Where Public and Private Spaces Converge: Discriminatory Media Access to Government Information

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WHERE PUBLIC AND PRIVATE SPACES
CONVERGE: DISCRIMINATORY MEDIA ACCESS
TO GOVERNMENT INFORMATION

Ilana Friedman*

"[W]ere it left to me to decide whether we should have a government
without newspapers or newspapers without government, I should not
hesitate for a moment to prefer the latter."

-Thomas Jefferson

INTRODUCTION

Government and the media engage in a constant battle over the
accessibility of information. At present, as the War on Terror gives the
federal government more power to deflect the media’s scrutiny for purposes
of national security,1 the implications of this battle present timely and
important questions. The climate of fear in newsrooms today is stronger
than it has been in several decades. This fear arises from the pressure that
politicians exert on journalists to conform to the story that the government
wants to tell.2 In particular, the current Administration has employed a
tactic of selectively granting access to government information to media
actors who support Administration policies and ask questions that highlight
Administration successes while stonewalling actors who are more critical.3

The Administration physically restricted access to information, for
example, by routinely excluding a New York Times reporter assigned to
cover Vice President Dick Cheney from the press plane during the 2004

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1. Letter from Thomas Jefferson to Edward Carrington (Jan. 16. 1787), quoted in

2. See infra notes 5-8, 225-48 and accompanying text.

3. See Paul J. Gough, Emotional Rather Blasts “New Journalism Order,”
http://medialit.med.sc.edu/rather_criticism.htm (stating that this pressure has “taken its toll
on the news business”).

4. See infra notes 5-8 and accompanying text.

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presidential campaign.\(^5\) Additionally, the Administration admitted to prescreening reporters' questions at a press conference during the Iraq War, permitting only scripted questions to be asked.\(^6\) Access to government information is not only controlled by restricting the press; rather, it may also be problematic when government selectively grants access based on a reporter’s content or viewpoint. In a highly publicized incident, a member of the White House press corps, Jeff Gannon, received liberal access to the White House while working on behalf of an organization owned by a prominent Republican whose mission it was to promote a conservative agenda.\(^7\) The organization arguably did not even qualify as a media entity.\(^8\)

These actions affect not what the media may communicate or publish, but rather the information to which the media has access, and whether media access to that information is dependent on adhering to a particular point of view. The U.S. Supreme Court is often willing to apply the First Amendment as preventing restraints on publication, but it is much more hesitant to grant the press what it considers to be special privileges.\(^9\) Therefore, predicting the outcome of a Supreme Court case on differential treatment of the media in gaining access to government information is more complicated than predicting the outcome of, for example, a prior restraint case.\(^10\)

The First Amendment structurally envisions a clash between the press and the government. All of the prohibitions in the Bill of Rights place limits on the government with respect to individual citizens, with the exception of the Press Clause, which limits the government’s ability to “abridg[e] the freedom of... the press” specifically.\(^11\) This makes the press the only institution specifically mentioned, and arguably protected, by the Bill of the Rights.\(^12\) Perhaps this is because the press needs protection


\(^8\) See Boehlert, supra note 7.

\(^9\) See Dyk, supra note 1, at 928. For example, the U.S. Supreme Court protects the press from prior restraints and some defamation claims, government-imposed access requirements, and certain taxation schemes. Id. at 928-29.

\(^10\) See infra note 32 and accompanying text.

\(^11\) U.S. Const. amend. I.

\(^12\) See Amy Jordan, The Right of Access: Is There a Better Fit than the First Amendment?, 57 Vand. L. Rev. 1349, 1360-64 (2004), for a discussion of whether the Press Clause of the First Amendment is a general subset of free speech or whether the press as an industry has its own separate protection. Some argue that the purpose of the Press Clause is
from the government in order to empower citizens against the
government. In other words, it is not the press that is protected by the
First Amendment, but the citizens who use the press as a tool to inform
their citizenship.

The emergence of more powerful government since World War II
necessitates a more effective press with greater access to information.
Nevertheless, the Supreme Court, though it clearly delineates protections
for the press based on the First Amendment, "has yet to explicitly afford
special protections to the newsgathering process." Press advocates argue
that there are a number of reasons to grant such protection, including the
press's role as a surrogate for the public. They contend that political
bodies and journalists have developed their own alternatives to a right of
access, but such alternatives are unreliable at the times of the greatest
danger – when government is abusing its power.

Though the Supreme Court severely limits any right of access, it has
not considered whether differentiating between media organizations or
individual reporters based on the content of their reporting implicates
greater constitutional values than traditional access provisions. This issue is
highly salient at this moment in history, as a secretive administration and
thwarting executive officials tightly guard government information related
to critical contemporary issues. The constitutional question is whether
such secretive and discriminating behavior is permissible, and what ought
to be the appropriate test to determine when discriminating between media
organizations on the basis of content violates the First Amendment.

Part I discusses the place of newsgathering in the American political
tradition and First Amendment doctrine, and considers the applicability of
to ensure that people can express their views in writing as well as speaking without forfeiting
their rights under the First Amendment. See id. at 1360. Others counter that the Press Clause
provides special protection for the press because of the press's unique role in educating the
public so that it may adequately and meaningfully participate in the democratic system. See id. at 1361.

13. See id. at 1361-62 (stating that the press plays a crucial role as "the so-called Fourth
Estate," acting to "expos[e] public mismanagement and keep[] power fragmented,
manageable, and accountable." These arguments indicate that the purpose of the press clause
was to guard against prior restraints of the press and to place additional checks on
government power) (quoting Leonard W. Levy, Original Intent and the Framers'
Constitution 213 (1988)).

14. See infra notes 56-57 and accompanying text.

15. See Dyk, supra note 1, at 929 ("Under such circumstances, press access must be
'protected so that [the press can] bare the secrets of government and inform the people.'" (quoting N.Y. Times v. United States, 403 U.S. 713, 717 (1971) (Black, J., concurring))).

16. Id. at 928.

17. See id. at 935. The press, however, is a less disruptive and, at least arguably, a more
discretionary body than the general citizenry. See id. at 935.

18. See id. at 936-37 (giving as examples Freedom of Information Act (FOIA)
exemptions that permit the government to withhold evidence of abuse or delay its release
and the fact that government officials are unlikely to expose themselves when they abuse
power).


20. See generally Chaddock, supra note 5.
the equal protection doctrine in differential press access to government information. Part I also considers the parallel development of the public forum doctrine, as well as divergent lower court decisions about discriminatory press access. Part II explores the arguments on both sides of the debate, illustrated by the lower court cases, which highlight the historical lack of a right to gather news on one side and the equal protection and content-based First Amendment arguments on the other. Part III argues that the best test is one that applies the public forum doctrine to the discriminatory media access problem.

I. THE MEDIA AND THE FIRST AMENDMENT: THE CONTROVERSIAL RIGHT TO NEWSGATHERING AND THE INCORPORATION OF A RIGHT OF ACCESS TO GOVERNMENT INFORMATION INTO THE FIRST AMENDMENT

This Part introduces the Press Clause and First Amendment doctrine on media access to government information. It then considers various theories proposed by academics in support of a right of access. Part I.A considers the balance between political and constitutional protections of the press. Part I.B discusses the relationship between traditional rights protected by the First Amendment and the lack of a general right to access government information. Parts I.C, I.D, and I.E discuss related areas of doctrine implicated in a discussion of selective media access to government information, including equal protection doctrine, in both the general and the media context, and public forum doctrine. Part I.F discusses the way a time of war impacts freedom of speech doctrine.

A. The Intended Balance Between Executive/Legislative Power and Press Access to Government Information

The framers of the Constitution wanted an informed public. In addition to the First Amendment, the Constitution frequently references other ways in which the government must be forthcoming in providing information to the people.21 These references suggest that the Constitution assigns value to an informed electorate and that the framers passed the First Amendment with a "core purpose" of promoting the circulation of ideas and information necessary for government by the people.22

On the other hand, the fact that the framers expressly conferred these rights might also suggest that they intended any other affirmative rights of access to "depend upon political decisions made by the people and their

21. See Capital Cities Media, Inc. v. Chester, 797 F.2d 1164, 1168 (3d Cir. 1986). For example, the Constitution requires Congress to provide a regular statement of accounts and receipts to be published from time to time and presumably to be provided to the public. U.S. Const. art. I, § 9. The Constitution also requires the President to give Congress information on the state of the union from time to time. Id. art. II, § 3. Finally, Congress must publish a journal of its proceedings. Id. art. I § 5; see also Jordan, supra note 12, at 1367 (stating that many of these other provisions in the Constitution are explicit suggestions of a right of access).

22. See Capital Cities Media, Inc., 797 F.2d at 1167.
elected representatives”\textsuperscript{23} rather than to be constitutionally protected.\textsuperscript{24} Some of the framers, at least, found the available provisions inadequate and believed that the Constitution guaranteed more rights than those expressly conferred. For example, James Wilson argued that “the people have a right to know what their agents are doing or have done, and it should not be in the option of the legislature to conceal their proceedings.”\textsuperscript{25} Patrick Henry agreed, stating that “[Congress] may carry on the most wicked and pernicious of schemes under the dark veil of secrecy. The liberties of a people never were, nor ever will be, secure, when the transactions of their rulers may be concealed from them.”\textsuperscript{26} 

The actions of the framers, arguably, suggest that they never found public, on-demand access necessary to the goal of an informed public.\textsuperscript{27} They themselves met behind closed doors to write the Constitution, and the Houses of Congress followed suit.\textsuperscript{28} The actions of the executive branch also directly conflicted with a principle of access for the general public.\textsuperscript{29} 

The framers granted representatives the right to withhold from the public “such Parts [of their Proceedings] as may in their Judgment require Secrecy.”\textsuperscript{30} In writing the Constitution, the framers always recognized that, where discussions concerned military operations or matters of great secrecy, the people had no right of access if publication would be detrimental to the public.\textsuperscript{31} 

### B. Does the Media Have a Right to Gather News Under the First Amendment?

Though the media has a clearly established right to publish or broadcast information, the doctrine governing media access to government information is more complex and less well established.

First Amendment doctrine is highly deferential to the right to speak or publish once the media already possesses the information sought. Prior

\textsuperscript{23} Id.
\textsuperscript{24} See id. at 1168.
\textsuperscript{25} Id.
\textsuperscript{26} Id. at 1169.
\textsuperscript{27} See id. at 1169.
\textsuperscript{28} See id. The Senate met in private until 1794; the House of Representatives, less open to the public, met in private until after the War of 1812. Committee sessions in both Houses remained closed until the 1970s. The Senate currently holds onto its records, granting access to the public after twenty years for routine Senate records, and after fifty years for sensitive records. See id. at 1169.
\textsuperscript{29} Id. at 1170. For example, President Jefferson refused to turn Aaron Burr’s private papers over to John Marshall, claiming a “private side” to the presidential office. See id. He argued that the balance between the public’s right to know and the executive’s need for secrecy should be struck by the executive. See id.
\textsuperscript{30} Id. at 1169.
\textsuperscript{31} See id.
restraint is probably the quintessential First Amendment violation and one of the primary reasons for its passage.\textsuperscript{32}

The First Amendment secures "the paramount public interest in a free flow of information to the people concerning public officials,"\textsuperscript{33} and the First and Fourteenth Amendments also protect the right of the public to receive published information and ideas.\textsuperscript{34}

This subsection discusses both the doctrine and the theory behind media access to government information. Part I.A.1 considers whether a right of access is sufficiently important to examine in greater depth. Part I.A.2 articulates the barriers that make recognition of a right of access less likely. Part I.A.3 examines the cases that make up the doctrine of media access to government information, while Part I.A.4 evaluates their impact. Part I.A.5 goes beyond the doctrine to include theoretical support for media access to government information.

1. The Political Process and a Free Press: Is a Right of Access Necessary?

Those who find a right of access necessary and important often rely on arguments that the political process cannot adequately safeguard a free press. Additionally, one may see the right as more or less necessary depending on the role and status one envisions for the press.

Some critics argue that the political process is incapable of protecting access, because "openness itself is essential to the proper functioning of that process. Majoritarian pressure for openness cannot arise if people are unaware of or misled about the abuses or mistakes going on behind closed doors."\textsuperscript{35} This question becomes even more urgent when considered in the context of the War on Terror: "In the current political climate, where much of United States foreign policy is quietly conducted at dangerous locations around the world, the need for public information is vital for our democracy to function correctly."\textsuperscript{36}

On the other hand, some argue that judicial doctrine finding no right to access has not hurt the public, because representatives are generally responsive to political pressure at the times that the public requires greater access.\textsuperscript{37} For example, there has been a profound change in the government's approach to granting access in the last three decades, perhaps

\begin{itemize}
\item \textsuperscript{33} Pell v. Procunier, 417 U.S. 817, 832 (1974) (internal quotations omitted).
\item \textsuperscript{34} See id.
\item \textsuperscript{35} Michael J. Hayes, \textit{Note, Whatever Happened to "the Right to Know"?: Access to Government-Controlled Information Since Richmond Newspapers}, 73 Va. L. Rev. 1111, 1138 (1987).
\item \textsuperscript{37} See Capital Cities Media, Inc. v. Chester, 797 F.2d 1164, 1170 (3d Cir. 1986). \textit{But see supra} note 18 and accompanying text (arguing that the times when government is abusing its power are the times at which it is least likely to grant access).
\end{itemize}
as a result of the greater need for information arising from rapid government growth. The judiciary, however, has never "asserted the institutional competence" to decide what access the public ought to receive to government information. Perhaps this is because the First Amendment and the general grant of powers to the federal government by the Constitution never explicitly mention access to information, so they provide insufficient guidance to the courts.

