

MAKE CAMPAIGN COVERAGE GREAT AGAIN: PRESIDENTIAL CAMPAIGNS, THE PRESS, AND THE RIGHT OF ACCESS

*Maximilian J. Mescall**

I. INTRODUCTION

As news organizations multiply and cater to niche fields and interests, Americans have flocked towards news sources that fit their ideological preferences.¹ For instance, eighty-eight percent of consistent conservatives have a positive view of Fox News, while consistent liberals are more likely to rely on NPR, PBS, the New York Times or the BBC for their news.² Although more Americans follow the news, the public has moved away from television and print mediums, where news sources attempt to appeal to a broader audience, to blogs or ideologically consistent television such as the O'Reilly or Daily Show.³ Meanwhile, on social media, consistent conservatives and consistent liberals are more likely to defriend or unfollow people who share political views contrary to their own.⁴ This shift in American news consumption results in fewer Americans receiving news from multiple sources or viewpoints.⁵

* J.D. Candidate, 2018, Seton Hall University School of Law; B.A., *magna cum laude*, 2014, Rutgers University. I would like to express my gratitude to my faculty advisor, Jonathan Hafetz, for his guidance and support in the writing of this Comment.

¹ *Today's Washington Press Corps More Digital, Specialized D.C.-based Newspaper Staff Focus on Congress, but Wire Services Account for Most of What Readers See*, PEWRESEARCH (Dec. 3, 2015), <http://www.journalism.org/2015/12/03/todays-washington-press-corps-more-digital-specialized/>.

² Amy Mitchell et al., *Political Polarization & Media Habits*, PEWRESEARCH (Oct. 21, 2014), <http://www.journalism.org/2014/10/21/political-polarization-media-habits/>.

³ *Americans Spending More Time Following the News: Ideological News Sources: Who Watches and Why*, PEWRESEARCH (Sept. 12, 2010), <http://www.people-press.org/2010/09/12/americans-spending-more-time-following-the-news/>.

⁴ Mitchell, *supra* note 2.

⁵ *Id.* (“When it comes to getting news about politics and government, liberals and conservatives inhabit different worlds. There is little overlap in the news sources they turn to and trust.”). *But see id.* (“The study also suggests that in America today, it is virtually impossible to live in an ideological bubble. Most Americans rely on an array of outlets—with varying audience profiles—for political news. And many consistent conservatives and liberals hear dissenting political views in their everyday lives.”).

This ideological split bled into the 2016 presidential campaign. At a rally for Donald Trump's presidential campaign, campaign staff approached Ben Schreckinger, a Politico reporter, called security, and escorted him from the premises.⁶ Schreckinger had obtained an admission ticket to the event, but had not been granted the press credentials⁷ he requested.⁸ The story was a common one in the 2016 presidential election, with the Trump campaign expelling reporters from Vice News,⁹ Univision,¹⁰ the Washington Post,¹¹ and other news outlets from campaign events.¹²

The Trump campaign's actions were the result of a blacklist of news organizations the campaign believed treated Trump unfairly.¹³ After the editorial board of The Des Moines Register called for then-candidate Trump to bow out of the race, it became the first media outlet placed on the blacklist.¹⁴ From there, the list expanded to at least half a dozen news organizations that were denied the access and privileges that come with press credentials, including access to the campaign's news conferences.¹⁵ Some

⁶ Ben Schreckinger, *Trump Security Removes POLITICO Reporter from Rally*, POLITICO (June 3, 2016, 12:50 AM), <http://www.politico.com/story/2016/06/donald-trump-security-politico-reporter-223856>.

⁷ Jeffrey P. Hermes et al., *Who Gets a Press Pass? Media Credentialing Practices in the United States*, BERKMAN CTR. INTERNET & SOC'Y, June 2014, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2451239 ("For decades, journalists at established news organizations have routinely applied for and been granted credentials by government bodies at the federal, state and local levels, from the White House all the way down to local police and fire departments. Private organizations also often control access to other events, such as concerts, sporting events and political conventions. Despite some unease and tensions, many reporters have maintained working relationships with these agencies and their officials. Some media organizations have obtained a standing [sic], generic set of credentials that are used interchangeably by their reporters; in other cases, a press badge from a recognized news organization may prompt an informal 'wave through' by officials, allowing special access at accident scenes, government events, and other restricted areas.").

⁸ Schreckinger, *supra* note 6.

⁹ Harper Neidig, *Reporter Arrested at Trump Campaign Event*, THE HILL (Sept. 17, 2016 4:09 PM), <http://thehill.com/blogs/ballot-box/presidential-races/296477-reporter-arrested-at-trump-campaign-stop>.

¹⁰ Theodore Schleifer, *Univision Anchor Ejected from Trump News Conference*, CNN (Aug. 26, 2015, 11:52 AM), <http://www.cnn.com/2015/08/25/politics/donald-trump-megyn-kelly-iowa-rally/index.html>.

¹¹ Tom Kludt and Brian Stelter, *Donald Trump Revokes Washington Post Press Credentials*, CNN (June 14, 2016, 11:03 AM), <http://money.cnn.com/2016/06/13/media/donald-trump-washington-post-credentials/index.html>.

¹² Tom Kludt and Brian Stelter, *'The Blacklist': Here Are the Media Outlets Banned by Donald Trump*, CNN (June 14, 2016, 12:52 PM), <http://money.cnn.com/2016/06/14/media/donald-trump-media-blacklist/>.

¹³ *Id.*

¹⁴ Eliza Collins, *Trump Ends Media Blacklist: 'I Figure They Can't Treat Me Any Worse!'*, USA TODAY (Sept. 7, 2016, 12:52 PM), <http://www.usatoday.com/story/news/politics/onpolitics/2016/09/07/donald-trump-media-blacklist/89951650/>.

¹⁵ Kludt, *supra* note 12.

media advocates expressed concern that blacklisting “could have a chilling effect on other outlets’ coverage of Trump,”¹⁶ while others believed the campaign was correct to punish these news organizations for their dishonesty.¹⁷ While the Trump campaign’s actions were well known and documented, other presidential candidates have also engaged in selective access.¹⁸

The Supreme Court has found viewpoint discrimination problematic when the entity denying the press access is a government actor.¹⁹ Under the First Amendment, the Court has recognized the press’s right of access to government buildings, but for the past fifty years declined to further address the doctrine.²⁰ The doctrine is meant to prevent government from providing selective access to members of the press or public who promote a certain viewpoint.²¹ It fosters open access to government and subjects it to scrutiny from its citizens.²²

Campaigns, however, have a special interest in promoting a certain viewpoint, namely, that their candidates would best represent the interests of the electorate.²³ The history of granting press credentials access²⁴ combined with the fact that campaigns are private actors meant there was no need to extend the constitutional right of access to presidential campaigns.²⁵ In recent campaigns, the denial of press access, due to ideological differences and how Americans select news sources, has created a new need to expand the right of access. While some may argue that other media outlets can

¹⁶ *Id.*

¹⁷ The O’Reilly Show, *Bill O’Reilly Supports Trump’s Media Blacklist: ‘If Someone Is Being Dishonest . . .’* FOX NEWS (Dec. 26, 2016), <https://www.youtube.com/watch?v=82vGiEkCLb8>.

¹⁸ See Dylan Byers, *Clinton Campaign Denies Access to Pool Reporter*, POLITICO (June 15, 2015, 9:27 AM), <http://www.politico.com/blogs/media/2015/06/clinton-campaign-denies-access-to-pool-reporter-208839>; Rachel Sklar, *Obama’s Revenge: New Yorker Reporter Excluded from Press Plane for Overseas Trip*, HUFFINGTON POST (July 28, 2008, 5:12 AM), http://www.huffingtonpost.com/2008/07/21/obamas-revenge-emnew-york_n_113969.html.

¹⁹ *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995) (“Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.”).

²⁰ Luke M. Milligan, *First Amendment Discussion Group: Rethinking Press Rights of Equal Access*, 65 WASH & LEE L. REV. 1103, 1105 (2008).

²¹ *Id.*

²² *Rosenberger*, 515 U.S. at 829.

²³ Michael D. Shear, *For Both Campaigns, a Need to Control the Message*, N.Y. TIMES (Sept. 16, 2012), <http://www.nytimes.com/2012/09/17/us/politics/for-romney-and-obama-a-need-to-control-the-message.html> (“There is almost nothing more valuable to a presidential campaign than controlling the message.”).

²⁴ See discussion *infra* Part IV.A.

²⁵ See discussion *infra* Part IV.B.

republish an article of another journalist who was granted access, this argument is hollow. By granting selective access, campaigns control the initial public perception of the event, thus undermining an ideologically opposite news source's ability to provide a contrary interpretation.²⁶ Since presidential campaigns are so integral to the American democratic process, courts should recognize a right to access for press following campaigns and protect against viewpoint discrimination.²⁷

This Comment will examine the right to access for members of the press to the general election campaigns of presidential candidates. Part II of this Comment will briefly summarize the two leading interpretations of the Freedom of the Press Clause in the First Amendment. Part III will argue that campaigns are necessary to the function of government and therefore constitute state actors subject to constitutional limitations. Part IV will discuss the recognized right to access government buildings which the press currently enjoys. Part V will lay out the "Enumerated Reasons Rule" which provides the courts with guidance for balancing the press's and the campaign's interests. Part VI will conclude.

II. ORDINARY OR EXTRAORDINARY PROTECTION: INTERPRETING THE FIRST AMENDMENT

Unlike most constitutional amendments, the First Amendment has little historical or original understanding.²⁸ The first Congress, which passed the amendment, maintained no records defining its terms nor held significant discussions concerning the amendment's implementation.²⁹ This has led the First Amendment generally, and the press clause specifically, to acquire an ambiguous nature subject to multiple interpretations.³⁰ In this vacuum, two primary interpretations of the press clause have arisen. The first, the Fourth Estate theory, contends that Congress created the press clause to provide special rights to journalists and reporters who would act as the People's watchdog over the three branches of government.³¹ The second, the press-as-a-technology theory, argues that the clause is meant to ensure ordinary

²⁶ See Ilana Friedman, *Where Public and Private Spaces Converge: Discriminatory Media Access to Government Information*, 75 *FORDHAM L. REV.* 253, 285 (2006).

²⁷ See *Leigh v. Salazar*, 677 F.3d 892, 900 (9th Cir. 2012) ("The free press is the guardian of the public interest, and the independent judiciary is the guardian of the free press. Thus, courts have a duty to conduct a thorough and searching review of any attempt to restrict public access.").

²⁸ Derigan Silver & Dan V. Kozlowski, *The First Amendment Originalism of Justices Brennan, Scalia and Thomas*, 17 *COMM. L. POL'Y* 385, 390 (2012).

