Whatever Happened to The "Right to Know?": The Right of Access to Government-Controlled Information since Richmond Newspapers on Those Who Don't

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NOTES

WHAT EVER HAPPENED TO "THE RIGHT TO KNOW"?: ACCESS TO GOVERNMENT-CONTROLLED INFORMATION SINCE RICHMOND NEWSPAPERS

The "right to know" has long been a rallying cry for those claiming a right of access to government-controlled information.1 From the Freedom of Information Committee's campaign against government secrecy during the McCarthy era,2 to the efforts of "Nader's Raiders" to obtain records from recalcitrant agencies in the 1960's,3 to present-day calls for greater openness in the Reagan administration,4 the "right to know" has continually been invoked to support demands for government information. Despite the vigor of the rhetoric it inspired, however, for many years the right went without any judicial acknowledgment of its existence. Indeed, the United States Supreme Court repeatedly rejected claims of a constitutional right of access to government-controlled information.5

Then, in the 1980 watershed case of Richmond Newspapers, Inc. v. Virginia,6 the Supreme Court recognized the public's right of access to criminal trials.7 Many commentators hailed this right as the beginning of a general "right to know,"8 while others predicted that this right would

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2 See H. Cross, supra note 1, at xiv-xv.
5 See infra notes 34-41 and accompanying text.
4 448 U.S. 555 (1980).
7 Court members themselves recognized the importance of this decision. Justice Stevens stated, "This is a watershed case. Until today the Court has accorded virtually absolute protection to the dissemination of information or ideas, but never before has it squarely held that the acquisition of newsworthy matter is entitled to any constitutional protection whatsoever." Id. at 582 (Stevens, J., concurring).
not extend beyond the criminal courtroom.\textsuperscript{9} Seven years later, neither forecast has been fully borne out. Although the Supreme Court has decided a number of right of access cases since \textit{Richmond Newspapers},\textsuperscript{10} it has never explicitly recognized this right outside criminal proceedings. State and lower federal courts, however, have found rights of access in a variety of contexts.\textsuperscript{11}

The purpose of this Note is to examine the present state of the right of access to government-controlled information. Part I begins by looking at the constitutional basis of the right of access and at the Supreme Court's gradual acceptance of the principle. It then turns to a discussion of \textit{Richmond Newspapers} and its progeny, focusing on the development of two alternative standards for evaluating right of access claims. The Supreme Court's two-prong test recognizes a right of access only when there is a tradition of openness surrounding the information in question, and when the access contributes to the functioning of the process involved. Under the balancing test, the right exists whenever the public's interest in obtaining access outweighs the government's interest in denying it.

Part II briefly summarizes the treatment of the right of access by state and lower federal courts. Part II then describes the courts' application of the alternative standards and the effect of their decisions on the scope of the right of access.

Drawing largely from the lessons of lower court experience, Part III evaluates the two right of access standards. Part III shows that the "two-prong" test is seriously flawed, for it both abandons the Court's established approach to first amendment adjudication and bears little relation to the underlying rationale for the right of access. The balancing test better captures the purpose of the right of access, but creates a risk of ad hoc policymaking by courts. The Note concludes that this problem can be overcome by allowing both the legislature and the judiciary to assume roles in the balancing process.


\textsuperscript{10} See infra notes 66-96 and accompanying text.

\textsuperscript{11} See infra notes 105-65 and accompanying text.
I. THE SOURCES AND DEVELOPMENT OF THE "RIGHT TO KNOW"

A. The Constitutional Basis for a Right of Access

The "right to know" can ultimately be traced to the widely accepted principle that the core value protected by the first amendment is the citizen's right to participate in America's representative democracy. According to this "political" theory of the first amendment, often associated with Professor Alexander Meiklejohn, freedom of speech is a necessary corollary of the American system of self-government. Because voters govern the nation, it is vital that they have access to information on the matters they decide. Restricting information would prevent voters from understanding the issues before them, and would lead to "ill-considered, ill-balanced" results, threatening the welfare of the nation. Meiklejohn therefore argued that the core purpose of the first amendment is to protect the free flow of information, so as to give every voter "the fullest possible participation in the understanding of those problems with which the citizens of a self-governing society must deal."

Although Meiklejohn did not extend his analysis beyond freedom of speech, his use of this political theory provides considerable support for the right of access to government information. The right of access involves the acquisition of information, without which dissemination to the public would, of course, be impossible. To meet the core objective of informed self-government, the first amendment must do more than protect channels of communication from government restraint. It must also ensure a right of access, so that relevant information is available to flow through those channels to the voters.

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12 U.S. Const. amend. I.
14 See A. Meiklejohn, Free Speech and Its Relation to Self-Government (1948). This book is generally regarded as the seminal work on the link between the first amendment and self-government. See BeVier, supra note 13, at 502 n.80.
15 See A. Meiklejohn, supra note 14, at 88.
16 Id.
17 It should be noted that this led Meiklejohn to the conclusion that only "political speech" was protected by the first amendment. See id. at 44-46, 94; W. Francois, Mass Media Law and Regulation 20 (1975). Because this Note concerns only government-controlled information, which almost always fits into the category of "political speech," the distinction between political and non-political speech is not important for this discussion.
18 A. Meiklejohn, supra note 14, at 88.
20 Excellent examples of this line of reasoning can be found in Houchins v. KQED, Inc., 438 U.S. 1, 30-33 (1978) (Stevens, J., dissenting), and Saxbe v. Washington Post Co., 417 U.S. 843, 862-64 (1974) (Powell, J., dissenting).
The Supreme Court first recognized the fundamental link between the first amendment and self-government in *Grosjean v. American Press Co.* 21 On that occasion, the Court stated that the first amendment was intended to protect "such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens." 22 The Court has since relied on this political theory to protect the dissemination of information from prior restraint, 23 criminal punishment, 24 and civil damages. 25 The theory has also been instrumental in the Court's recognition of a "right to receive" information, 26 a right that has been extended to personal correspondence, 27 political 28 and religious 29 material, commercial information, 30 pornography, 31 and information and ideas generally. 32 Thus, the Supreme Court has used the political theory to protect "both ends of the flow of information." 33

The Court, however, was initially less receptive to the right to acquire information. In 1965, addressing its first right of access claim, 34 the Court declared that "[t]he right to speak and publish does not carry with it the unrestrained right to gather information." 35 Although the Court announced in 1972 that "news gathering is not without its First Amendment protections," 36 it soon became apparent that this protection did not include a right of access to government-controlled information. In 1974, in

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22 Id. at 249-50 (quoting 2 T. Cooley, Cooley's Constitutional Limitations 886 (8th ed. 1927)).
26 This "right to receive" has also been referred to as the "right to know." The right to receive involves the receipt of information from willing sources, and so is distinguishable from the "right to know" discussed in this Note, which involves the right of access to information in the hands of an unwilling source—the government.
31 See *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("This right to receive information and ideas, regardless of their social worth . . . is fundamental to our free society.").
34 *Zemel v. Rusk*, 381 U.S. 1 (1965). In *Zemel*, the plaintiff argued that the government's ban on travel to Cuba violated the first amendment right of citizens to gather information on the effect of government policies. See id. at 16.
35 Id. at 17.
36 *Branzburg v. Hayes*, 408 U.S. 665, 707 (1972). In *Branzburg*, the Court held that this protection did not extend to giving newsman a constitutional privilege not to reveal confidential sources and information before a grand jury. See id. at 709.
Pell v. Procunier\(^3\) and Saxbe v. Washington Post Co.,\(^3\) the Court rejected reporters' claims of a right of access to prisons to interview inmates. The court nonetheless dodged the "right to know" issue by holding only that the press had no greater access rights than the public generally.\(^3\) Four years after Pell and Saxbe, the Court again confronted the media's claim of a right to conduct inmate interviews. This time, in Houchins v. KQED, Inc.,\(^4\) both Chief Justice Burger's plurality opinion and Justice Stewart's concurrence denied that the first amendment provided the press or the public with a right of access to government-controlled information.\(^4\)

Meanwhile, however, the right of access principle was slowly gathering the support of the Court. In his Saxbe dissent, Justice Powell argued that the political objective of the first amendment required access to information because "public debate must not only be unfettered; it must also be informed."\(^4\) This argument was later echoed by Justice Stevens' dissent in Houchins v. KQED, Inc.\(^4\) When the Court in 1979 held that neither the public nor the press had a sixth amendment right to attend criminal trials,\(^4\) Justice Powell stated that the right to attend trials should be recognized as a first amendment right "[b]ecause of the importance of the public's having accurate information concerning the operation of its criminal justice system."\(^4\) The following year, in Richmond Newspapers, a majority of the Court recognized a first amendment right to attend criminal trials, and the right of access was born.\(^4\)