There is a body of literature that generally extols the place of the media in American politics. Some envision the press as the "Fourth Estate," a fourth branch of government with a constitutional role superior to or at least separate from that of the other three branches of government. This is a theoretical construct, promulgated fairly actively by academics, but never confirmed in case law or even in dictum. The judiciary generally portrays the media as a committed political force, always truthful and acting in good faith, if not always fair and objective, a "force beyond commercial or political self-interest and dedicated to serving the public good." Lawyers defending the press portray it as the archetypal critical citizen: aggressive, politically involved, energetic, and vigorous in public service. Lawyers opposing the press characterize it as more hesitant, willing to demand extra privileges, and expected to divulge sources.

Nevertheless, Professor Sandra Chance argues that, no matter what the academic literature posits, the media today "face a backlash of unprecedented proportions, new anti-media legislation, and a rise in court decisions that chip away at traditional First Amendment protections for the news media and threaten our very freedom." The media face a crisis of credibility today, accompanied by a decline in public support. In the Freedom Forum State of the First Amendment Survey of Public Attitudes,

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39. Id. at 1171.
40. See id.
42. See id. at 247.
44. See id. at 33.
45. See id.
47. See id.
with data collected in 1999, more than half of the respondents reported that they felt that the press has too much freedom.48

The public perception of the media is reflected in recent court decisions, in which judges have cut back severely on protections, particularly limiting the “breathing space” arguably necessary for the exercise of free expression.49

Some academics argue that current doctrine is too permissive and does not take into account actual media practices.50 Therefore, they argue, the rulings do not satisfy the underlying purpose of the First Amendment’s protection.51 Professor Philip Judy, for example, argues that First Amendment jurisprudence permits the media to operate in a way that does not contribute to the goal of an informed citizenry.52 He agrees with the public assessment of the media and says that “taken as a whole, the Court has all but encouraged bad journalism. The overall impact of the Court’s decisions has fostered a news media that need not adhere to standards of accuracy or truth to be legally protected.”

Therefore, although there is a perception of the media that would support giving the media greater access as an agent of the public, others argue against such a construction.

2. Barriers in the Way of Recognizing a Right of Access

There are several structural elements of the First Amendment that lead both courts and scholars to believe that the Constitution does not contemplate a right of access to government information. First, the differences between the Speech Clause and the Press Clause are not always clear. Also, one must consider the differences recognized between speech and action in First Amendment doctrine.

One of the great debates in the question of media access is whether the Press Clause provides the same or a qualitatively different protection than the Speech Clause. According to former Chief Justice Warren Burger, the difference between speech and the press does not matter, as the Press Clause is “complementary to and a natural extension of” free speech.54 He argued that it is only separate because the press is more likely to be

48. See id. at 170.
49. Id. at 170-71; see, e.g., Jones v. Clinton, 12 F. Supp. 2d 931, 936-37 (E.D. Ark. 1998) (stating, in response to a request by the media for access to discovery materials in the Paula Jones case, that the media was “often inaccurate” and, along with other entities, motivated by the prospect of “profit and political gain”); Ayeni v. CBS, Inc., 848 F. Supp. 362, 368 (E.D.N.Y. 1994) (equating a media outlet with thieves after the government permitted the media outlet’s cameras to go into an apartment to film).
51. See id.
52. See id.
53. Id. at 548.
restrained. Courts may be reluctant to define freedom of the press as totally separate from freedom of speech, as the press is made up of individual, unlicensed citizens. The limits of the press are defined partially by the fact that all citizens have a duty, to some extent, to act as the press acts; therefore, because the press both represents and consists of citizens, freedom of speech and freedom of the press essentially comprise the same doctrine.

In contrast, Supreme Court doctrine sometimes recognizes the fundamental role of the press in protecting First Amendment values, as "function as much as forum." The press, in this role, has a "watchdog" function of sorts. Such a conception might require greater constitutional protection.

Regardless of whether one agrees that the Press Clause is a separate form of protection, it is not clear whether the Press Clause protects the public or the press as a private business. Members of the media argue that the Amendment was intended to give the press virtually an unrestricted license, but the history surrounding the adoption of the First Amendment suggests that the authors of the Constitution did not necessarily intend to give the press special protection as a private business. Justice Potter Stewart believed that it was the business that was protected: "[T]he Free Press Clause extends protection to an institution. The publishing business is, in short, the only organized private business that is given explicit constitutional protection."

Even if the press is granted special institutional privileges, a right of access does not necessarily follow. There is a difference between denying access to government information and restricting or punishing the process

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55. See id. Note that one could quibble with this narrow understanding of the Press Clause and argue that the separate articulation of freedom of the press ought to be treated more like religion or expression, which are doctrinally separate from speech. See id.
56. See id. at 34.
57. See id.
58. Id. at 27. For example, the Supreme Court recognizes protection of the media against government harassment and protection against discriminatory taxation. See id.
59. Id. Professor Dilts has written, "If the role of the press is to play the role of the citizen critic, then the constitutional behavior of the press inevitably will be judged by a judicial understanding of what it means to be a good citizen." Id. at 37.
60. See Jordan, supra note 12, at 1360-61.
61. See id. Note that it is not necessary to consider only what the founders were thinking when they wrote the Constitution: "It is what they said, not necessarily what they meant, that in the last analysis may be determinative. This is particularly true when constitutional language is subjected to tensions not anticipated when the text was written." Dilts, supra note 43, at 32 (citing Melville Nimmer, Introduction—Is Freedom of the Press a Redundancy: What Does It Add to Freedom of Speech?, 26 Hastings L.J. 639, 641 (1975)).
62. Dilts, supra note 43, at 29 (quoting Potter Stewart, Or of the Press, 26 Hastings L.J. 631, 633 (1975)). However, Professor Randall Bezanson responds that it is not the business that is protected but rather the exercise of "editorial judgment" of a particular kind. See id.
of information-gathering. The question is whether the process is expressive conduct protected by the First Amendment.

According to C. Edwin Baker, both verbal and nonverbal conduct can advance the purpose of the First Amendment. Therefore, there seems to be no reason to grant protection to speech and not conduct, especially because freedom of assembly and freedom of religion both implicate conduct rather than speech. The First Amendment, he argues, ought to include all conduct that advances fundamental First Amendment values, with the exception of obstructionist behavior and coercive or physically injurious conduct. Professor Jon Paul Dilts would claim that access, more conduct than speech, is integral to the purposes of the First Amendment:

Some scholars, unhappy with a dominant speech-action dichotomy model of the First Amendment, complain that it forces recognition of powerful protection for speech far from the core of First Amendment values while ignoring actions essential to democratic ideals. They complain that the assumption that the First Amendment protects expression but not behavior has produced peculiar results, such as greater constitutional protection for pornography than for press investigations of organized crime. As a matter of social utility, they suggest, it would be a more useful exercise of First Amendment freedoms to guard the activities of a vigilant press than the speech of sexual panderers.

This dichotomy raises the question of how to treat the process by which the media goes about acquiring news.

3. First Amendment Doctrine: Deference to the Media in the Context of Newsgathering is Not Clearly Established

Though Supreme Court doctrine clearly dictates deference to the media in speaking and publishing, when faced with the question of whether the Press Clause includes the right to access government information, the Court has not given a clear answer. In Branzburg v. Hayes, the Court reaffirmed the principle that journalists have no uninhibited right to publish,

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63. See Jordan, supra note 12, at 1364-65. The author does concede that not allowing access to government information interrupts the free flow of information. Id. at 1365.
64. See Dilts, supra note 43, at 26.
65. See id.
66. See id. at 28.
67. Id. at 25-26 (internal citation omitted).
68. See supra note 32 and accompanying text.
69. 408 U.S. 665 (1972). This case was actually about whether journalists who were asked to divulge their confidential sources to a grand jury might be forced to do so in spite of the First Amendment. See generally id. The court stated, it is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability. . . . [O]therwise valid laws serving substantial public interests may be enforced against the press as against others, despite the possible burden that may be imposed.

Id. at 682-83.
but rather are subject to statutory and common law limitations.\textsuperscript{70} The Court stated that there is no constitutional right of special access to information.\textsuperscript{71} The reporters in this case made the argument that being forced to disclose news sources would hamper newsgathering because relationships between reporters and reluctant sources would deteriorate.\textsuperscript{72} The Court responded that not every incidental burden on the press based on criminal and civil statutes of general applicability is invalidated by the First Amendment, as having rights under the Press Clause does not allow one to invade the rights of others:\textsuperscript{73}

> We do not question the significance of free speech, press, or assembly to the country’s welfare. Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated. But... no exaction or tax for the privilege of publishing, and no penalty, civil or criminal, related to the content of published material is at issue here. . . . [R]eporters remain free to seek news from any source by means within the law.\textsuperscript{74}

The Court unequivocally stated that the right to speak and publish does not imply an “unrestrained right to gather information,”\textsuperscript{75} though official harassment of the press undertaken to disrupt a reporter’s relationship with his sources was not to be tolerated.\textsuperscript{76} Particularly because the press continues to flourish despite a failure to recognize this right, the Court concluded that maintaining the confidentiality of sources was not necessary to the free flow of information.\textsuperscript{77}

In a series of cases, the Supreme Court developed access doctrine that continued to deny any right to gather news. \textit{Pell v. Procunier}\textsuperscript{78} considered whether prohibiting the press and other media members from interviewing specific inmates, as codified in a Department of Corrections manual, was a violation of the First Amendment.\textsuperscript{79} The press argued that the limitation on newsgathering impermissibly infringed on its rights under the Press

\begin{itemize}
\item \textsuperscript{70} See \textit{id.} at 684-85.
\item \textsuperscript{71} See \textit{id.} The Court laid out a series of examples of forums that exclude newsmen, including grand jury proceedings, Supreme Court conferences, crime scenes, some trials, and meetings of private organizations. \textit{See id.}
\item \textsuperscript{72} See \textit{id.} at 670-71. The Court described the reporters’ claim:
\item \textsuperscript{73} \textit{T}o gather news it is often necessary to agree either not to identify the source of information published or to publish only part of the facts revealed, or both; . . . if the reporter is nevertheless forced to reveal these confidences to a grand jury, the source so identified and other confidential sources of other reporters will be measurably deterred from furnishing publishable information, all to the detriment of the free flow of information protected by the First Amendment.
\item \textsuperscript{74} Id. at 679-80.
\item \textsuperscript{75} See \textit{id.} at 682-83.
\item \textsuperscript{76} Id. at 681-82.
\item \textsuperscript{77} Id. at 684.
\item \textsuperscript{78} See \textit{id.} at 707-08.
\item \textsuperscript{79} See \textit{id.} at 698.
\item \textsuperscript{79} 417 U.S. 817 (1974).
\item \textsuperscript{79} See \textit{id.} at 819.
\end{itemize}
Clause,80 citing a right of access to sources of newsworthy information.81 The Court reiterated that the Press Clause had never been held to grant reporters a special right of access exceeding that of the public.82 Reaffirming its commitment to the freedom of the press, the Court stated that the constitutional guarantee "assur[ed] the maintenance of [the] political system and an open society" and mandated a "free flow of information."83 The Court also stated, in dictum, that the First Amendment protects the right of the public to receive information and ideas,84 and that any restraints are presumptively invalid under the Constitution.85 Nevertheless,

[i]t is one thing to say that a journalist is free to seek out sources of information not available to members of the general public, that he is entitled to some constitutional protection of the confidentiality of such sources, and that government cannot restrain the publication of news emanating from such sources. It is quite another thing to suggest that the Constitution imposes upon government the affirmative duty to make available to journalists sources of information not available to members of the public generally.86

_Saxbe v. Washington Post Co._87 considered a similar issue: whether the prohibition of individual or personal interviews between reporters and individually designated federal prison inmates violated the First Amendment.88 The Court found that the burden on newsgathering was only a variation of the burden on all individuals, press or not, to allow no one to enter the prison and speak with whomever he or she would like.89

_Houchins v. KQED, Inc._,90 established a similar principle based on similar facts. The Court considered whether the media had a constitutional right of access to a county jail to interview inmates.91 Distinguishing

80. See id. at 821.
81. See id. at 830.
82. See id. at 833. It is important to note, however, that the facts here suggested that the press already enjoyed access beyond that which was granted to the public. See id. at 830-31. Therefore, the regulation merely eliminated a privilege that news reporters had been granted at one time. See id. at 831.
83. Id. at 832.
84. See id.
85. See id.
86. Id. at 834 (internal citations omitted).
88. See id. at 844. The regulation in this case prohibited both the general public and the press from entering the prison to interview specific inmates without personal or professional ties to the inmates themselves. See id. at 846. The news reporters, however, were still granted considerable access to the prisons. See id. at 847. They were permitted to tour, photograph, interview those they met during those tours, and correspond in an almost unlimited fashion. See id. The lawyers for the federal prisons argued that these concessions proved that the purpose of the regulation was "not part of any attempt . . . to conceal from the public the conditions prevailing in federal prisons." _Id._ at 848.
89. See id. at 849.
91. See id. at 3.
between the freedom afforded to the media to communicate information already obtained and the constitutional compulsion to provide the media with information or accede to media demands for access, the Court reaffirmed the absence of a right of media access to prisons. Articulating the standard as clearly as it ever had, the Court stated that it had "never intimated a First Amendment guarantee of a right of access to all sources of information within government control." The media, the Court asserted, is not a part of government; sometimes the two complement one another, and other times they conflict. The assumption that reporters are the best qualified to discover institutional malfeasance finds no support in constitutional doctrine, even though the press serves a valuable function in the democracy. References to public entitlement to information support a right to publish, not necessarily a right to access. The Court quoted Justice Stewart's opinion that "[t]he public's interest in knowing about its government is protected by the guarantee of a Free Press, but the protection is indirect. The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act." Nevertheless, the Court reaffirmed the importance of the media to a democratic society.

