Rough start for a new right: An analysis of Montana's right to know

Brian D. Howell
The University of Montana
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Rough Start
for a
New Right

An Analysis of
Montana's Right to Know

by
Brian D. Howell
B.S. University of Minnesota

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[Signatures]
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Dean, Graduate School

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This thesis examines the right-to-know provision (Article II, Sec. 9) of the Montana Constitution, including its roots in political theory since the 18th century, the drafting of the provision during the state's 1970-71 Constitutional Convention, and how the provision has been considered and interpreted by the Montana Supreme Court since the Constitution was ratified in 1972.

Primary research sources were philosophers and political theorists, beginning with John Locke, who helped develop modern democratic theory; the verbatim transcripts of the Montana Constitutional Convention; numerous U.S. Supreme Court cases that dealt with free speech issues; several law review articles concerning a right of access to government-held information; and most of the Montana Supreme Court cases that involved the right-to-know provision.

This thesis concludes that the right to know remains undeveloped and murky as a doctrine in Montana law, and that the constitutional provision has received only a modicum of support from the state Supreme Court in the two-plus decades since it was ratified. In many cases, the court has found ample reasons to circumvent or even diminish the right to know.

A right to know is not found in most state constitutions or in the U.S. Constitution, but the concept has deep roots in democratic theory. Political theorists as far back as Locke and John Stuart Mill drew parallels between the importance of free speech and value of searching for truth. Modern-day writers and thinkers like John Rawls and Alexander Meiklejohn articulated their own theories about how the free flow of information was essential to a functional democracy. The framers of the Montana Constitution, fearing that expanding governmental power would diminish the role of individuals in public affairs, argued that this constitutional provision would serve as a check on government's abuse of its power.
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Under the compact upon which the Constitution rests, it is agreed that men shall not be governed by others, that they shall govern themselves . . . . The primary purpose of the First Amendment is, then, that all the citizens shall, so far as possible, understand issues which bear upon common life. That is why no idea, no doubt, no belief, no counterbelief, no relevant information, may be kept from them.1

Alexander Meiklejohn

No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.

Art. II, Sec. 9, Montana Constitution

The right to know was a new provision in the Montana Constitution when it was ratified in 1972. Its explicit language

protecting citizens' rights to information about their government was bold and unusual. The wording is clear and clean, and includes only one exception: The privacy rights of individuals, when clearly more important than the public's right to know, can override the right to know.

The rationale for this constitutional provision grew, in part, out of Montana citizens' healthy suspicion of government, best expressed perhaps by a sentence introducing the state Open Meetings law in Montana Code: "The people of the state do not wish to abdicate their sovereignty to the agencies which serve them."\(^2\)

The constitutional status of a specific right to know is relatively new to Montana law, but the concept is as old as democratic theory itself, drawing upon centuries of thought about government in a free society.

From the 17th century, John Locke, John Stuart Mill, James Madison and others built the framework for modern democracy; these men believed that an uneducated society was incapable of governing itself. They believed in free speech because it was the key to an educated citizenry. To them, ignorance was antithetical to freedom. Madison, who drafted the First Amendment to the U.S. Constitution, believed the right to seek knowledge was inherent in the right to free speech.

"(A) popular government, without popular information, or the means of acquiring it, is but a prologue to a farce or tragedy; or perhaps both," he wrote in 1822. "Knowledge must forever govern

\(^{2}\)Montana Code Annotated 2-3-201.
ignorance. And a people who mean to be their own governors, must arm themselves with the power that knowledge gives. 3

Modern political theorists like Alexander Meiklejohn, who wrote extensively about free speech in the first part of this century, and Harvard University Professor John Rawls, also have promoted the right to know as a corollary to free speech. "All citizens should have the means to be informed about political issues," Rawls wrote in A Theory of Justice published in 1971. 4

But the words "right to know" or any similar expressions don't appear in the text of the U.S. Constitution, a fact that for 200 years has left judges and scholars arguing about whether the First Amendment itself, or any other passages in the Constitution, gives citizens a right of access to government secrets.

Retired Supreme Court Justice Potter Stewart, for example, in an analysis of free speech protections, rebuked those who claimed to find a right of access to government-held information in the text of the U.S. Constitution. Asserting such a right is simply "fuzzy thinking," Stewart said. 5

But others disagree. A scattering of court rulings over the years have supported the right to know, with some judges arguing, as did Mill, Madison and Meiklejohn, that access to government information

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5Justice Potter Stewart (retired), The Constitution: That Delicate Balance (Film Series). From a round-table discussion with political leaders, jurists and journalists.
is essential if citizens are to hold lawmakers accountable and voters are to make intelligent and informed decisions.6

During the framing of Montana's 1972 Constitution, the argument over the right to know was thorough and robust. Fears about government becoming too large and its ability to control information emboldened Montanans to draft and pass a constitutional provision that granted its citizens a fundamental right to be informed.

Transcripts of the convention show that the debate returned repeatedly to two main concerns: How best to protect citizens from the power and abuses of government; and how to provide openness in society and still protect individual privacy. The solution was to give both rights constitutional protection; the document ratified in 1972 contains both a right to know and a right to privacy.7

The difficulty delegates had in developing the language of both of these provisions proved a harbinger of the many significant battles to come over these two conflicting rights.

This paper will ultimately discuss the difficult and important issue of balancing openness with individual privacy as it examines the significant right-to-know cases to come before the Montana Supreme Court since 1972.

First, however, this thesis will explore the roots of the right to know, beginning with political theorists Locke, Mill and Meiklejohn,

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7Montana Constitutional Convention, 1971-72, Volume II, Bill of Rights Committee Proposal. Summary of discussion over Sec. 9, Right to Know, and Sec. 10, Right to Privacy. 631-633.
and continuing through the eloquent debates just over two decades ago by citizen framers of the Montana Constitution.
The Right to Know: Roots in Political Theory

One of the characteristics of representative government is the respect it pays to individuals. American democracy in particular is guided by a set of individual liberties, of which freedom of speech and religion are listed first. None pays more respect to the value of an individual than the right to speak and think as you wish.

The men whose theories about self-government guided the framers of the U.S. Constitution were themselves guided by different motives and dreams. Nonetheless, most placed a higher value on the individual than on society or, for that matter, on a workable government. As such, government was a means to an end; a mechanism by which individual well-being could be enhanced, whether it helped each person develop a stronger sense of morality, as Locke would have it, or increase happiness, as Mill wished.

Each vigorously sought to preserve the liberties of conscience. The right to think what you want and say what you think was precious to these men, each for his own reasons.

John Locke

In John Locke’s ideal commonwealth, individuals vested their power in the legislative branch, which sat strictly at the pleasure of the people and, he said, “neither must nor can” transfer its power to
any other branch of government or any person. He also promoted a separation of powers, similar to that found in American government today, which vests lawmaking authority in one branch of government, administrative duties in another, and enforcement in still a third.

In Locke's view, government existed solely for the convenience of society, to perform limited duties more efficiently and effectively than individuals could themselves. Government's first duty, Locke believed, was to protect fundamental rights to life, liberty, and property. These rights, he said, originate from a "state of nature," which he described as a circumstance in which people live together "according to reason, without a common superior on earth with authority to judge between them."9

Natural law, he said, reveals a set of God-given moral rules that he believed were self-evident to all rational persons. Within the bounds of natural law, man answered to no authority beyond himself and God "without asking leave or depending upon the will of any other man."10

Within this natural state, Locke said, man must rely on himself to protect his liberties and to punish those who would deny his rights or take his property.

But it was disadvantageous if not impossible, Locke believed, for individuals to protect themselves, since enemies were often

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9Ibid.
10Ibid.
emboldened by their evil and too powerful to defeat single-handedly. Thus it was wise and practical, he said, to form a commonwealth that relied on the collective power of its citizens to settle disputes, protect society from criminals and degenerates, preserve claims to property and guarantee liberties of thought and conscience. The state's power, then, was established through a contract with its members. The members in turn agreed to submit to majority rule in exchange for protection and security.  

Locke's highest priorities were rights of conscience and property. A simplistic account of his theory on property says man in his natural state first owned himself. By extension, any products from his labor "we may say are properly his." The "great and chief end" was to protect private property, which Locke believed no man or government had the right to take without a person's consent.

The roots of America's protections for speech and religion can, in part, be traced to Locke's views on religious toleration. By natural law, he said, a man has a right to his own opinions, to express them and to choose his own form of religion. On ethical grounds, Locke believed no government nor church had any power to persecute people for their beliefs (though he acknowledged the right of churches to expel people with contrary views). Similarly, he believed

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no individual or church should impose its opinions on another,\textsuperscript{15} reacting, no doubt, to the turbulent politics of 17th century England and the religious persecution of Charles II.

But Locke's own tolerance had its exceptions. He argued, for example, that the state had the right to outlaw such religious practices as sacrificing humans. He also didn’t tolerate either atheists or Catholics, two groups he said didn’t deserve protection -- atheists because they rejected God and were therefore without moral guidance; Catholics because of their own intolerance of other religious interpretations. Locke feared that if Catholics, for example, ever gained a majority, they would exert "undue influence" over society and likely deny the very liberties of conscience he so highly valued.\textsuperscript{16}

Such practical exceptions are notable for at least a couple of reasons. One, they obviously conflict with Locke's general regard for individual rights. D. J. O'Connor, an Oxford professor who interpreted Lockean thought in this century, suggests that the philosopher's essay, Religious Toleration, was meant only to provide a framework for society, that Locke knew the value of tolerance as a social policy, yet recognized society's need for expediency.\textsuperscript{17}

Finally, Locke was equally fearful of government tyranny, and prescribed limiting the power vested in any commonwealth. Government, he argued, must hold no power beyond what the people approve, a notion rooted in his concept of natural law: No one has

\textsuperscript{15}Ibid.
\textsuperscript{16}O'Connor, John Locke, pp. 211-215.
\textsuperscript{17}Ibid.
power over another, and no one can transfer to another more power than he has himself.\footnote{Locke, John, \textit{Concerning Civil Government, Second Essay} Great Books.}

Locke also recognized that not all people in society would submit to the contract agreeably, that some would inevitably lose faith in government and rebel against its power. To maximize trust, Locke wanted the relationship between government and its people to work like a trusteeship: power may be relinquished but never enhanced for government's gain.\footnote{Ibid.} Locke's writings are vague about the precise limits of government's power, but O'Connor interprets Locke to say that as long as government obeys its citizens, it will command their allegiance.\footnote{O'Connor, John Locke, p. 209-210.} The trusteeship also allowed the people to remove government officials who abused their positions.

"There is no reason for government than to preserve their lives, liberties and fortunes," Locke wrote. "To go further -- to vest more power than that in the state -- would make man worse off than if in the state of nature. Giving government more power disarms (man) -- and arms government -- making himself the prey."\footnote{Locke, John, \textit{Concerning Civil Government, Second Essay}.}

Underlying Locke's design for the commonwealth was belief that government would be guided by the moral code man devised from natural law, using his good reason and intuition. Such a government showed the utmost respect for the individuals who established it.

\footnotesize{\begin{itemize}
\item[19]Ibid.
\item[21]Locke, John, \textit{Concerning Civil Government, Second Essay}.}

John Stuart Mill's concern for the individual was less about preserving God-given liberties than it was about increasing human happiness and self-development. To Mill, liberties were utilitarian, tools people could use primarily for self-improvement. His thoughts about good and evil were more secular; morality to Mill was independent of a God or any concept of natural law.\textsuperscript{22}

Mill believed that all questions about individuals "are reduced to questions about their happiness." His goal was not to promote a set of ethical rules for people or society; they held no ultimate value for him. Mill believed people behaved rightly if their actions promoted happiness, wrongly if they promoted the reverse.\textsuperscript{23}

His "principle of individuality" emphasized "the importance of self-development, self-improvement, self-formation, self-respect, conscience and honor," and that all men should be respected as ends in themselves, and not for their moral values or relationship to God.\textsuperscript{24} In that sense, individuality was to Mill equivalent to self-development. Similarly, liberty to Mill was personal and essential to self-development.

Mill's structure of self-government may be similar to Locke's in many ways, yet he valued it differently. Government was useful to Mill primarily as a means to maximize happiness. If it could provide


\textsuperscript{24}Anschutz, \textit{The Philosophy of J.S. Mill}, p. 20.
security and protect liberties better than an individual could by himself, then it was useful, Mill believed. Mill also saw democracy as a remedy for ignorance and a tool for self-improvement. Mill wanted people to participate in government; participation meant education. Democracy, he wrote, allows for the "utmost possible publicity and liberty of discussion, whereby ... the whole public are ... sharers in the instruction and mental exercise derivable from it."\(^{25}\)

Thus he was able to argue for the widest possible extension of representative government.

But Mill held elitist views about the intellectual pursuit of happiness, which colored how he imagined democracy should work. He believed that the best educated, those with the most varied experience, were in the best position to make right decisions about self-government. This idea provided the foundation for his proposal for "plural voting" -- giving those who are wiser a greater voice in democracy, which he believed would maximize everyone's happiness. He worried, conversely, that true representative government tolerated a low-grade of intelligence, which he believed to be a problem with early American democracy.\(^{26}\) As he aged, the worry grew, and toward the end of his life, Mill admitted he dreaded most "the ignorance and especially the selfishness and brutality of the mass... ."\(^{27}\)


\(^{27}\)Ibid. p. 30.
To Mill, the biggest question regarding government was how to avoid being ruled by corrupt men. Corrupt leaders not only put their interests above that of society, but denied the less educated -- usually the poor -- from the means of self-development. "The poor ... cannot any longer be governed and treated like children," he said.\(^{28}\)

Mill wanted legislative bodies (ill suited, he thought, to actually govern) to be watchdogs over government: "To throw the light of publicity on its acts: to compel a full exposition and justification of all of them which one considers questionable."\(^{29}\) If, as Locke suggested, one of the functions of government is to provide security, then what better role could the legislature fill than to monitor its leaders and to remove them from office if they failed to perform honestly and fairly, Mill concluded.