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\(^3\) 417 U.S. 817 (1974).  
\(^3\) Pell, 417 U.S. at 834; Saxbe, 417 U.S. at 850.  
\(^4\) 438 U.S. 1 (1978). In Houchins, reporters sought to bring television cameras into a county jail. See id. at 3-4.  
\(^4\) See id. at 15 ("Neither the First Amendment nor the Fourteenth Amendment mandates a right of access to government information . . . ."); id. at 16 (Stewart, J., concurring) ("The First and Fourteenth Amendments do not guarantee the public a right of access to information generated or controlled by government . . . .").  
\(^4\) See Gannett Co. v. DePasquale, 443 U.S. 368 (1979). The sixth amendment gives the accused a right to a "public trial." U.S. Const. amend. VI.  
\(^4\) Gannett Co., 443 U.S. at 397 (Powell, J., concurring).  
\(^4\) Specifically, the Court held that "[a]bsent an overriding interest articulated in findings, the trial of a criminal case must be open to the public." Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 581 (1980). For a more detailed discussion of the right of access cases preceding Richmond Newspapers, see Gunther, Constitutional Law 1439-45 (11th ed. 1985).
B. Richmond Newspapers and Its Progeny: The Development of a Right of Access Standard

In Richmond Newspapers, seven members of the Court agreed that there was a first amendment right to attend criminal trials. However, because six of these Justices submitted separate opinions, the basis, operant standards, and scope of this right of access were unclear. In a series of decisions following Richmond Newspapers, the Court reached a consensus on the right's underlying rationale and fashioned a standard to determine when that right applies.

In his opinion announcing the judgment in Richmond Newspapers, Chief Justice Burger relied in part on the "political" theory of the first amendment. He explained that some right of access protection is needed if the first amendment is to fulfill its "core purpose" of providing information on issues related "to the functioning of government." He found this to be especially true in the criminal trial context, because no aspect of government is "of higher concern and importance to the people than the manner in which criminal trials are conducted." The Chief Justice, however, did not rely solely on this political argument to justify the right of access. He also invoked what Justice Blackmun called a "veritable potpourri" of constitutional guarantees, including the first amendment right of assembly, the ninth amendment, and the "penumbra" of the Bill of Rights. Underlying all of these, Chief Justice Burger said, is the "presumption of openness" of criminal trials resulting from the long historical tradition of access to such proceedings.

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48 See id. at 558-81 (Burger, C.J., plurality opinion); id. at 581-82 (White, J., concurring); id. at 582-84 (Stevens, J., concurring); id. at 584-98 (Brennan, J., concurring); id. at 598-601 (Stewart, J., concurring); id. at 601-04 (Blackmun, J., concurring in the judgment).
49 See infra notes 66-96 and accompanying text.
50 See Richmond Newspapers, 448 U.S. at 575-77.
51 Id. at 575.
52 Id.
53 Id. at 603 (Blackmun, J., concurring in the judgment).
54 See id. at 577-78. Chief Justice Burger suggested that the trial courtroom could be considered a "public place." Id. at 578.
55 See id. at 579 n.15.
56 See id. at 579-80. Chief Justice Burger compared the right to attend criminal trials to such penumbral guarantees as the right of association and the right of privacy. See id.
57 Id. at 573. Chief Justice Burger made much of the fact that a tradition of access to trials existed at English common law, and was firmly in place in this country at the time the Bill of Rights was adopted. See id. at 564-75. The Chief Justice relied on this factor to distinguish the earlier "right of access" cases, writing that Pell and Saxbe were outside the Richmond Newspapers rationale because "[p]enal institutions do not share the long tradition of openness." Id. at 576 n.11.
Of more lasting importance than the Chief Justice's opinion was the concurrence of Justice Brennan, which became the foundation for subsequent decisions in this area. Justice Brennan based the right of access to government-controlled information squarely on the political theory of the first amendment. He wrote that an informed citizenry is "necessary for a democracy to survive," and that to ensure that information flows to the public, the first amendment must provide a right of access to government information. Conceding that the scope of such a right is "theoretically endless," Justice Brennan proposed "two helpful principles" to aid in setting practical limits on access rights.

First, Justice Brennan stated that a right of access claim is stronger where there is a tradition of openness to the particular proceeding or information at issue. Second, he proposed that access be granted whenever it furthers the functioning or purposes of the particular process involved. He then found both of these factors to be present in the context of criminal trials. Justice Brennan therefore concluded that only a "compelling" government interest could outweigh the right of access to trials.

The Court's next right of access case, decided in 1982, was Globe Newspaper Co. v. Superior Court. Justice Brennan's majority opinion struck down a Massachusetts law requiring judges to exclude the press and the public from the courtroom during the testimony of minors who were alleged victims of a sex offense. Justice Brennan relied on his reasoning in Richmond Newspapers, stating that the right of access is grounded in the core first amendment purpose of ensuring that citizens can "effectively participate in and contribute to our republican system of self-govern-

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58 Id. at 588 (Brennan, J., concurring).
59 See id. at 587-88.
60 Id. at 588 (quoting Brennan, Address, 32 Rutgers L. Rev. 173, 176 (1979)). Justice Brennan noted that the access right could be invoked not only to support demands for any and all sorts of government information, but to challenge virtually any government restriction on private actions, because "[t]here are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow." Id. (quoting Zemel v. Rusk, 381 U.S. 1, 16-17 (1965)).
61 Id. at 589.
62 See id.
63 See id.
64 Justice Brennan, like Chief Justice Burger, noted the long tradition of access to trials. See id. at 589-93. Regarding the value of access to the trial process, Justice Brennan said that access buttresses public confidence in the criminal justice system, restrains judicial abuse, and aids accurate factfinding. See id. at 593-97.
65 Id. at 598.
67 See id. at 610-11.
ment."\textsuperscript{68} Globe was the first case in which a majority of the Court accepted first amendment political theory as the basis for a right of access to government information.

Justice Brennan also returned to the "two helpful principles" he had noted in Richmond Newspapers. He stated that the first amendment's protection of a right of access to criminal trials in particular is explained by the tradition of openness associated with the proceeding and by the contributions such access could make to the functioning of the criminal trial process.\textsuperscript{69} Justice Brennan's opinion indicated that the two principles, "tradition of openness" and "contribution to function," had been elevated from "helpful" concepts. Rather, the opinion implied, the principles were the bases or the necessary preconditions for a right of access to criminal trials. Indeed, after Globe, many lower courts began using "tradition" and "contribution to function" as a two-pronged standard for determining whether there was a right of access to government proceedings or information.\textsuperscript{70}

Other language in Justice Brennan's opinion, however, cast doubt on the importance of these two principles. The Commonwealth of Massachusetts argued in Globe that the requisite "tradition of openness" was not present in the case because criminal trials had historically been closed during the testimony of minors who were sex crime victims.\textsuperscript{71} Justice Brennan rejected this argument, saying that access to a particular trial did not depend on the historical openness of the type of trial involved.\textsuperscript{72} This, along with the explicit grounding of the right of access in first amendment political theory, led some courts to treat "tradition" and "contribution to function" as mere factors to be considered in evaluating right of access claims.\textsuperscript{73} Thus, the standard for determining when a right of access exists was still uncertain after Globe.

The Globe decision did, however, establish the test for assessing government attempts to limit access rights where they do exist. Government restrictions are subject to the traditional first amendment "strict scrutiny" standard: the right of access could be outweighed only by a "compelling governmental interest" and the denial had to be "narrowly tailored to serve that interest."\textsuperscript{74} The use of the strict scrutiny standard

\textsuperscript{68} Id. at 604.
\textsuperscript{69} See id. at 605-06.
\textsuperscript{70} See, e.g., cases discussed infra notes 103-37 and accompanying text.
\textsuperscript{71} See Globe, 457 U.S. at 605 n.13.
\textsuperscript{72} See id.
\textsuperscript{73} See, e.g., cases discussed infra notes 138-65 and accompanying text.
\textsuperscript{74} Globe, 457 U.S. at 606-07. Applying this standard to the statute at issue, Justice Brennan found that the interest in protecting the wellbeing of a minor was compelling, but then found that a mandatory closure rule was too broad. See id. at 607-08.
underscored the Court's holding that the right of access is a first amend­
ment right.

