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# Rethinking Press Rights of Equal Access

Luke M. Milligan\*

## *Abstract*

*The prevailing approach to First Amendment equal-access litigation, turning on the "general inclusivity" of government access, is deeply flawed. The standard has proved to be, in the end, exceedingly permissive, hopelessly vague, and, perhaps most importantly, theoretically incompatible with the Supreme Court's emerging view that access is a form of government subsidy. This Article calls on the courts to abandon their reliance on inclusiveness, and, in its place, tailor the definition of "access" to include only those government acts conducted "pursuant to official duties." The resulting doctrine would be one worthy of the federal courts—durable, coherent, and duly respectful of the traditional relations between public officials and the press.*

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## I. Introduction

The relationship between public officials and the press is marked, to a large degree, by its transactional nature. While their exchanges are sometimes formal (as in the case of political advertisements),<sup>1</sup> they are, more often than not, informal. Take, for example, the modern press conference: An official provides reporters with access to himself and his office, and, in exchange, the reporters provide the official with public exposure.<sup>2</sup> The "informal" market for reporters and officials is, upon examination, not hard to discern.<sup>3</sup>

For officials participating in this informal market, public exposure does not come cheap. Access, after all, begets vulnerability. Information captured through access is forever liberated from the official's control. It can be projected, fairly or not, to suggest official corruption, incompetency, or dishonesty. Not surprisingly, public officials regularly seek to mitigate the risk of access through "selectivity." Selectivity reduces risk in two ways. In a narrow sense, it confines information revealed through access to trusted members of the press, thereby enhancing the likelihood that access will reflect favorably on the government. In a wider sense, selectivity (which in effect subsidizes reporting) can be wielded to reward past loyalty and build future loyalty.

Unfortunately, the prevailing judicial approach to First Amendment "selective access" (or, as it is inversely put, "equal access") litigation is deeply flawed. Most of the lower courts, as it stands, limit the analysis to *whom* was included in the grant of access. They hold that excluded reporters enjoy a presumptive right of access if, and *only* if, the grant of access was "generally inclusive" of the press. This Article argues that the current focus on "general

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1. See, e.g., Ellen P. Goodman, *Stealth Marketing and Editorial Integrity*, 85 TEX. L. REV. 83, 88–92 (2006) (identifying the issues surrounding government sponsorship of media content); Jodie Morse, *Managing the News: The History and Constitutionality of the Government Spin Machine*, 81 N.Y.U. L. REV. 843, 843 (2006) (discussing the example of the Bush White House paying a columnist for favorable coverage of a government policy).

2. See, e.g., W. DALE NELSON, WHO SPEAKS FOR THE PRESIDENT? 1 (1998) (quoting a journalist's statement that "[w]e're trying to get the news and they are trying to keep it from us or select the news we get . . . [i]t's a game").

3. This Article works on the premise that informal transactions, rather than constitutional principles, should be the central force mediating press access to government information. Cf. Eric Easton, *Public Importance: Balancing Proprietary Interests and the Right to Know*, 21 CARDOZO ARTS & ENT. L.J. 139, 144–54 (2003) (outlining the development of the "right to know" principle underlying the First Amendment); Amy Jordan, *The Right of Access: Is There a Better Fit Than the First Amendment?*, 57 VAND. L. REV. 1349, 1350 (2004) (arguing that "press access is part of the foundation upon which the First Amendment is built"). That said, this Article argues that once a government chooses to grant some access, the Constitution plays an important role in regulating the terms of that grant.

inclusivity" is permissive, irrational, ambiguous, and, perhaps most importantly, theoretically incompatible with the Supreme Court's emerging views on government subsidization of speech. It would make far better sense, it seems, for courts to forego inquiries into whom was granted access, and, in its place, tailor the definition of "access" to only those grants made "pursuant to official duties." This doctrinal shift will, no doubt, result in sounder judicial analyses and more coherent, reliable outcomes. And because the phrase "pursuant to official duties" has been largely defined in the analogous context of employee-speech cases, the proposed standard will not require lower courts to undertake the long and sometimes awkward process of developing precedent.

## II. Access and Inclusivity

Although the text of the First Amendment does not reference a right of press access,<sup>4</sup> the Supreme Court identified such a right in a series of cases in the 1970s.<sup>5</sup> Since then, the Court has had little to say on the issue, leaving the lower courts, for better or worse, with just a few guiding principles. One such principle is that reporters enjoy no "special" right of access to government places or information that are (and have traditionally remained) closed to all members of the public and the press.<sup>6</sup> A second principle is that, for places or information traditionally opened to the general public, the government may not base selective grants of press access on viewpoint.<sup>7</sup>

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4. See, e.g., *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972) (noting that the First Amendment "does not guarantee the press a constitutional right of special access to information not available to the public generally").