Mill agreed with Locke, if for somewhat different reasons, that government should have no power beyond that which the people gave it. Mill recognized "no authority whatever in society over the individual, except to enforce equal freedom of development... ."\(^{30}\)

It was for the utility of it, then, that Mill argued for liberties. Freedom of speech and conscience and participation were essential for intellectual development, from which happiness resulted. If, as Mill reasoned, bad decisions in democracy resulted from ignorance, then the converse is also true -- that information and education produce better, if not good, decisions. Mill and Locke, in their own

\(^{28}\)Ibid. p. 21.


ways and for different reasons, laid groundwork for the free flow of information as an essential element in the liberties of speech and conscience.

"It is only light and evidence that can work a change in men's opinions,"31 Locke wrote in the 1680s. More than 200 years later, Mill said, "Wrong opinions and practices gradually yield to fact and argument: but facts and arguments, to produce any effect on the mind, must be brought before it."32

**John Rawls**

In his writings, John Rawls, the modern-day political theorist at Harvard, bases his "first principle of justice" on an assumption that "a democratic regime presupposes freedom of speech and assembly, and liberty of thought and conscience."33

Rawls adheres to Mill's belief that without these liberties, political affairs cannot be conducted rationally. If the idea is to have free and open public discussion, then all people must have access to the process, Rawls argues. But Rawls departs from Mill in that he (Rawls) shows more respect for individuals based on their intrinsic value as persons. Where Mill embraces plural voting, given his belief that better-educated and more intelligent people make better decisions and therefore are in a better position to maximize happiness for all, Rawls simply recognizes the expediency of it. Rawls

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31Locke, *Concerning Toleration*, Great Books, p. 3.
would prefer that democracy be established in a way that all persons have equal footing and an even chance in life; the very act of participating, or structuring society so everyone has the same chance to participate, shows proper respect for each individual, Rawls proposes.34

For Rawls, free speech is one important step to equal participation; the only way citizens can fully develop ideas and thoughts, and expect those ideas to have equal weight in a discussion, is to assure everyone has equal access to information.35

Put another way, if we respect the value of individuals participating in a democracy, then denying information to some, while others have it, is a contradiction. Such selective sharing disregards the principle that all people have intrinsic worth, have the ability to think on their own, and can vote rationally.

These "liberties of conscience" lose much of their value, Rawls further argues, when some in society have greater means than others to "control the course of public debate." Inevitably, those with "greater means" will exercise greater influence over such things as legislation and public policy.36

Like Mill and Locke, Rawls never explicitly equates a right of access to information on par with free speech as a political liberty, but his belief in the inviolability of the individual may draw him closer than either of the others to such an argument. Only when access to information is guaranteed can the uneducated or

34Ibid. p. 233-234.
35Ibid. 225.
36Ibid.
uninformed participate in democracy with an expectation that their ideas and opinions can fully develop and have weight. If we respect the individual, then we owe each one the opportunity to be informed and share influence.

Equal political rights of participation can heighten the “self-esteem and the sense of political competence of the average citizen,” Rawls says, as people engage in discussion, disagree, defend ideas and opinions, weigh other interests and acquire a sense of duty and obligation to participate. In this sense, “equal political liberty is not solely a means ... These freedoms strengthen men’s sense of their own self worth, enlarge their intellectual and moral sensibilities and lay the basis for a sense of duty and obligation upon which the stability of just institutions depends.”

Alexander Meiklejohn

Alexander Meiklejohn was a 20th-century educator turned philosopher. He is known among free-speech scholars for his analysis of the political theory embodied in the free-speech clause of the First Amendment. While he wouldn't fully embrace Rawls' theories about individuals, his writings suggest his respect for the dignity of individuals, which he claims is embodied in the language

37Ibid. p. 234
38Michael Hayes, 73 Virginia Law Review, Sept. '87. Meiklejohn's discourse on Free Speech "is generally regarded as the seminal work on the link between the First Amendment and self-government."
of the U.S. Constitution. The right to know as a corollary to free speech is a prominent theme in his work.

Meiklejohn, in the wake of Justice Oliver Wendell Holmes' famous "clear and present danger" test outlined in a post-World War I Supreme Court case,39 sketched out a political theory based on a fundamental respect for the dignity of individuals. In Meiklejohn's view of democracy under the U.S. Constitution, Americans "are pledged together to create a society in which men shall have the status of governors of themselves."40 Creation of self-government is hard work and "[i]ts victories are won, not by the carnage of battle, but by the sweat and agony of the mind,"41 he wrote. In criticizing Holmes' belief that speech may be restrained when it presents a clear and present danger to society, Meiklejohn was adamant: "[N]o idea, no doubt, no belief, no counterbelief, no relevant information" may be kept from the people in a democratic society.42

From Locke onward -- though each theorist promoted his own brand of liberalism -- these thinkers all argued for the basic right to free speech and liberties of conscience. Locke's view held that the right to hold and express opinions fell in with natural rights, God given, to be used for the right moral purposes, to preserve religious beliefs and, on another level, to protect property. It was also a

39See Schenk v. U.S. 249 U.S. 47, 39 S.Ct. 247 (1919) Holmes argued that when speech presented a "clear and present" danger, it was not necessarily protected by the First Amendment.
40Meiklejohn, Free Speech, p. 70.
41Ibid. p. 10.
42Ibid. p. 75.
qualified right which could be withheld from some for the purposes of preserving liberty and upholding the principles of natural law.

For Mill, who held a more libertarian view, rights and liberties, free speech included, were a utility, to be used and protected as a means to self-development. He reasoned that free speech had value for increasing happiness for the individual, and served its role in government by allowing individuals to check its abuses, or remove corrupt leaders. Mill (the elitist) also argued that free speech was perhaps more important for some than others, since in a practical sense, the better-educated were in a better position to make important decisions in society. Finally, Mill argues that free speech was simply a valuable tool for self-development.

Rawls would value free speech because it was essential to participation in the political process -- not too different from the utilitarian view -- and because denying such a liberty showed disrespect for the intrinsic worth of individuals.

Meiklejohn, whose influence is more limited to modern political theory, took rather more seriously the freedom of speech for its vital role in making democracy work. As a socialist, he fought for the freedom to promote unpopular beliefs and believed the First Amendment provided such protection at a minimum.

Obviously these men, among others, influenced not just the structure of American government, but its application. Individual perspectives aside, each placed a high value on both the functional and philosophical values embodied in freedom of speech and freedom of conscience. In the final analysis, it is important to
recognize that the First Amendment, as it came to be written and interpreted, distinguishes between at least two liberties, or values. One, the freedom of religion language and, in some interpretations, the free speech clause, is designed to protect individual autonomy, including the liberties of conscience outlined most clearly by Locke and Mill. Because perhaps they lived in times when rulers were more inclined to proscribe religion and impose on matters of conscience, these philosophers concerned themselves to a greater extent with the freedom to be left alone, the freedom to think and conduct themselves as they wished. Religious freedom served that end, and to an extent, so did freedom of speech -- the right to think what you want was insignificant without the right to freely express it, exchange views with others, debate and search for truth. In one sense, then, freedom of religion and speech were critical to the development of an individual, and critical to a definition of autonomy.

In another sense, however, the First Amendment and its free-speech language was more concerned with the function of democracy. This value was developed perhaps more thoroughly by Mill, who took a somewhat mechanical view of democracy. To interpret him in the context of the First Amendment might go something like this: Democracy is the best form of government to promote overall happiness. Freedom of expression is essential to make democracy work, therefore in democracy, a constitution must protect speech for its value in promoting happiness.
Rawls and Meiklejohn, of course, concerned themselves too with free speech -- and free press -- as instruments of democracy. Rawls likes free speech for its guarantee of equal participation (which of course is also an autonomy issue), while Meiklejohn is more direct in his assertion that democracy cannot fully function without free speech and free press.

It must also be said, of course, that the instrumental value and the autonomy value of the freedoms protected in the First Amendment create an inherent conflict. The value of autonomy is linked inextricably to the value we place on privacy, and our expectations that we will be let alone to think and believe and discuss matters as we wish. The instrumental value of the First Amendment freedoms of speech and press are linked directly with our notions of -- and our desire for -- publicity. If democracy is to function properly, its citizens must be able to depend on the free flow of information.

These separate values, explored and developed by political theorists for centuries, remain in conflict today, and are present in most First Amendment arguments, both legal and philosophical. The U.S. Supreme Court has struggled through the years over the instrumental and autonomy values imbedded in the First Amendment, although many of the important access-to-information cases concentrated more on the instrumental values of the free speech and press clauses. And, as we shall see, the framers of Montana's new constitution also sought to diminish the tension
between these two important values, which they called the right to privacy and the right to know.
The Supreme Court and the Right to Know

In the classic First Amendment confrontation over the publication of the government's secret history of the Vietnam War, known as the Pentagon Papers, in 1971, Justice Hugo Black issued a stern message to the president and Congress, chastising them for keeping secrets from the people in the name of national security.

"The guarding of military and diplomatic secrets at the expense of informed representational government provides no real security for our Republic," he wrote. Rather, Black said, the foundation of real security in American society is the First Amendment, which guarantees the very rights that the government sought to restrict -- freedom of speech and of the press. "The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government," Black said.

But Justice Black, an absolutist on issues of free speech in a democracy, was unusual. Over the years, the Supreme Court has never ruled that the Constitution offers unqualified protection for a right to know.

However, in cases scattered over history, the high court has given the right to know some support, in direct and indirect ways. Publishers, for example, are protected from prior restraint by a

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44 Ibid.
landmark ruling, Near v. Minnesota,\textsuperscript{45} in 1931 that said restraining publication was "the essence of censorship." Near didn't address the issue of citizen's right to know, of course, but it was an important early ruling: Had Near upheld prior restraint, the whole argument for access to government information would have been severely diminished. Forty years later, the Pentagon Papers case reaffirmed and elaborated on the vital role of the press to "bare the secrets of government and inform the people." A right of access to criminal courts was established in 1980 in Richmond Newspapers, Inc.\textsuperscript{46} a subsequent case extended the right of access to jury selection;\textsuperscript{47} and still another struck down a state law that required the courtroom to be closed during testimony from minors in sexual abuse trials.\textsuperscript{48}

Beyond criminal trials and related proceedings, the Supreme Court has said that the right to government-held information is at best a qualified right; but in both dissents and majority opinions justices have repeatedly linked the right to know with what one justice called the "core purpose" of the First Amendment -- that citizens have a right to participate in democracy.\textsuperscript{49}

\textsuperscript{45}Near v. Minnesota el rel. Olson, 283 U.S. 697, 51 S. Ct. 625 (1931).
\textsuperscript{46}Richmond Newspapers, Inc., 448 U.S. 555 (1980).
\textsuperscript{48}Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982).
\textsuperscript{49}Richmond Newspapers, 448 U.S. at 575. Chief Justice Burger wrote that the freedoms of speech and press, and the rights to assemble and petition the government "share a common core purpose of assuring freedom of communication on matters relating to the functioning of government."
In a 1974 dissent, for example, Justice Lewis Powell disagreed with the ruling that denied newspaper reporters the right to interview convicts in a prison. Powell argued that the political ends of a democracy demanded a different decision: "(P)ublic debate must not only be unfettered; it must also be informed."\(^{50}\)

Similarly, in 1980 Justice William Brennan wrote in his concurrence with Richmond Newspapers, the case where a Virginia newspaper sued for the right to attend a murder trial, that an informed citizenry is "necessary for a democracy to survive."\(^{51}\)

Such declarations, of course, fall short of making the right to know a constitutionally protected liberty equal to free speech. In a 1987 analysis of the right to know in the Virginia Law Review, author Michael Hayes says that until Richmond granted courtroom access in 1980, the Supreme Court has "repeatedly rejected claims of a constitutional right of access to government-controlled information."\(^{52}\)

But since 1931, when Near v. Minnesota prohibited the government from restraining publication of defamatory information on First Amendment grounds, the court also has repeatedly recognized the relationship between free speech and effective democracy. It was in 1936, in a case about taxation and the press,\(^{53}\) when, according to Hayes, the court first recognized the

\(^{51}\)Richmond Newspapers, 448 U.S. at 588.
"fundamental link between the First Amendment and self-government."

But then in 1965, when a plaintiff claimed that a ban on travel to Cuba restricted his First Amendment right to gather information about government policies, the court said, "The right to speak and publish does not carry with it the unrestrained right to gather information." In 1974, the court limited reporters' rights to interview prisoners and then, in 1978, reaffirmed that position.

In 1979, the court refused in *Gannett v. DePasquale* to grant public access to a pretrial suppression hearing. The ruling was controversial and confusing because many, including Justice Blackmun who dissented, interpreted it to mean that the right of access to the *entire* trial could be denied, based not on First Amendment grounds but on an interpretation of the right to a public trial guaranteed in the Sixth Amendment.

Meanwhile, the case for access was slowly growing, pushed in part by the dissents of Justice Powell and Justice John Paul Stevens, both of whom argued that traditional political theory supports the right to know.

