Secrecy in the Immigration Courts and Beyond: Considering the Right To Know in the Administrative State

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> It's really a disgrace that the attorney general of the United States thinks we should return to tactics used during the Spanish Inquisition. . . . My client comes from a part of the world where they use these secret trials, and then people disappear.
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> —Immigration Attorney Bennett Zurofsky[1]

I. Introduction

Ten days after the attacks of September 11, 2001, Chief Immigration Judge Michael Creppy sent an e-mail memorandum (the "Creppy Memorandum") to all immigration judges. The Creppy Memorandum pertains to "certain cases in the Immigration Court" that Attorney General Ashcroft has deemed of "special interest," and for which "the Attorney General has implemented additional security procedures."[2] The Memorandum states that immigration judges will be notified should "any of these cases [be] filed in [their] court," that hearings for such cases must be closed to the public, and that courts must keep all details of such cases secret.[3] The order prevents courts from even confirming or denying whether "a [designated] case is on the docket or scheduled for a hearing."[4] By mid-2003, over 600 secret immigration hearings had been held pursuant to the Creppy

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[1] Associated Press, *Detainees' Lawyers Trying to Chip Away at Government Secrecy* (Mar. 4, 2002), *available at* http://www.freedomforum.org/templates/document.asp?documentID=15813.

[2] E-mail memorandum from Hon. Michael J. Creppy, Chief Immigration Judge, to all Immigration Judges and Court Administrators (Sept. 21, 2001) *available at* http://archive.aclu.org/court/creppy_memo.pdf.

[3] *Id.*

[4] *Id.* (attachment to Creppy Memorandum entitled "Instructions for cases requiring additional security").

Memorandum and over 500 "special interest aliens" had been deported.[5] Although "[t]he government has never formally explained how it [decides who is] singled out for this extraordinary process,"[6] the available information suggests that "most of these cases involved Arab and Muslim men who were detained in fairly haphazard ways, for example at traffic stops or through tips from suspicious neighbors."[7] Furthermore, "[l]aw enforcement officials have acknowledged that only a few of these detainees had any significant information about possible terrorists."[8]

The Creppy Memorandum has generated significant legal controversy, resulting in a split between the Sixth and Third Circuits as to its constitutionality. Both courts considered arguments that the Memorandum violates the First Amendment by depriving the public of the right to witness important government proceedings. While the Sixth Circuit held that the Memorandum violates the First Amendment,[9] a divided Third Circuit found the Memorandum constitutional on the grounds that the public and the press do not have a First Amendment right to attend immigration proceedings.[10]

The Creppy Memorandum raises issues that are unique to the immigration law context,[11] but it also raises major First Amendment questions that transcend that context. Specifically, the Memorandum raises questions as to whether the First Amendment rights to freedom of speech and of the press encompass a "right to know" on the public's part and whether any such right to know includes a right to attend or otherwise access government facilities, proceedings and information. The Memorandum raises further questions as to whether the public has a First

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[5] Brief of Solicitor General in Opposition to Petition for Writ of Certiorari at 5, N. Jersey Media Group, Inc. v. Ashcroft, *cert. denied*, 123 S. Ct. 2215 (May 27, 2003) (No. 02-1289), [hereinafter Solicitor General Brief].

[6] Adam Liptak et al., *After Sept. 11, A Legal Battle Over Limits of Civil Liberty*, N.Y. TIMES, Aug. 4, 2002, at A1, *available at* http://www.globalpolicy.org/wtc/liberties/2002/0804battles.htm.

[7] *Id. See also, e.g.*, Jim Edwards, *No More Secrecy? Muslim Detainee's Lawyer Persuades Federal Judge to Review Ban on Open Deportation Hearings*, BROWARD DAILY BUS. REV., Mar. 7, 2002 (discussing the case of Syrian Malek Zeidan, whose expired tourist visa came to the INS' attention when the INS arrived at his apartment to look for a former roommate, leading to a lengthy detention and to secret immigration hearings); Wayne Parry, *Many Arrested But Few Are Charged in the Government's Roundup*, AUGUSTA CHRON., Sept. 11, 2002, *available at* http://augustachronicle.com/stories/091102/sep_124-4147.shtml (same).

[8] Liptak et al., *supra* note 6. Similarly, in the case resulting in the Sixth Circuit's deeming the Creppy Memorandum unconstitutional, *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002), the government repeatedly argued that openness would endanger national security. Yet when transcripts of the relevant proceedings were released pursuant to court order, the government acknowledged that the release would not cause "irreparable harm" to national security. *See, e.g.*, Brief of Appellees at 5 n.2, N. Jersey Media Group v. Ashcroft, 308 F.3d 198 (3d Cir. 2002) (DN 02-2524) [hereinafter North Jersey Media Brief]; *infra* note 158 and accompanying text.

[9] *See Detroit Free Press*, 303 F.3d 681.

[10] N. Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198 (3d Cir. 2002).

[11] *See infra* Part V.A.1.

Amendment right to access information or proceedings within the administrative state, including deportation hearings, other quasi-adjudicative hearings, or information and debate regarding quasi-legislative rulemaking activity.[12]

It is important to address the First Amendment questions raised by the Creppy Memorandum in light of their broad implications including, and extending beyond, the Memorandum itself. Indeed, while the Justice Department has indicated that it might revise the Memorandum's policy,[13] the doctrinal context that proved conducive to the Memorandum's creation and implementation remains. That context is one in which the existence and contours of public rights to access government information, particularly information within the administrative state, remain unclear. That such a context could foster the continued creation of administrative secrecy policies is evidenced by the Justice Department's own statements. In its brief successfully opposing certiorari in the Third Circuit case, the Department opines not only that there is no "First Amendment right of public access to . . . removal proceedings involving special interest aliens," but also that there is "no First Amendment right of public access to Executive Branch proceedings in general."[14]

Current doctrine regarding the existence and contours of constitutional rights to access government information stems from two lines of Supreme Court case law. First, in a series of cases in the 1970s, the Supreme Court rejected arguments to the effect that the First Amendment prevents the government from unduly restricting press access to prisons.[15] While these cases could be interpreted as limited to their facts, the language of the relevant opinions suggests hostility to the very notion that First Amendment rights to disseminate and to consume information encompass rights to gather information. Second, in a series of cases in the 1980s, the Court veered sharply from the tone of the prison access cases to explain that the rights to speak and to consume information prevent the government from hindering information-gathering by closing its pro-

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[12] Indeed, while both the Sixth and Third Circuit opinions begin by addressing threshold immigration law issues, both opinions focus predominantly on articulating and applying generally applicable doctrinal standards regarding the public's right to access government proceedings. *See Detroit Free Press*, 303 F.3d at 685–91, 694–700; *North Jersey Media*, 308 F.3d at 206–08, 219 n.15. *See also infra* Part III.C.3.

[13] *See, e.g.*, *Supreme Court Rejects Dispute Over Closed Deportation Hearings*, May 27, 2003, *at* http://www.cnn.com/2003/LAW/05/27/scotus.detainees.ap/index.html; Solicitor General Brief, *supra* note 5, at 13–14.

[14] Solicitor General Brief, *supra* note 5, at 9. *See also id.* at 14. Because the Court denied certiorari by memorandum order it did not explain the denial. 123 S.Ct. 2215 (2003) (mem.). It seems fair to speculate, however, that mootness considerations played a role, given the Justice Department's representations to the Court that the Department is reconsidering the Creppy Memorandum policy and that the vast majority of "special interest" cases have been resolved. *See* Solicitor General Brief, *supra* note 5, at 12–14.

[15] *See* Houchins v. KQED, Inc., 438 U.S. 1 (1978); Saxbe v. Washington Post Co., 417 U.S. 843 (1974); Pell v. Procunier, 417 U.S. 817 (1974).

ceedings to the public under certain circumstances.[16] In these cases, the Court found a presumptive right of public access to criminal trial and pre-trial proceedings. The approach developed by the Court in these latter cases breaks down into two primary components: First, the Court explains the principles underlying First Amendment access rights; second, the Court places limitations on those rights by suggesting criteria necessary for presumptive access rights to attach to government proceedings or information. With respect to the principles underlying access rights' existence, the Court relies on a structural understanding of the First Amendment. Under this approach, the Court deems citizen "participat[ion] in and contribut[ion] to our republican system of self-government" "'a major purpose of [the First] Amendment,'"[17] and deems constitutional free speech rights inclusive of other rights—such as information-gathering rights—necessary to facilitate speech that promotes self-government.[18] With respect to the criteria necessary for presumptive access rights to attach, the Court applies a two-part test. First, it considers whether the type of proceeding at issue is one that historically has been open to the public (the "experience" standard).[19] Second, the Court considers "whether access to [the proceeding] is important in terms of that very process" (the "logic" standard).[20] If these standards are met, the Court deems access a presumptive right that can be denied only if the policy withstands strict scrutiny.[21]

It is unclear whether the Court would extend the logic of constitutional access rights outside of the criminal trial and pre-trial contexts and, if so, whether the Court would apply the experience and logic standards in these new contexts. Perhaps the most important manifestation of this ambiguity is uncertainty as to whether there are First Amendment implications to secrecy in the administrative state and, if so, how such implications should translate into doctrinal standards. While the lower federal courts routinely apply the experience and logic prongs to administrative proceedings, the manner and results of such application are mixed. Some courts interpret the experience prong leniently in the context of the administrative state given the relative modernity of many agency proceedings,[22] while other courts interpret one or both prongs

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[16] *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980). *See also* Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986) ("*Press-Enterprise II*"); Press-Enterprise v. Superior Court, 464 U.S. at 505 (1984) (*Press-Enterprise I*); Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982).

[17] *Globe Newspaper Co.*, 457 U.S. at 604 (quoting Mills v. Alabama, 384 U.S. 214, 218 (1966), and citing *Richmond Newspapers*, 448 U.S. at 587–88).

[18] *See, e.g.*, *Globe Newspaper Co.*, 457 U.S. at 604–05; *Richmond Newspapers*, 448 U.S. at 587 (Brennan, J., concurring).

[19] *See Richmond Newspapers*, 448 U.S. at 588–89 (Brennan, J., concurring).

[20] *Richmond Newspapers*, 448 U.S. at 588–89 (Brennan, J., concurring). *See also Globe Newspaper Co.*, 457 U.S. at 605–06.

[21] *See Press-Enterprise I*, 464 U.S. at 510; *Globe Newspaper Co*., 457 U.S. at 606–09.

[22] *See infra* notes 134, 151 and accompanying text.

strictly due to express concerns about the implications of deeming administrative secrecy a constitutional matter.[23] The differing approaches taken by the Sixth and Third Circuits in the Creppy Memorandum cases embody this conflict.[24]

Much of the uncertainty over access rights doctrine can be traced to discontinuity between the Supreme Court's embrace of structuralism and access rights on the one hand and the Court's relatively ad hoc approach to limiting access rights on the other. Indeed, it does not follow from the logic of structuralism that there are First Amendment implications only to secrecy in certain government activities or that the existence of such selective implications can be traced to "experience" and "logic." To the contrary, the experience requirement is both overbroad and underbroad from a structuralist perspective. It is underbroad in that structuralist ends can be undermined by closed proceedings even where such proceedings are novel or simply unaccompanied by a long tradition of access. It is overbroad in that it does not necessarily follow from a tradition of openness that such openness is constitutionally required. The logic prong, for its part, simply is too indeterminate to facilitate principled line-drawing between those proceedings to which access must be provided and those to which it need not be provided. Given the lack of clarity as to the standards' rationales, it is unsurprising that lower courts differ widely in defining and applying them.

This Article seeks to offer a richer interpretation of First Amendment structuralism toward the end of explaining that the logic of access rights cannot be contained exclusively to select areas of government activity, but that lines can be drawn between access denials that raise heightened levels of constitutional concern and those that raise lesser levels of concern. As an initial matter, this Article agrees with the basic structuralist insight that access denials are significant not because they directly restrain speech but because they threaten the preconditions of speech facilitative of self-government and the checking of government abuse. Drawing from the logic of this insight and its theoretical underpinnings, this Article concludes, first, that the First Amendment harms of government secrecy are not logically restricted to any one branch of government or to select categories of government activity. Second, because secrecy's First Amendment implications stem from its stifling of the speech-related preconditions of self-government, an access denial's level of constitutional suspiciousness varies with the relevant activity's degree of political insularity and with other factors indicative of the extent to which non-constitutional controls can protect against secrecy and its effects. More concretely, the level of constitutional suspiciousness generally will vary based on whether the relevant government activity is di-

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[23] *See infra* notes 132, 169–170 and accompanying text.
[24] *See infra* Part II.C.3.

rected broadly or whether it narrowly targets a discrete person or group, whether the relevant activity is subject to political controls, and whether the relevant activity is legitimized primarily by such political controls or instead is legitimized by procedural norms of reason and fairness.

Under this Article's approach, for example, access denials to adjudicative proceedings presumptively are inappropriate, as adjudicative activity typically involves a discrete set of litigants, occurs in a context insulated from political controls, and achieves its legitimacy largely through adherence to procedures that can be confirmed only through observation. Absent constitutional guarantees of access to such proceedings, there are special risks that the public either will not be able to attain awareness of particular closed proceedings or that any public awareness will be in vain given the absence of political channels to respond to particular instances of closure and given the importance of opportunities to observe adjudications' procedures as opposed merely to attaining awareness of adjudications' existence. Alternatively, access denials to legislative proceedings presumptively are political matters to be addressed through political rather than constitutional channels. The latter conclusion stems from the typically broad focus of legislative proceedings and the fact that such proceedings tend to be legitimized through political controls rather than through nuanced procedural requirements. Such factors suggest that the public will retain opportunities to learn of and respond politically to legislative proceedings (and to any secrecy with which they are undertaken) even absent constitutional access guarantees. In the case of legislative proceedings, the issue of secrecy itself can become part of the political debate over the subject of the proceedings; in the case of adjudicative proceedings, secrecy stifles the public's ability meaningfully to oversee and to debate the relevant proceedings in the first place.

Toward the goal of developing this Article's approach to access rights, Part II begins by reviewing and critiquing the approaches taken by the Supreme Court in its access right cases of the 1970s and 1980s. Part II also evaluates relevant lower court case law, placing special emphasis on the Third and Sixth Circuit cases addressing the constitutionality of the Creppy Memorandum. Part II concludes that while the Supreme Court has made an important breakthrough in recognizing the very existence of First Amendment access rights, it has stumbled badly in purporting to allocate such rights on the bases of experience and logic, an approach that has infected lower court case law as well.

Part III elaborates on this Article's alternative approach to access right doctrine, emphasizing four major points. First, Part III explains why the self-government and closely related "checking" theories of free speech value constitute important, though not exclusive, parts of the justification for free speech. Second, Part III reiterates the standard structuralist explanation of why self-government and checking theories

of free speech value suggest that access rights are constitutionally significant. Third, Part III explains that the standard structuralist argument is of limited utility, as it justifies the existence of access rights but fails to consider why or how structuralism and its component political and free speech theories militate in favor both of access rights and of limitations thereupon. Fourth, Part III explains how structuralism and its component political and free speech theories lend themselves to a richer and more coherent understanding of access rights and their limitations than that reflected in existing case law. In addition to explaining this Article's basic conclusions as to access denials' varying levels of constitutional suspiciousness and the theoretical underpinnings of these conclusions, Part III discusses the implications of these conclusions. Specifically, Part III explores major factors that courts should consider in assessing an access denial's level of constitutional suspiciousness, and explains how these factors generally justify deeming access denials regarding "political" activities presumptively constitutional and access denials regarding "adjudicative" activities presumptively unconstitutional. Of course, government activities extend well beyond the "political" and the "adjudicative," and the two categories themselves overlap in important ways. Nonetheless, the general distinction developed in Part III serves as a useful example of this Article's approach as applied to broad categories of government activity.

Part IV emphasizes major practical implications of this Article's approach for access rights in the administrative state. Specifically, Part IV explains that access denials to quasi-adjudicative proceedings in the administrative state typically should be deemed presumptively unconstitutional, while access denials to quasi-legislative proceedings in the administrative state typically should be deemed presumptively constitutional. As with the parallel categories of "political" and "adjudicative," the categories of quasi-legislative and quasi-adjudicative do not, of course, encompass all administrative activities. These examples do, however, encompass a range of major administrative activities. More importantly, these examples can be drawn from through comparison and contrast in assessing future access denials within other realms of the administrative state.

Finally, Part V returns to the issue of closed deportation hearings to illustrate this Article's major points. Part V notes that deportation and related hearings presumptively should be open in light of the doctrinal approach suggested herein, and that the Creppy Memorandum does not overcome the requisite level of scrutiny. Part V further notes that the Creppy Memorandum exemplifies precisely the type of governmental abuse that can occur where a presumption favoring open quasi-adjudications, and the principles underlying such a presumption, go unrecognized.