²⁹ *Id.* (citing David A. Anderson, *The Origins of the Press Clause*, 30 *UCLA L. REV.* 455, 485 (1983)).

³⁰ *Id.*

³¹ See generally Sonja R. West, *The "Press," Then & Now*, 77 *OHIO ST. L.J.* 49 (2016) (arguing in favor of adoption of the Fourth Estate interpretation of the Press Clause).

citizens have a right to distribute their thoughts via publication that are ancillary to the First Amendment's right to freedom of speech.³²

A. *The Fourth Estate Interpretation*

In early American history, printing technology was limited to “a highly select group of people” who “served as gatekeepers by adhering to a developed set of ethical norms.”³³ Some evidence suggests that the Founders were comfortable with providing special rights and access to members of the press.³⁴ Low literacy rates, the costs of obtaining and maintaining a printing press and favorable tax treatment all imply that originally the press was an elite group meant to monitor government actions and inform the people of important events.³⁵ In this role as gatekeepers, the press served as “purposeful actors in the political process, linking parties, voters, and the government together.”³⁶ In today's media, journalists continue to act as moderators, organizing the debate to provide the coherence and structure necessary for public consumption.³⁷ Essentially, the Fourth Estate interpretation suggests that the Press Clause fulfilled a dual purpose: to provide the People with the ability to “express their sentiments regardless of the purpose or content” and to provide a “checking function—to examine the proceedings of government.”³⁸

The Fourth Estate's interpretation of the press is not strictly limited to professional journalists.³⁹ Instead, “the press clause of the First Amendment not only protects the ability of the press to speak, but also protects certain types of press behavior.”⁴⁰ Like freedom of expression or freedom of religion, the individual receives protection from the First Amendment by

³² See generally Eugene Volokh, *Freedom for the Press as an Industry, or For the Press as a Technology? From the Framing to Today*, 160 U. PA. L. REV. 459 (2012) (arguing the press-as-a-technology interpretation of the Press Clause is proper).

³³ West, *supra* note 31, at 72.

³⁴ *Id.*

³⁵ *Id.* at 73–81.

³⁶ *Id.* at 88 (citing JEFFERY L. PASLEY, “THE TYRANNY OF PRINTERS”: NEWSPAPER POLITICS IN THE EARLY AMERICAN REPUBLIC, 3 (2001)).

³⁷ *Id.* at 103 (“Mass communication without journalists resembles ‘a town meeting with no moderator and no agenda; freedom of speech may be maximized but to no common purpose.’”) (quoting Anderson, *supra* note 29, at 333).

³⁸ West, *supra* note 31, at 66–67 (internal quotations omitted).

³⁹ Benjamin Oliphant, *Freedom of the Press as a Discrete Constitutional Guarantee*, 59 MCGILL L.J. 283, 302 (2013) (“Just as freedom of expression is afforded equally to all to the extent they are engaging in expression . . . freedom of the press should be available to all who are engaging in press-like activity—from the lonely pamphleteer or pajama-clad blogger to the institutional mainstream reporter.”).

⁴⁰ Amy Jordan, *The Right of Access: Is There a Better Fit than the First Amendment?*, 57 VAND. L. REV. 1349, 1361 (2004) (citing Jon Paul Dits, *The Press Clause and Press Behavior: Revisiting the Implications of Citizenship*, 7 COMM. L. & POL'Y 25, 31 (2002)).

acting with a certain purpose.⁴¹ Under this definition, intent, not action, separates the journalist from the public individual.⁴² Simply put, the journalist's intent to distribute the information for public consumption, places him within the definition of, and provides him with the protection of, the Press Clause.⁴³

The Court has suggested that the press has unique powers and protections under the Press Clause. Early in the 20th Century the Court recognized that "security of the freedom of the press requires that it should be exempt [from] restraint"⁴⁴ It has recognized, under the First Amendment, "the press has exerted a freedom in canvassing the merits and measures of public men of every description which has not been confined to the strict limits of the common law" but seems to have extraordinary power.⁴⁵ Indeed, the Court has held that when it comes to criticism of public officials, newspapers are protected under the First Amendment.⁴⁶ In addition to having certain privileges, the press is also subject to certain restraints. For example, the Court found the Federal Communication Commission's former fairness doctrine constitutional, which required broadcasters to provide candidates with equal airtime so that they may address voters directly.⁴⁷ Throughout history some Justices, including Justice Stewart⁴⁸ and Justice Stevens,⁴⁹ argued for this interpretation.

⁴¹ Oliphant, *supra* note 39, at 302.

⁴² *Id.*

⁴³ *Id.* at 299–300 ("[A]nyone who is undertaking newsgathering activity with intent to publish or otherwise disseminate that information to the public.").

⁴⁴ *Near v. Minnesota*, 283 U.S. 697, 715 (1931).

⁴⁵ *Id.* at 718. (quoting James Madison, *Report on the Virginia Resolutions* (1800), http://press-pubs.uchicago.edu/founders/documents/amendI_speeches24.html) (internal quotations omitted).

⁴⁶ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 256, 280–81 (1964) (holding that a public official could not recover damages for libel from a newspaper without a showing of actual malice).

⁴⁷ *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 380 (1969) (subjecting broadcasters to content neutral FCC regulation).

⁴⁸ *Branzburg v. Hayes*, 408 U.S. 665, 727 (1972) (Stewart, J., dissenting) ("A corollary of the right to publish must be a right to gather news."); Potter Stewart, *Of the Press*, 26 HASTINGS L.J. 631, 633 (1975) ("[T]he Free Press Clause extends protection to an institution."). See *Zurcher v. Stanford Daily*, 436 U.S. 547, 571–72 (1978) (Stewart, J., dissenting) ("Protection of those sources is necessary to ensure that the press can fulfill its constitutionally designated function of informing the public"). See also Timothy B. Dyk, *Newsgathering, Press Access, and the First Amendment*, 44 STAN. L. REV. 927, 929–32 (1992) ("Justice Stewart's comments [about the press] touched off a fury of debate."); Melville B. Nimmer, *Introduction—Is Freedom of the Press a Redundancy: What Does It Add to Freedom of Speech?*, 26 HASTINGS L.J. 639 (1975).

⁴⁹ *Citizens United v. FEC*, 558 U.S. 310, 413 n.57 (2010) (Stevens, J., concurring in part and dissenting in part) ("In fact, the Free Press Clause might be turned against Justice SCALIA, for two reasons. First, we learn from it that the drafters of the First Amendment did draw distinctions—explicit distinctions—between types of 'speakers,' or speech outlets

If the Court explicitly adopts this theory, then access to presidential campaigns becomes straightforward.⁵⁰ Since the press has certain news-gathering privileges, the right to obtain a press pass would be a natural extension of that privilege. Lower courts need only be concerned with issues of viewpoint discrimination and prudential concerns. The Fourth Estate argument, however, was never adopted by the Court.⁵¹ Instead, both the Supreme Court and lower courts have effectively adopted the press-as-a-technology interpretation to the Press Clause.⁵²

B. *The Press-As-A-Technology Interpretation*

The press-as-a-technology theory, like the Fourth Estate theory, is based upon the Founders' understanding of the press as presented in colonial and post-independence America.⁵³

For instance, long before the adoption of the First Amendment, press protections included not only pamphlets, newspapers and articles, but also books, which do not always discuss the news.⁵⁴ Early American case law supported the idea that the Press Clause applies to all persons; all persons benefited from its protections, not just an elite group.⁵⁵ Additionally, scholars have argued it was unlikely the Founders intended to grant special rights to the press because political elites were more likely to grant rights to the public in its entirety rather than to a subclass of the population to which the elites did not generally belong.⁵⁶ Overall, the argument asserts the

or forms. Second, the Court's strongest historical evidence all relates to the Framers' views on the press, yet while the Court tries to sweep this evidence into the Free Speech Clause, the Free Press Clause provides a more natural textual home. The text and history highlighted by our colleagues suggests why one type of corporation, those that are part of the press, might be able to claim special First Amendment status, and therefore why some kinds of 'identity'-based distinctions might be permissible after all. Once one accepts that much, the intellectual edifice of the majority opinion crumbles." (internal citations omitted). *Cf.* John Paul Stevens, *The Freedom of Speech*, 102 YALE L.J. 1293 (1993) (arguing the First Amendment grants individuals immunity from government prosecution for rights which are expressly enumerated).

⁵⁰ *Cf.* Dyk, *supra* note 48, at 941–44.

⁵¹ *See infra* text accompanying notes 52–62.

⁵² *See, e.g.*, *Obsidian Fin. Grp., LLC v. Cox*, 740 F.3d 1284, 1291 (9th Cir. 2014) ("We agree with our sister circuits. The protections of the First Amendment do not turn on whether the defendant was a trained journalist, formally affiliated with traditional news entities engaged in conflict-of-interest disclosure, went beyond just assembling others' writings, or tried to get both sides of a story.").

⁵³ Volokh, *supra* note 32, at 468–83.

⁵⁴ *Id.* at 481 ("Copyright law at the [adoption of the First Amendment] covered books, maps, and charts, but not newspapers. To talk about copyright law as even potentially related—however benignly—to the freedom of the press suggests that the freedom of the press was seen as applicable to books.") (internal footnotes omitted).

⁵⁵ *Id.* at 489–97.

⁵⁶ *Id.* at 469.

Founders envisioned a press populated by citizen journalists, similar to today's news bloggers, rather than professional journalists working for established media corporations.⁵⁷

Modern American case law appears to support this definition. The Court has extended Press Clause protections to citizens distributing a single writing in addition to periodical news organizations.⁵⁸ At times, the Court has explicitly declined to extend privileges to the institutional press, holding that the Constitution grants no special protections to the profession.⁵⁹ Described inversely, “[t]he general public has the same right of access as does the media.”⁶⁰ Recently, the Court recognized the rise of Internet reporting as further support for treating individuals and the institutional press as one and the same under the First Amendment.⁶¹

While both the Fourth Estate and press-as-a-technology theories appear viable, the Court has more consistently applied the latter in its interpretation of the Press Clause.⁶² Thus, any First Amendment right to access a campaign would apply not only to the institutional press, but the public at large.

⁵⁷ *Cf.* Robert A. Arcamona, *In This Issue, Cover Story Bloggers, Other Alternative Media, and Access to Press Conferences*, 27 COMM. LAWYER 12 (2011) (discussing the difficulties citizen bloggers have when attempting to access government sources).

⁵⁸ *Lovell v. Griffin*, 303 U.S. 444, 452 (1938) (“The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.”).

