

Houchins was decided by seven members of the Supreme Court. Chief Justice Burger wrote the plurality opinion. Justice Stewart’s concurrence is recognized as having controlling effect as the narrowest prevailing vote. See Marks v. United States, 430 U.S. 188, 193 (1977). Justice Stewart “agree[d] substantially” with the Chief Justice that the First Amendment confers no general right of access to government documents. See Houchins, 438 U.S. at 16, 98 S.Ct. 2588. He wrote separately to emphasize that, in some circumstances, the press might merit additional solicitude in its information-gathering efforts to which the general public would not be entitled.802

The Ninth Circuit has agreed, explaining that because “Stewart’s view in Houchins was the narrowest prevailing one, it has controlling effect.”803 Several commentators have agreed that Stewart’s concurrence was “in effect, the controlling opinion in the 4 to 3 decision.”804


801. Ctr. for Nat’l Sec. Stud., 331 F.3d at 934; see also City of Chicago v. U.S. Dep’t of Treasury, 423 F.3d 777, 784 (7th Cir. 2005) (citing Houchins plurality as if a majority).


804. Erin C. Carroll, Protecting the Watchdog: Using the Freedom of Information Act to Preference the Press, 2016 Utah L. Rev. 193, 221 (2016); see also Erin C. Carroll, Platforms and the Fall of the Fourth Estate: Looking Beyond the First Amendment to Protect Watchdog Journalism, 79 Md. L. Rev. 529, 589 n.91 (2020) (“Justice Stewart’s opinion, which was effectively the controlling one
Finally, there are those courts that take the issue-by-issue approach. As one explained, “Stewart concurred in the judgment of the three-justice majority, but agreed with the three dissenting justices that at least some limited injunctive relief was warranted in favor of media plaintiffs.” 805 That court refused to dismiss a complaint seeking access based on this approach: “Justice Stewart and the dissenting Justices all believed that at least some measure of injunctive relief in favor of the media plaintiffs was warranted.” 806 Another court similarly grouped Stewart with the dissenters, explaining that a “majority of the voting members of the Court . . . recognized the First Amendment’s concern that the public be optimally informed could in some instances render unreasonable restraints upon the scope of access to members of the press even where it would not be unreasonable to exclude the general public.” 807

None of these approaches is particularly satisfying though—not least because they all reach different results in applying variations of the same test. The implicit consensus approach does not work because neither the plurality nor Stewart’s concurrence entirely subsumes the other. The plurality’s holding that there is no special right of access for
the press beyond that of the public does not fit within Stewart’s opinion that would provide at least some special access.808 The fifth-vote gives Stewart’s lone opinion the effect of a majority opinion despite every other Justice refusing to join him. And issue-by-issue gives legal force to the dissenters. But as Chief Justice John Roberts has written, “comments in [a] dissenting opinion ‘about legal principles and precedents ‘are just that: comments in a dissenting opinion.”809

But what is a court to do then where the Marks inquiry does little to help? In similarly badly fractured cases, the Supreme Court has explained, “We think it not useful to pursue the Marks inquiry to the utmost logical possibility when it has so obviously baffled and divided the lower courts that have considered it.”810 Instead, the Court has admitted that where a “splintered decision” leads to such a substantial “degree of confusion” in lower courts, its continued viability may reasonably be questioned.811 In such instances, lower courts have found the judgment to be binding, but not the Court’s reasoning. That is, not every judgment has a binding holding.

The Eleventh Circuit, for example, in refusing to follow Powell’s opinion in Regents of the University of California v. Bakke, observed that the Supreme Court has “indicated that there may be situations where even the Marks inquiry does not yield any rule to be treated as binding in future cases.”812

The Seventh Circuit, in trying to discern the holding of the

811. Id. at 746.
Court’s ruling in *June Medical Services LLC v. Russo*, agreed. Expressing its frustration with *Marks*, it explained: “*Marks* does not command lower courts to find a common denominator—to find an implicit consensus among divergent approaches—where there is actually none. It is not our duty or function to bring symmetry to any ‘doctrinal disarray’ we might encounter in our application of Supreme Court precedent.”

*Houchins* cries out for the same treatment. It reads exactly as it was drafted: two groups of three Justices at either extreme with Stewart straddling both. Sure, Stewart agreed with the plurality at a certain level of abstraction, but he arrived at results consistent only with the dissenters’ views. Said differently, while Stewart expressed his disagreement with the dissenters, the result he arrives at betrays that disagreement. As White observed of Stewart’s position at the conference, “But if there is no right of public generally, [I] can’t understand [Stewart’s] position.” That Stewart, as the deciding vote, tried to have the best of both worlds had an inescapable knock-on effect: his opinion makes it impossible to discern a single *ratio decidendi* in *Houchins*. As such, courts should simply recognize that *Houchins* lacks one and, thus, does not provide a binding rule.

2. Prudential Considerations Undercut *Houchins*

While *Houchins* should not be viewed as precedential for the reasons just discussed, it is worth going beyond the judicial bean counting to explain why, as a normative matter,

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813. See generally 140 S. Ct. 2103 (2020).


Houchins should not be considered precedential. As Powell’s clerk recognized when Stevens circulated his ill-fated draft majority opinion in Houchins: “Even if the Justice does get a majority to join his opinion, the Court will be in the awkward position of handing down an important new precedent by a 4-3 vote.” While Stevens did not get a majority, the point applies with even greater force to the plurality handing down an important decision in that case by a 3-1-(3) vote.

For most of the Court’s history, it simply did not issue plurality opinions. One early study found that once Chief Justice Marshall discarded the Court’s practice of issuing seriatim opinions, the Court issued just ten plurality opinions in the entirety of the nineteenth century. After 1900 and 1956, it issued thirty-five. After 1956, the Court’s use of plurality opinions exploded, and by the early 1970s, it had issued some sixty-one more. Traditionally, such opinions represented “nothing more than the views of the individual justices who join[ed] in the opinion.” As such, members of the Court “indicated that such cases lack authority.”

This made sense because a plurality opinion was not “an opinion of the Court as an institution.” Instead, as scholars observed in the 1970s, a plurality opinion carries “less precedential weight” precisely because it is not a majority. As a result, the bar and the public would be less willing to accept them. Nor would such cases give lower courts

816. Id.
818. Id.
819. Davis & Reynolds, supra note 814, at 60.
820. Id. at 61.
821. Comment, supra note 817, at 100.
822. Davis & Reynolds, supra note 814, at 61.
823. Id. at 62.
824. Id.
“definitive guidance as to the state of the law.”825

Plurality opinions raised another issue particularly relevant to Houchins: they detract from the Court’s role as a constitutional arbiter by “failing to provide a foundation which can give stability to the Court’s own development of constitutional law.”826 As one commentator said, a plurality opinion, “by its very nature, represents the most unstable form of case law. It is the resolution of a ‘hard’ case by a nonunanimous Court.”827 Justices who join a plurality are free to change their minds in later cases without the pull of stare decisis.828 Future Justices are also “free to diverge from the plurality view without considering the serious consequences of overruling a precedent firmly established by a majority of the Court.”829 Therefore, “the law develops not in an orderly process of logical progression, but in a confused ebb and flow of divergent concepts.”830

These “juridical cripples” cause related problems in the lower courts too. There, they may do “more to confuse the current state of the law than to clarify it.”831 Decisions like Houchins “often fail[] to give definitive guidance as to the state of the law to lower courts—both state and federal.”832 As such, lower courts, as the circuit splits demonstrate in the case of Houchins, “must—and often do—‘guess’ at the Court’s reaction when faced with a somewhat similar case.”833 This confusion is attributable first to the Court’s “inability to give

825. Id.
826. Id. at 66.
828. Id.
829. Davis & Reynolds, supra note 814, at 66.
830. Id.
831. Id. at 62.
832. Id.
833. Id. at 71.
stability to the development of constitutional law.”834 The Burger Court’s many plurality opinions were thus “much criticized for their inadequacy as pronouncements of the court of final resort, as guides to lower courts, and as statements of the law.”835 Houchins is a prime example.

