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Keynote Address: The Right to Scrutinize Government: Toward a First Amendment Theory of Accountability*

ANTHONY LEWIS**

The speaker eschews the view that the press enjoys a "preferred position" under the first amendment and aligns his beliefs with the view of Alexander Meiklejohn—an informed public is necessary for the success of a self-governing democracy. Mr. Lewis analyzes case law and concludes that the Court should cautiously "develop the principle of public accountability as a fundamental premise of the first amendment," guaranteeing a limited right of acquiring information to scrutinize government.

"[I]nformed public opinion is the most potent of all restraints upon misgovernment" ¹ So wrote Mr. Justice Sutherland in 1936. He is not a liberal hero among the Justices of the Supreme Court of the United States, but he surely deserves a modest niche in the reconstructed pantheon for his opinion in *Grosjean v. American Press Co.* ² That was the second of our great legal tests of freedom of the press, decided by the Supreme Court just five years after *Near v. Minnesota*. ³

The issue in the *Grosjean* case was a tax that Huey Long's Louisiana imposed on newspapers: a flat two percent of gross receipts on all journals with a circulation of more than 20,000 a week. The Supreme Court found that the tax violated the free press guarantee of the first amendment, ⁴ as applied to the states by the fourteenth amendment. Of course newspapers are not immune from taxation, Justice Sutherland said; but this tax was reminiscent of the 18th-century English levies on newspapers, which had been resisted in Britain and the American colonies as "taxes on

* This is the text of the keynote address delivered at the Fifth Annual Baron de Hirsch Meyer Lecture Series. A student editor, working in collaboration with Mr. Lewis, subsequently added the footnotes.

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1. *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936).

2. *Id.*

3. 283 U.S. 697 (1931). I note that *Grosjean* was argued on January 14, 1936, and decided on February 10, 1936. How many major constitutional cases are decided these days just 27 days after argument?

4. The first amendment provides that: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." U.S. CONST. amend. I.

knowledge."⁵ Their purpose was to limit "the acquisition of knowledge by the people in respect of their governmental affairs."⁶ And "the aim of the struggle" against them, Justice Sutherland said, was to "preserve the right of the English people to full information in respect of the doings or misdoings of their government."⁷

I begin with what must seem ancient history, the *Grosjean* case, because Justice Sutherland's words provide a framework for discussion of what I think is today the most important and hotly contested issue under the speech and press clauses of the first amendment—the right of the people, as he put it, to acquire knowledge "in respect of their governmental affairs."⁸ It goes by other names now—the right to gather news, the right to know, the right of access to public institutions. But the same essential is involved that Justice Sutherland saw: the need for "an informed . . . public opinion"⁹ to keep governments "in due subjection"¹⁰—that is, to prevent either corruption or autocracy.

"The core of the first amendment" is a phrase much in vogue these days. Lawyers argue that activities are at that core or at varying distances from it, as if the amendment were a giant electromagnet. Whatever the grace of the metaphor, there is no doubt what we have in mind when we use it. The first amendment has been held to protect a wide range of artistic and other expression, but its paramount function, historically and analytically, is to assure the working of democracy by protecting the free exchange of *political* information and ideas.

Professor Meiklejohn put it this way:

Just so far as, at any point, the citizens who are to decide an issue are denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to that issue, just so far the result must be ill-considered, ill-balanced planning for the general good. *It is that mutilation of the thinking process of the community against which the First Amendment to the Constitution is directed.* The principle of the freedom of speech springs from the necessities of the program of self-government.¹¹

5. 297 U.S. at 246.

6. *Id.* at 247.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* (citing 1 T. ERSKINE, SPEECHES OF LORD ERSKINE 525 (High ed. 1876)).

