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# More than Mere "Constitutional Window Dressing": Why the Press Clause Should Protect a Limited Right to Gather Information

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Comment*

# More than Mere "Constitutional Window Dressing": Why the Press Clause Should Protect a Limited Right to Gather Information

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* Mallory B. Rechtenbach, J.D. candidate, 2020, University of Nebraska College of Law. I would like to thank Brenna M. Grasz for all of her help throughout the writing process as well as my husband, Marcus Rechtenbach, for his constant encouragement and endless discussions of the Press Clause. I would also like to thank my parents, Andrew and Iris Sleight, as I would not be where I am without their continual support. Finally, thank you to the NEBRASKA LAW REVIEW, especially Executive Editor Sarah Gorsche, for preparing this Comment for publication.

## I. INTRODUCTION

The Constitution was intended to be an agreement made by the people to govern themselves.[1] The Framers eschewed what they considered tyranny: a government shrouded in secrecy.[2] In what was considered a radical experiment, the Framers, through the Constitution and the Bill of Rights, constructed an open political process rooted in democratic theory.[3] One leading First Amendment theorist stated, "public discussions of public issues, together with the spreading of information and opinion bearing on those issues, must have a freedom unabridged," and "though they govern us, we, in a deeper sense, govern them. Over our governing, they have no power. Over their governing we have sovereign power."[4]

For the first time in history, political theorists recognized that the electoral process was intimately linked to free expression.[5] Freedom of speech imparts information to the electorate, which allows the people to wisely choose their representatives.[6] Popular government requires popular information, and freedom of expression—the "principal pillar in a free government"—is the means to achieve these indispensable

1. Chief Justice John Jay, one of the authors of the Federalist Papers, observed in *Chisholm v. Georgia*, 2 U.S. 419 (1793) that "the Constitution of the United States is . . . [a] compact made by the people of the United States in order to govern themselves." LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 231 (1985).
2. "The generation that made the nation thought secrecy in government [was] one of the instruments of Old World tyranny and committed itself to the principle that a democracy cannot function unless the people are permitted to know what the government is up to." Envtl. Prot. Agency v. Mink, 410 U.S. 73, 105 (1973) (Douglas, J., dissenting) (quoting Henry Steels Commager).
3. Mary-Rose Papandrea, *Lapdogs, Watchdogs and Scapegoats: The Press and National Security Information*, 83 IND. L.J. 233, 238 (2008).
4. *Id.*
5. LEVY, *supra* note 1, at 134.
6. William Bollin and James Alexander, colonial theorists, "stressed the necessity and right of the people to be informed of the conduct of their governors so as to shape their own judgment on 'Publick Matters' . . . " creating a clear relationship between freedom of expression and elections. LEONARD W. LEVY, LEGACY OF SUPPRESSION 137–38 (1960).

ends.[7] Freedom of the press was intended to fulfill this specialized role; the freedom to publish using the printing press would ensure a popular government by informing the voters of a candidate's positions and record.[8] The "great bulwark of liberty"[9] was intended to be completely protected from regulation, as the federal government could exercise only enumerated powers.[10]

However, over two centuries later, there is still government control over the press—it has simply evolved. In 1946, President Harry S. Truman issued an executive order creating a uniform system of classification within the Executive Branch.[11] The categories of classification were subsequently expanded to "top secret," "secret," "confidential," and "restricted."[12] The power of the Executive Branch to classify documents and the scope of what can be classified has ebbed and flowed through different administrations.[13] While overt censorship, licensing, and taxing are no longer utilized to muzzle the press, unelected bureaucrats exploit the classification system to prohibit information from reaching the public sphere. Rather than freely disseminating government information to the polity, the prevailing attitude became "when in doubt, classify."[14] In the past, information was readily available, but freedom to express opinions was not yet secured. Now, there is essentially unqualified protection for opinions, but information is not so easily accessible.

The foundation of the Press Clause is a prohibition on prior restraints, which are restrictions on speech before its publication.[15] In *Near v. Minnesota ex rel. Olson*,[16] the Supreme Court made clear that under the First Amendment the government cannot censor publications through the use of prior restraints.[17] Beginning shortly thereafter, and escalating at a frightening pace since, the Executive Branch

7. James Alexander described free expression as "a principal pillar in a free government" and argued "the Constitution is dissolved," and tyranny is erected in its ruins if it is suppressed. JEFFREY ALLEN SMITH, WAR AND PRESS FREEDOM 28 (1999).
8. The Framers quickly realized that the existence of a free state as well as individual liberties depended in large part on the freedom and vigilance of the press. LEVY, *supra* note 1, at 273.
9. *Id.* at 251.
10. *Id.* at 270. All other unenumerated rights are reserved to the states or to the people by the Tenth Amendment. U.S. CONST. amend. X.
11. Exec. Order No. 9784, 11 Fed. Reg. 10,909 (Sept. 25, 1946).
12. Exec. Order No. 10,104, 15 Fed. Reg. 597, 598 (Feb. 1, 1950).
13. *See* Austin Harris, *Square Information, Round Categorization: Executive Order 13556 and Its Implementation Challenges*, 1 U. MIAMI NAT'L SEC. & ARMED CONFLICT L. REV. 165 (2011).
14. BRUCE LADD, CRISIS IN CREDIBILITY 188 (1968).
15. *Prior Restraint*, BLACK'S LAW DICTIONARY (10th ed. 2014).
16. Near v. Minnesota *ex rel.* Olson, 283 U.S. 697 (1931).
17. *Id.* at 713 ("[T]he operation and effect of the statute in substance" is the "essence of censorship.").

has avoided the prohibition on direct prior restraints by wielding the classification system to stifle information at the source.[18]

Justice Stewart, in his 1971 concurring opinion in the *Pentagon Papers* case, wrote, "[f]or when everything is classified, then nothing is classified, and the system becomes one . . . to be manipulated by those intent on self-protection or self-promotion."[19] Almost fifty years later, even in the world of the 24/7 news cycle, the American electorate has been largely cut off from information needed to fulfill its constitutional role of self-government due to the Executive Branch's culture of classification.

There are two consequences when government restricts access to information. First, the American electorate does not have the requisite information necessary to make enlightened decisions at the polls. When the Executive Branch has virtually unbridled power to classify, suppress, and withhold information, such power all but extinguishes the fundamental constitutional check: governing by the consent of the governed.[20] This "paper curtain" has created a direct barrier between a purportedly representative government and the people it represents.[21]

The second consequence of restricted access to information is the ability of government officials to shape public debate and, thus, policy through selectively leaking the information favorable to their position.[22] Walter Lippman once wrote, "men who have lost their grip upon the relevant facts of their environment are the inevitable victims of agitation and propaganda. The quack, the charlatan, the jingo and the terrorist can flourish only where the audience is deprived of independent access to information."[23] By only publicizing information on one side of the debate, government officials are able to put their thumb on the scale of political discourse.

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18. SAM LEBOVIC, FREE PRESS AND UNFREE NEWS 132 (2016).
19. N.Y. Times Co. v. United States, 403 U.S. 713, 729 (1971) (Stewart, J., concurring).
20. Information is required for our governmental system to properly function; without it, the balance of power is redistributed. Wallace Parks, *The Open Government Principle*, 26 GEO. WASH. L. REV. 1, 3–4 (1957).
21. *Id.* at 6. In 1956, the House Government Information Subcommittee stated "Slowly, almost imperceptibly, a paper curtain has descended over the Federal Government. Behind this curtain lies an attitude novel to democratic government—an attitude which says that we, the officials, not you, the people, will determine how much you are to be told about your own government." H.R. Rep. No. 86-2947 (1956).
22. *See* Genevra Kay Loveland, *Newsgathering: Second-Class Right Among First Amendment Freedoms*, 53 TEX. L. REV. 1440, 1466 (1975) ("In recent years, the government has increasingly used its control over access to information about its activities to disseminate—through selective leaking, backgrounders, deep backgrounders, and other methods—only information favorable to the government's position.").
23. WALTER LIPPMAN, LIBERTY AND THE NEWS 54 (1920).

While the First Amendment affords the press nearly complete autonomy to publish information, it affords virtually no protection to the press for newsgathering—creating a dichotomy between publication and newsgathering.[24] But the connection between gathering and publishing is self-evident: before one can publish information, one must gather information. The Supreme Court has stated in dicta that "without some protection for seeking out the news, freedom of the press could be eviscerated."[25] Yet, the current jurisprudence of the Court declines to recognize the connection between gathering and publishing, essentially holding that gathering is sufficiently "prior" to publication to permit restraints.[26] However, the right of the press to publish information is unavoidably impeded when the government inhibits the ability to gather information, which in turn prevents the electorate from intelligent self-government.

In order to give full effect to the First Amendment, newsgathering must be given *some* limited protection. This Comment begins from an originalist perspective of freedom of the press, then seeks to apply the underlying principles to current issues involving newsgathering in order to facilitate a revival of the Press Clause.[27] Part II will begin by examining the purpose and role of the First Amendment's Press Clause. It will then trace the current jurisprudence on newsgathering and provide an overview of the Freedom of Information Act (FOIA).[28] Part III will begin by delineating a broad interpretation of the First Amendment that encompasses corollary rights. It will then argue for a limited right to gather information under the First Amendment grounded on three current First Amendment doctrines: (1) restrictions against prior restraints; (2) protection for conduct necessary for expression; and (3) a structural model of the Press Clause which fosters intelligent self-government. Finally, it will discuss why the current protection under the FOIA is insufficient.

