

# The People's Right to Know and State Secrecy

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Among the classic arguments which advocates of open government use to fight government secrecy is the appeal to a “people’s right to know.” In its core meaning, the people’s right to know is understood as a right held by any individual, as against a government, to know about the workings and dealings of that government.<sup>1</sup> The people’s right to know emerged as a concept from debates on freedom of the press after WW2, in which the term ‘freedom of information’ was coined.<sup>2</sup> It was a prominent concept that led to the adoption of the Freedom of Information Act (FOIA). As envisaged by its early advocates, the people’s right to know was a fairly sweeping right. According to Thomas Emerson, for example, the right to know extended “to all information in the possession of the government. (...) As a general proposition, (...) there can be no holding back of information.”<sup>3</sup> According to Harold Cross, only the “most urgent public necessity”<sup>4</sup> could justify the state’s resort to secrecy. The insurgent rhetoric of the people’s right to know has in recent years been appropriated by WikiLeaks. In dumping gigabytes of leaked government information online, WikiLeaks presents itself as a radical enforcer of the people’s right to know. In its vision, the right to know is all-encompassing and requires total elimination of state secrecy (if not states as structures of “bad governance”).<sup>5</sup>

I argue that the principled opposition between the people’s right to know and state secrecy is not entirely correct. My claim is that the same moral principles that ground the people’s right to access government information, also establish a domain of state secrecy. In his seminal work defending a degree of secrecy in democratic governance, Dennis Thompson has famously argued that some of the best reasons *for* secrecy are the same reasons that argue *for* openness and *against* secrecy.<sup>6</sup> I see my argument as a way of fleshing out Thompson’s claim.

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1. Frederick Schauer, “Rights and the Right to Know” (1983) 14:1 *Philosophic Exchange* 65 at 70.
2. For the history of the concept, see Michael Schudson, *The Rise of the Right to Know: Politics and the Culture of Transparency 1945-1975* (Harvard University Press, 2016); Mark Fenster, *The Transparency Fix: Secrets, Leaks, and Uncontrollable Government Information* (Stanford University Press, 2017).
3. Thomas I Emerson, “Legal Foundations of the Right to Know” (1976) 1 Wash ULQ 1 at 16, 14.
4. Harold L Cross, *The People’s Right to Know* (Columbia University Press, 1953) at xiii.
5. Julian Assange, *Conspiracy as Governance* (<http://cryptome.org/0002/ja-conspiracies.pdf>, 2006); see also Mark Fenster, “Disclosure’s Effects: WikiLeaks and Transparency” (2012) 97:3 *Iowa L Rev* 753 at 773, 776.
6. “Some of the best reasons for secrecy rest on the very same democratic values that argue against secrecy,” Dennis Thompson, “Democratic Secrecy” (1999) 114:2 *Political Science Q* 181 at 182. It is not obvious from the essay exactly which values are those “very same

The people's right to know exists, at least in part, as a legal right in the form of FOIA. In its FOIA embodiment, the people's right to know is not so sweeping as to encompass the full range of government information which many advocates of open government urged.<sup>7</sup> My argument provides a normative defense of the people's right to know so confined.<sup>8</sup>

In order to develop my argument, I take a closer look at the moral underpinnings of the people's right to know. To this end, I consider two arguments commonly invoked to support the people's right to know. First, the right to know information within government control is a human right. Second, a people's right to know is a right of democratic citizenship. To the extent that these arguments ground the people's right to access government information, I argue, they also limit this right and in limiting it, they establish a domain of state secrecy.

### The people's right to know as a human right

Appeals to a human right to know government-held information figure prominently in public and scholarly debates about open government and democratic transparency. For example, Patrick Birkinshaw claims that access to government-held information is "fundamental to my membership as a full *member of the human race*."<sup>9</sup> A human right to know government-held information is also mentioned in a number of political documents. For example, according to the 2004 Joint Declaration by the United Nations Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, "[t]he right to access information held by public authorities is a fundamental *human right* which should be given effect at the national level through comprehensive legislation (for example Freedom of Information Acts)."<sup>10</sup> The Universal Declaration of Human

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democratic values" that generate reasons for secrecy and transparency alike. When speaking of reasons for openness ("reasons against secrecy"), Thompson refers to the principle of accountability. When speaking about reasons for secrecy, he makes two arguments: (1) secrecy is justified if it is necessary and (2) secrecy is justified if the principle "second order publicity about first order secrecy" is satisfied. Neither (1) or (2) can be said to be the same reasons as the reasons for openness Thompson indicates. Extrapolating from other remarks Thompson makes in the essay, one might venture that there is an implicit appeal to the idea of hypothetical consent in his appeal to necessity. Thompson remarks that "[t]hese policies and processes [which would be undermined by publicity] may well be ones to which citizens would consent if they had the opportunity," *ibid* at 182. Such an appeal to the idea of hypothetical consent and, by extension, to the idea of democratic authority may simultaneously support the demand for public accountability. My argument takes yet a different route to flesh out Thompson's claim. I thank Jonathan Bruno for a discussion on this issue.

7. Schudson, *supra* note 2 at 51-52, 61.

8. For a version of the argument to the effect that FOIA legitimizes a domain of state secrecy, see Mark Fenster, "The Difficult Paths to a Right to Know" delivered at the International Conference on the Democratic Legitimacy of State Secrecy, Leiden, 13-15 September 2017 [unpublished].

9. Patrick Birkinshaw, "Transparency as a Human Right" in C Hood & D Heald, eds, *Transparency: The Key to Better Governance?* (Oxford University Press, 2006) 47 at 56 [emphasis added].

10. Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom

Rights (UDHR) and the European Convention on Human Rights (ECHR) recognize a general human right to know. Under the heading of freedom of speech, Article 19 of the UDHR and Article 10 of the ECHR protect freedom to receive information and ideas without interference by public authority and regardless of frontiers. A recent judgment of the European Court of Human Rights (Eur Ct HR) makes clear that the human right to seek and receive information conceived in such broad terms involves access to government information. In 2013, the Court's judgment granted a Belgrade-based NGO a right to access classified intelligence information held by the Serbian Intelligence Agency on the grounds of Article 10.<sup>11</sup> In doing so, the European Court of Human Rights effectively recognized access to intelligence information as a matter of the human right to know.<sup>12</sup> It also made an important step towards establishing a positive legal duty on the part of states to provide citizens with information within their control.<sup>13</sup>

Despite its wide endorsement, the claim that access to government-held information or, for that matter, access to intelligence information, is a matter of a human right raises a number of questions. Why is an interest in receiving information a matter of human rights in the first place? Do we have a human right to know *simpliciter*, or a right to know only certain kinds of information? If only certain kinds of information, why would intelligence information fall within that range?