Even if Houchins was viewed not as a plurality but as a majority opinion as some have suggested, these prudential concerns remain. How much precedential value should a four-Justice “majority” have on a Court where, as Brennan remarked, the most important thing is “counting to five”?836 Traditionally, the question was moot because the Court refused to issue opinions on constitutional questions where it did not have a full complement of Justices. As Chief Justice Marshall said (when the Court was composed of seven): “The practice of this court is, not (except in cases of absolute necessity) to deliver any judgment in cases where constitutional questions are involved, unless four judges concur in opinion, thus making the decision that of a majority of the whole court.”837 While that rule relaxed as time went on, decisions of a short Court were still “regarded as of less weight and value as a precedent.”838 A four-Justice majority on a nine-Justice Court is, after all, a minority-majority opinion or, as Blackmun (joined by then-Justice Rehnquist) called such decisions: a “4-3 vote by a bobtailed Court.”839

834. Id. at 73.
Other Justices have also questioned overreliance on such opinions. Justice Robert Jackson in *Saia v. People of New York* wrote, “The quotation in the Court’s opinion today [of *Hague v. C.I.O.*, 307 U.S. 496 (1939), a seven-Justice opinion] had the support of only two Justices, with a possible third. The failure of six or seven Justices to subscribe to those views would seem to fatally impair the standing of that quotation as an authority.” Justice Harold Burton, writing of the *Legal Tender Cases*, would say that an opinion “of a majority of the whole Court, as against a lesser majority” of the same Court provided “additional degrees of stability and soundness.” Justice Stevens, in *Montana v. United States*, similarly observed that a prior seven-Justice case, *Choctaw Nation v. Oklahoma*, should not “be read as having made a substantial change in settled law,” because “only four Justices . . . joined the Court’s opinion.” And, recently, Justices Samuel Alito, Clarence Thomas, and Neil Gorsuch observed that there is a difference between what a plurality opinion “actually decided” and mere “comments” made in it—especially comments that might lead “to confusion in the lower courts.”

Other decisions by a 4-3 Court, even if considered binding on lower courts under modern rules, have nonetheless faced ignoble deaths. The prime example is

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Fuentes v. Shervin, a 4-3 decision issued in the 1970s like Houchins that purported to hold unconstitutional certain repossession statutes.\textsuperscript{845} Shortly after Fuentes was decided, however, the Arizona Supreme Court declined to follow it.\textsuperscript{846} It did so because of the 4-3 nature of the opinion: “We do not believe . . . that it is unreasonable to ask that before we are required to declare unconstitutional statutes enacted by our legislature . . . that the United States Supreme Court speak with at least a majority voice on the subject.”\textsuperscript{847}

While the Arizona Supreme Court’s decision was met with criticism in some corners, it turned out to be right to question Fuentes: a fully constituted U.S. Supreme Court disagreed with the result in Fuentes just two years later.\textsuperscript{848} And, in 1975, in North Georgia Finishing, Inc. v. Di-Chem, Inc., Justices Blackmun and Rehnquist argued that “Fuentes, a constitutional decision, obviously should not have been brought down and decided by a 4-3 vote.”\textsuperscript{849} They added, “Announcing the constitutional decision, with a four-Justice majority of a seven-Justice shorthanded Court, did violence to Mr. Chief Justice Marshall’s wise assurance that . . . the practice of the Court ‘except in cases of absolute necessity’ is not to decide a constitutional question unless there is a majority ‘of the whole court.’”\textsuperscript{850}

Houchins did similar violence. It was, at its very, very

\textsuperscript{845} 407 U.S. 67 (1972).
\textsuperscript{847} Id.; see also Hart v. Commonwealth, 109 S.E. 582, 588 (Va. 1921) (considering a 4-2 Supreme Court decision and observing that “it may be fairly said to be still an open question in so far as the authority of the Supreme Court is concerned”).
\textsuperscript{850} Id. (quoting Briscoe v. Commonwealth’s Bank of Ky., 8 Pet. 118, 122 (1834)).
best, a 4-3 decision, but still purported to establish an unqualified constitutional rule—a rule that was almost immediately drawn into doubt by the Court’s subsequent cases in *Gannett, Richmond Newspapers*, and *Globe Newspaper*. *Houchins* thus never spoke for the Court. As Stevens wrote in *Richmond Newspapers*, “Since Mr. Justice MARSHALL and Mr. Justice BLACKMUN were unable to participate in that case, a majority of the Court neither accepted nor rejected that conclusion [regarding access] or the contrary conclusion expressed in the prevailing opinions.”851 The Court aggravated this violence when it failed to, as it had in *North Georgia Fishing, Inc.*, explicitly disclaim *Houchins*, leaving it as some sort of undeveloped vestigial remnant in the U.S. Reporter.

C. *Post-Houchins Precedent Displaced Houchins*

The question of whether *Houchins* matters cannot be answered only by reference to its narrow factual premises and precedential idiosyncrasies. Instead, the inquiry has to expand beyond *Houchins* itself to the right of access cases that came after it. Three observations can be drawn from this history. First, the Court’s post-*Houchins* jurisprudence, beginning with *Richmond Newspapers*, speaks directly to the existence of a First Amendment right of access. Second, while the Court was fractured in *Richmond Newspapers*, in subsequent cases the Court spoke in one voice adopting a doctrine inconsistent with *Houchins’ dicta*. Third, the *Richmond Newspapers* line of cases is consistent with the Court’s modern First Amendment doctrine, while *Houchins* is not.

1. *Post-Houchins Jurisprudence Speaks Directly to the Issue*

Courts finding that *Houchins* establishes the general

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rule often observe that Houchins must control because the Supreme Court has never applied Richmond Newspapers’ two-part test outside the criminal prosecution context. As the First Circuit wrote, “While the Supreme Court has recognized a qualified First Amendment right of access to records and proceedings connected to the criminal justice system, the Court has never recognized a corresponding right of access to Executive Branch documents.”852 Stated simply, as the D.C. Circuit did, “Neither the Supreme Court nor this Court has applied the Richmond Newspapers test outside the context of criminal judicial proceedings or the transcripts of such proceedings.”853

This reasoning is unpersuasive though. As an initial matter, it goes both ways. It is true that the Court has never applied Richmond Newspapers outside of the criminal context. But it is just as true that the Court has never applied the Houchins rule to anything but prisons. Moreover, while the Court has invoked Houchins in dicta in non-prison cases, it has also suggested that the Richmond Newspapers line of cases establish a rule of general applicability. In Richmond Newspapers, for example, Burger, speaking for himself and Justices White and Stevens, noted, “Whether the public has a right to attend trials of civil cases is a question not raised by this case, but we note that historically both civil and criminal trials have been presumptively open.”854 Stewart also left little doubt that the right of access recognized by the Court went further than simply guaranteeing a right of access to criminal trials: “the First and Fourteenth Amendments clearly give the press and the public a right of access to trials themselves, civil as well as criminal.”855