II. Existing Doctrine and Its Theoretical Underpinnings

A. Major Elements of the Supreme Court's Access Cases

1. Theoretical Background: The Major Forms of Structuralism

To understand the significance of the case law, it is important to recognize that there are two major forms of First Amendment structuralism. One form embraces structuralism's logic as additional support to restrain the government from restricting speech dissemination or consumption, and the other interprets structuralism to demand some affirmative activity on the government's part.[25] The former, which this Article calls "negative structuralism," is largely of rhetorical value, consisting typically of sweeping statements to the effect that the public has a right to receive information and that this right serves the ends of self-government, as support for invalidating government restraints on the dissemination or consumption of speech.[26] Negative structuralism long has been embraced by the Supreme Court in cases addressing government restrictions on speech dissemination.[27] The second form of structuralism is considerably more radical, demanding not only that the government refrain from acting in the name of informed and robust public debate but that the government take affirmative steps to facilitate this debate.[28] Broadly speaking, structuralism's second form may be referred to as "affirmative structuralism." This Article is concerned only with that subset of affirmative structuralism involving demands that the government provide access to its own proceedings or information, as opposed to demands for other speech-

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[25] *See, e.g.*, William J. Brennan, Jr., *Address by William J. Brennan, Jr.*, 32 Rutgers L. Rev. 173, 176–77 (1979); Thomas I. Emerson, *Legal Foundations of the Right to Know*, 1976 Wash. U. L.Q. 1, 1–14 (1976).

[26] *See, e.g.*, Thornhill v. Alabama, 310 U.S. 88, 95, 101–02 (1940) (invalidating a restriction on picketing); Grosjean v. Am. Press Co., 297 U.S. 233, 243, 247–48, 250 (1936) (invalidating a press tax). Of course, even this less radical face of structuralism can have a tangible impact. For example, the notion that a listener has a right "to know" can justify a grant of standing to a listener to challenge restrictions on third-party speakers. *See, e.g.*, Emerson, *supra* note 25, at 6–7.

[27] *See, e.g.*, *Thornhill*, 310 U.S. at 95, 101–02; *Grosjean*, 297 U.S. at 243, 247–48, 250; Emerson, *supra* note 25, at 5–7.

[28] The second form of structuralism itself can be broken down into two primary forms: one demanding that the government provide access to its own proceedings or information, and one demanding that the government take affirmative steps to ensure balanced debate on public issues, such as by imposing "fairness" requirements upon broadcasters. *See, e.g.*, Emerson, *supra* note 25, at 8–13. *Cf.* Red Lion v. FCC, 395 U.S. 367, 390 (1969) (invoking structuralist principles in upholding the constitutionality of regulatory "fairness" requirements for broadcasters). The latter raises greater complications than the former, as it typically seeks to restrict speech by restraining editorial discretion in order to enhance speech by exposing listeners to more information. *See, e.g.*, *Red Lion*, 395 U.S. at 390 ("It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."). However, only the former manifestation of structuralism's second form (that involving access to government information or proceedings) is at issue in this Article.

enhancing activity.[29] The subset of affirmative structuralism with which this Article is concerned will be referred to as "access structuralism."

2. The Prison Access Cases

Prior to 1980's *Richmond Newspapers v. Virginia*,[30] the Court appeared uncomfortably torn between negative structuralism and access structuralism. Indeed, while the Court had stated in dicta that newsgathering merits some First Amendment protection,[31] it consistently had rejected requests for access to government facilities or proceedings or for other privileges to facilitate information-gathering.[32] The conflict between the Court's frequent embrace of negative structuralism and its reluctance to legitimize access structuralism was particularly evident in three 1970s cases involving claims of access to prison facilities.[33]

The first two cases—*Saxbe v. Washington Post*[34] and *Pell v. Procunier*[35]—were decided on the same day in 1974 and involved nearly identical regulations prohibiting the press from conducting face-to-face interviews with pre-selected inmates.[36] The *Pell* Court, whose logic was expressly adopted by the Court in *Saxbe*,[37] made fairly broad statements both embracing negative structuralism and implying rejection of access structuralism. On the one hand, the Court noted that "[t]he constitutional guarantee of a free press 'assures the maintenance of our political system and an open society,'"[38] and that "the First and Fourteenth Amendments . . . protect the right of the public to receive such information and ideas as are published."[39] On the other hand, the Court cited language from an earlier case to the effect that "'[t]he right to speak and publish does not carry with it the unrestrained right to gather information.'"[40]

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[29] *See supra* note 28.

[30] 448 U.S. 555 (1980).

[31] Branzburg v. Hayes, 408 U.S. 665, 681, 707 (1972). In spite of such dicta, the *Branzburg* Court held that the press was not exempt from grand jury subpoenas requiring them to reveal their news sources. *Id.* at 690–91.

[32] *See, e.g.*, Houchins v. KQED, 438 U.S. 1 (1978); *Saxbe*, 417 U.S. 843; *Pell*, 417 U.S. 817; *Branzburg*, 408 U.S. at 690–91. *See also* Eugene Cerruti, *"Dancing in the Courthouse": The First Amendment Right of Access Opens a New Round*, 29 U. RICH. L. REV. 237, 238 (1995).

[33] *See* Cerruti, *supra* note 32, at 250 ("Certainly the most explicit repudiation of the argument that the First Amendment might be wielded as a sword of access to a criminal trial or other government-controlled information occurred in the prison right-of-access cases.").

[34] 417 U.S. 843 (1974).

[35] 417 U.S. 817 (1974).

[36] *Compare Saxbe*, 417 U.S. at 844, *with Pell*, 417 U.S. at 819.

[37] *Saxbe*, 417 U.S. at 850.

[38] *Pell*, 417 U.S. at 832 (quoting Time, Inc. v. Hill, 385 U.S. 374, 389 (1967)).

[39] *Id.*

[40] *Id.* at 834 n.9 (quoting Zemel v. Rusk, 381 U.S. 1, 16–17 (1965)).

Yet the *Saxbe* and *Pell* opinions leave some room for the Court to embrace public access rights in subsequent cases. Indeed, both opinions emphasize that the relevant regulations provided some public access to prisons, including personal visits by inmates' families and friends, scheduled tours, and press rights to interview any inmates randomly encountered during tours,[41] and both opinions' holdings rest on the relatively narrow point that the press has no entitlement to access beyond that owed to the public.[42] Thus, while *Saxbe* and *Pell* reflect ambivalence, even hostility regarding access structuralism, they leave room for arguments to the effect that some form of public access to prison facilities is constitutionally mandated, even if unique press rights above and beyond that owed to the public are not required.

In 1978's *Houchins v. KQED*,[43] the Court inched closer to an outright rejection of access structuralism, upholding prison regulations more restrictive than those at issue in *Saxbe* and *Pell* and using somewhat bolder dicta. The prison in *Houchins* provided public access only through visits to inmates by families and friends and through a limited number of scheduled tours during which no inmate interviews were permitted and during which inmates were "generally removed from view."[44] The tours also excluded certain portions of the jail, including an area that had been the "scene of alleged rapes, beatings, and adverse physical conditions" which broadcast station KQED had sought permission to inspect.[45] A plurality in *Houchins* rejected KQED's access right claim, stating that "the media have no special right of access to the [jail] different from or greater than that accorded the public generally."[46] The plurality opinion, written by Chief Justice Burger and joined by Justices Rehnquist and White, also made the broader points that the First Amendment does not "mandate[ ] a right of access to government information or sources of information within the government's control,"[47] and that access questions inherently are matters of policy, rather than of constitutional right.[48] While *Houchins*' holding thus can be construed simply as rejecting "special" press access rights, the restrictions tolerated in *Houchins* and the rhetoric invoked by

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[41] *Saxbe*, 417 U.S. at 846–47; *Pell*, 417 U.S. at 830–31, 831 n.8.

[42] *Saxbe*, 417 U.S. at 850; *Pell*, 417 U.S. at 833–34. *See also* Cerruti, *supra* note 32, at 251; Leonard G. Leverson, *Constitutional Limits on the Power to Restrict Access to Prisons: An Historical Re-Examination*, 18 HARV. C.R.-C.L. L. REV. 409, 429 (1983).

[43] 438 U.S. 1 (1978) (plurality opinion).

[44] *Id.* at 4–5.

[45] *Id.* Additionally, no photography or video-taking was permitted during tours. *Id.*

[46] *Id.* at 16.

[47] *Id.* at 15.

[48] *Id.* at 12. The Court explicitly distinguished between the two forms of structuralism, noting that "[t]he right to *receive* ideas and information is not the issue in this case. The issue is a claimed special privilege of access which the Court rejected in *Pell* and *Saxbe*, a right which is not essential to guarantee the freedom to communicate or publish." *Id.* (citations omitted).

the *Houchins* plurality suggest a more fundamental hostility toward access structuralism.[49]

3. Criminal Court Proceedings: Overview of the Major Supreme Court Cases

Given *Houchins*' apparent hostility to access structuralism, the Court's subsequent finding, just four years later, of a First Amendment right to attend criminal trials has been described as remarkable, unanticipated, and watershed.[50] Furthermore, *Houchins*' holding and dicta, and the Court's consistent refusal to uphold First Amendment access claims,[51] were not the only bases for surprise at the result in *Richmond Newspapers*. Just one year prior to *Richmond Newspapers*, the Court had rejected a newspaper company's claim that the public has a Sixth Amendment right to attend pre-trial suppression hearings in criminal cases.[52] The opinion in *Gannett Company v. DePasquale* rests primarily on the notions that the Sixth Amendment's "public trial" guarantee attaches only to criminal defendants and creates no independent right of access on the public's part,[53] and that any public right to attend criminal trials would not, in any event, necessarily translate to a pre-trial access right.[54] *Gannett* thus did not resolve whether the First Amendment creates an independent right on the part of the public to attend criminal court proceed-

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[49] Three of the seven Justices on the *Houchins* Court took a much more sympathetic view of access structuralism than did the three-Justice plurality, and the remaining Justice took a somewhat moderate approach to access structuralism. Justice Stevens' dissent, joined by Justices Brennan and Powell, reflects a highly sympathetic view of access structuralism, noting among other things that "[w]ithout some protection for the acquisition of information about the operation of public institutions such as prisons by the public at large, the process of self-governance contemplated by the Framers would be stripped of its substance." *Id.* at 32 (Stevens, J., dissenting). While Justice Stewart, concurring, agrees with the plurality that the First Amendment does not guarantee access to government information, *id.* at 16 (Stewart, J., concurring), he notes that "equal access" is required once the government does provide access to information and that the requirement of equal access may, as a practical matter, demand extra access for press members in light of their role as agents for the public. *Id.* at 16–19 (Stewart, J., concurring).

[50] Cerruti, *supra* note 32, at 238; *id.* at 239 (citing *Richmond Newspapers*, 448 U.S. at 582 (Stevens, J., concurring)).

[51] *See, e.g.*, *Branzburg*, 408 U.S. at 684 (citing *Zemel*, 381 U.S. at 16–17).

[52] Gannett Co. v. DePasquale, 443 U.S. 368 (1979). Eugene Cerruti notes that the *Gannett* petitioners did not rely solely on the argument that the public has standing to raise a Sixth Amendment claim. The *Gannett* petitioners argued also that there was a "putative First Amendment right of access [that] was, in several respects, informed by the collateral guarantees of the Sixth Amendment." Cerruti, *supra* note 32, at 256–57. Yet the First Amendment "issue all but disappeared from the five separate opinions in the case." *Id.* at 257.

[53] *Gannett Co.*, 443 U.S. at 379–80.

[54] *Id.* at 387–91. In 1984, the Court held that an accused has a presumptive right, under the Sixth Amendment, to a public pre-trial suppression hearing. Waller v. Georgia, 467 U.S. 39 (1984).

ings.[55] Yet the *Gannett* Court, like the *Houchins* Court, used fairly sweeping language suggesting a more fundamental hostility to public access claims, noting that "[t]he Constitution nowhere mentions any right of access to a criminal trial on the part of the public"[56] and that "the public interest in the administration of justice is protected by the participants in the litigation."[57]

Nonetheless, the Court, precisely one year to the day after it issued *Gannett*, held in *Richmond Newspapers* that the public has a First Amendment right to attend criminal trials.[58] *Richmond Newspapers* was soon followed by a string of cases honing its doctrinal approach and extending the public's access right to other aspects of the criminal trial process.[59]

a. Richmond Newspapers

i. Chief Justice Burger's Plurality Opinion

Richmond Newspapers was decided by a divided Court that could reach agreement only on the existence of a qualified right on the part of the public to attend criminal trials and the fact that the right was not outweighed by countervailing social interests under the facts at issue. Chief Justice Burger, writing for a plurality including Justices Stevens and White, concluded that, "[a]bsent an overriding interest articulated in findings, the trial of a criminal case must be open to the public."[60]

The plurality relied primarily on two factors: the logic of access structuralism and the fact that criminal trials traditionally have been open to the public.[61] Regarding the former, Chief Justice Burger, who in *Houchins* had written that "[n]either the First Amendment nor the Fourteenth Amendment mandates a right of access to . . . sources of informa-

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[55] The *Gannett* Court noted that even if such a right existed, the trial court had properly weighed it against the defendant's right to a fair trial and deemed the balance of interests to favor closure. *Gannett*, 443 U.S. at 391–93. Concurring, Justice Powell stated that he would have found a First Amendment right of access but would have deemed the right outweighed by countervailing interests. *Id.* at 397–400 (Powell, J., concurring). Justice Rehnquist would have reached the First Amendment issue and found no First Amendment right of access on the public's part. *Id.* at 404 (Rehnquist, J., concurring).

[56] *Id.* at 379.

[57] *Id.* at 383.

[58] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (plurality opinion). *See* Cerruti, *supra* note 32, at 262 (suggesting that the timing of *Richmond Newspapers*' issuance was "perhaps not entirely by coincidence").

[59] *See infra* Part II.A.3.b. *See also, e.g.*, Cerruti, *supra* note 32, at 242–44, 263–65 (summarizing facts and holdings of *Richmond Newspapers* and its progeny); G. Michael Fenner & James L. Koley, *Access to Judicial Proceedings: To* Richmond Newspapers *and Beyond*, 16 HARV. C.R.-C.L. L. REV. 415, 418–30 (1981) (summarizing facts and holding of *Richmond Newspapers*).

[60] *Richmond Newspapers*, 448 U.S. at 581 (Burger, C.J., plurality opinion).

[61] *See id.* at 575–76.

tion within the government's control,"[62] now wrote that "'[t]he 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.'"[63] More importantly, this language was directed toward the conclusion that "the First Amendment guarantees of speech and press . . . prohibit government from summarily closing courtroom doors which had long been open to the public at the time that [the First] Amendment was adopted."[64]

The *Richmond Newspapers* plurality thus relies largely on a historical tradition of access to deem access structuralism applicable to criminal trials. Specifically, the plurality opinion relies on the "unbroken, uncontradicted history" of openness in criminal trials dating back to English common law.[65] Yet the plurality opinion also emphasizes the underlying reasons for the tradition of openness, which it stresses are "as valid today as in centuries past."[66] These reasons include the perception that open trials deter abuse and unfairness in trial proceedings and inspire public confidence in the justice system.[67]

The *Richmond Newspapers* plurality thus rests primarily on the argument that the First Amendment demands access to some governmental proceedings and that such proceedings include at least those to which access has been permitted since the time of the First Amendment's adoption.[68] The plurality's emphasis on the policy rationales underlying the tradition of openness to criminal trials, however, leaves some question as to whether structuralist concerns might demand openness even in some cases in which a tradition of historical access is absent or fairly slim.

ii. Justice Brennan's Concurrence

Justice Brennan's concurrence, joined by Justice Marshall, expressly embraces access structuralism while cautioning that lines must be drawn indicating when structuralism gives rise to access rights. As for the former, Justice Brennan notes that "the First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a *structural* role to play in securing and fostering our republican system of self-government."[69] The First Amendment thus "entails solicitude not only for communication itself, but also for the indispensa-

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[62] *Houchins*, 438 U.S. at 15.

[63] *Richmond Newspapers*, 448 U.S. at 575–76 (quoting First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978)).

[64] *Id.* at 576.

[65] *Id.* at 573.

[66] *Id.*

[67] *Id.* at 569–73.

[68] *Id.* at 576.