Two years later, in Press-Enterprise Co. v. Superior Court75 (Press­
terprise I), the Supreme Court found a right of access to voir dire pro­
ceedings in a criminal case.76 This was the first time that the Court recog­
nized a right of access to a proceeding other than a criminal trial. The
majority opinion did not discuss the constitutional basis of this right of
access, but instead turned directly to the “tradition of openness” and
“contribution to function” principles.77 After finding that both of these
factors were present,78 the Court recognized a right of access to voir dire
proceedings and declared that government attempts to deny this right
had to meet Globe's strict scrutiny standard.79

The majority's reference to “tradition” and “contribution to function”
provided further confirmation of the importance of these factors.80 None­
theless, the opinion did not explicitly state that these two factors were
prerequisites to a right of access. Indeed, evidence of historical tradition
was referred to merely as “helpful” to that determination.81 This lent
some support to lower court arguments that “tradition” and “contribution
to function” were just two of the many factors to be weighed in eval­
uating a right of access claim.82

The uncertainty left by Press-Enterprise I was exacerbated by Waller v. Georgia.83 In Waller, a unanimous Court found that a defendant's sixth
amendment right to a public trial had been violated when a pretrial sup­

76 See id. at 504-05.
77 This, in fact, probably prompted Justice Stevens' concurrence, in which Justice Stevens
said that he wanted to “emphasize” the fact that the holding was based on the political
theory of the first amendment. See id. at 516-19 (Stevens, J., concurring).
78 Chief Justice Burger showed that there was a long history of public access to jury selec­
tion proceedings. See id. at 505-08. He then explained that access to voir dire contributed to
the functioning of the criminal process because it enhanced “both the basic fairness of the
criminal trial and the appearance of fairness so essential to public confidence in the sys­
tem.” Id. at 508. Such confidence, he said, would be bolstered by public knowledge that
criminals were being brought to account “by jurors fairly and openly selected.” Id. at 509.
79 See id. at 510.
80 See Recent Case, Press-Enterprise Co. v. Superior Court: The Door Can Stay Closed
'til the Trial Begins, 13 W. St. U.L. Rev. 311, 318 (1985) (“[T]he Court's . . . indulgence in
historical review in Press-Enterprise I [leaves] little doubt as to the continued viability of
the historical element.”).
81 Press-Enterprise I, 464 U.S. at 505.
82 See, e.g., In re Reporters Comm. for Freedom of the Press, 773 F.2d 1325, 1347 (1985)
(Wright, J., concurring in part and dissenting in part) (“[T]he Court appears to have
weighed historical practice as one factor among many in evaluating the appropriate scope of
the right of access.”).
83 467 U.S. 39 (1984). Waller was decided four months after Press-Enterprise I.
pression hearing had been closed to the press and public. 84 Although the Court did not rule on the petitioner's first amendment claim, 85 the opinion implied that there was a right of access to suppression hearings. 86 Not only did this suggest an expansion of the right of access, it did so without discussing the "tradition of openness" factor that was so important in Globe and Press-Enterprise I. 87 Justice Powell's opinion focused instead on the importance of the public interest in such hearings. 88 Waller thus further confused the standard for evaluating right of access claims.

In its latest "right to know" case, Press-Enterprise Co. v. Superior Court 89 (Press-Enterprise II), the Supreme Court finally announced the definitive standard for determining whether there is a right of access to government-controlled information. 90 The reviewing court must first decide whether the "proceeding" to which access is sought meets the "tests of experience and logic." 91 These tests are the two helpful principles that

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84 See id. at 43.
85 See id. at 47 n.6.
86 Justice Powell's opinion relied on the Richmond Newspapers line of cases to establish that right, saying that "there can be little doubt that the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public." Id. at 46. His opinion also noted that "[t]o the extent there is an independent public interest in the Sixth Amendment public-trial guarantee[,] . . . it applies with full force to suppression hearings." Id. at 47 n.5.
87 Two years after Waller, in Press-Enterprise Co. v. Superior Court (Press-Enterprise II), 106 S. Ct. 2735 (1986), the Supreme Court confirmed that Waller recognized a first amendment right of access to suppression hearings: "[I]n Waller v. Georgia . . . [w]e noted that the First Amendment right of access would in most instances attach to [suppression hearings]." Id. at 2740.
88 Nonetheless, Justice Powell's discussion of the importance of access to a fair trial was similar to the "contribution to function" factor that was applied in those cases. See Waller, 467 U.S. at 45-47.
89 See id.
90 106 S. Ct. 2735 (1986). In Press-Enterprise II, the Court held that the first amendment right of access to criminal proceedings applies to preliminary hearings as they are conducted in California. See id. at 2743.
91 Because of the central role of the "tradition" and "contribution to function" prongs in this standard, this Note will refer to it as the "two-prong" test.

Not everyone, however, agrees that this is definitely the standard. In one federal circuit court decision made after Press-Enterprise II, the dissenters still insisted that the Supreme Court regarded historical practice as just a "relevant consideration" in weighing the government's interest in closure against the access right. See Capital Cities Media v. Chester, 797 F.2d 1164, 1189-90 (3d Cir. 1986) (Gibbons, J., dissenting). As the majority in Capital Cities Media pointed out, however, the Supreme Court has made it quite clear that a tradition of openness is a requirement for a right of access. See id. at 1173-74 (detailing those instances in which the Court has noted the critical role of the tradition of access).

Justice Brennan first suggested in *Richmond Newspapers*. There must be a tradition of access to the proceeding, and access must play "a significant positive role in the functioning of the particular process in question." If the proceeding passes these tests, then a "qualified" first amendment right of access attaches.

Once there is a "qualified" right of access, the reviewing court must decide whether the government can restrict that right. To resolve this issue, the court applies the "strict scrutiny" test set out in *Globe* and *Press-Enterprise I*. The right of access can only be restricted if it is outweighed by an "overriding" government interest and if the denial of access is narrowly tailored to serve that interest.

One issue left unresolved by *Press-Enterprise II* is whether the right of access and the standard that defines it apply outside the context of criminal proceedings. Some language in the case suggests that the right of access can in fact extend to other areas. Although the majority opinion initially refers to the "First Amendment right of access to criminal proceedings," it later fails to restrict its discussion to the criminal context. When introducing the right of access standard, the Court notes that "history and experience shape the functioning of governmental processes." It also states that "[i]f the particular proceeding in question passes [the two-prong test], a qualified First Amendment right of public access attaches." The Court's reference to "governmental" proceedings and its failure to specify criminal proceedings when setting out the test imply that the right of access can be applied to government proceedings and information generally.

More importantly, logic dictates that the right of access applies outside the context of criminal proceedings. If a right of access exists in criminal proceedings because they pass the tests of "tradition" and "contribution to function," then it is difficult to see how this right can be denied to other proceedings and information that also pass these tests. Justice Stevens recognized this in his dissent in *Press-Enterprise II*, pointing out that "the logic of the Court's access right extends even beyond the con-

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92 *Press-Enterprise II*, 106 S. Ct. at 2740.
93 Id. at 2740.
94 Id. at 2741.
95 See id.
96 Id. (quoting *Press-Enterprise I*, 464 U.S. 501, 510 (1984)).
97 The Supreme Court has never recognized a right of access outside that sphere. *Richmond Newspapers* and *Globe* both involved criminal trials, *Press-Enterprise I* involved voir dire proceedings, and *Press-Enterprise II* involved preliminary hearings.
98 *Press-Enterprise II*, 106 S. Ct. at 2740.
99 Id. at 2741 (emphasis added).
100 Id.
fines of the criminal justice system”101 and could apply to civil proceedings and other forms of governmental information.102

To a large extent, Justice Stevens' prophecy has already been fulfilled. State and lower federal courts have found rights of access to a variety of government proceedings and information. The next Part surveys these lower court decisions and outlines the present scope of the “right to know.”

II. THE SCOPE OF THE “RIGHT TO KNOW”: THE RIGHT OF ACCESS IN THE LOWER COURTS

Lower courts have taken divergent approaches in assessing the right of access to government-controlled information. A number of courts have accepted the “two-prong” test first suggested by Globe and then spelled out in Press-Enterprise II.103 These courts examine whether there is a tradition of openness to the information in question and whether access contributes to the functioning of the process involved. If the claim clears these two hurdles, a right of access is recognized and government actions restricting it must meet the strict scrutiny standard.