Additionally, at least three Justices thought the

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854. Richmond Newspapers, Inc., 448 U.S. at 580 n.17 (plurality opinion).
855. Id. at 599 (Stewart, J., concurring).
implications of the case stretched beyond judicial proceedings and records. The First Amendment, Brennan and Marshall explained, had “a structural role to play in securing and fostering our republican system of self-government.”856 That Amendment did not protect freedom of speech for its “own sake,” but for the sake of advancing the system of self-government established by the Constitution. Protecting speech, without also protecting “the antecedent assumption that valuable public debate . . . must be informed,” would inhibit self-governance.857 Thus, the First Amendment had to be seen as protecting speech, yes, but also the “indispensable conditions of meaningful communication.”858

To contain the stretch of this theory, Brennan did not suggest that the right of access be limited by the kind of proceeding. Instead, Brennan suggested it be limited by principles generally applicable to government proceedings. It should be limited to access to “particular proceedings or information” that had an “enduring and vital tradition of public entree.”859 And, it should be enforced only where “access to a particular government process is important in terms of that very process.”860 Thus, Brennan spoke of access to government proceedings and information generally, not just criminal trials specifically. Stevens did as well: “an arbitrary interference with access to important information is an abridgment of the freedoms of speech and of the press protected by the First Amendment.”861

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856. Id. at 586–87 (Brennan, J., concurring).
857. Id.
858. Id. (emphasis added).
859. Id. at 589.
860. Id.
861. Id. at 583 (Stevens, J., concurring) (emphasis added). While in Houchins Stevens had suggested that the Sixth Amendment played a role, he did not revive that argument. Houchins v. KQED, Inc., 438 U.S. 1,36–37 (1978) (Stevens, dissenting). In Richmond Newspapers, only Blackmun confined himself strictly to criminal trials. He alone credited Tribe’s argument that the interplay between
Moreover, while *Richmond Newspapers* may have left uncertainty as to whether Burger’s or Brennan’s approach would prevail, the Court in *Globe Newspaper* dispelled that uncertainty. As the Second Circuit explained, there the Court read “*Richmond Newspapers* broadly.” 862 In *Globe Newspaper*, Brennan adopted for the Court his republican approach to the First Amendment right of access proffered in *Richmond Newspapers*:

Of course, this right of access to criminal trials is not explicitly mentioned in terms in the First Amendment. But we have long eschewed any “narrow, literal conception” of the Amendment’s terms for the Framers were concerned with broad principles, and wrote against a background of shared values and practices. The First Amendment is thus broad enough to encompass those rights that, while not unambiguously enumerated in the very terms of the Amendment, are nonetheless necessary to the enjoyment of other First Amendment rights. *Underlying the First Amendment right of access to criminal trials is the common understanding that “a major purpose of that Amendment was to protect the free discussion of governmental affairs.” By offering such protection, the First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government. Thus to the extent that the First Amendment embraces a right of access to criminal trials, it is to ensure that this constitutionally protected “discussion of governmental affairs” is an informed one.* 863

The republican right of access endorsed by the Court in *Globe Newspaper* was not a recognition of a right of access to trials alone. It was a recognition of a republican right of access: that the First Amendment existed to advance self-governance through the public exchange of ideas and, thus, protected indispensable conditions for it, including access to certain government information. 864 Nothing about that

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864. While Cerruti disagreed with the outcome, he agreed with this principle.
theory suggests that it is inherently limited to criminal trials, or even to the judiciary. The limiting principles were the complementary considerations of a history of openness and whether access “plays a particularly significant role in the functioning of the . . . government as a whole.”

Brennan's opinion for the Court in *Globe Newspaper* was then many things. It was first an adoption by the Court of Brennan's broad concurring opinion in *Richmond Newspapers* and the republican theory of the First Amendment he outlined in that opinion. It was, second, a tacit critique of *Houchins*. Where the *Houchins* plurality believed that the First Amendment had nothing to say about an access right, the Court in *Globe Newspaper* rejected that position. In that way, *Globe Newspaper* was also the vindication of the *Houchins* dissenters and the view that “[t]he preservation of a full and free flow of information to the general public has long been recognized as a core objective of the First Amendment to the Constitution,” and that, it was “for this reason that the First Amendment protects not only the dissemination but also the receipt of information and ideas.”

While pre-*Globe Newspaper* cases like *Gannett* and *Richmond Newspapers* suggested potential alternative doctrinal hooks for the access right instead of the republican theory, none of those were ever adopted by the Court. There was no mention of the argument that the First Amendment right of access should be viewed through the lens Sixth

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See Cerruti, *supra* note 688, at 283 (“*Richmond Newspapers* does not vindicate a freedom of speech so much as it does a freedom of self-rule.”).

865. Cerruti has argued that “[t]he answer to this riddle [regarding the reach of the access right] may indeed be straightforward: perhaps the First Amendment right of access does not apply to the other branches of government simply because it cannot be so applied. In other words, the limitation is practical, or political, but not theoretical.” *Id.* at 309.


Amendment, as proposed by Tribe in *Richmond Newspapers*. There was no futzing with the relationship between the right of access and the public forum doctrine, as had been advocated for by counsel in *Gannett* and by Burger in *Richmond Newspapers*. And there were no lingering assertions that maybe the Ninth Amendment had something to do with it. Rather, the theory adopted by a majority in *Globe Newspaper* owed itself to and was defined by the broadly applicable theories of self-governance advanced by Powell’s dissent in *Saxbe*, Stevens’ dissent in *Houchins*, and, finally, Brennan’s concurring opinion in *Richmond Newspapers*.

Nor did any subsequent jurisprudence upset *Globe Newspaper*. At best, those subsequent cases tacitly endorsed Brennan’s theory; at worst, they were ambivalent. In *Press-Enterprise II*, for example, Burger, writing for the Court, used broad language to describe the access right as a right of access to government information.868 As Burger explained, in language suggested by Brennan himself, “history and experience shape the functioning of governmental processes. If the particular proceeding in question passes these tests of experience and logic, a qualified First Amendment right of public access attaches.”869 If the end was to limit the right of access to judicial processes, Burger’s use of Brennan’s phrase “governmental processes” is an odd one—indeed, seemingly inconsistent with those courts of appeal holding that the right of access is limited to the judiciary.

Those courts of appeals that treat the *Richmond Newspapers* line of cases as establishing the general rule


869. *Id.* at 9. While Brennan offered the language, Burger’s initial draft also included broad language of its own: “[P]ublic access to the affairs of government does not merit Constitutional protection unless it plays a significant positive role in the functioning of the particular process in question.” Warren Burger, Majority Opinion, 1st Draft (May 30, 1986) (emphasis added), in *POWELL PAPERS: PRESS-ENTERPRISE CO. V. SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF RIVERSIDE*, supra note 559, at 47.
have done so precisely because of *Globe Newspaper*’s theoretical dominance. When the Third Circuit confronted the issue of whether there was a right of access to a town planning meeting, it was the theory adopted in *Globe Newspaper* that was at the forefront of the court’s analysis. As the panel said, “Because a ‘major purpose of [the First] Amendment was to protect the free discussion of governmental affairs,’ the public and press have the right to attend certain types of governmental proceedings.”870 The Second, Sixth, and Ninth Circuits have all also relied on this doctrinal anchor in finding that the right of access is generally applicable to government proceedings.871 These courts recognized that *Globe Newspaper* spoke directly to the question of whether the First Amendment provides an enforceable right of access and why—*Houchins* did not.