In order to understand the rationale behind conceiving access to government information as a human right, we need to turn to theories of human rights. Below I analyze the people's right to know government information from the perspective of two dominant theories of human rights, the naturalistic conception and the political conception.

### The naturalistic conception

A long tradition in understanding human rights is to conceive them on a model of natural rights. "Within philosophy—and within much popular understanding as well," Kenneth Baynes argues, "human rights are viewed as 'natural rights'

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of Expression 6 December 2004 in A Hulin, ed, *Joint Declarations of the representatives of intergovernmental bodies to protect free media and expression* (OSCE Representative on Freedom of the Media, 2013) 33 at 34 [emphasis added].

11. *Youth Initiative for Human Rights v Serbia*, No 48135/06, ECHR 1 [YIHR v Serbia].
12. A different case in point is a 2006 pronouncement of the Inter-American Court of Human Rights, which declared that access to government information is included within the basic human right of free thought and expression, *Reyes v Chile*, Inter-Am Ct HR (Ser C).
13. The exact wording of Article 10 implies a negative duty on the part of the state to refrain from restricting a person from receiving information that others wish to impart to her. In this case, however, the Court established that state authorities have a positive duty to provide information upon request. As Tiilikka and also Hins and Voorhoof observe, this is indicative of a development in the Court's jurisdiction towards a recognition of a positive duty on the part of the state proactively and out of its own motion to promulgate information which is likely to be of interest to a wide range of individuals. See Päivi Tiilikka, "Access to Information as a Human Right in the Case Law of the European Court of Human Rights" (2013) 5:1 J Media L 79 at 99 and Wouter Hins & Dirk Voorhoof, "Access to State-Held Information as a Fundamental Right under the European Convention on Human Rights" (2007) 3:1 Eur Constitutional L Rev.

or (...) at least as the direct heirs to this tradition of rights.”<sup>14</sup> First, like natural rights, people possess human rights simply in virtue of their humanity. The most influential human rights accounts in this tradition point to basic aspects of human agency, such as people’s capacity for autonomy and intentional action.<sup>15</sup> Second, human rights, like natural rights, are universal. Relatedly, they exist prior to and independently of any social or political arrangements; their validity does not depend on their recognition by political society.

It is not immediately clear in what sense a claim to access government information, including intelligence information, satisfies this description. While human rights scholars have not engaged specifically with the human right to access government information, the theoretical framework they have established makes it possible to construct an argument for them.

First, what human interests of paramount importance are at stake in accessing government information, including intelligence information? Proponents of the naturalistic approach claim that all human rights are generated out of the urgent and universal interest in the exercise of human agency and autonomy. This, presumably, must also hold for the right to access information within government control. An argument to this effect could begin with emphasizing that access to information is necessary for the capacity to make autonomous choices and intentional action, viz., it is a condition of effective agency. As Matthew Liao and Adam Etinson say: “The relevant basic human right may be that of acquiring the knowledge necessary to be an adequately functioning individual in one’s circumstances, or, perhaps even more basic than that, the right to effective agency.”<sup>16</sup> In a second step, one could argue that information within government control, including intelligence information, belongs with the information necessary for the capacity to make autonomous choices and to undertake intentional action.

Second, in what sense is the right to access government information a universal right? Given that the right to access such information is tied to existing political institutions, for example, governments and their intelligence services, how can it be binding at all times and all places? To echo Joseph Raz’s challenge, “it follows that cave dwellers in the Stone Age had that right. Does that make sense?”<sup>17</sup> Proponents of the naturalistic approach have a ready answer to this concern. They speak of human rights at different levels of abstraction. For example, James Griffin speaks of basic and derived human rights. Basic human rights refer to general moral claims made on behalf of human agency, which “we have even in the state of nature.” Derived rights “come about as a result of the application of these highest-level considerations with increasing attention to

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14. Kenneth Baynes, “Toward a Political Conception of Human Rights” (2009) 35:4 *Philosophy & Social Criticism* 371 at 372.
  15. Alan Gewirth, *Human Rights: Essays on Justification and Applications* (University of Chicago Press, 1982); James Griffin, *On Human Rights* (Oxford University Press, 2008).
  16. S Matthew Liao & Adam Etinson, “Political and Naturalistic Conceptions of Human Rights: A False Polemic?” (2012) 9:3 *J Moral Philosophy* 327 at 339.
  17. Joseph Raz, “Human Rights in the Emerging World Order” (2010) 1:1 *Transnational Legal Theory* 31 at 40.

circumstances.”<sup>18</sup> In the light of these arguments, the institutional embedding of the human right to know government information is not inconsistent with the universal character of human rights. Rather, its institutional form is the form that the universal basic human right to information acquires in circumstances in which government institutions shape the conditions in which people live. As no such institutions shaped the circumstances in which Stone Age cave dwellers used to live, it would indeed be absurd to claim that they had a human right to access government information. We can nonetheless argue that even Stone Age cave dwellers had a generic version of this right, viz., a human right to information relevant to their circumstances.

On the naturalistic approach, then, the argument that access to government-held information is a human right would take the following form: (1) Access to information necessary for autonomous and intentional action is a human right and (2) under the conditions of modern societies, government information is information of this necessary kind. Hence (3) access to government information is a human right.

Whether the conclusion (3) holds depends on whether the move from step (1) to step (2) is warranted, that is, it depends on how one goes about specifying the general moral claim to information necessary for autonomous action in modern societies. Under the conditions of pluralism and disagreement characterizing modern societies, general moral claims can be specified in many different and competing ways. Starting with disagreements about the value of autonomy and conditions for autonomous action, people will disagree about what information they need in order to act in an autonomous way. Some may consider intelligence information necessary to make autonomous political choices; others may not. Those who agree that intelligence information is necessary to make autonomous political choices will disagree about the scope of that information. If information about electronic surveillance is necessary to make autonomous political choices, is all other intelligence information similarly necessary? If only some of it, which? What other information within government control is similarly necessary: Diplomatic cables? Internal memos and minutes of meetings with government advisors? Tax records of office holders, their medical records or information about their religious beliefs and sexual orientation?

