

DO DEMOCRACIES DIE BEHIND THE DOORS OF
POLLING PLACES? FINDING A FIRST
AMENDMENT RIGHT OF PRESS ACCESS TO
POLLING PLACES FOR NEWSGATHERING

Leena Ketkar

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Leena Ketkar*

INTRODUCTION

British politician Edmond Burke once said, “there were three Estates in Parliament; but, in the Reporters Gallery yonder, there sat a *Fourth Estate* more important far than they all.”¹ Within the United States, the three traditional branches of government check and balance each other while the media or press stands as “independent and unfettered watchdogs for all.”² Nothing is more important to a democracy than a well-informed electorate. The United States Supreme Court has indicated, at least in a backhanded way, that the press might enjoy special constitutional rights: “[W]ithout some protection for seeking out news freedom of the press could be eviscerated.”³

Even with statutory and case law safeguarding the right to freedom of the press, the United States lags behind other developed nations in protecting the press’ rights.⁴ The Reporters Without Borders Press Freedom Index ranks the United States thirty-second in their measure of freedom available to the press, including

* J.D. Candidate, 2015, University of Pittsburgh School of Law; B.A., 2011, University of Pittsburgh.

¹ THOMAS CARLYLE, ON HEROES, HERO-WORSHIP, AND THE HEROIC IN HISTORY 215 (62 *The World’s Classics*, Oxford Univ. Press 1935) (1841) (quoting Edmond Burke).

² Robert T. Sherwin, “*Source*” of Protection: *The Status of the Reporter’s Privilege in Texas and a Call to Arms for the State’s Legislators and Journalists*, 32 *TEX. TECH L. REV.* 137, 183 (2000) (citing DONALD M. GILLMOR ET AL., *FUNDAMENTALS OF MASS COMMUNICATION LAW* 10 (1996)).

³ *Brazenburg v. Hayes*, 408 U.S. 665, 681 (1972).

⁴ See *World Press Freedom Index 2013*, REPORTERS WITHOUT BORDERS FOR FREEDOM OF INFORMATION, http://fr.rsf.org/IMG/pdf/classement_2013_gb-bd.pdf (last visited Feb. 19, 2015).

government censorship and the quality of journalism.⁵ The United States ranks behind many of the Nordic countries as well as Estonia, Jamaica, Canada, and the United Kingdom.⁶

This Note argues that state statutes limiting press access to polling locations for newsgathering purposes—so long as the newsgathering does not interfere with the voting process—violates the First Amendment. Part I of this Note takes a historical look at the development of freedom of the press, beginning in the Eighteenth Century. Part II analyzes the circuit split concerning two similar statutes in Ohio and Pennsylvania, both limiting press access to polling locations. Part III walks through the First Amendment analysis of Freedom of the Press and the constitutionality of these limiting state statutes. Part IV compares press access to polling locations to that of news organizations conducting exit polls outside of polling locations. Although the question of who is considered the “press” continues to be debated, this Note will not tackle that complex issue.⁷

I. BACKGROUND

A. *Beginnings of the Fourth Estate*

The idea of Freedom of the Press began in the United States around 1795 with a case involving John Peter Zenger, publisher of the *New York Weekly Journal*.⁸ Zenger was tried for seditious libel after publishing critical opinions of the colonial governor William Cosby.⁹ The twelve-person jury returned a verdict of not guilty in August 1735 after being persuaded by Zenger’s lawyer, Alexander Hamilton.¹⁰ As noted by Douglas Linder, “[t]he Zenger trial established no new laws with respect to seditious libel, but in unmistakable terms it signaled the public’s opposition to such prosecutions. Concern about likely jury nullification discouraged prosecutions, and press freedom in America began to blossom.”¹¹

⁵ *Id.*

⁶ *Id.* at *20.

⁷ For more information, see David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 435–47 (2002).

⁸ Douglas Linder, *The Trial of John Peter Zenger: An Account*, FAMOUS AMERICAN TRIALS: U. MO.-KAN. CITY SCH. L. (2001), <http://law2.umkc.edu/faculty/projects/ftrials/zenger/zengeraccount.html>.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

During the Revolutionary War, the Founding Fathers considered free press a major protection for their liberties.¹² George Mason in the Virginia Declaration of Rights in 1776 called for freedom of the press.¹³ Although the Constitution contains a Freedom of the Press Clause within the Bill of Rights, the government originally set “many controls on the press and quieted the opinions of most early journalists.”¹⁴ After the nation’s capital moved to Washington D.C., journalistic efforts started to focus on congressional reports and other governmental events.¹⁵ Politics began to play a role in journalism well through the Nineteenth Century.¹⁶ During the mid-to-late 1800s, newspapers started to produce more stories on love, tragedy, and entertainment in order to increase circulation.¹⁷ “Prior to the 1930s, the Supreme Court position on First Amendment freedoms was to suspend free speech and press if the expressions constituted a ‘reasonable tendency’ to endanger society.”¹⁸ The expressions were judged by whether they created a “clear and present danger” to society.¹⁹ These were the beginnings of Freedom of the Press in the United States, and the evolution of the Fourth Estate.²⁰

B. *Free Press in the Twentieth Century*

In 1931, the United States Supreme Court in *Near v. Minnesota* defined Freedom of the Press and prohibited the government from restricting a publication

¹² *Freedom of the Press Clause*, REVOLUTIONARY WAR AND BEYOND, <http://www.revolutionary-war-and-beyond.com/freedom-of-the-press-clause.html> (last visited Feb. 19, 2015).