[69] *Id.* at 587 (Brennan, J., concurring).

ble conditions of meaningful communication,"[70] including access to information. As for the latter, Justice Brennan cautions that "'the stretch of this protection is theoretically endless,'" and that it "must be invoked with discrimination and temperance."[71]

Justice Brennan articulates two guidelines to mark when access rights attach to particular proceedings. First, courts should determine the existence of "an enduring and vital tradition of public entree to particular proceedings or information."[72] The importance of tradition stems from the notions that "the Constitution carries the gloss of history" and that "a tradition of accessibility implies the favorable judgment of experience."[73] Second, "the value of access must be measured in specifics. . . . [W]hat is crucial . . . is whether access to a particular government process is important in terms of that very process."[74]

Justice Brennan concludes that the two-prong test favors a presumption of openness in criminal trials, citing historical considerations very similar to those cited by Chief Justice Burger. With respect to the test's second prong, Justice Brennan concludes that openness serves the interests of criminal defendants and of the public in fair criminal trials, as well as the public interest in the perception of fairness.[75] Justice Brennan notes, for example, that "public access to court proceedings is one of the numerous 'checks and balances' of our system, because 'contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.'"[76]

Having found a presumptive public right to access criminal trial proceedings, Justice Brennan found no immediate need to consider "[w]hat countervailing interests might be sufficiently compelling to reverse this presumption," as the relevant statute clearly violated the Constitution by authorizing "trial closures at the unfettered discretion of the judge and parties."[77]

b. Richmond Newspapers' *Progeny*

The logic of access structuralism and the experience and logic standards employed by Justice Brennan in *Richmond Newspapers* were adopted by a majority of the Court in three subsequent cases.[78] First, in 1982's

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[70] *Id.* at 588.
[71] *Id.*
[72] *Id.* at 589.
[73] *Id.* at 588–89.
[74] *Id.* at 589.
[75] *See id.* at 591–97.
[76] *Id.* at 592 (quoting *In re* Oliver, 333 U.S. 257, 270 (1948)).
[77] *Id.* at 598.
[78] In addition to the major cases discussed herein, the Court has decided one additional case concerning First Amendment rights to attend criminal proceedings. In *El Vocero de Puerto Rico v. Puerto Rico*, the Court invalidated Puerto Rico's practice of holding private,

Globe Newspaper Co. v. Superior Court,[79] the Court considered a statute mandating the closure of criminal trials for specified sexual offenses involving victims under the age of eighteen.[80] In an opinion authored by Justice Brennan, the Court began by reviewing the logic of structuralism, citing cases invoking negative structuralism to the effect that "the First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government."[81] The Court also adopted Justice Brennan's two-pronged approach from *Richmond Newspapers* to conclude again that the public has a presumptive First Amendment right to attend criminal trials. The Court explained that "[t]wo features of the criminal justice system . . . together serve to explain why a right of access to *criminal trials* in particular is properly afforded protection by the First Amendment."[82] These features include the facts that "the criminal trial historically has been open to the press and general public," and that "the right of access to criminal trials plays a particularly significant role in the functioning of the judicial process and the government as a whole," fostering fairness and the appearance thereof.[83] The Court thus deemed the mandatory closure statute presumptively invalid.[84] The Court also introduced the use of strict scrutiny as a means of determining if such presumptive invalidity is overcome in a particular case, holding that the statute could not overcome its presumptive invalidity as it was not narrowly tailored to promote a compelling governmental interest.[85]

In 1984's *Press-Enterprise Co. v. Superior Court*[86] ("*Press-Enterprise I*") the Court again applied the two-pronged test, this time concluding that criminal *voir dire* proceedings presumptively must be open to the public.[87] In an opinion by Chief Justice Burger, the Court noted that "since the development of trial by jury, the process of [juror selection] has presumptively been a public process."[88] The Court also discussed the value of openness to the "administration of justice," again

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preliminary hearings absent a contrary request by the defendant. 508 U.S. 147 (1993).

[79] 457 U.S. 596 (1982).

[80] *Id.* at 598.

[81] *Id.* at 604 (citing Thornhill v. Alabama, 310 U.S. 88, 95 (1940); Mills v. Alabama, 384 U.S. 214, 218 (1966)).

[82] *Id.* at 605.

[83] *Id.* at 605–06.

[84] *Id.* at 598, 606–07. The Court noted that the historical question is not whether particular types of criminal trials—such as those involving minor sex victims—historically have been open. Rather, the question is whether criminal trials in general have historically been open. *Id.* at 605 n.13.

[85] *Id.* at 606–09. While the Court found the state's interest in protecting the well-being of minors compelling, it held that the statute was not narrowly tailored to promote that interest, as case-by-case assessments of the propriety of closure could have served the interest as well as a mandatory closure rule.

[86] 464 U.S. 501 (1984).

[87] *Id.* at 511.

[88] *Id.* at 505.

emphasizing its positive impact upon fairness and the appearance thereof.[89] The Court noted, for example, that the "value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known."[90] The Court also held that "[t]he presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."[91]

Lastly, in 1986's *Press-Enterprise Co. v. Superior Court*[92] ("*Press-Enterprise II*"), the Court held that the experience and logic prongs support the extension of access rights to California pre-trial criminal proceedings.[93] In an opinion by Chief Justice Burger, the Court noted that "there has been a tradition of accessibility to preliminary hearings of the type conducted in California,"[94] and that, in preliminary hearings such as trials and *voir dire* proceedings, openness is "essential" to foster fairness and the appearance thereof.[95] The *Press-Enterprise II* Court also reiterated that the presumption of openness can be overcome only by findings demonstrating that "'closure is essential to preserve higher values and is narrowly tailored to serve that interest.'"[96]

Finally, it should be noted that *Richmond Newspapers* and its progeny involve claims of public access generally and thus do not address the status of any "special" press access rights. As a practical matter, however, public access rights may prove particularly beneficial to the press given the press' likely heightened interest in attending and disseminating information about criminal trials and other government proceedings.[97] Furthermore, as Chief Justice Burger points out in *Richmond Newspa-*

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[89] *Id.* at 508–09.

[90] *Id.* at 508.

[91] *Id.* at 510. The Court concluded that the presumption of openness was not overridden by concerns about juror privacy and fairness to the defendant where the record showed no threat of unfairness and where the trial judge had opened only three days out of six weeks of *voir dire* without considering less restrictive alternatives. *Id.* at 510–11.

[92] 478 U.S. 1 (1986).

[93] *Id*. at 10.

[94] *Id.*

[95] *Id.* at 12–13.

[96] *Id.* at 13–14 (quoting *Press-Enterprise I*, 464 U.S. at 510). The Court elaborated that

> [i]f the interest asserted is the right of the accused to a fair trial, the preliminary hearing shall be closed only if specific findings are made demonstrating that, first, there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent and, second, reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights.

Id. at 14. Because the trial court's findings did not meet this standard, the Court held that the public's First Amendment access rights had been violated. *Id.* at 14–15.

[97] *See Richmond Newspapers*, 448 U.S. at 586 n.2 (Brennan, J., concurring) (noting that as a practical matter, press likely will be the chief beneficiary of public access rights).

pers, preferential press access sometimes may be justified as a restriction on unfettered public access where seating or other limitations make unfettered public access infeasible.[98]

4. Additional Case Note

The issue of First Amendment access rights was also raised in the 1999 Supreme Court case of *Los Angeles Police Department v. United Reporting Publishing Corporation* ("*LAPD*").[99] The doctrinal significance of *LAPD* is so unclear, however, that it sheds little if any light on access rights doctrine.

In *LAPD*, the Court addressed a facial challenge to a statute placing conditions on public access to arrestees' addresses.[100] The *LAPD* Court notes that, "[f]or purposes of assessing the propriety of a facial invalidation, what we have before us is nothing more than a governmental denial of access to information in its possession. California could decide not to give out arrestee information at all without violating the First Amendment," followed by a "cf." citation to *Houchins*.[101] Notably, however, this is the entirety of the Court's analysis of First Amendment access rights doctrine. More importantly, the Court is careful to limit its statement's application to the assessment of facial challenges. Immediately following its statement, the Court observes that no customers of the petitioner commercial publisher had brought suit and that the petitioner could not bring a facial challenge on their behalves because of the unique nature of an access rights challenge, whereby no penalties, such as threat of prosecution or the cut-off of funds, "hang[ ] over [customers'] heads."[102] The Court's limitation of its analysis to facial challenges and its highly cursory analysis of First Amendment access rights doctrine, unaccompanied by analysis of precedent beyond a "cf." citation to *Houchins*, makes the significance of *LAPD* to general access rights doctrine highly question-

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[98] *Id.* at 581 n.18 (plurality opinion). While a comprehensive analysis of "special" press access rights is beyond this Article's scope, this Article does note agreement with the contention that some preferential press access is generally appropriate in the context of fulfilling public access mandates, given the press' special role as the public's information-gathering agent. For more detailed consideration of "special" press rights, see, for example, David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429 (2002); Lillian R. BeVier, *An Informed Public, An Informing Press: The Search for a Constitutional Principle*, 68 CAL. L. REV. 482 (1980); Timothy B. Dyk, *Newsgathering, Press Access, and the First Amendment*, 44 STAN. L. REV. 927 (1992); David Lange, *The Speech and Press Clauses*, 23 U.C.L.A. L. REV. 77 (1975); Anthony Lewis, *A Preferred Position for Journalism?*, 7 HOFSTRA L. REV. 595 (1979); Melville B. Nimmer, *Introduction—Is Freedom of the Press a Redundancy: What Does it Add to Freedom of Speech?*, 26 HASTINGS L.J. 639 (1975); William W. Van Alstyne, *The Hazards to the Press of Claiming a "Preferred Position,"* 28 HASTINGS L.J. 761 (1977).

[99] 528 U.S. 32 (1999).

[100] *Id.* at 34–35, 37.

[101] *Id.* at 40.

[102] *Id.* at 40–41.

able at best. Justice Scalia, concurring in *LAPD*, explains that the case stands for nothing beyond the proposition that facial challenges are inappropriate in the access rights context because the nature of access rights restrictions "eliminate[ ] any 'chill' upon speech that would allow a plaintiff to complain about the application of the statute to someone other than himself."[103]

Given the questionable significance of *LAPD* to access rights doctrine, it is unsurprising that the case has largely been ignored by federal appellate courts as authority on substantive access rights questions.[104] *LAPD* simply leaves open too many questions to be considered controlling precedent. It is unclear, first of all, that *LAPD* makes any statement on substantive access rights doctrine, as opposed to overbreadth/facial challenge doctrine. Second, to the extent that *LAPD* does make a statement about access rights doctrine, it is uncertain whether that statement constitutes a decisive rejection of access rights in particular contexts and, if so, it is uncertain to which contexts the rejection applies. Third, the absence in *LAPD* of any mention of *Richmond Newspapers* and its progeny leaves unclear whether any substantive access rights conclusions reached in *LAPD* constitute a rejection of the *Richmond Newspapers* framework or a limitation on the framework's application.

Because *LAPD*'s significance, if any, to access rights doctrine is unclear, this Article focuses its critique of the Supreme Court's access rights analysis on the prison access cases and on *Richmond Newspapers* and its progeny. Similarly, because *LAPD* goes unmentioned in the bulk of the lower court case law, including the Creppy Memorandum cases, this Article's discussion of lower court case law deals primarily with lower court applications of the experience and logic standards of *Richmond Newspapers* and its progeny. Finally, it is important to note that, to the extent that *LAPD* can be interpreted to impact First Amendment access rights doctrine in a manner inconsistent with this Article's proposed approach, this Article implicitly takes issue with *LAPD*.

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[103] *Id.* at 41 (Scalia, J., concurring).

[104] Dismissiveness toward *LAPD* as a source of access rights doctrine is not without exception. Most notably, Judge Silberman of the D.C. Circuit, writing for a two-judge majority, recently offered the following interpretation of *LAPD*: "to the extent the Supreme Court has addressed the constitutional right of access to information outside the criminal trial context, the Court has applied the general rule of *Houchins*, not *Richmond Newspapers*." Ctr. for Nat'l Sec. Studies v. Dep't of Justice, 331 F.3d 918, 935 (D.C. Cir. 2003). For the reasons stated above, this argument dramatically overstates the decisiveness of *LAPD*'s relationship to general access rights doctrine. Furthermore, the Sixth Circuit, in Amelkin v. McClure, 330 F.3d 822 (6th Cir. 2003), cited *LAPD* as support for the substantive conclusion that statutes restricting access to motor vehicle accident reports do not raise First Amendment problems. *Id.* at 827–28. Notably, the *Amelkin* court did not so much as cite *Richmond Newspapers* or its progeny.

B. Critique of the Court's Approach in Richmond Newspapers *and Its Progeny*

Despite their flaws, *Richmond Newspapers* and its progeny make some important contributions to access rights theory and doctrine. Most significant among these contributions is the cases' embrace of access structuralism. Such an embrace is important in its own right as it is demanded by free speech values as discussed in Part III. Furthermore, this embrace helps to resolve the longstanding tension in the case law between the positive approach typically taken to negative structuralism and the dismissive approach long taken to access structuralism. In addition to embracing access structuralism, *Richmond Newspapers* and its progeny contain the seeds of important insights regarding what types of access restrictions are presumptively undue. Specifically, in the context of explaining why trials historically have been open and why public access furthers trials' purposes, the Court suggests that the denial of public access has particular significance in the context of politically insular proceedings such as adjudications.

While the positive elements of *Richmond Newspapers* and its progeny are explored somewhat further in Part III,[105] the remainder of this Section critiques the cases' major problems. Specifically, the remainder of this Section explores the fact that the Court, despite the significance of its insight that the logic underlying negative structuralism naturally lends support to access structuralism, approaches the subsequent question of line-drawing with relative carelessness. Hence, we are left with an unsatisfying rationale as to why the experience and logic factors follow from structural theory and with little basis for determining what other standards, if any, might guide us in considering claims of access outside of the criminal adjudication context.

The most coherent rationale offered in the case law for the experience prong is implicit in Chief Justice Burger's plurality opinion in *Richmond Newspapers*. The opinion's reliance on tradition seems to rest on the straightforward historical rationale that, if the First Amendment is intended partly to "'prohibit government from limiting the stock of information from which members of the public may draw,'"[106] then surely it is meant to protect against the government's "summarily closing courtroom doors which had long been open to the public at the time that Amendment was adopted."[107] The problem with this rationale, however, is that it places too much reliance on history *qua* history. While history can be a valid consideration in assessing the legitimacy of government inter-

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[105] *See infra* Part III.C.3.a.

[106] *Richmond Newspapers*, 448 U.S. at 575–76 (quoting First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978)).

[107] *Id.* at 576.

ests in closure, as discussed in Part III, attempts simply to check access claims against the framers' presumed views regarding the openness of particular proceedings finds little support in the text, history, or theory of the First Amendment. Indeed, commentators widely agree that "there is little indication of what the framers intended" beyond their well-documented concerns about prior restraints.[108] Rather than the deceptively simple historical approach taken by the Court, a more productive one would confront the admittedly complicated but ultimately inescapable inquiries regarding the principles underlying free speech protections and the insights that such principles shed upon access rights.[109]

In contrast to an approach embracing history for its own sake, Justice Brennan's invocation, in his *Richmond Newspapers* concurrence, of the experience and logic prongs draws upon broader considerations. Yet these considerations are fairly arbitrary, grounded in common sense intuitions too unnuanced to provide much useful guidance. Justice Brennan turns to the experience prong primarily because "a tradition of accessibility [is deemed to imply] the favorable judgment of experience."[110] Yet this rationale at once is too narrow and too broad, and more significantly, is devoid of much connection to the rationale of structuralism. That access has been provided in the past hardly establishes that such access furthers structuralist aims. And Justice Brennan's conclusory statement that tradition implies the "favorable judgment of experience"[111] hardly suffices to convert past policy judgments into constitutional mandates. At the same time, the prong itself can also prove unnecessarily confining. Certainly, structuralist concerns can be undermined as much if not more by historical refusals to provide access to certain proceedings as by sudden turnabouts in policy. As demonstrated in Part II.C, these problems manifest themselves both in case law reading the experience prong so

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[108] Erwin Chemerinsky, Constitutional Law 896 (2001). *See also, e.g.*, Rodney A. Smolla, Smolla and Nimmer on Freedom of Speech 1–18 (1996) (cited in Chemerinsky, Constitutional Law 896); Martin H. Redish, *The Value of Free Speech*, 130 U. Pa. L. Rev. 591, 595 n.27 (1982).

[109] By the same token, little weight should be accorded those arguments to the effect that the historical record demonstrates that the framers did not support access rights, and that constitutional access arguments are therefore foreclosed. *See, e.g.*, David M. O'Brien, *The First Amendment and the Public's "Right to Know,"* 7 Hastings Const. L.Q. 579, 586–603 (1980). It bears noting, however, that such historical arguments generally cite evidence suggesting that the framers did not place constitutional value on the public's right to know of legislative activities and do not cite evidence involving the public's right to witness adjudicative or similar proceedings. *Id.*

[110] *Richmond Newspapers*, 448 U.S. at 589 (Brennan, J., concurring). Justice Brennan also places some reliance on history *qua* history, noting that tradition is important partly because "the Constitution carries the gloss of history." *Id.* He deems the "favorable judgment of experience" factor more important, however, than any reliance on history for its own sake. *Id.*

[111] *See, e.g.*, *Press-Enterprise II*, 478 U.S. at 8 (citing Justice Brennan's rationale from *Richmond Newspapers* to explain why the Court considers the factor of tradition).

broadly as to be virtually meaningless and in case law reading the experience prong so strictly as to frustrate structuralist concerns.[112]

Nor does the "logic" prong as outlined by Justice Brennan in his *Richmond Newspapers* concurrence, and as later adopted by the Court, help matters much. While considering whether "access to a particular government process is important in terms of that very process"[113] seems intuitively appealing, so open-ended an inquiry fails to provide useful guidance for drawing lines between those access grants that are constitutionally necessary and those that simply are wise policy choices.[114] Indeed, it is difficult to imagine scenarios in which public access could not in some sense be said to further the ends of particular processes. The core question for constitutional purposes is the degree to which the preconditions of meaningful public debate and recourse are threatened without an access guarantee. Of course, this Article's emphasis on this core question itself could be characterized as a fine-tuned "logic" inquiry. The point is not that any inquiries grounded in the logic of theoretical or other considerations are problematic. Rather, the point is that a logic prong so unclear in its theoretical grounding and practical implications as that relied upon by the Supreme Court cannot meaningfully contribute to the assessment of access claims.