The few human rights theorists who have addressed the problem of translating general moral claims into concrete, action-guiding rules deal with it by reference to political decision-making.<sup>19</sup> According to Seyla Benhabib, under

18. Griffin, *supra* note 15 at 50. A similar line of argument is endorsed by Liao and Etinson, who speak of the aim of human rights and the means of achieving that aim. The aims of human rights are universal, while the means of achieving them vary across time, location, and society. Liao & Etinson, *supra* note 16 at 339.

19. Saladin Meckled-Garcia, “Specifying Human Rights” in R Cruft, SM Liao & M Renzo, *Philosophical Foundations of Human Rights* (Oxford University Press, 2014) 300; Samantha Besson, “Human Rights and Constitutional Law. Patterns of Mutual Validation and Legitimation” in R Cruft, SM Liao & M Renzo, *Philosophical Foundations of Human Rights* (Oxford University Press, 2014) 279; Seyla Benhabib, “Is There a Human Right to Democracy? Beyond Interventionism and Indifference” in C Corradetti, ed, *Philosophical Dimensions of Human Rights: Some Contemporary Views* (Springer, 2011) 191.

conditions of disagreement regarding the content of human rights, people should be given an equal say, i.e., universal claims should be specified in the process of democratic decision-making.<sup>20</sup> As Samantha Besson says, it is “the law [that] turns universal moral rights into human rights.”<sup>21</sup> If political decision-making and national legislation specify the content of human rights, then, national FOIA legislation emerges as the specification mechanism translating a general moral right to information relevant to be properly functioning in one’s circumstances into action-guiding principles under typical social-political conditions of modern societies. Remarkably, a closer analysis of the European Court of Human Rights judgment in the Serbian case adds plausibility to this argument. The applicant NGO lodged the case at the European Court of Human Rights after the Serbian Intelligence Agency did not comply with the decision of the Serbian Information Commissioner in its favor. In its judgment, the Court invoked the fact that the Serbian Information Commissioner had ordered disclosure of the classified documents. It was the “obstinate reluctance” of the Serbian Intelligence Agency to comply with this declassification order that, in the Court’s judgment, constituted a breach of Article 10 of the Convention.<sup>22</sup> Now, if the Court perceived a violation of a domestic FOIA legislation as equivalent to a violation of a human right to know, then the Court took domestic information law to specify the human right to know.

This answer to the specification problem has important consequences for the scope of the human right to access government-held information. If resolving a disagreement about the boundaries of the human right to know is a matter of a political decision, then, ultimately, it is the decision-maker, viz., the state that determines the exact contents of the human right to know. Even if the human right to know has a normative status prior to political decision making, the state determines which information, including government information, people are entitled to know in virtue of this right. In drawing a line between the information that people are and are not entitled to access, it draws a limit to the human right to know. That is, it exempts certain information, including government information, from its scope. In exempting certain government information from the scope of information people are entitled to access, the state legislation establishes a class of information to which the state is not obliged to grant access. In establishing a domain of information to which it may withhold access, it establishes a domain of secrecy. What follows from this is that both the people’s right to know and state secrecy emerge as an outcome of a process by which we specify the general human right to know. The people’s right to access government information and state secrecy are not based on different principles: Reasons that ground the people’s right to access government information are the same reasons that put in place a domain of secrecy.

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20. Seyla Benhabib, *Dignity in Adversity: Human Rights in Troubled Times* (Polity Press, 2011) at 65.

21. Besson, *supra* note 19 at 284.

22. *YHR v Serbia*, # 26.

### The political conception

A second influential account of human rights, introduced by John Rawls, is “political, not metaphysical” in that it is worked out independently of any substantial foundation in “a theological, philosophical, or moral conception of the nature of the human person.”<sup>23</sup> This account of human rights takes as its core idea the practical role that human rights are to play in the international order. In this, as its proponents emphasize, it corresponds to the intention of the UDHR drafting committee which, in the words of one of its members, aimed at creating agreement “not on the basis of common speculative ideas, but on common practical ideas, not on the affirmation of one and the same conception of the world, of man, and of knowledge, but on the affirmation of a single body of beliefs for guidance on action.”<sup>24</sup>

According to the political conception, human rights introduce a system of standards for the domestic conduct of governments with regard to their citizens that reasonable states would agree to adopt even if they disagreed about their justification. They would incorporate them as a “module” in their legal regimes from within their different political moralities and ethical outlooks. The satisfaction of such norms is a condition of a state having its “internal sovereignty”<sup>25</sup> respected; their violation justifies international intervention. As Charles Beitz put it: “[H]uman rights are standards for domestic institutions whose satisfaction is a matter of international concern.”<sup>26</sup> Joshua Cohen links human rights so understood to principles of legitimate political authority.<sup>27</sup> The idea is that states would incorporate such pre-institutional moral norms regulating their relationships with their citizens lest they lose their claim to legitimacy.

From this perspective, to claim that access to government information is a human right is to claim that access to government information is a pre-institutional moral right to which every reasonable state would give effect in its national legislation lest it lose its claim to legitimacy. Just as in the naturalistic conception, then, a human right to access government information acquires its specific content and scope in national legislation. To the extent that it is made effective in the particular national legislative setting, it is the legislator that determines the scope of the human right to access government information. It is also the legislator that sets limits to it by, for example, exempting some government information from the scope of information which citizens are entitled to access. Thus, in institutionalizing a human right to access some government information, the state also creates a domain of information to which it is not obliged to grant access. The people's right to know and state secrecy emerge, then, as outcomes of the same process of institutionalizing the human right to know.

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23. John Rawls, *The Law of Peoples* (Cambridge University Press, 1999) at 81.

24. Jacques Maritain quoted in Joshua Cohen, “Minimalism about Human Rights: The Most We Can Hope For?” (2004) 12:2 *J Political Philosophy* 190 at 194.

25. Rawls, *supra* note 23 at 79.

26. Charles R Beitz, *The Idea of Human Rights* (Oxford University Press, 2009) at 128.

27. Joshua Cohen, “Is There a Human Right to Democracy?” in C Sypnowich, ed, *The Egalitarian Conscience: Essays in Honour of G.A. Cohen* (Oxford University Press, 2006) 226 at 234.