¹³ *Ordinances Passed at a General Convention of Delegates and Representatives from the Several Counties and Corporations of Virginia Held at the Capitol, in the City of Williamsburg, on Monday the 6th of May, anno. dom. 1776*, in THE PROCEEDINGS OF THE CONVENTION OF DELEGATES, HELD AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, IN THE COLONY OF VIRGINIA, ON MONDAY THE 6TH OF MAY, 1776, WILLIAMSBURG (1776).

¹⁴ *First Amendment Curriculum Guide*, ILLINOIS FIRST AMENDMENT CENTER 45 (2005), <http://www.gsspa.org/home/wp-content/uploads/2012/05/1.-First-Amendment-curriculum-guide.pdf> [hereinafter ILLINOIS FIRST AMENDMENT CENTER].

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ ILLINOIS FIRST AMENDMENT CENTER, *supra* note 14, at 45.

¹⁹ *Schenck v. United States*, 249 U.S. 52 (1919) (articulating the clear and present danger test: “whether the words used are used in such circumstances and are of such a nature as to create a *clear and present danger* that they will bring about the substantive evils that Congress has a right to prevent”) (emphasis added).

²⁰ ILLINOIS FIRST AMENDMENT CENTER, *supra* note 14.

before its distribution.²¹ The Court ruled that a Minnesota law that targeted publishers of “malicious, scandalous and defamatory” newspapers violated the First Amendment, as applied to states via the Fourteenth Amendment.²² During World War II, the Office of Censorship handled the largest censorship effort in United States history.²³ Compliance with the Voluntary Censorship Code (“Code”) was completely voluntary; many journalists and newspapers cooperated, however, creating a supportive culture among journalists and editors.²⁴ The Code set forth two conditions for the media: “their stories must be accurate and they could not help the enemy.”²⁵ In the late 1960s and early ’70s, there were many charges between journalists and government officials regarding the government withholding information about the Vietnam War. In 1971, in a suit involving the *New York Times*, the United States sought to enjoin the newspaper from publishing *The Pentagon Papers*, a collection of classified information about the Vietnam War.²⁶ Finding that “secrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors” and that “[o]pen debate and discussion of public

²¹ *Near v. Minnesota*, 283 U.S. 697, 721–22 (1931).

If we cut through mere details of procedure, the operation and effect of the statute in substance is that public authorities may bring the owner or publisher of a newspaper or periodical before a judge upon a charge of conducting a business of publishing scandalous and defamatory matter—in particular that the matter consists of charges against public officers of official dereliction—and unless the owner or publisher is able and disposed to bring competent evidence to satisfy the judge that the charges are true and are published with good motives and for justifiable ends, his newspaper or periodical is suppressed and further publication is made punishable as a contempt. This is of the essence of censorship.

Id. at 713.

²² *Id.* at 712, 722–23.

²³ See Robert J. Hanyok, *Intelligence in Recent Public Literature*, CENT. INTELLIGENCE AGENCY (June 27, 2008, 7:15 AM), <https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/csi-studies/studies/vol46no3/article10.html> (reviewing MICHAEL S. SWEENEY, *SECRETS OF VICTORY: THE OFFICE OF CENSORSHIP AND THE AMERICAN PRESS AND RADIO IN WORLD WAR II* (2001)).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971).

issues are vital to our national health,” the Supreme Court allowed the release of these government documents.²⁷

The First Amendment right to newsgathering has not been spelled out; however, the Supreme Court has recognized its public importance.²⁸ After the Vietnam War, the United States government restricted access of reporters and news outlets in combat areas in following military endeavors.²⁹ This practice caused resentment among reporters, especially during the invasion of Grenada and the Persian Gulf War.³⁰ Domestically, many states have passed shield laws that allow journalists to refuse to disclose confidential information and sources to law enforcement officials, but the United States Supreme Court does not recognize such a right.³¹

II. CIRCUIT SPLIT ON THE CONSTITUTIONALITY OF STATE STATUTES RESTRICTING PRESS ACCESS TO POLLING LOCATIONS

Statutes in Pennsylvania and Ohio limit press access to polling locations during the process of voting. Both statutes were challenged separately in Pennsylvania and Ohio, and the United States Courts of Appeal for the Sixth and Third Circuits came out on different sides of the issue.

A. *The Beacon Journal*

In 2004, the Beacon Journal Publishing Company (“Beacon Journal”) petitioned the United States District Court for the Northern District of Ohio to enjoin the defendants, the Ohio Secretary of State and the County Board of Elections, from interfering with any Beacon Journal journalist while in the course of newsgathering at any polling place in Ohio during the November 2004 elections.³² Beacon Journal publishes the *Akron Beacon Journal*, a daily

²⁷ *Id.* at 724.

²⁸ *A Reporter’s Field Guide*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS (Winter 2006), <http://www.rcfp.org/rcfp/orders/docs/RFG.pdf>.

²⁹ Janet Kaaya, *Effects of Media Access Restrictions and Censorship During War*, HOWARD BESSER’S WEB (Fall 2001), <http://besser.tsoa.nyu.edu/impact/f01/Focus/Mass-media/209/MediaPaperJ.htm>.

³⁰ *Id.*

³¹ *Rise Up for Risen! Raise the Shield!*, SOC’Y OF PROF. JOURNALISTS, <http://www.spj.org/shieldlaw.asp> (last visited Feb. 19, 2015).