## II. BACKGROUND

### A. Purpose and Role of the First Amendment

"Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."[29] As simple as these words appear, their meaning

24. Steven Helle, *The News-Gathering/Publication Dichotomy and Government Expression*, 1982 DUKE L.J. 1, 40 (1982).
25. Branzburg v. Hayes, 408 U.S. 665, 681 (1972).
26. Helle, *supra* note 24, at 42.
27. Leonard W. Levy, *On the Origins of the Free Press Clause*, 32 UCLA L. REV. 177, 180 (1984) (stating the "principles—not the Framers' understanding and application of them—were meant to endure").
28. Freedom of Information Act, 5 U.S.C.A. § 552 (West 2016).
29. U.S. CONST. amend. I.

was not expressly manifested at the time of adoption.[30] Alexander Hamilton in Federalist No. 84 wrote, "who can give [freedom of the press] any definition which would not leave the utmost latitude for evasion?"[31] James Madison's original proposal stated, "the people shall not be deprived or abridged of the right to speak, to write, or to publish their sentiments; and freedom of the press, one of the great bulwarks of liberty, shall be inviolable."[32]

The Press Clause has often been treated as a redundancy of the Speech Clause, but the two clauses protect different methods of expression.[33] The Speech Clause safeguards the right to speak, whereas the Press Clause was originally intended to protect the freedom to use the printing press as a vehicle for promoting a popular government.[34] The freedom of the "press" occupied a "preferred position" under the Constitution,[35] not because the press as an institution was distinctive, but because the power of the printing press ensured that anyone could publish their insights on government.[36]

The Supreme Court has treated the Press Clause as mere "constitutional window dressing."[37] However, the Framers' *primary* concern was freedom of the press, with freedom of speech being ancillary.[38] The four foundational purposes of the Press Clause include (1) freedom from prior restraints; (2) protecting the "functional" role of the press; (3) providing a conduit for self-government through the discovery of truth; and (4) creating a check on governmental power through the "Fourth Estate."

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30. LEVY, *supra* note 1, at 266. In fact, most of the Framers were not particularly passionate about creating a Bill of Rights as the argument for enshrining individual liberties originated from the Anti-Federalists. *Id.* However, the Federalists, at James Madison's insistence, eventually agreed to frame and ratify the Bill of Rights in order to "give great quiet" to the people. *Id.*
31. THE FEDERALIST NO. 84, at 434 (Alexander Hamilton) (Ian Shapiro ed., 2009).
32. LEVY, *supra* note 1, at 251. A clear difference between the first version of the First Amendment and the adopted language is the addition of the word "Congress," which specifically curbed federal legislative authority over freedom of expression. The prohibition was limited to Congress because the Executive Branch was intended to be less powerful and thus less threatening. However, it is now well established that the First Amendment is applied to the exercise of presidential as well as legislative power and applies to the states through the Due Process Clause of the Fourteenth Amendment. *See* Parks, *supra* note 20, at 8–9.
33. Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. REV. 1025, 1033 (2011).
34. LEVY, *supra* note 1, at 273.
35. *Id.*
36. The word "press" has dual significance as both an institution that disseminates content and a technology for creating and distributing content. At the time of the ratification of the First Amendment, the freedom of the "press" referred to the use of the technology of the day—the printing press. *See* Jack M. Balkin, *Old-School / New-School Speech Regulation*, 127 HARV. L. REV. 2296, 2302 (2014).
37. West, *supra* note 33, at 1033.
38. David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 533 (1983).

The First Amendment was designed to provide complete freedom from censorship through the use of "prior restraints."[39] Prior restraints at their core are governmental orders or actions which prohibit the publication or broadcast of information before it is published.[40] The Blackstonian view of press freedom, which ripened under the milieu of suppression in England and the colonies during the use of licensing and taxing, was limited to liberty from any form of prior restraint.[41] In other words, "freedom of the press" meant that a message could not be muzzled prior to publishing, however, there was no protection from the government punishing the speaker after publication.

Suppressing speech prior to publication was considered a more dangerous affront to freedom of the press than punishing a speaker following publication.[42] In a regime of subsequent punishments, at least the message was disseminated, whereas it never reached the marketplace of ideas if a prior restraint was utilized.[43] This was the primary concern of libertarian political thought leading up to the Revolution.[44] After the Constitution was ratified, the fear was that enumerated powers, such as the power to tax, could be manipulated to stifle freedom of expression and prevent publication of information.[45] The absence of prior restraints was understood to preserve unrestricted liberty to write or publish, especially on topics concerning government.[46]

While the newly freed colonies understood the absence of prior restraints to be a critical component of press freedom, it was not consid-

39. *See* Tom A. Collins, *Press Clause Construed in Context: The Journalists' Right of Access to Places*, 52 MO. L. REV. 751, 758 (1987) (stating the text and historical analysis of the amendment provides strong evidence that it was intended to protect against prior restraints, while also emphasizing that printed speech was to be given specific and special protection).

40. Neb. Press Ass'n v. Stuart, 427 U.S. 539, 556 (1976). The Blackstonian view of press freedom prohibited the government from censoring speech *prior* to publication, but provided no shield against government punishment *after* publication. ZACHARIAH CHAFEE JR., FREE SPEECH IN THE UNITED STATES 9 (1941).

41. *See* Karen L. Turner, *Convergence of the First Amendment and the Withholding of Information for the Security of the Nation: A Historical Perspective and the Effect of September 11th on Constitutional Freedoms*, 33 MCGEORGE L. REV. 593, 595 (2002). The English government claimed that the right to control any printed material and publications were subject to review and censorship prior to printing. However, licensing ended in England in 1695 and in colonial America by 1725. *Id.* at 597.

42. Thomas I. Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648, 660 (1955).

43. *Id.* at 657.

44. LEVY, *supra* note 1, at 65.

45. *Id.* at 231. Richard Henry Lee observed that the enumerated power to tax could be exerted to "destroy or restrain the freedom" of the press. *Id.*

46. *Id.* at 191.

ered the only limitation on government action against the press. Blackstone's explanation of press freedom described the current state of English law, but the Framers of the First Amendment had a more expansive interpretation in mind.[47] Judge Cooley explained that true freedom of the press required a broader interpretation which protected against both prior restraints *and* subsequent punishment in order to guard against repressive actions of government. He wrote, "[t]he evils to be prevented were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters . . . ."[48] Thus, the First Amendment's scope begins with freedom from previous restraints, but does not end there.

Since the twentieth century, there has been substantial disagreement over whether the Press Clause was originally intended to apply to or protect "the press" as an institution. It is evident from the history surrounding ratification that the First Amendment was intended to protect the *functional* role of the press, guaranteeing that anyone had the freedom to publish their sentiments.[49] The Framers recognized the importance of using the printing press to publish and widely disseminate information, which facilitated popular government.[50] They believed the press fulfilled the function of informing the electorate, and "the electoral process would've been a sham if voters did not have the assistance of the press in learning what the candidate stood for and what the record showed about past performance and qualifications."[51] The Supreme Court has "consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers."[52] However, the Court has emphasized protection for the functional role of the press, arguing in *Lovell v. City of Griffin*[53] that "the press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion."[54] Thus, the functional press includes newspapers, books,

47. CHAFEE JR., *supra* note 40, at 9.
48. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION, 886 (8th ed. 1868).
49. Amy Jordan, *The Right of Access: Is There a Better Fit Than the First Amendment?*, 57 VAND. L. REV. 1349, 1360–61 (2004). The First Amendment allows the press to act as a vehicle for information which in turn educates and informs the polity. *Id.* at 1362.
50. *Id.* at 1368.
51. LEVY, *supra* note 1, at 213.
52. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 352 (2010) (quoting Austin v. Chamber of Commerce, 494 U.S. 652, 691 (1990) (Scalia, J., dissenting)).
53. Lovell v. City of Griffin, 303 U.S. 444 (1938).
54. *Id.* at 452. Freedom of the Press refers to the "freedom of the people to publish their views, rather than the freedom of journalists to pursue their craft." David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 446–47 (2002).

magazines, pamphlets and virtually any other medium for disseminating information or news to the public.[55]

Another fundamental purpose of the Press Clause is to facilitate self-government through the discovery of truth. Recognizing that men are only free when they are self-governed, the Framers utilized the Press Clause to prevent government from interfering with *any* communications so the people could fully exercise their rights as citizens.[56] The printing press was a conduit for self-governance; the people could both inform fellow citizens about important governmental matters and try to persuade them.[57] Therefore, the objective of the Press Clause is to ensure that "no opinion, no doubt, no belief, no counter-belief, no relevant information" may be kept from the electorate.[58] If all "relevant information" is published, then the marketplace of ideas will produce truth, democracy, and civic virtue.[59] However, truth will only emerge when governmental policies and officials are actively questioned and challenged.[60] The polity must rely on those who fulfill the function of the press in order to have the requisite information to make informed choices.[61]

Finally, the functional role of the press was intended to create a check on governmental power as the "Fourth Estate."[62] Anti-Federalists like Patrick Henry were particularly concerned that the Constitution's structure, which created checks and balances within the three branches of government, was an insufficient safeguard against se-

55. *Lovell*, 303 U.S. at 452; Mills v. Alabama, 384 U.S. 214, 219 (1966). This Comment's discussion of the "press" refers specifically to anyone who fulfills the functional role foreseen in the Press Clause of publishing information to enlighten and inform the people.