In the last two sections I have argued that the people's right to know emerges in the same process that sets limits to it. A question arises regarding the normative status of the domain of secrecy so established: Is the state at liberty to withhold information within a domain so designated or does it have a right to withhold it? Do people have a duty to keep off the information thus withheld? This issue depends on the powers with which the state specifies and institutionalizes a general moral claim to know. I discuss this issue below in the context of the argument that locates the normative source of the people's right to know in the practice of citizenship. Following the traditional conception of authority, I argue that the powers vested in the state are conceived in terms of its right to rule. From this perspective, the state's resort to secrecy should be seen as an exercise of this right.

### The people's right to know as a right of citizenship

An appeal to citizenship as the ground of the people's right to access government information is as common as an appeal to human rights. Birkinshaw mentions it in one breath with an appeal to human rights: "The right to information (...) is fundamental to my position as a *citizen* and a human being."<sup>28</sup> Whereas the 2004 Joint Declaration, as cited above, appeals in its first paragraph to human rights as the grounds of the right to access information held by public authorities, in its third paragraph, it states that "[a]ccess to information is a *citizens'* right."<sup>29</sup>

Citizenship is a normative status individuals acquire by virtue of their membership in political society. It comes with special, as opposed to general, rights and duties that arise on the plane of relations between individuals and the state. To claim that access to government-held information is a right of citizenship is then to claim that it is a special right that arises on the plane of relations between citizens and the state. Exploring its force and scope requires, then, exploring that relation first.

In exploring the people's right to know as a right arising on the plane of relations between individuals and the state, I place my argument in the context of representative democracy. In a representative democracy people delegate the power to make laws and policies on their behalf to their representatives. A model which has been widely used to illuminate the relation of political representation is the model of the principal-agent relation, in which one party (principal) empowers another (agent) to represent one's interests and to act on one's behalf and the agent provides an account of the actions performed with respect to those interests.<sup>30</sup> In this approach citizens are viewed as the principals and the

28. Birkinshaw, *supra* note 9 at 56.

29. Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression 6 December 2004, *supra* note 10 at 34.

30. Thomas Christiano, *The Rule of the Many: Fundamental Issues in Democratic Theory* (Westview Press, 1996); Adam Przeworski, Bernard Manin & Susan C Stokes, *Democracy, Accountability, and Representation* (Cambridge University Press, 1999).

government and legislature as the agent. This political relation is commonly analyzed along two dimensions. First, representatives-agents exercise *authority* over citizens when acting on their behalf and in the light of their interests. Second, citizens-principals call representatives to *account*. Below I argue that citizenship conceived along these two dimensions grounds the people's right to know but also limits it by establishing a domain of state secrecy.

### Political accountability and the people's right to know

The accountability of office-holders is seen as the hallmark of democratic governance. "It is the rendering of accounts that has constituted from the beginning the democratic component of representation," Bernard Manin argues.<sup>31</sup> In this context, much attention has been paid to the nexus between the citizens' right to access government information and the accountability of office-holders. People's right to access to government-held information has been seen as derivative from their right to hold representatives-agents to account: In order for citizens to be able to voice their policy concerns and have representatives respond to these concerns, they must know what their representatives are doing and why.

The argument linking accountability and the people's right to know is widely recognized. Without rehearsing the details of the argument let me recall its two main lines. On one line of argument the people's right to access government information is seen as a check on abuse of power. As Onora O'Neill puts it, "Publicity is taken to deter corruption and poor performance, and to secure a basis for ensuring better and more trustworthy performance."<sup>32</sup> On this line of argument, people have a right to access government-held information whenever they suspect abuse of power on the part of office-holders. On the second line of argument, people need not suspect misconduct in order to justify their right to access government information; rather, their right to know is inherent in their role as principals. Citizens have a right to know the conduct of government business because, as Jeremy Waldron put it, "it is *their* business conducted in *their* name."<sup>33</sup> Some scholars would go so far as to say that the information within government control is the citizens' property. As owners of the government information, they are entitled to access it at any time

information held by public authorities is, in fact, the property of state's citizens (...). The information held by public agencies was "created" or gathered by civil servants-officials (...) who carry out their mandate by means of taxes paid to the public. By the very nature of this structure, the owners of the information, those who financed its collection, should have access to it.<sup>34</sup>

31. Bernard Manin, *The Principles of Representative Government* (Cambridge University Press, 1997) at 234.

32. Onora O'Neill, "Transparency and the ethics of communication" in C Hood & D Heald, eds, *Transparency: The Key to Better Governance?* (Oxford University Press, 2006) 75 at 76.

33. Jeremy Waldron, *Political Political Theory: Essays on Institutions* (Harvard University Press, 2016) at 183.

34. Roy Peled & Yoram Rabin, "The Constitutional Right to Information" (2011) 42:2 Colum HRL Rev 357 at 365.

To sum up, the right to know which people have in their capacity as citizens, is derived from their right to hold their representatives to account. Thus conceived, the scope of the people's right to know extends to all legislative and executive information: As all legislative and executive action is done on people's behalf, the people are entitled to scrutinize all of it.

### **Political authority and the limits on the people's right to know**

Whereas the link between accountability and the people's right to know has been widely discussed, only a few scholars have paid attention to the link between the people's right to know and the second dimension of citizenship, viz., people's subjection to political authority. Bernard Manin, Adam Przeworski, and Susan Stokes point out that to the extent that representatives have the authority to rule, they also have the authority to establish rules of information access:

The peculiarity of the principal-agent relation entailed in the relation of political representation is that our agents are our rulers: we designate them as agents so that they would tell us what to do, and we even give them the authority to coerce us to do it. And the rules that our agents impose on us include access to information. (...). The principal-agent model entailed in the relation of representation is a peculiar one, insofar as it is the agents who decide what principals will know about their actions.<sup>35</sup>

If representatives-agents have the authority to establish rules of information access, do they have the authority to limit the scope of the right to know that people have in their capacity as citizens-principals? Below I analyze the concept of political authority and argue that the political authority that people vest in their representatives grounds a right to withhold information, viz., a right to secrecy. In other words, I claim that citizenship is not only the ground for the people's right to know but also a source of its limits.