³² *Beacon Journal Publ’g Co. v. Blackwell*, No. 5:04-cv-02178 (N.D. Ohio Nov. 1, 2004).

newspaper, serving readers in the Ohio counties of Summit, Portage, Stark, Medina, and Wayne.³³ The Ohio statute provided, in pertinent part: “No person, not an election official, employee, witness, challenger, or police officer, shall be allowed to enter the polling place during the election, except for the purpose of voting.”³⁴ The complaint stated that the Ohio statute violated Beacon Journal’s employees’ rights under the First and Fourteenth Amendments of the United States Constitution.³⁵ The district court denied the motion, finding that the State of Ohio had a “compelling interest in making sure that voters vote freely and without intimidation.”³⁶

On appeal, however, the United States Court of Appeals for the Sixth Circuit vacated the district court’s finding that the Ohio statute did not violate the First Amendment. The Sixth Circuit held that the district court’s fear of “turmoil that could be created by hordes of reporters and photographers’ [was] purely hypothetical and [could not], therefore, support Defendants’ proposed restriction of the First Amendment’s guarantee.”³⁷ The Sixth Circuit boldly stated that “[d]emocracies die behind closed doors”³⁸ and therefore the public views the press as the “guardians of their liberty.”³⁹ So long as the Beacon Journal reporters did not interfere with poll workers and voters as they exercised their right to vote, the defendants may have reasonable access for newsgathering purposes.⁴⁰

B. Pittsburgh Post-Gazette

Similar to the Ohio law in *Beacon Journal*, Pennsylvania law provides, in pertinent part:

All persons, except election officers, clerks, machine inspectors, overseers, watchers, persons in the course of voting, persons lawfully giving assistance to voters, and peace and police officers, when permitted by the provisions of this

³³ THE AKRON BEACON J., <http://www.ohio.com/about-main-page> (last visited Feb. 19, 2015).

³⁴ *Beacon Journal*, No. 5:04-cv-02178, at *2 (citing OHIO REV. CODE ANN. § 3501.35 (2012)).

³⁵ *Id.*

³⁶ *Id.* at *3.

³⁷ *Beacon Journal Publ’g Co., Inc. v. Blackwell*, 389 F.3d 683, 685 (6th Cir. 2004).

³⁸ *Id.* (quoting *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6th Cir. 2002)).

³⁹ *Id.*

⁴⁰ *Id.*

act, must remain at least ten (10) feet distant from the polling place during the progress of the voting.⁴¹

In *PG Publishing Co. v. Aichele*, the constitutionality of the aforementioned Pennsylvania law was challenged.⁴² PG Publishing Company, the publisher of the *Pittsburgh Post-Gazette*, a daily newspaper, brought action against state and county officials for alleged violations of their First and Fourteenth Amendment rights by limiting press access to polling places on Election Day in 2012 with a ten-foot buffer zone.⁴³

The United States District Court for the Western District of Pennsylvania outlined the level of scrutiny to apply and found that the challenged regulation was content-neutral, because it applied to one's physical location, not his or her speech.⁴⁴ The court noted, "A 'compelling justification' for a law is required only where a State attempts to 'single out the press' for disfavored treatment."⁴⁵ The district court adhered to the reasoning set forth in *Burson* to hold that the ten-foot buffer zone set forth in § 3060(d) does not impose a "severe burden" on newspaper reporters' ability to gather information from voters.⁴⁶

On appeal, the United States Court of Appeals for the Third Circuit affirmed the district court's decision, holding that PG Publishing did not have a First Amendment right of access to the voting process.⁴⁷ The Third Circuit emphasized a distinct difference between a right to access and a right to free speech.⁴⁸ Using the "experience and logic" test articulated in three Supreme Court cases, the Third

⁴¹ 25 PA. CONS. STAT. § 3060(d) (2007).

⁴² *PG Publ'g Co. v. Aichele*, 902 F. Supp. 2d 724 (W.D. Pa. 2012).

⁴³ *Id.* at 733. The Free Press Clause is applicable to the states by way of the Fourteenth Amendment's Due Process Clause. *See Near v. Minnesota ex rel. Olsen*, 283 U.S. 697, 707 (1931). For the purpose of this article, only PG Publishing's First Amendment claim will be addressed.

⁴⁴ *PG Publ'g Co.*, 902 F. Supp. 2d at 750.

⁴⁵ *Id.* at 751 (quoting *Leathers v. Medlock*, 499 U.S. 439, 447 (1991)).

⁴⁶ *Id.* at 755 (citing *Burson v. Freeman*, 504 U.S. 191, 200 (1992)).

⁴⁷ *PG Publ'g Co. v. Aichele*, 705 F.3d 91 (3d Cir. 2013).

⁴⁸ *Id.* at 99.

Circuit found that, historically, the right to vote privately has been preserved and that the class to whom this theoretical right of access would apply is endless.⁴⁹

Both the district and circuit courts make reference to the new voter identification law signed into law by then-Pennsylvania Governor Tom Corbett in 2012, which requires an individual to provide proof of identification before casting his or her vote.⁵⁰ It should be noted that neither court takes into consideration the circumstances surrounding the 2012 Election with voter ID laws when conducting their First Amendment analysis.⁵¹

III. THE FIRST AMENDMENT AND FREEDOM OF THE PRESS

The First Amendment ensures that open discussions about the government are protected in order to promote a well-informed electorate. The First Amendment of the Constitution provides that: “Congress shall make no law . . . abridging the freedom of speech, or of the press.”⁵² Challenging a statute on First Amendment grounds requires the court to first consider whether the Constitution protects the speech or conduct.⁵³ Freedom of the Press protects all persons against abridgement by the states through the Fourteenth Amendment.⁵⁴

⁴⁹ *Id.* at 110, 112. *See* *Press-Enterprise Co. v. Super. Ct. of Cal. for Riverside Cnty.*, 478 U.S. 1 (1986); *Globe Newspaper Co. v. Super. Ct. for Norfolk Cnty.*, 457 U.S. 596 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (plurality opinion).