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57 See *Richmond Newspapers* concurrence by Justice Blackmun, who took one more opportunity to criticize *Gannett* and acknowledge the confusion it caused journalists.
58 *Saxbe*, 417, U.S. 843, 862-63. It is here that Powell said "Public debate must not only be unfettered, it must be informed."
Then in 1980, Richmond Newspapers provided a breakthrough. The court's ruling that the public had a constitutional right to attend criminal trials meant, in Hayes' view, that "a right of access was born."\(^{60}\)

Chief Justice Warren Burger wrote the lead opinion in Richmond; in all, seven justices agreed that a right of access was implicit in the First Amendment.\(^{61}\) In his concurrence, Justice Stevens called it "a watershed case" because "never before has (the court) squarely held that the acquisition of newsworthy matter is entitled to any constitutional protection whatsoever..."\(^{62}\)

Burger's opinion relied in part on a political theory argument, saying that access to trials is part of the "core purpose" of the First Amendment.\(^{63}\) Burger also relied on a classic conservative argument, that a long tradition of openness in criminal trials also supported the right. But Burger's decision was narrowly drawn, saying that in access cases outside criminal trials where a tradition of openness doesn't exist, access could be denied.\(^{64}\)

In his concurrence (joined by Justice Marshall), Justice Brennan also relied on political theory, yet warned that a right of access was "theoretically endless,"\(^{65}\) and proposed guidelines to help lower courts rule in subsequent cases. First, a right of access was

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\(^{60}\)Hayes, 73 Virginia LR, p. 1115.
\(^{61}\)Eight justices took part in this case and wrote a total of seven opinions, including one dissent. Justice Powell did not vote.
\(^{62}\)Richmond Newspapers, 448 U.S. 555.
\(^{63}\)Ibid.
\(^{64}\)Ibid.
\(^{65}\)Ibid.
strengthened by a tradition of openness. Second, access must play a “significant positive role” in the process or function of government. When these two tests were met, he said, then government must have a “compelling” interest to support closure.66

This was significant. As Justice Stevens added in his concurring opinion: "For the first time, the Court unequivocally holds that an arbitrary interference with access to important information is an abridgement of the freedoms of speech and of the press protected by the First Amendment."67

Richmond had the added benefit of eliminating some of the confusion in Gannett; now it was clear at least that the trial itself was open.

Two years later, Brennan applied his own guidelines from Richmond in a case that struck down a Massachusetts' law requiring judges to exclude the public from the testimony of minors in sexual abuse cases.68 In writing the majority opinion, Brennan relied on the reasoning in Richmond that the purpose of the First Amendment is to ensure that citizens can "effectively participate in and contribute to our republican system of self-government."69 Once again, however, the decision applied only to criminal trials. In 1984, the Supreme Court found a right of access to voir dire, or jury selection, a proceeding obviously connected to, but technically outside, the trial itself.70 Brennan's "tradition of openness" and "contribution to

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66Ibid.
67Ibid.
68Globe Newspapers Co. 457 U.S. 596.
69Ibid.
function" tests played a role in this decision and in some subsequent lower court cases, but have never become legal doctrine.

Meanwhile, in some lower courts a different trend was emerging, according to Hayes. More and more, judges in federal and state courts began using a balancing test to determine the strength of a First Amendment right of access. As applied, the test would weigh "the public's interest in obtaining ... information against the government's interest in refusing to provide it."71

The balancing test implicitly says, of course, that the right to know is limited; courts could, and did, find that privacy, property or fair trial rights could overrule or limit access to information. In one case out of Pennsylvania, *Capital Cities Inc. v. Chester*,72 the Third Circuit Court used Brennan's test to deny access to state records, and in so doing recommended that some sort of balancing test was preferable to Brennan's approach in determining the public's right to know. And that job, the court said, was best left to state lawmakers, not judges.

In 1986, the Wilkes-Barre Times Leader sought documents from the state Department of Environmental Resources, hoping to prove its suspicion that the state had discriminated in its enforcement of laws covering contamination of groundwater. The state refused to release the documents and the Times Leader sued and lost. In an appeal to the Third Circuit, the newspaper contended that the denial of access to a public agency's records "abridged the

72797 F2d 1164. (3rd Cir. 1986)
public's historic First Amendment right to information to evaluate the government's effectiveness."  

The Third Circuit rejected the newspaper's argument based on one part of Brennan's test, and said the newspaper failed to prove that a historical tradition of access to the agency's documents existed. Moreover, the court said, that since the Supreme Court has never recognized an absolute right of access in the First Amendment, it placed the judiciary in the position of deciding between competing political interests. That job, the court said, should be done in the legislature.

The notion of politicians determining rights of access is not new, of course. Legislatures in every state have passed laws regulating open meetings, records and more. But the approach has inherent problems, including unending conflicts between the self-protective instincts of politicians and bureaucrats, and the public's need for maximum information. And it raises at least one important question: How can citizens participate fully in making laws regulating openness if they don't already have full access to information, and

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74 Ibid. NOTE: Greenberg assailed the court's decision: "The Third Circuit refused to read the Supreme Court's decisions as mandating an expansion of the First Amendment protection ... the Third Circuit denigrated the Supreme Court's recognition of the right of access." Greenberg also pointed out that Brennan's tradition of openness test would require the newspaper to show that the agency's documents had been "generally available during the colonial period ... Proving a tradition of access is virtually impossible because few governmental agencies existed at that time."
are unaware of issues or corruption already held secret? And, as Judge Gibbons pointed out in his dissent on *Capital Cities*, there is something fundamentally disturbing about "a model of government in which elected officials are deemed to have the delegated power to decide for us what we need to know."\(^7^5\)

The political process has not, however, been unresponsive. The Freedom of Information Act was passed by Congress in 1966 and requires government agencies to produce information on request, unless the information is restricted under one of nine exemptions.\(^7^6\) (It is common knowledge, at least among journalists, that the procedures for requesting information under FOIA are onerous and expensive, and often obstructive, given the breadthness of the exemptions.)

State access laws, in most cases, also contain broad exemptions, according to a survey by Hayes. Montana's Open Meetings law is a case in point: Until recently struck down, provisions in the law allowed meetings to be closed for discussion of collective bargaining or litigation. The law also has a privacy exemption.\(^7^7\) And, for better or for worse, Montana code contains scores of other statutes that restrict access to courts, records, and meetings, each attempting

\(^7^5\)Ibid.  
\(^7^6\)Freedom of Information Act, U.S. Code, vol. 28, sec. 552 (a) (3). The exemptions allow the government to withhold information in the following general categories: national defense, foreign policy, information protected by statute, trade secrets or commercial information that is privileged or confidential, medical files, investigative records of law agencies and even some geological and geophysical information.  
\(^7^7\)Montana Codes Annotated 2-3-201 through 203. (1987)
presumably to strike a balance between the public's right to know and a perceived need for privacy or secrecy.\textsuperscript{78} How some of these laws have stood up against Montana's constitutional right to know is, of course, what this paper ultimately will explore.

In summary, a brief look at judicial history makes clear that the courts have never fully embraced Justice Black's absolutist appeal, nor the somewhat more qualified approach to free speech liberties taken by Alexander Meiklejohn.

Even though \textit{Near, Richmond, Globe} and \textit{New York Times}, for example, all considered free speech for its value to the functioning of democracy (not necessarily as it conflicted with autonomy and related liberties of conscience) a federal right to know is today at best a limited right without the same protection as freedom of speech; it has its firmest footing in the criminal courtrooms, and is shakier outside the courts. The lower courts, and as we shall see, Montana judges, increasingly are applying balancing tests to determine access rights, which may be more in line with one of John Rawls' main principles: the individual has only as much right to liberty as is compatible with the liberty of others.

Nonetheless, as Hayes points out, at least a balancing test presumes a right to government-held information exists.

\textsuperscript{78}MCA, Title 1, p. 7. (1987) The intent here is to draw attention to the plethora of legislation related to the right to know. A more complete inspection of the statutes is beyond the scope of this paper.
On Feb. 22, 1972, the Bill of Rights committee presented its work to the Montana Constitutional Convention. Wade Dahood, who was chairman of the committee and a Butte attorney, introduced the documents with language that captured the essence of democratic theory:

"The guidelines and protections for the exercise of liberty in a free society," Dahood wrote, "come not from the government but from the people who create the government." 79

That primary concept of self-government provided the foundation for the entire Declaration of Rights, which included Art. II, Sec. 9, Montana's unique "right to know" provision. Dahood's committee recommended that such concepts as the right to privacy and the right to know should be given, for the first time in Montana, constitutional protection. Government must never forget that it was "created solely for the welfare of the people," the committee wrote. 80

The committee then offered, among 35 enumerated rights, two articles that defined and guaranteed the citizen's right of access: the right to participate and the right to know. 81

80 Ibid.
81 Constitution of the State of Montana, art. II, sec. 8 (1972). The Right of Participation: "The public has the right to expect governmental agencies to afford such reasonable opportunity for citizen participation in the operation of the agencies prior to the final decision as may be provided by law."
The committee prefaced its introduction of the draft bill of rights with a comment: Montanans typically distrust government authority, and the drafters said they hoped the constitutional right to participate "will play a role in reversing the dissatisfactions increasingly expressed regarding bureaucratic authority insulated from public scrutiny ... ."82

The right to know, which the committee called a "companion provision" to the right to participate, arises "out of the increasing concern ... that government's sheer bigness threatens the effective exercise of citizenship... ."83

The committee then quoted from the preamble to the state Open Meetings Law, which had existed in Montana codes since 1963: "The people of the state do not wish to abdicate their sovereignty to the agencies which serve them."84

Thus the stage was set. The constitutional rights to know and to participate were rooted in historical skepticism that government would ignore the source of its powers and abuse the powers delegated to it. The provisions also suggest the drafters desire that these rights would encourage Montana citizens to fully exercise the fundamental duty in a democracy, to be governors rather than simply be governed. Thus the right to know emphasized the value of free speech in making government work better.

83Ibid.
84Revised Codes of Montana, 82-3401, 1947. This language remains in the preamble to the state Open Meetings Law. See MCA 2-3-201.
This language, too, reflects several of the fears, concerns and issues raised by the early philosophers like Mill and Locke. Dahood's words, for example, that government was created "solely for the welfare of the people" embraces Locke's notion that "there is no reason for government than to preserve their lives, liberties and fortunes."85 Moreover, the Open Meetings Law preamble -- "the people ... do not wish to abdicate their sovereignty" -- is strikingly similar to an element of Locke's natural law theory, that no one individual has power over another, and that therefore government should have no power beyond what the people approve.

The bill of rights committee worried about a loss of trust between citizens and government and hoped that exercising the rights to know and participate would rebuild that trust. Locke believed government would command the allegiance of its citizens if it used its power only for the public's benefit. John Stuart Mill worried about this issue on two levels; one, that corrupt leaders would put their own interests first, and, two, ordinary citizens would be denied the opportunity to participate in government, an exercise that he believed would increase their knowledge and skills.

And so, the framers by their discussion and their intent were attempting to resolve the conflict within the First Amendment. There is a correlation between freedoms of speech and press and the right to know as they contribute to the functioning of democracy, they said. When it comes to making government work and encouraging the fullest participation and development of citizens, the framers

85Locke, Concerning Civil Government, Second Essay.
wanted to go further than simply guaranteeing free speech and a free press. In a sense, the right to know was an attempt to further clarify what is meant by free speech and a free press. If the delegates were fierce in their desire for open government, they were equally passionate about protecting the autonomy of its citizens. The minutes of the convention reveal the extent of the debate over the wording of the privacy and right-to-know provisions. Since judges and lawmakers alike in the years to come would search these passages not just for the plain meanings, but also for their intent, each word was carefully chosen and fully discussed.

The obvious conflict between privacy and the right to know would leave for the courts and legislatures the difficult job of finding a fair and equitable balance. But which branch of government should take the lead role in determining that balance? Should the language of the constitution suggest whether income tax returns are public or private? Should it say whether school board meetings are open or closed, and why? Obviously, no article in the constitution could address individual cases, so the debate centered on the question of how, within the spare language of a constitutional provision, to provide broad guidance to the courts and the legislature.

Records of the debate over the right to know show little appetite for an unqualified right to know; the privacy exemption was a key element from the beginning. However, delegate Dorothy Eck, worrying that government agencies may use the exemption unwisely, argued for language that favored openness. Thus, she prompted the drafting committee to amend the original language
with just one word: clearly. As finally proposed to the full convention then, Art. II, Sec. 9 said:

No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demands of individual privacy clearly exceeds the merits of public disclosure (emphasis added).

Again the debate turned to the issue of who should arbitrate the balance. Some delegates wanted the legislature to have the power and argued for the words "except as may be provided by law" to be inserted. When privacy rights clashed with the right to know, some delegates worried that the courts were too slow and cumbersome to react with speed and efficiency. The opposition argued legislators should not be encouraged to fashion their own exemptions to the right to know, believing lawmakers were too inclined to vote for the secrecy that bureaucrats and politicians so often desired.

Ultimately, the phrase was rejected, and the provision reflected what the framers intended: the ultimate authority for interpreting the balance between privacy and the right to know should lie with the courts.

But the debate wasn't over. The Montana press vigorously resisted the privacy exemption, and lobbied the delegates to throw it out. The Missoulian editorialized that the right-to-know provision as

87 Ibid. 1971-1679.
written was a "right to conceal," reasoning that government agencies could use the privacy exemption to hide whatever information they wished. The Montana Press Association and some of its members agreed, arguing that the exemption was so vaguely worded as to allow government agencies routinely to operate in secret and claim privacy exemptions for their own convenience. But the pleas were ultimately rejected, and the privacy exemption remained.

In the end, the convention proposed a unique article to the new state Constitution. Citizens had, as a fundamental liberty, the right of access to the workings of their government. The framers' intent was clear and the delegates felt the final wording accomplished several important things: Article II, Section 9 guaranteed the right to know, except when the demands of individual privacy outweighed it; those demands of privacy must "clearly" exceed the public's right to know, tipping the balance in favor of openness. And finally, the debate -- and the ultimate drafting of the right to know provision itself -- would clarify that for government to function best in Montana, it's citizens must have the right to know what it was doing.

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88Ibid. 1672-73.