⁵⁹ *See Bartnicki v. Vopper*, 532 U.S. 514, 525 n.8 (2001) (declining to extend protections to reporters who invaded privacy); *Houchins v. KOED, Inc.*, 438 U.S. 1, 18–19 (1978) (refusing to grant the press special rights of access to prisons beyond that normally accorded to the public); *Pell v. Procunier*, 417 U.S. 817, 834 (1974) (“The Constitution does not, however, require government to accord the press special access to information not shared by members of the public generally.”); *Branzburg v. Hayes*, 408 U.S. 665, 708–09 (1972) (denying reporters privilege in the context of grand jury investigations).

⁶⁰ *Courthouse News Serv. v. Planet*, 750 F.3d 776, 788 (9th Cir. 2014).

⁶¹ *Citizens United v. FEC*, 558 U.S. 310, 352 (2010) (“With the advent of the Internet and the decline of print and broadcast media . . . the line between the media and others who wish to comment on political and social issues becomes far more blurred.”).

⁶² *See First Nat'l Bank v. Bellotti*, 435 U.S. 765, 798 (1978) (“[T]he history of the [Press] Clause does not suggest that the authors contemplated a ‘special’ or ‘institutional’ privilege.”). *But see* *Leathers v. Medlock*, 499 U.S. 439, 464 (1991) (Marshall, J., dissenting) (“Although the Free Press Clause does not guarantee the press a preferred position over other speakers, the Free Press Clause does ‘protect [members of press] from invidious discrimination.’”) (alterations in original) (quoting L. Tribe, *American Constitutional Law* § 12-20, 963 (2d ed. 1988); *Jordan, supra* note 40, at 1351 (“In cases following *Zemel [v. Rusk]*, the Supreme Court explicitly rejected [] the argument that the press enjoyed special privileges not enjoyed by average citizens”).

2018]

COMMENT

1661

III. CAMPAIGNS AS STATE ACTORS

Campaigns are an integral part of the American electoral system.⁶³ Without campaigns, the average person would not know a candidate's politics, experience or character.⁶⁴ Presidential campaigns also benefit from government protection and aid after a candidate is formally nominated at national party conventions.⁶⁵ Since general election campaigns have become a necessary part of American democracy, presidential campaigns should be considered state actors subject to constitutional limitations.⁶⁶

A. *The State Actor Test*

From its inception, the Court created the state actor test to balance “Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion”⁶⁷ It explicitly emphasized that the freedoms of press and religion “occupy a preferred position” in our democracy.⁶⁸ Therefore, when an entity becomes “so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action” the entity is regulated by the Constitution.⁶⁹

The Supreme Court has held political parties to be state actors when acting in an electoral capacity. In *Nixon v. Condon*, the Court addressed a Texas statute that allowed a party to restrict its primary elections to only white voters.⁷⁰ The Court acknowledged that “a political party is merely a voluntary association . . . it has inherent power like voluntary associations generally to determine its own membership”⁷¹ The statute itself, however, empowered the party commission to determine rules as to who could vote in the primary process.⁷² By acting on this statutory authority, “[w]hatever power of exclusion has been exercised by the members of the committee has come to them . . . as the delegates of the State.”⁷³ Declaring

⁶³ See H. T. Reynolds, *Coverage of Political Campaigns* <https://www1.udel.edu/htr/American/Texts/campcov.html#note1> (“Those running for office must state their positions. Otherwise, there is no real choice and elections lose their meaning.”).

⁶⁴ See *id.*

⁶⁵ See discussion *infra* Part III.B.

⁶⁶ Although primary campaigns could conceivably be state actors subject to regulation, such discussion falls outside the scope of this Comment. For an example of how courts have addressed the press and primary campaigns, see *American Broadcasting Companies v. Cuomo*, 570 F.2d 1080 (2d Cir. 1977).

⁶⁷ *Marsh v. Alabama*, 326 U.S. 501, 509 (1946).

⁶⁸ *Id.*

⁶⁹ *Duke v. Cleland*, 5 F.3d 1399, 1401 (11th Cir. 1993) (holding a political party was a state actor when it denied placement of a candidate on its ballot).

⁷⁰ 286 U.S. 73, 81 (1932).

⁷¹ *Id.* at 83.

⁷² *Id.* at 84.

⁷³ *Id.* at 85.

the law unconstitutional under the Fourteenth and Fifteenth Amendments, the Court concluded, “when those agencies are invested with an authority independent of the will of the association in whose name they undertake to speak, they become to that extent the organs of the State itself, the repositories of official power.”⁷⁴ Holding thus, the Court reserved the question of whether a political party could restrict membership absent empowerment by a statute for a later date.⁷⁵

The Court answered that question in *Terry v. Adams*.⁷⁶ There, a private political organization, the Jaybirds, denied African-Americans admission into its primaries.⁷⁷ Unlike in *Nixon*,⁷⁸ the Jaybird primary excluded black voters without any blessing from the state.⁷⁹ Whoever won the Jaybird primary, however, typically won the later Democratic primary and the general election.⁸⁰ As a result, “[t]he Democratic primary and the general election [had] become no more than the perfunctory ratifiers of the choice that has already been made”⁸¹ The Court reasoned that “[t]he Jaybird primary has become an integral part, indeed the only effective part, of the elective process that determines who shall rule and govern in the county.”⁸² It therefore concluded that it was “immaterial that the state does not control that part of this elective process” and the Jaybirds could not deny African-Americans the right to vote any more than the state itself could.⁸³

The Supreme Court’s most recent decision concerning state actors is *Brentwood Academy v. Tennessee Secondary School Athletic Association*.⁸⁴ There, a private athletic association regulated all high school interscholastic sports in the state of Tennessee.⁸⁵ Though no law required schools to join the association or the association to accept all schools, it effectively had a monopoly on interscholastic sport in the state and was acknowledged by the state’s school board as the governing authority of interscholastic sports.⁸⁶ When the association suspended a member school, the aggrieved school argued the association violated its First Amendment rights.⁸⁷

⁷⁴ *Id.* at 88.

⁷⁵ *Id.* at 83.

⁷⁶ 345 U.S. 461 (1953).

⁷⁷ *Id.* at 463.

⁷⁸ *Nixon*, 286 U.S. at 73.

⁷⁹ *Terry*, 345 U.S. at 465–66.

⁸⁰ *Id.*

⁸¹ *Id.* at 469.

⁸² *Id.*

⁸³ *Id.* at 469–70.

⁸⁴ 531 U.S. 288 (2001).

⁸⁵ *Id.* at 291–94.

⁸⁶ *Id.*

⁸⁷ *Id.* at 293.

2018]

COMMENT

1663

The Supreme Court concluded that “[t]he nominally private character of the Association is overborne by the pervasive entwinement of public institutions and public officials in its composition and workings, and there is no substantial reason to claim unfairness in applying constitutional standards to it.”⁸⁸ In reaching that decision, the Court observed that the association’s membership was drawn entirely from public schools and that the state had effectively recognized the association as the sole interscholastic regulator in the state.⁸⁹ It concluded that “[e]ntwinement will support a conclusion that an ostensibly private organization ought to be charged with a public character and judged by constitutional standards; entwinement to the degree shown here requires it.”⁹⁰

Certainly, campaigns meet this basic level of entwinement. The Constitution itself provides for the “general strictures for the election of the President, such as the manner in which electors are to be chosen and the qualifications for the presidency.”⁹¹ On a governmental level, the Republican and Democratic parties “claim the membership and presumed loyalty of virtually every elected official in the federal government”⁹² Since party members raise money, rally votes for candidates, appoint judges and review candidates before supporting their electoral bids, campaigns supported by these party structures are state actors.⁹³

Lower federal courts have created several tests to determine entwinement.⁹⁴ One test in particular, the joint action,⁹⁵ or symbolic relationship⁹⁶ test, applies when the state “has so far insinuated itself into a position of interdependence” with a private actor that “it must be recognized as a joint participant in the challenged activity. . . .”⁹⁷ Interdependence is a narrowly construed test.⁹⁸ The private actor must be “an indispensable part

⁸⁸ *Id.* at 298.

⁸⁹ *Id.* at 299–301.

⁹⁰ *Brentwood*, 531 U.S. at 302.

⁹¹ John D. Castiglione, *Sign Here, Please: The First Amendment Implications of Requiring a Loyalty Oath for Admission to Political Events*, 74 GEO. WASH. L. REV. 345, 353 (2006).

⁹² Gregory P. Magarian, *Regulating Political Parties Under a “Public Rights” First Amendment*, 44 WM. & MARY L. REV. 1939, 2046 (2003).

⁹³ *See id.*

⁹⁴ *Santiago v. Puerto Rico*, 655 F.3d 61, 68 (1st Cir. 2011) (action coerced by state); *Gritton v. Disponett*, 332 F. App’x 232, 237 (6th Cir. 2009) (nexus test); *Kirtley v. Rainey*, 326 F.3d 1088, 1093 (9th Cir. 2003) (public function test); *Trigen-Oklahoma City Energy Corp. v. Okla. Gas & Elec. Co.*, 244 F.3d 1220, 1126 (10th Cir. 2001) (state supervision and intent test).

⁹⁵ *Kirtley*, 326 F.3d at 1093.

⁹⁶ *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1451 (10th Cir. 1995).

⁹⁷ *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961).

⁹⁸ *Gallagher*, 49 F.3d at 1451.

of a state project”⁹⁹ and the state must “knowingly [accept] the benefits derived from unconstitutional behavior.”¹⁰⁰ In essence, the private entity must be a “willful participant in joint action with the State or its agents.”¹⁰¹

B. *The Campaigns as State Actors*

While political parties are not always considered state actors,¹⁰² presidential campaigns are so integral to the electoral process that they should be bound by the Constitution. Even if they are technically private associations, presidential campaigns interact with various levels of government. These interactions are mutually beneficial and satisfy the joint action test.

The most relevant examples of a mutually beneficial relationship are seen in the Federal Election Campaign Act,¹⁰³ the Presidential Election Campaign Fund Act¹⁰⁴ and the Presidential Primary Matching Payment Account Act,¹⁰⁵ which are all enforced by the Federal Election Commission (FEC).¹⁰⁶ Under all of these acts, campaigns receive money from the federal government in exchange for some regulation.¹⁰⁷ For instance, the FEC provides federal funds to campaigns while also placing limits on donations that campaigns can obtain from private donors.¹⁰⁸ Once parties nominate their presidential candidates, those candidates have the opportunity to receive that government funding.¹⁰⁹ General federal elections are therefore subject to oversight from the government.¹¹⁰

⁹⁹ *Id.*

¹⁰⁰ *Parks Sch. of Bus., Inc. v. Symington*, 51 F.3d 1480, 1486 (9th Cir. 1995).