First, the case for a right of access has special force when drawn from an enduring and vital tradition of public entree to particular proceedings or information. Such a tradition commands respect in part because the Constitution carries the gloss of history. More importantly, a tradition of accessibility implies the favorable judgment of experience. Second, the value of access must be measured in specifics. Analysis is not advanced by rhetorical statements that all information bears upon public issues; what is crucial in individual cases is whether access to a particular government process is important in terms of that very process.

Richmond Newspapers, 448 U.S. at 589 (internal citation omitted).

⁵⁰ *See PG Publ'g Co.*, 705 F.3d at 96; *PG Publ'g Co.*, 902 F. Supp. 2d at 732; 25 PA. CONS. STAT. § 3050(a) (2012).

⁵¹ *See PG Publ'g Co.*, 705 F.3d at 96 n.4.

⁵² U.S. CONST. amend. I.

⁵³ *Clean-Up '84 v. Heinrich*, 759 F.2d 1511, 1513 (11th Cir. 1985).

⁵⁴ *Schneider v. New Jersey*, 308 U.S. 147, 147 (1939).

The Supreme Court has noted that “[t]he Constitution specifically selected the press . . . to play an important role in the discussion of public affairs.”⁵⁵ Further, “the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve.”⁵⁶ Because state statutes prohibiting journalists from gathering news inside polling places infringes on the media’s right to gather news, strict scrutiny should be applied when reviewing the constitutionality of these statutes.⁵⁷ When laws impose “severe burdens” on the exercise of First Amendment rights, the laws must be narrowly tailored and advance a compelling state interest.⁵⁸

A. *Constitutionality of Press-Restricting Statutes*

Statutes exist in many states prohibiting journalists and reporters from entering polling places on Election Day. A Minnesota statute, for example, provides: “No one except an election official or an individual who is waiting to register or to vote or an individual who is conducting exit polling shall stand within 100 feet of the building in which a polling place is located.”⁵⁹

However, there are some states that allow news media to report from inside of the polling place. The Commonwealth of Virginia, for instance, allows:

The officers of election [to] permit representatives of the news media to visit and film or photograph inside the polling place for a reasonable and limited period of time while the polls are open. However, the media . . . (ii) shall not film or photograph any person who specifically asks the media representative at that time that he not be filmed or photographed; (iii) shall not film or photograph the voter or the ballot in such a way that divulges how any individual voter is

⁵⁵ *Mills v. Alabama*, 384 U.S. 214, 219 (1966).

⁵⁶ *Id.*

⁵⁷ *See Beacon Journal Publ’g Co. v. Blackwell*, 389 F.3d 683, 685 (6th Cir. 2004).

⁵⁸ *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997).

⁵⁹ MINN. STAT. ANN. § 204C.06 (2012); *see also* NEV. REV. STAT. § 293.274 (2013) (“1. The county clerk shall allow members of the general public to observe the conduct of voting at a polling place. 2. A member of the general public shall not photograph the conduct of voting at a polling place or record the conduct of voting on audiotape or any other means of sound or video reproduction. 3. For the purposes of this section, a member of the general public does not include any person who: (a) Gathers information for communication to the public; (b) Is employed or engaged by or has contracted with a newspaper, periodical, press association, or radio or television station; and (c) Is acting solely within his or her professional capacity.”).

voting; and (iv) shall not film or photograph the voter list or any other voter record or material at the precinct in such a way that it divulges the name or other information concerning any individual voter.⁶⁰

The United States Supreme Court, as well as many lower courts, has clearly stated that polling places are not public forums.⁶¹ The Third Circuit in *PG Publishing* rejected applying strict scrutiny to the state statutes in question, in favor of the *Richmond Newspapers* test—experience and logic.⁶² Applying the experience and logic test is in line with the general trend of the Third Circuit’s decisional authority: “that access to government proceedings—in effect, access to information about governmental bodies and their actions or decisions—must be evaluated with an eye toward the historical and structural role of the proceeding.”⁶³ Three Supreme Court cases led to the creation of a balancing test for evaluating whether a right of access to information exists, looking at “the interests of the People in observing and monitoring the functions of their government against the government’s interest and/or long-standing historical practice of keeping certain information from public scrutiny.”⁶⁴ Both the experience and logic prongs must be satisfied in order to establish a presumptive “right of access.”⁶⁵ Once a presumptive right is found, the court must then apply strict scrutiny to the restriction of that right.⁶⁶

The Sixth Circuit in *Beacon Journal* applied strict scrutiny to the state statute regulating polling places.⁶⁷ In applying such a strict test, the Sixth Circuit found that the Ohio statute violated the First Amendment and was overly broad.⁶⁸ While

⁶⁰ VA. CODE ANN. § 24.2-604 (2014); *see also* MO. REV. STAT. § 115.409 (2013).

⁶¹ *See* *Burson v. Freeman*, 504 U.S. 191, 214 (1992) (plurality opinion) (Scalia, J., concurring); *Marlin v. D.C. Bd. of Elections & Ethics*, 236 F.3d 716, 719 (D.C. Cir. 2001).

⁶² *See PG Publ’g Co.*, 705 F.3d 91 (3d Cir. 2013), *cert. denied*, 133 S. Ct. 2771 (2013).

⁶³ *Id.* at 106–07.

⁶⁴ *Id.* at 104; *see also* *Press-Enterprise Co. v. Superior Court of Cal. for Riverside Cnty.*, 478 U.S. 1 (1986); *Globe Newspaper Co. v. Superior Court for Norfolk Cnty.*, 457 U.S. 596 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

⁶⁵ *Press-Enterprise Co.*, 478 U.S. at 9 (explaining that a presumptive right of access is found only if a proceeding passes both “these tests of experience and logic”).