56. Parks, *supra* note 20, at 9.

57. Loveland, *supra* note 22, at 1464.

58. ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 89 (1966) (Lawbook Exchange 2014).

59. LEBOVIC, *supra* note 18, at 24; Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market."); Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2375 (2018) ("[T]he people lose when the government is the one deciding which ideas should prevail."). As James Madison clearly asserted, "[T]he right of freely examining public characters and measures, and a free communication thereon, is the only effective guardian of every other right." Parks, *supra* note 20, at 9.

60. CHAFEE JR., *supra* note 40, at 33.

61. LEVY, *supra* note 1, at 209.

62. ROBIN D. BARNES, OUTRAGEOUS INVASIONS: CELEBRITIES' PRIVATE LIVES, MEDIA, AND THE LAW 54 (2010) (Edmund Burke, an eighteenth-century British politician, is credited with declaring that "although there are three Estates in Parliament, the Reporters Gallery constituted a Fourth Estate . . . . Overnight, the term *Fourth Estate* became synonymous with the press. Its popularity is a testament to the notion that the avowed purpose of the Press Clause in the Constitution was to create a mechanism outside of governmental control as an additional check on the three official branches.").

crecy, abuse, and suppression.[63] Another counterbalance outside the government was necessary to limit potential misuse of power: the press. The Framers viewed freedom of the press as an indispensable component of a free government because it could thwart "government oppression and tyranny."[64] The press was in a unique position not only to critique the government, but also to disseminate information to the masses.[65]

This emphasis on the free flow of information once again evokes an overarching theme of the Press Clause: to inform the electorate.[66] As Justice Black eloquently argued in *Milk Wagon Drivers Union v. Meadowmoor Dairies*,[67]

> I view the guarantees of the First Amendment as the foundation upon which our governmental structure rests and without which it could not continue to endure as conceived and planned. Freedom to speak and write about public questions is as important to the life of our government as is the heart to the human body. In fact, this privilege is the heart of our government. If the heart be weakened, the result is debilitation; if it be stilled, the result is death.[68]

## B. The Court's Expansion of the First Amendment

### *1. The Developing Interpretation of Prior Restraints*

As discussed above, the First Amendment developed as a consequence of experience with prior restraints. However, the scope of both the Speech Clause and Press Clause have expanded significantly beyond their original reach.[69] As critical as these clauses were to the Framers, it was not until the 1930s that the Supreme Court definitively spoke about the constitutionality of previous restraints.

The Supreme Court's opinion in *Near*[70] was a seminal moment for freedom of the press. First, the Court emphatically stated that the First Amendment's protections were incorporated through the Fourteenth Amendment's Due Process Clause against the states.[71] Second,

63. SMITH, *supra* note 7, at 31. Patrick Henry stated at the Constitutional Convention that "[t]he liberties of a people never were, nor ever will be, secure when the transactions of their rulers may be concealed from them . . . ." DANIEL N. HOFFMAN, GOVERNMENTAL SECRECY AND THE FOUNDING FATHERS 35 (1981).

64. Timothy B. Dyk, *Newsgathering, Press Access and the First Amendment*, 44 STAN. L. REV. 927, 932 (1992) (quoting David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 487 (1983)).

65. Helle, *supra* note 24, at 8.

66. *Id.*

67. Milk Wagon Drivers Union of Chicago v. Meadowmoor Dairies, 312 U.S. 287 (1941).

68. *Id.* at 301–02.

69. Collins, *supra* note 39, at 759.

70. Near v. Minnesota *ex rel.* Olson, 283 U.S. 697 (1931).

71. *Id.* at 707. The Court previously stated that "the main purpose of such constitutional provisions is 'to prevent all such previous restraints upon publications as had been practiced by other governments.'" Patterson v. Colorado *ex rel.* Att'y

the Court looked to the "historic conception of the liberty of the press" to determine whether the "operation and effect" of the statute worked as a prior restraint.[72] In determining that the statute amounted to "effective censorship," the Court created a broad interpretation of prior restraint analysis instead of limiting it to its narrow original conception.[73] The statute at issue did not conform to the historic prior restraints utilized in England and the Colonies. Yet, in practice, the law would operate as a prior restraint bringing it within the domain of the Press Clause.[74] While the Court affirmed an unprecedented expansive view of press freedom, the opinion also stated in dictum that prior restraints might be constitutional in exceptional cases, such as times of war.[75]

Five years later in *Grosjean v. American Press Co.*,[76] the Supreme Court reiterated its commitment to freedom from any form of prior restraints or censorship while also restating a broad construction of the First Amendment.[77] This comprehensive interpretation was created to "preserve an untrammeled press as a vital source of public information . . . since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern."[78]

The prior restraint in *Grosjean* arose in the form of a tax, yet the Supreme Court viewed it as a façade to "limit the circulation of information to which the public is entitled."[79] The focus was once again on the "operation and effect" of the state action as a prior restraint rather than a narrow historic view of previous restraints. The emphasis on the role of the press as a conduit for information is also significant. The Court viewed the imposition of a tax on a newspaper as a violation of the freedom of the press because it would restrict the free flow of information to the electorate.[80]

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Gen. of Colo., 205 U.S. 454, 462 (1907) (quoting Commonwealth v. Blanding, 20 Mass. 304, 313–14 (1825)).

72. *Near*, 283 U.S. at 708 (determining that "[t]he object of the statute is not punishment, in the ordinary sense, but suppression of the offending newspaper or periodical").

73. *Id.* at 712.

74. Emerson, *supra* note 42, at 654–55.

75. *Near,* 283 U.S. at 716.

76. Grosjean v. Am. Press Co., 297 U.S. 233, 249 (1936).

77. *Id.* at 249.

78. *Id.* at 250 (highlighting the importance of "newspapers, magazines, and other journals" by stating that "a free press stands as one of the great interpreters between government and the people. To allow it to be fettered is to fetter ourselves.").

79. *Id.*

80. *Id.* at 249.

Both the Framers and Supreme Court justices have been justifiably concerned about prior restraints as opposed to subsequent punishment of speech. A system of subsequent punishment requires a governmental official to publicly prosecute the speaker *after* the communication has been published and entails an expenditure of time and money.[81] However, a prior restraint in any form suppresses the communication *before* it ever reaches the marketplace of ideas.[82] Additionally, prior restraints can be implemented behind the scenes by a single bureaucrat, whereas a prosecution initiated by the Executive in the Judiciary plays out on the public stage.[83] This danger of suppression led Chief Justice Burger to state that a subsequent punishment "chills" speech, while a prior restraint "freezes" speech.[84]

*2. The Expanded View of "Speech"*

Regardless of the Framers' original intent for the independence of the Press Clause, the Supreme Court has typically treated it as an extension of the Speech Clause. Therefore, it is necessary to analyze what is considered "speech" under the First Amendment.[85] It is apparent that the Speech Clause protects language as well as other forms of communication, such as the use of symbols.[86] However, there are three expansions of "speech" that are relevant to analyzing protections for newsgathering. First, the shelter of the First Amendment reaches beyond what is traditionally considered communication to nonverbal conduct "sufficiently imbued with elements of communication."[87] For example, the Supreme Court held that burning a flag to communicate a political message can fall within the ambit of the Speech Clause.[88] Second, conduct that is necessary or integrally tied to expression receives protection.[89] The distribution of handbills[90] or door-to-door so-

81. Emerson, *supra* note 42, at 657.

82. *Id.*

83. *Id.* at 657–58 (noting the danger of giving administrative officials the power of prior restraint and observing that these systems tend toward "unintelligent, overzealous, and usually absurd administration" which allows unelected bureaucrats to be "driven by fear or other emotion to suppress free communication").

84. Neb. Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976).

85. Anderson, *supra* note 54, at 430.

86. RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH 11–12 (3d ed. 1996 & Supp. 2001).

87. Spence v. Washington, 418 U.S. 405, 409 (1974). To focus merely on a citizen's "right to speak" overlooks many activities that the amendment protects. MEIKLEJOHN, *supra* note 58, at 95.

88. Texas v. Johnson, 491 U.S. 397, 418–19 (1989).

89. Barry P. McDonald, *The First Amendment and the Free Flow of Information: Towards a Realistic Right to Gather Information in the Information Age*, 65 OHIO ST. L.J. 249, 259 (2004).