¹⁰¹ *Dennis v. Sparks*, 449 U.S. 24, 27 (1980).

¹⁰² *C.f. Rutan v. Republican Party*, 497 U.S. 62, 69 (1990) (holding that political patronage to members of the same party violates due process).

¹⁰³ 52 U.S.C. §§ 30101–30146 (2012); Bipartisan Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified as amended in scattered sections of 2 U.S.C.).

¹⁰⁴ 26 U.S.C. §§ 9001–9013 (2012).

¹⁰⁵ 26 U.S.C. §§ 9031–9042 (2012).

¹⁰⁶ *Castiglione*, *supra* note 91, at 353.

¹⁰⁷ *Id.*

¹⁰⁸ *Contribution Limits For 2015–2016 Federal Elections*, FEC (Feb. 2015), <http://www.fec.gov/pages/brochures/contrib.shtml#Chart>.

¹⁰⁹ *Presidential Election Campaign Fund*, FEC (May 13, 2016), <http://www.fec.gov/press/bkgnd/fund.shtml>.

¹¹⁰ *Campaign Guide for Congressional Candidates and Committees*, FEC 20 (2014), <http://www.fec.gov/pdf/candgui.pdf> (“A candidate is entitled to an election limit only if he or she seeks office in that election. Thus, a candidate who loses the primary (or otherwise does not participate in the general election) does not have a separate limit for the general.”).

2018]

COMMENT

1665

In addition, the federal government regulates broadcasters to ensure that each candidate has access to television time.¹¹¹ Federal law “provides that where a radio or television station permits a legally qualified candidate for public office to use its facilities, that station must also afford equal opportunities to all other such candidates for that office.”¹¹² Though this does not automatically grant presidential candidates access to the airwaves (candidates must pay for the time they use), these regulations ensure that campaigns have an equal opportunity to reach voters.¹¹³

In addition to monetary and broadcasting support, presidential campaigns receive security services directly from federal and state governments. In presidential campaigns, the candidates’ personal security is handled by the Secret Service¹¹⁴ while state and local police coordinate security at campaign rallies and fundraising events.¹¹⁵ When candidates hold town halls, rallies or speeches, municipal governments often bear some of the costs necessary to secure the event.¹¹⁶

Undoubtedly, elections are a critical part of the democratic experience,¹¹⁷ and various federal and state entities and the campaigns

¹¹¹ John Stewart Fleming, *Renewing the Chase: The First Amendment, Campaign Advertisements and the Goal of an Informed Citizenry*, 87 IND. L. J. 767, 778–89 (2012) (discussing government regulation of broadcast media to allow equal access to airwaves by all candidates). See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 392 (1969) (“[Without regulation] [s]tation owners and a few networks would have unfettered power to make time available only to the highest bidders, to communicate only their own views on public issues, people and candidates, and to permit on the air only those with whom they agreed.”); see also Marvin Ammori, *The First Amendment and Mass Communication*, 13 FIRST AMEND. L. REV. 263 (2014) (arguing the Internet can be regulated under the free speech doctrine).

¹¹² Russell J. Davis, *Political Candidate’s Right to Equal Broadcast Time Under 47 U.S.C.A. § 315*, 35 A.L.R. Fed. 856, 2a (2016).

¹¹³ *Id.*

¹¹⁴ 18 U.S.C. § 3056(a)(7) (2012) (“Under the direction of the Secretary of Homeland Security, the United States Secret Service is authorized to protect the following persons . . . Major Presidential and Vice Presidential candidates and, within 120 days of the general Presidential election, the spouses of such candidates.”).

¹¹⁵ See David Leventhal, *Police Want Presidential Candidates to Pay Bills*, JOURNAL SENTINEL, <http://www.jsonline.com/story/news/politics/elections/2017/01/11/police-want-presidential-candidates-pay-bills/96447570/>; Joshua Stewart, *Trump’s Trip to San Diego Cost Taxpayers \$460K*, THE SAN DIEGO UNION TRIBUNE (July 22, 2016), <http://www.sandiegouniontribune.com/news/politics/sdut-trumps-trip-to-san-diego-cost-taxpayers-460-2016jul22-story.html>; Dominic Dezzutti, *The Price of Political Rallies*, CBS (Feb. 17, 2012, 12:31 AM), <http://denver.cbslocal.com/2012/02/17/the-price-of-political-rallies/>. See also Jordyn Phelps, *Who Pays When the President Travels for Campaign Events?*, ABC NEWS (July 25, 2016, 7:44 PM), <http://abcnews.go.com/Politics/pays-president-travels-campaign-events/story?id=40361545>. Cf. Jane C. Timm, *Taxpayers Foot Bill for 2016 Campaign Security*, MSNBC (June, 29, 2015, 2:14 PM), <http://www.msnbc.com/msnbc/taxpayers-foot-bill-2016-campaign-security> (discussing states covering security costs for state governors campaigning as presidential candidates out of state).

¹¹⁶ See, e.g., Stewart, *supra* note, 115.

¹¹⁷ See *supra* text accompanying notes 63–76.

coordinate closely during an election cycle.¹¹⁸ The United States Supreme Court has, on several occasions, emphasized the importance of voting in the democratic process.¹¹⁹ When articulating the importance of elections, it has placed emphasis on the importance of voter access to a campaign's message.¹²⁰ Because of the importance of informed voters, the Court has curtailed broadcast media rights to ensure candidates may purchase equal time for television commercials.¹²¹ In doing so, the Court has both explicitly and implicitly recognized the campaign, and its purpose to convey the candidate's message to the voters, as an important tenant of the democratic process.¹²²

This analysis leads to one conclusion: the federal and state governments are directly involved in promoting a presidential candidate's positions of the germane issues. Under the joint action test, campaigns and government work in tandem for a common goal; here, that is the distribution of the candidate's message to the public. State or federal governments incur costs by providing security for candidates and securing the venues where candidates appear.¹²³ Campaigns are subject to a degree of control by the federal government through spending and contribution limits.¹²⁴ Additionally, there would be no elected government without a general election and general elections cannot occur without candidates and campaigns.¹²⁵ Since campaigns and the federal

¹¹⁸ Campaigns likely must be considered state actors even in federal elections. The federal actor designation is extremely narrow. *See* *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 400 (1995) (“[W]here, as here, the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment.”).

¹¹⁹ *See* *Cal. Democratic Party v. Jones*, 530 U.S. 567, 587 (2000) (Kennedy, J., concurring) (“Encouraging citizens to vote is a legitimate, indeed essential, state objective; for the constitutional order must be preserved by a strong, participatory democratic process.”); *Plyler v. Doe*, 457 U.S. 202, 233 (1982) (“[T]he right to vote is accorded extraordinary treatment because it is, in equal protection terms, an extraordinary right: a citizen cannot hope to achieve any meaningful degree of individual political equality if granted an inferior right of participation in the political process.”); *Reynolds v. Sims*, 377 U.S. 533 (1964) (declaring a state legislative scheme unconstitutional under the Equal Protection Clause asserting that the scheme harmed the right to have each vote weighted equally.).

¹²⁰ *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 392 (1969) (“It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount [in an election].”) (citing *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940)); *FCC v. Allentown Broad. Corp.*, 349 U.S. 358, 361–62 (1955).

¹²¹ *Red Lion Broad. Co.*, 395 U.S. 367 (holding the FCC can regulate airtime that broadcasters provide candidates to ensure voters were able to hear from all candidates).

¹²² *Id.* *But see* *Burson v. Freeman*, 504 U.S. 191 (holding a state statute imposing 100-foot boundary restriction on distribution of campaign materials on election day constitutional).

¹²³ *See* *Leventhal*, *supra* note 115.

¹²⁴ *Castiglione*, *supra* note 91, at 353.

¹²⁵ *See* *Reynolds*, *supra* note 63.

2018]

COMMENT

1667

government are intertwined, campaigns should comply with constitutional dictates.¹²⁶

IV. THE RIGHT OF ACCESS AND CAMPAIGNS

Despite declining to hold that the press has privileges superior to that of the ordinary individual, the Court has recognized that the government may not discriminate between different members of the press.¹²⁷ When it comes to accessing government buildings, courts have acknowledged that the press has a right of access and that the government may not discriminate between different news outlets.¹²⁸

A. *The Right to Access: Newsgathering*

The right of access cases originated with the Press's access to criminal trials. In *Richmond Newspapers v. Virginia*, the Court held the public, and by extension the press, had a right of access to observe criminal trials under the First Amendment.¹²⁹ The Court reasoned that freedoms of speech and the press shared "a common core purpose of assuring freedom of communication on matters relating to the functioning of government."¹³⁰ It considered open trials vital to the public's ability to obtain information on the government.¹³¹ "[W]ithout some protection for seeking out the news," it reasoned, "freedom of the press could be eviscerated."¹³² The Court therefore held that in places "traditionally open to the public" there was a "right of access."¹³³ In the context of criminal proceedings, the Court would

¹²⁶ *But see* George F. Will, *Elections and Campaigns Are Not the Same Thing*, WASH. POST (May 27, 2015), https://www.washingtonpost.com/opinions/elections-and-campaigns-are-not-the-same-thing/2015/05/27/72d0ce42-03c6-11e5-a428-c984eb077d4e_story.html?utm_term=.1a0e51896beb.

¹²⁷ *See* Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 225 (1987) (holding that a tax on magazines that were not "religious, professional, trade or sports periodical[s]" was unconstitutional); *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 576 (1983) (holding a special tax that applies only to certain newspapers unconstitutional).

¹²⁸ *Regan v. Time, Inc.*, 468 U.S. 641, 648–49 (1984) ("Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.").

¹²⁹ 448 U.S. 555 (1980). The Court had previously held that the accused has the right to a public trial in *Gannett Co. v. DePasquale*, 443 U.S. 368, 378 (1979). *Richmond Newspapers* is significant in that it prevented a nongovernment actor (the accused) from closing his trial to the general public.

¹³⁰ *Richmond Newspapers*, 448 U.S. at 575.

¹³¹ *Id.* at 575–76 ("[The] First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw.") (quoting *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 783 (1978)).

¹³² *Id.* at 576.