Finally, in *Gannett Co. v. DePasquale*, the Court decided that the press has no independent constitutional right to insist upon access to a pretrial judicial proceeding. The State wanted to minimize adverse prejudicial pretrial publicity. History suggests that pretrial proceedings had traditionally been closed under English common law, though there was a common law right of open civil and criminal trials. In *Gannett*, the Court acknowledged a right of press access, but balanced that right against the defendant’s right to a fair trial and found that, because the denial of

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92. See id. at 9.
93. Id.
94. See id. at 8-9.
95. See id. at 13-14. Nevertheless, the concurrence emphasized that the First Amendment identified the press by name, thereby highlighting its special role in American society, and that the Constitution therefore requires sensitivity to that role. See id. at 17 (Stewart, J., concurring).
96. See id. at 10.
97. See id.
98. Id. at 14 (quoting Potter Stewart, Or of the Press, 26 Hastings L.J. 631, 636 (1975)).
99. See id. at 10. The opinion defined "the role of the media 'as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve.'" Id. (quoting Mills v. Alabama, 384 U.S. 214, 219 (1966)).
100. 443 U.S. 368 (1979).
101. Id. at 370-71.
102. See id. at 378.
103. See id. at 389-90.
104. See id. at 384.
access was only temporary (the press would have access to the transcript afterward), the defendant’s rights outweighed the right of the press.105

In Richmond Newspapers, Inc. v. Virginia,106 the Court held for the first time that the press had a right of access under the First Amendment.107 The question was whether the press and the public had the right to attend a criminal trial.108 The media claimed a right to attend as a surrogate for the public, because the media had certain amenities, including seating and priority, allowing it to report.109 Therefore, this right does not appear to fall under the Press Clause alone, but rather under an amalgam of free speech, free press, and freedom of association.110 The Court distinguished Richmond Newspapers from Gannett, stating that Gannett did not decide the question presented here because it involved a pretrial hearing and not a trial.111 Relying again on history, the Court made much of the fact that throughout its evolution, the trial had always been open to those who wanted access.112 Historically, there is a strong public policy rationale for an open trial: An open trial ensures that people accept and support both the process and the results of the administration of justice.113

Both concurring Justices in Richmond Newspapers would have decided the case on slightly different grounds. Justice Stevens intimated that he would be willing to recognize a right of access to information “about the operation of [the] government, including the Judicial Branch” (but perhaps suggesting not limited to it).114 Justice Brennan concurred on broader grounds, stating that, “[r]ead with care and in context, our decisions must therefore be understood as holding only that any privilege of access to governmental information is subject to a degree of restraint dictated by the nature of the information and countervailing interests in security or confidentiality.”115 Nevertheless, he found that there must be some check on this right, because a data flow to the public is far too broad of a right; therefore, he proposed a consideration of the information sought and the opposing interests invaded.116 He adopted an explicitly political rationale,
promoting self-sovereignty both beyond and independent of individual freedom of speech.\textsuperscript{117} To that end, he developed a two-part test that has subsequently been used by courts considering the same issue: 1) Whether there is an “enduring and vital tradition” of public access to the forum; and 2) “[W]hether access to a particular government process is important in terms of that very process.”\textsuperscript{118}

Since the \textit{Richmond News} decision, the Court has extended the right articulated therein to rape trials,\textsuperscript{119} voir dire examination of potential jurors,\textsuperscript{120} and preliminary hearings,\textsuperscript{121} among other judicial procedures and documents. The lower courts have considered a number of similar cases, and have extended the right of access to other legal proceedings, including suppression hearings, bail hearings, change of venue hearings, plea hearings, sentencing hearings, pretrial ex parte recusal proceedings, post-conviction proceedings, parole revocation hearings, parole release hearings, and executions.\textsuperscript{122} The right of access has also been extended to a number of judicial documents associated with trials.\textsuperscript{123} Generally speaking, courts have been unwilling to extend protection of access to nonjudicial forums;\textsuperscript{124} they have, however, found nonjudicial rights of access in judicial review board proceedings,\textsuperscript{125} federal administrative fact-finding proceedings,\textsuperscript{126} state legislative meetings,\textsuperscript{127} city council meetings,\textsuperscript{128} and governor executive travel records.\textsuperscript{129}

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\textsuperscript{117} See Cerruti, \textit{supra} note 41, at 282.
\textsuperscript{118} \textit{Richmond News}, 448 U.S. at 589 (Brennan, J., concurring).
\textsuperscript{119} See Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 598 (1982).
\textsuperscript{121} \textit{Id.} at 511-13.
\textsuperscript{122} See Cerruti, \textit{supra} note 41, at 266-67.
\textsuperscript{123} See \textit{id.} at 267-68.
\textsuperscript{124} See \textit{id.} at 268. In one circuit court case, the Court of Appeals for the D.C. Circuit refused to extend the holding to a FOIA action against the Department of Justice to release information concerning persons detained after September 11. \textit{See} \textit{Cttr. for Nat’l Sec. Studies v. U.S. Dep’t of Justice}, 331 F.3d 918, 920 (D.C. Cir. 2003). The journalists were requesting information regarding names, attorneys, dates of arrest and release, locations of arrest and detention, and reasons for detention. \textit{See id.} at 920. The government based its refusal on FOIA exemption 7(A), which exempts records compiled for law enforcement purposes from discovery under FOIA. \textit{See id.} The court focused on the fact that these were nonjudicial documents and not part of a criminal trial, \textit{see id.} at 934, and refused to “convert the First Amendment right of access to criminal judicial proceedings into a requirement that the government disclose information compiled during the exercise of a quintessential executive power—the investigation and prevention of terrorism.” \textit{Id.} at 935.
\end{flushright}
4. The Effect of Richmond News and its Progeny

In some ways, Richmond News was a watershed case. The case law in the media right of access, however, is quite misleading. The Court's language sounds like it recognizes a broad right of access, but the holdings are ultimately quite conservative. The fact is that, "[d]espite a series of assertions by the Supreme Court clearly suggesting tacit recognition of an independent First Amendment right to gather information for purposes of publication," the Court has never recognized a right of press access beyond the criminal court context. The Brennan test has not "traveled well" in the doctrine: Though lower courts have held that a right of access is appropriate in forums related to trial, they have seemed unwilling to extend the holding to areas or documents outside of trial even with a strong history of access or a great deal of utility to the governing process.

Since Richmond News, the courts have decided a number of cases involving discriminatory media access, but those decisions are by no means uniform.

5. Academic Theories that Support a Right of Access to Gather News

Though courts have limited the right to access, scholars have promulgated a number of theories that support a right of access to newsgathering. Some of these theories also support a legal doctrine that would prevent the government from differentiating between different media organizations in granting access.

First Amendment theory and doctrine do not necessarily complement one another. Newsgathering doctrine arguably moves away from the areas that the First Amendment theoretically protects. Access to government sources is less protected than access to nongovernment sources, arguably diserving the purpose of the First Amendment. The doctrine is now being used to protect academic and scientific research, as well as information-gathering by private research and policy organizations, rather than protecting the access rights of the media. Perhaps the solution

130. See id. at 21-22 (stating that the language in Richmond News makes it clear that a restraint on the flow of information does not comport with the First Amendment, and that the press has a distinct role in a democratic society).
131. Cerruti, supra note 41, at 245.
132. See id.
133. Id. at 246.
134. See id. at 269.
135. See generally infra Part II.
137. See generally id.
138. See generally id.
would be a more cohesive doctrine that depends primarily on preserving the "meaningful flows of information" that the First Amendment envisioned.  

Professor Eric B. Easton suggests that the test for violations of the First Amendment Press Clause ought to be an effectiveness test, though admittedly this theory finds no support in doctrine. Where the same speech is available through other media, the theory posits, the First Amendment may not allow it to be suppressed. First Amendment doctrine does not address this issue at all, and, "[c]onsequently, the government has been permitted to take measures that suppress speech, by some, but not other, speakers, to some, but not other, audiences." Easton proposes the initiation of a presumption against speech suppression where the suppression would be futile in preventing information from reaching the "marketplace of ideas." The presumption could be overcome only when the government asserts an important interest unrelated to the content of the speech. The test would apply to both publishing and access, but it would be particularly important in the access context, where it would "diminish the state's interest in suppression and thus tip the scale in favor of access." It is also true to the purposes of the First Amendment, for ""[h]ow important can the government's asserted interest in suppression be if it allows access to some arbitrarily chosen members of the public or to the entire world via some other medium?"

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139. Id. at 257.
140. See Eric B. Easton, Closing the Barn Door After the Genie Is Out of the Bag: Recognizing a "Futility Principle" in First Amendment Jurisprudence, 45 DePaul L. Rev. 1, 3 (1995). Note, however, that this theory is already accepted doctrine in Great Britain and Canada. See id. at 4-5. Additionally, several of the Justices in N.Y. Times v. United States, 403 U.S. 713 (1971), used this reasoning, though they did not identify it as such. See Easton, supra, at 8. Justice Douglas, for example, stated, "There are numerous sets of [the material in question] in existence and they apparently are not under any controlled custody... [T]here already is rather wide distribution of the material that is destined for publicity, not secrecy." Id. (quoting N.Y. Times, 403 U.S. at 723 (Douglas, J., concurring)). Similarly, Justice White wrote in his concurring opinion that "here, publication has already begun and a substantial part of the threatened damage has already occurred." Id. (quoting N.Y. Times, 403 U.S. at 733 (White, J., concurring)). Finally, Justice Harlan, in his dissenting opinion, wrote, "Whether the threatened harm to the national security or the Government's possessory interest in the documents justifies the issuance of an injunction against publication in light of... [t]he extent to which the materials at issue have apparently already been otherwise disseminated." Id. (quoting N.Y. Times, 403 U.S. 713, 754-55 (Harlan, J., dissenting)). The Court also used effectiveness as one of three dispositive factors in Neb. Press Ass'n v. Stuart, 427 U.S. 539 (1976) (considering a case in which local media were banned from publishing what the national media could publish), and considered it again in United States v. Progressive, 467 F. Supp. 990 (1979) (involving a decision by the government to terminate its case after two other magazines published the information that they were seeking to enjoin). For a discussion of these cases, see Easton, supra, at 8-10.
141. See Easton, supra note 140, at 3.
142. Id. at 3.
143. See id. at 64.
144. See id.
145. Id. at 36.
146. Id.
There are three justifications for using the futility principle. The first is that the government will conserve resources by not trying to "force the genie back into the bottle" once the information is already available.\textsuperscript{147} The second is that it would increase respect for the law, because, as the way things currently stand, authorities look foolish trying to suppress already-available speech.\textsuperscript{148} The third is that it would protect the integrity of speech by increasing the number and diversity of information providers.\textsuperscript{149}

A related theory is that "genuine autonomy and the media's legitimacy hinge not only upon its freedom to disseminate, but also on the duty to exercise that right in a manner that incorporates the diversity of individualized perspectives."\textsuperscript{150} If the purpose of a free media is to inform the population and increase robust debate, then the best way to do that is to have the media express a multiplicity of views.\textsuperscript{151} Though it is arguable whether the media changes attitudes, historical evidence suggests that the media "acts subtly to influence public behavior."\textsuperscript{152}

Other theorists argue that the right of access ought not to be considered under the First Amendment but rather as a systemic right, such as the right to vote.\textsuperscript{153} The theory is that access serves more than just First Amendment rights; instead, it is also a check on government, ensuring that government does its job properly and enhancing the perception of fairness in government activities.\textsuperscript{154} Access also ensures individual participation in government.\textsuperscript{155} Under this theory, it is a more fundamental right than the the rights secured by the First Amendment; it is, in fact, the ground on which the First Amendment is built.\textsuperscript{156}

According to this theory, if one concedes that the right to vote is fundamental, then the right of access to government information must also be fundamental, because voting is meaningless unless the citizenry is informed.\textsuperscript{157} Democratic politics themselves then depend on access, because in order for elected officials to take into account what the will of

\textsuperscript{147} Id. at 39.
\textsuperscript{148} See id.
\textsuperscript{149} See id.
\textsuperscript{151} See id. at 945-46.
\textsuperscript{152} Id. at 949. Examples include Thomas Paine's role in starting the American Revolution and William Randolph Hearst's part in galvanizing the public for the Spanish-American War. See id. at 949-50. It is difficult to overlook, however, that the primary motivator of the media is money, see id. at 951, which overshadows the libertarian ethic that the media has a responsibility to the citizens to disseminate multiple viewpoints to the marketplace. See id. at 952. Therefore, this theory requires that there be a corresponding theory of democracy that encourages the expressive rights of others, which in turn will enhance the level of participation in marketplace expression and will require the media to report from various viewpoints. See id. at 962-63.
\textsuperscript{153} See Jordan, supra note 12, at 1349-51.
\textsuperscript{154} See id. at 1350.
\textsuperscript{155} See id.
\textsuperscript{156} See id.
\textsuperscript{157} See id. at 1369.
the people is, the people must have a well-informed will. This argument is quite similar to the structural argument posited by Alexander Meiklejohn and others, who argue both that the public right to receive information serves the ends of self-government and that the affirmative right to have government information provided facilitates public debate.