89COMMENT: At one point in the Con Con debate, a delegate inquired whether "individual" could also mean a corporation. The question implicitly anticipated the time when a corporation or perhaps even a government agency might claim the right to "individual privacy." Wade Dahood, chairman of the Bill of Rights Committee, responded that "an individual, in my judgment, would not be a corporation." Later, a Montana Supreme Court ruled just the opposite, and extended individual privacy rights to a telephone company. See Mountain States Telephone & Telegraph Co. v. Dept. of Public Service Regulation. 634 P.2d 181 (Mont. 1981).
The framers' hopes that the legislature would show restraint in its interpretation of the right to know were soon diminished. Montana Code Annotated is flush with statutes that direct government agencies on how to manage public access to the government's business. MCA lists scores of statutes covering access to judicial proceedings, student records, law enforcement documents, child custody and child abuse matters, medical records, parole board proceedings, weather modification records and more.\(^90\)

The most important, perhaps, of all these enactments is the Montana Open Meetings Law, which is a broad statute directing all public boards and agencies to permit public access to their deliberations. It states in part:

> The legislature finds and declares that public boards, commissions, councils, and other public agencies in this state exist to aid in the conduct of the peoples' business. It is the intent of this part that actions and deliberations of all agencies shall be conducted openly. The people of the state do not wish to abdicate their sovereignty to the agencies which serve them. Toward these ends, the provisions of the part shall be liberally construed.\(^91\)

Subsequent provisions of the law, as revised in 1987, spell out more clearly what openness means, and further define what is meant

\(^{90}\)MCA, Title 1, p. 7. (1987)  
\(^{91}\)MCA, 2-3-201 (1987)
by “public boards, commissions, councils, and other public agencies...” The statute also defines a "meeting" as "the convening of a quorum of the constituent membership ... ."

It also addresses individual privacy in section (3), which reads:

... the presiding officer of any meeting may close the meeting during the time the discussion relates to a matter of individual privacy and then if and only if the presiding officer determines that the demands of individual privacy clearly exceed the merits of public disclosure. The right of individual privacy may be waived by the individual about whom the discussion pertains and, in that event, the meeting shall be open.\footnote{Ibid. 2-3-203 (1), (2).}

An additional section stipulated that meetings may be closed “to discuss a strategy to be followed with respect to collective bargaining or litigating position of the public agency.”\footnote{Ibid. (4)} In 1990 and in 1992, the Montana Supreme Court struck down collective bargaining and litigation exemptions, saying the plain language of the constitution was clear that individual privacy was the only exception to openness.\footnote{See Associated Press et. al. v. Board of Education, 246 Mont. 386 (1991) and Great Falls Tribune Company, Inc., v. Great Falls Public Schools, 255 Mont. 125.}

Within the many other laws regarding open government, much of the language directs how and under what circumstances state agencies or boards must make deliberations and records open to public inspection. However, many also restrict or deny access in some
way. For example, the state Board of Oil and Gas Conservation, which oversees the exploration and development of oil and gas reserves, is permitted by statute to keep confidential any so-called "trade secrets" it inherits in the course of routine business.\textsuperscript{95} Law enforcement agencies can restrict access to information when the need for "law enforcement security" exceeds the public's right to know.\textsuperscript{96} These examples typify perhaps what the framers hoped to prevent: legislation that allows secrecy with no constitutional authority. On their face, neither of these laws conform to the language of the right to know. Extending confidentiality to trade secrets grants privacy rights to corporations, a step the framers explicitly declined to take. Law enforcement security needs are addressed nowhere in the Constitution, and if tested, may well meet the same fate as the exemptions for litigation and collective bargaining.

In any case, as the Constitutional Convention debates foretold, perhaps, the legislature needed no encouragement to write legislation to further define the right to know and the right to privacy. The only question left, then, is whether the statutory enactments remained true to the language and the intent of the Montana Constitution.

\textsuperscript{95} MCA 82-11-117.
\textsuperscript{96} MCA 7-1-4144.
The Montana Cases

Since the new constitution was ratified in 1972, 13 Supreme Court cases have tested the right to know provision.97

One measure of a constitutional liberty like the right to know is whether it can withstand legislative enactments. It is the role of the judiciary to decide if laws conform to — and respect — fundamental rights granted by a constitution. Open meeting and privacy statutes are increasingly being tested before the Montana Supreme Court. This section examines most of those cases and the paper concludes with an assessment how the language and intent of Article II, Section 9 has stood up to scrutiny over the past two decades.

Open Meetings

In the cases that tested the government's power to close meetings, the agencies routinely asserted they had met the requirements of the open meetings law. But in two such cases the Supreme Court found flagrant violations.98 A third case presented,

97University of Montana Law Library indices, Pacific Reporter 2d, and Montana Reports.
98Board of Trustees v. Board of County Commissioners of Yellowstone County 606 P.2d 1069 (Mont. 1980) and Jarussi v. Board of Trustees. 664 P.2d 316 (Mont. 1983).
at least theoretically, a tougher challenge. In Missoulian v. Board of Regents,99 the justices were asked to rule whether the individual privacy rights of a university president outweighed the public's right to be present during an evaluation of his job performance. The right to know lost decisively in this important instance.

The latest two open-meetings cases, decided in 1991 and 1992,100 challenged statutory exemptions that permitted closed meetings for discussions about strategy related to litigation or collective bargaining.
In these opinions, the court clearly said that when the legislature makes laws that permit secrecy in government, it must provide clear evidence that a right to individual privacy is endangered, or the statutes will fall.

Here is a look at the open meetings cases, the first of which was decided in 1980:

The Yellowstone County Board of Commissioners held public meetings in 1978 to hear testimony over a new subdivision in the Huntley Project School District. School officials and others had an interest in the subdivision's approval because of its potential impact on school enrollment. In a public meeting in December, commissioners gave conditional approval to the project, but did not take a formal vote. Later that same day, two of the commissioners --

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in a telephone conference call with two other county officials -- officially approved the subdivision. A third commissioner did not participate in the conference call, nor was he apprised of the call in advance. The commissioners claimed that the telephone vote was not a new meeting, rather a continuation of the discussion earlier in the day.

The school district sued, alleging the final vote was in fact an illegal secret meeting primarily because the public was not given adequate notice that the board would be taking a final vote on the matter. The Supreme Court determined first that a telephone conference call between a quorum of the board constituted a meeting under the legal definition, and said the telephone vote appeared to deliberately flout the Open Meetings Law since the time and place of the final vote had not been publicly announced, and since one of the commissioners hadn't been advised of the vote. To be effective, the Open Meetings Law requires sufficient notice to the

101A "meeting" is defined as " ... the convening of a quorum of the constituent membership of a public agency, whether corporal or by means of electronic equipment, to hear, discuss, or act upon a matter over which the agency has supervision, control, jurisdiction, or advisory power." 2-3-202, MCA.

102Section 2-3-103(1), MCA provides that "Each agency shall develop procedures for permitting and encouraging the public to participate in agency decisions that are of significant interest to the public. The procedures shall assure adequate notice and assist public participation before a final agency action is taken that is of significant interest to the public."

Further, Section 7-5-2122, MCA requires county commissioners to establish and publicize regular meeting times. Further, it says, ",[c]ommissioners may, by resolution and prior 2 days' posted public notice, designate another meeting time and place."
public of where and when the meeting is to take place, the court said, adding that without public notice, a meeting is open in theory only. "This type of clandestine meeting violates the spirit and the letter of the Montana Open Meetings Law," the ruling said.

The court further noted that the district court had ruled that the meeting was in fact illegal, but that it had declined to nullify the vote and to order a new meeting in compliance with the law. It ordered the board to reconvene on the matter, and criticized the district judge for letting "substance overtake form."

**Jarussi v. Board of Trustees**

In 1978, a St. Ignatius High School principal, Louis Jarussi, sued his school board after a dispute over his salary and his subsequent firing. Jarussi contended board members met twice in illegal secret sessions, the first time to consider Jarussi's salary request for the upcoming year and the second time to fire him when they learned he had contacted a lawyer in response to their first closed meeting.

The district court found that the board's meetings violated the state Open Meetings Law and voided the decision.

The school board appealed, claiming state law allows secret meetings to discuss collective bargaining strategy. The Supreme Court upheld the district court, saying the collective bargaining exemption didn't apply, since Jarussi was an individual represented by no bargaining agent or union, nor was he acting on behalf of a union. The court said Jarussi had a right to be present during the
board's deliberations, and upheld damages awarded him in district court.\textsuperscript{103}

\textbf{Missoulian v. Board of Regents}

Throughout the 1970s, the competing issues of right to know and right to privacy had not come up in an open meetings case. In 1980, the Missoulian sued the University of Montana Board of Regents\textsuperscript{104} after its reporter, Mea Andrews, was shut out of a meeting in which the regents conducted an annual performance evaluation of UM President Richard Bowers. The regents closed the meeting on the grounds that Bowers' right to privacy was more important than the public's right to attend the evaluation. District court ruled in favor of the regents, and Missoulian editors appealed.

This case focused on the privacy exemption in the Open Meetings Law,\textsuperscript{105} and in so doing interpreted the central conflict within Art. II, Sec. 9: Do the privacy rights of a university president outweigh the public's right to be present during an evaluation of his performance?

The Missoulian argued that the privacy exemption in the Constitution was intended to protect personal matters of family or

\textsuperscript{103}Jarussi v. Board of Trustees.
\textsuperscript{104}Missoulian v. Board of Regents. 207 Mont. 513 (1983).
\textsuperscript{105}MCA 2-3-203 (3). The statute says, in part: "... The presiding officer of any meeting may close the meeting during the time the discussion relates to a matter of individual privacy and then if and only if the presiding officer determines that the demands of individual privacy clearly exceed the merits of public disclosure."
health -- issues of autonomy not necessarily related to the president's job performance. Further, the newspaper said, the status of a university president diminishes his privacy rights because he is a "policy making official whose actions are of greater importance to the public."\textsuperscript{106} And finally, the newspaper argued, if the evaluation did contain discussion about the president's personal life, such matters could be saved for private discussion, leaving larger issues open for public scrutiny.

The Supreme Court rejected the newspaper's arguments one by one. To determine whether an individual has a constitutionally protected right to privacy, the court used a two-part test, which it had applied in a 1982 records case, \textit{Montana Human Rights Division v. City of Billings},\textsuperscript{107} and which the U.S. Supreme Court had devised in 1967 in \textit{Katz v. United States}.

The \textit{Katz} test said an individual has a protected right to privacy when the person has a "subjective or actual expectation of privacy" and when "society is willing to recognize that expectations as reasonable."\textsuperscript{109}

The court ruled in \textit{Missoulian} that both prongs of the test applied: University presidents expected privacy in their performance reviews, the court said, because the board of regents had promised them in advance that the evaluations would be confidential.

\footnotesize{\textsuperscript{106}Missoulian v. Board of Regents. p. 526.}
\footnotesize{\textsuperscript{107}649 P.2d 1283.}
\footnotesize{\textsuperscript{108}389 U.S. 347 (1967).}
\footnotesize{\textsuperscript{109}Ibid.}
For the second prong of the test, the justices examined the performance evaluation process in detail, and cited numerous examples of how secret discussions of procedures and management policies can actually benefit the public. A confidential evaluation is so important to a university president, the justices said, that he could even fail in his job without it:

A university president depends to a large degree upon good relations and a strong image within the community for the successful accomplishment of his job. A university president has a good reason to expect that his unabashed views, his candid evaluations of himself and his staff, and his perceptions of the faculty will remain private.110

In part on that basis, society recognizes this expectation of privacy as reasonable, the court said. For further evidence, it reminded the Missoulian that its own publisher, then Tom C. Brown, had once written an editorial supporting the need for confidential evaluations of public officials.

No common ground could be found. The Missoulian suggested a compromise, and asked that the regents adopt "agenda scheduling," whereby professional matters not related to the president's privacy be separated from the private meeting and be discussed publicly. No again, said the court: "There is so much interweaving of sensitive material that it would have been impossible ... to separate private

110Missoulian. p. 526.
matter from non-private to protect privacy, or to avoid destroying the effectiveness of the evaluations."\textsuperscript{111}

**AP v. Board of Education**

The latest two open meetings cases struck down two of three exemptions to the state Open Meetings Law. In the first, decided in 1990, the Associated Press, 11 daily newspapers and two newspaper organizations sued the state Board of Public Instruction\textsuperscript{112} after the board met in secret with its attorneys. The meeting was called to discuss a legal challenge to an order from the governor that the board submit for his review and approval a set of proposed administrative rules. The news organizations alleged the meeting was illegally closed to the public; the board responded that the closed session met the requirements of the Open Meetings Law, which allowed exemptions for discussion of litigation strategy.\textsuperscript{113}

The issue, the court said, is whether the legislature has the authority to create exemptions to open meetings beyond the privacy exemption written into the language of Art. II, Sec. 9.

The Board of Education based its arguments not in political theory, but in public policy. On a practical level, the board said, all

\textsuperscript{111}Ibid. p. 535.

\textsuperscript{112}Associated Press et. al. v. Board of Public Education. Cause No. BDV-89-121.

\textsuperscript{113}MCA 2-3-203, (4): "... a meeting may be closed to discuss a strategy to be followed with respect to collective bargaining or litigation when an open meeting would have a detrimental effect on the bargaining or litigating position of the public agency."
attorneys must have the freedom for wide-ranging and frank discussions with their clients, which is only possible in private. Furthermore, the board argued, discussing legal matters in an open forum would divulge strategies that could sabotage the board’s case. Placing itself on such uneven ground with an adversary would be unsound policy and violate the client’s right to due process under the law, the board’s attorneys said.