11. A. MEIKLEJOHN, POLITICAL FREEDOM 27 (1965) (emphasis in original).

The early first amendment cases were about freedom to propagate opinions. Justice Holmes in 1919 spoke of "free trade in ideas."¹² That was in the *Abrams* case, which involved the publication of what he called "puny"¹³ leaflets supporting the Bolsheviks in Russia. The theory of our Constitution, Holmes said, is that "the best test of truth is the power of the thought to get itself accepted in the competition of the market."¹⁴ Ten years later, in a case involving the doctrine of pacifism,¹⁵ he spoke of "freedom for the thought that we hate."¹⁶ That constitutional battle, for freedom to argue ideas however extreme or unwelcome, has now been won. I think the end was signified when Justice Powell wrote for the Court in 1974: "Under the First Amendment there is no such thing as a false idea."¹⁷

The issue now is facts, especially facts about the business of government. We see this in the most important contemporary Supreme Court decision on freedom of speech and press, *New York Times Co. v. Sullivan*.¹⁸ Enormous libel damages were imposed on the *Times* and on four black Alabama ministers because some of the facts were wrong in an advertisement, signed by the ministers and published in the *Times*, that criticized southern officials for their racist practices. Justice Brennan said there must be some allowance for factual mistakes in criticism of official conduct, for otherwise "the citizen-critic of government"¹⁹ would be deterred from his "duty."²⁰ The words seem to me to embody the philosophy of Alexander Meiklejohn.²¹

Facts were again the issue, in more sensitive circumstances, in the *Pentagon Papers Case*.²² There the United States tried to stop the *New York Times* from publishing parts of a secret official history of the Vietnam War. Judge Murray I. Gurfein of the District Court for the Southern District of New York denied the Government's request for a preliminary injunction.²³ His view was eventu-

12. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

13. *Id.* at 629.

14. *Id.* at 630.

15. *United States v. Schwimmer*, 279 U.S. 644 (1929).

16. *Id.* at 655 (Holmes, J., dissenting).

17. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974).

18. 376 U.S. 254 (1964).

19. *Id.* at 282.

20. *Id.*

21. See A. MEIKLEJOHN, *supra* note 10.

22. *New York Times Co. v. United States*, 403 U.S. 713 (1971).

23. 328 F. Supp. 324 (1971).

ally vindicated in the Supreme Court,²⁴ but I think no other judge put the reasons for refusing to stop publication as well as he did:

A cantankerous press, an obstinate press, an ubiquitous press must be suffered by those in authority in order to preserve the even greater values of freedom of expression and the right of the people to know. In this case there has been no attempt by the Government at political suppression. There has been no attempt to stifle criticism. Yet in the last analysis it is not merely the opinion of the editorial writer or of the columnist which is protected by the First Amendment. It is the free flow of information so that the public will be informed about the Government and its actions."²⁵

The social reality to which the first amendment must be applied has also changed over the last two generations in a fundamental respect: the size of government and its functions. In 1931, in *Near v. Minnesota*,²⁶ Chief Justice Hughes sought to justify the holding that prior restraints on the press are presumptively invalid under the first amendment by saying that "the administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied . . .,"²⁷ and that showed the need for "a vigilant and courageous press."²⁸ But as we see it from the vantage point of today, American government in 1931 was marginal to the society. Washington was a sleepy southern town, and the Federal Government took little or no responsibility for the economy, employment, health, education, or the environment. Federal spending took just 5.5% of the gross national product.²⁹ Today Federal Government expenditure is 21.5% of G.N.P.,³⁰ and Washington is a bureaucratic colossus that touches just about every person, business, and group interest in this country. State and local government is growing even more rapidly. And so the challenge to the Meiklejohn principle of an informed public controlling the government has become much more formidable. Big government requires more scrutiny by the public to prevent abuse—but its very

24. 403 U.S. 713 (1971).

25. 328 F. Supp. at 331.

26. 283 U.S. 697 (1931).

27. *Id.* at 719.

28. *Id.* at 720.

29. BUREAU OF ECONOMIC ANALYSIS, U.S. DEP'T OF COMMERCE, THE NATIONAL INCOME AND PRODUCT ACCOUNTS OF THE UNITED STATES, 1929-74 (A Supplement to the SURVEY OF CURRENT BUSINESS) (1976).