5. See *id.* ("[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated."); see also *Houchins v. KQED, Inc.*, 438 U.S. 1, 17 (1977) (noting that the job of a journalist on assignment is "to gather information to be passed on to others, and his mission is protected by the Constitution for very specific reasons"); *Pell v. Procunier*, 417 U.S. 817, 833-34 (1974) (identifying a right of access for the press equal to that of the general public); *Saxbe v. Washington Post Co.*, 417 U.S. 843, 850 (1974) (agreeing with the holding in *Pell*).

6. See, e.g., *Branzburg*, 408 U.S. at 684-85 (noting that the First Amendment "does not guarantee the press a constitutional right of special access to information not available to the public generally"); see also *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980) (finding a press right of access to historically open events like criminal trials); *Telemundo of L.A. v. City of L.A.*, 283 F. Supp. 2d 1095, 1102 (C.D. Cal. 2003) (mandating equal press access to a public ceremony commemorating the Mexican War); C. Edwin Baker, *The Independent Significance of the Press Clause Under Existing Law*, 35 HOFSTRA L. REV. 955, 956 (2007) ("[T]he Court has never explicitly recognized that the Press Clause involves any significant content different from that provided to all individuals by the prohibition on abridging freedom of speech.").

7. See, e.g., *Pell*, 417 U.S. at 834 ("The First and Fourteenth Amendments bar

These principles aside, many questions regarding the right of access remain unanswered by the Supreme Court. For instance, the Court has not ruled on, or otherwise suggested how courts should analyze, a reporter's claim of access to places or information that are *closed* to the public but *opened* to at least some members of the media.<sup>8</sup> Left to their own designs, the lower courts have tended to coalesce their holdings around the following rule: The press enjoys First Amendment rights of access to all places or information that, notwithstanding their being closed to the general public, have been made *generally available* to the press.<sup>9</sup>

Probably the leading decision in this regard is the D.C. Circuit's 1977 opinion in *Sherrill v. Knight*.<sup>10</sup> Sherrill was a correspondent for *The Nation*

government from interfering in any way with a free press."); *Saxbe*, 417 U.S. at 850 (same); *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 9 (1st Cir. 1986) (holding that, in context of judicial proceeding, the government may not grant selective access based on viewpoint); *United States v. Connolly*, 204 F. Supp. 2d 138, 139 (D. Mass. 2002) (finding it "beyond dispute that only in the most extraordinary circumstances is the government permitted, consistent with the First Amendment, to discriminate between members of the press in granting access to trials and other [traditionally open] government proceedings").

8. See, e.g., *Developments in the Law—The Law of Media*, 120 HARV. L. REV. 990, 1019–20 (2007) (characterizing this as a "difficult question" in which "a number of ambiguities exist").

9. Not all courts, however, have taken this approach. Some jurisdictions have been unwilling to overlook the doctrinal flaws of the "general inclusivity" standard. The Fourth Circuit, as a result, held that there is never a right of equal access. See *Baltimore Sun Co. v. Ehrlich*, 437 F.3d 410, 418 (4th Cir. 2006) ("[W]hether the disfavored reporters number two or two million, they are still denied access to discretionarily afforded information on account of their reporting."). A handful of other decisions have taken the opposite approach, holding that a grant of access to even a single reporter triggers a presumptive right of access for all excluded reporters. See, e.g., *Getty Images News Serv. Corp. v. Dep't of Def.*, 193 F. Supp. 2d 112, 120 (D.D.C. 2002) (requiring the Department of Defense to permit media access based on reasonable guidelines); *Nation Magazine v. U.S. Dep't of Def.*, 762 F. Supp. 1558, 1573 (S.D.N.Y. 1991) ("Regardless of whether the government is constitutionally required to open the battlefield to the press . . . once it does so it is bound to do so in a non-discriminatory manner."). Both reactions are highly problematic—one allows for unmitigated viewpoint discrimination, the other unduly upsets traditional relations between the press and officials (e.g., exclusive interviews). For a detailed discussion of the relevant lower court holdings, see Ilana Friedman, *Where Public and Private Spaces Converge: Discriminatory Media Access to Government Information*, 75 FORDHAM L. REV. 253, 253 (2006) (surveying lower court approaches to access claims, and arguing that the "general inclusivity" standard is the most workable).