### **Content-independent authority and the right to secrecy**

Political authority is traditionally defined by its possession of a right to rule in a content-independent way, viz., a right to create new, and to cancel existing, obligations of others without regard to the content of the actions they require or proscribe.<sup>36</sup> The idea that political authority has a content-independent character has a long tradition in modern political philosophy and, as Leslie Green remarks, cannot be abandoned "without abandoning part of any satisfactory analysis of political authority."<sup>37</sup> The idea goes back to Hobbes's *Leviathan*, where Hobbes defines authoritative commands as follows: "Command is, where a man saith,

35. Manin, Przeworski & Stokes, *supra* note 30 at 23-24, 17.

36. Joseph Raz, *The Authority of Law* (Clarendon Press, 1979).

37. Leslie Green, *The Authority of the State* (Clarendon Press, 1988) at 239. For the critiques of content-independence see P Markwick, "Independent of Content" (2003) 9:1 *Legal Theory* 43; George Klosko, "Are Political Obligations Content Independent?" (2011) 39:4 *Political Theory* 498.

Doe this, or Doe not this, without expecting other reason than the Will of him that says it.”<sup>38</sup> On this view, when authority issues a command, it intends its will rather than the content of the command to function as the reason for action by the hearer. This view of authoritative commands has received a powerful re-statement in the work of H.L.A. Hart and Joseph Raz.<sup>39</sup> It was Hart who coined the term “content-independence” to indicate that the binding force of authoritative commands is divorced from their content.

Hart contrasts content-independent reasons with standard cases in which there is a connection between the reason for action and the action to be done, such as when the action has moral merits, is independently desirable or has desirable consequences. Authoritative directives are different in that the content of the commanded act, its moral merits, or its consequences are not what makes the act required. The binding force of an authoritative command lies in the fact of its being issued: It “is in the (...) fact that someone in authority has said so,” as Raz puts it.<sup>40</sup>

Democratic authority is a species of the genus authority and most influential theories of democratic authority endorse the idea that democratic states exercise power in a content-independent way.<sup>41</sup> For example, Thomas Christiano says:

Democratic directives give content independent reasons. (...) Citizens have duties to obey democratic decisions not because of the content of the decision or the consequences of their obedience but because of the source of the decision in the democratic assembly.<sup>42</sup>

Content-independence seems particularly well suited to explain the role of political authority in modern democracies. As many scholars emphasize, under the conditions of disagreement characterizing modern societies, the authority exercised by the state relates to its role in arbitrating disputes and solving coordination problems. In such situations, it is more important *that* a decision is taken rather than *what* decision is taken from the range of options available. The government's role in solving coordination and bargaining problems consists of, among other things, marking certain courses of action as salient. Salient points derive their action-guiding force not from *what* they prescribe but from the fact *that* they prescribe it. The content of the prescription, i.e., the quality of the action prescribed, is irrelevant to the job it is supposed to do. As David Lewis puts it, a salient point “does not have to be uniquely *good*; indeed, it could be uniquely *bad*. It merely has to be unique in some way the subjects will notice, expect each

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38. Thomas Hobbes, *Leviathan*, Revised Student ed, ed by Richard Tuck (Cambridge University Press, 2003) at 176.

39. HLA Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Clarendon Press, 1982) at ch 10; Raz, *supra* note 36 at ch 12.

40. Joseph Raz, *The Morality of Freedom* (Clarendon Press, 1986) at 35.

41. Thomas Christiano, *The Constitution of Equality: Democratic Authority and its Limits* (Oxford University Press, 2008); Daniel Viehoff, “Democratic Equality and Political Authority” (2014) 42:4 *Philosophy and Public Affairs* 337; David Lefkowitz, “A Contractualist Defense of Democratic Authority” (2005) 18:3 *Ratio Juris* 346; David Estlund, *Democratic Authority: A Philosophical Framework* (Princeton University Press, 2008).

42. Christiano, *supra* note 41 at 252, 244.

other to notice, and so on."<sup>43</sup> If government directives serve as a salient guide for action, then it is not their content, but the fact that they have been issued that makes them the focus of obligations to obey. Addressing the content-independent character of democratic decisions, Daniel Viehoff argued:

The outcome of the egalitarian procedure must (...) be a content-independent reason: It is the fact *that* the directive picks out scheme A rather than scheme B, not the *merit* scheme A has as such, that gives each a reason to act in accordance with A. (For if it were the merit of the scheme that guided their actions, the parties' disagreement would once again upset their attempts at coordination.)<sup>44</sup>

A qualification is in order. It might seem that a right to rule in a content-independent way grants to the state an absolute discretionary power to create normative requirements in regard to any content it chooses. This is not the case. If the state has authority over its citizens, it is in virtue of the reasons that individuals have to be subject to it. Such reasons articulate, then, the side constraints on the legislative and executive decision-making process; authoritative directives that do not serve those reasons are not binding. The constraints may be substantive, for example that the policies the government adopts respect justice, equality, and citizens' privacy. Laws and policies that violate these values lose their authority. Laws and policies that are reached through procedures that violate these values, for example, denying equal voting power to a minority, are not binding either.<sup>45</sup> The constraints with regard to decision-making may also be procedural, as when citizens specify policy areas and the conditions under which information regarding decision-making processes and details of policies can be classified. Thus, content-independent commands are not absolute but valid only within the boundaries that determine their propriety as substantively and procedurally legitimate.

Verifying whether laws and policies remain within the side-constraints determined by citizens and accord with democratic values is a matter of democratic control and accountability. Political accountability, understood as a mechanism through which citizens can voice their policy concerns and have representatives respond to these concerns, is then a necessary (though not sufficient) condition of the authority exercised by democratic states.

I have described the political authority exercised by a democratic state as a right to rule in a content-independent way. I said that the right to rule in a content-independent way is predicated on two conditions: (1) the authoritative directives and policies remain within the substantive and procedural scope limitations determined by citizens and (2) there are mechanisms in place to control and call decision-makers to account. Below I argue that state authority so described extends to secret exercises of power or, in other words, that by vesting authority so defined in their representatives, citizens authorize them to withhold

43. David Lewis, *Convention: A Philosophical Study* (Harvard University Press, 1969) at 35 [emphasis changed].

44. Viehoff, *supra* note 41 at 370 [emphasis added].

45. Christiano, *supra* note 4 at ch 7.

information. My argument turns on the relation between the authority of state policies and people's knowledge of their contents. When we understand the authority of the state as content-independent, I contend, the link between citizens' knowledge of state action and the authority of state action is less tight than the common view has it. Detaching the authority of state policies from the people's knowledge of state policies creates conceptual space for extending authority to secret uses of power. I begin by explaining the common view and build my argument in opposition to it.