Meanwhile, other courts have used a “balancing” test to assess right of access claims. These courts have discounted the “history” and “contribution to function” prongs and have instead looked directly at the public interest in access to the information.104 If the public's interest in obtaining access outweighs the government’s interest in refusing to provide it, then a right of access is recognized.

101 Id. at 2751.
102 Indeed, Justice Stevens' dissent stated that “the ratio decidendi of today's decision knows no bounds.” Id. Justice Stevens' dissent provides an interesting commentary on the present state of the law on the right of access. In Part I of his opinion, Justice Stevens reaffirmed his support for the right of access, relying on the “political” argument he had made in Houchins. See id. at 2744-47. Nevertheless, in Part II, Justice Stevens criticized the majority's decision extending the right in Press-Enterprise II. See id. at 2747-52. Justice Stevens’ concern seems to have been that the “tradition” and “contribution to function” prongs would be ineffective as practical limits on the right of access, resulting in a very broad access right that could only be limited by restrictions that pass the “strict scrutiny” test. See id.
103 For examples of cases applying the two-prong test, see infra notes 105-37 and accompanying text.
A. Application of the "Two-Prong" Test

Some courts have used the two-prong test to find a right of access in criminal justice areas not yet addressed by the Supreme Court. For example, federal circuit courts have used this standard to find access rights to both criminal indictments\textsuperscript{105} and postconviction proceedings.\textsuperscript{106} Similarly, the right of access has been extended beyond criminal proceedings themselves to the documents filed in those proceedings.\textsuperscript{107}

Courts have additionally relied on the two-prong test to establish a right of access to proceedings held "on the civil side of the docket."\textsuperscript{108} At least four federal circuits have recognized such a right.\textsuperscript{109} These courts

\textsuperscript{105} See United States v. Smith, 776 F.2d 1104 (3d Cir. 1985). In Smith, the United States Court of Appeals for the Third Circuit showed that there has been a long common law tradition of public access to indictments. See id. at 1112. According to the Third Circuit, access to indictments contributes to the functioning of the trial process, because "[k]nowledge of the . . . charges is essential to an understanding of the trial, essential to an evaluation of the performance of counsel and the court, and most importantly, essential to an appraisal of the fairness of the criminal process to the accused." Id.

\textsuperscript{106} See CBS, Inc. v. United States Dist. Court, 765 F.2d 823 (9th Cir. 1985). In CBS, Inc., the United States Court of Appeals for the Ninth Circuit simply stated that tradition and contribution to function "apply with as much force to post-conviction proceedings as to the trial itself." Id. at 825.

\textsuperscript{107} The leading case in this area is Associated Press v. United States Dist. Court, 705 F.2d 1143 (9th Cir. 1983). In Associated Press, the Ninth Circuit noted that there has historically been a common law right of access to most pretrial and trial documents. See id. at 1145. The function prong was satisfied because such documents are "often important to a full understanding of the way in which 'the judicial process and the government' as a whole are functioning." Id. Other courts, following the lead of Associated Press, have also recognized such a right. See, e.g., CBS, Inc., 765 F.2d at 825 (right of access to documents in postconviction proceedings); United States v. Miller, 579 F. Supp. 862, 866 (S.D. Fla. 1984) (right of access to affidavit tapes).

It should be noted, however, that the right of access to documents in a judicial proceeding is often viewed as a common law and not a constitutional law right. See, e.g., United States v. Hickey, 767 F.2d 705 (10th Cir.), cert. denied, 106 S. Ct. 576 (1986); United States v. Hubbard, 650 F.2d 293 (D.C. Cir. 1980). Courts have concluded that Richmond Newspapers and its progeny do not overrule Nixon v. Warner Communications, 435 U.S. 589 (1978). In that case, the Supreme Court held that members of the press had no first amendment right to copy tapes admitted as evidence in the Watergate trials. See id. at 608-11. The Nixon decision, however, was at least partly based on the fact that the press and the public had been able to listen to the tapes during the trial. Thus, the Nixon case posed the question of whether the right of access is limited to the right to attend, observe, and listen, or whether it extends to a right to copy records, to tape, or even to televise. That issue is beyond the scope of this Note.


\textsuperscript{109} See Westmoreland v. Columbia Broadcasting Sys., 752 F.2d 16 (2d Cir. 1984), cert. denied, 472 U.S. 1017 (1985); Publicker Indus. v. Cohen, 733 F.2d 1059 (3d Cir. 1984); In re Continental Ill. Sec. Litig., 732 F.2d 1302 (7th Cir. 1984); Brown & Williamson Tobacco
noted the Supreme Court's emphasis on "tradition" and "contribution to function" in criminal cases, and then found that these factors were similarly present in civil proceedings.

The two-prong test has also been used, in contrast, to deny claims of access on both sides of the docket. In the criminal context, courts have used the "tradition" and "contribution to function" prongs to deny access rights to grand jury proceedings, proceedings to obtain corporeal evidence, proceedings to determine whether a witness can testify, search warrants, and juvenile proceedings. With respect to civil proceedings, access has been denied to prejudgment records and civil settlement documents because the "tradition" and "function" prongs were found wanting.


For example, in Publicker, the Third Circuit engaged in a lengthy discussion of English and American legal authorities to show that there was a long history of access to civil trials. See Publicker, 733 F.2d at 1068-69. The court then turned to the "contribution to function" factor, relying on authorities such as Holmes and Wigmore to show that public access to civil trials increased the quality of judicial administration, and increased public trust in the judicial system. See id. at 1069-70 (citing Cowley v. Pulsifer, 137 Mass. 392 (1884); 6 J. Wigmore, Evidence § 184 (J. Chadbourn rev. 1976); see also Brown & Williamson, 710 F.2d at 1178-79 (suggesting that public access to civil trials permits community catharsis, promotes integrity, and discourages perjury).

See In re Secretary of Labor Donovan, No. 81-2 (D.C. Cir. Aug. 22, 1986) (LEXIS, Genfed library, Cases file) (per curiam). The United States Court of Appeals for the District of Columbia Circuit ruled that there was no right of access because grand jury proceedings had historically been closed to the public and access would "frustrate" rather than enhance the functioning of the grand jury process; see also In re Final Grand Jury Report, 197 Conn. 698, 501 A.2d 377 (1985) (holding that "particularized need" standard permitted release of grand jury proceeding information to Department of Public Safety, but also holding that trial court had not abused its discretion in prohibiting release to newspapers).


See In re Reporters Comm. for Freedom of the Press, 773 F.2d 1325 (D.C. Cir. 1985). In an opinion by then-Judge Scalia, the District of Columbia Circuit rejected the reporters' challenge to a protective order by the trial court delaying until after trial and entry of judgment the public's access to court records consisting of documents produced by and depositions given by the officers of plaintiff Mobil Oil Corporation. See id. at 1339. The appeals court also denied the reporters' claim of a right of access to materials used by the trial court in dismissing Mobil's motion for summary judgment, saying that there was no right of access to "all documents consulted . . . by a court in ruling on pre-trial motions." Id. at 1338.

See Minneapolis Star & Tribune v. Schumacher, 392 N.W.2d 197 (Minn. 1986).

See Reporters Comm., 773 F.2d at 1336; Schumacher, 392 N.W.2d at 205.

See Reporters Comm., 773 F.2d at 1337; Schumacher, 392 N.W.2d at 205.
Judicial disciplinary proceedings represent yet another category to which the two-prong test has been applied. In *First Amendment Coalition v. Judicial Inquiry & Review Board*, the United States Court of Appeals for the Third Circuit found no first amendment violation when a state constitutional provision permitted public access to Board records only when the Board recommended discipline. The court declared that in such disciplinary proceedings, "what tradition there is favors public access only at a later stage in the process." It further noted that the contribution to function question was taken into account by the state constitutional convention and stated that "contribution to function" interests were adequately served by allowing access at a later stage.

At least one court has used the two-prong test to find a right of access outside the judicial branch. In *Society of Professional Journalists v. Secretary of Labor*, a federal district court found a first amendment right of access to administrative factfinding hearings. It stated that first amendment political theory applied in the administrative context and found that administrative hearings satisfied both the "tradition" and "contribution to function" prongs. The particular agency in question had regularly conducted closed hearings, but the court found a tradition of openness in the brief history of administrative hearings as a whole. "Contribution to function" existed because "openness ensures that [the agency] properly does its job." *Society of Professional Journalists* thus demonstrates that extensive first amendment rights of access can be found under the two-prong test.