2. The *Richmond Newspapers* Line of Cases Displaced *Houchins*

While the *Houchins* plurality found that neither “the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government’s control,” that statement cannot survive holdings in cases like *Richmond Newspapers* finding that the “First Amendment . . . prohibit[s] government from summarily closing courtroom doors.”872 The two propositions cannot exist together; one is right, and one is wrong. As First Amendment scholar Lillian BeVier wrote at the time, Burger’s plurality opinion in *Houchins* was “particularly difficult to reconcile with the

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871. See, e.g., Cal. First Amend. Coal. v. Woodford, 299 F.3d 868, 874 (9th Cir. 2002); Detroit Free Press v. Ashcroft, 303 F.3d 681, 704 (6th Cir. 2002); New York Civil Liberties Union v. New York City Transit Auth., 684 F.3d 286, 303 (2d Cir. 2012); Leigh v. Salazar, 677 F.3d 892, 898 (9th Cir. 2012).

Almost everything Burger did in *Houchins* he did the opposite in *Richmond Newspapers*. BeVier noted that in *Houchins* Burger stressed that the Court “‘never intimated a First Amendment guarantee of a right of access to all sources of information within government control.’” But in *Richmond Newspapers*, that appeared “nearly inconsequential,” a “momentar[y] inconvenience.” In *Houchins*, Burger said that “the public importance of conditions in penal facilities and the media’s role of providing information afford no basis for reading into the Constitution a right of the public or the media to enter these institutions.” In *Richmond Newspapers*, however, the importance of public trials was central to his logic. In *Houchins*, Burger dismissed *Branzburg*’s dicta that “‘news gathering is not without its First Amendment protections.’” Yet, in *Richmond Newspapers*, he credited it.

Despite this, “[c]onspicuously absent” from Burger’s *Richmond Newspapers* opinion was any mention of *Houchins*. As a result, lower courts have had to try to reconcile *Houchins* and the *Richmond Newspapers* line of cases without guidance. For courts that prefer *Houchins*...
over Richmond Newspapers, they dismiss Richmond Newspapers and its progeny as providing only a “limited exception” to Houchins’ “general rule.” In these courts, Houchins’ holding applies to all government information and proceedings except criminal trials. As the Sixth Circuit explained, “[a]n exception to Houchins’ general rule exists. In a line of cases beginning with Richmond Newspapers v. Virginia, the Supreme Court has recognized a right of access to certain criminal proceedings and the documents filed in those proceedings.” 882

This approach suffers from several deficiencies. First, nowhere in Richmond Newspapers nor any subsequent cases did the Court say that it was marking out a limited exception to Houchins. One would expect that had the Court intended to create an explicit exception to Houchins it would have said so. Instead, in Globe Newspaper the Court adopted a theory that was not tethered to judicial proceedings alone—and, based on that theory, the Court in Globe Newspaper and Press-Enterprise II spoke of access to government information not just criminal trials. 883 This rule is, by its nature, a general rule, not an exception.

Second, that the Court recognized a right of access in the Richmond Newspapers line of cases means that the broad dicta in Houchins that no right of access existed was, in fact, wrong. Richmond Newspapers proved as much in finding that the First Amendment protects a right of access to criminal trials. And if Houchins was wrong once, what is to say that it is not wrong in other places as well? As one court explained, “the Houchins holding does not provide quite the bright line standard that might first appear,” because courts “have noted a number of exceptions to the Houchins rule.” 884

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882. Phillips, 841 F.3d at 418; see also, Flynt, 355 F.3d at 704 (describing Richmond Newspapers as an “exception” to the “general rule of Houchins”).

883. See supra Section III.C.1.

Maybe these should not be viewed as exceptions, but rather the proper application of the two-part test adopted by the Court in *Globe Newspaper*.

Third, in the face of any ambiguity between *Houchins* and *Richmond Newspapers* line of cases, the better path is to rely on the majority positions in cases like *Globe Newspaper* rather than on a three-Justice plurality opinion. Otherwise, courts would find themselves elevating a plurality opinion that never garnered majority support over a majority opinion. As the Sixth Circuit said in finding that the *Richmond Newspapers* line of cases controlled over *Houchins*, “*Houchins* represented a plurality opinion of the Court.”885 And while it would have been preferable for the Court to explicitly abrogate *Houchins*, the prudent course is to rely on a majority opinion like *Globe Newspaper* as opposed to a plurality opinion like *Houchins*.886

3. *Globe Newspaper* is the Better Fit Doctrinally than *Houchins*

Another reason to question whether *Houchins* matters is its relation to First Amendment doctrine generally. Of course, *Houchins* did not attempt to fit the access right into any extant First Amendment theory because it did not believe that the First Amendment was implicated at all. In fact, to support its broad *dicta*, the *Houchins* plurality had to distinguish itself out of the Court’s prior case law relating to the necessity of an informed public and what was required to ensure such an informed public. Indeed, much of the *Houchins* plurality was devoted to explaining why this prior, seemingly relevant case law was not controlling.

Of *Grosjean v. American Press Co.*, which challenged

886. Remember that Brennan sought in *Globe Newspaper* to dispatch *Houchins* with Footnote 13 that approvingly cited the dissenters in *Houchins*. See supra text accompanying note 474. That footnote did not survive the drafting process, but that it was even attempted demonstrates that Brennan did not view *Globe Newspaper* as some kind of exception to *Houchins*. 
retaliatory taxes imposed on newspapers, the Houchins plurality admitted that “Grosjean readily acknowledged the need for ‘informed public opinion’ as a restraint upon misgovernment.” But, it dismissed this as meaning “no more than that the government cannot restrain communication of whatever information the media acquire—and which they elect to reveal.” Of Mills v. Alabama, which challenged a law that made it a crime to publish an editorial about the election on the day of the election, it similarly admitted that “the Court noted that ‘a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.’” But, it added, “the Court did not remotely imply a constitutional right guaranteeing anyone access to government information beyond that open to the public generally.” It similarly distinguished Branzburg v. Hayes and Zemel v. Rusk.

On the other hand, the republican theory adopted in Globe Newspaper conforms to the Court’s contemporary First Amendment jurisprudence. As Brennan explained there, the access right was necessary to ensure that the “major purpose” of the Amendment, i.e., “to protect the free discussion of governmental affairs,” was more than an empty promise, that such discussion would be both free and informed. As he put it in Richmond Newspapers, “[t]he

888. Id.
889. Id. (quoting Mills v. Alabama, 384 U.S. 214, 218 (1966)).
890. Id.
891. Id. (citing Branzburg v. Hayes, 408 U.S. 665 (1972); Zemel v. Rusk, 381 U.S. 1 (1965)).
892. Cerruti is at war with himself on this point. On the one hand, he argues that Brennan’s approach in Richmond Newspapers and Globe Newspaper was “novel, even radical.” See Cerruti, supra note 688, at 283. On the other hand, he asserts that like New York Times v. Sullivan, Richmond Newspapers “restructured the core meaning of the First Amendment to advance the central political purposes of the Constitution.” Id. at 262.
structural model links the First Amendment to that process of communication necessary for a democracy to survive, and thus entails solicitude not only for communication itself, but also for the indispensable conditions of meaningful communication.”