⁶⁶ *Press-Enterprise Co. v. Super. Ct. of Cal. for Riverside Cnty.*, 464 U.S. 501, 510 (1984).

⁶⁷ *Beacon Journal Publ’g Co. v. Blackwell*, 389 F.3d 683 (6th Cir. 2004).

⁶⁸ *Id.* at 685.

applying strict scrutiny to statutes regulating persons in and around polling locations is the incorrect test after a line of Supreme Court cases regarding right-of-access, the *Richmond Newspapers* test as applied by the Third Circuit applies the “experience” prong more rigidly than required.⁶⁹

i. Experience Prong of First Amendment Test, as Taken from *Richmond Newspapers*, Applied to Press Access

Under the experience prong of the *Richmond Newspapers* test, a court must consider whether a “place and process have historically been open to the press and general public.”⁷⁰ This prong, however, “should seek not only the historical fact of past proceedings but also the normative lessons to be learned from this history.”⁷¹ In considering this element of the *Richmond Newspapers* test, it is important to consider the standard flexibly.⁷²

Many important trends in election laws appeared during the late Nineteenth Century, brought about by election fraud and violence throughout the United States.⁷³ Voting in the United States began as an open process through voice voting in public, but by the turn of the Twentieth Century, the voting process evolved.⁷⁴ Paper ballots, private polling booths, and restrictions on speech around polling places emerged.⁷⁵ On its face, the history of the voting process reveals a trend toward a closed election process; this analysis, however, should be viewed in light of modern trends and processes.⁷⁶ The post-World War II emergence of a more

⁶⁹ See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); Kathleen K. Miller, *Do Democracies Die Behind Closed Doors? Finding a First Amendment Right of Access to Deportation Hearings by Reevaluating the Richmond Newspapers Test*, 72 GEO. WASH. L. REV. 646, 654–56 (2004).

⁷⁰ See *Press-Enterprise Co.*, 478 U.S. at 8.

⁷¹ *First Amendment—Public Access—Third Circuit Holds That First Amendment Does Not Afford the Public a Protected Right of Access to Polling Places for News-Gathering Purposes—PG Publ’g Co. v. Aichele*, 705 F.3d 91 (3d Cir.), cert. denied, 133 S. Ct. 2771 (2013), 127 HARV. L. REV. 1067, 1072 (2014) [hereinafter *First Amendment*].

⁷² Miller, *supra* note 69, at 658.

⁷³ JOSEPH P. HARRIS, *ELECTION ADMINISTRATION IN THE UNITED STATES* 19 (1934).

⁷⁴ *First Amendment*, *supra* note 71, at 1070.

⁷⁵ *Id.*

⁷⁶ See Timothy B. Dyk, *Newsgathering, Press Access, and the First Amendment*, 44 STAN. L. REV. 927, 954–56 (1992).

powerful government has occasioned the need for a more effective press with greater access to relevant information.⁷⁷

While the Supreme Court has yet to recognize that the press should enjoy a greater right of access, lower federal and state courts recognize more liberal press access rights.⁷⁸ In *Daily Herald*, Judge Reinhardt stated that “the state has an affirmative duty to protect the media’s right of access to information crucial to the societal process of political deliberation.”⁷⁹ Further, courts have also held that the First Amendment bars discrimination to press and media organizations for access to state legislative galleries⁸⁰ and campaign events.⁸¹

When the access was sought for reporting on issues of public importance or generally to educate voters, lower courts have “reinforce[d] the dominance of personal, expressive rights over collective interests in the preservation of the electoral process.”⁸² Alternative options exist beyond allowing the media and press unlimited access, such as requiring separate entrances and exits, as well as narrowing the definition of the press.⁸³ A changing and evolving society, however, dictates the need for changing and evolving election laws that allow for greater press access to report on the electoral process for the benefit of the American public.

ii. Logic prong of First Amendment Test as Taken from
Richmond Newspapers, Applied to Press Access

The logic prong of the *Richmond Newspapers* framework asks the court to consider “whether public access plays a significant positive role in the functioning

⁷⁷ *Id.* at 929.

⁷⁸ *Id.* at 944.

⁷⁹ *Daily Herald Co. v. Munro*, 838 F.2d 380, 390 (9th Cir. 1988) (Reinhardt, J., concurring); *see also* *Mintz v. Director, Dep’t of Motor Vehicles*, 9 Media L. Rep. (BNA) 1301 (9th Cir. 1982) (holding that issuance of “press” license plates to members of press, giving them greater access to places closed to the general public, does not violate the First Amendment), *cert. denied*, 460 U.S. 1071 (1983).

⁸⁰ *See, e.g., Kovach v. Maddux*, 238 F. Supp. 835 (M.D. Tenn. 1965).

⁸¹ *See, e.g., ABC, Inc. v. Cuomo*, 570 F.2d 1080 (2d Cir. 1977).

⁸² *See* Blake D. Morant, *The Jurisprudence of the Media’s Access to Voting Polls*, 4 FIRST AMEND. L. REV. 107, 111 n.12, 111–13 (2005).