In light of the experience and logic prongs' problematic natures, fairly predictable problems have arisen in the lower courts. Such problems range from courts' effectively abandoning the experience prong and thus leaving themselves with little reasoned basis for line-drawing[115] to courts' reading much greater nuance into the logic prong than the prong does or reasonably should contain in an effort to find more precise line-drawing principles.[116] Part III.C turns to these and other doctrinal issues that have arisen in the lower courts.

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[112] *See infra* notes 132, 134, 151, 169–170 and accompanying text.

[113] *Richmond Newspapers*, 448 U.S. at 589 (Brennan, J., concurring). *See also, e.g.*, *Press-Enterprise II*, 478 U.S. at 8.

[114] Openness as a policy choice can manifest itself in case-by-case decisions to open particular proceedings or to make certain information available, and/or through broad anti-secrecy directives such as those embodied by the Freedom of Information Act. *See* 5 U.S.C. § 552 (2000). Of course, there will be overlap between openness that is protected through case-by-case government discretion, openness that is protected by statute or regulation, and openness that is protected constitutionally. The core constitutional question, however, is whether openness can and should be trusted entirely to political processes.

[115] *See infra* notes 134, 151 and accompanying text.

[116] *See infra* notes 132, 169–170.

C. Lower Court Applications

1. Civil and Criminal Trial and Pre-Trial Proceedings

Not surprisingly, lower court analysis has been relatively trouble-free in cases involving access to civil trial proceedings. Such proceedings are uniquely amenable to the experience and logic tests, given a largely shared history of openness and of articulated rationales for such openness between civil and criminal trial proceedings.[117] It thus is unsurprising that the lower federal courts generally have followed straightforward paths of applying the experience and logic tests in the civil trial proceedings context[118] and that every federal appellate court to address the issue has found a presumptive access right to civil trial proceedings and related information.[119]

While application of the experience and logic prongs also has been largely trouble-free in the context in which they were developed—namely, that of criminal trial proceedings—it is telling as to the prongs' problematic natures that at least one doctrinal problem has arisen even in this context. Specifically, at least two lower federal courts considering access

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[117] Indeed, while Justice O'Connor, concurring in *Globe Newspaper Co.*, was careful to state that "neither *Richmond Newspapers* nor [*Globe Newspaper Co.* should] carry any implications outside the context of criminal trials," *Globe Newspaper Co.*, 457 U.S. at 611 (O'Connor, J., concurring), other members of the Court have emphasized the parallels between civil and criminal proceedings. The *Richmond Newspapers* plurality noted, for example, that while access to civil trials "is a question not raised by this case . . . historically both civil and criminal trials have been presumptively open." *Richmond Newspapers*, 448 U.S. at 580 n.17. *See also id.* at 599–600 (Stewart, J., concurring).

[118] *See, e.g.*, Rushford v. New Yorker Magazine, Inc., 846 F.2d 249, 253, 253 n.4 (4th Cir. 1988); Publicker Indus. v. Cohen, 733 F.2d 1059, 1067–70 (3d Cir. 1984); Westmoreland v. Colum. Broad. Serv., 752 F.2d 16, 22–23 (2d Cir. 1984); Brown & Williamson Tobacco Co. v. FTC, 710 F.2d 1165, 1178–79 (6th Cir. 1983). *But cf.* Matter of Cont'l Ill. Sec. Litig., 732 F.2d 1302, 1308 (7th Cir. 1984) (not mentioning experience prong but finding that presumptive access rights attach to civil proceedings and information because "the policy reasons for granting public access to criminal proceedings apply to civil cases as well"); Newman v. Graddick, 696 F.2d 796, 800–01 (11th Cir. 1983) (citing the Supreme Court's emphasis on experience and logic but discussing only policy reasons in explaining why presumptive access rights attach to civil trial proceedings).

[119] *See, e.g.*, N. Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198, 207 n.3 (3d Cir. 2002) (noting that every Court of Appeals to address the question has found an access right to apply in the civil trial context and citing cases); Detroit Free Press v. Ashcroft, 303 F.3d 681, 695 n.11 (6th Cir. 2002) (same); *Rushford*, 846 F.2d at 252–54 (holding that denial of access to civil summary judgment documents must be justified by a compelling interest toward which the denial is narrowly tailored); *Publicker*, 733 F.2d at 1067–71 (holding that the presumptive right of access to civil trial and pre-trial proceedings can be overcome only by a compelling interest toward which denial is narrowly tailored); *Cont'l Ill.*, 732 F.2d at 1309 (holding that the presumption of access applies to hearings held and evidence presented on motions to terminate in civil cases); *Brown & Williamson*, 710 F.2d at 1176–79 (holding that the presumptive access right attaches to documents filed in conjunction with civil trial proceedings); *Newman*, 696 F.2d at 800–02 (holding that presumptive access rights attach to pre- and post-trial hearings in class action case). *But cf., e.g.*, *Westmoreland*, 752 F.2d at 21–23 (agreeing that public has presumptive right to attend civil trials, but disagreeing that federal trials must be televised).

to pre-trial criminal proceedings and documents deemed the Court's experience prong irrelevant to their inquiries, leaving themselves with only the Supreme Court's logic prong for guidance.

In *United States v. Criden*,[120] the Third Circuit found a presumptive right of access to pretrial suppression, due process, and entrapment hearings.[121] *Criden*, a 1982 case, lacked the benefit of the *Press-Enterprise II* Court's 1986 statement that there is a long tradition of access to at least some types of pre-trial criminal hearings.[122] The *Criden* court concluded, in contrast, that there was no public right to attend pre-trial criminal proceedings at common law.[123] The court also concluded, however, that there was no historical counterpart to modern pre-trial suppression hearings and that "the first amendment is to be interpreted in light of current values and conditions."[124] The *Criden* court thus deemed the history prong irrelevant to its inquiry.[125]

The Ninth Circuit adopted a similar approach in 1988's *Seattle Times Co. v. United States District Court*,[126] finding a presumptive access right with respect to documents filed in conjunction with pre-trial bail determination hearings. The *Seattle Times* court acknowledged that "[p]retrial detention proceedings do not share with criminal trials an unbroken history of public access."[127] The court noted, however, that such hearings have gained increasing importance in the modern era and that "[u]nder [such] circumstances, the historical tradition surrounding bail proceedings is much less significant."[128] The court thus relied on the logic prong to find a presumptive access right.[129]

The problem with the *Criden* and *Seattle Times* Courts' approaches is not that the courts deem the experience prong too confining to serve as a categorical prerequisite to access. Indeed, as already noted, such conclusion is entirely appropriate from the perspective of structural theory. The problem with these courts' approaches is simply that the logic prong is insufficient to carry single-handedly the burden of guiding access determinations, as discussed above. *Criden* and *Seattle Times* thus exemplify the "catch-22" with which the experience and logic prongs present the lower courts: faithful application of the experience prong is too restrictive to serve structuralist ends in many cases, while abandonment of

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[120] 675 F.2d 550 (3d Cir. 1982).
[121] *Id.* at 554.
[122] *Press-Enterprise II*, 478 U.S. at 10.
[123] *Criden*, 675 F.2d at 555.
[124] *Id.*
[125] *Id.* at 555–57. In *North Jersey Media Group*, the Third Circuit sought to disavow *Criden*'s approach to the experience prong. 308 F.3d at 213. The *North Jersey Media* court distinguished *Criden* on the basis of *Criden*'s having arisen in the criminal context and having been decided prior to *Press-Enterprise II*. *Id.*
[126] 845 F.2d 1513 (9th Cir. 1988).
[127] *Id.* at 1516.
[128] *Id.*
[129] *Id.* at 1516–17.

the experience prong leaves courts with scant useful guidance for assessing access claims.

2. Overview of Approaches Taken to Administrative Proceedings

Administrative proceedings raise yet greater difficulties in the application of the experience and logic prongs, given historical and other factual distinctions between administrative proceedings and the criminal proceedings addressed in the Supreme Court's access cases. Courts thus have taken somewhat varied approaches to considering access to proceedings and information in the administrative state. The approaches can be grouped into three major categories. First, some courts have used the occasion of addressing access in the administrative state to call into question the very logic of First Amendment access rights.[130] These courts suggest that the reasoning of the *Houchins* plurality, to the effect that access is a matter of policy and not of constitutional right, still carries weight and that *Richmond Newspapers* and its progeny should be limited to criminal trial proceedings.[131] Ultimately, however, these courts generally rely on the absence of much if any history of access to the particular administrative proceedings or information at issue to conclude that the experience prong, if applicable, is not satisfied.[132] Second, some courts simply have applied the experience and logic prongs to particular administrative proceedings or documents and found both prongs unmet.[133] Third, some courts have minimized the significance of the experience prong in light of the limited histories of the administrative proceedings at issue, relying primarily on the expansive nature of the logic prong to find access rights.[134]

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[130] A divided D.C. Circuit, in an opinion written by Judge Sentelle, joined by Judge Henderson, and dissented from by Judge Tatel, recently suggested that the Supreme Court itself has backed away from applying the experience and logic prongs, or extending the logic of access rights generally, outside of the criminal trial context. *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 935. Specifically, Judge Sentelle cites Los Angeles Police Dep't v. United Reporting Publ'g Corp., 528 U.S. 32 (1999), to this effect. As detailed *supra* at note 104 and accompanying text, Judge Sentelle's opinion significantly overstates the decisiveness of *LAPD*'s relationship to substantive access rights doctrine.

[131] *See* Calder v. IRS, 890 F.2d 781, 783–84 (5th Cir. 1989); Capital Cities Media, Inc. v. Chester, 797 F.2d 1164, 1167–74 (3d Cir. 1986).

[132] *Calder*, 890 F.2d at 784; *Capital Cities Media*, 797 F.2d at 1174–75.

[133] *See, e.g.*, United States v. Miami Univ., 294 F.3d 797, 823 (6th Cir. 2002); Johnson Newspaper Corp. v. Melino, 77 N.Y.2d 1, 7–8 (1990).

[134] *See, e.g.*, Soc'y of Prof'l Journalists v. Sec'y of Labor, 616 F.Supp. 569, 575–76 (D. Utah 1985) (finding qualified access right to a formal fact-finding proceeding of the Mine Safety and Health Administration ("MSHA"), while noting that MSHA's limited history minimizes the significance of the experience prong), *vacated and remanded as moot by* 832 F.2d 1180 (10th Cir. 1987). *Cf.* Whiteland Woods v. Township of W. Whiteland, 193 F.3d 177, 180–81 (3d Cir. 1999) (finding qualified access right to town planning commission meetings based on relatively cursory analysis as to a few decades of access, combined with logic prong analysis).

The first and third approaches reflect the major difficulties to which the Court's experience and logic prongs lend themselves. Under the first approach, courts treat the lack of a consistent history of access to the relevant proceedings or materials as fully dispositive of the access right question. As already noted, the treatment of history as a necessary prong is not called for by structuralist theory and in fact undermines structuralist concerns.[135] The experience prong's restrictive tendencies are particularly problematic in the context of the administrative state, given the relative modernity of most administrative proceedings.[136] The third approach, under which courts react to the experience prong's restrictive tendencies and to the relative modernity of the administrative state by minimizing the prong's significance, also is problematic. The difficulty stems from the logic prong's inadequacy as a sole guiding factor, as evidenced in the approaches taken in *Criden* and *Seattle Times*.[137]

3. Immigration Proceedings and the Creppy Memorandum

The recent Sixth and Third Circuit cases addressing the Creppy Memorandum's constitutionality further reflect the ill-suited nature of the current doctrinal framework for assessing access questions in the administrative state. First, the conflicting approaches that the cases take to applying the experience prong demonstrate the prong's ambiguity as to the amount and nature of tradition required. Such ambiguity makes the prong vulnerable to manipulation caused by courts' broader concerns about access doctrine. For example, the Third Circuit strictly interprets the experience prong due in part to concerns about the "perverse consequences" that might follow from a broader rule.[138] On the other hand, while the Sixth Circuit's broader interpretation of the prong is more consistent with its underlying rationale, the unsatisfying and potentially limitless reach of that rationale makes unsurprising the backlash embodied in the Third Circuit's narrower approach. Furthermore, the cases' conflicting approaches reflect the logic prong's inability to add much clarity where application of the experience prong is ambiguous: while the Sixth Circuit easily deems access to serve useful ends, the Third Circuit expresses frustration with the logic prong's breadth as typically applied, and interprets it as a balancing test whereby the negative ramifications of access in the subcategory of proceedings subject to closure are weighed against positive ramifications of access to the larger category of proceedings at issue.

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[135] *See supra* Part II.B.
[136] *See Detroit Free Press*, 303 F.3d at 702.
[137] *See supra* Part II.C.1.
[138] *See N. Jersey Media Group*, 308 F.3d at 215.

a. The Sixth Circuit's Opinion: Detroit Free Press v. Ashcroft

Suit was filed in *Detroit Free Press v. Ashcroft* ("*DFP*")[139] by deportee Rabih Haddad, several newspapers, and Congressman John Conyers in response to the closing of three detention hearings in Haddad's case.[140] A federal district court granted a declaratory judgment to the effect that the Creppy Memorandum violates the First Amendment, an injunction barring future closures under the Memorandum in Haddad's case, and an order requiring the government to provide transcripts of previously closed proceedings in the case.[141] The Sixth Circuit initially stayed, but ultimately affirmed, the district court's order.[142]

In affirming the district court's order, the *DFP* court begins by rejecting the government's argument that the deference typically accorded the government in immigration cases bars searching review of the Creppy Memorandum. The court states that while the "plenary power" doctrine traditionally precludes searching review of substantive immigration law—such as law regarding the bases on which immigrants may be removed from the country—the doctrine does not limit review of deportation's procedural aspects where constitutional rights are involved.[143] Thus, the court concludes that the plenary power doctrine does not limit judicial review of constitutional challenges to the closing of deportation hearings.[144]

In addressing the merits of the constitutional claim, the Sixth Circuit begins by rejecting the government's argument that *Richmond Newspapers* and its progeny, and hence the experience and logic tests, apply only to judicial proceedings and are inapplicable to administrative proceedings. The court notes that the Supreme Court has applied the experience and logic tests to several stages of the criminal judicial process, including *voir dire* and pre-trial suppression hearings.[145] It further comments that lower federal courts typically apply the experience and logic tests in assessing claims of access to administrative proceedings.[146] Additionally, the Sixth Circuit observes that the *Houchins* case, whose principles the government urges the court to adopt, produced no majority opinion, predated *Richmond Newspapers* and its progeny, and rested upon the Su-

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[139] 195 F. Supp. 2d 937 (E.D. Mich. 2002).
[140] *Id.* at 940–41.
[141] *Id*. at 948.
[142] Detroit Free Press v. Ashcroft, 303 F.3d 681, 685 (6th Cir. 2002).
[143] *Id.* at 685–87.
[144] *Id.* at 687–91. The *DFP* court notes that the Supreme Court has deemed constitutional limitations inapplicable to procedural decisions in cases involving persons seeking initial entry to the United States. *Id.* at 688. Of course, it does not necessarily follow that the First Amendment fails to provide a public access right even in proceedings involving initial entry. In any event, the proceedings at issue in *DFP* clearly involve the removal of one already present in the United States.
[145] *Id.* at 695.
[146] *Id.* at 695, 700.

preme Court's treatment of "special" press access rights rather than public access rights.[147]

The remainder of the *DFP* court's analysis amounts to a fairly straightforward application of the experience and logic tests, albeit one reflective of ambiguity as to the meaning of experience and the breadth of the logic test. With respect to the experience prong, the court concludes that a relatively unbroken tradition of access to deportation hearings has existed for over a century. The court bases this conclusion on findings that, since enactment of the first immigration act in 1882, Congress repeatedly has closed exclusion hearings involving initial entry requests while never explicitly closing deportation hearings involving removal of persons already present in the United States; INS regulations explicitly have required deportation hearings to be presumptively open since 1965; and the government's reference to two statements to the effect that some early-twentieth century immigration hearings took place in prisons, hospitals, and homes are anecdotal and are inconclusive as to whether such hearings were closed to the public.[148]

While the Sixth Circuit concludes that deportation hearings have a long tradition of access, it also concludes that the experience prong does not necessarily demand such tradition. In this respect, the court notes that the *Press-Enterprise II* Court relied entirely on a post-Bill of Rights history of openness in preliminary hearings to deem the experience prong satisfied.[149] The court also relies on the Supreme Court's rationale that tradition implies the "favorable judgment of experience" to conclude that even a brief historical tradition can be sufficient "where the beneficial effects of access to [a] process are overwhelming and uncontradicted."[150] Finally, the court considers the relative novelty of the administrative state, the trend within the administrative state toward openness in formal adjudicative hearings, and the uncontradicted history of openness in the analogous context of judicial proceedings to conclude that a long and

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[147] *Id.* at 694. The *DFP* court also argues that the experience and logic prongs apply at least to quasi-adjudicative proceedings even if they are deemed inapplicable to other administrative proceedings. The argument is one of simple analogy: since the Supreme Court applies the experience and logic prongs to judicial proceedings, then administrative proceedings that "'walk, talk, and squawk' very much like a judicial proceeding" ought to be assessed in the same way, lest form triumph over substance in access right analysis. *Id.* at 696–700, 702. This analysis suggests that there might be something unique about quasi-adjudicative proceedings for purposes of assessing access rights. Additionally, the *DFP* court notes that deportation, "'[t]hough . . . technically not a criminal proceeding . . . visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom.' As such, '[t]hat deportation is a penalty—at times a most serious one—cannot be doubted.'" *Id.* at 696 (quoting Bridges v. Wixon, 326 U.S. 135, 154 (1945)).