10. See *Sherrill v. Knight*, 569 F.2d 124, 129–30 (D.C. Cir. 1977) (requiring the publication of a standard by which the government grants press credentials and prohibiting any arbitrary or content-based denials of press passes). Prior to *Sherrill* only a handful of scattered district court decisions had addressed the right to equal access. See, e.g., *Westinghouse Broad. Co., v. Dukakis*, 409 F. Supp. 895, 896 (D. Mass. 1976) (stating that public officials must provide equal access to press members absent a compelling government interest to the contrary); *Borreca v. Fasi*, 369 F. Supp. 906, 910 (D. Haw. 1974) (ruling against mayor's attempt to

magazine. When refused a White House press pass, he sued various government agencies and departments for violating his First and Fifth Amendment rights. The D.C. Circuit held that Sherrill had a First Amendment right to access the press conferences, and, as such, his exclusion could not be justified on viewpoint grounds alone.<sup>11</sup>

The reasoning of the *Sherrill* decision is, at its heart, functionalist. With the goal of maximizing public discourse, the panel searched for a standard that would bar "bad" forms of selective access (say, press conferences, when equal access *was not* thought to discourage grants of access) and, at the same time, permit "good" forms of selective access (say, exclusive interviews, when equal access *was* thought to discourage grants of access). Ultimately the court identified a doctrinal test to produce these desired results: An excluded reporter enjoys a presumptive right of access whenever such access is already *generally inclusive* of the press.

In applying this new standard, the D.C. Circuit (not surprisingly) found that the White House press conference was "generally inclusive" of the media:

[T]he White House has voluntarily decided to establish press facilities for correspondents who need to report therefrom. These press facilities are perceived as being open to all bona fide Washington-based journalists. . . . White House press facilities having been made publicly available as a source of information for newsmen.<sup>12</sup>

The *Sherrill* decision explicitly sets forth its own limits: It did not impede on "the discretion of the President to grant interviews or briefings with selected journalists."<sup>13</sup> The panel observed that "[i]t would certainly be unreasonable to

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exclude journalist without demonstrating any compelling rationale); *Consumer Union v. Periodical Correspondents' Ass'n*, 365 F. Supp. 18, 25 (D.D.C. 1973) (determining that limitations on press access must be motivated by a legitimate government interest); *Lewis v. Baxley*, 368 F. Supp. 768, 775 (D. Ala. 1973) ("Journalists and newsmen have a First Amendment right to certain items of news."); *Quad-City Cmty. News Serv., Inc. v. Jebens*, 334 F. Supp. 8, 15 (S.D. Iowa 1971) (contending any restraint on First Amendment rights must promote a compelling government interest). Each of these pre-*Sherrill* opinions, however, is vague regarding the degree of inclusiveness needed to trigger a right of equal access. See *generally Snyder v. Ringgold*, 40 F. Supp. 2d 714, 717 (D. Md. 1999) (inferring that the *Borreca* decision was based "on the factual context of the exclusion of the reporter: general news conferences open to all media").

11. *Sherrill*, 569 F.2d at 131 ("The requirement of a final statement of denial and the reasons therefore is necessary in order to assure that the agency has neither taken additional, undisclosed information into account, nor responded irrationally to matters put forward by way of rebuttal or explanation.").

12. *Id.* at 129.

13. *Id.*

suggest that because the President allows interviews with some bona fide journalists, he must give this opportunity to all."<sup>14</sup>

This "general inclusivity" inquiry, characterized by some as a "public forum" analysis,<sup>15</sup> has been favored by most of the lower courts.<sup>16</sup> The same year as *Sherrill*, the Second Circuit, in *American Broadcasting Companies v. Cuomo*,<sup>17</sup> held that once the general press had been invited to cover a campaign event, candidates could not selectively exclude particular members of the press based on viewpoint.<sup>18</sup> The panel observed that "[t]he issue is not whether the public is or is not generally excluded, but whether the members of the broadcast media are generally excluded."<sup>19</sup> One recent district court decision observed that the "equal access" precedent:

[R]eveals that a limited constitutional right of access applies only where comments by government officials are offered in a forum *effectively open to all* members of the press. . . . This rule . . . permits the common and widely accepted practice among politicians of granting an exclusive interview to a particular reporter and equally widespread practice of public officials declining to speak to reporters whom they view as untrustworthy.<sup>20</sup>