Some theorists try to justify a right to access based on the public's "right to receive information." This right is based on rationales that appear in a number of cases. For example, in *Meyer v. Nebraska* the Court held that there was a right to receive information in an educational context, suggesting a symbiotic relationship between the right to know and the right to speak. More relevantly, in *Near v. Minnesota*, the Court found a right to receive information in a case where a statute prohibited the press from critiquing government officials. Continuing with this line of reasoning, the Court in *Martin v. City of Struthers* struck down a local ordinance banning the distribution of handbills and advertisements, reasoning that individuals had the right to receive information, and therefore distributors had a right to distribute it. The right to receive information was most clearly stated in *Lamont v. Postmaster General*, where the Court held that requiring postal workers to separate and hold mail containing communist propaganda material was unconstitutional. The concurrence specifically cited a right to receive publications in its reasoning.

C. Equal Protection Doctrine and the Fundamental Right—Equal Protection Confluence

Journalists who are excluded selectively from government information often assert an equal protection claim as well as a First Amendment claim.

158. *See id.*


160. 262 U.S. 390 (1923); *see also* Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (holding that children may not be required to attend public school and may instead attend any school of their choosing); Robin A. Arzon, Comment, *Exploring Iraq War News Coverage and a New Form of Censorship in Violation of the Quickly Evaporating Public Interest Requirement and Public Right to Receive Information*, 12 Vill. Sports & Ent. L.J. 327, 336 (2005).

161. *See Eric B. Easton, Public Importance: Balancing Proprietary Interests and the Right to Know, 21 Cardozo Arts & Ent. L.J. 139, 144 (2003).*

162. 283 U.S. 697 (1931).


164. 319 U.S. 141 (1943).


166. 381 U.S. 301 (1965).


168. *See Lamont, 381 U.S. at 308 (Brennan, J., concurring).*
The courts will examine the classifications under rational basis review unless given reason to do otherwise.

The Equal Protection Clause of the Fourteenth Amendment states: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." States, however, make classifications all the time; therefore, "[i]n evaluating [a statute] under the Equal Protection Clause, ‘we must first determine what burden of justification the classification created thereby must meet, by looking to the nature of the classification and the individual interests affected.’" When a fundamental right is at stake (e.g., the right to marry, or the right to procreate), and where the classification significantly interferes with that right, "critical examination" of state interests is required, and the remedy must be found to be narrowly tailored to that interest. Therefore, if the right of access is found to be a fundamental right, classifying on that basis would trigger heightened review.

D. Other Equal Treatment Cases in the Context of the Media

The Court has already decided cases involving the constitutionality of distinguishing between media outlets in other contexts. In 1936, in *Grosjean v. American Press Co.*, the Court held that a Louisiana statute requiring publications with less than a certain weekly circulation to have their advertisers pay a special tax was unconstitutional. The Court reasoned that the tax restrained publication in two ways: by restricting the amount of revenue these publications could realize through advertising, and by restricting circulation. As a result, the statute was being used as a device to limit the circulation of information to the public.

Plaintiffs raised a similar question in *Leathers v. Medlock*, in which cable television subscribers and other affected parties brought a claim challenging an Arkansas sales tax applied to cable television on the theory that the tax discriminated on the basis of the medium. The Court reaffirmed the holding in *Grosjean*, but found that the "discrimination" described here was not sufficient to "stifle the exchange of ideas," and as such did not violate the First Amendment under that holding.

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171. *See id.*
172. 297 U.S. 233 (1936).
174. *See id.* at 355.
175. *Id.*
178. *See id.*
E. Parallel Doctrine: Public Forum Doctrine and Content-Based Restrictions

This section considers the law on public forums, which distinguishes between time, place, and manner restrictions and content-based restrictions in general free speech doctrine. Some of the lower court cases have used a similar rationale in finding that selective access to government information is unconstitutional.\(^{179}\)

1. Time, Place, and Manner Restrictions

The Supreme Court held in *Cox v. New Hampshire*\(^ {180}\) that a municipality has a right to impose regulations to assure the safety and convenience of the people without violating civil liberties, reasoning that “[c]ivil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses.”\(^ {181}\) The state or municipality may regulate the “time, place and manner in relation to the other proper uses of the streets,” so long as they do so without unfair discrimination.\(^ {182}\)

The Court reaffirmed this holding in *Heffron v. International Society for Krishna Consciousness, Inc.*,\(^ {183}\) in which a state regulation required all those who wished to distribute or sell religious literature and solicit donations to conduct their activities at fixed locations.\(^ {184}\) The Court held that, pursuant to *Cox*, it is permissible to have restrictions that are subject to time, place, and manner restrictions, but elaborated that these restrictions are only permissible so long as they do not reference the content of the speech, serve significant government interests, and leave open ample channels for communication.\(^ {185}\) Additionally, the Court cautioned in dictum that resting arbitrary power in a government official could lead to inconsistent, and potentially content-based, results.\(^ {186}\)

2. Content-Based Restrictions

When legislation bases access to the public forum on the content of the speech, however, the courts are not as permissive. In *Schneider v. New Jersey*,\(^ {187}\) the Court considered an ordinance that required those who wished to distribute handbills on a public street to get their handbills pre-
approved by a government official. The Court reasoned that so long as legislation intends to keep the streets free for movement and travel and does "not abridge the constitutional liberty of one rightfully upon the street to impart information through speech ... it may lawfully regulate the conduct of those using the streets." The prohibited activity, however, must bear "no necessary relationship to the freedom to speak, write, print or distribute information or opinion." As the Court suggested in Heffron, the municipality was not constitutionally permitted to require those who wished to disseminate ideas to present them first to police authorities for their consideration or approval. Recognizing the special place that the First Amendment holds in American law, the Court stated: "Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions."

In Police Department of the City of Chicago v. Mosley, the statute at issue defined disorderly conduct by limiting where and when the public was permitted to picket, but excepted peaceful labor picketing from these regulations. The Court held that the statute was unconstitutional because it made "an impermissible distinction between labor picketing and other peaceful picketing." The central problem was the delineation of permissible picketing by subject matter, because "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." "Necessarily ... under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." States may not, under this holding, base their exclusions on content or justify their exclusions by content. All restrictions must be "carefully scrutinized," though they may pass muster if they are based on time, place, and manner restrictions, conflicting demands for the same space, or protecting the public order.

188. See id. at 154.
189. Id. at 160.
190. See id. at 161.
191. See id. at 164.
192. Id. at 161.
194. Id. at 92-93.
195. Id. at 94.
196. See id. at 95.
197. Id. (citations omitted).
198. Id. at 96.
199. Id.
200. See id. at 98-99.
F. The Effect of the War on Terror

1. The History of Freedom of Speech in Wartime

Times of conflict always hit the First Amendment particularly hard: "'Truth has been said to be the first casualty in war, but perhaps it is more precise to say that the First Amendment has been the first casualty, followed closely by the marketplace of ideas where truths, or at least better understandings, are more likely to emerge than in a system of authoritarian control.'"\(^{201}\)

According to First Amendment scholar Vincent Blasi, "'[c]onstitutional principles that are taken for granted in normal times may be challenged in times of stress.'"\(^{202}\) Historically, in such times, everything seem[s] so different, so out of joint, the threats from within or without seem so unprecedented, that the Constitution itself is perceived by many persons as anachronistic, or at least rigidly, unrealistically formalistic. In times when those misgivings take hold, the central norms of the constitutional regime are in jeopardy.\(^{203}\)

Former Chief Justice William Rehnquist seems to adopt essentially the position that President Abraham Lincoln took during the Civil War, believing that "'the Constitution applies in time of war, but the special demands of war may affect the application of the Constitution.'"\(^{204}\) Those who advocate for decreased civil liberties in wartime assert that, for the safety of democracy, there is no choice but to temporarily disable some civil liberties during these turbulent times.\(^{205}\) American history bears out that Americans have a long history of overreacting to the dangers of wartime and suppressing dissent, later regretting their actions.\(^{206}\)

It has been argued that throughout American history, the national government has never tried to suppress criticism of itself except during times of war.\(^{207}\) Nevertheless, in nearly every war, the government placed limitations on freedom of speech. The first important challenge to the First Amendment was the Alien and Sedition Act of 1798,\(^{208}\) which was passed.


\(^{203}\) Id. at 462.


\(^{206}\) See Stone, supra note 204, at 5.

\(^{207}\) See id.

\(^{208}\) Act of July 14, 1798, ch. 74, §§ 1-2, 1 Stat. 596 (expired 1801).
with the participation of many of the Constitution’s drafters. The Act prohibited publication of “false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States.” The lower courts upheld the Act, but the Supreme Court never heard a case under the statute.

The Espionage Act of 1917 and the Sedition Act of 1918 passed during World War I, had similar effects. The Espionage Act prohibited the making of false reports or statements with the intent to interfere with America’s military success or aid its enemies, and attempting to cause disloyalty or mutiny, while the Sedition Act prohibited, among other things, “disloyal, profane, scurrilous, or abusive language intended to cause contempt or scorn for the form of government of the United States, the Constitution, or the flag . . . or to utter any words supporting the cause of any country at war with the United States.” Generally, during World War I, the media was highly censored, broadcasting mostly pro-Allied news coverage.

During the Vietnam War, there were rumors that the press’s free access lost the war for the United States. The Pentagon Papers, which led to the injunction considered in New York Times Co. v. United States, also related to the Vietnam War. The government argued in that case that the Papers contained secret military information and sought to enjoin publication on that basis. The Court held that an injunction would be an impermissible prior restraint under the First Amendment and that national security was not a sufficient reason to enjoin publication.

During the Persian Gulf War, the Pentagon created press pools, or groups of reporters whose traveling and interviews were controlled by the military. The reporters were rewarded and punished for the stories that they wrote. The military prevented them “from learning embarrassing or unfavorable information.”

209. Turner, supra note 205, at 597-98.
210. Act of July 14, 1798, ch. 74, § 2, 1 Stat. 596. The statute did allow for the defense of truth and required the establishment of malicious intent. Id. §§ 2, 3.
211. Turner, supra note 205, at 598.
213. Act of May 16, 1918, ch. 75, § 1, 40 Stat. 553 (repealed 1921).
214. Turner, supra note 205, at 598.
215. Id. at 599 (quoting Geoffrey R. Stone et al., Constitutional Law 993, 1006 (4th ed. 2001)).
216. See Arzon, supra note 160, at 332.
217. See id. at 332-33.
218. 403 U.S. 713 (1971).
219. See generally id.
220. See Turner, supra note 205, at 599-600.
221. See id. at 600. Note that this may have been in part because the war was already over. See id.
222. See Sinai, supra note 32, at 185.
223. See id.
224. See id.
2. Freedom of Speech in the War on Terror

Theorists disagree as to whether the War on Terror is even more deserving of deference to the government than the average war or whether it is less deserving. On the one hand,

[a]s evidenced by the September 11th ... terrorist attacks on America, the need for secrecy in national defense is arguably at its alltime greatest. When coupled with the age of high speed and highly technical access to information, it is no surprise that the leaders of this country demand that the press, public access to information, and the spread of information, all of which may be particularly sensitive to national defense, are restricted in some manner.225

On the other hand, there have been a number of setbacks for journalists covering the War on Terror, making it difficult for them to cover the progress of the war. Reporters and photographers were taken away from the World Trade Center right after the terror attacks.226 Military coverage has been particularly problematic. The Department of Defense kept reporters out of Afghanistan until the end of November 2001 while the Pentagon debated the proper time to “introduce” the press.227 On December 6, 2001, reporters were locked in a warehouse to keep them from covering a bomb explosion,228 and another reporter, Doug Struck, was restrained at gunpoint from investigating a missile impact area for national security reasons.229 ABC, CBS, NBC, FOX, and CNN all agreed when asked by the government not to air the tapes of Osama Bin Laden and his followers, thereby restricting their own content.230 During the most recent war with Iraq, in March 2003, coverage was “muzzled” as a result of “intimidation by the administration.”231

The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act),232 passed quickly after the attacks by an overwhelming margin, “expanded the government’s ability to conduct electronic surveillance,” limited attorney-client privilege, and expanded the FBI’s power to collect

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226. See id at 607.
227. See id.
228. Id. at 608.
229. Sinai, supra note 32, at 179.
230. See Turner, supra note 205, at 608. Professor Turner argues that the government’s attempt to force the press to withhold publication of the contents of the Bin Laden tapes would not withstand a constitutional review under New York Times unless the government could show irreparable harm would immediately follow publication of their content. However, the press itself chose to withhold the tapes, precluding any constitutional analysis. Id. at 612.
231. Magarian, supra note 6, at 119.
domestic intelligence. It fundamentally expanded the power of the Executive for example, by restricting courtroom access to immigration courts and secret military tribunals. The Act profoundly increased the government’s power to conduct surveillance.

The Pentagon and Former Pentagon spokeswoman Victoria Clarke developed an embedding policy by which media organizations, in return for being embedded within military units, agreed to “security reviews, flagging of sensitive information, [and] limitations on filming dead bodies.”

A recent case in the United States Court of Appeals for the D.C. Circuit held that there is “no constitutionally based right for the media to embed with U.S. military forces in combat,” and therefore the restrictions were constitutional.