¹³³ *Id.* at 577.

go on to expand the right of access to hearings,¹³⁴ criminal trials involving minors¹³⁵ and voir dire.¹³⁶ In doing so, the Court created a right of access in criminal trials subject only to the defendant's right to a fair trial under the Sixth Amendment.¹³⁷

Lower courts seized upon the right of access and expanded it significantly to include areas outside the courtroom including "access [to] a wide range of civil and administrative government activities."¹³⁸ Under the Equal Protection Clause, courts granted access to government tax records,¹³⁹ legislative galleries,¹⁴⁰ government press conferences¹⁴¹ and executions¹⁴² that were previously opened only to select members of the press.¹⁴³ In doing so, lower courts shifted the analysis from whether the general public could obtain access to whether other journalists had access when determining if there was a right of access.¹⁴⁴ "Once unmoored from the Sixth Amendment['s protections]"¹⁴⁵ the First Amendment began to assure "the public and the press equal access once the government has opened its doors."¹⁴⁶

Despite this expansion, courts recognition that the right of access is "qualified, rather than absolute, and is subject to limiting considerations such as confidentiality, security, orderly process, spatial limitations, and doubtless

¹³⁴ *Press-Enter. Co. v. Super. Ct. (Press Enterprise II)*, 478 U.S. 1 (1986) (holding the public had a right of access to a criminal preliminary hearing).

¹³⁵ *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596 (1982) (granting press access to a trial involving sexual assault on minors).

¹³⁶ *Presley v. Georgia*, 558 U.S. 209 (2010); *Press-Enter. Co. v. Super. Ct. (Press Enterprise I)*, 464 U.S. 501 (1984) (holding the right to access outweighed the government's interest to inhibit the disclosure of sensitive information).

¹³⁷ Cristina Carmody Tilley, *I Am a Camera: Scrutinizing the Assumption That Cameras in the Courtroom Furnish Public Value by Operating as a Proxy for the Public*, 16 U. PA. J. CONST. L. 697 (2014).

¹³⁸ *Leigh v. Salazar*, 677 F.3d 892, 899 (9th Cir. 2012). See Dyk, *supra* note 48, at 944–53.

¹³⁹ *McCoy v. Providence Journal Co.*, 190 F.2d 760, 765–66 (1st Cir. 1951).

¹⁴⁰ *Kovach v. Maddux*, 2378 F. Supp. 835 (M.D. Tenn. 1965).

¹⁴¹ *Times-Picatune Publ'g Corp. v. Lee*, Civil Action No. 88-1325, 1988 U.S. Dist. LEXIS 3506 (E.D. La. Apr. 15, 1988); *Borrec v. Fasi*, 369 F. Supp. 906 (D. Haw. 1974).

¹⁴² *Cal. First Amendment Coalition v. Woodford*, 299 F.3d 868 (9th Cir. 2002).

¹⁴³ But see Ryan Benjamin Witte, *It's My News Too! Online Journalism and Discriminatory Access to the Congressional Periodical Press Gallery*, 12 YALE J. L. & TECH. 208 (2010) (arguing that the government should grant access to the Congressional Press Gallery for news bloggers).

¹⁴⁴ *Lewis v. Baxley*, 368 F. Supp. 768, 777 (M.D. Ala. 1973) (finding the right of "newsmen" to reasonable access to news of the government extends to access "to places where other members of the press may go and congregate in the ordinary course of events. In other words, there is a limited First Amendment right of access to the public galleries, the press rooms, and the press conferences dealing with state government.").

¹⁴⁵ *N.Y. Civ. Liberties Union v. N.Y.C. Transit Auth.*, 684 F.3d 286, 298 (2d Cir. 2011).

¹⁴⁶ *Houchins v. KQED, Inc.*, 438 U.S. 1, 16 (1978) (Stewart, J., concurring).

many others.”¹⁴⁷ The Court has drawn several lines where the public’s right of access is curtailed. For instance, it has distinguished closed-door sessions from open-door sessions of government, with the press allowed to access the latter but not the former.¹⁴⁸ Safety and impeding the government’s ability to fulfill its purpose are also compelling reasons to restrict access of the press.¹⁴⁹ Lower courts have expanded and defined these restrictions. Public polling places, for example, are not considered public under right of access because of the individual citizen’s right to have a secret ballot.¹⁵⁰ The military’s need for secrecy and concern for journalists’ safety led to denial of a “right” to embed reporters in military units.¹⁵¹ Most denials of right of access are based upon privacy rights and national security interests.¹⁵²

When granting the right of access, these private rights and national security interests are balanced against two important public policies necessary to maintain a democratic government. First, the press acts as a watchdog and surrogate of the public.¹⁵³ Through proximity, journalists build rapport with government officials, sources, and others in the industry to obtain information.¹⁵⁴ The press, unlike the average person, has time to discover, organize, and distribute this information. As stated by the Court,

¹⁴⁷ *Cable News Network, Inc. v. Am. Broad. Cos.*, 518 F. Supp. 1238, 1245 (N.D. Ga. 1981).

¹⁴⁸ *Pell v. Procunier*, 417 U.S. 817, 833–34 (1974) (“Despite the fact that news gathering may be hampered, the press is regularly excluded from grand jury proceedings, our own conferences, the meetings of other official bodies gathering in executive session, and the meetings of private organizations have no constitutional right of access to the scenes of crime or disaster when the general public is excluded.”).

¹⁴⁹ *See Zemel v. Rusk*, 381 U.S. 1, 17 (1965) (“[T]he prohibition of unauthorized entry into the White House diminishes the citizen’s opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right. The right to speak and publish does not carry with it the unrestrained right to gather information.”). *C.f.* *Branzburg v. Hayes*, 408 U.S. 665, 684–85 (1972) (“Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded . . .”).

¹⁵⁰ *See PG Publ. Co. v. Aichele*, 705 F.3d 91, 112 (3d Cir. 2013) (“[T]here is a very real possibility that the presence of reporters during the sign-in period, when individuals are necessarily exchanging personal information in preparation for casting a private vote, could concern, intimidate or even turn away potential voters.”).

¹⁵¹ *Flynt v. Rumsfeld*, 355 F.3d 697 (D.C. Cir. 2004).

¹⁵² *United States v. Doe*, 63 F.3d 121 (2d. Cir 1995).

¹⁵³ *Courthouse News Serv. v. Planet*, 750 F.3d 776, 786 (9th Cir. 2014) (“We have observed that the news media, when asserting the right of access, are surrogates for the public The free press is the guardian of the public interest, and the independent judiciary is the guardian of the free press.”) (internal quotations omitted).

¹⁵⁴ Richard B. Kielbowicz, *The Role of News Leaks in Governance and the Law of Journalists’ Confidentiality, 1795–2005*, 43 *SAN DIEGO L. REV.* 425 (2006); Elizabeth Coenia Sims, *Reporters and Their Confidential Sources: How Judith Miller Represents the Continuing Disconnect Between the Courts and the Press*, 5 *FIRST AMEND. L. REV.* 433, 433–43 (2007).

“[w]ithout the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally.”¹⁵⁵ By acting as a surrogate and watchdog, the press conducts investigations and provides the results to the public.¹⁵⁶ Thus, citizens gain an understanding of the workings of government.

Second, the right of access forces government to be more accountable and open.¹⁵⁷ In the context of a criminal trial proceeding, it “permits the public to participate in and serve as a check upon the judicial process—an essential component in our structure of self-government.”¹⁵⁸ Construing the right of access broadly “protects the public against the government’s ‘arbitrary interference with access to important information.’”¹⁵⁹ Using the press as a surrogate, “the citizen’s desire to keep a watchful eye on the workings of public agencies . . . [and] the operation of government” is fulfilled.¹⁶⁰

In determining whether there is a right of access, courts apply a balancing test.¹⁶¹ Prior to applying the balancing test, however, the journalist must meet the two-part test that the Court articulated in *Press Enterprise II*. Under this test, courts must determine (1) “whether the place and process have historically been open to the press and general public”¹⁶² and (2) “whether public access plays a significant positive role in the functioning of the particular process in question.”¹⁶³ The first factor examines past practice by asking if there is “a tradition of opening to the press the matter in question.”¹⁶⁴ If this first factor is present, there is a presumption in favor of access that can only be overcome by a narrow and specifically tailored governmental interest.¹⁶⁵

The second prong ensures that the press is not excluded from areas where the public would benefit from the knowledge gathered. Courts review the government’s action to determine “whether public access plays a positive

¹⁵⁵ *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491–92 (1975).

¹⁵⁶ *See Gertz v. Robert Welch*, 418 U.S. 323 (1974).

¹⁵⁷ *Leigh v. Salazar*, 677 F.3d 892, 897 (9th Cir. 2012) (“Open government has been a hallmark of our democracy since our nation’s founding.”).

¹⁵⁸ *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 606 (1982).

¹⁵⁹ *N.Y. Civ. Liberties Union v. N.Y.C. Transit Auth.*, 684 F.3d 286, 298 (2d Cir. 2011) (quoting *Richmond Newspapers v. Virginia*, 448 U.S. 555, 583 (1980) (Stevens, J., concurring)).

¹⁶⁰ *Nixon v. Warner Commc’ns*, 435 U.S. 589, 589 (1978).

¹⁶¹ *PG Publ. Co. v. Aichele*, 705 F.3d 91, 102 (3d Cir. 2013); *Leigh*, 677 F.3d at 899.

¹⁶² *Press-Enter. Co. v. Super. Ct. (Press Enterprise II)*, 478 U.S. 1, 8 (1986).

¹⁶³ *Id.* at 9.

¹⁶⁴ *N. Jersey Media Grp. Inc. v. United States*, 836 F.3d 421, 428–29 (3d Cir. 2016).

¹⁶⁵ *United States v. Bulger*, 283 F.R.D. 46, 59 (D. Mass. 2012).

2018]

COMMENT

1671

role in the functioning of [the government], whether the [government] has demonstrated an overriding interest in the viewing restrictions, or whether the restrictions are narrowly tailored to serve that interest.”¹⁶⁶ In doing so, a court weighs the benefits achieved against the impairment of the public good.¹⁶⁷ Factors courts have considered include: better analysis of the government’s policies, increased perceptions of fairness in government proceedings, serving as a check on corruption through public scrutiny, better government performance, and discouragement of fraud.¹⁶⁸

Regardless, the government cannot grant selective access to specific members of the press.¹⁶⁹ Some courts have taken this to mean that granting access to a single reporter triggers a requirement to allow access to all journalists who meet reasonable criteria.¹⁷⁰ Other courts have relied on the public forum doctrine in concluding that government cannot discriminate between different journalists or their viewpoints.¹⁷¹ This doctrine protects against a government entity which retaliates against a member of the press.¹⁷²

B. *The Right of Access in the Campaign Context*

Since campaigns are state actors subject to the restraints of the Constitution, journalists and reporters have a right of access.¹⁷³ Expanding the right to access to campaigns would promote the policy decisions behind this right: placing the press in a position to observe and report on the campaign’s activities and thereby opening the campaign to press scrutiny. To obtain a right of access, the press must meet both the historic prong and

¹⁶⁶ *Leigh*, 677 F.3d at 900.