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14. *Id.*

15. Friedman, *supra* note 9, at 282–84; *Developments, supra* note 8, at 1020.

16. *See, e.g., Raycom Nat'l Inc. v. Campbell*, 361 F. Supp. 2d 679, 683 (N.D. Ohio 2004) (holding that the right of equal access turns on whether the sought information was "generally available to other members of the media"); *United Teachers v. Stierheim*, 213 F. Supp. 2d 1368, 1374 (S.D. Fla. 2002) (holding that "exclusion of Plaintiffs from the press room reserved for members of the 'general-circulation' media constitutes denial of access to information"); *Snyder v. Ringgold*, 40 F. Supp. 2d 713, 717 (D. Md. 1999) (concluding that the right to equal access is limited to "information generally available"); *Times-Picayune Publ'g Co. v. Lee*, Civ. A. No. 88-1325, 1988 WL 36491, at \*9 (E.D. La. April 15, 1988) ("The right [to access] includes, at a minimum, a right of access to information made available to the public or the press generally."); *Stevens v. N.Y. Racing Ass'n*, 665 F. Supp. 164, 175 (E.D.N.Y. 1987) (holding that it was impermissible to prohibit photojournalist from bringing his camera into racetrack paddock areas that "were otherwise open to the press"); *Emard v. County of Orange*, No. G035913, 2007 WL 1493815, at \*6 (Cal. Ct. App. May 23, 2007) (summarizing the relevant precedent as requiring that the contested access be generally inclusive of the press).

17. *Am. Broad. Cos. v. Cuomo*, 570 F.2d 1080 (2d Cir. 1977) (ruling that "once there is a public function, public comment, and participation by some of the media, the First Amendment requires equal access to all of the media or the rights of the First Amendment would no longer be tenable").

18. *Id.* at 1083.

19. *Id.*

20. *Youngstown Publ'g Co. v. McKelvey*, No. 4:05 CV 00625, 2005 WL 1153996, at \*6 (N.D. Ohio May 16, 2005) (internal citations and quotations omitted).

All in all, the lower courts have turned to the "general inclusivity" standard to resolve press claims of access to tax records,<sup>21</sup> press conferences,<sup>22</sup> press tables,<sup>23</sup> interviews,<sup>24</sup> official buildings,<sup>25</sup> and prosecutorial records.<sup>26</sup>

### III. A Critique of Inclusivity

The prevailing standard for equal access claims—turning on "general inclusivity"—is troubling. First, it has proved to be exceedingly permissive. Sophisticated officials can deny a reporter a right of access by simply relabeling an "open" event as "invite-only." The White House Press Secretary in *Sherrill* could have, it seems, excluded the correspondent in a constitutional manner by clarifying that the conferences were by invitation. So long as the reporters in attendance, taken as a whole, were not "generally inclusive" of the press corps, the secretary would then be free to selectively omit certain reporters from the event.

Second, the standard is irrational. It is founded on nothing more than the distinction between viewpoint-based exclusion from an *open event* and viewpoint-based exclusion from an *invitation list*. Is there any real difference between the wrongfulness of the official's act, or the harm caused to the reporter, in these two scenarios?<sup>27</sup>

A third glaring problem with the "general inclusivity" standard is that it is hopelessly ambiguous. What does "generally" mean? And how will courts discern the relevant market of reporters? For instance, do bloggers count? This ambiguity might be tolerable if we could foresee regular opportunities for judicial calibration. However, we do not. The press tends to resolve access-related grievances with public officials by extra-legal means. After all, the benefit of a right of access to an exclusive interview is relatively small. Even if

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21. *Emard v. County of Orange*, No. G035913, 2007 WL 1493815, at \*6 (Cal. Ct. App. May 23, 2007).

22. *Sherrill v. Knight*, 569 F.2d 124, 129 (D.C. Cir. 1977).

23. *McBride v. Vill. of Michiana*, No. 4:92-CV-155, 1998 WL 276139, at \*10 (W.D. Mich. Apr. 2, 1998); *United Teachers v. Stierheim*, 213 F. Supp. 2d 1368, 1372–73 (S.D. Fla. 2002).

24. *Raycom Nat'l Inc. v. Campbell*, 361 F. Supp. 2d 679, 683 (N.D. Ohio 2004); *McBride*, 1998 WL 276139, at \*10.

25. *Snyder v. Ringgold*, 40 F. Supp. 2d 713, 717 (D. Md. 1999).

26. *Sw. Newspapers Corp. v. Curtis*, 584 S.W.2d 362, 365 (Tex. Civ. App. 1979).