30. BUREAU OF ECONOMIC ANALYSIS, U.S. DEP'T OF COMMERCE, SURVEY OF CURRENT BUSINESS (Feb. 1980).

size and complexity make that public duty more difficult. As government has grown, it has acquired defenses against scrutiny. Armies of public relations officers now protect nearly all official institutions, with the signal exception, I am happy to say, of the courts. Particular interest groups, from trucking firms to cancer researchers, have cozy relationships with the government bureaucracies that regulate or subsidize them; and the mere public is hard put to understand how it may be affected.

For all these reasons, information about the working of government is a valuable commodity in our society. And the right to acquire that information has become a crucial aspect of first amendment liberty. "[P]ublic debate must not only be unfettered," Justice Powell said in 1974; "it must also be informed."³¹ But he said it in dissent. The Supreme Court has often stated that the right to receive information is included in the first amendment along with the right of free expression. Indeed, the first federal statute ever found by the Court to violate the first amendment was one that inhibited the receipt of information.³² In *Lamont v. Postmaster General*,³³ the Court struck down a law that obstructed the right of citizens to receive through the mails from abroad what postal officials determined to be "Communist political propaganda." A Virginia law prohibiting the advertising of drug prices was similarly held unconstitutional because the statute kept the public "in ignorance" of what it was entitled to know.³⁴

But in other cases, dictum notwithstanding, the Supreme Court has denied claims of a right to acquire information under the first amendment. The Court rejected a suit seeking a passport valid for travel to Cuba, contrary to the State Department restrictions of the day, so that a citizen could inform himself of conditions there.³⁵ It rejected the claim, strongly pressed by journalists, that they had a right to gather news and a corollary privilege not to testify before a grand jury when to do so might compromise their confidential sources.³⁶ It rejected a claim that newsrooms should be exempt from unannounced police searches—searches

31. *Saxbe v. Washington Post Co.*, 417 U.S. 843, 862-63 (1974) (Powell, J., dissenting).

32. The provision in question was the Postal Service and Federal Employees Salary Act of 1962, Pub. L. No. 87-793, § 305 (a), 76 Stat. 840 (1962).

33. 381 U.S. 301 (1965).

34. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

35. *Zemel v. Rusk*, 381 U.S. 1 (1965).

36. *Branzburg v. Hayes*, 408 U.S. 665 (1972).

that might disclose the names of sources.³⁷ It rejected arguments that members of the press were constitutionally entitled to access to prisons, under reasonable regulations, so that they could look into conditions there.³⁸ And finally, last Term, it upheld against both sixth and first amendment objections the closing of a pretrial hearing in a criminal case to both press and public.³⁹ That was the *Gannett* case, the most important in this series of decisions, I think—and the one most likely to lead the Court, in the end, to a more sensitive view of what I would call the right to scrutinize government.⁴⁰

There *are* difficulties in framing a general theory of a right to acquire official information. More of those later. But I think there were particular problems in the cases I have mentioned—distorting factors in the way both the parties and the Court approached the issues. Analysis of those factors may help explain why the Court has been so slow to vindicate the right to scrutinize.

First, the parties—and they were usually from the press—paid scant respect to other interests in making their claims for information. The Court was understandably reluctant to recognize claims so nearly absolute that they would tend simply to override competing values. Thus in the reporters' privilege case, *Branzburg v. Hayes*,⁴¹ Justice White said for the majority that "news gathering is not without its First Amendment protections."⁴² To that reluctant generality he added in dictum specific suggestions that the Court would not countenance exposure of journalists' sources for the sake of exposure,⁴³ or grand jury subpoenas for the purpose of harassing the press.⁴⁴ But he declined to create a journalists' privilege because it would damage other important interests. The inter-

37. *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978).

38. *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974); *Pell v. Procunier*, 417 U.S. 817 (1974).

39. *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979).

40. A postscript: Some months after this talk, with its expressed hope that reflection on *Gannett* would lead the Supreme Court to take a more sensitive view of the right to scrutinize government, the Court did just that. In *Richmond Newspapers, Inc. v. Virginia*, 100 S. Ct. 2814 (1980), a 7-to-1 majority held that the first amendment gives the public a right of access to criminal trials. This article has not been revised to take retrospective account of the decision. Suffice it to say that *Richmond Newspapers* at least opens the possibility of developing a general right of access to official institutions and information, defined in terms of the need for accountability.