[148] *Id.* at 701–03.

[149] *Id.* at 700.

[150] *Id.* at 701 (quoting *Richmond Newspapers*, 448 U.S. at 589 (Brennan, J., concurring)).

unbroken tradition of access to particular administrative hearings is not strictly necessary.[151]

The *DFP* court also finds the logic prong easily satisfied through analysis largely mirroring that of *Richmond Newspapers* and its progeny. According to the Sixth Circuit, access to deportation hearings furthers fairness and the appearance thereof. In particular, access enables the public to participate in the affairs of its government, not only by serving as a direct check on possible government abuse or mistake but by "enhanc[ing] the public's ability to affirm or protest government's efforts."[152] The *DFP* court also deems it:

> important for the public, particularly individuals who feel that they are being targeted by the Government as a result of the terrorist attacks of September 11, to know that even during these sensitive times the Government is adhering to immigration procedures and respecting individuals' rights . . . . And if in fact the Government determines that Haddad is connected to terrorist activity or organizations, a decision made openly concerning his deportation may assure the public that justice has been done.[153]

Having found a presumptive right of access to deportation hearings, the *DFP* court concludes that the Creppy Memorandum, while justified by reference to a compelling interest in national security,[154] is not "'narrowly tailored to serve that interest.'"[155] The court finds no adequate reason why sensitive information and related secrecy needs cannot be addressed on a case-by-case basis, rather than through sweeping, unreviewed administrative directives.[156] In response to the government's "mosaic" theory to the effect that information innocuous in isolation may be pieced together by terrorists to create a mosaic of dangerous intelligence, the court concludes that "speculation should [not] form the basis for such a drastic restriction on the public's First Amendment rights."[157] Indeed, the court notes:

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[151] *Id.* at 702–03.
[152] *Id.* at 703–05.
[153] *Id.* at 704 (quoting *Detroit Free Press*, 195 F. Supp. 2d at 944).
[154] *Id.* at 707.
[155] *Id.* at 704 (quoting *Globe Newspaper Co.*, 457 U.S. at 606–07).
[156] *Id.* at 707–09. The government argued that case-by-case analysis already occurs insofar as the government reviews each case to determine if special circumstances merit closure. The court pointed out, however, that any such case-by-case analysis is problematic insofar as the review is "performed in secret, without any established standards or procedures, and the process is, thus, not subject to any sort of review, either by another administrative entity or the courts. Therefore, no real safeguard on this exercise of authority exists." *Id.* at 710.
[157] *Id.* at 709.

> Fittingly, in this case, the Government subsequently admitted that there was no information disclosed in any of Haddad's first three hearings that threatened "national security or the safety of the American people." Yet, all these hearings were closed. The only reason offered for closing the hearings has been that the presiding immigration judge was told to do it by the chief immigration judge, who in turn was told to do it by the Attorney General.[158]

b. The Third Circuit's Opinion: North Jersey Media v. Ashcroft

Suit in the case of *North Jersey Media Group v. Ashcroft* ("*NJM*")[159] was brought by reporters repeatedly denied docket information for and access to deportation proceedings in a New Jersey immigration court.[160] The District Court held that the Creppy Memorandum violates the First Amendment and granted a nationwide injunction against its further enforcement. The Third Circuit granted the government's request for expedited review, and the Supreme Court stayed the District Court's injunction pending appeal. The Third Circuit reversed the District Court's order.[161]

As an initial matter, the Third Circuit's opinion largely echoes the Sixth Circuit's conclusions with respect to the plenary power doctrine and the experience and logic prongs' applicability to the Creppy Memorandum. That is, the *NJM* court agrees that judicial review is appropriate with respect to procedural aspects of deportation hearings, including decisions to close such hearings.[162] Furthermore, the *NJM* court agrees that the experience and logic prongs are applicable to the Creppy Memorandum, given that the Supreme Court has applied the test beyond the criminal trial context, and given that lower courts, including the Third Circuit, have applied the test to civil trial proceedings and administrative proceedings.[163]

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[158] *Id.* (quoting Press Release, Dep't of Justice, Statement of Associate Attorney General Jay Stephens Regarding the Sixth Circuit Decision in the Haddad Case 02-238 (Apr. 19, 2002), *available at* http://www.usdoj.gov/opa/pr/2002/April/02_ag_238.htm). The court's narrow tailoring analysis also was supported in part by its finding that the Creppy Memorandum had elements of underbreadth, as detainees and their attorneys themselves could divulge details of the closed hearings, and as this gap was not closed by an interim rule allowing immigration judges to impose gag orders on hearing participants. *Id.* at 707–08. In addition to finding that the Creppy Memorandum was not narrowly tailored, the Sixth Circuit also found that the decisions resulting from the Memorandum were not supported by "'findings specific enough that a reviewing court can determine whether the closure order was properly entered.'" *Id.* at 705 (quoting *Press-Enterprise II*, 478 U.S. at 9–10).

[159] 205 F. Supp. 2d 288 (D.N.J. 2002).

[160] *Id.* at 290.

[161] North Jersey Media Group v. Ashcroft, 308 F.3d 198 (3d Cir. 2002).

[162] *Id.* at 219 n.15.

[163] *Id.* at 206–08.

It is in the application of the experience and logic prongs that the Third Circuit's approach veers significantly from that of the Sixth Circuit, suggesting a doctrinal backlash against the broad approach that the latter represents. First, the Third Circuit concludes that the experience prong is not met by a sufficiently long and consistent tradition of access to deportation hearings.[164] This conclusion is due partly to some differences between the *NJM* court's reading of the facts and that of the *DFP* court. For example, while the *DFP* court deems the government's argument that some deportation hearings were held in hospitals, prisons or homes and thus likely were closed to the public insignificant and inconclusive,[165] the *NJM* court views the same argument as intuitive and convincing.[166] More significantly, the Third Circuit simply reads the experience requirement more strictly than does the Sixth Circuit. For example, while the *NJM* court acknowledges that deportation hearings presumptively have been open at least since 1964, when regulations began to provide explicitly for such openness, the court concludes that "a recent—and rebuttable—regulatory presumption is hardly the stuff of which Constitutional rights are forged."[167] Similarly, the *NJM* court rejects the argument that similarities between judicial trials and deportation proceedings counsel openness in the latter given the long history of access in the former.[168] The *NJM* court concludes, in short, that a relatively strict reading of the experience prong is necessary to avoid "perverse consequences."[169] Specifically, the court deems a strict reading of the experience prong necessary to avoid "effectively compel[ling] the Executive to close its proceedings to the public *ab initio* [lest it] risk creating a constitutional right of access that would preclude it from closing them in the future."[170]

The Third Circuit expresses its discomfort not only with a broad reading of the experience prong, but also with the breadth of the logic prong as typically applied. Specifically, the court notes that:

> [a]lthough existing caselaw on the logic prong has discussed only the policies favoring openness, we are satisfied that the logic prong must consider the flip side of the coin. Indeed, the Supreme Court seems to have contemplated this, for in formulating the *Richmond Newspapers* test it asked "whether public access plays a significant *positive* role in the functioning of the particular process in question." . . . Any inquiry into whether a

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[164] *Id.* at 212.
[165] *See supra* note 148 and accompanying text.
[166] 308 F.3d at 212 & n.11.
[167] *Id.* at 213. *See also id.* at 209.
[168] *Id.* at 214–15.
[169] *Id.* at 215.
[170] *Id.* at 216.

> role is positive must perforce consider whether it is potentially harmful.[171]

Yet the *NJM* court applies this analysis not by considering the negative and positive aspects of open deportation hearings generally, but by considering the positive aspects of access as a general matter and the negative aspects of access solely in the context of those cases singled out under the Creppy Memorandum. The court thus acknowledges, on the one hand, that access to deportation proceedings generally serves those positive values, such as fairness and the perception thereof, typically relied on by courts in applying the logic prong.[172] On the other hand, the court concludes that negative consequences outweigh positive consequences in the context of those cases singled out for secrecy under the Creppy Memorandum. In so concluding, the court relies on the security risks cited by the government both in *DFP* and in *NJM*. While agreeing that these risks are somewhat speculative, the court concludes that the logic test is "unavoidably speculative," and that the executive branch deserves significant deference in its judgments regarding national security.[173]

The difficulty with the *NJM* court's interpretation of the logic prong is that it takes analysis designed to determine whether special factors overcome a general access presumption in particular cases and uses such analysis to determine whether a general access right exists in the first place. Thus, rather than first focusing on access to deportation hearings as a general matter and next considering whether special risks outweigh any presumptive access rights in particular cases, the *NJM* court takes the logically unsound step of reading "special case" considerations into its assessment of whether access rights attach to deportation hearings generally.[174] Having so read and applied the logic test, the *NJM* court, in conjunction with its reading and application of the experience test, finds no presumptive access right to deportation hearings.

III. Toward a New Understanding of Access Rights and Their Limitations

This Part proceeds in three Sections. Section A steps back from the topic of access rights to explain why, in the realm of free speech theory generally, self-government and related "checking" theories of free speech

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[171] *Id.* at 200–01 (citation omitted). Similarly, the Third Circuit expresses concern that "the logic inquiry, as currently conducted, does not do much work in the *Richmond Newspapers* test." *Id.* at 217.

[172] *Id.* at 217.

[173] *Id.* at 217–19.

[174] The *NJM* dissent makes this point, noting that "at [the presumptive access determination] stage, we must consider the value of openness in deportation hearings generally, not its benefits and detriments in 'special interest' deportation hearings in particular." *Id.* at 225 (Scirica, J., dissenting).

value constitute important, though not exclusive parts of the justification for free speech. Section B reiterates, and explains the limitations of, the standard structuralist argument as to why it follows from self-government and checking theories of free speech value that access rights are of constitutional magnitude. Section B goes on to explain how structuralist insights lend themselves to a richer and more nuanced approach to access rights and their limitations than has yet been provided. Finally, Section C explains that the approach developed in Section B provides support for drawing a rough distinction between "political" and "adjudicative" activities for purposes of determining when presumptive constitutional access rights attach to major categories of government activity. Of course, the categories of "political" and "adjudicative" are far from exhaustive in describing government activity. Nonetheless, the use of these categories exemplifies this Article's approach as applied to broad realms of government activity. Section C also discusses the doctrinal implications of deeming access denials "presumptively constitutional" or "presumptively unconstitutional."

A. Self-Government Theory and the "Checking Theory" of Free Speech Value as Important Components of the Justification for Free Speech

From the perspective of access rights theory and doctrine, the two most relevant and influential theories of free speech value are the self-government and "checking" theories. Self-government theory, most closely associated with the work of Alexander Meiklejohn, posits that free speech is necessary in a democratic society so that persons will gain the information and critical thinking skills necessary to participate in their own governing.[175] "Checking" theory, most closely associated with the work of Vincent Blasi, emphasizes the "value that free speech, a free press, and free assembly can serve in checking the abuse of power by public officials."[176] The influence of both theories on access rights doctrine is clear. As explored in Part II, the Supreme Court cases embracing access structuralism rely largely on the rationale that free speech is intended partly to facilitate self-government and to deter government abuse and that such ends would be frustrated were government secrecy permitted without restraint.[177] As elaborated on in the next Section, such theories do, in fact, provide the base-level explanation for the constitutional status of access rights, although more nuanced analysis is needed beyond

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[175] *See* Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 256, 263 (1961).

[176] Vincent Blasi, *The Checking Value in First Amendment Theory*, 3 AM. B. FOUND. RES. J. 521, 527 (1977). *See also id.* at 557–67 (comparing checking value theory to Meiklejohnian theory).

[177] *See supra* Part II.A.

the bare conclusions that secrecy frustrates the ends of a non-abusive, self-governing system.

Because self-government and checking theories of free speech value provide the base-level explanation for the constitutional status of access rights, it is important to explain why such theories form constituent parts of the justification for free speech value. The answer is rather intuitive, as the meaning and value of free speech necessarily stem from the principles and premises underlying familiar political theories of self-government. Specifically, such meaning and value necessarily stem from the unique understanding of human nature that underscores political theories of self-government, whereby the governed and their governors are presumed to share common capacities for rationality and self-government as well as for abuse and mistake,[178] and whereby such common capacities and fallibilities demand self-government both as a manifestation of respect for the dignity of a rational people[179] and as a means of checking the abuse and tyranny likely to flow from a government not subject to popular control.[180]

The relationship between the basic premises and principles of self-government as a political concept and the guarantee of free speech is borne out first and most obviously by the inextricable connection between the First Amendment, the Bill of Rights, and the American "constitutional experiment" generally. In particular, such logic stems from the fact that political theories of self-government, and particularly of "indirect" self-government via republicanism, necessarily share with the concept of free speech a commitment both to the optimistic assumption that persons can be trusted with self-government and with liberty, and to the pessimistic assumption that persons tend to abuse power and that the power to govern thus must be limited and dispersed.[181]

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[178] *See infra* note 181 and accompanying text. The notion that humans share common capacities and fallibilities in the realm of government can be traced in significant part to Immanuel Kant's core insight that humans are rational beings who are capable of self-government, *see, e.g.*, PAUL GUYER, KANT ON FREEDOM, LAW, AND HAPPINESS 129–30 (2000); IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE, ix-x, 13, 15 (John Ladd trans., Bobbs-Merrill 1965) (1780), and to his recognition that self-government is instrumentally useful as humans will tend to abuse power or to make mistakes when accorded concentrated and unchecked governing power, *see, e.g.*, IMMANUEL KANT, PERPETUAL PEACE 13 (Bobbs-Merrill 1957) (1795) (discussing likelihood that a ruler unchecked by popular controls will involve his nation in warfare "for the most trivial reasons").

[179] *See, e.g.*, KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE, *supra* note 178, at ix-x, 78–79, 112–13; KANT, PERPETUAL PEACE, *supra* note 178, at 10–11.

[180] *See supra* note 178 and *infra* note 181.

[181] That republicanism embodies an understanding that persons' common capacities and fallibilities necessitate both self-government and limitations thereupon is famously discussed by James Madison in Federalist 10. THE FEDERALIST No. 10, at 77–84 (James Madison) (Clinton Rossiter ed., 1961). Tellingly, even Alexander Hamilton, though opposed to the inclusion of a Bill of Rights in the Constitution, viewed specific constitutional protections designed to prevent arbitrary interference with individual interests as stemming from the same liberal democratic principles that give rise to the concept of self-government. *See* THE FEDERALIST No. 84, at 512 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (drawing connections between general protections designed to ensure self-

Furthermore, such liberal democratic premises can be found at the core of virtually all major theories of free speech value. For example, the marketplace of ideas theory rests directly on the premises that: (1) persons are fallible and thus should never be trusted formally to declare truth and to close off all debate on a matter; (2) the tendency to abuse power in the realm of free speech is quite natural, as the desire to close off debate on issues about which one feels strongly is a natural one; and (3) despite such ordinary human failings, persons also share a basic capacity to reason and to discover truth.[182] Similarly, Lee Bollinger's relatively recent theory that free speech cultivates a characteristic of tolerance among social actors rests on the twin premises that persons have a capacity for profound intolerance that can manifest itself through majority rule and that speech represents an area in which enforced tolerance can maximize human tendencies toward reasoned understanding.[183]

From the understanding that liberal democratic premises of humans' common capacities and fallibilities as self-governors underscore free speech protections, it follows that self-government and checking values necessarily constitute at least an important part of the justification for free speech. First, it follows that persons generally must be left to deliberate freely about matters that affect their governing so as to facilitate their use of reason toward the end of self-government. Second, it follows that the majority or their representatives will likely wish to suppress deliberation on matters about which they have reached consensus or which

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government, such as prohibition on titles of nobility, and more individually focused protections designed to preserve individual liberty, such as a prohibition on arbitrary imprisonment). Similarly, Hamilton's famous discussion of the judicial power in Federalist 78 explained that pure adherence to popular will sometimes must be tempered by restraint if adherence to the very principles underlying the concept of self-government, and hence underlying the Constitution, are not to be lost. *See* THE FEDERALIST No. 78, at 466–69 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[182] John Stuart Mill, *On Liberty*, *in* THE PHILOSOPHY OF JOHN STUART MILL 185, 205, 208–18 (Marshall Cohen ed., Random House 1961) (1869).