27. *See Balt. Sun v. Ehrlich*, 437 F.3d 410, 415 (4th Cir. 2006) ("Whether one reporter is excluded or all but one reporter is excluded, the claim would present instances in which government officials disadvantage some reporters because of their reporting and simultaneously advantage others by granting them unequal access to nonpublic information.").



the excluded reporter is successful in litigation, he will probably not gain any actual access—the more likely scenario is that interview grants will cease altogether. This expected benefit of litigation is inarguably outweighed by its expected costs (in the forms of attorney's fees, industry reputation, and diminished government relationships).

Lastly, and maybe most importantly, the "general inclusivity" standard runs afoul of the Court's solidifying position that access is a form of government subsidy.<sup>28</sup> The subsidy argument is nicely outlined by Justice Ginsburg's concurrence in *Los Angeles Police Department v. United Reporting Publishing Corp.*:<sup>29</sup>

To be sure, the provision of address information is a kind of subsidy to people who wish to speak to or about arrestees, and once a State decides to make such a benefit available to the public [i.e., release to one entity], there are no doubt limits to its freedom to decide how that benefit will be distributed. California could not, for example, release address information only to those whose political views were in line with the party in power.<sup>30</sup>

Five other justices (four of whom are on the current Court) explicitly endorsed Justice Ginsburg's view that access to arrest records is a form of government subsidy which cannot be selectively granted based on viewpoint.<sup>31</sup>

The Court's emerging view on subsidies has stark theoretical implications for the "general inclusivity" standard. First, the natural limits to this view of subsidies is not readily apparent: If arrest records are a *subsidy* to those who wish to speak "about arrestees," then presumably access to a presidential interview or press conference is a subsidy for those who wish to speak "about

28. See, e.g., *Leathers v. Medlock*, 499 U.S. 439, 448 (1991) (explaining that imposing a special tax on the press "resembled a penalty for certain newspapers"); *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 234 (1987) (holding it unconstitutional to impose a sales tax on general interest magazines while exempting newspapers, religious, professional trade, and sports journals); *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 592–93 (1983) (same) ("A tax that singles out the press, or that targets individual publications within the press, places a heavy burden on the State to justify its action."). See generally Martin H. Redish & Daryl I. Kessler, *Government Subsidies and Free Expression*, 80 MINN. L. REV. 543 (1996) (assessing the constitutionality of government subsidization of expression); Mark G. Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment*, 57 TEX. L. REV. 863 (1979); Edward H. Ziegler, Jr., *Government Speech and the Constitution: The Limits of Official Partisanship*, 21 B.C. L. REV. 578 (1980).

29. *L.A. Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32, 40 (1999) (upholding a law permitting the government to deny access to arrestee information).

30. *Id.* at 43 (Ginsburg, J., concurring).

31. Justices Souter and Breyer signed onto Justice Ginsburg's concurring opinion. *Id.* Justices Stevens, O'Connor, and Kennedy also endorsed this view. See *id.* at 44 (Stevens, J., dissenting) ("As Justice Ginsburg points out, if the State identified the disfavored persons based on their viewpoint, or political affiliation, the discrimination would be clearly invalid.").

the President."<sup>32</sup> Second, the position of "access-as-subsidy" necessarily implies that rights of access turn on the simple existence—not the inclusiveness—of an audience. After all, the value of a subsidy, and, inversely, its cost to those denied the subsidy, is not positively correlated with the degree of audience inclusion. In fact, the opposite seems true. The value of a subsidy is just as high—and very likely higher—when the audience is smaller. The logic here is straightforward: the more selective the grant of access, the larger the reporter's "scoop," and, thus, the more valuable the access. This theoretical erosion of the "general inclusivity" standard, coupled with its permissiveness, irrationality, and ambiguity, suggests that courts should begin to reformulate their approach to equal access claims.

#### IV. Narrowing "Access"

While the lower courts' "general inclusivity" approach to resolving equal access litigation is deeply flawed, a pure "subsidy" approach (one naturally extrapolated from the reasoning of the majority of justices in *Los Angeles Police Department*) seems equally problematic.<sup>33</sup> After all, a pure subsidy approach would unduly encroach on the traditional relationship between media and public officials, effectively barring customary interchanges such as the exclusive interview and the press leak.<sup>34</sup> As a result, it will be paramount that courts, before supplanting the "general inclusivity" standard, place reasonable, coherent, and easily applicable limits on the subsidy principle.<sup>35</sup> Fortunately, these limits are not hard to find as they exist in the analogous context of the

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32. *Id.* at 43 (Ginsburg, J., concurring).