41. 408 U.S. 665 (1972).

42. *Id.* at 707.

43. *Id.* at 699-700.

44. *Id.* at 707-08.

est involved in that case was law enforcement, through the ancient device of a grand jury entitled to every man's evidence.⁴⁵ Justice White also mentioned the necessary privacy of some official proceedings, such as the conferences of the Supreme Court itself, from which he said the press was regularly excluded despite the loss to news-gathering.⁴⁶ Still another interest that might well be sacrificed on occasion, if a reporter's privilege were read broadly into the first amendment, is fair trial. That was the problem in the *Farber* case,⁴⁷ when a reporter wrote stories about unexplained hospital deaths years before, suggesting that a doctor had poisoned the patients. When the doctor was prosecuted for murder, he sought all of the reporter's notes, and the New Jersey Supreme Court said he was entitled to them.⁴⁸ His demand seems to me to have been too sweeping, but a defendant on trial for his life surely does have a strong interest—rooted in the sixth amendment⁴⁹—in seeing notes that may disclose prior inconsistent statements by prosecution witnesses or other exculpatory matter. So long as claims of a "right to gather news" seem to the courts to be of an exclusivist character that threatens other important values, I doubt that most judges will be hospitable to them.

Second, the press in my view made a serious mistake in seeming to claim a special status under the first amendment—a preferred position—giving journalists rights that are not available to others. Justice Stewart took that position six years ago in a notable speech at the Yale Law School,⁵⁰ saying that the press clause of the first amendment was "a structural provision"⁵¹ protecting a particular institution, the "established news media."⁵² I have explained at some length elsewhere why I find Justice Stewart's thesis unconvincing.⁵³ It is enough to say briefly now why I think the press does itself injury when it adopts Justice Stewart's proposition as its own.

There is, to begin with, no historical basis for the Stewart

45. *Id.* at 688.

46. *Id.* at 684. He might have to qualify that statement now. See B. WOODWARD & S. ARMSTRONG, *THE BRETHREN* (1979). But see Lewis, *Supreme Court Confidential*, New York Review of Books, Feb. 7, 1980, at 3; *id.*, June 12, 1980, at 47.

47. *In re Farber*, 78 N.J. 259, 394 A.2d 330, cert. denied, 439 U.S. 997 (1978).

48. *Id.* at 281, 394 A.2d at 341 (after in camera inspection by the court).

49. U.S. CONST. amend. VI.

50. Address by Justice Stewart, Yale Law School (Nov. 2, 1974), reprinted in Stewart, "Or of the Press," 26 HASTINGS L.J. 631 (1975).

51. *Id.* at 633 (emphasis in original).

52. *Id.* at 631.

53. See Lewis, *A Preferred Position for Journalism?* 7 HOFSTRA L. REV. 595 (1979).

thesis. The long English struggle over licensing of the press and seditious libel involved not only newspapers but books and pamphlets.⁵⁴ The framers of the first amendment, with this English history in mind, gave no evidence of intending to confine the protections of the press clause to periodicals, excluding other forms of publication. The natural explanation of the speech and press clauses together is that the framers wanted to protect expression whether in unprinted or in printed form. Nor do the decided cases draw any distinction in the quality of protection given by the amendment to newspapers on the one hand and to books or pamphlets on the other, or in the applicability of special doctrines (such as that disfavoring prior restraints) to the press and to varieties of speech.⁵⁵

The definitional problem would be severe if "the organized press" were to have exalted status; would editors and publishers be happy to have judges deciding who was qualified for that rank? In principle, moreover, it would be quite wrong to give journalists a higher constitutional position than, for example, professors or former Central Intelligence Agency officials, whose writings play a valuable part in informing the country about vital public questions. When the Supreme Court heard argument in *Richmond Newspapers, Inc. v. Virginia*,⁵⁶ a successor case to *Gannett*, Professor Laurence Tribe of the Harvard Law School was arguing for two reporters who were excluded from a Virginia criminal trial when Chief Justice Burger asked whether the case would be any different if a law school professor who wanted to study the criminal process had been excluded from the trial. "Is there any difference," the Chief Justice asked, "in whether a person wants to attend to write something or make a speech about it?"⁵⁷ "None," Mr. Tribe wisely replied, "nor if he just wanted to inform himself as a citizen."⁵⁸