This problem is made all the more urgent by the restriction of information under the Freedom of Information Act (FOIA) imposed by the current Administration. FOIA, passed in 1966, was “one of the primary channels of information-gathering.” The premise of the Act was that citizens need access to government information to make the informed decisions required in a democracy. It is a powerful tool because, though it is not the only way to get access to government information, FOIA theoretically requires the government to bear the burden of proof when it denies a request.

FOIA permits individuals to obtain federal agency records after a proper written request is submitted. The government agency, however, may...

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233. See Olson, supra note 202, at 463.
234. See id. In fact, one criticism that can be made is that [the irony in the government’s attempt to foreclose access to images and information related to the war on terrorism, ostensibly to protect privacy, is that the government has simultaneously adopted laws such as the USA PATRIOT Act, which in the name of fighting terrorism, facilitates the government’s own invasive information gathering activities.]
235. See Olson, supra note 202, at 463-64. The Creppy Memorandum, already in the process of challenge, required immigration judges to close certain hearings designated by Attorney General John Ashcroft to the public. See Kitrosser, supra note 159, at 95. In the Department of Justice’s brief opposing certiorari in a Third Circuit challenge to the Creppy Memorandum, it argued that there was no First Amendment right of public access to Executive branch proceedings in general. See id. at 97.
236. See supra notes 233-35.
238. Calvert, supra note 201, at 157.
239. Turner, supra note 205, at 602.
240. See id.
241. See id. at 602-03. It may be even more powerful for journalists, because the Electronic Freedom of Information Amendments to FOIA expedite the process for journalists making agency requests. See id. at 603. The records may be received by a person primarily engaged in disseminating information if a “compelling need,” i.e. “an urgency to inform the public concerning actual or alleged Federal Government activity,” is shown. Id.
242. See id. at 602.
refuse if the request falls into one or more exempted categories.\textsuperscript{243} One of these categories is information classified because of national defense and security concerns.\textsuperscript{244} After September 11, 2001, the government was concerned that free access to government information directly conflicted with national security concerns.\textsuperscript{245} As a result, Attorney General John Ashcroft's office significantly enhanced government agency power to withhold information under the FOIA national security exemption.\textsuperscript{246} On October 12, 2001, Ashcroft rescinded a directive instituted by former Attorney General Janet Reno ordering agencies to use FOIA exemptions minimally; instead, Ashcroft promised that those who used the exemptions would be protected by the Department of Justice.\textsuperscript{247} This new directive essentially negates the presumptive right to access information, because the burden of proof is effectively on the requesters and not the agency.\textsuperscript{248}

As a result of all of these new restrictions on the press, a constitutional right to access may be even more critical, because the alternatives on which the media generally relies are less potent.


The Supreme Court has not yet heard a case that specifically addresses whether discriminatory press access to government information violates the First Amendment. Circuit and district courts are thus left to deal with the problem on their own. Subsection A considers different rationales for finding discriminatory access unconstitutional. Subsection B articulates the rationale advanced by courts that have found that discriminatory access violates no constitutional principles.

\subsection*{A. Discriminatory Access Triggers a Right to Gather News}

There are a number of rationales that a court might use to find that discriminatory media access violates the First Amendment.

The Brennan test, which enables the First Amendment to act in conjunction with the Equal Protection Clause, imposes a higher level of scrutiny.\textsuperscript{249} In order to find newsgathering to be a fundamental right under

\textsuperscript{243} See id. The exemptions are not mandatory, but the government may exercise them. See id.
\textsuperscript{244} See id.
\textsuperscript{245} See id. at 603.
\textsuperscript{246} See id. at 610.
\textsuperscript{247} See id. Ashcroft's memo stated: ""Only if [the agency's] decisions lack a "sound legal basis" or could lead to an unfavorable court decision that might impair the government's ability to deny records in the future, would the department not support denials."" Id.
\textsuperscript{248} See id. at 610-11.
\textsuperscript{249} See supra note 118 and accompanying text.
the First Amendment, one must meet each of the two prongs: a historical tradition of access and a value of access.250

The historical tradition would have to be considered on a case-by-case basis. Thus far, only the criminal justice system has been found to have a historical tradition of access,251 but the facts of some of these cases suggest that other forums may have an equal claim.

In terms of the second prong, one could consider it from two separate angles. The first angle is the structural role of the First Amendment in fostering a republican system of self-government.252 In order to have an informed electorate, the debate on public issues ought to be “uninhibited, robust, and wide-open.”253 This structural model emphasizes conditions of meaningful communication, not simply communication itself.254 As such, individuals have an interest in expressing their opinions and contributing to the public debate, but there is also a social interest in “the attainment of truth, so that the country may not only adopt the wisest course of action but carry it out in the wisest way.”255 The press represents the public’s social interest.256

The second angle is that “[p]eople in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.”257 In this sense, it is essential that the press be given access so that people retain faith in their government. The more that a leader, for example, appears to be screening out the questions of those with whom he or she disagrees, the less faith the public may have in that person’s leadership.

The public forum doctrine distinguishes between government restrictions based on content and government restrictions based on time, place, and manner.258 In cases of discriminatory access based on content,

the government itself has balanced the interests, decided generally that access is appropriate, but has denied it in the particular instance [or for this particular person or point of view] . . . . [T]he government’s inconsistent responses to access claims suggest that it may be seeking to suppress the dissemination of damaging information without justification rather than asserting legitimate interests.259

Ultimately, content control invokes all of the same concerns in the media context as it does in the public speech context, if not more serious concerns

250. See supra note 118 and accompanying text.
251. See supra notes 133-34 and accompanying text.
252. See supra Part I.B.2.
254. See id. at 588.
256. See id. at 864.
257. Richmond Newspapers, 448 U.S. at 572.
258. See supra Part I.E.
259. Dyk, supra note 1, at 941.
because of the media's function as informant of the public. Content control is the very "essence of ... forbidden censorship."\textsuperscript{260}

The lower courts have considered cases of discriminatory media access in a number of contexts, and have used different rationales to decide these cases. The following sections examine these rationales.

1. Equal Protection: Classifications Between Media Entities and Fundamental Rights

Where courts use the Brennan test,\textsuperscript{261} they must pass an early critical threshold by finding that there is a fundamental right of access before they may use an equal protection analysis.\textsuperscript{262} This does not necessarily require a fundamental First Amendment right. In \textit{McCoy v. Providence Journal Co.},\textsuperscript{263} for example, the court found that "no broad, general issue of freedom of the press is presented, for the defendants, acting in their respective official capacities, ha[d] not barred the press at large."\textsuperscript{264} Rather, the fundamental right arose from the fact that the plaintiff (as well as other news media outlets) already had a right to inspect the documents in question, as they were a matter of public record.\textsuperscript{265}

In \textit{Capital Cities Media, Inc. v. Chester},\textsuperscript{266} the court did not decide the case on equal protection grounds, but did allow the case to withstand a summary judgment motion based on an argument to that effect. There, the plaintiffs, employees of the \textit{Times Leader}, a Wilkes Barre newspaper, were denied access to records in the sole possession of the Pennsylvania Department of Environmental Resources.\textsuperscript{267} The Department's policy prohibited the disclosure of certain categories of documents. A substantial number of documents that the Department refused to turn over fell into these categories.\textsuperscript{268} Though the claim had not been completely substantiated at that procedural juncture, the \textit{Times Leader} alleged an equal protection violation based on discriminatory media access. The lower court granted summary judgment to the Department. On appeal, the court held that the claim was serious, vacating and remanding for the lower court to

\textsuperscript{260} Police Dep't of Chi. v. Mosley, 408 U.S. 92, 96 (1972).
\textsuperscript{261} See supra note 118 and accompanying text.
\textsuperscript{262} See supra note 118 and accompanying text.
\textsuperscript{263} 190 F.2d 760 (1st Cir. 1951). But see infra notes 297-301 and accompanying text (discussing a more recent First Circuit opinion that at least on the surface appears to be using a pure First Amendment justification).
\textsuperscript{264} McCoy, 190 F.2d at 763.
\textsuperscript{265} See id. at 764. The court in this case considered an allegation that the mayor prevented the \textit{Providence Journal} from gaining access to fiscal records related to a tax abatement in order to publish them while releasing those records to the \textit{Pawtucket Times}. See id. at 762. Once the \textit{Pawtucket Times} had the records, the city passed an ordinance banning all city officials from permitting anyone to examine the tax abatement or disclose the contents of the abatement without the permission of the City Council. See id. at 762.
\textsuperscript{266} 797 F.2d 1164 (3d Cir. 1986).
\textsuperscript{267} Id. at 1165.
\textsuperscript{268} Id.
consider the evidence.\textsuperscript{269} Here, the fundamental right appears to arise from the Department's policies themselves, as the Department's policies permitted the disclosure of documents suppressed in this instance.\textsuperscript{270} A more recent case in the United States Court of Appeals for the First Circuit,\textit{United States v. Connolly}, analyzed a discriminatory media access claim and found the right to an open trial to be a fundamental right, satisfying this threshold requirement of the Brennan test.\textsuperscript{271}

Whether a more or less traditional fundamental rights rationale is used, the next step in this analysis after finding a fundamental right is to consider whether there has been an equal protection violation. The recent decision in\textit{Connolly} states: "It also is beyond dispute that only in the most extraordinary circumstances is the government permitted, consistent with the First Amendment, to discriminate between members of the press in granting access to trials and other governmental proceedings."\textsuperscript{272} Similarly, once the court in\textit{McCoy} held that the documents were a matter of public record, it held that the mayor violated equal protection by releasing these records to one media outlet but not the other.\textsuperscript{273}

2. Discriminatory Access Violates the First Amendment

Other courts have struck down discriminatory media access to government information on pure First Amendment grounds. There are a number of methods by which courts assess the First Amendment right involved. Some consider the method by which the government actor makes decisions about whom to admit and whom to exclude.\textsuperscript{274} Others prohibit discrimination on the basis of the media outlet's content.\textsuperscript{275} Still others explicitly use the framework of the public forum doctrine to judge whether or not the discrimination is content-based.\textsuperscript{276} Most courts, regardless of how they explicitly justify their holdings, use the logic of the public forum doctrine to justify those holdings.

A line of cases in the D.C. Circuit reflects a strong interest in how decisions are made between media outlets. For instance,\textit{Sherrill v. Knight}\textsuperscript{277} involved a journalist's challenge to the denial of a White House press pass based on the fact that there were no published or internal regulations about the criteria on which issuance was based.\textsuperscript{278} The government argued that the public had no right of access to the White

\textsuperscript{269} See\textit{id.} at 1176.
\textsuperscript{270} See\textit{id.} at 1165.
\textsuperscript{272} See\textit{id.} at 139.
\textsuperscript{273} See\textit{McCoy v. Providence Journal Co.}, 190 F.2d 760, 762 (1st Cir. 1951).
\textsuperscript{274} See\textit{infra} notes 277-94 and accompanying text.
\textsuperscript{275} See\textit{infra} notes 295-301 and accompanying text.
\textsuperscript{276} See\textit{infra} notes 303-07 and accompanying text.
\textsuperscript{277} 569 F.2d 124 (D.C. Cir. 1972).
\textsuperscript{278} See\textit{id.} at 126-27. The journalist was a Washington correspondent from The Nation.\textit{Id.} at 126. The Secret Service denied the journalist a press pass and refused to give him a reason for his rejection. See\textit{id.} at 126-27.
House and that the right of access due to the press is generally no greater than the right of access to the public. Therefore, the lack of guidelines was a violation of the First Amendment only if the denial was based on the content of the journalist’s speech. The journalist, on the other hand, argued that he deserved “notice, opportunity to rebut, and a written decision” because of the potential infringement on his First Amendment rights. The court agreed with the journalist that, not only are content-based criteria problematic, but also that when a forum like the White House establishes press facilities for correspondents, it is perceived as open to all bona fide journalists. Government facilities that are open in this way should not “be denied arbitrarily or for less than compelling reasons.” The government has a responsibility to prove a compelling government interest for the restriction and must articulate or publish standards in some way to ensure due process. This due process is necessary not only for the journalist, but also for the public: “Not only newsmen and the publications for which they write, but also the public at large have an interest protected by the first amendment in assuring that restrictions on newsgathering be no more arduous than necessary, and that individual newsmen not be arbitrarily excluded from sources of information.”

The D.C. Circuit recently affirmed this holding in *Getty Images News Services, Corp. v. Department of Defense*, holding that when the Department of Defense restricts media access to Guantanamo Bay, the First Amendment requires, “at a minimum, that before determining which media organizations receive the limited access available, [the Department of Defense (DOD)] must not only have some criteria to guide its determinations, but must have a reasonable way of assessing whether the criteria are met.” It was not enough for the Department of Defense to articulate its principles for choosing among media outlets once the

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279. See id. at 129.
280. See id.
281. Id. at 128.
282. See id. at 129; see also infra note 303 and accompanying text (suggesting that opening up a government space to the media may create a public forum).
283. *Sherrill*, 569 F.2d at 129. But see *Consumers Union of the U.S., Inc. v. Periodical Correspondents’ Ass’n*, 515 F.2d 1341 (D.C. Cir. 1975) (holding that where Congress promulgates clear rules that apply distinctions in a uniform way, the case is nonjusticiable).
284. See *Sherrill*, 569 F.2d at 130.
285. Id. at 129-30.
287. Id. at 121.
288. According to the Department of Defense, there were four criteria that they considered: (1) a mix of media types; (2) some preference to those media organizations that consistently reach large audiences; (3) a desire to send at least some international media organizations; and (4) a desire to send at least some regional news media because the stories at Guantanamo Bay are at least partially regional in nature. *See id.* at 115. The Department of Defense stated that they used all of the criteria to determine which media outlets were permitted to go to Guantanamo, but admitted that nowhere were the criteria written or published, and that there was no formal procedure by which the Department of Defense made its decision. *See id.* at 116.
government arrived in court. Instead, the court stated that the only way to satisfy the due process concerns that the limitation on First Amendment rights raised was to publish the criteria that the Department of Defense used to select journalists and provide them an opportunity to demonstrate that they satisfied these criteria.