District court Judge Jeffrey Sherlock ruled in favor of the plaintiffs, and Sherlock’s ruling is noteworthy because his opinion -- and much of his actual language -- formed the foundation for the Supreme Court’s next two rulings on right to know. Using a strict interpretation of the constitution, Sherlock said he found no basis for a litigation exemption, and cited three reasons for his ruling: One, the language in Art. II, Sec. 9 is clear and unambiguous that there is only one exemption to openness, individual privacy; two, the state can assert no right to privacy on its own behalf -- such liberties are reserved for individuals to protect them from government, not the other way around; and three, voiding the exemption would not, as the state asserted, somehow require attorneys to divulge their secret strategies. The right-to-know provision, Sherlock argued, does not compel discussion to take place at a public meeting, it simply requires a quorum of any board to hold its meetings in public.114

On appeal, the Supreme Court said the Montana Constitution was equally clear and unambiguous: The only time the government

114Cause No. BDV-89-121.
can consider closing its meetings is when an individual's right to privacy is at stake.

The court took note of two other important issues, and again agreed with Sherlock: The Board of Education's argument for the right to due process "is unsound," the court said, adding: "State agencies have never been included under the umbrella of the right to due process. The protections guaranteed by the constitutional right to due process were designed to protect people from governmental abuse. They were not designed to protect the government from the people." 115

Finally, the court said defendant's claim on the so-called public policy issue -- that the loss of privacy to discuss legal strategy would give unfair advantage to the opposition -- was nonsense. The opinion characterized the litigation in question as "essentially a turf battle" between the Board of Education and the governor, which should be played out for all to see. "In short," the court said, "it is the public's business." 116

With this case decided so clearly, it wasn't hard to see that soon another Open Meetings Law exemption would fall, too.

In July 1990, the Board of Trustees of the Great Falls Public Schools, after months of labor negotiations with teachers and library aides, scheduled a closed meeting for September to discuss a fact-finder's report. The Great Falls Tribune requested that the meeting be open, and the school board agreed. However, at the September

115Supreme Court No. 89-589 at 7.
116Ibid. p. 8.
meeting no discussion of the report took place; the board simply recommended that the report be rejected, took a vote, and moved on.

The Tribune complained that private discussions had taken place in the interim, in a deliberate effort by board members to avoid conducting its business publicly, thus violating the Open Meetings Law and the right to know provision. The newspaper sued in district court, and the board responded saying that an exemption in the Open Meetings Law allowed closed meetings to discuss collective bargaining issues. The district court ruled in favor of the board, and the Tribune appealed.

The issue before the Supreme Court was whether the collective bargaining exemption was an unconstitutional restriction of the right to know. The court agreed with the Tribune that Art. II, Sec. 9 allowed a government agency to close meetings only for concerns about individual privacy. This case, the court said, "does not involve a matter of individual privacy but instead involves a public agency desiring privacy." 117

In striking down the exemption, the court said it need not review the wording or the intent of the right to know provision. The court noted it had addressed this issue in at least two previous rulings, in Great Falls Tribune v. District Court in 1980, and in AP v. Board of Education. "The intent of the framers of a constitutional provision is controlling," the court said. "We have clearly held that Article II, Section 9, of the Montana Constitution is unambiguous and

117 Great Falls Tribune v. Great Falls Public Schools. 255 Mont. 125.
The school board asked the court to balance the right to know against what it said was its "duty to supervise the school district" as outlined in another constitutional provision, Article X, Section 8, which says simply: "The supervision and control of schools in each school district shall be vested in a board of trustees to be elected as provided by law."

There was precedent for such a balancing of rights, the board argued, citing an open records case -- *Mountain States Telephone v. Department of Public Service Regulation* -- in which the court restricted the right to know in an effort to protect a corporation's property rights.

But the court rejected the argument saying the telephone company's property rights were synonymous with privacy rights, and therefore the court had properly attempted to balance the right of privacy against the public's right to know. This case is different, the ruling said. "Here there is a lack of any individual privacy being involved," the court said. In the end, the court said, "the collective bargaining strategy is an impermissible attempt by the legislature to extend the grounds upon which a meeting may be closed."120

118Ibid. p. 129.
119634 P.2d 181.
120255 Mont. 125. p. 131.
Access to Records

The Montana Supreme Court has decided a half-dozen cases involving the public's access to government-held information. In three,121 the court held that public boards or agencies can gather and use certain kinds of information for administrative purposes, yet withhold the information from the public. In another case,122 the court said law enforcement agencies in Montana can legally withhold many of their official records from the public.

In Mountain States v. Department of Public Service Regulation, the dispute centered on the phone company’s request that its “trade secrets” be kept from public view. The trade secrets were supplied to the Public Service Commission (PSC) as part of a request for a phone-rate increase. The PSC refused to keep the trade secrets confidential, saying it had a duty to share all its information with the Consumer Counsel, a state-sponsored agency that represents consumers during PSC rate-request deliberations.

Mountain Bell sued in district court and Judge Gordon Bennett ruled that the right to know, coupled with state statutes covering open records, demanded that once the PSC receives such information, it becomes automatically available to the public.

On appeal, the Supreme Court overturned, saying Mountain Bell’s privacy rights deserved the same protection as an individual’s

privacy, effectively ruling that in Montana law, corporations are "individuals" deserving the same protection as a private citizen. This was an unusual and controversial ruling. It was contrary to the intent of the framers of the right-to-know provision, who clearly said that the individual right to privacy did not apply to corporations\(^{123}\) and the decision worried constitutional experts because it significantly expanded the rights of corporations in Montana law.

Finally, having ruled that the telephone company had the right to protect its property based on the constitutional right to privacy, the court needed a way to balance that privacy right against the right to know. The court resolved the conflict with a special "protective order" that limited the public's access to the trade secrets. The order said the PSC, the Consumer Counsel, and anyone else whose "interest relates to the ratemaking function" could review the trade secrets, but that the information must be kept otherwise confidential.

Such an arrangement, the court said, would give consumers "adequate knowledge" to fully participate in the commission's proceedings and yet protect the privacy/property interests of the corporation.

It was the first time the court had ever issued such a protective order, but it would not be the last.

In 1982, in Human Rights Division v. City of Billings, the court ordered the City of Billings to turn over personnel files for evaluation

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\(^{123}\)See footnote 89.
by the state Human Rights Division to determine if the city had discriminated in its hiring practices.

The city had refused to open the records, claiming a right to privacy on behalf of its employees, and to protect itself against liability for disclosing private information. The Supreme Court agreed in part, saying the city employees had a reasonable expectation that their files would be kept confidential, but it also acknowledged that state Human Rights Division could not properly evaluate the discrimination issue without thoroughly examining employee records. As a compromise, the court again issued a protective order, saying the state could have access to the files, but must keep them confidential under penalty of contempt. Human Rights v. Billings wasn't the last of it. In 1987, in another case appealed from Judge Bennett's district court, the justices ruled one more time that a state agency could keep secret third-party information. In Belth v. Bennett, Joseph Belth, an editor of an insurance industry magazine, sued state auditor Andrea Bennett to obtain information from her files about the financial condition of insurance companies operating in Montana. That information had been supplied to the commissioner of insurance from the Insurance Regulatory Information System, a private firm.

Judge Bennett reasoned, as he had in Mountain States, that once the information was held by the government, citizens of the state should have access to it. Further, Bennett challenged the high

\[124740\text{ P.2d 638}\]
court's earlier ruling that corporations had the same rights as individuals. But the Supreme Court reversed Bennett again.

Engrav v. Cragun was an unusual records case that came before the Supreme Court in 1989. It was presented and argued by a University of Montana student, Barry Engrav, who was doing a research paper intended to examine the quality of law enforcement in Granite County. He had requested access to the Granite County Sheriff's Department daily telephone records, criminal investigation files, pre-employment files, and arrest records, for use in his term paper. The sheriff, citing state code that protects police records, refused. Engrav sued, lost in district court, and appealed.

After examining a jumble of state codes regulating confidentiality of police records, and relying heavily on the Katz "expectation of privacy" test, the Supreme Court said the privacy rights of individuals, coupled with the need for law enforcement to keep investigations secret, outweighed Engrav's claim to see telephone logs, employee files, and criminal investigations.

Arrest records, however, were another matter. State law specifically says arrest records are open documents. However, the court then noted an exemption in the codes that said whenever a record is compiled by name, only information about "convictions, deferred prosecutions or deferred sentences" is available to the public.

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125MCA  44-503, 44-5-103(14), 44-5-301.
126MCA  44-5-301.
The court concluded that although arrest records are open by statute, they are also indexed by name rather than by date of arrest, and therefore by statute, the state can keep the names confidential. "It is important to keep the right of privacy of individuals in mind here," the court wrote. It then made an unusual ruling: Engrav could have the arrest records, but could not name individuals from those records in his research paper. Since the right to privacy provision states that individual privacy "shall not be infringed without the showing of a compelling state interest," the court declared that Engrav's school research project was not of sufficient state interest to outweigh individual privacy.127

But not all names in law enforcement records could be kept secret, the court ruled in another 1989 case. In Great Falls Tribune v. Cascade Co. Sheriff,128 the court said that police and other law enforcement officers have a diminished right to privacy in disciplinary actions and required police agencies to release the names of sanctioned officers.

The case began in Cascade County in 1988, when a number of police officers and sheriff's deputies were disciplined after they were involved in a high-speed chase and the arrest of a suspect, who was struck while on foot by a car driven by a sheriff's deputy. The deputy was suspended, a Great Falls police officer fired, and two other officers were asked to resign, which they did. The Great Falls Tribune requested the names of the disciplined officers and was

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127 Engrav, 1228.
128 238 Mont. 103.
refused, so the newspaper sued. After a district court ordered the names released, the sheriff released the name of the deputy, but the city attorney appealed the ruling on behalf of the city police officers.

The Supreme Court traced the privacy issue back through several cases, including *Montana Human Rights Missoulian*, and *Engrav*, to establish the privacy standard, but then ruled that although police officers may have a "subjective or actual expectation of privacy," it was a weak right given their "positions of high public trust." As such, the public had a stronger right to know since issues of "public health, safety and welfare are closely tied to an honest police force," the court said.129

And finally, the most recent test of government records, *Associated Press v. State of Montana*,130 centered on whether an affidavit filed with the court in connection with a criminal charge can be kept secret. Such affidavits typically describe the facts that lead to a felony charge and are the equivalent of an indictment from a grand jury.

The issue arose in 1991, after the legislature amended the state's criminal procedure statutes. One of the many new amendments required that the affidavits be kept sealed unless a judge determined they should be opened to the public.

The Associated Press, 15 state newspapers, seven television stations and several news organizations sued the state to have the statute stricken, claiming that it violated the constitutional right to

129Ibid. 107.
130250 Mont. 299.
The news organizations bypassed district court and went directly to the Supreme Court in an effort to get a speedy ruling, since the new law was effectively sealing affidavits all over the state. The Supreme Court agreed that the issue was pressing, and ruled on the case within a month after the statute became effective.

The court struck down the new law, saying it did not conform to the constitutional right to know. In the process, the court made a couple of important findings. One, that such affidavits are "documents" of the type described in the language of Art. II, Sec. 9: "No person shall be deprived of the right to examine documents ... of all public bodies or agencies of state government ...." And two, the court said the statute itself was "antithetical" to the standard of the right to know provision. The court noted that since the days of territorial government, the public had been allowed access to such documents, and that such access was important to the public's faith in the judicial system.131

Access to courts

In two important cases regarding access to Montana courtrooms, the Supreme Court has ruled generally in favor of open courts, and in one, declared that the right-to-know provision holds Montana to a stricter standard than does the U.S. Constitution.

131 Ibid. p. 302-303.
In Great Falls Tribune v. District Court, a district court judge granted the plaintiff's request to close voir dire examination, allowing prospective jurors to be questioned in secret about their suitability for jury duty.

The defendant in the case, Gene Andrew Austad, had been charged with several felony counts, including deliberate homicide, robbery, sexual intercourse without consent, and aggravated burglary.

Before his arrest, Austad had led police on a wild automobile chase, which ended in a wreck. Austad was permanently injured and spent months recuperating before he was able to stand trial. The crimes for which he was charged were particularly grisly, and the Great Falls Tribune and several TV and radio stations reported extensively on the case.

At trial, Austad requested that the voir dire examination be closed, arguing that extensive publicity, including details of his criminal record and other evidence not previously known to the public, threatened his right to a speedy trial by an impartial jury. The district court, ordered by the Supreme Court to hold a special hearing regarding the closure, concluded that the individual voir dire proceedings should be limited to the defendant, the officers of the court and one prospective juror at a time. The request was based on a presumption that the other prospective jurors could be tainted by discussion and questions during voir dire, or by newspaper coverage,

\[\text{\textsuperscript{132}}608 \text{ P.2d 116.}\]
since the defendants poor physical condition threatened to extend voir dire for days, perhaps weeks.

The Tribune appealed, and the Supreme Court reversed the lower court based primarily on its reading of the right to know, and secondarily because, the court said, "we fail to see just how closing such examination to the public is necessary to guarantee the defendant a fair trial."

In his opinion, Chief Justice Frank Haswell referred to a controversial U.S. Supreme Court case, Gannett Co., Inc. v. DePasquale, which had upheld a "common law rule" of open civil and criminal trials in America. Gannett, as noted earlier, was controversial, in part, because it also said courts could shut down pre-trial suppression hearings because they weren't necessarily part of the trial. Legal experts found the case confusing, and some worried whether Gannett allowed judges in certain circumstances to close the trial itself.

In any case, Haswell cited language from Gannett that traced the benefits of public trials, which included preventing "secret inquisitional techniques" and unjust prosecutions. A closed trial breeds suspicion and mistrust, Haswell said.