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121 These are adjudicatory hearings to determine whether judicial officers should be disciplined for misconduct.

122 *784 F.2d 467 (3d Cir. 1986).*

123 Id. at 473.

124 See id. at 474-75.


126 See id. at 577. The hearing involved in the case was a Mine Safety and Health Administration (MSHA) investigation into the cause of a coalmine fire that killed 27 miners. See id. at 570.

127 The court maintained that administrative agencies should not have unfettered discretion to close proceedings, for this interferes with the "public awareness and opportunity to criticize that is the very foundation of our democracy." Id. at 576.

128 Id. at 575.

129 See id. at 575 ("in administrative hearings, the rule of the 'open' forum is prevailing" (quoting Fitzgerald v. Hampton, 467 F.2d 755, 764 (D.C. Cir. 1972))). The court also drew analogies to congressional sessions and civil trials, whose long traditions of public access suggested that administrative hearings should also be open. See id. at 575-76.

130 Id. at 576. Specifically, the court noted that public access to hearings increases the probability that any mistakes will be quickly corrected, and helps to prevent an agency from abusing its power.
The test, however, has also been used to deny a right of access to various executive branch records. Courts have rejected claims of access to arrest records, classified materials, and applications for liquor licenses. These rejections were all at least partly based on the lack of tradition of public access to such information. In Capital Cities Media, Inc. v. Chester, the Third Circuit implied that there was no right of access whatsoever to administrative materials. In dicta, the court suggested that the government has historically limited access to executive branch records, indicating that such documents could never meet the "tradition" prong. Thus, in contrast with Society of Professional Journalists, Capital Cities Media appears to shut the door on access rights in the administrative sphere.

In sum, it is difficult to draw any conclusions regarding the scope of the right of access under the two-prong test. In every area where the test has been used to find a right of access, it has also been used to deny such a right. Courts have thus sent mixed signals on the test's potential to expand the right of access into areas beyond those already recognized by the Supreme Court.

B. Application of the Balancing Test

Some courts have not used the two-prong test in assessing claims of access rights, but instead have balanced the public's interest in obtaining particular information against the government's interest in refusing to provide it. One of the earliest, and most influential, of the balancing test

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132 See McGhee v. Casey, 718 F.2d 1137, 1147 (D.C. Cir. 1983) (classified documents are "traditionally nonpublic government information"); see also American Library Ass'n v. Faurer, 631 F. Supp. 416, 421 (D.D.C. 1986) (no first amendment right to classified documents previously disclosed to the public where such disclosure could endanger national security).


134 797 F.2d 1164 (3d Cir. 1986).

135 Specifically, the court denied a claim of access to records of the Pennsylvania Department of Environmental Resources because appellants had "neither pleaded nor offered to prove the existence of a tradition of public access to the type of administrative records here in dispute." Id. at 1175-76.

136 See id. at 1170, 1172-73. A concurring opinion stated explicitly that "it is clear that there is no tradition of access to administrative agency records." Id. at 1177-78 (Adams, J., concurring).

137 In dicta, the court also expressed the view that issues of access rights should be resolved by the legislature, not the courts. See infra notes 212-16 and accompanying text (discussing argument by Houchins plurality that access issue should be left to legislature).
cases was *Cable News Network v. American Broadcasting Cos.* In *Cable News Network*, a federal district court held that the first amendment was violated by a Reagan administration policy that excluded the television media from "limited coverage" White House events. Although the court mentioned historical tradition, it emphasized the importance of a right of access in "informing the public at large of the workings of government." The court concluded that the public's interest in access must be balanced against "limiting considerations such as confidentiality, security, orderly process, spatial limitation, and doubtless many others." The court determined that, in this instance, the balance favored access.

Many courts have explicitly followed *Cable News Network* in finding a right of access to government-controlled information. In *WPIX, Inc. v. League of Women Voters*, a district court addressed the press's claim of a right of access to presidential debates. Relying on *Cable News Network*, the court held that "[u]nder the first amendment, press organizations have a limited right of access to newsworthy events." The court then stated that this interest in access had to be "balanced against the interest served by denial of that [newsgathering] activity." In *Westinghouse Broadcasting v. National Transportation Safety Board*, the court found that the first amendment was violated by an order limiting press access at airplane crash sites. According to the court, *Cable News Network* indicated that the balancing test was the proper standard for assessing right of access claims. The court concluded that access to the wreckage area was required unless the government could show some overriding consideration.

Like the two-prong test, the balancing test has also been used in the

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139 See id. at 1238, 1245.
140 See id. at 1244.
141 Id. at 1245. The court also pointed to the role of access in serving the first amendment's core purpose of providing the public with information on governmental activities. See id. at 1241-44.
142 Id. at 1244.
143 See id.
145 Id. at 1489.
146 Id. The court denied WPIX's request for an injunction that would allow it to cover the debate. Although the court found that WPIX's claims presented sufficiently serious questions to warrant judicial scrutiny, it denied the injunction because WPIX had failed to meet its burden of showing that an order granting it access was "necessary, fair and workable." Id. at 1493-95.
148 See id. at 1177, 1184.
149 See id. at 1184.
criminal justice sphere to find rights of access not explicitly recognized by the Supreme Court. In *In re Chase*,159 the court recognized a right of access to juvenile proceedings. The court found that the right of access was "vital to the core principles of the First Amendment,"161 but that this right was still subject to countervailing interests.162 Similarly, in *United States v. Chagra*,163 the United States Court of Appeals for the Fifth Circuit held that the right of access to bail reduction hearings is not absolute but must instead be weighed against such governmental interests as the right to a fair trial and the need to preserve the confidentiality of sensitive information.164 Courts have also found a right of access to sentencing hearings,165 parole revocation hearings,166 and hearings on the release of convicted prisoners,167 unless there is a governmental interest sufficient to outweigh the public's interest in access.

Outside the criminal context, the balancing test has been applied in a number of areas. Assessing a right of access claim to certain police records, the Wyoming Supreme Court, for example, weighed and evaluated the legitimate competing interests.168 The Massachusetts Supreme Judicial Court used the balancing test to invalidate the impoundment of records in a public official's divorce proceeding.169 The court said that

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159 112 Misc. 2d 436, 446 N.Y.S.2d 1000 (Fam. Ct. 1982).
161 Id. at 1003.
162 See id. at 1004. The court found that the juvenile in *Chase* had failed to show an interest overcoming the presumption of openness. See id. at 1009.
163 701 F.2d 354 (5th Cir. 1983).
164 See id. at 364-65.
167 See Newman v. Graddick, 696 F.2d 796 (11th Cir. 1983).
168 See Sheridan Newspapers v. City of Sheridan, 660 P.2d 785, 795, 798 (Wyo. 1983). The Sheridan court largely took as its guide Houston Chronicle Publishing Co. v. City of Houston, 531 S.W.2d 177 (Tex. 1975), a pre-Richmond Newspapers case that had said that there was "a constitutional right of access to information concerning crime in the community, and to information relating to activities of law enforcement agencies." Id. at 186. In the Sheridan case itself, the court found that the state's Public Records Act struck the proper balance between the right of access and governmental interests, and that because the denial of police records in the case was inconsistent with the statute, the denial violated both the law and the Constitution. See Sheridan, 660 P.2d at 795. For further discussion of the Sheridan case, see infra notes 244-47 and accompanying text.
169 George W. Prescott Publishing Co. v. Register of Probate, 395 Mass. 274, 479 N.E.2d 658 (1985). It should be noted that in this case the court did not explicitly ground the right of access in the Constitution. The court said that the access right was based on the "principle of publicity" recognized in Ottaway Newspapers v. Appeals Court, 372 Mass. 539, 362 N.E.2d 1189 (1977). See Prescott, 395 Mass. at 278, 479 N.E.2d at 662. This "principle of publicity" appears to be a hybrid common law/first amendment right. The reliance by the
although legitimate expectations of privacy would ordinarily justify impoundment, in this instance those expectations were outweighed by the public interest in learning "whether public servants are carrying out their duties in an efficient and law-abiding manner." 160

Like the two-prong test, the balancing approach has been used to deny right of access claims as well as to uphold them. In *Dean v. Guste*, 161 the Louisiana Court of Appeal denied access to a school board executive session on the ground that the government's interest in uninhibited debate among school board members outweighed the public interest in access to such sessions. 162 Similarly, a federal district court rejected a freelance photographer's claim that he had the "right" to photograph rock concerts. 163 Because the plaintiff was freely able to observe and comment on the concert, the court found, the incremental value of allowing him to photograph it was "negligible." 164 This minimal interest was outweighed by the considerable government interests in receiving revenue from concerts and protecting the property rights of performers. 165

Although the balancing test, like the two-prong test, has been used both to expand and restrict the right of access to government-controlled information, the balancing test is generally more expansive than its two-pronged counterpart. This wider coverage results from the balancing test's presumption of a right of access to government-controlled information. The right attaches regardless of the particular proceeding's history of openness. As a result, the right can be denied only if it is outweighed by some governmental interest. The next section of this Note further examines the differences between the two tests and evaluates each test's standards.

court, however, on a number of the Supreme Court's right of access cases indicates that the right has at least some constitutional dimensions.