33. This would presumably be in accord with Judge Timothy Dyk's view. See Timothy B. Dyk, *Newsgathering, Press Access, and the First Amendment*, 44 STAN. L. REV. 927, 941 (1992) (arguing that the press should have a "presumptive right of access," rebuttable by legitimate government interests, when the government discriminates in granting access among press organizations).

34. See, e.g., *Snyder v. Ringgold*, No. 97-1358, 1998 WL 13528, at \*4 (4th Cir. Jan. 15, 1998) (rejecting the subsidy approach on the ground that it would "presumably preclude the common and widely accepted practice . . . of granting an exclusive interview to a particular reporter"); Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 573 (1980) ("The President . . . may decide what will be discussed in the Oval Office of the White House tomorrow and may decide to invite some private groups and exclude others. No one doubts his constitutional power to do so."); *Developments, supra* note 8, at 1020 (explaining that it is important that the doctrine allow "socially useful, historically sanctioned exclusive access").

35. Student commentators have rightly, I think, criticized the use of a forum-based limitation on the rights of access. See *Developments, supra* note 8, at 1027-28 (contending that such discrimination will only likely benefit the established media outlets).

employee speech cases.<sup>36</sup> The following paragraphs briefly introduce this area of First Amendment jurisprudence.

### A. Public Employee Speech

The First Amendment's right of free speech extends to public employees. The Supreme Court has observed that, were such individuals not able to speak on the operation of their employers, "the community would be deprived of informed opinions on important public issues."<sup>37</sup> The Court, however, has been mindful to balance the speech-right against the competing interest of workplace efficiency. Government employers, like private employers, must be able to maintain some degree of control over their employees' words and actions.<sup>38</sup> As the Court has observed, "Official communications have official consequences, creating a need for substantive consistency and clarity."<sup>39</sup>

Weighing these competing interests, the Court held in *Pickering v. Board of Education* that public-employee speech is protected by the First Amendment so long as the employee is speaking as a citizen about matters of public concern.<sup>40</sup> This standard was recently clarified by the Court in *Garcetti v. Ceballos*:<sup>41</sup> "[W]hen public employees make statements *pursuant to their*

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36. As Judge Posner recently observed, "Proliferation of legal categories is a chronic problem for American law, as it deflects attention from practical to definitional concerns." *United States v. Johnson*, 380 F.3d 1013, 1014 (7th Cir. 2004). It is hardly uncommon for the federal courts to import doctrine to facilitate constitutional adjudication. *See, e.g.*, *Illinois v. Gates*, 462 U.S. 213, 233 (1983) (importing the "totality of the circumstances" doctrinal point to evaluate reliability of tipster); *Rakas v. Illinois*, 439 U.S. 128, 144 (1978) (replacing property-based doctrine for Fourth Amendment standing with the "legitimate expectations of privacy" test governing violations); *Johnson*, 1013 F.3d at 1014–16 (importing tort doctrine to govern doctrine of exclusionary rule).

37. *City of San Diego v. Roe*, 543 U.S. 77, 82 (2004) (per curiam).

38. *See Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) (holding that the First Amendment is limited in its application to statements made pursuant to the official duties of public employees); Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 164 (1996) ("Managerial domains are necessary so that a democratic state can actually achieve objectives that have been democratically agreed upon. [Thus] the state can regulate speech within public educational institutions so as to achieve the purposes of education.").

39. *Garcetti*, 547 U.S. at 422.

40. *See Pickering v. Bd. of Ed.*, 391 U.S. 563, 574 (1968) (holding that "absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment"); *see also Connick v. Myers*, 461 U.S. 138, 145 (1983) (discussing the holding in *Pickering*).

41. *See Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) (holding that the First Amendment is limited in its application to statements made pursuant to the official duties of public

*official duties*, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."<sup>42</sup>

There are two important components to the *Garcetti* standard. The first is the *official nature* of the employee's activity. The *Garcetti* Court explained that the inquiry into whether a particular act is an "official duty" is "a practical one".<sup>43</sup>

Formal job descriptions often bear little resemblance to the duties an employee actually is expected to perform, and the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes.<sup>44</sup>

True to its practical nature, the term "official duties" has been held to encompass the employee's "daily professional activities,"<sup>45</sup> which would include "activities that the employee is not expressly required to perform"<sup>46</sup> so long as they were "consistent with the type of activities the employee was paid to do."<sup>47</sup> Accordingly, the term extends to acts that are "ad hoc" or "de facto" components of public employment.<sup>48</sup>

A second component of the *Garcetti* standard is the nexus requirement that the employee's speech be *pursuant* to his official duties. Lower courts have so far defined this element broadly to include speech which "reasonably contributes to or facilitates the employee's performance of the official duty."<sup>49</sup> Importantly, the term "pursuant to" captures speech, such as a leak, which might be contrary to one's official duties, but whose content is based on

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employees). The gatekeeping standard in *Garcetti* was recently extended to allow a state interscholastic athletic association to retaliate against a private high school that violated rules on recruiting students. See *Tenn. Secondary Sch. Athletic Ass'n v. Brentwood Acad.*, 127 S.Ct. 2489, 2491 (2007) (permitting state interscholastic athletic association to impose conditions on speech that are necessary to managing its league).