90. Lovell v. City of Griffin, 303 U.S. 444, 452 (1938).

licitation[91] are examples of conduct that is not intrinsically expressive, but is closely entwined with expression.[92] Third, the Supreme Court has provided some measure of protection for conduct that is not expressive, but is "necessary to accord full meaning and substance" to explicit First Amendment guarantees.[93]

In *Lamont v. Postmaster General*,[94] the Court held that the right to receive information is a fundamental right, as the "dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers."[95] Two decades later in *Board of Education v. Pico*,[96] the plurality stated that the right to receive information is an "inherent corollary to the rights of free speech and press" because it inevitably follows a speaker's communication and it is an essential underpinning to the recipient's free expression.[97]

It is also important to remember that just because a particular form of expression falls within the scope of the First Amendment, that does not mean that the government is unable to limit the expression. When speech and nonspeech elements are both involved in conduct, the *O'Brien* test allows the government to regulate the nonspeech aspect if: (1) it is justified by a sufficiently important governmental interest; (2) that interest is not related to suppressing the speaker's expression; and (3) the incidental restriction on the speech element is no greater than necessary to further the government's interest.[98] However, if the government attempts to limit conduct that is a pretext to suppress the speaker's expression, the regulation can only stand if it survives strict scrutiny, the most rigorous standard of constitutional review.[99]

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91. Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton, 536 U.S. 150, 168–69 (2002).

92. McDonald, *supra* note 89, at 259.

93. *Id.* at 260.

94. Lamont v. Postmaster Gen., 381 U.S. 301 (1965).

95. *Id.* at 308.

96. Bd. of Educ. v. Pico, 457 U.S. 853 (1982) (plurality opinion).

97. *Id.* at 867.

98. United States v. O'Brien, 391 U.S. 367, 376–77 (1968). Similarly, the government is traditionally permitted to regulate expression if it is on a content-neutral basis such as time, place, or manner restrictions that are justified without reference to the content of the expression and are narrowly tailored to serve a significant government interest. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

99. *See* City of Erie v. Pap's A.M., 529 U.S. 277, 278 (2000); Texas v. Johnson, 491 U.S. 397, 403 (1989). This is treated similarly to a content-based restriction, which requires the challenged regulation to advance a compelling interest and be the least restrictive means of achieving that interest. Reed et. al. v. Town of Gilbert, 135 S. Ct. 2218, 2231 (2015).

## C. Current Interpretation of the Right to Gather Information

### *1. The Supreme Court's Principles in Access and Newsgathering Cases*

Relatively few newsgathering cases have reached the Supreme Court, and many of the cases that have reached the highest Court have involved access to places, such as criminal trials or hearings, rather than the gathering of information. Nevertheless, there are several principles that can be distilled from Supreme Court precedent.

First, the Supreme Court has been unwilling to give the institutional press any special privileges, such as access to places or information, that are not shared by the general public.[100] As long as a particular government restriction does not single out the press for disadvantages but instead treats them on an equal playing field with average citizens, a regulation limiting access or information is constitutional regardless of whether it impedes effective reporting.[101] Unfortunately, this concern over granting the institutional press special rights—instead of focusing on the functional role of the press in our constitutional scheme—has colored many of the Court's decisions in this area of law.[102]

However, a few justices have recognized and argued for the distinction between protections for the *institutional* press verses the *functions* of the press. In *Saxbe v. Washington Post Co.*,[103] Justice Powell filed a powerful dissent arguing that the press should not receive special privileges based on being a member of the institutional press, but because they are "agent[s] of the public at large" whose constitutional role is to inform the electorate.[104]

While *Branzburg v. Hayes*[105] acknowledged in dictum that "without some constitutional protection for seeking out the news, freedom of the press could be eviscerated,"[106] the Supreme Court has typically upheld the dichotomy between newsgathering and publication.[107]

100. Pell v. Procunier, 417 U.S. 817, 834 (1974) (holding that the First Amendment provides no affirmative duty on the government to give journalists information that is not available to the general public); Branzburg v. Hayes, 408 U.S. 665, 682 (1972).

101. *See* Saxbe v. Wash. Post Co., 417 U.S. 843, 847 (1974) (declining to apply the policy in question to prohibit a person who was otherwise eligible to visit inmates from doing so on the basis of being a member of the press).

102. *See* Houchins v. KQED, Inc., 438 U.S. 1, 12 (1978) (framing the issue as the press claiming a "special privilege of access" which the Court firmly rejected).

103. *Saxbe*, 417 U.S. 843 (1974).

104. *Id.* at 863 (Powell, J., dissenting).

105. Branzburg v. Hayes, 408 U.S. 665 (1972).

106. *Id.* at 681.

107. *Id.* ("But these cases involve no intrusions upon speech or assembly, no prior restraint or restriction on what the press may publish, and no express or implied

Thus, communication is protected by the First Amendment, but access or newsgathering is "not essential to guarantee the freedom to communicate or publish."[108] This distinction stems from the Supreme Court's opinion in *Zemel v. Rusk,*[109] and has been carried through many of the newsgathering cases. However, it is important to note that in *Zemel*, the plaintiff requested permission to travel to Cuba "to satisfy his curiosity"—not to publish or disseminate the information.[110] Several dissents have dissolved this dichotomy, stating:

> a corollary to the right to publish must be the right to gather news . . . . No less important to the news dissemination process is the gathering of information. News must not be unnecessarily cut off at its source, for without freedom to acquire information the right to publish would be impermissibly compromised.[111]

The Supreme Court has traditionally refused to allow the First Amendment to be used as a "sword" to affirmatively compel information, especially from the government. In *Pell v. Procunier*,[112] the Supreme Court emphatically stated that the Constitution does not impose on the government the "affirmative duty to make available to journalists sources of information not available to members of the public generally."[113] The Court seemed to imply that while government officials could not unduly interfere with newsgathering, journalists could not compel the government to provide information.[114]

Further, in *Houchins v. KQED, Inc.*,[115] the plurality asserted that any protection under the First Amendment for newsgathering did not apply when seeking information in the government's control.[116] In the plurality's view, government-controlled information was outside the realm of the First Amendment and squarely within the political or legislative processes.[117] However, this standard seems incongruous with the Court's consistent warnings that governmental or political speech occupy the "core" of First Amendment protection.[118]

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command that the press publish what it prefers to withhold. No exaction or tax for the privilege of publishing, and no penalty, civil or criminal, related to the content of published material is at issue here.").

108. *See* Houchins v. KQED, Inc., 438 U.S. 1, 12 (1978); *See also Saxbe*, 417 U.S. at 858 (Powell, J., dissenting) ("[T]he dichotomy between speech and action, while often helpful to analysis, is too uncertain to serve as the dispositive factor in charting the outer boundaries of First Amendment concerns.").
109. Zemel v. Rusk, 381 U.S. 1 (1965).
110. *Id.* at 4 (holding "the right to speak and publish does not carry with it the unrestrained right to gather information").
111. *Branzburg*, 408 U.S. at 727–28.
112. Pell v. Procunier, 417 U.S. 817 (1974).
113. *Id.* at 836.
114. McDonald, *supra* note 89, at 312.
115. Houchins v. KQED, Inc., 438 U.S. 1 (1978).
116. *Id.* at 12.
117. *Id.*
118. McDonald, *supra* note 89, at 309.

Only in more recent cases has the Supreme Court begun to recognize the societal values underlying the First Amendment and their direct connection to newsgathering. For example, in Justice Powell's *Saxbe* dissent he emphasized the societal function of press freedom in promoting an "unfettered" and "informed" public debate.[119] He contended that government regulations that undermine this function by incidentally restricting speech through limits on newsgathering must be justified by a substantial governmental interest unrelated to the suppression of expression and limit no more expression than is necessary, which is similar language to the *O'Brien* standard mentioned above.[120] Justice Stevens' dissent in *Houchins* also argued that the fundamental objective of freedom of speech and press is maintaining the free flow of information to the electorate in order to preserve the process of self-governance.[121]

Finally, in *Richmond Newspapers, Inc. v. Virginia*,[122] the plurality agreed that the First Amendment's goal of fostering communication mandated access to criminal trials.[123] The Court decided that certain unarticulated rights are "implicit in enumerated guarantees."[124] The concurrence of Justice Brennan in *Richmond Newspapers* took this argument one step further: underscoring the structural role of the First Amendment in fostering self-government, he stated, "[t]he structural model links the First Amendment to that process of communication necessary for a democracy to survive, and thus entails solicitude not only for communication itself, but also for the indispensable conditions of meaningful communication."[125]

Ultimately, the only affirmative grant of access the Supreme Court has provided is in the context of criminal trials. In *Globe Newspaper Co. v. Superior Court*,[126] the majority held that access could only be denied to a criminal trial if it survived strict scrutiny due to the "broad principles" underlying the Speech and Press Clauses, which secured unenumerated rights necessary to the enjoyment of other First Amendment rights.[127] The analysis adopted by the Court in this case,

119. Saxbe v. Wash. Post Co., 417 U.S. 843, 863 (1974) (Powell, J., dissenting) ("An informed public depends on accurate and effective reporting by the news media. No individual can obtain for himself the information needed for the intelligent discharge of his political responsibilities.").
120. *Id.* at 655.
121. *Houchins*, 438 U.S. at 36 (Stevens, J., dissenting).
122. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (plurality opinion).
123. *Id.* at 580. The Court further stated that "[p]eople in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Id*. at 572.
124. *Id.* at 579.
125. *Id.* at 587–88 (Brennan, J., concurring).
126. Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982).
127. *Id.* at 604. The Court held that free discussion of governmental affairs guarantees that citizens can successfully participate in our system of self-government. *Id.*

however, could easily be extended to other areas of access or newsgathering. The Supreme Court also adopted Justice Brennan's two "helpful principles" from his concurrence in *Richmond Newspapers*. First, the Court looked to whether the particular proceeding had historically been open to the press and public.[128] The second consideration was whether public scrutiny of a criminal trial enhanced the integrity of the proceeding.[129] To summarize, even though the Court has taken a step toward safeguarding newsgathering in the context of criminal trials, there has still been a reluctance to extend this protection any further.