According to the common view, public knowledge of state policies is an epistemic condition of their authority. As Thompson observed, "the policies and processes of government must be public in order to secure the consent of the governed."<sup>46</sup> If I am denied knowledge of the state's actions, Christopher Kutz says, "I cannot (...) understand myself either as in harmony or in dissonance with my polity."<sup>47</sup> As such, I cannot consent to or dissent from the state's actions nor can I articulate my will that is needed to authorize its rule. In effect, secrecy "strike[s] at the foundation of (...) the government's right to rule."<sup>48</sup> From this perspective, secret uses of power seem to lack authority because, one argues, people cannot authorize what they are denied knowledge about.

The common view is in tension with the prevailing view of state authority as content-independent. Content-independence refers to the fact that the authority of a state's rule is to be sought outside the citizens' evaluation of the content of its directives and policies, provided they remain within the substantive and procedural limitations determined by citizens. One way in which scholars put this point is by saying that content-independent directives are binding even if citizens disagree with them and consider them mistaken. Philip Soper argues: "[an] authoritative (...) directive (...) requires action even if the authority is mistaken in its evaluation of the action. (...). If authorities expect to be obeyed even if their estimates about what is to be done are mistaken, individual deliberation about the content of directives is *necessarily irrelevant*."<sup>49</sup> In light of this understanding of state authority, the link between citizens' knowledge of state action and their authorization of state action is less tight than commonly presupposed. If citizens' deliberation on and assessment of the content of policies are irrelevant for the purpose of their authorization, citizens need not attend to the details of these policies in order to authorize them. If the authorization of state policies does not require attending to their content, then citizens' knowledge of the specific content of state policies is not required to authorize them either. Citizens need only know and authorize the procedural and substantive rules under which policies are made, but need not know the details of policies that are created under these rules. One way to put this point is to say that what citizens authorize is the state's power to take decisions and make policy within

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46. Thompson, *supra* note 6 at 182.

47. Christopher Kutz, "Secret Law and the Value of Publicity" (2009) 22:2 Ratio Juris 197 at 214 [emphasis changed].

48. *Ibid* at 199.

49. Philip Soper, "Legal Theory and the Claim of Authority" (1989) 18:3 Philosophy and Public Affairs 209 at 218 [emphasis added].

the substantive and procedural limitations determined by citizens rather than the content of those decisions and policies.

If citizens' knowledge of the details of state policies is not a condition of their authority, then policies the content of which is unknown to citizens can be authorized by them. If policies the content of which people do not know can be authoritative (i.e., if people can authorize policies the specific content of which they do not know), then also policies the content of which people do not know because the state restricts access to it can be authoritative. The restriction of access to the content of policies does not undermine their authoritative character because state policies do not derive their authority from their content. From this perspective, policies the content of which is concealed by the government can be authoritative. In other words, secret policies can be seen as a special case of policies that have a content-independent authority. As with any exercise of political authority, resort to secret uses of power is subject to the relevant substantive and procedural scope limitations determined by citizens. To the extent that this is the case and the state's resort to secrecy is a legitimate exercise of political authority, however, citizens have an obligation to refrain from seeking and disclosing information that they authorize the states to classify.

I have argued that secret uses of power may be authoritative and, thus, that citizenship is not only the ground of the people's right to know but also, to the extent that it involves people's submission to authority, it is a source of its limits. Proponents of the common view might press two objections against my argument. Both objections target my argument by denying the detachment between the authority of state policies and the people's knowledge of their contents, which I identified in the concept of content-independent authority. First, they might argue that the people's knowledge of state policies is a condition of their authority because it is a condition of their efficacy, viz., action-guiding function. Second, they might argue that the people's knowledge of state policies is a condition of accountability: Without knowing what the state-officials do and why, people cannot determine whether the relevant substantive and procedural scope limitations in making policy are taken into account and, thus, whether the power-holders have the authority they claim to have.

### The efficacy objection

The first objection sets out to demonstrate that secret exercises of power cannot be authoritative because they fail in their action-guiding function. One of the conditions of the authoritative character of state policies and decisions, Raz argues, is their capacity to be presented as action-guiding directives, i.e., to be presented as "someone's (person's or institution's) view as to how citizens should act."<sup>50</sup> Now to present a view as to how citizens should act, one must first communicate it to them and, thus, the capacity to be communicated is a condition of exercising

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50. Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics*, revised ed (Clarendon Press, 1995) at 202.

authority. In Raz's words, "what cannot communicate with people cannot have authority over them."<sup>51</sup> Thus, directives and policies which are meant to regulate citizens' actions but, due to their secret character, cannot be communicated to them cannot have authority over them. Kutz gives this objection a functional twist. Given that the point of the practical authority exercised by the state is to coordinate social life by issuing directives that guide people's actions, he argues, then it is hard to see how coordination can be achieved if the action-guiding directives are secret.<sup>52</sup> Let me call this the efficacy objection.

In response to this objection, note that the state's right to rule in a content-independent way includes a right to pursue policies and take decisions that are not action-guiding at all or not action-guiding for certain groups in society. We can say that such policies and decisions are legitimate even if they provide no authoritative directives for action for some sections of society. Think of political negotiations conducted behind closed doors. Negotiations are ways of arriving at action-guiding directives and policies, but they are not action-guiding themselves. As they are not action-guiding, it is not the case that secrecy endangers their action-guiding power. As there is no action-guiding power that secrecy endangers here, the efficacy objection does not prohibit the secrecy of closed-door political negotiations. Similarly, the efficacy problem does not arise in situations in which policies coordinate the choices of only a subsection of all citizens, say only the members of intelligence services, the military, or the police. This is, for example, the case when the state directives guide the actions of officials rather than the people at large. Think of foreign intelligence gathering programs: They are meant to be action-guiding for intelligence agents, but not for citizens. When state directives guide the actions of intelligence agents but not of citizens, the efficacy objection requires transparency with regard to the addressees of the directives, viz., the intelligence agents. With respect to their non-addressees, viz., citizens at large, however, the secrecy of the directives does not undermine their action-guiding power because foreign intelligence programs have no action-guiding power for citizens in the first place. With regard to citizens, then, the efficacy objection does not prohibit the secrecy of foreign intelligence programs. I conclude that the efficacy objection leaves an important class of secret uses of power intact.