I do not think that the Court as a whole is hospitable to Justice Stewart's suggestion. And there is a further reason of self-in-

54. For example, John Milton, in his famous piece in opposition to the censors, wrote that he sympathized with the conscientious censor who must be "the perpetual reader of unchosen books and pamphlets, oftentimes huge volumes." J. MILTON, *Areopagitica*, in *COMPLETE POEMS AND MAJOR PROSE* 716, 734 (Hughes ed. 1957).

55. See, e.g., *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969) (city parade ordinance so vague that it violates the rule disfavoring prior restraints).

56. 48 U.S.L.W. 3549 (U.S. Feb. 19, 1980) (No. 79-243).

57. Exchange noted by author at oral argument before the Supreme Court of the United States, Feb. 19, 1980.

58. *Id.* See also 48 U.S.L.W. at 3549.

terest for the press to avoid making the claim of special rights for journalists. If the press succeeded in getting special treatment from the courts, would it be as effective in arguing that judges should keep their hands entirely out of editorial decisions—arguing, as Chief Justice Burger said, that editing is what editors are for?⁵⁹ If a newspaper were held to be constitutionally entitled to access to a prison while a prison reform organization were not, might the newspaper not risk greater accountability (in libel, for example) for what it published?⁶⁰ The lure of press exceptionalism should be resisted.

Third, I think the Supreme Court's view of the problem—the problem of acquiring information essential to self-government—has been obscured by old symbols and old rules. Not just the Court but all of us may be so moved by the powerful words of Holmes⁶¹ and Brandeis⁶² that we think about the first amendment as if we were still in the age of soapbox orators or puny pamphleteers. We are not. Of course there still are the occasional eccentrics whose cases make noble doctrine. But in terms of moving public opinion, of exerting real influence on policy, what matters is the tension between Big Government and Big Media. It is not a brief, isolated relationship like that between the streetcorner speaker and the policeman who arrests him. There is a whole network of relationships between powerful government departments and powerful newspapers or magazines or broadcasters, between officials and a sometimes worshipful press, between discontented government insiders and investigative reporters. The relationships are sometimes friendly and sometimes adversary, but always complicated. A clash between the Nixon Administration and an establishment newspaper whose natural respect for office has been eroded by the Vietnam War⁶³ cannot so easily be analogized to a conflict between the county attorney for Hennepin County, Minnesota, and an anti-semitic scandal sheet that published only nine issues.⁶⁴

Sometimes old formulas are pressed to a point where they lose their real meaning. Consider the question of pretrial comment that

59. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 257-58 (1973).

60. See Van Alstyne, *The Hazards to the Press of Claiming a "Preferred Position,"* 28 HASTINGS L.J. 761 (1977).

61. See, e.g., *Abrams v. United States*, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

62. See, e.g., *Whitney v. California*, 274 U.S. 357, 372 (Brandeis, J., concurring).

63. *New York Times Co. v. United States*, 403 U.S. 713 (1971).

64. Those were the facts in *Near v. Minnesota*, 283 U.S. 697 (1931).

may compromise the unbiased character of the jury that is later to decide the defendant's guilt or innocence at trial. In *Nebraska Press Association v. Stuart*⁶⁵ in 1976 the Supreme Court considered circumstances that I would have thought presented an extreme risk of prejudice. In a small town a defendant was charged with horrifying crimes—multiple sexual murders. A local court forbade the press to publish, before the trial, stories about his alleged confession or other material strongly suggesting his guilt. The Supreme Court held unanimously that such an order against the press violated the rule against prior restraints.⁶⁶ In that aggravated situation, newspapers and broadcasters were thus free to circulate the most damaging accounts. But then last Term, in the *Gannett*⁶⁷ case, the Supreme Court stated that a New York judge who was concerned about the remote possibility of prejudice in a case to which the press had paid little attention was constitutionally entitled to close his courtroom entirely when he held a pretrial hearing on a motion to suppress evidence.⁶⁸ Can it make any sense to have a virtually absolute rule allowing the press to publish almost anything it learns about a pending criminal case, however prejudicial, while allowing judges to close criminal courtrooms without any showing of possible prejudice? To me it seems that form has devalued substance.⁶⁹