*Getty* clarifies the principles articulated in *Sherrill*. The court acknowledged both that Guantanamo Bay was not a public forum and that the government deserved heightened deference because of the “deference due to military regulations and decision-making.” Despite these caveats, claims of discriminatory media access, according to the court, “warrant careful judicial scrutiny.” Though there is limited space available, once the space is allocated to journalists (or the public), that space must be allocated reasonably.

This concern with procedure seems to be linked to the process of discriminating among media outlets as opposed to discriminating on the basis of content in other ways. For example, when the government restricted media coverage of the arrival of soldiers’ remains to the port of entry but did not change the preexisting policy that allowed the media and civilians to observe other activities at the military base, the D.C. Circuit held that there was no impermissible viewpoint discrimination. The court reasoned that the policy applied uniformly to all media outlets and the rest of the public, “regardless of their views on war or the United States military.”

Some courts find that unequal access by journalists is impermissible regardless of any public forum analysis, so long as the discrimination is content-based. The First Circuit, for example, broadly held that “[t]here may be a rare situation in which continued application of a protective order could be justified after one media entity but not another was granted access. We cannot, however, think of one.” Such an arrangement would result in a situation where the court’s decision could be overturned on appeal.

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289. *Id.*
290. See *id.*
291. *Id.* at 119. Note, however, that the court reserves the question of how this principle might change were this a question of intervention in a military operation. See *id.* at 121. The court points out, however, that the detention at Guantanamo Bay is an ongoing operation that is likely to continue into “the foreseeable future.” See *id.* Therefore, “the situation at Guantanamo Bay does not seem to present the same set of challenges that more temporary and mercurial military operations might.” *Id.* at 122.
292. *Id.* at 119.
293. See *id.* at 120.
295. *Id.*
296. Note that the court relies on the Second Circuit holding in *ABC v. Cuomo*, 570 F.2d 1080 (2d Cir. 1977). For a discussion of this case, see infra note 306 and accompanying text. But see supra notes 263-65 and accompanying text (discussing *McCoy*, in which the court used the Brennan test).
297. Anderson v. Cryovac, Inc., 805 F.2d 1, 24 (1st Cir. 1986). In this case a trial court in a tort case granted exclusive access to court materials to one media outlet to the exclusion of others. See *id.* at 3. For another example of a case finding broadly that content-based discrimination between media outlets violated the First Amendment, see *Times-Picayune*
in the construction of a media organization as a "privileged media entity" with sole access to particular information, allowing that media entity to shape and mold information.\textsuperscript{298} The fact that others would later be able to re-publish the information is irrelevant, because the entire situation allows the government to influence the type of substantive media coverage that public events will receive. Such a practice is unquestionably at odds with the first amendment. Neither the courts nor any other branch of the government can be allowed to affect the content or tenor of the news by choreographing which news organizations have access to relevant information.\textsuperscript{299}

One may not, however, be able to extend this holding beyond the trial context involved here. The fact that this case involved judicial documents suggests that this case is really about the Brennan test, though the First Circuit did not expressly address the issue in its opinion.\textsuperscript{300} The First Circuit also uses the Brennan test under other circumstances.\textsuperscript{301} For instance, a recent district court case from the First Circuit buttresses the Brennan test reading: "It also is beyond dispute that only in the most extraordinary circumstances is the government permitted, consistent with the First Amendment, to discriminate between members of the press in granting access to trials and other governmental proceedings."\textsuperscript{302}

Still other courts resort to the language of the public forum doctrine. The Supreme Court recognizes traditional public forums, "defined by the objective characteristics of the property, such as whether, 'by long tradition or by government fiat,' the property has been 'devoted to assembly and debate.'"\textsuperscript{303} There are also designated public forums that the government creates by acting purposefully to open "a nontraditional public forum" for public discourse.\textsuperscript{304}

Even before the Supreme Court explicitly recognized designated public forums, the Second Circuit\textsuperscript{305} articulated a similar principle, arguing not

\textit{Publ'g Co. v. Lee}, 15 Media L. Rep. 1713 (E.D. La. 1988) (observing that "[d]iscriminatory government action aimed at the communicative impact of expression is presumptively at odds with the First Amendment," and that "[a]bove all else, the First Amendment means that the government cannot restrict freedom of expression on the basis of its ideas, message, or content"). Note, however, that there is also an alternative explanation for this holding: the case involved a reporter barred from attending press conferences and cut off from public information officers, which suggests that the decision may be more influenced by the public forum doctrine cases. See infra notes 303-313 and accompanying text.

\textsuperscript{298} See Times Picayune Publ'g Co., 15 Media L. Rep. at 9.

\textsuperscript{299} Id.

\textsuperscript{300} See generally id.

\textsuperscript{301} See supra notes 263-265, 271 and accompanying text.


\textsuperscript{304} Id.

\textsuperscript{305} While a number of the Second Circuit cases specifically cited here are older, Huminski v. Corsones, 386 F.3d 116 (2d Cir. 2004), recently affirmed the cases' vitality. See id. at 146.
only that the government can open a place to public discourse but also that
the invitation of journalists by virtue of their status as members of the press
creates a public forum:

We think that once the press is invited . . . there is a dedication of those
premises to public communications use . . . . The issue is not whether the
public is or is not generally excluded, but whether the members of the
broadcast media are generally excluded. If choice were allowed for
discrimination in a public event of this magnitude in the various media,
then we reject the contention that it is within the prerogative of a political
candidate. We rather think that the danger would be that those of the
media who are in opposition or who the candidate thinks are not treating
him fairly would be excluded. And thus we think it is the public which
would lose.\footnote{ABC v. Cuomo, 570 F.2d 1080, 1083 (2d Cir. 1977). This case involved ABC
journalists who were arrested or threatened with arrest when they tried to enter the
candidates’ quarters during the New York mayoral Democratic primary. See id. at 1082. In
their defense, the candidates stated that because ABC was in the middle of a bargaining
dispute, they feared that by permitting ABC reporters to enter, NBC and CBS would refuse
to cover the campaign. See id. The plaintiffs presented the court with the question of
whether refusing access to ABC violated the First Amendment. See id. The court considered
the interests of those who watched ABC exclusively either by choice or by necessity as part
of the irreparable harm analysis. See id. It concluded that these viewers would suffer
irreparable injury because they might not know that they were being foreclosed of
knowledge of the information and therefore would not be able to act as informed citizens in
the manner contemplated by the First Amendment. See id.}

Thus, it is the fact that the function, forum, or comment has become
public through the invitation of journalists rather than their general
exclusion that makes the difference.\footnote{See id.} The court found the appropriate test
for a permanent injunction to be (1) whether any party, either the media or
the public, would suffer irreparable injury if that media outlet were to be
foreclosed out of the information; and (2) whether the plaintiff is likely to
succeed upon trial of a permanent injunction (based on whether a First
Amendment right is being violated and whether the relevant behavior is
sufficient state action).\footnote{See id. at 1082.} An assertion that a particular media outlet would
provide “additional and unique” coverage may be sufficient to find
irreparable injury.\footnote{WPIX v. League of Women Voters, 595 F. Supp. 1484, 1491-93 (S.D.N.Y. 1984);
see also id. at 1493 (“The first amendment strongly suggests, if it does not mandate, that no
court should find a lack of irreparable injury when a purveyor of news and opinion to the
American public is able to make a colorable case that its message will not otherwise be
conveyed.”). The plaintiffs, operators of a local television station and producers of a
nationally syndicated news program, wanted to record the 1984 presidential and vice-
presidential debates, but the League of Women Voters, organizers of the debates, insisted on
permitting only pooled coverage of the debates. See id. at 1485-86. Complaining that they
could not afford the “unreasonably” high fee charged by the three major networks, the
plaintiffs requested that the League permit them access. The League, however, refused. See
id. at 1486. The court found that a record demonstrating that pooling may be necessary does
not necessarily end the analysis. See id. at 1490. This is the equivalent of a time, place, and
In considering the merits of the First Amendment claim, the Second Circuit has stated that the purpose of this “limited right of equal access to important public events” is to “maximize diversity of coverage.” To explain the value of such a rule, the Second Circuit court in *WPIX v. League of Women Voters* cited directly to *Cox v. New Hampshire*, referring specifically to public forum doctrine and the difference between time, place, and manner restrictions and content-based restrictions. On balance, cases in the Second Circuit suggest that “the cost of the restriction in terms of loss of editorial freedom and newsgathering” may outweigh the practical benefits that government actors may derive from the restrictions.

B. **There Is No Right Under the First Amendment to Equal Media Access to Government Information**

Part II.B.1 considers possible rationales for determining that there is no right to equal access. Part II.B.2 articulates the rationale used by the circuit courts to deny a right of equal access to journalists.

1. **Rationale for Not Finding a Right to Equal Access to Government Information**

Courts have emphasized that extending media access to government information is an executive and legislative task, left up to the political process. One reason is that a judicial solution would run the risk of being overinclusive. As the Supreme Court articulated in *Houchins*,

*[there] are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow. For example, the prohibition of unauthorized entry into the White House diminishes the manner restriction. See id. The important question is whether that restriction “‘is exerted so as not to deny or unwarrantedly abridge . . . the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places.’” Id. (quoting Cox v. New Hampshire, 312 U.S. 569, 574 (1941)). In this case, the plaintiffs explained that they had “purposes and techniques distinct from those” of the major networks that formed the pool, id. at 1490-91, and the court found that the differences in visual perspective were significant enough to deprive viewers of a particular perspective. See id. at 1492.*

310. *Id.* at 1489.
311. 312 U.S. 569 (1941).
312. *WPIX*, 595 F. Supp. at 1490. Even if the restriction on equal access is not content-based, the limitation must serve a legitimate government purpose, be rationally related to that purpose, and must “outweigh the systemic benefits inherent in unrestricted (or lesser-restricted) access.” *Stevens v. N.Y. Racing Ass’n*, 665 F. Supp. 164, 175 (E.D.N.Y. 1987); *see also* *Times-Picayune Publ’g Corp. v. Lee*, 15 Media L. Rep. 1713 (E.D. La. 1988) (holding that selective denial of access is unconstitutional regardless of whether a public forum is involved unless the regulation satisfies a compelling interest).
citizen’s opportunities to gather information . . . but that does not make entry into the White House a First Amendment right.\textsuperscript{315}

In other words, if reporters could argue that any government action that reduced the data flow to reporters was a First Amendment violation, there would be no semblance of balance between the legitimate concessions that must be made to maintain an independent media and the legitimate government right to keep some information secret.

Judicially mandated values would result in “standardless decision-making.”\textsuperscript{316} Courts, rather than applying the law, would be forced to legislate categories of exclusion, which would result in never-ending litigation.\textsuperscript{317} This illustrates how ill-equipped the judiciary is to apply a principle of equal media access as a First Amendment right, and how appropriate it is for a political solution.

Even some members of the media agree that these decisions should be left to the political arena. An editorial in the Washington Post about a case in which a governor denied one newspaper access to his office stated,

I don’t see in the Constitution where anyone, even the governor, is obliged to answer the calls of a particular reporter. (Of course, press secretaries, who are paid to talk to the press, should have to talk to all comers). . . . Why should [the governor] have to talk to a reporter he thinks is unfair?\textsuperscript{318}

Ultimately, the purpose of the First Amendment is to guarantee the right to communicate and, for the media, a right to publish. The right of access is not essential to guarantee communication or publication.\textsuperscript{319} In fact, a careful reading of the First Amendment suggests that not only is it unnecessary, but that it does not comport with the plain language of the Amendment. The Amendment prohibits interference, suggesting that it is unlikely that it was intended to mean an absolute right to know and a concomitant government duty to disclose.\textsuperscript{320}

The case law does not lead to the conclusion that discriminatory denial of access or any other denial of access ought to constitute a First Amendment violation. Even \textit{Branzburg}, so often touted for its observation that there must be some First Amendment protection for newsgathering, has been too often misinterpreted; in fact, “a fair reading of . . . \textit{Branzburg} makes plain that the result hinged on an assessment of the competing societal interests involved in that case rather than any determination that First Amendment freedoms were not implicated.”\textsuperscript{321}

\begin{flushleft}
\textsuperscript{315} \textit{Id.} (internal quotations omitted).
\textsuperscript{316} Capital Cities Media, Inc. v. Chester, 797 F.2d 1164, 1172 (3d Cir. 1986).
\textsuperscript{317} See \textit{id.}
\textsuperscript{319} See \textit{id.}
\textsuperscript{320} See \textit{Capital Cities Media, Inc.}, 797 F.2d at 1168.
\end{flushleft}
Most importantly, though Justice Brennan articulates a test in *Richmond Newspapers* that sounds like it might allow the doctrine to extend to new situations, this "experience and logic" test has not been applied outside of the criminal trial process. Moreover, the court has never indicated that it would be comfortable applying the test beyond criminal judicial proceedings. To the extent that the Court has considered cases outside of the criminal justice system, it has applied *Houchins*.