With this theory, “Brennan supplied a principle more readily identified with the purposes of the first amendment: retention by the people of meaningful control over the workings of government.”

In this way, *Globe Newspaper* is consistent with the Court’s defining First Amendment precedent *New York Times v. Sullivan*, while *Houchins* is not. In *Sullivan*, which Brennan also authored, the Court recognized that the First Amendment had a “central meaning,” namely, it protected the public discussion necessary for effective self-governance. Or, in the words of Madison, “In every state, probably, in the Union, the press has exerted a freedom in canvassing the merits and measures of public men, of every description.” As Harry Kalven explained shortly after that decision came down in 1964: “The choice of language was unusually apt. The Amendment has a ‘central meaning’—a core of protection of speech without which democracy cannot function, without which, in Madison’s phrase, ‘the censorial power’ would be in the Government over the people and not ‘in the people over the government.’”

The access right as conceived by Brennan in *Richmond Newspapers* and then in *Globe Newspaper* is, perhaps

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897. *Id.* at 270; *see also* Cox Broad. Corp. v. Cohn, 420 U.S. 469, 492 (1975) (“Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally.”).

unsurprisingly, a perfect complement to this “central meaning.” It was also a long time coming. In fact, in 1979, before Brennan ever drafted his opinion in Richmond Newspapers or the opinion for the Court in Globe Newspaper, he gave a speech at Rutgers Law School that foreshadowed how republican principles laid down in Sullivan might inform a First Amendment right of access.

In that speech, Brennan pointed the audience’s attention to recent “decisions of the Court circumscribing the protections the First Amendment.”899 Brennan blamed criticism of these cases on “the confusion of two distinct models of the role of the press in our society that claim the protection of the First Amendment.”900 One was the speech model, which stated that “the primary purpose of the First Amendment is more or less absolutely to prohibit any interference with freedom of expression.”901 The other was the structural model, which “is that the First Amendment protects the structure of communications necessary for the existence of our democracy.”902 While the first was absolutist in its application, its scope was limited, protecting only speech. The second, however, had “several important implications” because it “significantly extend[ed] the umbrella of the press’ constitutional protections” beyond speech.903 As Brennan explained, “The press is not only shielded when it speaks out, but when it performs all the myriad tasks necessary for it to gather and disseminate the news.”904

While not strictly a First Amendment case, Gannett Co., Inc. v. DePasquale, Brennan said, was “at its heart” an

900. Id.
901. Id. at 176.
902. Id.
903. Id. at 177.
904. Id.
“interpretation of the kind of government we have set for ourselves in our Constitution.” As Brennan explained, the ultimate question in such cases was “whether that government will be visible to the people, who are its authors.” The Court held that “judges, as officers of that government, may in certain circumstances remove themselves from public view.” This was foreign to Brennan: “I believe that the Framers did not conceive such a government, and that they had in mind the truth precisely captured several generations later by Lord Acton: ‘Everything secret degenerates, even the administration of justice.’ It was precisely this kind of structural argument—“I believe that the First Amendment . . . fosters the values of democratic self-government”—that animated Brennan’s opinions in *Sullivan* and later his opinion for the Court in *Globe Newspaper*.

The *Houchins* plurality represented an adherence to speech model. It recognized that the First Amendment provided protections for speech but no protection for the preconditions of meaningful speech. Protections for such

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905. Id.
906. Id. at 182.
907. Id.
908. Id.
909. The *Richmond Newspapers* line of cases is also consistent with the Court’s right to receive case law. The Court has recognized that “the Constitution protects the right to receive information and ideas.” Stanley v. Georgia, 394 U.S. 557, 564 (1969); see also Martin v. City of Struthers, 319 U.S. 141, 143 (1943) (“freedom of speech and press . . . necessarily protects the right to receive it.”). In *Pell v. Procunier*, the Court observed that the same freedom from prior restraints embodied in the First Amendment “[c]orrelatively, . . . protect[s] the right of the public to receive such information and ideas as are published.” 417 U.S. 817, 832 (1974). The *Richmond Newspapers* line of cases provide “powerful support for the Court’s decisions articulating a first amendment right to receive information independent of speech rights held by those who seek to convey it.” Public Right of Access to Criminal Trials: Richmond Newspapers, Inc. v. Virginia, 94 HARV. L. REV. 149, 155 (1980).

910. See, e.g., Houchins v. KQED, Inc., 438 U.S. 1, 9–10 (1978) (plurality opinion) (distinguishing *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936), on the grounds that they dealt with “the freedom of the media to communicate
preconditions, it explained, must come from the political process, not the Constitution.\textsuperscript{911} As such, the rationale for the \textit{Houchins} plurality’s opinion expressly disclaims a republican or structural theory of the First Amendment: “There is no discernible basis for a constitutional duty to disclose, or for standards governing disclosure of or access to information.”\textsuperscript{912} In so concluding, \textit{Houchins} placed itself at odds with the First Amendment theory adopted by the Court in \textit{Sullivan} and quickly came to be at odds with \textit{Globe Newspaper}.

\textbf{4. Globe Newspaper Addresses the Concerns of the \textit{Houchins} Plurality}

\textit{Globe Newspaper} also addresses the concerns of the \textit{Houchins} plurality. According to the plurality, one reason against recognizing a right of access was that there were “few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow.”\textsuperscript{913} Another was that there was “no discernable basis . . . for standards governing disclosure of or access to information.”\textsuperscript{914} These had long concerned the Court. The \textit{Houchins} plurality relied on language of the Court in \textit{Zemel v. Rusk}, where the issue was whether the Secretary of State could refuse to issue passports to travel to Cuba, to make its point.\textsuperscript{915} As the Court explained in \textit{Zemel}, “the prohibition of unauthorized entry into the White House diminishes the citizen’s opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right.”\textsuperscript{916}

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\textsuperscript{911.} \textit{Id.} at 13–15.
\textsuperscript{912.} \textit{Id.} at 14.
\textsuperscript{913.} \textit{Id.} at 12.
\textsuperscript{914.} \textit{Id.}
\textsuperscript{915.} 381 U.S. 1, 3 (1965).
\textsuperscript{916.} \textit{Id.} at 16–17.
\end{footnotesize}
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Neither *Houchins* nor *Zemel* were mistaken in their concern over the potential reach of a First Amendment right of access. Brennan too recognized the “theoretically endless” right of access under a republican theory of the First Amendment.\(^917\) Again, an analogy to *Sullivan* is useful: born of the same theory, it too was questioned for its potentially limitless application, reaching beyond public officials to matters of public concern generally, swallowing most all of the common law of defamation.\(^918\) As Harry Kalven wrote, summarizing the logic of the Court’s ruling that increased the burdens on public officials bringing defamation lawsuits to protect democratic debate, “[t]he invitation to follow a dialectic progression from public official to government policy to public policy to matters in the public domain, like art, seems to me to be overwhelming.”\(^919\) Similarly, the dialectic progression of the *Richmond Newspapers* line of cases is overwhelming—from criminal trial to civil trials to government proceedings and information generally as some courts have held.

One can question whether there is anything necessarily problematic about this. But nevertheless, while the reach of the theory is broad it is constrained by the two-part test of history and logic.\(^920\) These “two helpful principles,” as Brennan called them, prevent, as the *Houchins* plurality feared, an ever-expanding right of access.\(^921\) Second, the right of access recognized in the *Richmond Newspapers* line of cases does not deal in absolutes. Even if it applies, it is still qualified and may be overcome by countervailing interests: “Where . . . the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it

\(^{917}\) Brennan, *supra* note 899, at 177.