160 *Prescott*, 395 Mass. at 279, 479 N.E.2d at 662-63 (quoting Attorney General v. Collector of Lynn, 377 Mass. 151, 158, 385 N.E.2d 505, 509 (1979)). The public specifically had an interest in a deposition relating to allegations of misconduct by the party in his official capacity. See id. at 279, 479 N.E.2d at 662.


162 See id. at 865-66.


164 See id. at 1543.

165 See id. at 1543-44.
III. EVALUATION OF THE "RIGHT TO KNOW": AN ASSESSMENT OF THE RIGHT OF ACCESS STANDARDS

A. The Two-Prong Test

1. The "Historical Tradition" Prong

In deciding whether there is a historical tradition of access to particular information, a court must determine what constitutes a sufficient tradition. This, in turn, generates a barrage of secondary questions. For example, how old must the tradition be? Must it date back to English common law, or does a history of access in "modern" practice suffice? Similarly, how should a process of relatively recent origin, such as an administrative factfinding hearing, be handled? Should courts look at the process' own brief "history," analogize to older functionally similar processes, or simply declare that because there is no long tradition, there is also no right of access? Also, whose tradition should be considered? Do courts look at the tradition of the specific institution involved—that, for example, of the Department of Environmental Conservation? Or do they undertake a broader examination of the way the relevant type of information has historically been addressed?

The Supreme Court has provided few responses to such questions, and the answers it has given are themselves inconsistent. In Richmond Newspapers, for example, both Chief Justice Burger and Justice Brennan made much of the fact that a tradition of access to trials existed at common law at the time the Bill of Rights was adopted, implying that this was a condition that must be met to satisfy the tradition prong.166 In Press-Enterprise II, however, the Court recognized a right of access to pretrial proceedings, even though such proceedings had not been open at common law.167

Inconsistency also appears in the Supreme Court's statements regarding the perspective a court must adopt and the factors it should consider when determining whether a tradition of access exists. In Globe, the Court said that the right of access did not depend on the type of criminal trial involved, but rather on the tradition of access to criminal trials generally.168 As a result, many courts, including the California Supreme Court in Press-Enterprise II, denied access rights to any type of pretrial proceeding on the ground that the pretrial phase of criminal cases had generally been closed.169 When Press-Enterprise II came before the

166 See Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 564-66 (1980); id. at 589-91 (Brennan, J., concurring).
169 See, e.g., Press-Enterprise Co. v. Superior Court, 37 Cal. 3d 772, 774-77, 691 P.2d 1026,
United States Supreme Court, however, the Court reversed the California court, and its earlier position, holding that there was a right of access to the type of preliminary hearings at issue.170 Lower courts thus cannot rely confidently on even the little guidance the Supreme Court has provided. The lack of clear direction is illustrated by the lower courts' widely varying treatment of the tradition prong. For example, the United States Court of Appeals for the District of Columbia Circuit has said that the tradition of access must be of considerable duration—"modern practice" is not sufficient.171 Meanwhile, other courts have willingly examined the "modern" history of a proceeding when the proceeding itself is of relatively recent origin.172 Some courts have analogized recent proceedings to older, functionally similar processes,173 while at least one judge has suggested that a general tradition of press and public access to "newsworthy events" satisfies the tradition prong.174

There are difficulties in determining what constitutes a sufficient historical tradition of access, but there are even more serious problems with the "history" prong. First, the history test is inconsistent with the Supreme Court's established approach to first amendment adjudication. As some of the courts that have discounted the history test have noted, the Supreme Court has traditionally held that "the first amendment is to be interpreted in light of current values and conditions."175 Indeed, this approach made the development of modern first amendment doctrine possible by freeing the Court from the historical assumption that the first

1027-29, 209 Cal. Rptr. 360, 361-63 (1984), rev'd, 106 S. Ct. 2735 (1986); In re Midland Publishing Co., 420 Mich. 145, 164-75, 362 N.W.2d 580, 589-94 (1984); see also Recent Case, supra note 80, at 318 (describing the California Supreme Court's rejection of a right of access to pretrial proceedings as "nothing but faithful to the guidelines provided by the United States Supreme Court for determining the existence of access rights to judicial proceedings").

173 See, e.g., Society of Professional Journalists, 616 F. Supp. at 575 (analogizing administrative factfinding hearings to congressional sessions and civil trials); see also First Amendment Coalition, 784 F.2d at 484-85 (Adams, J., concurring in part and dissenting in part) (suggesting that judicial disciplinary proceedings be analogized to impeachment hearings).

amendment was limited to preventing prior restraints on speech or publication. The Supreme Court has offered no explanation for diverging from this approach and treating the right of access differently from other first amendment rights.

There are also many practical reasons for assessing the right of access in terms of contemporary values and conditions. For example, many criminal proceedings lack a common law tradition of openness but have grown so in importance under modern practice that closing them defeats the purpose of allowing access to trials. More generally, the size and power of many governmental institutions, particularly administrative agencies, have increased greatly in this century. As their power has increased, so has the public's need for access to information on their activities. Finally, basing the right of access on a history of openness rewards governmental institutions that have stonewalled and gives others an incentive to follow suit.

Another major problem with the history prong is that there is no logical link between the history factor and the first amendment rationale underlying the right of access. Right of access determinations should be based on the relevance of the information involved to the citizens' understanding of the functioning of their government. There is no reason to believe that traditional openness is a useful proxy for the information's capacity to promote self-governance. Indeed, information related to many of the most important public issues has historically been closed. Thus, the tradition prong diverts judges from the real issue, the importance to self-government of the information in question, and forces them to delve into the arcane history and obscure facts of proceedings at common law.

See BeVier, Like Mackerel in the Moonlight: Some Reflections on Richmond Newspapers, 10 Hofstra L. Rev. 311, 328 n.115 (1982).

See Chagra, 701 F.2d at 363; Criden, 675 F.2d at 555-57.


See BeVier, supra note 176, at 326.

Professor BeVier states that "[t]he connecting link between a claim of access and the first amendment's core purpose is not furnished by the coincidence of traditional openness . . . [but] by the connection between the facility or information to which access is requested and the functioning of government." Id.

BeVier provides a good example: "Because prisons 'do not share the long tradition of openness' of trials, surely discussion of, and hence information about, prisons do not fall outside the amendment's core." Id. at 326 (quoting Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 576 n.11 (1980)).

A particularly telling example is First Amendment Coalition, in which Judges Becker
Many courts have rejected the "tradition" prong on this basis. For example, one court has said that even though parole revocation hearings were not traditionally open to the public, access to them is necessary, in that it enhances "free, open and informed discussion" of a process of great interest to the public.\(^{184}\) Similarly, courts have stated that access to pretrial proceedings should not be foreclosed by a lack of historical tradition, because access to such proceedings serves important "societal interests."\(^{185}\) A federal district court adopted this perspective regarding government information generally, stating that "to give proper weight to the policy implications involving the first amendment rights of access, it is appropriate for courts to go beyond . . . historical analysis, [and determine] what information will [make] a positive contribution to the process of self-governance."\(^{186}\)

Some courts have defended the history prong by stating that it is necessary to limit the "theoretically endless" scope of the right of access.\(^{187}\) Although limits are needed, it is apparent that historical tradition is an inappropriate limiting factor. If the history prong were applied as a strict threshold test, as the Supreme Court seems to imply it should be, it would act as an arbitrary criterion bearing no relationship to either the contribution of access to the process involved, or the role of the first amendment in informing the public. If, on the other hand, it were applied with these considerations in mind, the history prong would have no significance independent of the "function" prong. Worse yet, the history prong could be rendered so meaningless that every government denial of access to information would be subjected to strict scrutiny.\(^{188}\)

Other courts have found that the history prong is necessary to ensure that the right of access is supported by both experience and logic.\(^{189}\) This,
however, does not justify treating tradition as an inflexible threshold requirement for a right of access. Such a test would "fossilize" the first amendment, and would make the right of access much more restricted than other first amendment rights. The goal of conforming the right of access to the lessons of experience can be met by treating historical tradition as a factor to be weighed in assessing right of access claims. Due consideration is then given to historical practice without letting the lack of a tradition of openness foreclose access that either contributes to the process' functioning or provides information to the public that is relevant to self-governance. This flexible approach is superior to treating history as a rigid threshold test, which unduly emphasizes experience at the expense of logic.