⁸³ *See* *CBS Inc. v. Smith*, 681 F. Supp. 794, 804–05 (S.D. Fla. 1988); *Nat’l Broad. Co. v. Cleland*, 697 F. Supp. 1204, 1212–13 (N.D. Ga. 1988).

of the particular process in question.”⁸⁴ Courts have adopted six societal interests that are served by openness:

[P]romotion of informed discussion of governmental affairs by providing the public with the more complete understanding of the judicial system; promotion of the public perception of fairness which can be achieved only by permitting full public view of the proceedings; providing a significant community therapeutic value as an outlet for community concern, hostility and emotion; serving as a check on corrupt practices by exposing the judicial process to public scrutiny; enhancement of the performance of all involved; and discouragement of perjury.⁸⁵

Beginning with this inquiry, the court in *PG Publishing* noted that openness of the voting process helps to prevent election fraud, voter intimidation, as well as other “other kinds of electoral evils.”⁸⁶ In *PG Publishing*, the press had a legitimate reason for wanting access to the polling places on Election Day—the press sought to observe and record the voter sign-in table in light of the then-newly enacted Voter Identification Law.⁸⁷ The *Pittsburgh Post-Gazette* sought to provide the public with clear guidelines of what to do at polling places and to educate the public about government proceedings since the implementation of the Voter Identification Law.⁸⁸ The Third Circuit found that because press access could cause voter intimidation or concern and determining who constitutes “press” is difficult, the Pennsylvania statute did not violate the First Amendment.⁸⁹

A positive purpose is served, however, by allowing press access to polling locations. In looking at the six societal interests enhanced by openness, allowing the press to observe and report on the occurrences inside of the polling place without interfering with the general voting process furthers many societal interests. Such newsgathering could give an outlet to disenfranchised voters who were

⁸⁴ North Jersey Media Grp., Inc. v. Ashcroft, 308 F.3d 198, 209 (3d Cir. 2002) (quoting *Press-Enterprise Co.*, 478 U.S. at 8).

⁸⁵ United States v. Simone, 14 F.3d 833, 839 (3d Cir. 1994).

⁸⁶ *PG Publ'g Co.*, 705 F.3d at 111.

⁸⁷ *Id.* at 111–12.

⁸⁸ *Id.* at 112.

⁸⁹ *Id.*

denied their constitutional right to vote due to a lack of identification.⁹⁰ Such newsgathering could expose voter fraud and election fraud generally.⁹¹

iii. Strict Scrutiny Analysis Applied After Statute Passes
Richmond Newspapers First Amendment Test

After a presumptive right is found by way of the *Richmond Newspapers* test, the First Amendment challenge requires strict scrutiny and a determination whether the challenged law is necessary to further the state's interest and narrowly drawn to achieve that end.⁹² State statutes restricting press access to polling locations for the purpose of newsgathering and observing do not advance an important government interest. The arguments set forth by the Third Circuit, as well as commentators, suggests that a ten-foot barrier (or a thirty- or one-hundred-foot barrier, as required in some states⁹³) is not far removed geographically from the voting process and therefore adequate for the press to report from.⁹⁴ Although the press is not far removed geographically, there is a wall between the voting process and the press.⁹⁵ At that point, proximity means nothing if a wall shields the electoral process. One commentator suggests that "[u]nless the reporters get to arrange the furniture, the photo ID checking might very well be out of the line of vision from ten feet outside the polling place."⁹⁶

The Third Circuit also stated that the state has a significant interest "in protecting voters from intimidation."⁹⁷ Voter intimidation is a real concern that has been addressed by courts.⁹⁸ However, most cases of voter intimidation are not

⁹⁰ See Josh Israel, *Virginia Rejects 134 Votes For Lack Of Voter ID*, THINKPROGRESS (Nov. 25, 2013, 9:06 AM), <http://thinkprogress.org/justice/2013/11/21/2977581/virginia-rejects-voters/#>.

⁹¹ See Eric Shawn, *Non-Citizens Caught Voting in 2012 Presidential Election in Key Swing State*, FOX NEWS (Dec. 18, 2013), <http://www.foxnews.com/politics/2013/12/18/non-citizens-caught-voting-in-2012-presidential-election-in-key-swing-state/>.

⁹² *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

⁹³ See ALA. CODE § 17-9-50 (2006); ARIZ. REV. STAT. ANN. § 16-515 (2006 & Supp. 2014); DEL. CODE ANN. tit. 15, § 4933(c) (2007); W. VA. CODE ANN. § 3-1-37(a) (LexisNexis 2013).

⁹⁴ Sandy Davidson, *Separated But Equal: The Third Circuit, the Press and Polling Places*, JURIST (Mar. 4, 2013), <http://jurist.org/forum/2013/03/sandy-davidson-press-polling.php>.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *First Amendment*, *supra* note 71, at 1068.

⁹⁸ See, e.g., *Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976 (D.S.D. 2004).

caused by the press trying to report the news but by observers or electioneers.⁹⁹ For example, North Carolina passed a law that allows “political parties to send 10 roving ‘observers’ from precinct to precinct on voting days, and authorizes citizens to challenge the legality of votes cast in the county where the challenger lives.”¹⁰⁰ Critics of the law claim that it will intimidate Democratic-leaning black voters, some of whom may remember the threats and assaults in the South in the 1960s.¹⁰¹ While this North Carolina law stands to increase voter intimidation, the newsgathering press stands to play no role in voter intimidation. The reasoning given by the Third Circuit for disallowing press access to polling locations falls short.

B. *Voting and News Media Reporting Surrounding Election Day*

Many newsworthy events occur during the voting process and inside the polling place. During the 2012 Presidential Election, *Fox News* received several complaints from voters using touch-screen machines, claiming that when they tried to select Presidential Candidate Mitt Romney, the machine indicated they had selected now-President Barack Obama.¹⁰² There were also reports that Florida’s governor Rick Scott refused to extend voting hours, causing long lines and chaos and criticism in the state during the 2012 Presidential Elections.¹⁰³

During the 2014 November Midterm Elections, voting problems arose across the country. In Chicago, there were problems “from closed polling locations to inoperable voting machines to missing ballot pages . . .”¹⁰⁴ A voter in Virginia

⁹⁹ See generally *State Laws Prohibiting Electioneering Activities within Certain Distance of the Polling Place*, NAT’L ASS’N OF SECRETARIES OF ST. (2014), http://www.nass.org/component/docman/?task=doc_download&gid=1347&Itemid=.