The facts of the *Gannett* case make clear that what was really at stake was not just the sixth amendment right to public trial, which a majority of the Court found for substantial reasons ran only to the defendant; if he waived it, the general public or press in effect had no standing to protest. The larger interest at stake was what Professor Meiklejohn called "the necessities . . . of self-government."⁷⁰ The suppression hearing in *Gannett* took place in Seneca County, New York, in 1976. In that county and that year not a single felony prosecution went to trial; all were disposed of before

65. 427 U.S. 539 (1976).

66. *Id.*

67. 443 U.S. 368 (1979).

68. *Id.*

69. Compare the British rule, contained in the Criminal Justice Act, 1967, Part 2, § 3, 2 Eliz. Under this Act the press and public may attend committal proceedings—where the magistrates decide whether there is enough prosecution evidence to hold the accused for trial—but no account of the proceedings may be published until after the trial itself. The rule against publication may be waived by any defendant. This system prevents secret judicial proceedings while at the same time avoiding the possibility of prejudicial impact on future proceedings.

70. A. MEIKLEJOHN, *supra* note 10, at 27.

trial.⁷¹ In this country generally the overwhelming proportion of criminal cases are settled by pleas or dismissals before trial.⁷² As Justice Blackmun said in dissent in the *Gannett* case, "The suppression hearing often is the only judicial proceeding of substantial importance that takes place during a criminal prosecution."⁷³ Justice Blackmun said: "Open trials . . . enable the public to scrutinize the performance of police and prosecutors in the conduct of public judicial business. Trials and particularly suppression hearings typically involve questions concerning the propriety of police and government conduct that took place hidden from the public view."⁷⁴

In short, what was really involved in the *Gannett* case was the principle of our system of government that public institutions must be publicly accountable. That is the correct way to look at all these cases, not as if they presented simply claims by a journalist or anyone else to a right of access to particular information. The question in each case is whether the denial of access, the sealing of the public process, effectively prevents accountability.

Openness, one must quickly say, is not the only way to make an institution accountable. The Supreme Court would not be able to function, I think, if its conferences were televised. The Justices could not be free in their exchange of views. But the Court meets the requirement of accountability in full by publishing its judgments and the reasons for them. The prison cases are troubling precisely because there may be no way to hold the managers of those institutions accountable if outsiders are not allowed to inspect them. As Justice Stevens said in dissent: "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."⁷⁵ Again, I hear echoes of Meiklejohn.

I think we are at a point when the Supreme Court can begin,

71. See *Gannett Co. v. DePasquale*, 443 U.S. at 435.

72. See, e.g., material cited in *id.* n.14. (figures for New York State).

73. *Id.* at 434 (Blackmun, J., dissenting).

74. *Id.* at 428.

75. *Houchins v. KQED, Inc.*, 438 U.S. 1, 32 (1978) (Stevens, J., dissenting). See also a speech by Justice Stevens, excerpted in Stevens, *Some Thoughts About a General Rule*, 21 ARIZ. L. REV. 599 (1979). The speech discusses what Justice Stevens called a general rule drawing "a sharp distinction between the dissemination of information or ideas, on the one hand, and the acquisition of newsworthy matter on the other. Whereas the Court has accorded virtually absolute protection to the former, it has never squarely held that the latter is entitled to any constitutional protection whatsoever." *Id.* at 602.