¹⁶⁷ *PG Publ. Co. v. Aichele*, 705 F.3d 91, 111 (3d Cir. 2013).

¹⁶⁸ *Id.* (“[1] promotion of informed discussion of governmental affairs by providing the public with the more complete understanding of the [proceeding]; [2] promotion of the public perception of fairness which can be achieved only by permitting full public view of the proceedings; [3] providing a significant community therapeutic value as an outlet for community concern, hostility and emotion; [4] serving as a check on corrupt practices by exposing the [proceeding] to public scrutiny; [5] enhancement of the performance of all involved; and [6] discouragement of [fraud].”) (quoting *United States v. Simone*, 14 F.3d 833, 839 (3d Cir. 1994)).

¹⁶⁹ *Milligan*, *supra* note 20, at 1109–11.

¹⁷⁰ *Getty Images News. Serv. Corp. v. Dep’t of Def.*, 193 F. Supp. 2d 112 (D.D.C. 2002). *But see* *Baltimore Sun Co. v. Ehrlich*, 437 F.3d 410 (4th Cir. 2008).

¹⁷¹ *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 673 (1998) (quoting *Perry Educ. Ass’n v. Perry Local Educ.’s Ass’n*, 460 U.S. 37, 45 (1983)).

¹⁷² *McBride v. Vill. of Michiana*, 100 F.3d 457, 461 (6th Cir. 1996) (“Although no Supreme Court or Sixth Circuit decisions had, at that time, applied time-honored First Amendment principles to a situation specifically involving governmental retaliation against a news reporter, relevant pre-existing case law made the illegality of such retaliation apparent.”).

¹⁷³ *See* discussion *supra* Part III.

the positive role prong of the *Press Enterprise II* test.¹⁷⁴

1. The History of the Press and Presidential Campaigns

The press has influenced the presidency from the very beginning.¹⁷⁵ By harnessing the power of the press, John Adams, Thomas Jefferson, and other Founding Fathers were able to sway Americans to support independence from Great Britain.¹⁷⁶ Shortly before Alexander Hamilton and Thomas Jefferson created the Federalist and Democratic-Republican parties, newspapers spread their political ideas.¹⁷⁷ Soon “politicians and parties looked to newspapers as their primary public combatants in the bruising battles that came after the Jefferson-Hamilton split.”¹⁷⁸ When Jefferson won the presidential election of 1800 with the support of a loose, but large network of newspapers, “it was more or less accepted that no serious political movement or presidential candidacy could afford to be without a newspaper network.”¹⁷⁹

For roughly a century thereafter, newspapers were highly partisan. Editors who supported the victorious presidential candidate were often granted appointments in the new administration.¹⁸⁰ Eventually, presidential campaigns and parties organized effectively enough to bypass the press and communicate their messages directly to the people via speaking tours.¹⁸¹ Towards the end of the 19th Century, presidential campaigns began “systemic organization of communication tactics” aimed at voters.¹⁸² By the 1896 presidential election, both Republican and Democratic candidates organized “campaign headquarters, national speaking tours and produced written pamphlets meant to ‘educate’ voters” without press involvement.¹⁸³

¹⁷⁴ *Press-Enter. Co. v. Super. Ct. (Press Enterprise II)*, 478 U.S. 1, 8 (1986).

¹⁷⁵ See RICHARD M. PERLOFF, *POLITICAL COMMUNICATION: POLITICS, PRESS, AND PUBLIC IN AMERICA*, 16–17 (2008) (“Anyone who thinks that George Washington, the heroic general of the Revolution, the legendary father of his country, got a free ride from the American press should think again. George Washington got gored by the newspapers of his era.”).

¹⁷⁶ Jeffery L. Pasley, *The Role of the Press and Media in American Presidential Elections*, ACADEMIA (2009), https://www.academia.edu/5338845/The_Role_of_the_Press_and_Media_in_Presidential_Elections (“John Adams, Samuel Adams, Thomas Jefferson, Alexander Hamilton, and others had made heavy use of the press in the movement for independence from Great Britain . . .”).

¹⁷⁷ *Id.* at 4.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 5–8.

¹⁸¹ *Id.* at 8.

¹⁸² Austin Corthell, *Public Relations and Politics: Background and Contemporary Practice*, LITERATURE REVIEW AND CASE STUDIES, at 4 (Aug. 13, 2008), <https://prtalkingpoints.files.wordpress.com/2008/10/public-relations-and-politics.doc>.

¹⁸³ *Id.*

Nevertheless, the press, initially through newspapers and later by radio and television, continued to play a role in presidential elections.¹⁸⁴ Starting with President Theodore Roosevelt's campaign in 1904, members of the press rode with presidential candidates in their railway cars.¹⁸⁵ While members of the press had their own car, the candidates made themselves available for questions and held press conferences between stops.¹⁸⁶ This tradition of the press accompanying the candidate eventually evolved into the modern press bus where the campaign provides buses the press may use to follow a presidential candidate's speaking tour.¹⁸⁷

The press has been an integral part of the election process in America since the passage of the First Amendment. The modern tradition of press access to a presidential campaign, while not as old as the Constitution, has existed for more than 100 years. The next question is therefore whether the electoral process benefits from analyses provided by multiple news outlets.

2. The Importance and Benefits of Press Access

Diverse viewpoints on a presidential campaign are crucial to ensuring proper scrutiny of presidential candidates.¹⁸⁸ Data suggests that individual newspaper outlets provide different campaign coverage.¹⁸⁹ In their research on campaign election coverage, Daron Shaw and Bartholomew Sparrow argue that there is an "inner ring" and "outer ring" of press coverage.¹⁹⁰ The inner ring is composed of well-known traditional media outlets such as the New York Times and Washington Post, while the outer ring is composed of new media and smaller regional outlets.¹⁹¹ While the amount of coverage

¹⁸⁴ See *id.* ("Print media dominated political campaigns until the advent of radio (1928) and television (1952).")

¹⁸⁵ See generally TIMOTHY CROUSE, *THE BOYS ON THE BUS, COMING TO POWER* (1972) (discussing the advent of the press bus).

¹⁸⁶ *Id.*

¹⁸⁷ See Jim Dickerson, *Covering the Presidential Campaign: The View from the Press Bus*, U.S. DEP'T OF STATE (Oct. 5, 2007), <http://iipdigital.usembassy.gov/st/english/publication/2008/05/20080523105359wrybakcu0.8072168.html#axzz4WA9yB1X3> [<https://web.archive.org/web/20151014071445/http://iipdigital.usembassy.gov/st/english/publication/2008/05/20080523105359wrybakcu0.8072168.html>].

¹⁸⁸ *Why You Should Care About Media Diversity*, THE LEADERSHIP CONF. (last visited Jan. 18, 2017), <http://www.civilrights.org/media/ownership/care.html> [<https://web.archive.org/web/20170515121551/http://www.civilrights.org/media/ownership/care.html>] ("Media remains a critical element in achieving equal opportunity and full participation in civic life. Media shapes public views of minority communities as well as views on the causes and scope of social problems and the best solutions. Thus, access to the media by the broadest sector of society is crucial to ensuring that diverse viewpoints are presented to the American people, and that all sectors of society are accurately depicted.")

¹⁸⁹ Daron R. Shaw & Bartholomew H. Sparrow, *From the Inner Ring Out: News Congruence, Cue-Taking, and Campaign Coverage*, 52 *POL. RES. Q.* 323 (1999).

¹⁹⁰ *Id.* at 330.

¹⁹¹ *Id.*

dedicated to specific campaign issues did not vary between inner ring and outer ring news organizations, interpretation and support for the candidates' stances on those issues did differ.¹⁹² This supports a simple proposition: the media is not a single conglomerate. Regional, ideological, and editorial opinions all influence coverage of a single candidate.¹⁹³

Campaigns, meanwhile, have many of the same objectives that the government has when it releases information, namely the desire to "transmit a message that persuades skeptics and mobilizes supporters."¹⁹⁴ The conflict between the candidate's need to spread his message, combined with the media's discretion to publish as it pleases, often creates a rancorous relationship between media outlets and campaigns.¹⁹⁵ Media distortion is something that candidates fear and campaigns are "engaged in a constant effort to convince the mass media to reflect their own campaign agendas in the hopes of influencing public opinion."¹⁹⁶ As the media asserts its own, independent view of the candidate's message, candidates may become increasingly exasperated at the media's effective refusal to spread the candidate's message.¹⁹⁷

The multiple viewpoints and political discourse the press fosters are necessary to allow voters to make a meaningful determination regarding presidential candidates.¹⁹⁸ Conservative analysis of a liberal candidate's platform may be critical, while a liberal analysis may praise the same platform.¹⁹⁹ Candidates restricting one, but not the other, effectively engage

¹⁹² *Id.* at 343 ("In short, editors of the outer ring newspapers appear to manifest news priorities different from those in the inner ring, an observation that casts some doubt on the phenomena of cue-taking among the nation's newspapers.")

¹⁹³ *Id.* ("This research suggests that the news media cannot be assumed to be a monolith.")

¹⁹⁴ Danny Hayes, *The Dynamics of Agenda Convergence and the Paradox of Competitiveness in Presidential Campaigns*, 63 POL. RES. Q. 594, 595 (2010).

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 596.

¹⁹⁷ *Cf. id.* at 606 ("Electoral competition produces many benefits for the political system but the accurate representation of candidate discourse by the mass media is not one of them Competition draws the media's attention, but the content of the ensuing coverage is not likely to help voters make informed judgments.") (internal citations omitted).

¹⁹⁸ See *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 795 (1978) ("[The] public interest standard necessarily invites reference to First Amendment principles and, in particular, to the First Amendment goal of achieving the widest possible dissemination of information from diverse and antagonistic sources . . .") (internal quotations and citations omitted); Akilah N. Folami, *Deschooling the News Media-Democratizing Civic Discourse*, 34 W. NEW ENG. L. REV. 489, 503 (2012) ("[P]olitical news and discourse should be deemed as a public good that is essential to the maintenance of America's self-governing democracy. It needs, as a result, to be sustained by a democratic infrastructure that promotes its open and inclusive production, again with consumer sovereignty considered and encouraged but not solely determinative.")

¹⁹⁹ See Dan Bernhardt, et al., *Political Polarization and the Electoral Effects of Media*

2018]

COMMENT

1675

in viewpoint discrimination.²⁰⁰ A banished reporter may be able to obtain press releases via other news sources, but the journalist cannot evaluate the new information on a first hand basis.²⁰¹ Thus, an extension of First Amendment protection to a right of access to presidential campaigns is warranted.