[183] LEE C. BOLLINGER, THE TOLERANT SOCIETY 107–44 (1986). Other examples abound. For example, self-realization theory, as explained by Martin Redish, rests on the premise that a system of self-government is designed to service its people rather than vice versa, given the dignity and autonomy that basic democratic theory recognizes as humans' due. Redish, *The Value of Free Speech*, *supra* note 108, at 602–04. This premise of persons' inherent dignity and consequent deservedness of self-government rests, in turn, on core liberal democratic premises to the effect that all persons share common capacities and fallibilities—namely, common capacities both to govern and to abuse power—and that all persons thus deserve the respect and the protection inherent in self-government. *See supra* notes 178, 181. Another example is found in Steven Shiffrin's theory that the First Amendment should be understood in large part as a mechanism to celebrate, cultivate, and protect a spirit of dissent and non-conformity among persons. STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE 1–8, 86–109, 140–69 (1990). Shiffrin's theory is grounded in the twin premises that there is a strong human tendency toward conformity and toward the enforcement of imperfectly realized or imperfectly understood "truths," *see, e.g.*, *id.* at 92–95, and that a freedom of dissent helps stem tendencies toward totalitarianism and intellectual stagnation through the embrace both of reasoned deliberation and of a romantic spirit of nonconformity, *see, e.g.*, *id.* at 91–96, 142, 159–61.

might involve embarrassing or otherwise unwelcome revelations, and that such desire ought not to take the form of legal restraint. Third, it follows that free political deliberation is particularly important to the extent that it facilitates persons' abilities to become aware of and to react to abuses of power in the form either of majority tyranny or of abuses by particular representatives, administrators or judges.

Finally, it is important to articulate two major limits on the scope of this Section's conclusions. First, this Section by no means argues that self-government and checking theories are the only justifications for free speech. Nor does this Section take a position on whether self-government and checking values are among several, independent free speech values[184] or whether such values are components of a larger, all-encompassing free speech theory such as self-realization theory or marketplace of ideas theory.[185] Rather, for this Article's purposes, it suffices to explain that self-government and checking values are constituent parts of the justification for free speech.

Second, while self-government theory is most closely associated with Alexander Meiklejohn and checking theory with Vincent Blasi, this Article does not adopt either theorist's approach wholesale. For example, while Meiklejohn concludes that the First Amendment protects only speech that relates to governing,[186] this Article does not, as already noted, adopt that conclusion. And while Blasi has used language suggesting that the checking value might support presumptive openness in all areas of government activity,[187] this Article does not adopt that conclusion, as detailed below.

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[184] For criticism of theories positing the existence of a single, all-encompassing free speech value, *see, e.g.*, Daniel A. Farber & Philip P. Frickey, *Practical Reason and the First Amendment*, 34 U.C.L.A. L. REV. 1615 (1987).

[185] Martin Redish argues, for example, that self-realization is the only major free speech value, but that other values, such as that of self-government, may be explained as component parts of the larger value of self-realization. Redish, *supra* note 108, at 594, 613–19. Similarly, self-government theory has been described as a narrower version of marketplace-of-ideas theory, whereby "the truth for which listeners search is the truth about issues necessary to make political decisions." Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 680–81 (1991). *See also, e.g.*, Heidi Kitrosser, *From Marshall McLuhan to Anthropomorphic Cows: Communicative Manner and the First Amendment*, 96 NW. U. L. REV. 1339, 1376 (2002). *But see* Meiklejohn, *supra* note 175, at 263 (explaining that self-government theory does not necessarily rely on a faith in the power of truth to gain acceptance in the marketplace of ideas).

[186] Ultimately, Meiklejohn came to define "political speech" so broadly as to call into question his distinction between political speech and non-political speech. *See* Meiklejohn, *supra* note 175, at 256, 257, 262. It is notable also that Robert Bork, who initially adopted the view that the First Amendment protects only political speech, eventually abandoned this view on the basis that one simply cannot draw principled lines as between political and non-political speech. *Compare* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20 (1971), *with* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 333–36 (1990).

[187] Blasi, *supra* note 176, at 609 (arguing that "[R]estrictions on press coverage of official activities" should, from the perspective of checking theory, be presumptively invalid).

B. Moving Beyond Standard Structuralist Arguments: Toward a New Approach to Access Rights

As the above analysis indicates, the notions that free speech enables individuals to govern themselves and facilitates their ability to check government abuse are important components of the justification for free speech. Of course, these propositions are assumed in the standard, structuralist justification for access rights. Specifically, as discussed in Part II, the Court's embrace of access rights in *Richmond Newspapers* and its progeny assumes that free speech is intended partly to facilitate self-government and the checking of government abuse, that such purpose necessitates a right not only to speak but also to receive and sometimes to gather information, and that free speech principles thus necessitate access rights in certain cases.[188] But the rub in this analysis is that it offers little insight as to what constitutes "certain cases." The Court, recognizing the practical impossibility of a government fully transparent in its every operation and the doctrinal and theoretical difficulties in suggesting that every access denial is of equal constitutional gravity, hinges its analysis on the factors of experience and logic.[189] Yet as discussed above, these factors, while allowing the Court to reach an intuitively appealing result in the context of criminal trial proceedings, are theoretically and logistically problematic and leave lower courts with sparse guidance in a realm as factually complicated as the administrative state.[190]

This Section seeks to develop a more fine-tuned understanding of First Amendment structuralism (specifically, of access structuralism), toward the end of explaining why and how structuralism and its compo-

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[188] *See supra* Part II.A.

[189] *See supra* Part II.A–B.

[190] *See supra* Part II.B. Scholarly commentary similarly reflects the limited utility of standard structuralist insights to the effect that self-government and related theories of free speech necessitate protection for information-gathering. In one of the few scholarly works to examine *Richmond Newspapers* and its progeny critically, Eugene Cerruti argues not only that such insights can resolve access right issues but that the shortcomings of *Richmond Newspapers* and its progeny stem from the Court's failure fully to embrace the wide, even radical scope of such insights' implications. Cerruti, *supra* note 32, at 239–41, 271–72, 282–83, 295–96, 305–07. Cerruti argues that all of the judiciary's decision-making apparatus presumptively must be open simply because the judiciary embodies government decision-making power and because basic structuralist insights demand that all government processes presumptively be open. *Id.* at 295–301, 305–06. Ironically, however, Cerruti's sweeping conclusions lead him to draw even tighter and arguably more *ad hoc* restrictions on access rights' scope than those drawn by the Supreme Court. Specifically, Cerruti would apply his conclusions only to the judicial branch on the theory that separation of powers principles prevent the judiciary from requiring openness in the executive and legislative branches. *Id.* at 302–03, 307–11. Cerruti's invocation of separation of powers principles is troubling and undermines the bulk if not the entirety of his First Amendment analysis. If First Amendment principles give rise to access rights, it makes little sense categorically to shield administrators and legislators from access rights' burdens. More fundamentally, Cerruti's analysis suggests the limitations of standard structuralist insights for contributing to a feasible and theoretically satisfying access rights doctrine.

nent political and free speech theories justify both access rights and limitations thereupon. The core practical and doctrinal conclusions reached in this Section are that all access denials to government proceedings or information raise some constitutional question but that the degree to which a denial is suspect and the level of scrutiny under which it must be assessed vary based on the relevant government activity's degree of political insularity and other factors indicative of the extent to which an access denial will frustrate public opportunities to learn of and respond to the relevant activity. To the extent that the relevant activity is such that an access denial is unlikely to deprive the public of meaningful opportunities to learn of, debate, and respond to such activity (including any secrecy with which the activity is undertaken), then access denials, while still subject to a degree of constitutional scrutiny, are not presumptively suspect from a constitutional perspective. On the other hand, to the extent that the relevant activity is such that an access denial will likely deny the public the opportunity either to learn of the activity's existence or to learn of and respond to crucial, legitimizing aspects of the activity (such as the carrying out of constitutionally mandated procedures), then access denials presumptively are suspect constitutionally.

This Section explains the bases for these conclusions and explores the conclusions' major doctrinal and practical implications. Subsection 1 explains that this Section's conclusions are grounded in structuralism's component free speech theories. Subsection 2 elaborates on the implications of Subsection 1's conclusions, outlining the major factors that courts should consider in determining the degree to which an access denial is suspect.

1. Theoretical Underpinnings

The most intuitive theoretical bases for the conclusions summarized above are found in the basic insights of structuralism and its component free speech theories. Specifically, insofar as structuralism relies on the notions that free speech is valuable partly because it enables the people to govern themselves and to check government abuses and that free speech cannot fulfill these functions where government information is kept secret, it stands to reason that the degree to which government secrecy is constitutionally suspect will vary by the extent to which such secrecy can be expected to stifle the preconditions of public debate.

From this perspective, for example, there is relatively slim constitutional significance to the withholding of information regarding activities that target and affect many people and with respect to which the public retains opportunities for political recourse. In such cases, there is relatively minimal risk that the public will be denied the opportunity to learn of major aspects of the information and to debate and respond politically to such information given the government's political incentives to appear

forthcoming, the public's incentives to seek out and demand information through political channels, and the logistical difficulties in hiding government decisions that affect many people. In such cases, then, the preconditions of public debate presumptively are not stifled by access denials. Furthermore, access denials themselves can become part of any political debate regarding the relevant government activities. Thus, while access denials in such cases may constitute troubling policy choices, they are unlikely ultimately to stifle public debate and presumptively pass muster as a matter of First Amendment law.

Conversely, there is relatively great constitutional significance to the withholding of information regarding activities that target discrete individuals or groups and that attain their democratic legitimacy not through opportunities for political recourse but through norms of reason and restraint. In such cases, the individualized nature of the activities combined with their normative and practical detachment from channels for political recourse suggest that secrecy might deprive the public of the opportunity ever to learn of the activities' existence in the first place. Alternatively, the preconditions of meaningful public discussion may be lost even where the public is aware of the activities' bare existence because the purportedly legitimizing elements of such activities will go unwitnessed and political channels of recourse are largely unavailable to respond to the activities and to any secrecy with which they are undertaken. Because secrecy in individualized and politically insular contexts poses a significant threat to the preconditions of public debate, it follows from the basic insights of structuralism and its component free speech theories that such secrecy presumptively offends the First Amendment.

2. Major Criteria for Determining Presumptive Constitutional Status of Access Denials

This Section outlines somewhat more comprehensively major factors that courts ought to consider to determine whether access denials presumptively are unconstitutional. This list is not necessarily exhaustive. Rather, it reflects an attempt to outline major factors of relevance based largely on the examples on which this Article focuses. As case law develops and as new examples are considered, the relevant criteria may, of course, be fine-tuned in accordance with the principles explored herein.

From the perspective of the principles discussed in this Article, major factors for determining the presumptive constitutional status of access denials include whether the proceedings at issue are broadly directed toward large groups of persons or whether they involve discrete parties, whether they include channels for political recourse, and whether they achieve their democratic legitimacy primarily through the possibility of political recourse or through norms of reason and restraint.

The basic rationale for considering whether a proceeding is broadly directed or instead is focused on discrete parties is that broadly targeted activities—such as the passage of legislation affecting any number of present and future individuals—are relatively difficult for the government to shield from public view. Furthermore, the public is more likely to have incentive and ability to mobilize politically with respect to such activities and with respect to any secrecy, real or perceived, with which they are undertaken. As such, the preconditions for public debate are less likely to be stifled through access denials in such cases. To the contrary, the reality or perception of secrecy in such cases itself can form a structurally healthy part of the political debate over the relevant activities.

Similarly, whether channels of political recourse exist with respect to the relevant activities is a significant factor. Absent such channels, any public awareness of the relevant activities and public outcry over the reality or perception of secrecy therein will be difficult to translate into political pressure regarding ongoing secret activities. Certainly, a policy of closure with respect to a broad category of discrete proceedings, such as a statute ordering the closure of many trials, could generate political pressure to change the policy. The core questions in considering the constitutional status of an access denial, however, are whether political recourse opportunities exist within channels that either are the same as those in which the closed proceedings occur or are politically tied to those channels, and whether political pressure can generate information flow with respect to the particular closed proceedings at issue. For example, access denials in the legislative context are relatively unlikely to stifle public debate on the relevant legislative activities in part because legislators themselves could face political consequences if viewed as supporting secrecy and because public responses to secrecy could manifest themselves in political uproars over the relevant legislative activities. In contrast, legislative or executive mandates (or allowances) of adjudicative secrecy lack the benefit of political recourse channels likely to impact existing closed proceedings. Hence, while public outcries might affect the broad closure policy and thus might affect future proceedings, such outcries are unlikely to be felt or considered (even assuming that the relevant legislative or executive directive gives adjudicators discretion to keep proceedings open) within the confines of closed proceedings undertaken during the policy's existence.

In addition to the actual existence of political recourse channels, also significant is whether the relevant activity achieves its democratic legitimacy primarily through opportunities for popular control or through norms of reason and restraint. This factor is significant for two reasons. First, to the extent that an activity achieves its core legitimacy through connections to popular will, pleas for openness can be expected to have relatively high political resonance. Second, to the extent that an activity is legitimized primarily by norms of fairness and restraint, openness is

particularly important from a structural perspective. This latter point is somewhat paradoxical, as proceedings that fit this description by definition do not rely on popular approval for their core legitimacy. However, to the extent that a proceeding relies on procedural rules or other norms of fairness and restraint for its political legitimacy, the following of such norms cannot, consistent with liberal democratic principles, simply be assumed absent some opportunity for public oversight and the attendant threat of publicity as to unfairness or abuse.

C. Drawing a Rough Distinction Between "Political" and "Adjudicative" Activities in Access Right Analysis

The examples in the foregoing discussion distinguish discrete and political insular proceedings, such as adjudications, from broadly focused political proceedings, such as legislative debates. This Section places these examples into a more comprehensive framework: it argues that access denials in political proceedings are generally non-suspect, but that access denials to adjudicative proceedings are generally suspect. These examples do not cover all government activities, but rather exemplify how this Article's approach can be applied to major realms of government activity. Section One offers rough definitions of political and adjudicative activities. Section Two elaborates on why access denials to political activities generally are non-suspect. Section Three elaborates on why access denials to adjudicative activities generally are suspect. Finally, Section Four outlines the doctrinal standards that should presumptively apply to access denials in political and adjudicative contexts.

1. The Rough Definitions

As an initial matter, it is important to eschew any pretense that politics and adjudication have fully essential natures that are distinct from one another. To the contrary, broad policymaking—whether through common law or administrative development—is an aspect of some adjudications and of legislative and quasi-legislative decision-making. Similarly, it is true that adjudications and quasi-adjudications generally are legitimized by the implicit promise of reason and restraint whereas legislative and quasi-legislative decisions typically are legitimized by popular influence and control. Nonetheless, the means of legitimacy and control sometimes overlap. For example, state judges in many jurisdictions are elected and quasi-judicial officers sometimes are subject to questionable levels of political control, whereas administrative agencies engaged in quasi-legislative activity are sometimes accused of straying too far from the realm of political control.

As a general matter, however, one can roughly distinguish political from adjudicative activities because political activities generally involve

making or implementing broadly applicable policy decisions while adjudicative activities generally involve decisions regarding discrete litigants. Political activities are generally attached to avenues for political recourse while adjudicative activities are generally disconnected from or connected only remotely to such avenues. Further, political activities are generally legitimized by their connection to political channels whereas adjudicative activities are generally legitimized by procedural constraints and other norms of reason and fairness in decision-making.

These distinctions are widely recognized in case law and scholarship. For example, the Supreme Court generally requires due process in adjudicative contexts but not in political proceedings precisely because the latter typically affect a broad population. Specifically, the Court has emphasized that individualized protections are neither feasible nor necessary for broadly applicable political decision-making, while such protections are necessary in settings more akin to adjudication that involve case-specific questions concerning a "relatively small number of persons."[191]

Jurists and scholars have also distinguished politics from adjudication based on their respective legitimizing mechanisms. Lon Fuller explains, for example, that:

> Adjudication is . . . a device which gives formal and institutional expression to the influence of reasoned argument in human affairs. As such it assumes a burden of rationality not borne by any other form of social ordering. A decision which is the product of reasoned argument must be prepared itself to meet the test of reason. We demand of an adjudicative decision a kind of rationality we do not expect of the results of contract or of voting.[192]

In contrast, Fuller contends that the results of the political process are justified not by their rationality, but by the fact that they purport to reflect the wishes of the majority.[193]

Judge Posner, writing for the Seventh Circuit, draws a similar distinction in *Coniston Corp. v. Village of Hoffman Estates*.[194] Arguing that zoning decisions tend to be legislative in nature, Judge Posner explains that:

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[191] Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445–46 (1915). *See also* Minn. State Bd. for Cmty. Colls. v. Knight, 465 U.S. 271, 283–85 (1984).

[192] Lon Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 366–67 (1978).

[193] *Id.* at 367.

[194] 844 F.2d 461 (7th Cir. 1988).