2. The "Contribution to Function" Prong

As with the "tradition of openness" test, the courts have inconsistently applied the "contribution to function" prong. Treating the test stringently, some courts have demanded that access contribute to the functioning of the process in question. Other courts have more generally examined the public's interest in receiving information on the process involved. In United States v. DeLorean, a federal district court ruled that pretrial documents could be sealed because access to them would not

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119 Reporters Comm., 773 F.2d at 1347 (Wright, J., concurring in part and dissenting in part).
120 See id. at 1353 ("Few constitutional rights that we now take for granted would survive this brittle test.").
121 See BeVier, supra note 176, at 327:
[T]he history of openness . . . might well be considered pertinent in calculating the weight to be accorded the government's interest in denying access in a particular case. For example, to the extent that experience has demonstrated that openness is ordinarily compatible with the proper and regular performance of the particular governmental activity, it might be more difficult for the government to demonstrate its substantial or compelling interests in denying access. Conversely, a history of restrictions on access, of confidentiality, or of secrecy might permit the more ready inference that access would materially disrupt important functions and thus help the government to justify a particular access restriction.

Id. at 327; see also Capital Cities Media, 797 F.2d at 1189-90 (Gibbons, J., dissenting) (tradition merely "relevant" to the decision on access); Reporters Comm., 773 F.2d at 1347 (Wright, J., concurring in part and dissenting in part) (historical tradition just one factor to be weighed in ruling on access).

122 See, e.g., Seattle Times v. Eberharter, 105 Wash. 2d 144, 153, 713 P.2d 710, 714 (1986) ("[B]ecause of the role of the probable cause determination in the judicial process, immediate public access is not required for the effective functioning of the process itself.").

123 See, e.g., Newman v. Graddick, 696 F.2d 796, 801 (11th Cir. 1983).
enhance the functioning of the criminal proceeding.\textsuperscript{198} Vacating the sealing order, the United States Court of Appeals for the Ninth Circuit took a broader view of the "contribution to function" prong, and found that it was enough that access would contribute to a full understanding of both the functioning of the judicial process and the government as a whole.\textsuperscript{197}

The proper approach to the function prong was also a source of disagreement in In re Reporters Committee for Freedom of the Press.\textsuperscript{198} Judge Wright's opinion, in which he dissented in part, stressed the public interest in obtaining information on governmental proceedings and found that such an interest required contemporaneous access to pretrial documents.\textsuperscript{199} Judge Scalia's majority opinion said that the dissent was "mis­taken in assuming that the public interest in obtaining news is the focus of inquiry in right-of-access cases . . . . [Rather], the focus is upon the public's ability to assure proper functioning of the courts. Contemporane­ity of access to written material does not significantly enhance that ability."\textsuperscript{200}

The inconsistent treatment of the function prong stems not merely from the lack of guidance provided to courts in applying that test, but also from the sense of many courts that looking exclusively at the effect of access on the immediate process improperly narrows the judicial inquiry. The enhancement of the quality of the process in question is just one of the many societal values that are furthered by access.\textsuperscript{201} Like the tradition prong, the "contribution to function" prong, narrowly construed, bears little relation to the underlying political rationale of the first amendment.\textsuperscript{202} There are numerous instances in which access could provide information useful to self-governance without also directly improving the functioning of the process involved. For example, although public access to legislative proceedings might not improve the quality of debate,\textsuperscript{203} it nonetheless increases public understanding of the issues before the legislature and the process by which that body works. Thus,
the "function" prong overemphasizes the effects of access on specific processes, when what is important is its more general effect on increasing citizens' understanding of the issues they must decide, and of the workings of the government they must control.

In sum, analysis of the two-prong test reveals that it is seriously flawed. The Supreme Court has offered little guidance to other courts applying the "tradition" prong, which has resulted in their putting the test to diverse and conflicting uses. More importantly, the historical tradition test fails to follow the established Supreme Court approach of interpreting first amendment issues in light of current values and conditions, thus creating a variety of practical problems. Finally, both the "tradition" and "contribution to function" prongs act as arbitrary criteria that have little to do with the underlying rationale of the right of access, and that often undermine its purpose.

B. Assessing the "Balancing" Test

The balancing test avoids many of the problems associated with the two-prong test. First, the balancing test is consistent with general first amendment jurisprudence in that it takes into account contemporary values and conditions. Second, it allows courts to grant access to proceedings lacking a history of openness when the importance of the proceeding has increased in recent years. Third, it avoids rewarding governmental bodies that close their proceedings by allowing courts to look beyond the pattern of closure to determine if there is a sufficient rationale justifying it.

The balancing test also marks an improvement over the contribution to function prong. Like the function prong, the balancing test takes into account the effect of public access on the process in question. The balancing test, however, does not limit a court's consideration to the effect of the access on the process itself. It instead allows a court to consider a whole range of benefits and costs of access.

204 See supra note 175 and accompanying text.
206 See supra note 179 and accompanying text.
207 For example, just as courts have denied access to grand jury records because openness might frustrate the functioning of the process, see, e.g., In re Secretary of Labor Donovan, No. 81-2 (D.C. Cir. Aug. 22, 1986) (LEXIS, Genfed library, Cases file), so too could courts use the balancing test to conclude that the impairment of the process outweighed the interest in access.
208 See supra text accompanying notes 201-03 (alternative benefits of access).
One benefit that the balancing test allows courts to consider is the public interest in the particular proceeding or information at issue. For example, although there is generally no tradition of access to records in divorce proceedings, a Massachusetts court found an access right to those records that were relevant to allegations of a public official's misconduct. The public's interest in learning about the official's inappropriate behavior was found to outweigh both the lack of a tradition of openness and the public official's privacy concerns. The balancing test can grant greater weight to those access claims in which the information involved is directly related to a major public issue or is a matter seriously affecting the operation of the government.

The balancing test properly focuses the reviewing court's inquiry on the political rationale of the right of access. Under the balancing test, the limiting variable on the "theoretically limitless" right of access is not an arbitrary factor like historical tradition, but rather the information's relevance to public debate and self-governance. If the information involved would do little to enhance public understanding of the workings of government or of an important public issue, then the government's countervailing interest in limiting access need not be very strong. If, on the other hand, the information does bear on the citizenry's ability to make informed political decisions, then a strong governmental interest is needed to offset the right of access.

There is, however, a drawback to the balancing approach. As courts balance the public interest in access against countervailing governmental interests, they become involved in what many regard as policy determinations. It has been argued that such political decisions should be made not by the judiciary, but rather by the legislature. Indeed, in *Houchins v. KQED, Inc.*, a plurality of the Supreme Court noted that making decisions on public access to governmental information was "clearly a legislative task." Drawing extensively from an article written by Justice Stewart, they declared that the public interest in access to government-controlled information was protected not by the Constitution, but by the

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210 Id. at 278, 281-82, 479 N.E.2d at 662, 664.
212 Houchins v. KQED, Inc., 438 U.S. 1, 12 (1978). The plurality opinion was written by Chief Justice Burger, who was joined by Justices White and Rehnquist. For a discussion of *Houchins*, see supra notes 40-41 and accompanying text.
213 See *Houchins*, 438 U.S. at 14-15 (quoting Stewart, Or of the Press, 26 Hastings L.J. 631 (1975)). Interestingly, Justice Stewart did not join Chief Justice Burger's opinion, and, in his own concurrence, he did not raise the "leave it to the legislature" argument. See id. at 16-19 (Stewart, J., concurring in the judgment).
They indicated that instead of turning to the courts to obtain a right of access, the public should secure that right through legislative enactments. Although the *Houchins* approach has never been adopted by a majority of the Court, it has been relied on by a number of other courts.