### *2. The Statutory Right to Gather Information*

While the primary focus of this Comment is newsgathering within the context of the First Amendment, it is also necessary to look at statutory protections for the gathering of information. The Freedom of Information Act (FOIA)[130] was originally passed in 1966 in response to swelling Executive power and escalating public distrust of government.[131] The FOIA was an attempt by Congress to curb the ever-expanding reach of the Executive bureaucracy and reinstate a semblance of oversight.[132] Congress' goal was to promote openness in government so the people, and particularly the press as the Fourth Estate, could be the vigilant watchdog of corruption, waste, and unnecessary secrecy.[133]

The FOIA provides a statutory basis for any citizen to obtain federal agency records.[134] The law provides a presumption of access and places the burden of proof on the government if it attempts to withhold information.[135] There are nine legal categories exempted from disclosure under the FOIA. These exemptions include records related solely to the internal personnel rules and practices of an agency (Ex-

128. *Id.* at 605 (underscoring that the right of access is specifically limited to the context of criminal trials; however, this analysis could easily be extended to other contexts).
129. *Id.* at 606.
130. Freedom of Information Act, 5 U.S.C.A. § 552 (West 2016).
131. Jordan, *supra* note 49, at 1374. The rising secrecy state led Congressman John Moss on a twelve-year crusade to pass the FOIA. Moss famously stated, "We must remove every barrier to information about—and understanding of—government activities consistent with our security if the American public is to be adequately equipped to fulfill the ever more demanding role of responsible citizenship." David L. Hudson Jr., *50 Years Later, Freedom of Information Act Still Chipping Away at Government's Secretive Culture*, ABA J. (July 2016), http://www.abajournal.com/magazine/article/50th_anniversary_of_the_freedom_of_information_act [https://perma.unl.edu/TYE4-2299].
132. MICHAEL SCHUDSON, THE RISE OF THE RIGHT TO KNOW 57 (2015).
133. Jordan, *supra* note 49, at 1375–76.
134. Turner, *supra* note 41, at 602.
135. *Id.* at 602–03.

emption 2), trade secrets or financial information (Exemption 4), and information that would constitute an unwarranted invasion of personal privacy (Exemption 6).[136]

Federal agencies have historically interpreted the exemptions, especially Exemption 1 and Exemption 5, broadly.[137] Under Exemption 1, agencies are permitted to withhold information that is specifically authorized by an executive order to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such executive order.[138] Exemption 5, which has become known as the "withhold it because you want to" exemption,[139] allows agencies to refuse to release information that would be considered privileged in a legal proceeding or fall under "deliberative process."[140] This protects any agency communication that is (1) predecisional, meaning prior to adoption of a policy; and (2) deliberative, meaning any documents expressing opinions on policy or legal issues.[141] To provide a picture of how these exemptions have been used to suppress the release of information, during fiscal year 2014, federal agencies cited exemptions to suppress information in over 550,000 documents related to almost 220,000 requests.[142]

Next, this Comment will apply the originalist understanding of the First Amendment while advocating for a broad interpretation of the Press Clause and a limited right to gather information constructed on both the First Amendment itself and the structural model of freedom of expression.

## III. ANALYSIS

The Supreme Court's expanded view of what constitutes speech, as well as a nearly universal prohibition on prior restraints, has had a significant impact on how the Executive Branch handles information. The New Deal gave rise to a centralized Executive that deposed the Legislative Branch as the center of policymaking.[143] Prior to the New Deal there were only two significant regulatory agencies: the Interstate Commerce Commission and the Federal Trade Commission.[144] Soon, these "quasi-legislative, quasi-executive, quasi-judicial" agen-

136. 5 U.S.C.A. § 552 (West 2016).
137. STAFF OF H. COMM. ON OVERSIGHT & GOV'T REFORM, 114TH CONG., FOIA IS BROKEN: A REPORT 8 (2016) [hereinafter FOIA IS BROKEN].
138. 5 U.S.C.A. § 552 (West 2016).
139. FOIA IS BROKEN, *supra* note 137, at 10.
140. *Id.* at 9–10.
141. *Id.* at 9.
142. Gardiner Harris, *House to Weigh Overhaul of Open Records Process*, N.Y. TIMES (Jan. 11, 2016), https://www.nytimes.com/2016/01/11/us/politics/house-to-weigh-overhaul-of-open-records-process.html [https://perma.unl.edu/UF5H-69LK].
143. LEBOVIC, *supra* note 18, at 56–58.
144. SCHUDSON, *supra* note 132, at 244.

cies became essential to the structure and operation of the federal government.[145] Executive agencies also began using formal press conferences and news releases to generate public support for policies.[146] Simultaneously, Congress struggled to compete with the swiftly inflating Executive while continuing its constitutionally proscribed role of oversight.[147]

In *Smith v. Daily Mail Publishing Co.*,[148] the Court held that when the press "lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information."[149] The Supreme Court no longer allowed explicit censorship, so instead the Executive stifled the flow of information at the source, crafting a new form of prior restraint.[150] The secrecy state originally developed out of wartime fear, but soon decisions regarding what should be released to the public became progressively political.[151]

Today, the Executive Branch has nearly unchecked control over the flow of information to the electorate through the classification system.[152] Government officials selectively leak information to the press allowing only the release of information favorable to their position while classifying the unfavorable information.[153] In 2017, the Executive Branch made 58,501 original classification decisions and over 49 million derivative classification decisions.[154] While the total number of classification decisions was the lowest since 2008, the abuse of the classification system remains a cause for concern, as much of what is deemed "classified" is done so for illegitimate reasons.[155] Former Solicitor General Erwin Griswold stated, "it quickly becomes apparent to

145. *Id.*
146. LEBOVIC, *supra* note 18, at 56–58.
147. SCHUDSON, *supra* note 132, at 254.
148. Smith v. Daily Mail Publ'g Co., 443 U.S. 97 (1979).
149. *Id.* at 103. Once information is "publicly revealed" or "in the public domain" a court cannot restrain its dissemination without violating the First Amendment. Okla. Publ'g Co. v. Dist. Court, 430 U.S. 308, 311–12 (1977).
150. LEBOVIC, *supra* note 18, at 132.
151. *Id.* at 118.
152. Papandrea, *supra* note 3, at 236.
153. Loveland, *supra* note 22, at 1466. One could argue that these leaks or whistleblowers are a sufficient method of acquiring government information. However, this method is "uncertain and haphazard" rather than permitting a free flow of information. McDonald, *supra* note 89, at 311 n.225.
154. INFO. SECURITY OVERSIGHT OFF., 2017 REPORT TO THE PRESIDENT 1 (2017), https://www.archives.gov/files/isoo/reports/2017-annual-report.pdf [https://perma.unl.edu/XR39-TRSX].
155. COMM'N ON PROTECTING & REDUCING GOV'T SECRECY, REPORT OF THE COMMISSION ON PROTECTING AND REDUCING GOVERNMENT SECRECY, S. DOC. NO. 105-2, at 36 (1997) (quoting Former National Security Council Secretary Rodney McDaniel who estimated that only ten percent of classification decisions are made for a legitimate purpose).

any person who has considerable experience with classified material that there is massive overclassification and that the principal concern of the classifiers is not with national security, but rather with the governmental embarrassment of one sort or another."[156]

As the government suppression of information burgeoned, a new form of democracy took root in the United States. Instead of citizens holding their government accountable only on election day, the mid-1960s saw the emergence of continual accountability through an adversarial media, think tanks, public opinion polling, and nongovernmental watchdog agencies.[157] A flourishing cultural appreciation for governmental transparency developed, which valued accessibility of information over secrecy.

Without some protection for newsgathering activities, the electorate is unable to discover information necessary to self-governance. As stated in *Smith*, "[a] free press cannot be made to rely solely upon the sufferance of government to supply it with information."[158] Yet, thus far, the Supreme Court has been emphatic in stating that there is no protection for a right to gather under the First Amendment.[159] However, as discussed above, there are two distinctions that the Court has failed to make which have blurred the issue. First, the Court has refused to acknowledge a distinction between the Speech Clause and the Press Clause, instead treating the latter as a mere redundancy. Yet, it is clear from the original meaning of the Press Clause that it was intended to specifically protect the use of the printing press for the wide dissemination of ideas, particularly those of a political nature.[160]

Second, although the Court is correct in asserting that the press should not be given special *institutional* protections based on the original meaning of the First Amendment, the history of the Press Clause clearly demonstrates that it was intended to provide a shield for the *functional* role that any citizen performs when she writes down and publishes material with the intent of disseminating it.[161] Thus, the Press Clause should be read to provide separate safeguards for anyone who fulfills the functional role of utilizing a modern "printing press."

It is upon this foundation that a limited right to gather information can be constructed. The analysis will begin by advocating for a broad construction of the scope of the First Amendment. Next, it will propose three primary arguments for why the First Amendment's Press and Speech Clauses, as interpreted consistently with their original meaning, should encompass a limited right of newsgathering: (1) the Press

156. *Id.* at A-63.
157. SCHUDSON, *supra* note 132, at 24–25.
158. Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 104 (1979).
159. Branzburg v. Hayes, 408 U.S. 665, 681 (1972).
160. LEVY, *supra* note 1, at 273.
161. Jordan, *supra* note 49, at 1361.