¹⁰⁰ Saki Knafo, *North Carolina Voter ID Law Could Lead to Increased Voter Intimidation, Harassment, Election Officials Fear*, HUFFINGTON POST (Aug. 2, 2013, 2:43 PM), http://www.huffingtonpost.com/2013/08/02/north-carolina-voter-intimidation_n_3695657.html.

¹⁰¹ *Id.*

¹⁰² Eric Shawn, *Claims Increase of Machines Switching Votes in Ohio, Other Battlegrounds*, FOX NEWS.COM: POLITICS (Nov. 2, 2012), <http://www.foxnews.com/politics/2012/11/02/claims-increasing-switched-votes-in-ohio/>.

¹⁰³ Daniel Lippman, *2012 Elections: Long Lines, Suppression, Voting and Ballot Issues Reported at Polling Places*, HUFFINGTON POST (Nov. 6, 2012, 12:11 PM), http://www.huffingtonpost.com/2012/11/06/2012-elections-polling-places_n_2036228.html.

¹⁰⁴ BJ Lutz & Lisa Balde, *Voters Report Problems at Chicago Polling Locations*, NBC CHI. (Nov. 4, 2014, 12:21 PM), <http://www.nbcchicago.com/news/politics/decision-2014-general-election-voter-problems-281440971.html>.

caught a voting machine glitch on camera: When the voter tried to select the Republican candidate, the Democratic candidate was selected.¹⁰⁵ The infamous Broward County in Florida experienced “systemic breakdowns” after mechanical failures and general confusion over the location of polling places after redistricting.¹⁰⁶ A motion to extend voting hours by two hours in Broward County was rejected by a Florida judge.¹⁰⁷

Rhode Island’s Voter ID law became more restrictive for the 2014 election.¹⁰⁸ While the list of accepted forms of identification in Rhode Island will still be greater than those accepted in most conservative states, such as Pennsylvania, testing the ID law in 2012 did not go without any hiccups.¹⁰⁹ Rhode Island’s chapter of the American Civil Liberties Union raised several concerns about the new ID law, stating that it is totally unnecessary and “will certainly have an adverse effect on certain categories of voters—poor, racial minorities.”¹¹⁰ The Rhode Island Midterm Election ran smoothly, however, according to reports from election officials.¹¹¹ Some groups are citing voter ID laws as the culprit for low voter turnout in Texas.¹¹² In October 2014, just days before early voting began in Texas, the United States Supreme Court upheld a Texas voter ID law vehemently

¹⁰⁵ Thomas Johnson, *Voting Machine Glitch Caught on Camera*, WASH. POST (Nov. 4, 2014, 5:08 PM), <http://www.washingtonpost.com/pb/politics/election-2014-live/?hpid=z2#bfa0a89-86a3-4765-a9d3-a397d229224e>.

¹⁰⁶ M. Alex Johnson, *Florida Democrats Lose Motion to Extend Voting in Broward County*, NBC NEWS.COM (Nov. 4, 2014, 7:29 PM), <http://www.nbcnews.com/politics/elections/florida-democrats-lose-motion-extend-voting-broward-county-n241326>.

¹⁰⁷ *Id.*

¹⁰⁸ Jess Bidgood, *Rhode Island Primary Tests New Voter ID Law*, N.Y. TIMES (Sept. 11, 2012, 9:50 PM), http://thecaucus.blogs.nytimes.com/2012/09/11/rhode-island-primary-tests-new-voter-id-law/?_php=true&_type=blogs&_php=true&_type=blogs&_r=3.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* (quoting Steven Brown, Executive Director of Rhode Island’s ACLU chapter).

¹¹¹ *Providence Board of Canvassers reporting ‘brisk’ turnout*, PROVIDENCE JOURNAL (Nov. 4, 2014, 6:40 PM), <http://www.providencejournal.com/politics/content/20141104-providence-board-of-canvassers-reporting-brisk-turnout.ece>.

¹¹² Ross Ramsey, *Turnout Down in Texas, and Democrats Claim a Reason: Voter ID Law*, N.Y. TIMES, Nov. 8, 2014, http://www.nytimes.com/2014/11/09/us/turnout-down-in-texas-and-democrats-claim-a-reason-voter-id-law.html?_r=0.

opposed by the Obama administration, civil rights groups, and former Attorney General Eric Holder.¹¹³

The foregoing issues highlight just a few reasons why the press should be given greater access.¹¹⁴ Voter ID laws are a recent trend, beginning with Arizona in 2004 passing the first law of its kind; “Arizona ‘is going to be the first rather than the last,’” claimed Robert Pastor, a director at American University.¹¹⁵ To that end, more states are following Arizona’s lead.

IV. EXIT POLLING COMPARED TO RESTRICTIONS ON PRESS ACCESS IN POLLING LOCATIONS

An “exit poll” refers to the collection of certain data from a random sampling of voters on Election Day used to predict election results.¹¹⁶ “The 1980 election [between incumbent Jimmy Carter and Governor Ronald Reagan] marked the first [ever] use of exit polls to predict the outcome”¹¹⁷ NBC was able to report Ronald Reagan’s victory almost three hours prior to the polls closing on the West Coast.¹¹⁸

In 1992, the United States Supreme Court held a Tennessee state statute restricting exit polling to greater than one hundred feet away from the polling location to be “narrowly tailored to serve a compelling state interest.” Many federal district courts, however, held the 100-foot barrier to be overly restrictive.¹¹⁹ Florida news organizations, including CBS Broadcasting and NBC Universal, brought

¹¹³ Jason Hanna & Michael Pearson, *Supreme Court Allows Texas Voter ID Law for Now*, CNN.COM: POLITICS (Oct. 19, 2014, 1:10 PM), <http://www.cnn.com/2014/10/18/politics/texas-voter-id-law/>; see also *Veasey v. Perry*, 135 S. Ct. 9 (2014) (issuing an order allowing Texas to use a strict voter ID law).