\(^{919}\) Kalven, *supra* note 898, at 221.


must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.”922 These limitations cabin the implications of recognizing a generally applicable access right, and, in doing so, address the concerns of the *Houchins* plurality.923

D. *The Practical Effect of Houchins is Anti-Democratic*

While the prior discussions have focused on the facts of *Houchins*, the precedential weight of that opinion, and that opinion in light of subsequent case law, this Section takes a different approach. Rather than ask whether *Houchins* does matter, it asks whether *Houchins* should matter. It concludes that it should not. First, the *Houchins dicta* is wildly undemocratic. It permits the government to conceal wrongdoing and misconduct, and gives the public no recourse—except, potentially, political solutions. But, of course, if the public does not know about such misconduct, the availability of political solutions does nothing. Case law proves up these concerns as some have recently attempted the intellectually impossible: honoring *Houchins* while avoiding its anti-democratic results.

1. *Houchins* is Remarkably Anti-Democratic

In July 2020, as Black Lives Matter protests in Portland, Oregon stretched into their third month, federal officers descended on the city. One night dozens of those officers deployed from the federal courthouse, blanketed the streets with tear gas, and started pushing out into the streets.924 As


923. See, e.g., Detroit Free Press v. Ashcroft, 303 F.3d 681, 695 (6th Cir. 2002) (“The *Richmond Newspapers*’ two-part ‘experience and logic’ test sufficiently addresses all of the *Houchins* Court’s concerns for the implications of a constitutionally mandated general right of access to government information.”).

they pressed forward, they fired “flash grenades and welt-inducing marble-size balls filled with caustic chemicals.”

Then they “moved down Main Street and continued up the hill, where one of the agents announced over a loudspeaker: ‘This is an unlawful assembly.’” By late July, sixty protesters were arrested. Federal agents shot journalists with “less than lethal” projectiles, others teargassed them, and another hit a journalist over the head. Debates over the lawfulness of this conduct raged.

That summer, several journalists and legal observers sued. They sought to stop the assaults on “neutral who [were] documenting the police’s violent response to protests over the murder of George Floyd.” The assaults, they alleged, were especially invidious as they were intended to “intimidate the press and suppress reporting on the police’s own misconduct,” which offended “fundamental constitutional protections” and struck “at the core of our democracy.” They asserted claims for violations of the First and Fourth Amendments and the Oregon Constitution. As to their First Amendment claim, they argued the journalists’ presence on the streets for newsgathering constituted “constitutionally protected acts of speech and expressive conduct” and that law enforcement had “retaliated against” them for that activity by targeting

courts.html.

925. Id.
926. Id.
927. Id.
929. See generally id.
931. Id.
932. See id. at 45, 47, 48.
them “for arrests, threats of arrests, and use of force.”

At a hearing on the plaintiffs’ motion for a temporary restraining order that month, the government disagreed. True enough, it said, there was no dispute “that the press and public have the right to exercise their First Amendment right to public spaces.” But, it argued, “[T]here can be no dispute that the Government can disperse demonstrations that have become violent or obstructive.” It added, “The Supreme Court has emphasized that the media have no special rights of access above and beyond the public . . . . If the public can be excluded from these violent areas to preserve public safety consistent with the First Amendment, then the media . . . can be as well.”

Nevertheless, the district court granted the plaintiffs’ motion for a temporary restraining order. Because the First Amendment retaliation claim was based on the plaintiffs exercising their alleged constitutional right of access to streets and sidewalks, the court first dealt with whether the access right existed. Contrary to the government’s arguments that the Richmond Newspapers line of cases applied only to judicial proceedings, the court found the access right extended to the government’s execution of a dispersal on public streets. Applying the history-and-logic test, it wrote, “The public streets, sidewalks, and parks historically have been open to the press and general public, and public observation of law enforcement activities in these public fora plays a significant positive role in ensuring conduct remains consistent with the
The court entered a preliminary injunction, adhering to this reasoning. The federal government appealed, but the Ninth Circuit affirmed. It began by observing that “the Supreme Court articulated a two-part test to determine whether a member of the public has a First Amendment right to access a particular place and process.” Rejecting the idea that the Richmond Newspapers line of cases did not apply, it found, invoking Burger’s public fora analysis, “that the place—Portland’s streets and sidewalks—and the process—public protests and law enforcement’s response to them—have historically been open to the public.” Nor, the panel observed, did the government “deny that public access plays a significant positive role in the functioning of our democracy,” because “the press has long been understood to play a vitally important role in holding the government accountable.” True enough, it admitted, the Richmond Newspapers line of cases involved “access to criminal judicial proceedings,” but “by its terms the test is not limited to any particular type of plaintiff or any particular type of forum.” Thus, it and other courts had applied that “analytical framework to other settings, including planning commission meetings, student disciplinary records, state environmental agency records, settlement records, transcripts of state utility commission meetings, resumes of candidates for school superintendents, and legislator’s telephone records, among others.”

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939. Id. at 1124.
941. Index Newspapers L.L.C. v. U.S. Marshals Serv., 977 F.3d 817, 829 (9th Cir. 2020).
942. Id. at 830.
943. Id. at 830–31.
944. Id. at 830 n.8.
945. Id.
While the Ninth Circuit’s approach vindicates democratic self-governance by enforcing a right of access for journalists to witness government conduct against the public, an overreliance on *Houchins* frustrates self-governance. For example, during the summer of 2019, an influx of migrants at the southern border resulted in a humanitarian crisis in Texas. Chain-link cages were constructed; some were standing room only; there was a constant “stench” and outbreaks “of scabies, shingles and chickenpox”; “children cried constantly.”\(^{946}\) Many of these stories, especially early on were based on secondhand accounts because the government barred press access to the detention centers. As a reporter explained, “The blackout on press access has left Americans largely in the dark about conditions in government facilities designed to handle migrants who have crossed the border. Photographs and TV images are rare and often dated. Rarer still are interviews with federal agency managers and employees or with the children.”\(^{947}\)

The blackout was never challenged in court—for good reason. Had it been, the Fifth Circuit would have almost certainly dismissed it. That court has taken the view that *Houchins* supplies the general rule. It has distinguished between judicial proceedings to which a right of access exists under *Richmond Newspapers* and other “government information or sources of information within the government’s control” to which no such right exists—like

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947. Farhi, supra note 946.
detention centers.\footnote{Sullo & Bobbitt, P.L.L.C. v. Milner, 765 F.3d 388, 392 (5th Cir. 2014) (internal quotation marks and citation omitted).} As one commentator explained in the somewhat analogous context of prison access, “[T]he unfriendly trio of Pell, Saxbe, and Houchins is the controlling First Amendment authority that we apply today, making prisons inaccessible to many journalists.”\footnote{Jonathan Peters, For Journalists Covering Prisons, the First Amendment Is Little Help, COLUM. JOURNALISM REV. (July 3, 2018), https://www.cjr.org/united_states_project/first-amendment-reporters-jail.php.} As a result, news organizations were left to beg, barter, and plead for access to the detention centers to inform the public about the humanitarian crisis inside.\footnote{See Farhi, supra note 946.}