> [t]he decision whether and what kind of land uses to permit does not have the form of a judicial decision. The potential criteria and considerations are too open-ended and ill-defined. Granted, much modern adjudication has this character, but the difference is that even modern courts hesitate to treat the decision-making process as a wide-open search for the result that is just in light of all possible considerations of distributive and corrective justice, while legislatures are free to range widely over ethical and political considerations in deciding what regulations to impose on society. The decision to make a judgment legislative is perforce a decision not to use judicial procedures, since they are geared to the making of more circumscribed, more "reasoned" judgments.[195]

In contrast to adjudication, which is legitimized and constrained by reason and procedural norms, Judge Posner finds that legislative zoning decisions earn their democratic legitimacy through electoral controls.[196]

These observations, with admitted exceptions,[197] are useful for translating "I know it when I see it"[198] intuitions about political and adjudicative activities into tangible guidelines. Specifically, these observations support the following rough understandings of political and adjudicative activities. Adjudicative activities generally purport to apply legal or policy principles to the facts of a particular case involving a discrete person or group and to do so through channels in which opportunities for popular influence or control are not standard legitimizing mechanisms. Political processes, on the other hand, purport to enact policies that will apply to all cases in a particular category, regardless of the facts at issue in each case and are situated within channels in which popular influence and control are standard legitimizing mechanisms.

2. Political Activities and Access Rights

Because political activities generally contain the factors that this Article has explained militate in favor of deeming access rights political in nature, access denials in political contexts typically should be deemed

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[195] *Id.* at 468.

[196] *Id.* at 469.

[197] *See id.* at 468 (referring to policymaking characteristics of open-ended criteria in "much modern adjudication"); *see also, e.g.*, Philly's v. Byrne, 732 F.2d 87, 93 (7th Cir. 1984) (noting that "the across-the-board character of legislation provides some protection against the use of the legislative process to single people out for adverse governmental action," but that "[m]ore may be required . . . where the legislation affects only a tiny class of people . . . .").

[198] This line is a reference to Justice Stewart's famous statement about obscenity: "I know it when I see it . . . ." Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

presumptively constitutional. This Section lingers over the matter briefly only to discuss how activities that generally are political in nature but that deviate from one or more of the important elements of such activities might be addressed and to offer two high-profile examples of secret political activities that encountered political checks regarding the secrecy with which they were conducted.

a. Addressing Deviations from Standard Characteristics of Political or Adjudicative Activities

First, there is enough play in the joints of the politics/adjudication distinction to leave room for flexibility in unusual cases. For example, just as legislation may raise bill of attainder and due process concerns in rare cases where legislation impacts only one person or a tiny class of persons,[199] so the presumption of a certain "safety in numbers" and of the possibility of political response to secrecy may be so unrealistic in such cases as to justify a limited expansion of constitutional access presumptions under such extraordinary circumstances.

On the other hand, no single factor guiding access rights analysis will be dispositive in all cases. Rather, the factors serve as loose guideposts to be followed on a case-by-case basis in light of their underlying logic. Thus, in some situations, deviations from "political" or "adjudicative" characteristics may so undermine the rationale for the applicable level of scrutiny as to require a heightened or reduced level of scrutiny for access denials. In other cases, deviations may not so undermine the rationale for the relevant scrutiny level as to call for such adjustment. This point is reflected in the next Section's argument that judicial elections do not undermine the logic underlying strict review of access denials to judicial proceedings.[200]

b. Examples of Secrecy as a Politically Explosive Tactic

To understand the argument for deferential review of access denials to political proceedings, it is useful to consider two high-profile cases in which the government not only failed to hide broadly focused policy deliberations but in which secrecy itself became an important political aspect of those proceedings. For example, Hillary Clinton's health care task force was perceived to be shrouded in secrecy early in the Clinton administration. Such perception provoked negative public reactions not only about the matter of secrecy, but about the substantive policymaking of the taskforce. Indeed, negative public reaction to the perception of secrecy was so strong that it continues to be the subject of derisive politi-

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[199] *See, e.g.*, *Coniston Corp.*, 844 F.2d at 469; *Philly's*, 732 F.2d at 93.
[200] *See infra* Part III.C.3.c.

cal commentary a decade later. More significantly, such perception is widely blamed for the Clinton administration's failure to formulate a successful national health care policy.[201]

More recently, the Bush administration has suffered political fallout because of public perceptions that it is handling domestic policy matters, ranging from energy policy to security matters, secretively.[202] Even right-wing commentator Phyllis Schlafly has been highly critical of secrecy in the Bush administration's policymaking, stating:

> Vice President Dick Cheney's pursuit of secrecy, unfortunately, revives unflattering comparisons. His refusal to produce the documents relating to his task force, the National Energy Policy Development Group, cannot help but remind everyone of Clinton's refusal to disclose documents revealing who attended the meetings of Hillary's task force on health care . . . .
>
> As in the case of the Clintons' refusal to disclose details about the making of their plan to revamp the health care industry, the public wants to know how our energy policy was developed. When information is kept secret, the natural inference is that there must be something the Administration is very eager to hide.
>
> While private businesses and households can be selective about what they tell the world, the American people are not willing to accord the same privacy to public officials paid by the taxpayers. Regardless of the legal veil woven over the energy policy meetings, Cheney's secrecy is a political mistake.[203]

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[201] *See, e.g.*, PETER FLAHERTY & TIMOTHY FLAHERTY, THE FIRST LADY: A COMPREHENSIVE VIEW OF HILLARY RODHAM CLINTON, ch. 9 (1996), *available at* http://www.nlpc.org/hctf/tfl-09.htm; Nelson D. Schwartz, *Is Dick Cheney the New Hillary?*, FORTUNE, June 5, 2001, *available at* http://www.fortune.com/fortune/washington/0,15704,368687,00.html; Terry Krepel, *They've Got a Secret*, Aug. 24, 2001, http://conwebwatch.tripod.com/stories/2001/cheneysecret.html; Chuck Raasch, *Bush Will Have to Deal With the Politics of Perception on Enron*, GANNETT NEWS SERV., Jan. 28, 2002, *at* http://www.nlpc.org/gip/articles/020128gn.htm; John Samples, *Hillary Clinton v. James Madison*, Nov. 15, 2000, *at* http://www.cato.org/dailys/11-15-00.html; *'Hillary Can't Beat Lazio—I Can': McMahon*, Sept. 6, 2000, *at* http://www.newsmax.com/showinside.shtml?a=2000/9/6/143914.

[202] Schwartz, *supra* note 201; Krepel, *supra* note 201; Raasch, *supra* note 201.

[203] Phyllis Schlafly, *Secrecy is a Losing Ploy*, Mar. 6, 2002, *at* http://www.eagleforum.org/column/2002/mar02/02-03-06.shtml. It is also significant that both the Clinton and Bush administrations faced allegations that they violated statutory openness requirements, including the Freedom of Information Act and the Federal Advisory Committee Act. *See, e.g.*, *id.*; FLAHERTY & FLAHERTY, *supra* note 201. This demonstrates how political pressure and legislative mandates for transparency may succeed in political contexts. *See supra* note 114 (referring to the potential overlap of statutory mandates and case-by-case openness decisions). Of course, broad statutory or regulatory mandates can be used, where applicable, to demand openness in quasi-adjudicative or similarly insular proceedings. The core constitutional question, however, is whether political protections should be relied on

Of course, not every issue can be expected to engage the public to so great a degree as to promote transparency in political decision-making. Given this fact, given the general imperfections of political controls, and given the relevance of access denials to structuralist principles, some constitutional protection from excessive or unreasonable access restraints ought to be provided even in broadly directed and politically responsive contexts. However, that protection should be deferential because the political context already contains inherent checking mechanisms.

3. Adjudicative Activities and Access Rights

Access denials to adjudicative proceedings should be presumptively unconstitutional because such proceedings generally contain the factors that this Article has explained militate in favor of deeming access rights of constitutional magnitude. Nonetheless, this Section pauses over the issue briefly to make three points. First, this Section returns to *Richmond Newspapers* and its progeny, focusing on points made by the Court and some of its members suggesting that openness is particularly important in adjudicative proceedings. Second, this Section addresses the paradox inherent in the conclusion that public access rights have special constitutional resonance in contexts where the public has little, if any, political role. Third, this Section considers how the courts should address certain deviations from adjudication's standard features.

a. Another Look at Richmond Newspapers *and Its Progeny: The Seeds of Important Insights About Adjudications*

Despite their shortcomings, *Richmond Newspapers* and its progeny contain the seeds of important insights regarding the heightened constitutional significance of access restrictions in adjudicative contexts. These insights are important both because they bolster this Article's points as to why access denials in adjudicative contexts are presumptively unconstitutional, and because they suggest that the doctrinal seeds of such arguments can be gleaned from existing case law.

Richmond Newspapers and its progeny suggest three points of particular significance. First, there is a special risk of government abuse where decisions are individualized, rather than broadly directed. Second, the public can only check abuse in these individualized cases by witnessing (or threatening to witness) the relevant proceedings or information. Third, procedural protections legitimize adjudicative decision-making; therefore, it is particularly important that the public have the opportunity to witness such procedures, rather than simply to learn of adjudication's results.

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as the primary source of openness in such contexts.

With respect to the unique danger of abuse in individualized proceedings and the role of the public in checking such abuse, Justice Brennan notes in *Richmond Newspapers* that open trials have long been deemed incident to defendants' due process rights so as to help ensure that the courts are not employed "'as instruments of persecution' or for the suppression of political and religious heresies."[204] Justice Brennan appears mindful of the individualized nature of adjudicative proceedings and the possibility that such proceedings, if they go unnoticed and unchecked, will serve as forums for abuse. Indeed, Justice Brennan adds that "public access to trials acts as an important check, akin in purpose to the other checks and balances that infuse our system of government."[205]

An additional observation suggesting a unique danger of abuse in adjudicative proceedings is that the fairness of such proceedings depends not only on reaching "good" results, but on following nuanced procedures. This observation is reflected in Chief Justice Burger's opinions for the Court in *Press-Enterprise I* and *Press-Enterprise II*: "[t]he value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known."[206] This statement suggests that the public's right to attend trials is essential because procedural fairness is a crucial element of adjudicative fairness, and such fairness can be safeguarded only through public oversight or the threat of it.

b. Addressing the Adjudication/Access Rights Paradox

It is also important to acknowledge and address an apparent paradox in deeming public access to adjudicative proceedings of heightened constitutional magnitude, as direct public influence tends not only to be of little importance, but generally to be inappropriate in such contexts. The paradox is explained largely by the notion that the implicit promises of reason and fairness from which adjudication generally derives its democratic legitimacy can not, consistent with political theories of self-government, simply be trusted to the assurances of the government. Rather, some basis for public oversight and judgment, albeit through the relatively remote threat of publicity as to abuse or arbitrariness, is necessary.

Furthermore, according to self-government theories of free speech, there is independent significance in the public's learning about and understanding adjudicative activity. In this respect, the fact that reason and

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[204] *Richmond Newspapers*, 448 U.S. at 592 (Brennan, J., concurring) (citing *In re* Oliver, 333 U.S. 257, 270 (1948)).

[205] *Id.* at 596 (Brennan, J., concurring). *See also, e.g.*, *Press-Enterprise II*, 478 U.S. at 12; *Globe Newspaper Co.*, 457 U.S. at 606.

[206] *Press-Enterprise II*, 478 U.S. at 13 (quoting *Press-Enterprise I*, 464 U.S. at 508)).

fair procedure are as significant if not more significant than the results reached in most adjudicative contexts makes the public's ability to evaluate process, rather than just to learn the results of cases, particularly important.

c. Addressing Deviations from Standard Characteristics of Adjudication

Finally, it is useful to consider that an adjudication's characteristics often do not precisely reflect those of adjudication's standard model. Part IV addresses the significance of the facts that quasi-adjudicative activity, like judicial activity, often involves the formation of broad-reaching policies or interpretations and that adjudicators in the administrative state sometimes face political pressure. This Subsection addresses the fact that jurists in a number of jurisdictions are elected and thus operate within channels that might be deemed politically responsive. This discussion concludes that judicial elections do not undermine the rationale for presumptive constitutional access rights to judicial proceedings for two reasons. First, no single guiding factor offered in this Article is dispositive in all cases. What is important, rather, is whether the rationales underlying the relevant factors are deemed met upon case-by-case consideration of all factors. Second, public oversight can be particularly important precisely where a proceeding is purportedly legitimized by reason and procedural fairness, but where such proceeding also raises the specter of political pressure.

First, even if the existence of elections as a political check were to weigh against presumptive access rights, the strength of the remaining factors would still militate in favor of access rights. A political check would not, for example, override the fact that adjudication receives its core democratic legitimacy not from the bare popularity of judicial results but from the reason and propriety with which such results are reached,[207] factors that can only be assessed through access to adjudication's processes. Furthermore, courtroom closure is likely to be least politically resonant in precisely those cases where closure poses the greatest danger of abuse. That is, where an individual judge or a court rule mandates closure in a case or class of cases involving the application of existing principles to a discrete person or class of persons, this closure is unlikely to generate a politically viable level of public response to influence judicial elections. This is of particular concern insofar as only relatively discrete, case-by-case closure decisions would provide the

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[207] *See, e.g.*, Republican Party of Minn. v. White, 122 S. Ct. 2528, 2546–49 (2002) (Stevens, J., dissenting); *id.* at 2550–51 (Ginsburg, J., dissenting); Paul J. De Muniz, *Politicizing State Judicial Elections: A Threat to Judicial Independence*, 38 WILLAMETTE L.REV. 367, 387–89 (2002).

public with reasons to hold individual judges responsible for closures. Broader closure rules that may generate politically viable levels of public concern are more likely to result from legislative or executive policies of closure for which judges are not directly responsible.

More fundamentally, the conclusion that judicial elections do not undermine the rationale for presumptive access rights stems from the complex relationship between public oversight and processes that are legitimized primarily by norms of reason and procedural fairness. Ironically, public access might be deemed of greatest constitutional significance where a proceeding attains its core democratic legitimacy through norms of reason and fairness, but where such proceeding also is subject to political pressures. In such cases, the risk of politically motivated deviations from reason and fair procedure is exacerbated, thus heightening the structural rationale for public oversight.[208]

4. Appropriate Doctrinal Standards for Adjudicative and Political Activities

a. Political Proceedings and the General Applicability of Rational Basis Review

For the reasons described above, access denials to information regarding political activities should generally be deemed presumptively constitutional. Of course, there is an important distinction between presumptive constitutionality and categorical constitutionality. Because access denials to political proceedings and information are only presumptively constitutional, they must be justified, if challenged, under a level of review akin to rational basis review. Hence, access denials to political proceedings must be justified by showing that they reasonably relate to legitimate government interests.[209]

Some level of review is necessary in political contexts because the public's ability to assess political information and to check secret political activities is structurally significant. The justifications for limiting constitutional access rights in political contexts has already been discussed, but it is important to consider these justifications in tandem with the structural significance of access to political information and the imperfections of political controls. Access to political information is of vast significance from the perspective of structuralism and its component free

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[208] This rationale is buttressed by commentators who question the propriety of judicial elections and suggest that the core allegiance of elected judges should be to reason and procedural fairness rather than to popular will. *See supra* note 207 and sources cited therein.

[209] *Cf.* CHEMERINSKY, *supra* note 108, at 533 (defining rational basis review and describing its use in the context of equal protection claims regarding non-suspect, presumptively constitutional, classifications).

speech and political theories. Such information constitutes a necessary precondition to the public's understanding and debating those government activities in which the public has a political role to play. Furthermore, secrecy in political activities raises the specter of abuse because the government appears to be circumventing the public's role in contributing to their own governing. Thus, while political checks can generally be relied on to guard against inappropriate secrecy in political decision-making, some level of constitutional review is necessary to prevent the government from creating realms of secrecy so excessive or unreasonable as to circumvent the operation of such checks.

b. Adjudicative Proceedings and the General Applicability of Slightly-Less-than-Strict Scrutiny

In the context of adjudicative proceedings, access denials should be presumptively unconstitutional for reasons outlined above. However, this Article views the precise doctrinal implications of presumptive unconstitutionality to be slightly different in the access rights context than in other constitutional contexts. Typically, the notion that a statute or regulation is presumptively unconstitutional triggers the application of strict scrutiny, whereby the regulation is deemed lawful only if it is the least restrictive means of achieving a compelling government interest.[210] In contrast, the test for assessing restrictions on quasi-adjudicative activity generally should be whether the restrictions are the least restrictive means of achieving important government interests. The only difference between classic strict scrutiny and the slight variation suggested herein is that an "important," rather than a "compelling" government interest is required.

The suggested test is flexible in an important sense and strict in an important sense. It is flexible in that, in the standard parlance of constitutional law, an "important" interest requirement is fairly moderate in nature. The requirement is neither so deferential as to permit any rational and inoffensive interests, nor so strict as to disallow any interests not involving such intuitively crucial areas as national security.[211] The most significant practical result of such moderation likely would be permissiveness toward government interests against fundamentally altering the character of existing proceedings. For example, in the context of those quasi-adjudications genuinely characterized by informality or privacy, the

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[210] *Id.* at 562–63 (describing use of strict scrutiny in the context of equal protection claims involving suspect, or presumptively unconstitutional, classifications based on race or nation of origin); Kitrosser, *supra* note 185, at 1345–46, 1395–96 (describing use of strict scrutiny for content-based, or "presumptively illegitimate" regulations of the dissemination of speech).