The court reviewed media coverage of Austad's arrest and alleged crimes, and found it "factual ... without editorializing" and "no more inflammatory" than routine reporting on any other brutal crime. There was nothing in the reporting or in the prospect of open

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13399 S.Ct. 2898 (1979)
voir dire that would jeopardize Austad's right to a speedy and fair trial, Haswell wrote.

In the final analysis, though, Haswell moved away from *Gannett*, and federal precedent. Rather, he said, the Montana Constitution's right-to-know provision provides the strongest possible argument for open court proceedings, which included voir dire. In fact, he argued, Art. II, Sec. 9 imposes a "stricter standard" than does federal law and "clearly provides that any person has the constitutional right to observe court proceedings unless the demand of individual privacy clearly exceeds the merits of public disclosure."136

That right not being absolute, Haswell acknowledged that if during voir dire it became necessary to discuss potentially inadmissible evidence, the judge may briefly close voir dire.

Haswell's argument was a blend of democratic traditions and the strong language in the Montana Constitution, which, he said, required the state courts to go further than the federal Constitution required. His conclusion: Openness is critical to the quality and integrity of the judicial process. Along the way he gave a strong nod

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135 Haswell joined those who found *Gannett* confusing, and hinted that alternative interpretations were likely: "Although it is not entirely clear, there is reason to believe that the holding in *Gannett* may not be applicable to closure of the trial itself," Haswell wrote. Haswell held, of course, that voir dire is part of the trial. Also, he likely had one eye trained on *Richmond Newspapers*, which was being argued at the Supreme Court, and he may have been confident that the high court would rule criminal trials open to the public.

to free speech and the right to know. "Closure," he wrote, "is
censorship at the source -- a denial of the right to know."\(^{137}\)

Within two years, the Montana Supreme Court had ruled again
in favor of access to the courtroom in *The State of Montana ex. rel.
Smith v. District Court*.\(^{138}\) A Great Falls man, Daniel Smith, asked the
Supreme Court to intervene and reverse a district court ruling that
his pretrial submission hearing should be open to the public.

Smith, who was charged with deliberate homicide, claimed he
was unlawfully arrested and that he and his home were illegally
searched without a warrant or his consent. Before his trial in district
court, a pretrial hearing was scheduled to determine what, if any,
evidence from the search was admissible during the trial. Smith
asked that the hearing be closed, contending publicity about possible
"tainted evidence" could prejudice potential jurors. The judge denied
Smith's request, and he appealed.

The Supreme Court considered two issues: Whether the press
and the public could be excluded from a pretrial suppression hearing
to ensure the right to a fair trial, and, if the hearing could be closed,
what standard should the court use?

This time, a 1982 U.S. case, *Globe Newspapers Co. v. Superior
Court*,\(^{139}\) provided some guidance. *Globe* allowed closure of portions
of a criminal trial during testimony of minors who were alleged
victims of sex crimes, but it also established that the public and the
press have a constitutional right of access to courts under the First

\(^{137}\)Ibid.
\(^{138}\)654 P.2d 982.
\(^{139}\)102 S.Ct, 2613 (1982).
and Fourteenth Amendments. Equally influential was Haswell's *Tribune* opinion that said the Montana Constitution required a stricter standard for openness.

*State ex. rel. Smith v. District Court* went to some lengths to balance two fundamental constitutional rights: the right to know and the right to a fair trial.

The court sought to establish a standard for allowing closure that infringed as little as possible on public access. In framing the issues, Justice Frank Morrison said the right-to-know provision in the Montana Constitution and the right of access outlined in the First and Fourteenth Amendments of the U.S. Constitution argued strongly for open proceedings. Morrison also ruled that suppression hearings were part of the trial itself, and could not be considered separate.

Thus, he said, a judge in Montana could close a suppression hearing only if the resulting publicity could create a "clear and present danger" to the fairness of the trial, and then only if the judge could find "no reasonable alternative means" to avoid the effects of the publicity.

The ruling detailed how the courts should discover a clear and present danger, suggesting judges consider, for example, "empirical evidence" of newspaper readership and "expert psychological testimony" about "the capacity of an individual to disregard pretrial publicity." Morrison also suggested judges attempt to avoid the clear and present danger altogether by enlisting the media's cooperation not to publicize details from the suppression hearing until after the jury is empaneled. And finally, he instructed judges to consider
alternatives such as a change of venue for the trial, sequestering the potential jurors, and even special instructions. Morrison adopted these guidelines directly from the American Bar Association standards for resolving conflicts between access and trial fairness.

In all, the decision leans in favor of keeping pretrial hearings open if possible, but Morrison made it clear: The right to a trial by an impartial jury is a right to be balanced against the right to know; the right to know is not absolute.
Analysis

Whenever the Montana Supreme Court examined the right to know as it conflicted with another constitutional liberty, it sought a balance that reasonably satisfied both liberties. In cases where the right to know conflicted with statutory protections, the court used a variety of methods to evaluate the strength of the right to know. With either approach, it was irrelevant whether the plaintiff sought access to records, meetings or the courts. As such, it may be more helpful to analyze these cases with less emphasis on what type of access was being sought, and more emphasis on the court's methods.

First some general observations:

1. The Supreme Court has said repeatedly in access cases that its interpretation of the right to know or of related statutes would rely on the plain meaning of the words, and that it needn't pursue "extrinsic methods of interpretation" if the language was clear.140 Where government agencies have attempted to justify secrecy based on any other interpretation, the court has been adamant: Bureaucrats may not deny public access for purposes of expediency or personal comfort or some other ad hoc public policy reason. The court has said repeatedly that the only exemption in the right-to-know provision is individual privacy. It has also said, however, that the right to a fair trial -- which is not part of the language of Art. II, Sec, 9 -- can trump the right to know. In short, any arguments for denying public

access are suspect if they aren't grounded in the rights to privacy or fair trial.

2. Where an argument for individual privacy is the basis for denying access, the court also has been fairly consistent in its approach. The "reasonable expectation of privacy test" has been the primary tool for determining a privacy interest, and the court has routinely used a balancing test to resolve conflicts between a right to privacy and a right to know.

That is not to say that the court has applied the "reasonable expectation of privacy" test appropriately in each instance. In at least one important case, Mountain States v. Dept. of Public Service Regulation, the application of the Katz test may have resulted in an unnecessary clash between the right to know and the right to privacy. And finally, the court has not, in my view, established a workable standard for determining how strong the right to privacy is. As a result, the court has said, for example, that police officers, because of their important positions of public trust, have a diminished right of privacy,141 and that university presidents, because of their important positions of public trust, do not.142

3. The court has ruled that the public should have broad access to courtrooms based on the few cases so far. The right to know provision, the court has said, holds the state to an even stricter standard for openness than does the federal law. Moreover, in cases where the right to privacy or the right to a fair trial is jeopardized by

142Missoulian v. Board of Regents.
publicity, the court has said that Montana judges must use the least restrictive means possible to protect such rights, and must consider any number of alternatives to keep the courtroom open. Only after those alternatives have been exhausted may a judge close portions of a trial or related trial hearings.

The cases: A closer look

In two open meetings cases — *Yellowstone* and *Jarussi* — the facts are simple, and the violations clear. The cases make the lesson equally clear for bureaucrats, agencies and supervisory boards: The right to know coupled with the Open Meetings Law make it the government's duty to open business to the public at all times, unless individual privacy is threatened, and to follow the law that requires sufficient public notice about when and where meetings will be held.

By ordering the commissioners in Yellowstone County to redo their meeting and vote again, the court said implicitly that government agencies must not sidestep the democratic process in the interests of expediency. Participation must be full, or the system is not truly democratic. The court in both cases quoted from the right-to-know provision: "No person shall be deprived of the right ... to observe the deliberations of all public bodies or agencies ... ." In the three cases that challenged statutory exemptions to the open meetings law — *Associated Press v. Board of Public Education*, *G.F. Tribune v. G.F. Public Schools* and *Associated Press v. State* — the court was equally clear: Unless the exemption deals with individual
privacy, it is unconstitutional on its face. In all three cases, the court maintained a strict interpretation of the Constitution. In two of the three cases the court deferred to the framers and their explicit desire that the legislature not make exemptions beyond what is allowed by the plain language of the right to know provision.

These cases, however, represent only three challenges to the dozens of statutes that regulate access to information collected and controlled by state agencies. As others are challenged, will they stand or be stricken? These cases suggest a couple of possibilities.

One view says that if the statutes are not grounded in some privacy interest, they are presumably unconstitutional. In Associated Press v. State, the court investigated the legislative record to see if lawmakers, when they passed the statute sealing the affidavits, were concerned about the defendant's privacy. It found no such legislative intent, and partly on that finding, ruled the law unconstitutional.

In another view, the court has shown it can create a right to privacy where none was intended by the framers. The court said in Mountain States that trade secrets are a property right and a privacy right that corporations and private citizens share equally, thereby extending the right of privacy to a corporation. But the framers explicitly said the language in the privacy exemption in the right to know did not to apply to corporations. Nonetheless, after Mountain States, corporations can now claim the right to individual privacy to protect property. By this standard, records that contain proprietary information gathered by the state Board of Oil and Gas Conservation,
for example, may well be inaccessible to the public based on a privacy exemption.

Finally, public policy unrelated to the right to privacy may protect some government-held information according to the ruling in Engrav. While Great Falls Tribune and AP v. State suggest it is unconstitutional to seal records without an individual privacy finding, Chief Justice Turnage said in Engrav that "public policy of this state cannot permit" the release of law enforcement files related to ongoing criminal investigations.\textsuperscript{143} Opening such records to the public would damage "law enforcement security," Turnage said. While Engrav did not challenge directly the statute that protects such files, Turnage clearly suggests the court would consider other arguments besides individual privacy to prevent public access to some government records.

But the remark in Engrav is far from doctrine, and the court's overall record seems to suggest that statutes not grounded partly or wholly in a constitutional liberty are suspect.

**Right to Know v. Right to Privacy**

In several cases from the early 1980s, the court used balancing tests to resolve conflicts between two fundamental rights in the Constitution -- the right to know and the right to privacy. One -- Missoulian -- was an open meetings case; the rest tested access to records. The state Constitution expressly considers the right to

\textsuperscript{143}769 P.2d 1224 at 1227.
privacy in two places: an exemption for privacy is part of the right to know provision, and Art. II, Sec. 10 makes privacy a fundamental right: "The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest."\(^{144}\)

These access cases raise a number of important issues and suggest some trends in the court's thinking. Any analysis, however, may be more meaningful with a brief review of the right to privacy and its development in U.S. and Montana political history.

University of Montana professor and constitutional expert Larry Elison and a University of Montana Law School graduate, Dennis Nettik-Simmons, traced the history of the right to privacy in a 1987 Montana Law Review article.\(^{145}\) Privacy by definition, and "[i]n the broadest context possible" is "the right to be let alone by other persons as well as by the government," they wrote.

Modern privacy rights are rooted in part in the natural law concepts developed by John Locke, the authors say. Locke, as indicated in the first chapters here, argued that property rights were an extension of an individual's ownership of himself: "[E]very man has a property in his own person; this nobody has any right to but himself."\(^{146}\)

Such an interpretation, Elison argues, "sheds some light on what the courts, for nearly a century, have been calling privacy." In U.S.

\(^{144}\)Montana Constitution, Art. II, Sec. 10.  
law, the right to privacy is generally linked to the Fourth Amendment ("The right of the people to be secure in their persons, houses, papers, and effects ....") and was developed as a common-law right in the opinions of Justice Louis Brandeis in the 1920s. Several Supreme Court decisions helped establish a general right to privacy, most notably Wolf v. Colorado in 1949, Mapp v. Ohio in 1961, Griswold v. Connecticut in 1965, and most important for this discussion, Katz v. United States in 1969.

By 1972, when the Constitutional Convention established the right to privacy in the new constitution, Elison says, the concept had been recognized by the state Supreme Court for 50 years. Privacy rights in case law were applied typically to search-and-seizure issues, Elison said, but the constitutional convention transcript makes it clear the drafters intended the right also to "protect citizens from illegal private action and from legislation and governmental practices that interfered with their autonomy to make decisions in matters that are generally considered private."152

This is essentially what Locke argued, that people are inherently individuals and no one has a right to control your person or your property.

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148338 U.S. 25.
149367 U.S. 643.
150381 U.S. 479.
151389 U.S. 347.
Individual autonomy, however, under the umbrella of "the right to be let alone," doesn't go far enough to describe privacy at issue in the Montana cases. Thomas Huff, University of Montana professor or philosophy and law, outlines what he calls "the privacy norm," a concept that embraces our most intimate activities, thoughts or conversations.\textsuperscript{153} The government or the press -- or any intruding entity, for that matter -- invades privacy when it takes "an interest in what we are doing, in how we are conducting our lives, or in what we are saying." The intrusion becomes unwarranted, Huff says, when someone is "in the position of knowing things about us which he or she should not know."

The invasion is compounded, then, by further disclosure of information -- about, say, sex lives, medical history, intimate friendships, and so on -- allowing others to make judgments about us. The potential damage, of course, is generally to reputations and occasionally personal wealth. Our privacy is invaded, Huff explains, "because we are treated as the potential objects of others' gratuitous evaluations rather than as persons."

This allows the "right to be let alone" to be seen in two distinct ways: One is a kind of privacy that allows us to be free from others gaining and distributing infomormation about our actions, thoughts, and behavior, and the second is a kind of privacy that protects us from government interfering with our decisions about our private

\textsuperscript{153}Huff, Thomas, \textit{55 Washington Law Review}, 1980. Huff's analysis criticizes the court for failing to distinguish between types of privacy, leaving a legacy of confusion over how to evaluate privacy rights.
conduct. One speaks to what people know about us; the other to our autonomous choices about such things as relationships, marriage, birth control, religious beliefs, etc., which have the least to do with -- or impact on -- others outside our private spheres of home, family and relationships.