If the Fifth Circuit’s approach were applied to the \textit{Index Newspapers} case, the journalists would have had no First Amendment claim. Under \textit{Houchins}, there would be no constitutional right of access to public streets. As a result, despite allegations of misconduct on the streets of Portland, including the literal abduction of individuals under the cover of darkness, the press could be summarily excluded.\footnote{See Shawn Boburg, Meg Kelly & Joyce Sohyun Lee, Swept Up in the Federal Response to Portland Protests: I Didn’t Know if I Was Going to Be Seen Again’, WASH. POST (Sept. 10, 2020), https://www.adn.com/nation-world/2020/09/10/swept-up-in-the-federal-response-to-portland-protests-i-didnt-know-if-i-was-going-to-be-seen-again/.} And, there would be nothing that the Constitution—or the courts—could say about it. But as the district court judge in \textit{Index Newspapers} put it, stating what is perhaps obvious, “When the government announces it is excluding the press for reasons such as administrative convenience, preservation of evidence, or protection of reporters’ safety, its real motive may be to prevent the gathering of information about government abuses or incompetence.”\footnote{Index Newspapers L.L.C. v. City of Portland, 474 F. Supp. 3d 1113, 1123 (D. Or. 2020) (citation omitted).}

\textit{Houchins}, carried to its logical extreme, allows even gross misconduct or unlawful conduct to continue—whether
under darkness or behind tall walls—out of the sight of the public. Under a boundless reading of *Houchins*, the role of the First Amendment as “a part of the working of the national government; . . . a part of the flow of communication which is its lifeblood” is simply irrelevant. It provides no outlet for courts to remedy denials of access based not on colorable claims of a need for confidentiality but simply to conceal misconduct. To borrow a phrase, an unbridled reading of *Houchins* does not chill the process of accountability, it freezes it. So while *Richmond Newspapers*’ critics have argued that *Richmond Newspapers* is difficult to constrain in theory, *Houchins* is too.

*Richmond Newspapers* recognizes that “[i]f a government agency restricts public access, the media’s only recourse is the court system,” that “[t]he free press is the guardian of the public interest, and the independent judiciary is the guardian of the free press.” As such, courts “have a duty to conduct a thorough and searching review of any attempt to restrict public access.” This approach makes good sense because it is impossible for the public to know what is hidden. It also shows why the *Houchins* plurality’s appeal to political fixes is far from perfect: the public cannot exercise its political power to correct abuses unknown to it. Brennan recognized as much in *Richmond Newspapers* where he pointed to Footnote 4 of *United States*

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954. See Alexander M. Bickel, *The Morality of Consent* 61 (1977); see also Gannett Co. v. DePasquale, 55 A.D.2d 107, 112–13 (N.Y. App. Div. 1976) (“The record shows that the closure order under review was entered specifically to prevent petitioner from disseminating the inherently prejudicial disclosures that inevitably follow from a Huntley hearing . . . . In this respect the order constituted a prior restraint on petitioner’s freedom to publish what transpired during the Huntley hearing.”).

955. Leigh v. Salazar, 677 F.3d 892, 900 (9th Cir. 2012).

956. Id.

2. Workarounds to *Houchins* are Unconvincing and Ineffectual

*Houchins* is further undercut by the splintered development of access jurisprudence in those courts of appeals that have adopted as controlling *Houchins’* rule that no constitutional right of access exists. Indeed, even in these circuits, panels have been forced to develop workarounds in some access cases to avoid *Houchins’* more obvious antidemocratic tendencies. The need for such workarounds in the first place, of course, suggests that *Houchins’* absolutist rule is unworkable in practice. At any rate, the reasoning behind these workarounds is unconvincing at best and, as a practical matter, the workarounds themselves are ineffectual.

The Fourth Circuit’s ruling in *Fusaro v. Cogan* is the best example of such a workaround. In *Fusaro*, the plaintiff, a Virginia resident, challenged a portion of Maryland’s election law that prohibited anyone but registered Maryland voters from accessing a list of registered voters in the state.\textsuperscript{959} It also limited the use of the list to the electoral process.\textsuperscript{960} The panel in *Fusaro* found that *Houchins* controlled—not *Richmond Newspapers*, which it said provided only a “limited exception” to *Houchins*.\textsuperscript{961} On its face, therefore “Fusaro’s request for a copy of the List falls under the general rule of *Houchins*.”\textsuperscript{962}

But the panel did not stop there. Instead, it went on to

\textsuperscript{958.} *Id.*

\textsuperscript{959.} See *Fusaro v. Cogan*, 930 F.3d 241, 244 (4th Cir. 2019).

\textsuperscript{960.} See *id.*

\textsuperscript{961.} See *id.* at 250.

\textsuperscript{962.} *Id.*
explain “three important considerations” relating to the law that “implicates interests that are protected by the First Amendment” that may, despite Houchins, require Maryland to provide access to the list.963 First, it found that the voter list was “closely tied to political speech, which generally receives the strongest First Amendment protection.”964 Unlike in Houchins and United Reporting, where the information sought related to prisons and arrest records, the voter list had a “direct relationship to political speech” and “an explicit connection to the electoral process.”965 That the list was “sufficiently intertwined with political speech” meant that laws “concerning its distribution are not immune to constitutional scrutiny.”966

Second, the law was both content-based and speaker-based because it limited the use of the list for the “electoral process” and also limited the distribution of the list to Maryland voters.967 “[S]uch restrictions,” the panel said, “are typically subject to heightened scrutiny.”968 The court admitted that it knew of no case where such restrictions were found to be onerous enough to “overcome the general principle that there is no First Amendment right to such information,” but “neither the Supreme Court in Houchins nor any appellate court applying that decision has been faced with a situation where the government provided information only to a discrete group for limited purposes, let alone in an overtly political context.”969

Finally, it found that “Supreme Court precedent indicates that suspect conditions on access to government

963. Id.
964. Id.
965. Id. at 251.
966. Id. at 252.
967. See id. at 252–53.
968. Id. at 250.
969. Id. at 253.
information may be subject to First Amendment scrutiny.”  

Relying on the concurring and dissenting opinions in United Reporting, the panel explained that “eight justices in United Reporting ‘recognized that restrictions on the disclosure of government-held information can facilitate or burden the expression of potential recipients and so transgress the First Amendment.’” Thus, “a First Amendment claim that challenges suspect conditions on access to government information must be available.” As such, the court found that the plaintiff had stated a First Amendment right of access claim: “We conclude . . . that the List is a means of political communication, and the combined effect of the content- and speaker-based restrictions contained in [the law] present a sufficient risk of improper government interference with protected speech that Fusaro may challenge [the law] in federal court.”

Perhaps uncomfortable with its conclusion in light of its contrary conclusion that Houchins controlled, the panel emphasized that it was not ruling that “a First Amendment right to government information exists as a general proposition.” It adhered to Houchins on that point and added that “granting access to such information is a decision for the political branches.” As the Court had explained in United Reporting, the panel said, Maryland “could have decided not to release its voter registration list ‘without violating the First Amendment.’” Yet, since Maryland chose to release the information, “it could not condition access to the List on any basis whatsoever.”

970. Id. at 250.
971. Id. at 254 (quoting Sorrell v. IMS Health Inc., 564 U.S. 552, 569 (2011)).
972. Id. at 255.
973. Id. at 256.
974. Id. at 255.
975. Id.
976. Id. (citation omitted).
977. Id.
Fusaro is not the only example of courts attempting to limit the anti-democratic effects of Houchins. In Boardman v. Inslee, the Ninth Circuit confronted a Washington law that prohibited “public access to certain government-controlled information, including the personal information of in-home care providers.”