A similar discussion has been conducted in jurisprudence regarding the validity of laws. For both natural law scholars and positivists, publicity is one of the principles of legality in the sense that it is a condition of the law's action-guiding function.<sup>53</sup> At the same time, however, it is acknowledged that not all laws are intended to guide the general public, the implication being that those whose actions the laws are not meant to guide need not know them. According to Lon Fuller, "the great bulk of modern laws relate to specific forms of activity, such as carrying

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51. *Ibid* at 201.

52. Kutz, *supra* note 47 at 199-201.

53. Hart speaks of the principle of intelligibility; Fuller of the principle of promulgation. See HLA Hart, *The Concept of Law* (Clarendon Press, 1997); Lon Fuller, *The Morality of Law* (Yale University Press, 1969).

on particular professions or businesses; it is therefore quite immaterial that they are not known to the average citizen.”<sup>54</sup> Hart points out that a law’s action-guiding force may be confined to officials, in which case there is no need to make it known to ordinary citizens. In an extreme case it is only officials whose conduct the law is intended to guide.<sup>55</sup> This seems to create a conceptual space for secret laws: as Raz argues, insofar as secret laws are meant to guide *someone’s* actions, the fact of concealment does not deprive them of validity:

I do not mean to suggest that all laws are open. Secret laws are possible provided that they are not altogether secret. Someone must know their content some of the time. They are publicly ascertainable and they guide the behavior of the officials to whom they are addressed or who are charged with their enforcement by being so.<sup>56</sup>

Addressing the efficacy objection allows me to reflect on the status of different kinds of state secrecy. On the one hand, there are secrets the existence of which citizens know even though they are ignorant of their content. This includes information or policies to which the state restricts access by flagging it as “classified.” For example, citizens know that intelligence services gather information on terrorism suspects, but they do not know the content of the information gathering programs. On the other hand, there are secrets the existence of which citizens are unaware. For example, they have no clue that the intelligence services gather suspect-related information of any kind. Scholars refer to these two kinds of secrecy as “shallow” and “deep” secrecy respectively.<sup>57</sup> As Amy Gutmann and Dennis Thompson put it, a deep secret is “a secret the very existence of which is hidden from citizens. In contrast, a secret is shallow when citizens know that a piece of information is secret but do not know what the information is.”<sup>58</sup>

Both in the case of shallow and deep secrets, we deal with (1) a restriction on access to state policies and (2) the policies to which access is restricted. Note that in the case of both shallow and deep secrets, the efficacy objection does not apply to (2), the policies to which access is restricted: As in both cases secret policies are intentionally withheld from citizens, it is plausible to assume that they are not meant to be action-guiding for them. Insofar as they are not action-guiding for citizens, there is no action-guiding power that their secrecy can endanger; in effect the efficacy objection does not prohibit their secrecy.

The efficacy objection is relevant to the status of (1) the restriction on access. In the case of shallow secrets, the restriction on access is known: Citizens know that a secret directive is issued or a classified program is in force. The fact of secrecy is known because the state communicates the restriction on access by, for example, labeling information about it “classified.” In communicating the restriction on access, the state communicates its will regarding how citizens should act with regard to classified information, viz., that they refrain

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54. *Ibid* at 51.

55. Hart, *supra* note 53 at 117. See Claire Grant, “Secret Laws” (2012) 25:3 Ratio Juris 301.

56. Raz, *supra* note 36 at 51 n 9.

57. David Pozen, “Deep Secrecy” (2010) 62:2 Stan L Rev 257.

58. Amy Gutmann & Dennis Thompson, *Democracy and Disagreement* (Belknap, 1996) at 121.

from seeking and disclosing it. Correspondingly, citizens are able to identify the restriction as an action-guiding directive. From the perspective of the efficacy objection, then, the restriction on access involved in shallow secrets is action-guiding and authoritative. The case of deep secrecy is different. Unlike in the case of shallow secrets, the restriction on access to such programs is itself secret and it cannot be communicated to those whose access it is meant to restrict. As this restriction is itself kept secret and, thus, incapable of being communicated to those whose access it is meant to restrict, it is, from the perspective of the efficacy objection, deprived of authority.

### **The accountability objection**

The argument that secret uses of power may be authoritative raises a concern that state secrecy, in limiting the people's right to know, disables mechanisms of control and accountability, for how can citizens call their representatives to account and verify whether secret uses of power remain within the relevant substantial and procedural side-constraints, if the knowledge of their content is withheld from them? Only if state policies and decisions are given adequate publication, the argument goes, can people ascertain whether policies remain within the relevant substantial and procedural side-constraints and, thus, whether they have the authority they claim to have. In this section I argue that state secrecy and the limits it places on the people's right to know do not automatically compromise the mechanisms of control and accountability because there are ways to control and to call government officials to account other than general public disclosure of government information.

Two alternative mechanisms of control and accountability are of special interest. The first mechanism is retrospective disclosure, viz., public disclosure of previously classified material when it has lost its sensitive character. Most states have institutionalized retrospective disclosure by either setting a time limit to the classification period or conducting periodic review procedures of classified documents.<sup>59</sup> The second mechanism of control and accountability is disclosure only to discrete groups of people, for example, specialized parliamentary or judicial committees. Oversight committees have the task of deciding whether the classification policy is within the procedural and substantial scope limitations of democratic authority. In order to perform this task, they are vested with the right to pose questions, issue resolutions, launch inquiries and conduct study missions. As a mechanism of control and accountability, oversight committees have an advantage over the retrospective disclosure mechanism. Whereas retrospective disclosure of previously classified documents makes it possible for citizens to investigate the secret policy, detect possible wrongdoing and call its authors to account, it offers little opportunity to take remedial measures. Oversight committees can ensure timely response to secret uses of power.

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<sup>59</sup>. For example, the Netherlands is legally required to declassify all classified secrets dossiers older than 25, 50 and 75 years; Poland has a mandatory review period of classified documents every five years.

Oversight committees as a mechanism of control and accountability have received much attention from public administration scholars and legal scholars.<sup>60</sup> Yet pointing to oversight committees as an alternative to the pursuit of transparency is not to deny that they face important challenges. For one, given that the committees must do their work *in camera*, the problem emerges of “who guards the guardians?”<sup>61</sup> When the oversight committee’s work is shielded from public view, the overseers might turn a blind eye to controversial uses of secret power. This danger is particularly acute when a majority of the committee members are affiliated with the governing party. As Marina Caparini put it:

[I]n the parliamentary system the executive (...) is drawn from the legislature (...). Since the executive is accountable to the legislature, party discipline is strictly maintained. Political deference may have significant influence on the functioning of parliamentary committees, where members of the majority or coalition governing party are unwilling to criticize a Minister and the domain under his management.<sup>62</sup>

For another, oversight committees depend on the willingness of the secret holders to provide classified information.<sup>63</sup> If the secret holders themselves will not provide it, or provide only those pieces of classified information that support their preferred policy choices, then the committee’s work is thwarted because there will be little information available that is independent and useful.