V. THE ENUMERATED REASONS RULE: POLICY REASONS FOR ADOPTION

This Comment advocates the adoption of the Enumerated Reasons Rule (the Rule). The Rule is simple; a campaign must provide a list of requirements necessary for a journalist to obtain a press pass. If a campaign denies a member of the press access to the campaign, the campaign must provide its rationale for denying or revoking access. The Rule is substantially functionalist and some courts have essentially applied the Rule in right of access cases.²⁰²

A. *The Courts and the Rule*

The Rule is best illustrated in *Sherrill v. Knight*.²⁰³ Sherrill, a journalist, applied for and was denied a White House press pass by the Secret Service.²⁰⁴ When the Secret Service denied Sherrill's request for a press pass, it had no articulated criteria regarding the issuance of a press pass and did not provide a reason for its refusal to grant the credential.²⁰⁵ After the denial, Sherrill sued and argued that the Secret Service violated his First and Fifth Amendment rights.²⁰⁶

Bias, 92 J. PUB. ECON. 1092, 1102 (2008) (“The fundamental reason for the inefficiency in electoral outcomes is that voters choose to listen to biased media. This effect is likely to be quite stable, even though the population as a whole would be better off if media reported unbiased news. In principle, voters could become completely informed even with two biased media, by listening to both.”).

²⁰⁰ *C.f.* *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 894 (1995) (“[T]he prohibition on viewpoint discrimination serves that important purpose of the Free Speech Clause, which is to bar the government from skewing public debate.”).

²⁰¹ Jonathan Peters, *One in Five Journalists Has Had a Credential Request Denied*, COL. JOURNALISM REV. (2014), (citing Hermes et al., *supra* note 7). http://www.cjr.org/united_states_project/survey_one_in_five_journalists_has_had_credential_request_denied.php.

²⁰² *Sherrill v. Knight*, 569 F.2d 124, 130 (D.C. Cir. 1977) (“[The White House] must publish or otherwise make publicly known the actual standard employed in determining whether an otherwise eligible journalist will obtain a White House press pass.”).

²⁰³ *Id.*

²⁰⁴ *Id.* at 126.

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 128.

The D.C. Circuit, on appeal, held that the Secret Service “must publish or otherwise make publicly known the actual standard employed in determining whether an otherwise eligible journalist will obtain a White House press pass.”²⁰⁷ Addressing the Secret Service’s argument that the White House is not open to the public and therefore there is no right of access, the court found the “White House press facilities [were] made publicly available as a source of information for newsmen,” and “the protection afforded newsgathering under the first amendment guarantee of freedom of the press” could not be “denied arbitrarily or for less than compelling reasons.”²⁰⁸

The D.C. Circuit’s reasoning in *Sherrill* provides a balance between the need of the public to have access to news, while still allowing the executive branch to control who has access to the White House.²⁰⁹ It is “at its heart, functionalist . . . [w]ith the goal of maximizing public discourse”²¹⁰ It ensures that viewpoint discrimination, arbitrarily denying access, and frustrating press attempts to obtain information meant for public consumption will not survive judicial scrutiny.²¹¹ The decision, however, did not go so far as to demand that the Secret Service or President provide access to all reporters.²¹² The President and his staff, for example, still had complete discretion to grant or deny interviews to the press.²¹³

Other courts have applied similar reasoning in the campaign context. In *WPIX, Incorporated v. League of Women Voters*, WPIX, a small media outlet, demanded access to a presidential debate.²¹⁴ The League allowed access to the event only if all news channels were willing to pool resources and use a single feed.²¹⁵ WPIX refused to join the pool and filed an injunction demanding its own cameras be granted access to the debate.²¹⁶ After determining that the League was a state actor and the First Amendment right of access applied, the court reasoned that granting access to WPIX would invariably lead to other news organizations requesting physical access, thus jeopardizing the safety and security of the event.²¹⁷ By denying

²⁰⁷ *Id.* at 130.

²⁰⁸ *Sherrill*, 569 F.2d at 129.

²⁰⁹ *See* Milligan, *supra* note 20, at 1107.

²¹⁰ *Id.*

²¹¹ *See Sherrill*, 569 F.2d at 129–30 (“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.”).

²¹² Milligan, *supra* note 20, at 1107.

²¹³ *Id.*

²¹⁴ 595 F. Supp. 1484, 1485 (S.D.N.Y. 1984).

²¹⁵ *Id.* at 1486.

²¹⁶ *Id.* at 1489–91.

²¹⁷ *Id.*

2018]

COMMENT

1677

access to the debate, the court in *WPIX*, applied a balancing test between “the interests to be served by the newsgathering activity at issue” against “the interest served by the denial of that activity.”²¹⁸

Other courts have recognized the harm that arises when the government does not provide reasons for exclusion.²¹⁹ These issues become prominent when there is limited space to house and maintain a press pool.²²⁰ When there is no published list of rules, priorities or requirements for the press, then journalists cannot take steps to correct their applications.²²¹ So while an agency’s decision may not be arbitrary or discriminatory, without enumerated reasons for denial, the reporter cannot correct the issues with his application and the judiciary cannot review the government’s decision.²²² Alternatively, having an express policy allows courts to better understand and efficiently deal with injunctions concerning denials of access.²²³

B. *The Functionalist Approach: Application of the Enumerated Reasons Rule*

Requiring campaigns to publish requirements for press credentials will allow courts to better balance the benefits and consequences of granting access. While the Rule does not compel campaigns to grant candidate interviews, it will avoid some of the pitfalls of allowing the campaign to have complete discretion to whom it grants press credentials. In particular, the Rule will (1) prevent judicial overreach, (2) promote diverse viewpoints of a candidate, and (3) not overburden campaigns.

²¹⁸ *Id.* at 1489 (citing *Cable News Network, Inc. v. Am. Broad. Cos.*, 518 F. Supp. 1238, 1245 (N.D. Ga. 1981); *Borreca v. Fasi* 369 F. Supp. 906, 909 (D. Haw. 1974)).

²¹⁹ *See Huminski v. Corsones*, 386 F.3d 116, 147 (2d Cir. 2004) (“Exclusion of an individual reporter also carries with it ‘the danger [that] granting favorable treatment to certain members of the media . . . allows the government to influence the type of substantive media coverage that public events will receive,’ which effectively harms the public.”) (quoting *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 9 (1st Cir. 1986)).

²²⁰ *Getty Images News Servs. v. Dep’t of Def.*, 193 F. Supp. 2d 112 (D.D.C. 2002).

²²¹ *Sherrill v. Knight*, 569 F.2d 124, 130 (D.C. Cir. 1977) (“[P]rocedural requirements of notice of the factual bases for denial, an opportunity for the applicant to respond to these, and a final written statement of the reasons for denial are compelled by the foregoing determination that the interest of a bona fide Washington correspondent in obtaining a White House press pass is protected by the first amendment.”).

²²² *See id.*

²²³ *See Flynt v. Rumsfeld*, 245 F. Supp. 2d 94 (D.D.C. 2003) (dismissing the complaint after examining the government agency’s press policy).

1. The Rule and Judicial Overreach

As a basic premise of American government, courts should not replace the legislature as the primary lawmaking authority through their rulemaking and constitutional powers.²²⁴ Indeed, many legal scholars have concluded that the courts should be a last resort for any new law, as the constitutional framework encourages the legislative and executive branches to tackle problems instead.²²⁵ Nevertheless, it is “the core purpose of the federal courts in vindicating constitutional rights.”²²⁶ Given the history and purpose of both the right of access and the state actor test, it is natural to extend these rights to campaigns.²²⁷

The Rule’s primary purpose is to prevent judicial overreach.²²⁸ As this rule was created by the D.C. Circuit, its application to executive agencies illustrates how courts would likely apply the rule to campaigns. D.C. Circuit opinions²²⁹ essentially “[balance] the benefits of transparency with some other factor”²³⁰ While providing deference to the needs of the

²²⁴ See THE FEDERALIST No. 78 (Alexander Hamilton) (“Nor does this conclusion [that the Constitution is superior to statute] by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental.”).

²²⁵ See *Reynolds v. Sims*, 377 U.S. 533, 625 (1964) (Harlan, J., dissenting) (“This Court, limited in function in accordance with that premise, does not serve its high purpose when it exceeds its authority [When] the Court adds something to the Constitution . . . the Court in reality substitutes its view of what should be so for the amending process.”). See also Brent G. McCune, *Judicial Overreach and America’s Declining Democratic Voice: The Same-Sex Marriage Decisions*, 20 TEX. REV. LAW & POL. 29, 75–76 (2015) (“It seems the people should always be able to decide matters of such importance as our nation’s fundamental rights and liberties. After all, ‘the right to make law rests in the people and flows to the government, not the other way around.’ Another disturbing belief is that ‘the Constitution stands for the proposition that some rights aren’t left to the whims of a democratic majority.’ This implies that it is preferable to place those cherished rights in the hands of five judges and their whims. This cannot be the ideal the Founding Fathers intended for our Nation.”) (internal citations omitted).

²²⁶ Daniel Breen, *Avoiding “Wild Blue Yonders”: The Prudentialism of Henry J. Friendly and John Roberts*, 52 S.D. L. REV. 73, 111 (2007).

²²⁷ See discussion *supra* Part II.A.

²²⁸ See *Milligan*, *supra* note 20, at 1107–08 (“[*Sherrill*] did not impede on ‘the discretion of the President to grant interviews or briefings with selected journalists.’ The panel observed that ‘[i]t would certainly be unreasonable to suggest that because the President allows interviews with some bona fide journalists, he must give this opportunity to all.’”) (quoting *Sherrill v. Knight*, 569 F.2d 124 (1977)).

²²⁹ *Sherrill v. Knight*, 569 F.2d 124 (D.C. Cir. 1977); *Flynt v. Rumsfeld*, 245 F. Supp. 2d 94 (D.D.C. 2003); *Getty Images News Servs. v. Dep’t of Def.*, 193 F. Supp. 2d 112 (D.D.C. 2002).