42. *Garcetti*, 547 U.S. at 421 (emphasis added).

43. *Id.* at 424.

44. *Id.* at 424–25.

45. *Id.* For the prosecutor-plaintiff at issue in that case, such duties included supervising attorneys, investigating charges, and preparing filings. *Id.*

46. *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 492 F.3d 1192, 1203 (10th Cir. 2007).

47. *Id.*

48. *Weisbarth v. Geauga Park Dist.*, 499 F.3d 538, 544 (6th Cir. 2007).

49. *Brammer-Hoelter*, 492 F.3d at 1203 (quoting *Green v. Bd. of County Commr's*, 472 F.3d 794, 801 (10th Cir. 2007)).

information gained *through* one's official duties.<sup>50</sup> Despite this loose nexus, the *Garcetti* Court made sure to identify concrete situations where such a nexus would not exist. Government may not, for instance, punish public employees for engaging in political discussions with government co-workers, or for seeking to publish personal views (i.e., views stripped of information gained exclusively through one's official duties) on government policies.<sup>51</sup>

### B. Importing *Garcetti*

A pure subsidy approach to equal access litigation, as extrapolated from the discussion in *Los Angeles Police Department*,<sup>52</sup> is unworkable. It would disrupt longstanding and valued transactional relations between the media and government officials. So it is important that the federal courts, before supplanting the current standard of "general inclusivity," find a way to bring the subsidy paradigm into accord with tradition. This Article raises the question: Why not draw from *Garcetti*? *Garcetti* discerns that "actions pursuant to official duties" is the limiting principle on the speech rights of public employees.<sup>53</sup> Why not extend this limiting principle to the equal-access context? Reporters would thereby enjoy a presumptive First Amendment right of access whenever an official grants access, *pursuant to his official duties*, to a member of the press.<sup>54</sup>

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50. The Fifth Circuit, in a case brought by a fired athletic director, framed the analysis as whether the basis of termination, a letter written to the principal regarding financial improprieties, was written by the plaintiff in his role as "father" or "taxpayer," or rather as "public employee." *Williams v. Dallas Indep. Sch. Dist.*, 480 F.3d 689, 694 (5th Cir. 2007). Although the director was not required to write the letter, the panel emphasized that the letter pertained to information he needed to properly execute his duties as Athletic Director (namely, taking the students to tournaments and paying their entry fees). *Id.* Similarly, the Tenth Circuit held that fired teachers had been speaking as employees rather than mere citizens when they complained to the school board regarding matters pertaining to curriculum and student behavior. *Brammer-Hoelter*, 492 F.3d at 1206. Such topics, the panel reasoned, related to the teachers' inherent duties to ensure that they had adequate materials to educate their students. *Id.*

51. See *Garcetti v. Ceballos*, 547 U.S. 410, 423 (2006) (disagreeing with any "intrusive" rule that would mandate "judicial oversight of communications between and among government employees and their superiors in the course of official business").

52. See *supra* notes 29–30 and accompanying text (outlining Justice Ginsburg's approach regarding access as a form of government subsidy).

53. In fact, one pre-*Sherrill* decision seems to actually endorse this approach. See *Borrecia v. Fasi*, 369 F. Supp. 906, 910 (D. Haw. 1974) (holding that there was a right to equal access to a press conference on the ground that "they are public communications put forth by [the mayor] in his official capacity").

54. This standard closely tracks the requirements for municipal liability in § 1983 lawsuits. See *generally* *Telemundo of L.A. v. City of L.A.*, 283 F. Supp. 2d 1095, 1102 (C.D.