Clause forbids the government from using prior restraints, yet restrictions on newsgathering act as a form of prior restraint; (2) newsgathering activities that are directly tied to expression should fall within the ambit of the Speech and Press Clauses; and (3) a structural analysis of the First Amendment lends support for recognizing newsgathering as a systemic right.

### A. The First Amendment's Scope Should Be Interpreted Broadly and Include Protection of Corollary Rights

It is important to begin with a foundational understanding of the scope of the Press Clause to understand why its interpretation should include a broad protection of corollary rights. The Supreme Court has stated that the liberty of the press must be given the "broadest scope that explicit language, read in the context of a liberty-loving society, will allow."[162] Thus, not only should the clause be interpreted with the broadest scope possible, but it should also be construed in a way to promote *liberty*. The Supreme Court has held that the free flow of information, which underscores press liberty, necessarily embraces corollary rights such as the right to receive information,[163] the right to distribute information,[164] the freedom of inquiry,[165] and the right to read.[166] The "spirit of the First Amendment" restrains the government's ability to diminish the range of available information.[167] This governmental restraint promotes the freedom of speech and press; it protects both the speech and the speaker, comprising the ideas that flow from each.[168]

In order for the First Amendment to protect the free flow of information, it must encompass "peripheral rights," which secure the clause's enumerated rights.[169] First, these corollary rights affirm the purposes underlying free expression. The Court has held that the Speech Clause and Press Clause require protection for the right to receive information, as the marketplace of ideas would be desolate if there were "only sellers and no buyers."[170] Second, the First Amendment safeguards the right to distribute information.[171] The freedom to

162. Bridges v. California, 314 U.S. 252, 263 (1941).
163. Kleindienst v. Mandel, 408 U.S. 753, 762–63 (1972) (emphasizing that freedom of speech "protects the right to receive information and ideas").
164. Martin v. Struthers, 319 U.S. 141, 143 (1943).
165. Wieman v. Updegraff, 344 U.S. 183, 193 (1952) (stating that "[w]hen used to shackle the mind [test oaths] are . . . unspeakably odious to a free people").
166. Stanley v. Georgia, 394 U.S. 557, 568 (1969) (holding that the right to read and observe is "fundamental to our scheme of individual liberty").
167. Griswold v. Connecticut, 381 U.S. 479, 482 (1965).
168. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 341 (2010).
169. *Griswold*, 381 U.S. at 482–83.
170. Bd. of Educ. v. Pico, 457 U.S. 853, 867 (1982) (plurality opinion).
171. Lovell v. Griffin, 303 U.S. 444, 452 (1938).

circulate information is critical to our democratic institutions; therefore, the dissemination of ideas cannot be restricted.[172] Furthermore, circulating information cannot be divorced from publishing information because publication without circulation would lose its value.[173]

Examining the Press Clause's peripheral rights provides a basis for a limited right to gather as a corollary to the First Amendment. Just as the right to receive or distribute information is necessary for the full enjoyment of the freedoms of speech and the press, so too is the right to gather information. With an established scope of the First Amendment, a limited right to gather information can now be composed.

## B. Argument for a Limited Right to Gather Information Under the First Amendment

### *1. Restrictions on Newsgathering as a Form of Prior Restraint*

The Executive Branch's unchecked power to control the flow of information has created a new form of prior restraint. Though direct restrictions on publication have been held unconstitutional,[174] controlling information at its source has the same outcome—preventing publication—without the government fearing prior restraint analysis by the courts. Thus, the Supreme Court has usually avoided the critical question in newsgathering cases: is a restraint on newsgathering a prior restraint on publication?

This element of the analysis has been circumvented because the Supreme Court has bifurcated *publication* from *newsgathering*.[175] Instead of treating newsgathering as an essential component of the publication process, a dichotomy has been instilled that provides protections for publishing, but not newsgathering.[176] By creating this dichotomy, the Court can apply prior restraint analysis to restrictions on publication, while declining to apply the same analysis to restrictions on newsgathering. While any prior restraint of publication is un-

172. Martin v. Struthers, 319 U.S. 141, 146–47 (1943). Any restriction on the distribution of information must be examined by weighing the circumstances and substantiality of the purposes given in support of the restriction. Schneider v. Town of Irvington, 308 U.S. 147, 161 (1939).

173. *Lovell*, 303 U.S. at 452. Preeminent First Amendment scholar Thomas Emerson argued that the "reverse side of the coin" of the right to speak is the right to receive information and the right to obtain information. Thomas I. Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U. L.Q. 1, 2 (1976).

174. N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971) (stating "any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity" (quoting Bantam Books v. Sullivan, 372 U.S. 58, 70 (1963))).

175. Helle, *supra* note 24, at 42.

176. Erik Ugland, *Demarcating the Right to Gather News*, 3 DUKE J. CONST. L. & PUB. POL'Y 113, 182 (2008).

constitutional, it seems that newsgathering is apparently too removed or satisfactorily "prior" to publication, thus restraints on newsgathering are permitted.[177]

Regardless of the supposed distinction between gathering and publishing, permitting restraints on newsgathering inevitably controls what can be published. Just as the right to receive information is an "inherent corollary" to the freedom of speech,[178] the right to gather information is a necessary corollary to the freedom of the press.[179] When the government restricts access to information as a pretext for regulating what information can be published, this is a prior restraint and should be a violation of the First Amendment.[180]

Further, allowing the Executive Branch in particular to have the power to limit or control newsgathering activities permits unelected bureaucrats to "dictate the content of the news."[181] The original intent behind the Press Clause was the libertarian precept that the government should have no role in determining what should be published.[182] The Bill of Rights does not contain any affirmative rights, but instead contains negative rights that place restrictions on the exercise of governmental power as a mechanism for protecting individual liberties.[183] Therefore, a right to gather should likewise be viewed as a negative right limiting the government's ability to withhold, suppress, or censor information. However, by upholding the publication/gathering dichotomy, which permits restraints on gathering, the Judiciary has enabled the Executive to decide what should and should not be published, directly undermining the purpose of the freedom of the press.[184]

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177. Helle, *supra* note 19, at 36.

178. Bd. of Educ. v. Pico, 457 U.S. 853, 867 (1982) (plurality opinion).

179. Jordan, *supra* note 49, at 1364.

180. *See* Helle, *supra* note 24, at 45 ("[I]f the entity that controls gathering effectively controls publication, the dichotomy collapses . . . and government obtains a distinct advantage in the contest between government and the press.").

181. *Id.* at 43 (observing that journalists report the "news" that government officials reveal). The press is rarely successful in uncovering information that the government intends to keep secret as numerous "public information specialists" spend their careers managing and filtering the information the electorate receives. *Id.* at 44.

182. LEVY, *supra* note 1, at 270.

183. *See also* Jordan, *supra* note 49, at 1358 (stating that there are two different forms of provisions in the Constitution: those that deal with the balance of power between the various branches and the states, and those that restrict the exercise of governmental power of individual rights).

184. *See* Vincent Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 MINN. L. REV. 11, 73 (1981) ("To trust the censor more than the audience is to alter the relationship between state and citizen that is central to the philosophy of limited government.").

*2. The First Amendment Creates Protection for Newsgathering that is Directly Tied to Expression*

To reiterate, the Supreme Court has bifurcated the publication process into two distinct stages: gathering and publishing. This bifurcation has resulted in the Court applying two different standards when analyzing a government restraint at each stage. Publishing is considered "expressive" and is analyzed under traditional First Amendment principles.[185] Newsgathering, on the other hand, is considered "nonexpressive" and therefore is not afforded First Amendment protection.[186]

Dividing the process of publication into two distinct phases, however, is inconsistent with the Court's own First Amendment precedent. In *Citizens United v. Federal Election Commission*,[187] for example, the Court stated that "laws enacted to control or suppress speech may operate at different points in the speech process."[188] Campaign–finance regulations were held to implicate First Amendment protection not because money *is* speech, but because money *facilitates* political speech.[189] The government was not permitted to silence particular voices regardless of where in the speech process the restriction occurred.[190] Further, in *First National Bank of Boston v. Bellotti*,[191] the Court stated that 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."[192] However, the Court has abandoned this precedent and allows the government to do just that by controlling newsgathering activities and thus limiting the information that reaches the public sphere.

As discussed in subsection II.B.2, the Supreme Court has expanded the concept of "speech" under the First Amendment to apply to

185. McDonald, *supra* note 89, at 258–59. *See also* Steven Helle, *Reconsidering the Gathering/Publication Dichotomy*, 33 N. ILL. U. L. REV. 537, 541 (2013) ("[I]f the government action was not aimed directly at publication, it was not aimed at the First Amendment.").

186. McDonald, *supra* note 89, at 268. Gathering has not been analyzed under First Amendment prior restraint analysis but could be even more effective at suppressing information than an actual restraint on publication. Helle, *supra* note 185, at 557.

187. Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

188. *Id.* at 336.

189. *Id.* at 339–40. *See also* Buckley v. Valeo, 424 U.S. 1, 19 (1976) (Restricting money in campaigns "necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.").

190. *Citizens United*, 558 U.S. at 337.