²³⁰ Derigan Silver, *Power, National Security and Transparency: Judicial Decision Making and Social Architecture in the Federal Courts*, 15 COMM. L. & POL’Y 129, 160 (2010).

executive, “most judges were unwilling to abdicate their judicial function and took their duty to protect civil liberties seriously, often attempting to balance transparency with national security.”²³¹ In effect, the rule prevents “bad forms of selective access (say, press conferences, when equal access was not thought to discourage grants of access) and, at the same time, permit good forms of selective access (say, exclusive interviews, when equal access was thought to discourage grants of access).”²³²

Requiring presidential campaigns to provide criteria for evaluating press credential applications allows courts to more easily balance the concerns of press access and campaign messaging. Courts applying the rule tend to defer to the entity laying down the rule.²³³ Interpreting the campaign’s own rules, the courts would examine them to determine if the criteria is reasonable²³⁴ and its application fair.²³⁵ Additionally, courts will look to see if a campaign’s rules favor a specific viewpoint or overtly discriminate due to ideology.²³⁶ In limiting court review to these areas, the Rule ensures that the judiciary will not overburden itself or the campaign it is scrutinizing.

2. The Rule and the Campaign’s Message

Another concern is that the campaign will not be able to control its message. A campaign’s purpose is to ensure that the public learns about the candidate and the media can disrupt or distort the candidate’s message.²³⁷ Campaigns argue that media outlets that untruthfully or unfairly “spin” the candidate’s words should not be permitted to continue such behavior.²³⁸

²³¹ *Id.* at 168.

²³² Milligan, *supra* note 20, at 1107 (internal quotations omitted).

²³³ *See* Getty Images News Servs. v. Dep’t of Def., 193 F. Supp. 2d 112, 119 (D.D.C. 2002) (noting that the military is entitled to “heightened deference”).

²³⁴ *Nation Magazine v. Dep’t of Def.*, 762 F. Supp. 1558, 1574 (S.D.N.Y. 1991) (“The activities of the press are subject to reasonable time, place, and manner restrictions.”) (citing *Grayned v. Rockford*, 408 U.S. 104, 115 (1972)).

²³⁵ *See* *Getty Images News Servs.*, 193 F. Supp. 2d at 121 (“[The Department of Defense’s] current approach, which involves making determinations about, *inter alia*, the relative audience sizes of media organizations based primarily upon the general knowledge of a D[e]partment of Defense] official without any published criteria or process for obtaining relevant information, strikes the Court as somewhat short of ‘reasonable.’”).

²³⁶ *See* *Christian Legal Soc’y Chapter of the Univ. of Cal. v. Martinez*, 561 U.S. 661 (2010) (holding that a viewpoint-neutral rule does not violate the First Amendment). *But see* *JB Pictures v. Dep’t of Def.*, 86 F.3d 236, 240 (D.C. Cir. 1996) (“[I]f plaintiffs’ theory of ‘viewpoint discrimination’ were accepted, virtually any restriction on access to government facilities . . . would be vulnerable to challenge on grounds of ‘viewpoint discrimination.’ Such a move would represent a complete transformation . . . on access to government operations not historically open to the public.”).

²³⁷ *See generally* Hayes, *supra* note 194.

²³⁸ Jonathan Easley, *Trump Fundraises Off ‘Liberal Media’ Attacks*, THE HILL (Aug. 11, 2016, 1:41 PM), <http://thehill.com/blogs/ballot-box/fundraising/291142-trump-fundraises->

Applying the Rule against this argument, a court must weigh the benefits to the press and American people against the harm done to the campaign by the press.²³⁹ As discussed above, viewpoints of presidential candidates by press members are diverse due to region, editorial makeup, and ideology.²⁴⁰ The American people, meanwhile, are limiting themselves to news organizations that support their ideological preferences.²⁴¹ Americans are therefore receiving their news from a finite number of subjective viewpoints rather than multiple viewpoints or a broad “objective” one.²⁴² In order to keep Americans informed, the courts should favor press access over the campaign’s desire to control its message.

While there is a chance that news outlets would abuse the Rule, campaigns still have significant power to counter such abuses.²⁴³ Campaign personnel would retain the right to give special access, interviews, first opportunity to publish leaks, and off record comments to members of the media that favor the campaign’s purpose.²⁴⁴ The Rule does not disrupt these tactics.²⁴⁵ Campaigns will still be allowed to reward outlets that write favorably about their candidates with special interviews.²⁴⁶ Additionally, with modern social media platforms, the campaign can sidestep the press altogether and bring its message directly to the people.²⁴⁷ The Rule prevents

off-liberal-media-attacks.

²³⁹ Silver, *supra* note 230 (discussing how courts balance national security interests against the interest of press access).

²⁴⁰ Shaw & Sparrow, *supra* note 189.

²⁴¹ *How Americans Get Their News*, THE AMERICAN PRESS INST. (Mar. 14, 2014), <https://www.americanpressinstitute.org/publications/reports/survey-research/how-americans-get-news/>.

²⁴² *See id.*; Mitchell, *supra* note 2.

²⁴³ *See* Glenn Halbrooks, *How Politicians Use Media to Win Elections*, THE BALANCE (Sept. 16, 2016), <https://www.thebalance.com/how-politicians-use-media-to-win-elections-2315204> (listing ways presidential campaigns use the media).

²⁴⁴ *See* Friedman, *supra* note 26, at 290 (“[In *Snyder v. Ringgold*, No. 97-1358, 1998 U.S. App. LEXIS 562 (4th Cir. Jan. 15, 1998)] [t]he plaintiff asserted a broad right to equal access to government information sources and similar treatment to other journalists . . . 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.”).

²⁴⁵ *See* *Sherrill v. Knight*, 569 F.2d 124, 129 (1977) (“Nor is the discretion of the President to grant interviews or briefings with selected journalists challenged. It would certainly be unreasonable to suggest that because the President allows interviews with some bona fide journalists, he must give this opportunity to all.”)

²⁴⁶ *See* Mulligan, *supra* note 20, at 1107–08 (“[*Sherrill*] did not impede on ‘the discretion of the President to grant interviews or briefings with selected journalists.’ The panel observed that ‘[i]t would certainly be unreasonable to suggest that because the President allows interviews with some bona fide journalists, he must give this opportunity to all.’”).

²⁴⁷ *See generally* JOHN ALLEN HENDRICKS AND DAN SCHILL, *PRESIDENTIAL CAMPAIGNING*

only an outright ban or removal of certain press entities.²⁴⁸ In effect, it balances the relationship between the press and the campaign, and eliminates the campaign's ability to banish a particular news outlet based solely on its coverage of a candidate.²⁴⁹

3. The Rule and the Burden on the Campaign

Critics of the Rule could contend that it places too heavy of a burden on a campaign. First, they could argue that it subjects the campaigns to extensive litigation.²⁵⁰ Second, they could claim that under the press-as-a-technology interpretation of the Press Clause (which courts have effectively adopted)²⁵¹ expansion of the right of access means any individual can request and successfully obtain a press pass.²⁵² The Rule addresses both scenarios.

The expansion of the right of access will not place onerous litigation burdens on the courts or the campaigns. For one, access will be determined by injunction rather than extensive litigation.²⁵³ Once determined by the grant or denial of an injunction, the doctrines of *res judicata* and collateral estoppel will prevent re-litigation of the issue in multiple jurisdictions.²⁵⁴ Finally, the onus of litigation will be placed on the campaign.²⁵⁵ If the campaign drafts and abides by sufficiently reasonable and fair criteria, then the court will not interfere.²⁵⁶ In effect, the campaign can limit the amount of litigation it engages in.

The Rule allows the campaign to set its own requirements. A campaign may set aside press passes for those entities with certain levels of readership or viewership, reserve credentials for a certain number of national, regional,

AND SOCIAL MEDIA: AN ANALYSIS OF THE 2012 CAMPAIGN (2014).

²⁴⁸ See Kludt, *supra* note 12; see also Dyk, *supra* note 48, at 953 (“[I]t is important for the courts to entertain selective access claims at least where the selectivity can be shown to have been arbitrary and to have stemmed from government’s desire to suppress the reporting of government abuses.”); Schreckinger, *supra* note 6.

²⁴⁹ See discussion *supra* Part I (“Some media advocates expressed concern that blacklisting ‘could have a chilling effect on other outlets’ coverage of Trump”) (citing Kludt, *supra* note 12).

²⁵⁰ See generally Marin K. Levy, *Judging the Flood of Litigation*, 80 U. CHI. L. REV. 1007 (2013) (analyzing how the United States Supreme Court handles “flood of litigation” arguments).

²⁵¹ See *Courthouse News Serv. v. Planet*, 750 F.3d 776, 788 (9th Cir. 2014) (“The general public has the same right of access as does the media.”).

²⁵² See discussion *supra* Part II.B.

²⁵³ See *WPIX, Inc. v. League of Women Voters*, 595 F. Supp. 1484 (1984) (ruling on an injunction in a right to access case).

²⁵⁴ RESTATEMENT (SECOND) OF JUDGMENTS ch. 1, intro. (AM. LAW INST. 1982); RESTATEMENT (SECOND) OF JUDGMENTS, § 27 (AM. LAW INST. 1982).

²⁵⁵ See *Getty Images News Servs. v. Dep’t of Def.*, 193 F. Supp. 2d 112 (D.D.C. 2002) (ordering the Department of Defense to draft more reasonable criteria for press access).

²⁵⁶ See *id.*

and local news outlets, or place a limit on the total number of press passes available.²⁵⁷ As courts have explained when applying the Rule, safety, size, and the amount of resources available to the campaign are all valid reasons for a campaign to structure its requirements.²⁵⁸ These reasons can effectively and validly limit access.²⁵⁹ The public's right of access may be limited to the institutional press, thus preventing everyone from obtaining press credentials. Additionally, courts have already adopted standards for determining who is a member of the press when applying the right of access to government entities.²⁶⁰ Courts could rely on these precedents in denying access to members of the public who do not work for a media outlet.²⁶¹ The Rule therefore adequately balances the burdens and rights that arise when granting the First Amendment's right of access to the press when following campaigns.

VI. CONCLUSION

The public cannot be properly informed without the press. As ideological shifts shape American politics and media choice, the press must have access to press credentials and campaign press conferences. Presidential campaigns are subject to the First Amendment because they are state actors that are sufficiently intertwined with government through the electoral system and federal regulation and support. Therefore, the right of access to government buildings and press conferences applies to presidential campaigns. As campaigns are interested in promoting their messages, courts should apply a balancing test and require campaigns to set definitive and reasonable guidelines to obtain a press pass. In doing so, courts will ensure that reporters are not discriminated against because of their ideological leanings and will promote multiple viewpoints of a presidential candidate.

²⁵⁷ See generally *id.*; *WPIX, Inc.*, 595 F. Supp. 1484.

²⁵⁸ See generally *WPIX, Inc.*, 595 F. Supp. 1484; *Getty Images News Servs.*, 193 F. Supp. 2d 112.

²⁵⁹ See generally *WPIX, Inc.*, 595 F. Supp. 1484.

²⁶⁰ See *supra* text accompanying notes 139–48.

²⁶¹ See *id.*