In Montana, the Supreme Court cases since 1972 reviewed here centered on disclosure of information, and thus "norm of privacy" cases by Huff's definition. In each, the court applied the "reasonable expectation of privacy" concept from Katz, which, Elison says, has become the "primary if not the sole method" of establishing a right of privacy by the Montana Supreme Court. And in each, the test helped the court determine that a right of privacy existed.

But Katz guided the court only in finding a right to privacy. In most access cases, the court has used a "balancing test" to weigh the right to privacy against the right to know. The question becomes, then, whether the court's overall approach properly values the right to know, given the framers' intent that the courts lean in favor of the right to know whenever the two rights conflicted. Such considerations provide a helpful framework to analyze some of the cases.

In Human Rights Division, the court said personnel records deserved protection, and few disagree that such files are generally kept confidential and are rarely made public -- they often contain detail that would allow, as Huff outlined, others to make possibly unwarranted judgments, and the kind of information that people value for its privacy. Yet the court recognized that the state had a
logical and sufficient reason to inspect the files to determine whether the city of Billings was discriminating against certain employees. In the interests of public policy, the court found a utilitarian solution: It issued a special protective order restricting circulation of the files to members of the Human Rights Division, thereby protecting the privacy of the individuals, and allowing controlled access to the information by a state agency that claimed a need.

Human Rights Division was perhaps a logical decision in a case which offered few easy alternatives. All parties seemed to get what they wanted, and the expectation of privacy was one that most in society may find reasonable. Nonetheless, the resolution of Human Rights presumes a measure of trust in government that some in society may be unwilling to grant. Who, after all, will be monitoring the Human Rights Division to guard against abuse? In that sense, the case institutionalizes secrecy in a manner that conflicts with the sentiments of political theorists like Meiklejohn, who argued that no pertinent information should be withheld from citizens, and Mill, who argued that proper self-government never granted powers to government beyond which the individuals had themselves.

The case has other notable dimensions, as well. For one, Human Rights Division marked the first time that the court said that a third party could assert the privacy rights of an individual (HRD was ordered under penalty of contempt to keep third-party information private). Two, it was also the first time a special protective order was used in combination with both the Katz test and the balancing test to resolve a right-to-know case.
It wasn't long before the court applied the same combination to another access case -- *Mountain States*. This time, with more troublesome results. As noted, the legacy of *Mountain States* is that it extended individual privacy rights to a corporation. Elison argues that the debate transcripts clearly show that the drafters never intended individual privacy to be applied to corporations.

One could argue that it was a Lockean view that led the Supreme Court to extend privacy rights as it did in *Mountain States*. If, as Locke proposed, property and liberty are roughly synonymous, then the court could logically argue, as it did in *Mountain States*, that trade secrets are "property" deserving protection and that the telephone company as owners of that property should be treated the same as an individual would be treated under similar circumstances. But this does not mean, nor should it mean, that a faceless corporation should be protected under the "privacy norm," as Huff describes it, and all that it encompasses.

Further, that aspect of *Mountain States* could have been avoided had the court considered a different approach that would have yielded a greater victory for openness and avoided the issue of privacy rights altogether. For example, if the court would have considered the trade secrets simply a "good" rather than a liberty, and resolved it in the same manner as any similar instance when the government takes property from its citizens: Simply reimburse them for any financial losses that occur.
Thus the justices could have upheld the lower court, declared the records open for public inspection, trade secrets and all, and simply ordered the state to make restitution, if necessary.

As it stands, the ruling partially and unnecessarily blocks citizen access to an important process: monitoring state regulated monopolistic practices. As Elison further argues, "This is precisely the kind of public agency deliberation the constitutional provision (of the right to know) intended to allow the citizenry to observe."\(^\text{154}\)

Finally, had the court ruled in this fashion, then the decision to grant "individual" status to a corporation would never have arisen, and the court could have preserved the intent of the framers that only true individuals could assert the right to privacy.

Missoulian & Engrav: Bad cases, bad law

The impact of Missoulian v. Board of Regents is significant, and for many in the press, dismaying. For one, it was the first test under the new Constitution that required the court to balance individual privacy against the right to know. Second, it tested the privacy rights of one of the most public citizens in the state: A university president whose performance is of great public interest and importance. Unfortunately, the decision appears to have closed off all access to this evaluation process, which journalists and others fear may exclude the public from important discussions elsewhere -- at

\(^{154}\)Elison, "Right of Privacy," p. 48.
school boards or whenever highly placed public officials claim a right to privacy during an evaluation of their performance.

This decision was also contrary to the framers' intentions about how the right to privacy should be applied. Delegate Dorothy Eck, speaking for the right to know committee, said the drafters feared the privacy exemption might be used to improperly exclude the public from important discussions about how government officials performed, again, making the distinction between information that is important to the autonomy of an individual and information that is important to the functioning of a democracy.155

She specifically referred to instances when it may be necessary to dismiss an "agency head" or other officials in "local school board situations, local government situations, and many others." It was with this in mind that the committee carefully worded the exemption to say the demands of privacy must "clearly" exceed the merits of public disclosure.

The court could have approached Missoulian differently. To see how, it is helpful to look at Elison's criticism of the Katz test itself.

In his evaluation of privacy rights and his criticism of Katz, Elison says the test overemphasizes an individual's "subjective" expectation of privacy. Elison quotes Supreme Court Justice Harlan, who devised the two-part test in Katz and who later in a dissent warned that the test "should not be overly emphasized." Harlan worried that an individual's expectations of privacy are often little more than "reflections" of the status quo rather than a standard for

what information ought to be protected. Harlan's thinking has an application to Missoulian. Where did Bowers' expectation of privacy originate? He was advised by the regents when he was appointed that his performance evaluations would be confidential. As such, his "expectation of privacy" was rooted in status-quo policies, which largely reflect practices in the private sector where job performance reviews are typically part of an employee's confidential files.

Even in the public sector, it is commonly acknowledged that regents boards, school boards, and myriad other boards and agencies prefer the comfort of private conversations where participants are free to speak as they wish and not be held accountable in the press. It is also a natural impulse to resist publicity when a performance evaluation is critical or negative.

But it is precisely such a circumstance -- an evaluation of a public servant whose performance may be inadequate, or at least questionable -- for which the right to know was intended. However uncomfortable it may be for university presidents, school principals or agency directors, they must in a democratic system be accountable to the people who entrusted them with their position. And, as Locke said, that trust is preserved only if power of government is retained by the people and not turned over to the bureaucrats. The intent of the Montana Open Meetings Law also speaks directly to this issue: "The people of the state do not wish to abdicate their sovereignty to the agencies which serve them." The

right to know should allow citizens to observe when a school superintendent or a similar public servant is under fire, delegate Dorothy Eck said at the Constitutional Convention.

Instead, the court in *Missoulian* fashioned an argument for safety, comfort, ease and convenience, and, on one hand, blurred the distinction between truly private information and the kind of discussion that should be open in order to make democracy function better. On the other hand, the court failed to heed Harlan's warning about missapplying *Katz*. In *Missoulian*, the reasonable-expectation-of-privacy test wrongly emphasized a subjective expectation of privacy and blinded the court to more important democratic values.

The court also missed at least one other opportunity to speak up for open government. After determining that the right to individual privacy applied in *Missoulian*, the court then failed to properly value that right. It rejected reasoning from the newspaper that a university president, as a highly visible and trusted public servant, should not enjoy the full privacy rights of an ordinary citizen. Rather, the court seemed to say that university presidents may even have an *enhanced* right to privacy: "Indeed the sensitive nature of the presidential function suggests that there is all the more reason to expect confidentiality in presidential evaluations."\(^{158}\)

Thus, once the court determined that Bowers' right to privacy was strengthened by his position, it was unsurprising that the final balancing of rights swung against the right to know. The court further rejected a compromise suggested by the *Missoulian* that

\(^{158}\text{*Missoulian v. Board of Regents*, 207 Mont. 513, 526.}
some portions of the review process could remain open to the public without violating Bowers' individual privacy. The language and tone of this decision seems contradictory to the long-held view by the court -- and the intent of the framers -- that openness in government is highly valued, and that the government should take the least restrictive means to protect privacy.

It may be a final irony that following the closed-door evaluations of several university system presidents, regent President Ted James said that, in his opinion, most of the annual review sessions could have been open to the public with little harm to anyone.159

The Engrav case is perhaps the most difficult to analyze, in part because the plaintiff's request was so broad, and in part because the opinion reviewed a large number of statutes in an effort to respond. A larger problem, perhaps, is that Engrav represented himself before the court, and failed in many ways to argue the appropriate points of law. His broad requests for information -- phone logs, radio call records, files the sheriff compiled in hiring law enforcement personnel, criminal investigation files, and arrest records -- were based on a general argument that all the records were necessary to adequately assess the quality of law enforcement in Granite County. While his intentions were praiseworthy, and his logic defensible, Engrav failed to challenge directly the constitutionality of the individual statutes that prevented his access to the records. Engrav argued that, in addition to the constitutional right to know provision,

159Ibid at 517.
state statute 2-6-102, MCA, set the standard for access. The statute says that "every citizen has a right to inspect and take a copy of any public writings of this state."

Sheriff Cragun responded that the statutes in the Montana Criminal Justice Information Act of 1979 governed the release of information. More specifically, Cragun argued, 44-5-103, MCA, defines "public criminal justice information" as court records and proceedings, convictions, deferred sentences, postconviction proceedings, initial offense reports and arrest records, bail records, daily jail rosters and statistical information that does not identify specific individuals.

The justices sided with the Granite County sheriff and considered Engrav's arguments in the specific context of a statute defining "public criminal justice information." On the broader issue of whether the individual right to privacy of people whose names existed in the files Engrav sought outweighed the public's right to know,\(^{160}\) the justices applied the Katz test and ruled that (presumably all) citizens who call the police on criminal matters "have an actual expectation of privacy." The court also said persons who are arrested but subsequently released "without charges or incarceration" deserve privacy because such people "must be protected from public persecution."\(^{161}\)

In the interests of public policy, then, the court declared as constitutional a string of law enforcement statutes that restrict the public's access, and in so doing granted a broad blanket of privacy

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\(^{160}\) Engrav v. Cragun, 769 P.2d 1224 at 1225.

\(^{161}\) Ibid at 1228.
for entire groups of people without careful examination of the kind of privacy it was protecting.

Further, the court also accepted common police arguments that opening records to the public would cripple law enforcement investigations. "[P]ublic policy .... cannot permit" the release of ongoing criminal investigations, the court said (it never mentioned closed criminal investigations), adding that opening such records would have a "disastrous effect" on police officers' ability to perform their duties.

Finally, of course, Engrav gained access to arrest records which are listed in the statute as "public information," but astoundingly was prohibited from reporting individual names from the records, a practice common in the press and protection highly valued in a society that is rightly sensitive to abuse of authority, including harassment or false arrest by police or other law enforcement officials.

That issue raises questions about another aspect of Engrav: The court's interpretation of the "reasonable expectation of privacy" test. Is it reasonable to presume, in a society in which the press routinely and thoroughly reports on criminal activity, and in which we routinely scrutinize police activities to guard against abuse, and in which we are guaranteed the right to face our accusers, that people seriously and generally expect privacy when making contact with their local law enforcement agencies? One might as easily argue that citizens actually expect to be publicly identified, formally or informally, as a result of their contact with the law. One might also
argue that any citizens who believe themselves to be the subject of police abuse may well want the protection provided by publicity. A broader view, based on the idea that access to information may in fact improve government, might suggest that the whole area of confidential law enforcement records should be re-examined.

Another troubling aspect of Engrav is the court's notion that an attempt by any citizen -- whether doing a student research paper or not -- to critique the quality of law enforcement isn't a compelling endeavor that warrants a measure of constitutional protection.

The watchdog role of citizens over their government agencies is firmly established in American democracy. Where better to spend energy and time than analyzing whether local police and sheriff's departments are responding appropriately to reported crimes, using adequate investigative procedures, hiring quality employees, and establishing "standards that taxpaying citizens were entitled to?" The court failed to acknowledge, even incidentally, the fundamental value, much less the right, of citizens to inform themselves in order to guard against government abuse, or to aid in government's improvement. Chief Justice Turnage's condescending language trivializes Engrav's efforts and insults his academic approach. "Appellant wishes to do a study for a school research project," Turnage wrote. "[T]his is not a sufficient state interest."

Finally, though the court in several privacy cases leaned clearly in favor of openness by applying what it considered the least

162 Ibid at 1225.
163 Ibid at 1229.
restrictive means of protecting privacy, it veered off in the opposite direction in Engrav and Missoulian. While neither of these cases suggest a new direction for the court, they at least leave confusion about what the standard is for balancing privacy against the right to know.

Here apply Huff's norm of privacy. Does Missoulian and Engrav represent the "norm of privacy" type intrusion? Is this information that we truly desire to keep private so that others don't unfairly or gratuitously judge us? In Missoulian, I would argue no, partly because by the nature of Bowers' position, he would enjoy a diminished right here. And if it did, again, the process could have been designed to protect Bowers "norm of privacy." In Engrav, clearly the court was worried that publicity may cause unwarranted judgments about some individuals whose privacy was invaded.
Conclusion

In the final analysis, one question remains: Do the citizens of Montana enjoy the fullest advantage of their unique constitutional provision?

In its many rulings on the right to know, the Supreme Court has only occasionally endorsed the fullest measure of access to government-held information. And it has occasionally ignored the plain words and clear intentions of the men and women who framed the right to know in Montana's Constitution.

Yet, some good things have happened, especially where the court has focused more on government process, and less on the natural tension between the right to know and the right to privacy.