191. First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 783 (1977).

192. *Id.*

conduct that is integrally tied to expression.[193] The Court has also granted some protection for conduct that is not expressive in and of itself, but is "necessary to accord full meaning and substance" to explicit First Amendment guarantees.[194] Even in access cases, the Court has implied that this protection exists by stating the "First Amendment is thus broad enough to encompass those rights that, while not unambiguously enumerated in the very terms of the amendment, are nonetheless necessary to the enjoyment of other First Amendment rights."[195]

Stated simply, the government is permitted to regulate expressive conduct only if the regulation is attempting to control the nonexpressive aspects of the conduct and is unrelated to the suppression of the expression itself.[196] In light of this, if "newsgathering" is divorced from publication, it is not expressive conduct that would traditionally enjoy First Amendment protection because the publication and dissemination are the expressive components. However, courts have refused to "disconnect the end product from the act of creation" in other contexts.[197] In the world of the 24/7 news cycle, there is a continuous process of gathering information with the express intent of informing the public through editing the gathered news and then disseminating it.[198]

Just as the process of political speech in campaigns includes raising money to facilitate the speech, the process of publication includes gathering information to facilitate the functional role of the press. While newsgathering in and of itself might not be expressive, it is the necessary antecedent to publication and is undertaken with the clear objective of expression.[199]

Protecting newsgathering activities that are directly linked to expression (publication) respects the original meaning and textual limitations of the First Amendment, while also fulfilling the underlying goals of facilitating debate and informing the public.[200] Furthermore, this would provide a precise limitation on a newsgathering right under the First Amendment, whereas a more universal "right to know" would have no limiting factor and would be inconsistent with both the original meaning of the Speech and Press Clauses as well as

193. McDonald, *supra* note 89, at 259.
194. *Id.* at 260.
195. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 604 (1982).
196. United States v. O'Brien, 391 U.S. 367, 377 (1968).
197. Anderson v. City of Hermosa Beach, 621 F.3d 1051, 1061–62 (9th Cir. 2010).
198. Helle, *supra* note 24, at 45.
199. McDonald, *supra* note 89, at 344.
200. *Id.* at 345. *See also* Mills v. Alabama, 384 U.S. 214, 218 (1966) ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect free discussion of governmental affairs.").

the Court's precedent.[201] Under this conception of newsgathering, anyone who fulfills the functional role of the press by gathering information with the evident intention of disseminating it would be afforded protection.[202] Thus, journalists, scholars, bloggers, and the "lonely pamphleteer" would all be protected as long as they are engaged in newsgathering with the intention of communicating the information gathered to the public.[203] This conception provides a direct link between the gathering of information and the expressive nature of publication, pulling newsgathering firmly within the ambit of the First Amendment.

### *3. The Structural Model of the First Amendment Requires Protection for Newsgathering in Order to Foster Intelligent Self-Government*

Freedom of expression, embracing both freedom of speech and of the press, necessarily recognizes the individual's right to have personal opinions and communicate them. However, there is also a vital societal interest cultivated by free expression: the dissemination of information through "uninhibited, robust, and wide-open" public debate.[204] It is through this collective process that the First Amendment plays a fundamental role in the structure of government.[205] The structural model links public debate fostered by free expression to our republican system of self-government.[206] The communication protected by the First Amendment promotes not only knowledge, but "sane and

201. McDonald, *supra* note 89, at 344–45. McDonald advocates for several requirements in order to claim First Amendment protection for information-gathering. These requirements would promote the societal interests of the First Amendment rather than individual interests. First, the content of the information sought should be about general matters of public concern, such as governmental affairs. *Id.* at 345–48. Second, there must be an intent to disseminate the information, which would promote the functional role of the Press Clause. *Id.* at 348–49. Finally, the person attempting to obtain the information of public concern in order to disseminate it should have certain bona fides to ensure that the information will be collected in a responsible manner and will indeed be dispersed to the public. *Id.* at 350–51.

202. Collins, *supra* note 39, at 780 (arguing that the functional conception of the Press Clause, properly understood, supports a constitutional preference for anyone fulfilling the functional role of the press).

203. *Id.* at 764 (contending "the Press Clause shelters a more diverse range of people other than the institutional press because people or entities come within the protection of the Press Clause when they publish with the intent to communicate").

204. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

205. Jordan, *supra* note 49, at 1368.

206. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 587–88 (1980) (Brennan, J., concurring).

objective judgment" which voters are subsequently able to express at the ballot box.[207]

The Supreme Court has long recognized the right to vote as an inherent systemic right in our constitutional scheme, stating that "other rights, even the most basic, are illusory if the right to vote is undermined."[208] However, it is not simply a right to vote that must be protected, but the "antecedent assumption" that civic behavior must be informed for democracy to survive.[209] The freedom of the press specifically was meant to protect public debate from government censorship, which is essential for the polity to intelligently exercise its rights.[210] True self-government requires elected leaders to be responsive to the will of the people, and information is the means by which the people control the government. Thus, the First Amendment was intended to facilitate the dissemination of information and ideas to inform voters who are then able to fully participate in the democratic process.[211]

The suppression of information, particularly information generated by the more than sixty unelected executive agencies, can manipulate and extinguish a government by consent and its system of checks and balances.[212] As Justice Douglas stated, "Secrecy in government is fundamentally anti-democratic."[213] This is why the dominant purpose of the First Amendment is to proscribe government suppression of information.

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207. Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 256 (1961). Additionally, one scholar argues that there could be no "right to know" government information due to our representative form of democracy, asserting that "[s]ince the Constitution does not establish a direct democracy, the inference of a right to know cannot find its constitutional source in the view of popular democracy which contemplates direct citizen participation in the making and administration of laws." Lillian R. BeVier, *An Informed Public, an Informing Press: The Search for a Constitutional Principle*, 68 CALIF. L. REV. 482, 506 (1980). However, this Comment is not advocating for a general "right to know," but instead a limited right to gather as a systemic right of our representative democracy. It is irrelevant if citizens participate in the "making and administration of laws." What citizens participate in is the selection of representatives to make and administer laws. In order to be able to intelligently exercise that right, citizens must have the requisite knowledge on which to base their decisions.

208. Wesberry v. Sanders, 376 U.S. 1, 17 (1964).

209. *Richmond Newspapers*, 448 U.S. at 587 (Brennan, J., concurring). Justice Brandeis also recognized that individuals have "limited time and resources with which to observe at first hand the operations of his government . . . great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government . . . . Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently." Cox Broad. Corp. v. Cohn, 420 U.S. 469, 491–92 (1975).

210. COOLEY, *supra* note 48, at 421–22.

211. Jordan, *supra* note 49, at 1372–73.

212. Parks, *supra* note 20, at 2.

213. N.Y. Times Co. v. United States, 403 U.S. 713, 724 (1971) (Douglas, J., concurring).

The right of the polity to use information to debate, discuss, and reach consensus by voting is a precondition to self-government.[214] In an era of "fake news" and Russian use of false information to influence elections,[215] the protection of the free flow of accurate information to voters is more crucial than ever. Yet, the "paper curtain" has largely closed the people off from accurate government information.[216] Opinions are derived from the information that reaches the public. If the only news reaching the public is "fake" or manipulated, the people's ability to self-govern is directly affected. Walter Lippman called the idea of self-governance the "original dogma of democracy," which can only be protected by increasing the validity of the sources upon which voters act.[217] Therefore, the key element in the structural model of the First Amendment that protects intelligent self-government is information.[218]

The power of information is a double-edged sword that can be wielded by the people to force their will upon their governors, or by the governors to manipulate the people for their own advantage.[219] It is a fundamental principle of our constitutional system that free public discussion allows the people to lawfully implement change and force the government to be responsive to the will of the voters.[220] The Supreme Court took this argument one step further by stating that "public discussion is a political duty" and "the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones."[221] However, this "political duty" presupposes the free flow of information, for without it there can be no public discussion.[222] The effective dissemination of the news requires the correlative right of gathering

214. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 339 (2010).

215. Mike Isaac & Daisuke Wakabayashi, *Russian Influence Reached 126 Million Through Facebook Alone,* N.Y. TIMES (Oct. 30, 2017), https://www.nytimes.com/2017/10/30/technology/facebook-google-russia.html [https://perma.unl.edu/2EZ6-2LBT].

216. Parks, *supra* note 20, at 6. The only information that breaches the "paper curtain" is what officials in executive agencies deem publishable in their personal discretion—usually for a particular purpose or due to strong pressure. *Id.*

217. LEBOVIC, *supra* note 18, at 26–29.

218. *See* 10 THOMAS JEFFERSON, Letter to William Charles Jarvis (Sept. 28, 1820), *in* THE WRITINGS OF THOMAS JEFFERSON 160, 161 (Ford ed., 1899) ("I know no safe depository of the ultimate powers of the society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion.").

219. Helle, *supra* note 24, at 56.

220. Stromberg v. California, 283 U.S. 359, 369 (1931).

221. Whitney v. California, 274 U.S. 357, 375–76 (1927) (Brandeis, J., concurring), *overruled in part on other grounds by* Brandenburg v. Ohio, 395 U.S. 444 (1969).