Whereas a full response to these challenges deserves a separate study, some insights can be gained from the studies of oversight of intelligence services.<sup>64</sup> They point to adjustments in institutional design of oversight committees that may contribute to overcoming the problems indicated above.

In order to maintain oversight objectivity and avoid overseers becoming too closely identified with the executive, it is considered desirable to strive for an adversarial composition of the membership of oversight committees, viz., including members of opposition parties so that they, as well as parties in power, may challenge governments. Kim Scheppele draws on the example of the German system of oversight, which is chaired by the majority and minority parties on a rotating basis and operates under the premise “that the opposition parties must be able to check that majority parties are not using the intelligence services for their own political purposes.”<sup>65</sup> True, even an adversarial composition could pursue

60. Marina Caparini, “Controlling and Overseeing Intelligence Services in Democratic States” in H Born & M Caparini, eds, *Democratic Control of Intelligence Services: Containing Rogue Elephants* (Ashgate, 2007) 3; Heidi Kitrosser, “Congressional Oversight of National Security Activity: Improving Information Funnels” (2008) 29 *Cardozo L Rev* 1049; Pozen, *supra* note 57; Michael P Colaresi, *Democracy Declassified: The Secrecy Dilemma in National Security* (Oxford University Press, 2014).

61. See Rahul Sagar, “On Combating the Abuse of State Secrecy” (2007) 15:4 *J Political Philosophy* 404.

62. Caparini, *supra* note 60 at 14.

63. For a discussion of the problems encountered by the Dutch parliamentary oversight committee to acquire information from the Dutch intelligence services, see Constant Hijzen, “More than a ritual dance. The Dutch practice of parliamentary oversight and control of the intelligence community” (2014) 24:3-4 *Security and Human Rights* 227.

64. Born & Caparini, *supra* note 60.

65. Kim Scheppele, “We Are All Post-9/11 Now” (2006) 75:2 *Fordham L Rev* 607 at 619; see Bruce Ackerman, “The Emergency Constitution” (2004) 113:5 *Yale LJ* 1029.

its own partisan agenda. In such cases, however, the task may be delegated to a panel of independent experts acting on reasons rather than interests.<sup>66</sup>

Another way to discipline the overseers is to introduce multiple stages of oversight. As Heidi Kitrosser argues, information might first be channeled to a small group, which has the power (through majority vote or other mechanism) to determine that the information or parts thereof should be transmitted to a different group.<sup>67</sup> The possibility that the proceedings of the committee become in this way more widely available, creates some incentive to act responsibly.

With regard to the problem of the dependency of oversight committees on the political will of those who they are to oversee, the issue is to overcome the secret-holders' reluctance to comply with reporting requirements. The measures proposed to deal with this problem focus on the stature of the committee and the way it interacts with the secret keepers.

Kitrosser and Caparini argue that the resistance of the executive to providing information to the oversight bodies relates to the fear that it will be leaked:

Whether reasonable or not, fears may arise that the more persons notified—even within the relatively secure realm of the intelligence committees—the greater the likelihood of leakage. More cynically, such fears may provide an easy and politically palatable excuse for avoiding (...) disclosures.<sup>68</sup>

To reduce this fear, a change in the structure and size of oversight bodies would be required. Thus, Kitrosser recommends adjustment of the oversight committees' structure and size via reassessment of security clearance requirements so as to ensure that the group of overseers is sufficiently large in terms of their capacities and powers to understand the information conveyed and to have a real chance of influencing the programs of which they are informed, but small enough to minimize the chances of leaks.<sup>69</sup> Further measures meant to induce the executive's compliance with reporting requirements include installing repetitive interactions between the executive and the overseers and increasing the committees' general powers, stature, competence and influence (even the authority to wield a power to subpoena of their own): "[H]eightening committees' prestige, visibility and abilities, such changes could increase the political incentives for committees to demand information and for the executive branch to comply with such demands."<sup>70</sup> To the extent that these institutional arrangements would amend the credibility of oversight committees, state secrecy and the limits on the people's right to know it imposes should not be an obstacle to control and accountability.

This concludes my argument that political authority or the right to rule entails a right to resort to secret uses of power within the relevant substantial and

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66. For a discussion see Rahul Sagar, *Secrets and Leaks: The Dilemma of State Secrecy* (Princeton University Press, 2013) at 99.

67. Kitrosser, *supra* note 60 at 1072.

68. *Ibid* at 1076. Cf Caparini, *supra* note 60 at 13; Pozen, *supra* note 57 at 331. For the opposing view, Sagar, *supra* note 66 at 88.

69. Kitrosser, *supra* note 60 at 1071.

70. *Ibid* at 1088.

procedural side-constraints determined by citizens. My argument has drawn on the content-independent character of political authority. I argued that as long as we have no problem with authorizing the content-independent power of democratic states, we should have no problem with authorizing the policies and decisions that democratic states classify. My argument is limited to shallow secrets only. Within such a confined domain, however, state secrecy need not necessarily compromise the accountability or the action-guiding role of authority.

Having argued that political authority involves a right to secrecy, I have qualified the prevailing view that citizenship grounds the people's right to know. I have conceded that citizens, in virtue of their role as principals, are entitled to access information related to the actions of their representatives-agents. However, I have also said that citizenship is not only the ground for the people's right to know but also a source of its limits. Just as Manin, Przeworski and Stokes observed, citizens have no right to know information which they, in their capacity as principals, have authorized their representatives-agents to classify.

### **Conclusion**

In this essay, I have reflected on the normative grounds and limits of the people's right to know government-held information. My overall conclusion is that the people's right to know, both as a human right and as a right of citizenship, is a limited right. The same principles that establish the people's right to know also limit that right. And in limiting it, these principles also establish a domain of state secrecy. The people's right to know and state secrecy are co-original: the same reasons that speak *for* the people's right to know, also speak *against* it and *for* state secrecy.