Prior to the enactment of the law, various unions had used the Washington Public Records Act to obtain contact information for the in-home care providers for union organizing efforts. The new law included exceptions that allowed unions to continue to obtain the information after its adoption. Opponents of the unions thereafter requested in-home care provider information for anti-union campaigning and were denied. They then filed suit.

Ruling in favor of the plaintiffs, the Ninth Circuit, contrary to its prior precedents, asserted that “Houchins first announced the well-settled principle that the First Amendment does not guarantee a general ‘right of access to government information or sources of information within the government’s control.’” Following the same trajectory as the Fusaro panel, it explained that the plaintiffs acknowledged “as they must” that they had no First Amendment right of access to the in-home care provider data. Still, the various concurring and dissenting opinions in United Reporting “illustrate the limited scope of

978. Boardman v. Inslee, 978 F.3d 1092, 1098 (9th Cir. 2020).
979. See id. at 1100.
980. See id. at 1102.
981. See id.
982. Id. at 1104 (citation omitted). In a footnote, the panel added that when it came to judicial proceedings, the Ninth Circuit had applied the Richmond Newspapers rule. See id. at 1104 n.6. But that same month the Ninth Circuit, consistent with its long history of applying that test outside of the judicial context, applied Richmond Newspapers to public streets. See Index Newspapers L.L.C. v. U.S. Marshals Serv., 977 F.3d 817 (9th Cir. 2020). At any rate, the appellants in Boardman had abandoned their argument under Richmond Newspapers, and the panel’s discussion of Richmond Newspapers, in that case, is dicta.
983. Boardman, 978 F.3d at 1105.
Houchins." As the panel put it, “Although the decision whether to disclose government-controlled information ‘at all’ is well within the prerogatives of the political branches, when the government selectively discloses information within its control, a First Amendment claim will lie if the government denies access to information ‘based on an illegitimate criterion such as viewpoint.’”

There is reason to question these approaches. First, while purporting to find Houchins controlling, they are contrary to it and thus are unpersuasive on their own terms. For example, Fusaro emphasized the importance of the information as a reason supporting access. But the Houchins plurality disclaimed that the “public importance” of the information affected the analysis: “The public importance of conditions in penal facilities and the media’s role of providing information afford no basis for reading into the Constitution a right of the public or the media to enter these institutions.” Fusaro also emphasized that the information lied close to political speech unlike in Houchins. But the Houchins plurality recognized that the information sought in that case had political valence: it was “true that with greater information, the public can more intelligently form opinions about prison conditions.” These attributes were not thus exclusive to Fusaro; they were present in Houchins itself.

Second, these decisions are unpersuasive insofar as they treat the Houchins plurality and a collection of concurring

984. Id. at 1107; see also Lanphere & Urbaniak v. Colorado, 21 F.3d 1508 (10th Cir. 1994) (law denying access to information to commercial speakers implicated First Amendment).
985. Boardman, 978 F.3d at 1107 (citations omitted); see also id. (“As in other areas where the legislature enjoys broad discretion in deciding whether and how to confer a benefit or subsidy, the government is not insulated from First Amendment scrutiny when it discriminates invidiously in the provision of government-controlled information.”).
987. Id. at 8.
and dissenting opinions in *United Reporting* to the exclusion of the majority position in *Globe Newspaper*. What is worse, they do so despite subsequent Supreme Court precedent making clear that *United Reporting* is “a case about the availability of facial challenges,” not “the merits of any First Amendment claim.” Thus, not only is *Houchins* elevated to precedential status, but so too is dicta from *United Reporting*’s lead opinion and, also, the concurring and dissenting opinions in that case. Meanwhile, the *Globe Newspaper* majority’s two-part history-and-logic test is cast aside.

Frustratingly, as well, there is nothing in these opinions that the *Richmond Newspapers* line of cases cannot address. In fact, the Ninth Circuit has applied the history-and-logic test to voter lists like that at issue in *Fusaro*. In *Cal-Almond, Inc. v. U.S. Department of Agriculture*, the question was whether a company involved in the almond business had a First Amendment right of access to a list of almond growers eligible to vote in a referendum on a long-standing marketing order issued by the Department of Agriculture. First, it dealt with the government’s misplaced reliance on *Houchins*. True, the court explained, *Houchins* recognized “that there is no general right of access to government information.” But, it added, “the line of cases from *Richmond Newspapers* to *Press-Enterprise II* recognizes that there is a limited constitutional right to some government information.” It then suggested for remand that the two-part test to determine whether the voter lists were subject to the access right would be satisfied.

There is also something unsettling about the conclusions

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989. *See* 960 F.2d 105, 106–07 (9th Cir. 1992).
990. *See id.* at 109 n.2.
991. *Id.*
992. *Id.*
993. *Id.* at 109–10.
in cases attempting to end-run *Houchins* absolutist *dicta*. Both seem to recognize that there would be no issue in simply refusing all access to the information sought. Yet, at the same time, *Fusaro* spills much ink explaining how the information at issue in that case “is a valuable tool for political speech” and how “circulation of political ideas typically receives ‘the broadest protection’ afforded by the First Amendment.”994 This kind of information, the court belabors, has a “direct relationship to political speech.”995 There is thus some friction between the idea that the government could simply lock information away altogether and the idea that such information is an extremely valuable tool for political speech and thus be disclosed on equal terms. Certainly, there may well be cases where the content-based and speaker-based restrictions on access to information will be the lynchpin of the analysis. Perhaps, for example, the in-home care provider information in *Boardman* does not pass the two-part test adopted in *Globe Newspaper*. In that case, *Globe Newspaper* would not require access as a constitutional matter. But, perhaps, the plaintiff would still have an argument that the distinctions made in providing access are themselves unconstitutional. But to begin from the premise that there is simply no right of access at all is not only inconsistent with the Court’s access jurisprudence it risks that, in response to such claims of access, governments will in the future simply deny access altogether. That approach under *Houchins* would be entirely proper—but as a matter of republican principles imprudent.

**CONCLUSION**

In the aftermath of the Court’s decision in *Gannett*, *TIME* noted that the confusion surrounding it stemmed from the

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995. *Id.*
Court’s broad dicta.\textsuperscript{996} It observed, “after a time, the precise limits on a high court decision have a way of getting obscured, especially if lower court judges or indeed high court Justices seize on sweeping statements in the majority opinion.” And so is the story of \textit{Houchins}. Its precise limits have become obscured. Lower courts and Justices have seized on the simplistic beauty of its sweeping language. It has overtaken the Court’s own contrary opinions.

This Article began by asking, \textit{Does Houchins matter?} That question was easy to answer: \textit{Yes}. It provides the prevailing rule in half of the federal appellate courts. The question that this Article ended up answering is a different one: \textit{Should} Houchins \textit{matter}? That question was more difficult to answer but just as clear: \textit{No}. As this Article has demonstrated, \textit{Houchins’} premises were extremely narrow. \textit{Houchins} lacks precedential weight standing alone and, especially, in the context of the access jurisprudence that came after it. And, above all, it is highly anti-democratic as it frustrates meaningful public debate and interferes with democratic self-governance. Alone, each is a reason to question \textit{Houchins’} continuing vitality. Together, they are definitive: \textit{Houchins} must not matter.

\textsuperscript{996} See \textit{Law: Confusion in the Courts}, supra note 321.