222. As was eloquently stated by Thomas Emerson, one who seeks knowledge "must hear all sides of the question, consider all alternatives, test his judgement by

information, otherwise the "freedom of the press could be eviscerated."[223]

The right of the people to have sufficient information for self-government is inherent in the power of the voters to "make and unmake governments."[224] This is not an explicitly delegated right; it is a right retained by the people.[225] With the people as the ultimate rulers, the government has no right to treat information as proprietary.[226] The First Amendment's checking value against corruption is indispensable to the system of restraints constructed to deal with official misconduct.[227] The free flow of information reveals abuse and allows the people to satisfy the ultimate check on corruption by voting out dishonest representatives.[228]

### C. Why the FOIA is Not Sufficient to Protect the Free Flow of Information

In response to this Comment's contention that the First Amendment demands a limited right to gather information, some may argue that this right is unnecessary due to the FOIA. However, even though the FOIA was passed and amended with good intentions, in practice it has been ineffective. Ultimately, the effectiveness of the FOIA is severely diminished by the broad scope given to its nine exceptions by both the Executive Branch and the courts reviewing decisions to withhold information.[229]

Courts are still extremely deferential to the Executive Branch, especially concerning Exemption 1 national security issues, thus turning judicial review of agency decisions into a virtual rubber stamp.[230] Congress amended the FOIA again in 2016 in an attempt to repair some of the inefficiencies and prevent abuse.[231] The amendments pro-

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exposing it to opposition, and make full use of different minds." THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6–7 (1970).

223. Branzburg v. Hayes, 408 U.S. 665, 681 (1972).

224. Jordan, *supra* note 49, at 1371.

225. This idea stems from the Ninth Amendment which unequivocally states that, "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

226. McDonald, *supra* note 89, at 318.

227. George W. Kelly, *Richmond Newspapers and the First Amendment Right of Access*, 18 AKRON L. REV. 33, 39 (1984).

228. *Id.*

229. Cohen, *supra* note 23, at 175.

230. Papandrea, *supra* note 3, at 244–45. Judicial review of classified materials under FOIA "often seems to be done in a perfunctory way." Patricia M. Wald, *Two Unsolved Constitutional Problems*, 49 U. PITT. L. REV. 753, 760 (1988). As Justice Scalia stated, the notion that the exemptions within FOIA should be construed narrowly is "a formula to be recited rather than a principle to be followed." John Doe Agency v. John Doe Corp., 493 U.S. 146, 161 (1989).

231. *See generally* FOIA IS BROKEN, *supra* note 137.

hibited the charging of record fees, required disclosure of requested information (unless disclosure would result in harm to a protected interest under the FOIA), established dispute resolution services, amended Exemption 5, and created a council for the FOIA.[232]

There are countless examples of the government taking inordinate amounts of time to respond to FOIA requests or of FOIA requests being rejected for seemingly absurd reasons. David Garrow, a historian writing a biography on Martin Luther King Jr., waited seventeen years for documents he requested through the FOIA.[233] Another historian, John Weiner, requested John Lennon's FBI files through the FOIA in 1981, but they were withheld for "national security" reasons.[234] After a lawsuit and sixteen years, he finally received *most* of the files he requested.[235] Anyone with experience using the FOIA quickly realizes that the law favors the government, not the person requesting the files, due to procedures and exceptions that are "ignored or manipulated."[236]

Despite the purposes behind the FOIA, the Executive Branch continues to foster a culture of an "unlawful presumption in favor of secrecy,"[237] and the discretion allowed has created a distorted incentive to overclassify information.[238] The Director of the National Security Archives estimates that anywhere from 50% to 90% of documents are *mis*classified.[239] This indicates that the Executive has effectively uninhibited power to control the flow of information, particularly by deeming information "classified."[240] For example, President Obama promised to have the "most transparent administration in history," yet during his last year in office his administration spent a record $36.2 million on legal fees defending its refusal to release documents under FOIA requests.[241] The Obama administration also set records for outright refusal of access to documents; in one-third of these law-

232. FOIA Improvement Act of 2016, 5 U.S.C.A. § 552 (West 2016).
233. SCHUDSON, *supra* note 132, at 33.
234. *Id.* at 34.
235. *Id.*
236. PHILIP H. MELANSON, SECRECY WARS 31 (2001).
237. FOIA IS BROKEN, *supra* note 137, at iii.
238. Elizabeth Goitein, *The Government is Classifying Too Many Documents*, THE NATION (July 7, 2016), https://www.thenation.com/article/the-government-is-classifying-too-many-documents/ [https://perma.unl.edu/9KY8-LTVU].
239. *Espionage Act and the Legal and Constitutional Issues Raised by WikiLeaks: Hearing on H.R. 6506 Before the H. Comm. on the Judiciary*, 111th Cong. 2 (2010) (prepared statement of Thomas S. Blanton, Dir., Nat'l Sec. Archive, George Wash. Univ.).
240. Mary-Rose Papandrea, *The Publication of National Security Information in the Digital Age*, 5 J. NAT'L SECURITY L. & POL'Y 119, 120 (2012).
241. Ted Bridis, *In Obama's Final Year, U.S. Spent $36 Million in FOIA Lawsuits*, PBS NEWS HOUR (March 14, 2017), https://www.pbs.org/newshour/nation/obamas-final-year-u-s-spent-36-million-foia-lawsuits [https://perma.unl.edu/T256-23F8].

suits, the administration admitted that it had been wrong in refusing to turn over all or part of the records requested.[242]

President Trump's administration has set new records for withholding documents or failing to find even a single page responsive to the FOIA request.[243] In 78% of FOIA requests the government responded to the request with either a censored file or nothing.[244] In 2017, the federal government spent $40.6 million defending decisions to suppress files.[245] Regardless of whether a Republican or Democrat is in office, the Executive Branch continues to encourage concealment of information rather than releasing it to the people who have a right to view it as the ultimate governors. The problem of overclassification is compounded by courts that consistently defer to the Executive in matters of "national security" instead of engaging in legitimate judicial review.[246]

But regardless of the efforts to fix the FOIA, the primary issues—abuse of the exceptions and the lack of genuine judicial review—persist. The FOIA was intended to create a fundamental change in the operation of government by tearing the "paper curtain" that separates the people from the government. Because the balance of power has shifted strongly in favor of the Executive, with "national security" becoming the ultimate catchall exception, the FOIA will continue to be ineffective despite the new amendments.[247]

This is why a limited right to gather information under the First Amendment is essential and indispensable. What is missing from current jurisprudence is a limited newsgathering right embedded in the structure of the Constitution as well as the First Amendment. With this underpinning and a sincere commitment to allowing "uninhibited, robust, and wide-open" public debate, perhaps judges would start to look at litigation under the FOIA differently and utilize actual judicial review to allow the polity the information necessary for self-government.[248]

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242. *Id.*
243. Ted Bridis, *US Sets New Record for Censoring, Withholding Gov't Files*, AP NEWS (March 12, 2018), https://apnews.com/714791d91d7944e49a284a51fab65b85 [https://perma.unl.edu/KC72-CCRJ].
244. *Id.*
245. *Id.*
246. DAVID DADGE, CASUALTY OF WAR 276 (2004).
247. Barry Sullivan, *FOIA and the First Amendment: Representative Democracy and the People's Elusive "Right to Know,"* 72 MD. L. REV. 1, 21–22 (2012). Further, Justice Stewart in *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971), noted the need to counter the "enormous power" of the Executive, which was "pressed to the very hilt since the advent of the nuclear missile age." He went on to argue that, due to the lack of checks and balances against the increasingly powerful Executive, the only effective restraint "may lie in an enlightened citizenry . . . which alone can here protect the values of democratic government." *Id.* at 727–28.
248. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

## IV. CONCLUSION

In the Supreme Court's view, the Press Clause, as "mere Constitutional window dressing," has been interpreted as a redundancy of the Speech Clause. However, as articulated in this Comment, the Press Clause provides protection for the functional role any person fulfills by writing and printing thoughts for public dissemination. When the Press Clause is divorced from the Speech Clause and stands alone, the purposes underlying the clause come into focus. The original purposes of the clause included guarding against prior restraints, providing a mechanism for self-government, and creating a check on misgovernment. These functions create the foundation for a limited right to gather information.

Furthermore, the Court has bifurcated the process of publication into two distinct elements: gathering and publication. However, this dichotomy is out of sync with the Court's own precedent which indicates that suppression may operate at different parts of the speech process. Gathering is the necessary antecedent to publication—if you suppress one, you suppress both. It is a sad state of affairs when the nation that pioneered the concept of freedom of the press currently ranks forty-fifth in the world for press freedom according to the World Press Freedom Index.[249] Removing barriers to information and protecting a limited right to gather information would go a long way toward increasing press freedoms.

Ultimately, the dissemination of information is necessary for the people to make informed decisions at the ballot box and to provide a sufficient check on corruption. Without the free flow of information, the freedom of the press as envisioned by the Framers will be forever stifled. As James Madison wrote, "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."[250]

249. *Trump Exacerbates Press Freedom's Steady Decline*, REPORTERS WITHOUT BORDERS, https://rsf.org/en/united-states [https://perma.unl.edu/6B9F-P7FZ] (last visited Oct. 15, 2018).

250. 9 JAMES MADISON, Letter to W. T. Barry (Aug. 4, 1822), *in* THE WRITINGS OF JAMES MADISON 103 (Gaillard Hunt ed., 1910).