Tailoring the subsidy approach in this manner would indeed preserve the customary transactional relationship between the media and public officials. For one, officials would remain free to grant exclusive interviews to reporters based on viewpoint. The *Garcetti* decision specified that the term "pursuant to official duties" would not, as a general matter, include an official's discussion of general public policy or personal matters.<sup>55</sup> And even if, during an interview, an official disclosed information gained exclusively through his official duties (say, when a President discusses the content of a cabinet meeting), the excluded reporters' rights of access could be accommodated with ease by the public distribution of an unedited transcript (or video feed). It should also be noted that the location of the interview (e.g., government property) is not dispositive of the *Garcetti* analysis:

That [the employee] expressed his views inside his office, rather than publicly, is not dispositive [of whether such speech is protectable]. Employees in some cases may receive First Amendment protection for expressions made at work. Many citizens do much of their talking inside their respective workplaces, and it would not serve the goal of treating public employees like any member of the general public to hold that all speech within the office is automatically exposed to restriction.<sup>56</sup>

In addition to interviews, the *Garcetti* limiting principle similarly preserves the *status quo* regarding press conferences and tours of public facilities. Because the press conference is, in its essence, a systematic function of the executive branch, with an organized staff and singular budget, it seems clear that it is a form of access granted "pursuant to official duties."<sup>57</sup> Moreover, tours of spaces such as prisons or battlefields are almost always conducted in accordance with official protocol, and thus pursuant to official duties. And even *ad hoc* tours of facilities would be viewed as "pursuant to official duties" inasmuch as they reveal information learned exclusively through the discharge of one's official duties.<sup>58</sup>

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Cal. 2003) (discussing the ways to satisfy the requirement that the action by an official be "undertaken pursuant to official policy or custom"). Note that the § 1983 inquiry deviates from the *Garcetti* standard in that it would presumably not capture a "leak," which is inherently contrary to official policy.

55. *Garcetti*, 547 U.S. at 423.

56. *Id.* at 420–21 (internal citations and footnotes omitted).

57. See *Sherrill v. Knight*, 569 F.2d 124, 126 (D.C. Cir. 1977) (explaining that part of a press secretary's official duties is to organize press conferences).

58. The use of press pools, necessary when there is limited space for reporters, are lawful time, place, and manner restrictions—so long as they are not arbitrarily implemented. See, e.g., *Nation Magazine v. U.S. Dep't of Def.*, 762 F. Supp. 1558, 1573 (S.D.N.Y. 1991) ("Regardless of whether the government is constitutionally required to open the battlefield to the press . . .

The *Garcetti* approach to equal access claims does, however, part from the "general inclusivity" standard in one important respect: the disclosure of government documents. Most of the time, the disclosure of documents is non-selective and in accord with the disclosing official's prescribed duties. In these circumstances, the competing standards lead to the same result (i.e., both recognize a right of access). But the standards lead to different results in the case of a government "leak." The leak is, in effect, a circumstance where the grant of access is *not generally inclusive* yet, at the same time, *pursuant to* one's official duties (because the content of the speech is information learned exclusively through the discharge of one's official duties). To put it plainly, the *Garcetti* standard, if extended to access claims, would find a right of access to leaked documents where one does not currently exist. Although this would, in theory, upset tradition, the practical impact of recognizing such a right would be *de minimus*. After all, leaks are anonymous, reporters protect sources, and, at the end of the day, media outlets are loathe to file lawsuits which, if successful, lead to the erosion of reporter's privileges.

Aside from preserving the customary relations between the press and public officials, limiting the subsidy paradigm with *Garcetti* offers the additional benefits of practicality and reliability. The limiting principle, unlike the "general inclusivity" approach, cannot be easily manipulated by public officials. Because it directs courts to conduct a "practical" inquiry, looking beyond formal job descriptions, officials cannot simply re-frame their job duties to avoid right-of-access claims. Reliability is also enhanced by the limiting principle. Due to the high number of public-employee wrongful-termination lawsuits (which regularly involve issues of protected speech), the federal courts have been able to define the contours of the term, "pursuant to official duties." The resulting reliability would not only assist lower courts in their disposition of unequal access cases, but would offer enhanced constitutional clarity to media outlets and public officials.

### V. Conclusion

The prevailing approach to equal-access litigation—turning on "general inclusivity"—is deeply flawed. The standard has proved to be, in the end, exceedingly permissive, hopelessly vague, and, perhaps most importantly, theoretically incompatible with the Supreme Court's emerging view that access is a form of government subsidy. This Article calls on the courts to abandon

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once it does so it is bound to do so in a non-discriminatory manner.").

their reliance on inclusiveness, and, in its place, limit the definition of "access" to government acts "pursuant to official duties." The resulting doctrine would be one worthy of the federal courts—durable, coherent, and duly respectful of the traditional relations between public officials and the press.





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# NOTES

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