Some courts have questioned whether the public interest in access can be protected through the political process. In *Society of Professional Journalists v. Secretary of Labor*, the district court stated that the democratic process cannot ensure that the right of access is protected 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. In addition, the court noted that the right of access is a procedural right and not a substantive one, and "[p]rocedural rights are less susceptible to protection by majoritarian pressures." Thus, the court concluded, the legislature cannot be relied upon to protect the right of access.

These arguments are rendered less compelling by the fact that "majoritarian pressures" have led legislatures to pass laws providing access to government information. On the federal level, Congress has passed three significant statutes that direct the release of government-held information. The Freedom of Information Act (FOIA) of 1967 requires that the executive branch positively respond to requests for information unless the information falls within one of nine exemptions. The Privacy Act of 1974 provides individuals with access to information about themselves...
that is held by the government. The Government in the Sunshine Act of 1976 requires that certain agencies open their meetings to the public, except in circumstances that closely parallel the FOIA exemptions. Similar developments have taken place at the state level. Today, every state has both an “open records” law and a “sunshine” law. These laws suggest that legislatures have been responsive to public demands for access to government-controlled information.

These statutes, however, do not adequately protect the public interest in access to government information. A wide range of the information that might be requested by the public from the federal government, for instance, falls within the exemptions set out in the federal Freedom of Information Act. The exemption for material relating to national security, for example, has been implemented through a classification system that allows the government to prevent public access to virtually any information pertaining to national defense or foreign relations. Similarly, the exemption for inter- and intra-agency memoranda could potentially bar access to nearly everything an agency puts in writing. Although courts have generally construed the exemption narrowly, this has not stopped the government from turning to it repeatedly to support its denial of requests for information. The scope of information available may further contract: Congress has recently expanded the exemption for law enforcement records and has considered several other proposals to limit access under FOIA. Moreover, FOIA’s procedure for obtaining information has become so costly and difficult that “[it] may become useless for all but the most patient and the best-financed citizens.”

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226 See Note, supra note 178, at 178, at 300 n.60.
228 See id. at 1049-63.
229 See id.; see also Note, Discovery of Government Documents and the Official Information Privilege, 76 Colum. L. Rev. 142, 153 (1976) (government has used exemptions as “ammunition” when resisting discovery).
232 Vaughn, Our Government Stymies Open Government, Wash. Post, July 1, 1984, at C1, col. 4; see also Gordon & Heinz, The Continuing Struggle over Citizen Access to Government Information, in Public Access to Information XX (A. Gordon & J. Heinz eds. 1979) (persons seeking access are discouraged by the extensive time and resources necessary to
federal "Sunshine Act" provides only limited protection, in that it applies only to meetings among members of agencies headed by collegial bodies.233 This leaves out proceedings of agencies with a single head234 as well as a number of adjudicatory and factfinding proceedings of covered agencies.

Meanwhile, most state laws are even less effective than their federal counterparts. State open records laws vary widely in the scope of information covered,237 and virtually all open records and open meetings laws contain broad exemptions.238 Under this statutory framework, the public continues to be denied access to important governmental information in a variety of contexts.

Beyond the deficiencies in present freedom of information laws, there are inherent problems with leaving protection of the right of access exclusively to the legislative and executive branches. First, this would prevent the courts from checking any self-protective tendency of bureaucrats and legislators to withhold information on their activities from public scrutiny.239 More importantly, as Judge Gibbons noted in his dissent in Capital Cities Media, Inc. v. Chester, there is something fundamentally disturbing about "a model of government in which elected executive or legislative branch officials are deemed to have been delegated the power to enforce their rights).239

233 See B. Braverman & F. Chetwynd, supra note 223, at 838. For a list of bodies covered by the Sunshine Act, see id. at 1097-99.

234 See id. at 841-42.


236 See, e.g., Society of Professional Journalists v. Secretary of Labor, 616 F. Supp. 569 (D. Utah 1985) (basing right of access to Mine Safety and Health Administration accident hearings directly on first amendment, implying no claim existed under Sunshine Act).


239 See W. Small, Political Power and the Press 394 (1972) (noting a Congressional Quarterly study showing that 37% of congressional committee meetings were held in secret executive sessions); see also Gore, Legislative Secrecy, in None of Your Business 140-45 (N. Dorsen & S. Gillers eds., 1974) (accounts of secret executive session and secret conference committee meetings); Note, supra note 178, at 300-03 (examples of officials' tendency toward secrecy).
to decide for us what we need to know." According to Judge Gibbons, this "'big brother' approach . . . carries with it the seeds of destruction of participatory democracy, for it places in the hands of those chosen for positions of authority the power to withhold from those to whom they should be accountable the very information upon which informed voting should be based." It is therefore unwise to exclude the judiciary from playing any role in the protection of the right of access.

Fortunately, there are less drastic means of dealing with the problem of judicial policymaking under the balancing test. Courts could take an approach similar to that developed by the Supreme Court in the area of commercial speech. Although commercial speech is protected by the first amendment, the Court has held that legislatures should be given more leeway in regulating commercial speech than they are given in regulating other forms of speech. Similarly, courts could recognize access to government-controlled information as a protected right but defer to legislative regulation of access as long as that regulation reasonably balanced the public's interest in access against the government's countervailing interests in closure. Where the legislature had not established any policy on access—as is widely true in many contexts today—the courts would step in to apply the balancing test themselves.

At least one court has already adopted such an approach to the right of access. In Sheridan Newspapers, Inc. v. City of Sheridan, the Wyoming Supreme Court found a constitutional right of access but noted that this right could be "conditioned" by statutory restrictions. The court stated that "the legislature [has] authority to promulgate . . . such statutory restraints upon the news-gathering business as will best serve the public good." The court nonetheless warned that such restraints could not "unlawfully deny the people's right to be informed."

This sort of approach restrains undue judicial intrusion into the policy realm by leaving the primary responsibility of policy balancing to the legislature. It allows the judiciary, however, to serve as a check on the legis-

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240 Capital Cities Media, Inc. v. Chester, 797 F.2d 1164, 1186 (3d Cir. 1986) (Gibbons, J., dissenting).
241 Id.
243 Cf. Note, supra note 178, at 343-48 (suggesting scheme of "coordinate implementation" of the right of access by the legislative and judicial branches).
244 660 P.2d 785 (Wyo. 1983).
245 See id. at 795.
246 Id.
247 Id.
lature, reviewing legislative regulation of access to ensure that the constitutional interest of the public is accorded its due weight in the balancing process, and stepping in to protect the right where the legislature has failed to address the issue at all. In this way, courts can ensure that, in all situations, the proper protection will be given to the people's "right to know."

IV. Conclusion

The right of access to government-controlled information is a vital corollary of the political purpose of the first amendment. Without some protection for access to governmental information, the first amendment cannot fulfill its role of ensuring an informed citizenry. In Richmond Newspapers, the Supreme Court finally took its first step in recognizing this right of access by holding that the public had a first amendment right to attend criminal trials.

Since Richmond Newspapers, two major "right of access" standards have emerged. In a series of cases following Richmond, the Supreme Court has fashioned a "two-prong" test which grants access only where there is a "tradition of openness" to the information in question, and where access contributes to the functioning of the particular process involved. The Court's decisions have also spurred the development of a balancing test under which the reviewing court weighs the interest in access against the government's interests in secrecy. Using these two standards, state and lower federal courts have extended the right of access to a variety of proceedings and information not yet addressed in decisions of the Supreme Court.

The two-prong test is fundamentally flawed, for it both abandons the Court's established approach to first amendment adjudication and bears little or no relation to the underlying purpose of the right of access. The balancing test is superior, in that it correctly focuses the inquiry on the political role of the right of access. This standard, however, creates a greater risk of judicial policymaking, leading some commentators to conclude that right of access decisions should be left exclusively to the legislative and executive branches. This solution is too extreme, because it leaves elected officials unchecked in their discretion to withhold information from those citizens to whom they should be accountable. This Note instead proposes that courts recognize access to governmental information as a protected right, but then defer to the legislature's balancing of that right against countervailing government interests, unless the result unreasonably impairs the political objective of the right of access. This would allow each branch to act on its strengths in shaping a right to know
that protects the underpinnings of American democracy without impairing the ability of that democracy to operate effectively.

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