2. The Fourth Circuit Denies a Right to Equal Access

Courts that have decided that discriminatory access is not problematic often rely heavily on the fact that, so long as the press has no constitutional right to access generally, government may restrict access in any way it pleases. In *Snyder v. Ringgold*, the court considered a § 1983 claim for alleged violations of First and Fourteenth Amendment rights by a defendant who was employed by the police department and responsible for disseminating information to the media. The plaintiff, Terrie Snyder, alleged that the police official denied her constitutional rights by refusing to grant her access while allowing access by other media entities. In 1992, the plaintiff aired a story alleging a cover-up by the police department; after that, she claimed, she began experiencing difficulties obtaining information from the police department, more so than other journalists. Subsequently, the department changed its policy, requiring a Public Information Officer (PIO) to give all information to journalists and to be on call on weekends for journalists to page. Shortly after this policy was instituted, the defendant told Snyder that he was tired of answering her weekend pages.

Snyder then published an article with a statement in it that the defendant claimed was made off the record to another reporter. In return, the defendant sent a letter stating that he would never go off the record with another reporter from the plaintiff's station, WBAL, and had ordered his staff to do the same. From the time of that letter, the defendant would not allow Snyder to participate with the TV crew in filming interviews with officials, refused to talk to her about any story, and would not let her get any information from the department without submitting her request in

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323. *See id.*
324. 26 *Media L. Rep.* 1249 (4th Cir. 1998).
325. *See id.* at 1250.
326. *See id.*
327. *See id.*
328. *See id.*
329. *See id.*
330. *See id.*
331. *See id.*
writing. The lower court held that defendant was not entitled to qualified immunity, saying that the department could not treat reporters unequally.

On appeal, the Fourth Circuit explained that a finding of qualified immunity requires that the right asserted be a clearly established right. Based on that standard, it concluded that the right to equal access had not been clearly established in either the Supreme Court or the Fourth Circuit. No constitutional right establishes that reporters get equal or nondiscriminatory access to government information which is not generally publicly available. The plaintiff asserted a broad right to equal access to government information sources and similar treatment to other journalists, which, according to the court, would preclude exclusive interviews, the common practice of officials declining to speak to reporters whom they see as untrustworthy because they have violated confidentiality or distorted their comments, or selective access to the White House. As a result, plaintiff’s claim would alter long-accepted journalistic practice, suggesting that it is not a clearly established right. Additionally, the court explained that a right of equal access could not be conferred without a holding that the press has privileged First Amendment status, and there is no doctrine to support that. The court also pointed out that prior decisions that had used the content-based restriction language from the public forum doctrine to support a right of access were behaving rather disingenuously:

[It] is a large analytical leap from holding that government may not regulate or prohibit private speech on the basis of content or viewpoint to holding that government may not make “content-based” distinctions between reporters in granting access to government information. Indeed, the government can certainly control the content of its own speech in ways it could never regulate or control the content of private speech. Arguably, by analogy, the government should be able to choose to limit

332. See id. at 1250-51. Note that the plaintiff claimed that the restrictions were because of the content of her stories; the defendant, however, contested this claim and said that she had been cut off because she violated confidentiality and abused the paging system. See id. at 1251.

333. See id. (stating that “absent a ‘compelling governmental interest,’ once a government agency or official makes such information generally available to the news media, such agency and/or official may not treat members of the news media, including the reporters working for such news organizations, unequally” (internal quotations omitted)).

334. See id. The standard is that the right is clearly established if “it has been ‘specifically adjudicated,’ that is, if it has been authoritatively decided by the Supreme Court, the appropriate United States Court of Appeals, or the highest court of the state’ in which the officers acted” or where “it is manifestly included within more general applications of the core constitutional principle invoked.” Id. (internal quotations omitted).

335. See id.

336. See id. The court noted that there is no support for such a proposition except for three relatively old out-of-circuit cases, including those cited supra, Part II.A and accompanying text. See id.

337. See id. at 1252.

338. See id.

339. See id. In fact, the Supreme Court held in Branzburg, described supra notes 69-71, that the press has no special rights beyond those of a normal citizen. Id.
its audience in a way it could not choose to limit the audience available to private speakers.340

A recent district court decision used similar reasoning to come to a similar conclusion. In *Baltimore Sun Co. v. Ehrlich*,341 the plaintiff, the Baltimore Sun newspaper, initiated a suit against the governor of Maryland under the First and Fourteenth Amendments.342 The governor's press office had issued a memorandum to state public information offices and the Executive Department directing that no one in those offices speak with either David Nitkin or Michael Olesker, two reporters for the *Baltimore Sun*, until further notice.343 The officials were not to return their phone calls or comply with any of their requests.344 The directive was based on the governor's perception that the two reporters were failing to report objectively on the administration.345 After the directive was issued, the state government employees who used to speak with the reporters refused to speak with them, at least one of the reporters felt that he was being deprived of certain information, and numerous officials stopped returning phone calls and offered no reason for doing so.346 The reporters, however, were permitted to attend press conferences that were open to members of the public and their public information requests continued to be honored.347 They were, however, excluded from a press briefing.348

The District Court noted that the Supreme Court "has refused to recognize—or construct—a First Amendment right of access to all sources of information within governmental control."349 The problem in fashioning the right was the lack of discernible judicial standards, which would result in ad hoc standards applied individually to cases.350 The resolution of the

340. *Id.* at 1253 (citations omitted). Note that the plaintiffs in this case relied on an old district court case in the Fourth Circuit, *see id.* at 1251, in which the court found a right of equal access in the case of explicitly public areas. *See Borreca v. Fasi*, 369 F. Supp. 906, 909 (D. Haw. 1974) (stating that there is a right of equal access to "public galleries, the press rooms, and the press conferences dealing with government"). The Fourth Circuit, however, did not endorse this opinion in *Snyder*, but instead referred to it as a "relatively old federal district court decision." *Snyder*, 26 Media L. Rep. at 1251. Indeed, the court then cited to *Anderson*, *Cuomo*, and *Sherrill* in support of its finding that the plaintiff was unable to establish Fourth Circuit precedent and to illustrate similar facts. *See id.*

342. *See id.* at 578.
343. *See id.* at 579.
344. *See id.*
345. *See id.*
346. *See id.*
347. *See id.* at 579-80.
348. *See id.* at 580. A press briefing is a smaller gathering limited to a small number of press members and by invitation only. *Id.*
349. *Id.* (citing Houchins v. KQED, Inc., 438 U.S. 1 (1978)).
350. *See id.*
conflict between those seeking access and those holding information should be resolved, according to the court, by political forces.351 As in Snyder, the court found that "[a]s the First and Fourteenth Amendments are currently understood in this Circuit, a government may lawfully make content-based distinctions in the way it provides press access to information not available to the public generally."352 It was clear that the expectations that the two reporters had were beyond any reasonable public expectation; though the Sun sought to be recognized as a protected actor, "that desire [was] not a cognizable basis for injunctive relief."353

III. ADDRESSING THE CHALLENGES OF DIFFERENTIAL ACCESS TO MEDIA ORGANIZATIONS

Though the circuit courts have emphatically decided either in favor of or against permitting discriminatory access to government information and officials, they have diverged widely on their reasons for doing so.354 Some focus on Equal Protection arguments, while others use First Amendment doctrine in order to find that journalists have a right of equal access to government sources. From these starting points, the circuit courts differ substantially in their reasoning.

Part III.A reviews the rationales offered by the different circuits for their holdings. Part III.B applies these rationales to the debate about the role of the media in American politics and analyzes which rationales best fit the articulated roles. Part III.C considers, more specifically, the various theories associated with a First Amendment right to media access and applies these theories to the problem of discriminatory access. Part III.D articulates the appropriate standard that the Supreme Court ought to apply when it hears a case on discriminatory access. Finally, Part III.E considers the role of the current political climate and the War on Terror in determining whether courts ought to be more deferential to government decisions about denying access, in a discriminatory manner or not, to government information during wartime.

A. Divergence of Opinion in the Lower Courts

The lower courts have considered both an equal protection rationale and a First Amendment rationale in deciding discriminatory access cases.

351. See id.
352. Id. at 581.
353. Id. at 582.
354. See supra Part II.
1. Equal Protection Rationale

   The First Circuit and the Third Circuit have both based decisions on the formulation in the Brennan test.\textsuperscript{355} What varies is the means of locating a fundamental right.\textsuperscript{356}

   The First Circuit, in \textit{Anderson}, without explicitly finding a fundamental right or applying heightened scrutiny, nonetheless suggested that denying access to government records to one newspaper but not others violates equal protection.\textsuperscript{357} Nevertheless, there are hints in the opinion that the court would need to find a fundamental right under the First Amendment in order to apply the equal protection doctrine effectively. The fact that this case involves access to judicial documents suggests that the court may be applying the analysis in \textit{Richmond News} of a fundamental right to access information from the judicial branch to the executive branch.\textsuperscript{358}

   The Third Circuit in \textit{Capital Cities Media, Inc.} applied a similar standard, but the rationale in the opinion is fuzzy because the court did not clearly establish whether it was applying the \textit{Richmond News} holding to a separate First Amendment claim articulated by the plaintiff or the equal protection argument discussed later in the opinion.\textsuperscript{359} If the \textit{Richmond News} rationale discussed in the opinion applied only to the plaintiff's First Amendment claim, then the court's remand for fact-finding on the equal protection claim was based solely on the First Amendment, then the First Amendment claim itself could be seen as the source of the fundamental right. If not, then the equal protection doctrine can only have an effect if the court finds a preexisting fundamental right of access.\textsuperscript{360}

2. First Amendment Rationale

   According to the D.C. Circuit, where there are no published or articulated standards but the government nevertheless decides which press members to admit and which to reject, such arbitrary methods violate the First Amendment.\textsuperscript{361} On the other hand, once internal regulations are published and enforced by the relevant government body, so long as they are made pursuant to the power of that body of government to make rules governing

\textsuperscript{355} See supra Part II.A.1.

\textsuperscript{356} See supra notes 261-73 and accompanying text. The Equal Protection Clause examination was triggered in \textit{McCoy}, for example, because the city government in that case treated two similarly situated defendants differently. See generally \textit{McCoy v. Providence Journal Co.}, 190 F.2d 760 (1st Cir. 1951).

\textsuperscript{357} See supra notes 296-302.

\textsuperscript{358} See supra note 297 and accompanying text.

\textsuperscript{359} Note that the First Amendment claim and the equal protection claim are discussed in separate sections of the opinion, and the section discussing the equal protection claim divulges no hint of the standard of review being applied, primarily because the equal protection claim was insufficiently pleading in the plaintiff's brief. See \textit{Capital Cities Media, Inc. v. Chester}, 797 F.2d 1164, 1174-76 (3d Cir. 1986).

\textsuperscript{360} See supra notes 263-66 and accompanying text.

\textsuperscript{361} See supra notes 277-95 and accompanying text.
its own procedure, decisions based on these regulations are branded nonjusticiable political actions.\textsuperscript{362}

The Second Circuit's reasoning proceeds in two steps. First, the court determines whether the plaintiff alleges an irreparable injury either to itself or to the public.\textsuperscript{363} The court then performs a First Amendment analysis by asking whether or not the press has been invited; if so, the court considers the premises open to the public and applies a rationale similar to the public forum cases.\textsuperscript{364} If there is an irreparable injury and the press has been invited, then a permanent injunction may issue.\textsuperscript{365}

The Fourth Circuit, conversely, denies journalists a constitutional right to equal access under the First Amendment.\textsuperscript{366} The court emphasizes that finding such a right of access in discriminatory cases would alter established journalistic practice and would confer a privileged First Amendment status on the press without appropriate doctrinal support.\textsuperscript{367} The court also objects to the finding of a First Amendment violation based on the creation of a public forum through the invitation of some media entities by other circuits, claiming that it is too large an "analytical leap" to infer from the fact that the government may not discriminate between private speakers on the basis of content that government may not choose what it says to various journalists.\textsuperscript{368}

\section*{B. What Is the Role of the Media in American Politics?}

The inclusion of the Press Clause in the Constitution suggests that the framers envisioned that the media would, at least, play a role either within government or as a representative of the people. The Press Clause's presence in the Bill of Rights suggests that its role is related to the prevention of tyranny.\textsuperscript{369} Also, the fact that the Constitution envisions abridgment of the rights of the press is an acknowledgment that politics might not be able to effectively police government abridgment of the press.\textsuperscript{370} Though representatives have been fairly responsive in the past, the explicit constitutional protection ought to apply both when government is willing to grant it and when government is unwilling.\textsuperscript{371} This is especially important in times of war, the only time in which government has sought to suppress political speech.\textsuperscript{372} Moreover, the courts have asserted

\begin{itemize}
\item \textsuperscript{362} See supra note 283.
\item \textsuperscript{363} See supra notes 308-09 and accompanying text.
\item \textsuperscript{364} See supra note 305-07 and accompanying text. See also Section I.E for a discussion of the public forum doctrine and the distinctions that the doctrine articulates between time, place, and manner restrictions and content-based restrictions.
\item \textsuperscript{365} See supra note 308 and accompanying text.
\item \textsuperscript{366} See supra Part II.B.
\item \textsuperscript{367} See supra notes 336-339 and accompanying text.
\item \textsuperscript{368} See supra note 340 and accompanying text.
\item \textsuperscript{369} See supra note 12-13 and accompanying text.
\item \textsuperscript{370} See discussion supra Part I.B.2.
\item \textsuperscript{371} See supra notes 37-40 and accompanying text; see also supra Part I.F.
\item \textsuperscript{372} See supra Part I.F.
\end{itemize}
institutional competence to determine when access ought to be granted in the Richmond News line of cases; thus, there is no reason why courts should not be able to address the question of whether the press may assert a right to equal access.\textsuperscript{373}

Regardless of whether politics could adequately determine its role, one must ask why the media ought to receive any sort of special protection. The theoretical construct of the media as the Fourth Estate of government, while attractive, finds little support in the text of the Constitution and no support in the doctrine.\textsuperscript{374} Instead, the Constitution seems to envision the press as a member of the public.\textsuperscript{375} Therefore, perhaps the more appropriate understanding of the Press Clause is one that ties the press into the individual rights articulated elsewhere in the Bill of Rights, particularly the First Amendment, which contains the press clause and focuses on free speech.