¹¹⁴ Other restrictions pose a threat to minority voters besides voter ID laws. See Jaeah Lee, *Charts: How Minority Voters Get Blocked at the Ballot Box*, MOTHER JONES (Nov. 3, 2014, 6:00 AM), <http://www.motherjones.com/politics/2014/10/charts-black-latino-voters-machines-poll-workers>.

¹¹⁵ Gannett News Service, *More States May Copy Arizona’s Proof-of-Citizenship Voter Requirement*, TUCSON CITIZEN (Jan. 16, 2008), <http://tucsoncitizen.com/morgue/2008/01/16/74246-more-states-may-copy-arizona-s-proof-of-citizenship-voter-requirement/>. Robert Pastor is the director of the Center for Democracy and Election Management at American University. *Id.*

¹¹⁶ Kate Pickert, *A Brief History of Exit Polling*, TIME (Nov. 4, 2008), <http://content.time.com/time/politics/article/0,8599,1856081,00.html>.

¹¹⁷ *Exit Polls and the First Amendment*, 98 HARV. L. REV. 1927, 1929 (1985).

¹¹⁸ Pickert, *supra* note 116.

¹¹⁹ *Burson v. Freeman*, 504 U.S. 191, 211 (1992) (plurality opinion); see *id.* at 217–18 (Stevens, J., dissenting).

action against state officials, challenging the constitutionality of a state statute prohibiting the solicitation of voters, including conducting exit polls within 100 feet of polling places.¹²⁰ After applying a two-part test,¹²¹ the district court held that the statute was not narrowly tailored to accomplish a significant state interest.¹²² The Ninth Circuit reviewed a Washington state statute that prohibited anyone from conducting an exit poll or public opinion survey within three hundred feet of any polling place.¹²³ The district court declared the statute unconstitutional and noted that the media's exit polling procedures were "systematic, reliable, and not inherently disruptive."¹²⁴

Surrounding recent general elections, news organizations in various states requested relief from federal courts in the form of declarations that statutes prohibiting exit polling are unconstitutional. In New Jersey and Minnesota, news outlets such as CBS, Fox News, and NBC brought suits alleging violations of their First Amendment right to gather news.¹²⁵ In response to such requests, United States District Judge Peter Sheridan said: "[t]here is simply no evidence that exit polling has ever led to disorderly conduct at polling places."¹²⁶ The recent trend toward allowing all exit pollers greater access to polling places should be mirrored by state legislatures in allowing the press greater access to polling places for newsgathering purposes.

CONCLUSION

While statutes governing and restricting exit polling have changed over the years and news organizations still challenge those in existence, the vast majority of

¹²⁰ CBS Broad., Inc. v. Cobb, 470 F. Supp. 2d 1365, 1366 (S.D. Fla. 2006).

¹²¹ *Id.* at 1368–69 (two-part test: (1) must determine if the statute is content-neutral or a content-based restriction; (2) as a facially content-based restrictions, statute is subject to strict scrutiny—"the State must show that the regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end") (internal quotation omitted).

¹²² *Id.*

¹²³ Daily Herald Co. v. Munro, 838 F.2d 380, 382 (9th Cir. 1988).

¹²⁴ Morant, *supra* note 82, at 122.

¹²⁵ Gene Policinski, *First Amendment Doesn't Shield Us from Private Infringements*, HERNANDO TODAY (May 13, 2013, 10:39 AM), <http://hernandotoday.com/news/hernando-sports/2009/oct/31/ha-first-amendment-doesnt-shield-us-from-private-i-ar-275432/>; James Walsh, *Judge Rules in Favor of Exit Polling in Minnesota*, STAR TRIB. (Oct. 16, 2008, 5:10 AM), <http://www.startribune.com/local/stpaul/31023804.html>.

¹²⁶ Policinski, *supra* note 25.

states freely allow exit polls to be conducted after a participant finishes voting.¹²⁷ Just as states over time have given news organizations more and more freedom to gather data from exiting voters, states should follow the Sixth Circuit's holding in *Beacon Journal* and allow press and news media to quietly observe and report from inside the polling place.¹²⁸ While interference with voters and voter intimidation is a concern, the press contributes very little to this problem and therefore should not be punished.

State statutes restricting press access to polling locations serve no compelling government interest. With the rise of Voter ID laws, voter fraud, and general concerns about the preservation of democracy, the press serves as a watchdog for all. In allowing press access to polling locations, the electoral process will remain under close watch, preserving the integrity of the electoral process, a cornerstone of American democracy. Some states have laws that allow the press access to the voting process. More states should follow this trend and allow the press to help preserve the sanctity of the American electoral process.

¹²⁷ See OKLA. STAT. ANN. tit. 26, § 7-108.1 (West 1997) ("Any person desiring to conduct an exit poll within three hundred (300) feet of any ballot box shall notify the secretary of the county election board of his intentions to do so no later than 5 p.m. on the Wednesday preceding the election.").

¹²⁸ See *Beacon Journal Publ'g Co. v. Blackwell*, 389 F.3d 683, 684 (6th Cir. 2004).