The state's Open Meetings Law has been strengthened as the court stripped away unconstitutional exemptions. Meetings generally must be open and bureaucrats can't exclude the public to discuss litigation or collective bargaining strategy. As the right-to-know provision says, individual privacy is the only exception. Courtrooms, too, generally must be open, as the court has rightly woven together the American tradition of openness in criminal matters with the strong language of the Montana Constitution. With refreshing eloquence, the justices embraced the rewards of open courtrooms: trust and integrity, fairness and justice.

Beyond these easier cases, however, where the court wrestled more directly with the conflict between individual privacy and open
government, it left a legacy of inconsistent reasoning and troubling conclusions.

For example, the court has emphasized in several cases that it was required to rely on the plain language of the constitution, the statutes and the framers' intent to interpret the right to know and individual privacy.

But when the framers said they clearly intended individual privacy to apply to people and not corporations, the court in Mountain States ignored the framers' intent (in fact there is no indication in the case that the court reviewed the transcripts of the Constitutional Convention for guidance) and granted individual privacy status to a corporation.

When the framers said the language of the privacy exemption was designed to make sure the public wouldn't be shut out of meetings in which important public matters would be discussed, the court in Missoulian closed public access to evaluations of university presidents.

The court itself said a public servant -- a university president -- in a position of high public trust enjoys an enhanced right to privacy, and that such a status may actually improve job performance. Then the court said that a public servant -- a police officer -- in a position of high public trust enjoyed a diminished right to privacy, and that such a status actually improves his job performance.

Though the statute and political tradition suggest that open arrest records protect the public from potential abuse by law
enforcement agencies, the court in Engrav refused to allow the publication of names of individuals arrested in Granite County.

Clearly, in these more complex cases, the justices have strayed off course. What makes them do so? At least two factors seem significant: One, the court has yet to find a workable standard for evaluating privacy, and two, the justices seem easily swayed by the reasonable and persuasive arguments for expedient public policy.

Most of the privacy cases -- Missoulian, Engrav, Mountain States, G.F. Tribune v. Cascade County -- involved issues in which the public had a strong interest: The performance of a university president, the rates for a regulated monopoly, and criminal activities within a community. In none of the cases did the court attempt to clarify what is truly personal privacy -- issues involving health, family, personal finance, and the like -- and privacy that public officials or corporations simply desired in the interests of efficiency, expediency or public policy. In Missoulian, for example, the court stubbornly refused to distinguish between the two, and recognized a broad right to privacy that overrode the right to know. In G.F. Tribune, the court recognized a narrower right to privacy and properly said the right to know outweighed it. In Mountain States, a right to privacy was virtually invented, contrary to the framers' intent. In Engrav, the court cited broad public policy reasons for extending privacy protection to unknown and unnamed citizens, none of whom requested it.

Is it unfair to ask the court for a clearer standard for when a right to privacy applies, and how it should be valued?
Issues of public policy have, in some instances, held greater sway on the court than the plain language of the law or the framers' intentions. Clearly, in two of the worst rulings -- *Engrav* and *Missoulian* -- the court was persuaded that public servants' jobs would be made easier and their performance enhanced by shutting off public access. In neither case did the court appear to give serious consideration to the more worthy arguments for open government, nor did it seriously attempt to weigh the value of openness in a democracy or how secrecy can erode the trust of its citizens. In fact, implicit in some of the decisions is an onerous notion that citizens should be satisfied with a certain level of *blind* trust in government leaders. Regents, sheriffs and the public service regulators, these opinions suggest, can operate at a level beyond mere trustees of the people. By these rulings, public officials gain undue power by their rarified access to information. And because average citizens are denied that same information, bureaucrats have another advantage: they escape full accountability to the people they serve.

At another level, these decisions parallel some of the less flattering proposals of some of the 18th and 19th century political thinkers. Though Locke and Mill, for example, proposed ways democracies can protect themselves from the tyranny of the rulers, their elitism and intellectual arrogance prompted some undemocratic ideas. Both philosophers rationalized ways society could exclude some from having equal benefits and power in government. Unfortunately, the Montana Supreme Court has occasionally taken the same view: Opinions in *Missoulian*, *Engrav*, *Mountain States* and
other cases, allowed an elite few access to information, from which they must make decisions presumably in the interests of all. The rest are left not only ignorant, but expected to trust a government that itself has been made less accountable.

Alexander Meiklejohn preached a democratic gospel that was purer. "If by suppression," he once said, "we attempt to avoid lesser evils, we create greater evils."

When suppression limits citizens' access to information, it shifts the balance of freedom from the governed to the governors, which is precisely the "greater evil" Meiklejohn feared.

Meiklejohn was critical of all efforts to balance the right to information against some other societal interests, and thus would have disapproved of such efforts by the Montana Supreme Court. The search for information, he said, is not an ordinary activity that we should bargain away. "When men decide to be self-governed, to take control of their behavior, the search for truth is not merely one of a number of interests which may be 'balanced,' on equal terms, against one another. In that enterprise, the attempt to know and to understand has a unique status, a unique authority, to which all other activities are subordinated."

If we fail to recognize that uniqueness, Meiklejohn contended, we fail to recognize the importance of individuals in democracy and we diminish their freedom.

"It is 'we' and not 'they' that must be free," he said. "If we break down that basic distinction we have lost sight of the responsibilities and the dignity of a 'citizen'. We have failed to see
the role which public intelligence plays in the life of a democracy. We have made impossible the understanding and the teaching of government by consent of the governed."

It is against this argument that the court's various attempts to protect public policy interests and limit citizens' access to information can be viewed. In Missoulian, Mountain States, and Engrav, the justices failed to properly consider the "greater evil" of eroding citizens' right to search for truth, and sought to balance that right against the significantly weaker interests of public policy.

One only need ask a few rhetorical questions to bring this issue into clearer light: In Missoulian, which is the greater harm, allowing ordinary citizens to observe the performance evaluation of a university president, or limiting citizens' access to information that better allows them to hold public servants accountable? In Mountain States, is the harm in revealing a corporation's trade secrets equal to the danger of excluding ordinary citizens from a democratic process that allows them to make fully informed decisions? In Engrav, is protecting the names of individuals who show up on police blotters more important than eroding fundamental freedoms?

Such individual questions spring from the distinction between the kind of expression that should be protected and the kind citizens in a democracy may want to limit. We have recognized the inherent conflict in the First Amendment between autonomy (freedom of religion) and instrumental (free speech) values. We have also recognized that the framers of the Montana Constitution sought to further clarify those values by drafting the unique right to know
provision. The questions, then, are deceptively simple: Is it the kind of information that political theorists and the framers intended to protect in order that discussion be more robust, the debate more thorough, so that democracy can function more fully? Or, is it the kind of information to which access should be limited in order to preserve individual autonomy and privacy? If the court reflected more carefully on this distinction, it could fashion a more consistent standard.

Such a focus also may help remove the clutter caused by side arguments over public policy, efficiency and comfort. And it respects the distinctions made by Locke, Mill, Meikeljohn, and the framers who, in their wisdom, sought to broaden rather than limit citizens' access to issues and information.

**Practicing the right to know**

An academic analysis, which has occupied the bulk of this thesis, is but one way to access the right to know in Montana. Another way, which is quicker, easier, and somewhat more alarming, is to enumerate the day-to-day problems of access encountered by the media as they attempt to gather the news and fulfill their role as watchdogs over government. Such an assessment reveals that, irrespective of political theory and Supreme Court decisions, the press continually encounters closed meetings, sealed records and limited access to government-held information.
In an effort to unlock meeting-room doors and unseal documents, several Montana newspapers and broadcasters joined with the Associated Press several years ago to establish a Freedom of Information Hotline. The FOI Hotline provides a telephone number that reporters and editors may call for advice whenever they encounter problems gaining access to the news. Questions about access are fielded by attorneys for the Helena law firm of Reynolds, Motl, Sherwood and Wright, which provides the service for a monthly fee paid through membership dues.

AP bureau chief John Kuglin is chairman of the Montana FOI Hotline Board, and has for several years tracked, catalogued and reported the number and types of complaints from reporters and editors throughout the state.164

In just the last two years, the hotline received 155 calls. A rough breakdown shows reporters and editors had the most problems with access to records -- 60 calls -- and closed meetings -- 53 calls. Problems with access to courtrooms or with judges issuing gag orders were a distant third -- 17 calls in all.

Interviews with Kuglin and James Reynolds, an attorney and partner in the law firm that provides hotline advice, reveal the majority of the problems with closed records stem from law enforcement agencies denying access to police blotters and jail rosters. In other words, local police chiefs and sheriffs won't release the names of people arrested and held in jail.

School districts, too, arbitrarily and commonly refuse access to records, Kuglin said.

And despite clear rulings from the Supreme Court, city and county commissions across the state continue to hold illegal closed meetings, or fail to routinely publicize upcoming meetings, Reynolds said. Troubling, too, Reynolds said, is an increasingly common practice by commission members to gather in groups too small to constitute a quorum, in an effort to discuss public business out of public view. Reporters routinely complain they are excluded from school board meetings where personnel issues are on the docket, Reynolds reported.

Reynolds said he has no accurate way of knowing how often reporters are barred from records or meetings that aren't reported to the hotline. However, he said, most -- perhaps as high as 90 percent -- of the problems that do get reported are resolved on advice from hotline attorneys.

Reynolds said he believes ignorance, rather than a desire to skirt the law, is to blame for most of the problems. In many sparsely populated areas of Montana where aggressive reporting is rare, officials are often simply unaware that the Constitution or the statutes require them to do business openly. Once advised, Reynolds said, they usually comply.

However, a few of the Supreme Court decisions continue to plague reporters. Engraw is commonly used by local officials to protect arrest records, in spite of a widely circulated opinion by the state attorney general's office that advised local officials not to use
the opinion to routinely shut off access to police blotters. But clearly it's still being done.

Missoulian, Reynolds said, has "closed the door" on most evaluations of public officials, and perhaps worse, kept reporters and editors from even challenging such closed proceedings. Further, Missoulian is commonly cited when reporters request resumes or other background information on candidates for important school district or university jobs. Missoulian "gets applied across the board," Reynolds said.

Overall, however, Reynolds is optimistic that neither case will prevail in the long run. He said he believes both cases are "aberrations," and don't necessarily reflect where the court is headed. Other decisions, most notably G.F. Tribune v. Cascade County Sheriff, suggest the court is beginning to view the right to privacy more narrowly, Reynolds said. As the court continues to struggle with the tension between privacy and the right to know, "the right to know is emerging as a stronger right," he concluded.

Nonetheless, a look at FOI Hotline records suggests that all manner of agencies and bureaucrats are easily inclined to close off access to government-held information. The responsibility for challenging those efforts falls largely on members of the Montana media, since they are the first to encounter secrecy, and are best equipped to fight it. But reporters and editors must take it upon themselves to educate an uninformed board chairman, to sue an obstinate bureaucrat, and hire the lawyers who can plead the case.
for the right to know, as articulately and vigorously as possible, before the courts in Montana.

As John Stuart Mill once said, the democratic institutions themselves provide the best remedy for the worst mishiefs in society. If members of the media are thus committed, and if Reynold's optimism is warranted, then the Montana right to know provision can afford far better protection for those citizens who truly "do not wish to abdicate their sovereignty to the agencies which serve them."
Addendum

In December 1993, the Montana Supreme Court ruled in a case out of Billings that a reporter can be excluded from a meeting between city employees and a private contractor without violating the Open Meetings Law or Art. II, Sec. 9 of the Montana Constitution.\footnote{KTVO v. City of Billings, No. 92-449 (Mont. 1993). NOTE: This case was concluded as the final touches were put on this thesis. It is an important case and deserves inclusion, however, it does not shift the focus of this report, nor change its conclusions.}

The facts are these: In May 1992, a reporter from KTVQ television learned of a scheduled meeting between two Billings city employees -- the city engineer and the director of public works -- and two private contractors working on a local street project. The meeting was to discuss construction delays and how to keep surrounding property owners better informed of construction problems. The reporter was barred because it was a "staff meeting," and because the firms requested the media be excluded.

KTVQ sued in District Court and won its argument that it had a constitutional right to attend the meeting. The city appealed and the Supreme Court reversed. In its decision, the court said:

1. The meeting was not a "staff meeting," as the city alleged, because the private firms were not part of the city staff.

2. The state Open Meetings Law would require the meeting be open only if it could be determined it was a meeting of a "public agency."
3. Based on interpretations of the Open Meetings Law, transcripts of the Constitutional Convention debates, and prior cases, the two city employees did not constitute "governmental agencies" or "public agencies" since neither "had rule-making authority and regulatory powers." Therefore, there is no constitutional requirement the meeting be open.

Five justices signed the majority opinion; two justices joined in a dissent.

Sadly, this ruling fits with several of the court's worst opinions on the right to know. The court seemingly went searching for evidence to redefine a public servant -- in this case, as someone who does not act on behalf of the agency he works for. In so doing, the court also invented another way to allow government officials to retreat to the comfort and seclusion of secret meetings.

Justice Trieweiler in his dissent picked apart the majority opinion, pointing out that the court itself ruled only months earlier in Great Falls Tribune v. Great Falls Public Schools that "The language of [Article II, Section 9] speaks for itself. It applies to all persons and all public bodies of the state and its subdivisions without exception (emphasis added)."

Trieweiler also hinted at the court's occasional predilection to let public policy arguments outweigh the plain interpretation of the law. Simply, he wrote, there can be no "public policy reason" to deny the media access to such meetings.

Finally, Trieweiler rightly concluded this ruling "is a substantial blow to the public's right to know guaranteed by our State
Constitution. It allows public agencies and their officers to conduct public business in secret and without public scrutiny. This is not in the public's interest and is exactly what our constitutional right to know was designed to prevent."
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