Though the history of the First Amendment’s passage does not suggest that the founders intended the press to have any institutional privileges beyond that of any other private business,\textsuperscript{376} the fact, again, that the Press Clause is in the Bill of Rights suggests that the right of a free press is a right of the citizens themselves rather than the press as an institution. The doctrine of access to government information reinforces this reading, both in denying a general right of access and implying a fundamental right of access in limited cases. In both Pell and Richmond News and their respective progenies, the right of access depends on whether the public has been, or ought to be, granted access to the government information.\textsuperscript{377} The press, then, must be given freedom to speak because it acts as an institutionalized form of the public.

C. Theories of the First Amendment and Their Relationship to the Discriminatory Access Conundrum

The glue that holds the theoretical foundation of a media right of equal access together is that the doctrine ought to reflect the purposes of the First Amendment. Professor Barry P. McDonald’s observation that the newsgathering doctrine is moving the media farther away from fulfilling its constitutionally protected role suggests that granting equal access to government information, and thereby restoring the press’s intended function as a watchdog or the Fourth Estate of government, is appropriate.\textsuperscript{378}

Though construing an equal right of access as a systemic right is attractive, because it avoids some of the pitfalls of First Amendment doctrine,\textsuperscript{379} the First Amendment ought to provide sufficient protection

\begin{footnotes}
\item[373] See supra Part I.B.2 (explaining the Richmond News line of cases).
\item[374] See supra notes 41-42 and accompanying text.
\item[375] See supra notes 56-57 and accompanying text.
\item[376] See supra notes 60-62 and accompanying text.
\item[377] See supra Part I.B.3.
\item[378] See supra note 136 and accompanying text.
\item[379] See, e.g., supra Part I.B.2.
\end{footnotes}
without looking to any other constitutional rights. The framers included freedom of the press in the First Amendment, making it an explicit right. As an explicit right, it both establishes a right of access more firmly and provides a rationale for its protection: free speech.

The most important theory in considering discriminatory access cases is the multiplicity of views theory. If the best way to inform the population and encourage robust debate is to encourage diverse perspectives in the marketplace of ideas, then allowing the government to stifle particular media outlets or journalists because they present a particular perspective denies the very purpose of the Press Clause. Though the multiplicity of views theory can never be perfectly implemented because the media functions as a private organization and therefore will always conform to financial pressures, preventing government from making content-based distinctions protects the purpose of the First Amendment.

The effectiveness test bears heavily on whether the government has a right to grant access in a discriminatory way, but for slightly different reasons than those expressed in Professor Easton's effectiveness theory. According to his articulation, the effectiveness test prevents the government from suppressing information that is already available through other media. The problematic aspect of discriminatory media access when discrimination results from content-based restrictions, however, is not that the information is already available in the marketplace of ideas, but rather that if the government is allowed to discriminate on the basis of content, certain unfavorable information may never come to light. The fact that the government may choose to divulge government information to some media actors but not others is not necessarily arbitrary, as Easton characterizes it, but may rather be the result of the government attempting to affect not only the tenor of the news but also its content. Thus, not only would the number of providers increase by preventing government from granting discriminatory access, but the quality of the coverage and the benefit that it makes available to citizens would also increase. News organizations would be more likely to report honestly and fairly on government representatives rather than reporting favorably merely to increase the chances that they could maintain access to those officials. This relates to the way in which the right to receive information fits into the discriminatory access question—the effectiveness test ought not to be whether the information is already publicly available, but rather whether the right to receive

381. See supra notes 150-52 and accompanying text.
382. See supra notes 150-51 and accompanying text.
383. See generally Magarian, supra note 6.
384. See supra note 140 and accompanying text.
385. See supra note 146 and accompanying text.
386. See supra note 299 and accompanying text.
information is being compromised by government officials engaging in image control.387

D. The Adoption of an Appropriate Standard

Ultimately, the standard adopted in the Second Circuit appears to be the most workable option for an ultimate resolution to this thorny problem.388

The standard articulated by the equal protection rationale cases simply would make it too difficult to find an equal right of access for members of the press, allowing some meritorious claims to fall through the cracks. As an initial matter, the standard is unclear and poorly articulated in some of the cases.389 If the standard actually requires that the court use rational basis review unless it can identify a fundamental right that ratchets up the level of review to heightened scrutiny, finding such a right may prove to be extraordinarily difficult no matter how compelling the facts. The Brennan test has not proved workable in extending much beyond the facts to which it was originally applied.390 Therefore, a fundamental right would be implied only in those limited cases exactly mapping the facts of McCoy,391 in which the media already has a right to the information.

The D.C. Circuit cases offer a good illustration of how to impose appropriate restrictions both in the presence and the absence of a public forum.392 This concern with process comports with general First Amendment doctrine and complements the Second Circuit’s public forum test both by providing a means of imposing time, place, and manner restrictions and by allocating limited space in the absence of a finding of a public forum.393

The First Circuit approach, which employs all-encompassing language and reasoning, does not take into account typical journalistic practices including exclusive interviews and source leaks.394 Had the court limited its holding to the judicial branch, one might argue that the conflation of the fundamental right of access to judicial proceedings and documents, in combination with equal protection concerns, is the reason for the heightened review.395 Because the court extended the holding in dictum to all branches of government, however, the holding appears to be based on the First Amendment and simply cannot be sustained without severely altering the way in which journalists conduct business.

387. See supra notes 160-68 for a discussion of the right to receive information.
388. See supra notes 363-65 and accompanying text.
389. See, e.g., supra notes 355-60 and accompanying text.
390. See supra note 134 and accompanying text.
391. 190 F.2d 760 (lst Cir. 1951).
392. See supra notes 361-62 and accompanying text.
393. See supra notes 277-93 and accompanying text.
394. For examples of articulations of these concerns, see supra notes 333-34.
395. See supra notes 119-24 for a discussion of the extent to which access to judicial proceedings and documents is considered a fundamental right and the other areas to which courts have extended this principle.
The reasoning in the Fourth Circuit, while compelling, ultimately does not fulfill the purposes of the First Amendment. Though it is true that there is no general right of access to government information, the government has created such a right by offering the information to some media outlets but not others, which, despite the arguments to the contrary, is problematic from the perspective of First Amendment theory. The Fourth Circuit implicitly concedes that there would be a right of equal access were the information public or the media generally admitted; this, however, does not effectively address the full range of problematic conduct.\textsuperscript{396} The standard, without more, satisfies the effectiveness test proposed by Easton, but does not address the problem of multiplicity of views when the information is less than completely public or the more nuanced issue of when the government may create a public forum by inviting multiple, but not all, journalists while excluding others.\textsuperscript{397}

The Second Circuit's approach solves many of these problems. Unlike the Fourth Circuit, the Second Circuit recognizes the value of transplanting the public forum doctrine into the press clause context.\textsuperscript{398} The Second Circuit also recognizes the complexity of determining what a public forum is in the context of media access, and formulates a test: Whether the forum (be it a classic press room or a general policy of speaking to all journalists but one) is more generally inclusive than it is exclusive.\textsuperscript{399} The important factor is not whether the interaction looks like a press briefing or like a series of exclusive interviews with all media organizations except for the one in question; instead, what ought to matter is whether a journalist is denied access to government information to which other media outlets generally have access, potentially chilling speech by allowing the government to communicate to journalists that they may be denied access if

\begin{itemize}
\item \textsuperscript{396} See supra note 336 and accompanying text.
\item \textsuperscript{397} See, for example, supra notes 381-87 for a comparison of the multiplicity of views theory and the effectiveness test and supra note 306 for a discussion of the effect of government creating a public forum by inviting members of the press.
\item \textsuperscript{398} See supra notes 340, 306 and accompanying text. It is clear from the theoretical underpinnings of the First Amendment that the rationale for the public forum doctrine applies equally in the context of the Press Clause regardless of whether one sees the media as the Fourth Estate or as a proxy for the public, as, in both cases, there is value to nondiscrimination on the basis of content. See supra notes 54-59 and accompanying text.
\item \textsuperscript{399} See supra note 306 and accompanying text. Note that this test also takes into account the Fourth Circuit's concerns about exclusive interviews because these are clearly more inclusive than exclusive, even if the government grants an exclusive interview to several media entities rather than just one, and therefore does not mandate preferential treatment for all. See supra note 337 and accompanying text. The test does not, however, take into account the practice of exclusion of journalists who violate confidentiality or other such journalistic conventions. See supra note 337 and accompanying text. One could argue that this is the price that one has to pay for ensuring that the government does not discriminate on the basis of content, analogizing to the public forum context in which government may not impose restrictions that might otherwise be valid if they may result in discrimination on the basis of content because of the vital First Amendment interests at stake. See supra notes 191-92 and accompanying text.
\end{itemize}
they portray the government in a negative light.\textsuperscript{400} The Second Circuit’s analysis under the irreparable harm test illustrates that its doctrine is in keeping with the purposes of the First Amendment: The courts will find irreparable harm if the exclusion of certain media outlets prevents the public from receiving unique perspectives under the multiplicity of views theory.\textsuperscript{401}

E. The Effect of the War on Terror

The War on Terror and the expected reduction of civil liberties that accompanies wartime further complicates the already thorny analysis resulting from all of this conflicting doctrine. The Supreme Court hesitated to extend a right of access to government information in times of peace, and in times of war or other national stress this tendency is further exacerbated.\textsuperscript{402} The public seems to have acquiesced in some curtailment of civil liberties in response to the passage of the USA PATRIOT Act and the exercise of a number of other executive powers, all of which expand government power in the area of law enforcement at the expense of individual rights.\textsuperscript{403}

There is certainly great need to maintain secrecy in national defense during the War on Terror, as supporters of the USA PATRIOT Act and other supporters of more restrictions on civil liberties maintain.\textsuperscript{404} Although fighting terrorism may require less military force than conventional wars, it entails more intelligence, which intuitively suggests more secrecy. Nevertheless, granting access to some media organizations while excluding others avoids implicating many of the same concerns. The effectiveness test appropriately applies here, in the sense that the government information is already out and therefore cannot implicate a serious national security concern.\textsuperscript{405} Therefore, while the issue concerns free speech at a time of war, it does not touch on national security in the same way. Mere embarrassment is insufficient to allow the government to limit free speech where it would otherwise be granted.

\textsuperscript{400} See supra note 299 and accompanying text. Consider, for example, the multiplicity of situations in which courts have found a First Amendment right to access. See, e.g., supra notes 286-90 and accompanying text (discussing First Amendment due process concerns when the government grants some reporters access to Guantanamo Bay while denying access to others); supra note 306 (discussing that when candidates invited some media members into their quarters, they thereby created a public forum); supra note 309 (discussing that the government violates the First Amendment by requiring media organizations to form press pools, thereby excluding the viewpoints of those who cannot afford those pools).

\textsuperscript{401} See supra notes 309-10 and accompanying text.

\textsuperscript{402} See supra notes 203-04 and accompanying text.

\textsuperscript{403} See supra notes 226-38 and accompanying text.

\textsuperscript{404} See supra note 225 and accompanying text.

\textsuperscript{405} See supra notes 140-49 and accompanying text. As Easton points out, “[h]ow important can the government’s asserted interest in suppression be if it allows access to some arbitrarily chosen members of the public or to the entire world via some other medium?” See Easton, supra note 140, at 36.
CONCLUSION

Discriminatory access does not, in itself, threaten democracy. Journalists and government sources regularly engage in practices that involve some discrimination between media outlets; exclusive interviews are merely the most visible example. Therefore, an outright ban on discriminatory access would be inappropriate and might even be detrimental to the public's right to know; who knows, for example, whether confidential sources would continue to talk to the media if they had to share the same information with all members of the media equally?

On the other hand, granting a blank check to government officials to exclude or include media outlets as they choose condones the abuse of government control over exclusive information, allowing government to control the public perception of its activities to the detriment of the public. During wartime, this effect is magnified, both because the government can tightly control the flow of information by citing national security concerns and because the public must be even more vigilant to protect against government abuses. The limitations on FOIA and the restrictions imposed by the USA PATRIOT Act illustrate the shortcomings of the political process at such a time. Therefore, a standard that both scrutinizes any inflicted harm and assesses whether the government has opened the information to the public, effectively determining whether government is trying to control the content of the media, ensures the flow of information without indiscriminately overturning established practices that allow both the media and government to operate effectively.

406. See supra Part I.F.2.