slowly and carefully, to develop the principle of public accountability as a fundamental premise of the first amendment. But if that development is to take place, we can see that some cautions have to be observed. When a claim is made for the minimum access or information needed to scrutinize a public institution—to make it accountable—the claim cannot be an absolute one. Those who advance it should frankly recognize that courts will have to weigh that interest against others: privacy of official deliberation, for example, or law enforcement, or serious risk to fair trial, or prison security. The press, then, will have to forswear claims of exclusive or superior rights. It will have to accept Justice Powell's definition of its role as "an agent of the public at large."⁷⁶ The press, he said, "is the means by which the people receive that free flow of information and ideas essential to intelligent self-government. By enabling the public to assert meaningful control over the political process, the press performs a crucial function in effecting the societal purpose of the First Amendment."⁷⁷

Then the Court itself will have to begin looking at the old problems addressed by the first amendment in light of contemporary cultural reality. It will have to see the process of political expression and information as just that: a process, not a collection of isolated events. The Court will have to understand that an immensely complicated, continuous, changing set of relationships determines, these days, whether the public can effectively scrutinize and criticize its government. The Court will have to recognize, as Professor Owen Fiss of the Yale Law School has said,⁷⁸ that realities require the protection today of something more than what can be defined in the abstract as "speech." A whole network of activities among government officials, professional communicators, and private institutions and groups contributes to the informing of the public. The Court will have to take account of that network if it is to give continuing content to the first amendment's guarantee of political freedom, of democratic control.

It will not be easy. Courts will naturally, and wisely, be wary of creating rights that are difficult to limit. Judges will not want to get into the business of drawing constitutional lines on how much access the public must have to every public function or institution. As Justice Stewart said in his Yale speech, the Constitution is not

76. *Saxbe v. Washington Post Co.*, 417 U.S. 843, 863 (1974) (Powell, J., dissenting).

77. *Id.*

78. Extemporaneous remarks of Professor Owen Fiss at New York University in honor of Justice Brennan, Dec. 1, 1979 recorded by the author.

a Freedom of Information Act.⁷⁹ What we are talking about is a minimum principle—a rock-bottom level of accountability necessary to prevent what the framers of the Constitution, knowing that men are not angels, feared above all: abuse of official power. I think, for example, of a prison in which large numbers of unexplained deaths occurred, from which fearful rumors emanated, but which no outsider was ever allowed to visit—not journalist, or lawyer, or relative. Or I think of the courtroom sealed when there was no substantial showing of risk to fair trial. Such facts would make compelling occasions for a fresh look at the question of public accountability under the first amendment.

Justice Brennan, in a speech at Rutgers,⁸⁰ pointed the way toward that re-examination by the Supreme Court. He suggested that the first amendment, in its protection of free speech and press, deals with two different concepts. There is speech or publication as such, in the classic sense: “the right of self-expression,”⁸¹ “the right to speak out.”⁸² To that the amendment gives very great, nearly absolute protection. But the amendment does more, Justice Brennan said. It “forbids the government from interfering with the communicative processes through which we citizens exercise . . . our rights of self-government Another way of saying this is that the First Amendment protects the structure of communications necessary for the existence of our democracy.”⁸³ In that larger, more complex model, there can be no absolutes—if indeed there ever can, in the real world. The Constitution, with all its concern for the communication needed for self-government, also protects other values—and so must judges. So Justice Brennan gave some polite advice to the press if it wishes to advance the cause of freedom in a complicated democracy: It may have to accept, he said, “a certain loss of innocence, a certain recognition that the press, like other institutions, must accommodate a variety of important social interests.”⁸⁴

The framers of the Constitution knew that the tendency of those who govern is to accumulate power. In the first amendment they sought to vest in the governed the countervailing force of

79. Address by Justice Stewart, *supra* note 50, at 636.

80. Address by Justice Brennan, Rutgers Law School (Oct. 17, 1979), *reprinted in* 32 *RUTGERS L. REV.* 173 (1979).

81. *Id.* at 176.

82. *Id.*

83. *Id.*

84. *Id.* at 181.

information. Governments are much more powerful today than James Madison ever imagined, and we have become much more dependent on them. The public's need for information is correspondingly greater. If the first amendment is to have meaning in today's political society, it must guarantee a basic right to scrutinize government and hold it accountable.