[211] *See, e.g.*, Orr v. Orr, 440 U.S. 268, 280 (1979) (noting, in equal protection context, that assisting needy spouses and reducing gender-based economic disparities are both "important" government interests).

government could claim a legitimate interest in resisting the fundamental alteration in character that could arise if the public had a right to access the proceedings. Indeed, flexibility with respect to such interests is counseled by structuralist concerns and the political theory that underscores them. Were access rights to cross the line from providing access to existing processes to fundamentally altering such processes' character, they would cease simply to enforce information flow and instead would meddle in the very nature of the government processes at issue.[212]

Any leeway reflected by such flexibility is, however, counterbalanced by the requirement that a government interest not only be important but be legitimate. The latter requirement helps to guard against asserted interests that merely are speculative or pretextual in nature.[213] It is in this respect that a history or experience requirement bears relevance to the constitutional inquiry: a history of access to the relevant type of proceeding should cast significant doubt on claims that access rights would fundamentally alter a proceeding's character. By the same token, a history of access to very similar proceedings also should cast doubt on such claims. For example, quasi-adjudicative proceedings that are formal and adversarial tend to parallel judicial trials. Therefore, claims of fundamental character change in these quasi-adjudicative proceedings should be viewed suspiciously.[214] Furthermore, agencies' attempts to recharacterize proceedings as private would be limited by judicial inquiries into whether the nature of the proceedings indeed gives rise to privacy concerns. In making such inquiries, courts would be influenced by the his-

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[212] This concern may well provide the most convincing explanation of the Supreme Court's invocation of the "experience" standard: a fear of the radical restructuring of government procedures that could be required if access rights were haphazardly imposed in a range of contexts. Indeed, such concern is voiced explicitly by the Third Circuit in *NJM*. *See North Jersey Media Group*, 308 F.3d at 210. Most likely, the interest against fundamental change would be applied to requests for live proceedings, but access rights also should not serve as vehicles for demanding live proceedings where quasi-adjudications currently are conducted on paper, essentially demanding the creation of processes so that these processes can be accessed. Thus, adjudicative activities that occur on paper presumptively should be accessible in the form in which they occur, just as other adjudicative information or processes should be presumptively accessible in the form in which they occur. But such rights ought not to give rise to further mandates requiring procedures not currently in existence.

[213] The requirement guards, in short, against the embracing of tautologies to the effect that the provision of access against the government's wishes itself constitutes a fundamental alteration. *Cf., e.g.*, Miss. Univ. for Women v. Hogan, 458 U.S. 718, 728 (1982) (noting in the intermediate scrutiny context that "'the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme'") (quoting Weinberger v. Wiesenfeld, 420 U.S. 636, 648 (1975)).

[214] It also bears noting that the nature of any requisite "experience" in this context should be far clearer than the nature and extent of experience required by the Court's existing experience prong. Because the role of experience in this context would be to undermine claims that given proceedings are inherently private, any history of reasonably regular openness should suffice, as should similar histories of openness in proceedings of like nature.

torical factors referenced above, and by due process constraints that, in many contexts, require proceedings to be relatively formal and adversarial in nature.

It is also significant that any leniency inherent in the "important" interest requirement would be juxtaposed against the requirement that an access denial be the necessary, least restrictive means of serving that interest. Thus, while a range of legitimate and important interests may be considered in tailoring access policies, such policies will rarely pass muster to the extent that they deny access *in toto*. For example, in those cases where access to live proceedings may be denied in light of a quasi-adjudication's fundamentally private character, some alternative means of learning about the processes, such as transcripts or paper records, typically would have to be provided.

Of course, the "necessary" and "least restrictive means" requirements also have resonance where access to proceedings is provided but limited, or where access to records, rather than to live proceedings, is at issue. For example, reasonable seating limitations or preferential press access,[215] while not unscrutinized, will typically be justified. Similarly, while it will typically be inappropriate to deny full access to judicial or relevant administrative files, some procedures to maintain privacy, safety, and neutrality could be allowed. For example, under this analysis, the court can order redaction of witness or litigant names based on legitimate privacy or safety concerns, and it could allow *in camera* presentations and private, "at the bench" conferences. On the other hand, agency or court-wide restrictions on access to entire categories of cases or files, even when based on speculation of highly compelling interests like national security, generally should not pass muster because less restrictive alternatives, such as case-by-case assessments and *in camera* presentations, are available.

IV. Some Implications for the Administrative State

This Part considers major implications of Part III's conclusions for constitutional access rights in the administrative state. Tracking the politics/adjudication discussion of Part III, this Part focuses on two major categories of activity in the administrative state: quasi-legislative and quasi-adjudicative. Specifically, this Part offers rough definitions of each type of activity and then examines the constitutional significance of access denials to such activities in light of the major factors outlined in Part III: (1) whether the activity is broadly or narrowly targeted, (2) whether the activity contains channels for political control, and (3) whether the activity's core legitimacy derives from such channels. Not surprisingly, this Part concludes that access denials to quasi-legislative decision-making

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[215] *See supra* note 98 and accompanying text.

should presumptively pass muster under First Amendment law and should be subject to rational basis review. This Part notes, however, that access limitations in the quasi-legislative context may implicate other issues, including non-delegation principles. This Part also concludes that access denials to quasi-adjudicative decision-making presumptively violate the First Amendment and should be scrutinized under the modified strict scrutiny test suggested in Part III. Of course, as with the parallel categories of "political" and "adjudicative" activities, quasi-legislative and quasi-adjudicative activities do not cover all activities within the administrative state. The categories do, however, help exemplify how this Article's approach applies to major sets of administrative activities and provides guidance for future cases.

A. Quasi-Legislative Activity

Quasi-legislative activity generally refers to the making of agency rules for future application, as opposed to the issuing of agency orders pursuant to individualized adjudications.[216] While the term quasi-legislative is not without ambiguity,[217] this Article uses the term somewhat broadly to refer not only to the promulgation of formal regulations with the force and effect of law, but also to the issuance of guidance documents such as non-binding policy statements and interpretive rules. This Subsection explains why access denials to this relatively broad category of activity merit significant deference under a First Amendment analysis. To the extent that this Subsection discusses the nature of particular types of quasi-legislation and their underlying procedures, it relies on the provisions of the federal Administrative Procedure Act ("APA")[218] as a model.

1. Generalized Nature of Quasi-Legislative Activity

Agency regulations, interpretative rules, and policy statements typically apply broadly and generally because they seek to resolve problems before they arise, rather than to respond, ex post facto, to particular fact patterns involving particular persons. Indeed, the APA definition of "rule" specifies that a rule is of "future effect,"[219] while the definition of an adjudicative "order" does not contain this qualification,[220] suggesting that orders generally will respond to specific fact patterns involving particular persons, while rules will be generally directed.

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[216] *See, e.g.*, BLACK'S LAW DICTIONARY 1245 (6th ed. 1990); Michael Asimow, *California Underground Regulations*, 44 ADMIN. L. REV. 43, 70-71 (1992). *Compare* 5 U.S.C. § 551(4) (2000) *with id.* §§ 551(6)–(7) (2000).

[217] *See, e.g.*, Asimow, *supra* note 216, at 70–71.

[218] 5 U.S.C. §§ 551–559, 701–706.

[219] *Id.* § 551(4).

[220] *Id.* § 551(6).

One obvious objection to the argument that rules are broadly directed is that the APA definition of "rule," while referring to a rule's "future effect," notes that rules can be of "general or particular applicability."[221] The full import of this provision is not entirely clear, though it likely is understood best as a catch-all statement designed to ensure that general rules that effectively cover only a few situations or relatively small groups nonetheless are "rules." This interpretation makes particular sense in light of two points: rules are indeed forward-looking, rather than directed toward known fact patterns or persons, and the APA implicitly deems all binding rules matters of general public interest by requiring public notice and comment opportunities. Nonetheless, the statutory admonition that a rule might be of "particular applicability" serves as a reminder that quasi-legislative activity might, in unusual cases, so deviate from the characteristics justifying deferential scrutiny of access denials as to merit a higher level of scrutiny for such denials.

In addition to the implications of rules being future-directed, judicial discussions of rulemaking also evince the understanding that rules are broadly and generally directed and that adjudicative orders, in contrast, respond to particular fact patterns involving particular persons or groups. In *Philly's v. Byrne*,[222] for example, the Seventh Circuit, while acknowledging the possibility of exceptions, noted that due process concerns generally do not attach to legislative or quasi-legislative activity because "[t]he fact that a statute (or statute-like regulation) applies across the board provides a substitute safeguard."[223] Similarly, the Supreme Court has referred to the difference in administrative law between "general rule[s] [and] . . . individual, *ad hoc* litigation."[224]

Finally, just as "legislative" rules of binding effect tend to be broad and general in their reach, so the same may be said of interpretive rules and policy statements. Policy statements announce "the agency's tentative intentions for the future" as to how the agency will likely proceed in creating binding policy.[225] Thus, while policy statements arguably establish norms that effectively constrain the public,[226] they are not formally binding because they have not gone through the statutory processes necessary to create binding regulations and because their logic and desir-

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[221] *Id.* § 551(4).

[222] 732 F.2d 87 (7th Cir. 1984).

[223] *Id.* at 92.

[224] *See* SEC v. Chenery Corp., 332 U.S. 194, 203 (1947). The Court has noted, among other things, that rulemaking tends to involve an agency anticipating and addressing *ex ante* general problems that might arise in a range of cases. *See, e.g.*, *id.* at 202–03. Adjudicative orders, on the other hand, proceed on individualized, case-by-case bases, even where adjudication entails some policy development. *Id.*

[225] Pac. Gas & Elec. Co. v. Fed. Power Comm'n, 506 F.2d 33, 38 (D.C. Cir. 1974).

[226] *See* PETER L. STRAUSS ET AL., GELLHORN AND BYSE'S ADMINISTRATIVE LAW 389 (9th ed. 1995) (citing Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1340–46 (1992)).

ability can be challenged on case-by-case bases through adjudication.[227] Interpretive rules similarly are not required by the APA to go through processes required of binding rules, but they differ from policy statements in that they purport only to explain the meaning of existing rules, regulations or statutes.[228] Because interpretive rules and policy statements by definition involve general, anticipatory policy formation or related interpretive activity, they tend to be as broad and general in nature as binding rules and regulations.

2. Political Recourse Channels

Although administrators are not elected, protections exist to ensure political accountability in the context of quasi-legislative policymaking. Such protections include the possibility of recourse to the legislative branches in light of non-delegation principles, to agencies themselves in light of statutory participation rights, and to the presidential (or state executive) administration in light of common associations between the administration and appointed agency heads.

The first and perhaps most obvious source of political protection stems from the doctrine of non-delegation, whereby the legislative branch theoretically cannot delegate law-making power to agencies, but can only entrust it to agencies to work out the details of "intelligible principle[s]" established by legislation.[229] This doctrine admittedly is quite slim in application, having been invoked by the Supreme Court only twice to invalidate legislative delegations.[230] Nonetheless, the basic understanding that agency policymaking power must derive from a legislative delegation leaves room for public recourse to legislators, either to assign blame or to seek new and different delegations.

The second source of political protection manifests itself in statutory participation rights in the binding rulemaking process, but it is better understood to encompass the specter of the non-delegation doctrine and the political protections to which such specter gives rise. The specter of the non-delegation doctrine includes the political and normative impact of the doctrine's premise that administrative policy formation is illegitimate if it does not stem from political directives. Such impact arguably extends much farther than the non-delegation doctrine's legal reach. Indeed, while non-delegation principles have been relatively anemic as legal weapons, they cast a specter of democratic illegitimacy on agency policymaking, and they have been credited with the passage of the APA in

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[227] *Pac. Gas & Elec. Co.*, 506 F.2d at 38–39.

[228] *Id.* at 37 n.14.

[229] *See, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001).

[230] *See id.* at 474 (citing Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935), and A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935)).

1946 as a means of legitimizing the policymaking process.[231] The APA legitimizes policymaking, among other ways, by requiring public participation in the process of creating binding rules and regulations.[232] Specifically, the APA requires written public notice before rules become binding. During this period, interested members of the public can file written comments (the notice-and-comment period), and publication of the final rule must reflect some agency consideration of major public commentary.[233] Furthermore, the public has an ongoing right to "petition for the issuance, amendment, or repeal of a rule."[234] Public participation rights, while somewhat diminished in their impact by the deferential judicial review of rulemaking,[235] represent an opportunity for public recourse and influence within the rulemaking process itself. More importantly, participation rights reflect a legislative sensitivity to the specter of potential democratic illegitimacy accompanying agency policymaking.

Third, the presidential (or state executive) administration may also suffer political repercussions for poorly perceived policymaking results or processes. Indeed, even those "independent" commissions headed by multi-member bodies with some statutory job protection (as opposed to "executive agencies" headed by single administrators who serve at the President's pleasure) are often politically associated with the presidential administration.[236] This is particularly so in the frequent cases in which the commission's chairperson is appointed by the president, serves as chairperson at the president's pleasure, and is perceived as steering the relevant agency in a direction reflective of the administration's goals.[237] A recent example of this phenomenon includes negative popular commentary on the direction of the Federal Communications Commission under the commissioners appointed by President Bush and under the leadership of Chairman Michael Powell in particular. This commentary tends to emphasize Powell's perceived anti-regulatory and pro-business stances and deems him "just an extension of the Bush administration."[238]

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[231] *See, e.g.*, Cass Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 446–48 (1987). *Cf.* STRAUSS ET AL., *supra* note 226, at 92–94 (discussing the "shadow" effect of non-delegation doctrine generally); Frona M. Powell, *The Supreme Court Rejects the New Nondelegation Doctrine: Implications for the Administrative State*, 71 MISS. L.J. 729, 737–38 (2002) ("Several commentators argued that the APA provides a better basis for judicial review, permitting courts to address concerns underlying the new nondelegation doctrine, without raising constitutional issues.").

[232] *See* 5 U.S.C. § 553(c) (2000).

[233] *Id.* §§ 553(b)–(c).

[234] *Id.* § 553(e).

[235] *Id.* § 706(2).

[236] *See* STRAUSS ET AL., *supra* note 226, at 35–36 (contrasting executive agencies with independent regulatory commissions).

[237] *See id.* at 35–36 (discussing relationship between President and independent commissioners and commission chairs).

[238] Jennifer Jones, *New FCC Chairman Meets With Mixed Reviews*, Jan. 24, 2001, *at* http://www.idg.net/crd_powell_387166_103.html (quoting Jeffrey Chester, executive director of the Center for Media Education). *See also, e.g.*, Janine Jackson, *Their Man in*

Further, political checks on quasi-legislative activity not only pertain to binding rules and regulations, such as policy statements and interpretive rules, but also to relatively informal mechanisms. While notice-and-comment opportunities are not provided for informal policies, members of the public can react to them by petitioning for a binding rule or regulation or for amendment to an existing rule or regulation undergirding informal policy.[239] Furthermore, informal policies and interpretations are largely on the same political footing as binding rules and regulations: both are generally directed and can have political repercussions in the legislative or executive branches.

3. Political Controls as Core Legitimizing Mechanisms

As the above discussion suggests, the status of political responsiveness as the normative touchstone of administrative policymaking's democratic legitimacy is largely responsible for existing means of protection against secretive or non-responsive policymaking. More significantly, such status may spur additional protections if existing protections were altered or diminished.

The strong political resonance of concerns about secret policymaking combined with the broadly directed nature of most policymaking and opportunities for political recourse to the legislature and executive branches suggest that the political process is uniquely capable of addressing secrecy in agency policymaking. While constitutional parameters must exist to protect against particularly egregious instances of information withholding, the political process generally offers the appropriate mechanisms to address nuanced questions as to precisely which processes must be open and what information must be disclosed in the realm of agency policymaking.

B. Quasi-Adjudicative Activity

The APA defines an administrative adjudication as the "agency process for the formulation of an order"; it defines an "order" as a "final disposition . . . of an agency in a matter other than rule making but including licensing."[240] The APA effectively subdivides quasi-adjudications into the "formal" and the "informal."[241] Where the statute authorizing the agency to undertake an adjudication evinces a legislative intent that adjudications be "on the record," the adjudication is deemed "formal" under the

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Washington: Big Media Have an Ally in FCC Chair Michael Powell, Sept./Oct. 2001, *at* http://www.fair.org/extra/0109/powell.html.

[239] *See supra* note 234 and accompanying text.

[240] 5 U.S.C. §§ 551(6)–(7) (2000).

[241] *Id.* §§ 554–557. *See also* STRAUSS ET AL., *supra* note 226, at 241–42.

APA.[242] In such cases, the APA imposes a host of procedural protections akin to those required in judicial proceedings.[243] Where an agency's own implementing statutes do not require on-the-record adjudications, APA directives as to the nature of any procedures required are minimal and informal.[244] As with quasi-legislative activity, the form of quasi-adjudicative activity in the administrative state is dictated by constitutional as well as statutory directives. Yet while quasi-adjudicative activity may raise non-delegation concerns to the extent that it involves broad policymaking power, constitutional directives about quasi-adjudication generally address concerns about reason and fairness in the adjudicative process, not about responsiveness to legislative will. Specifically, these directives stem from due process principles. For example, it is well-established that before an administrative agency can make a final adjudicative decision to deprive a person of a liberty or property interest, notice and an opportunity for a hearing usually must be provided.[245] Furthermore, notice and a hearing are often required prior to initial decisions depriving an individual of a liberty or property interest.[246]

1. Particularized Nature of Quasi-Adjudications

Both the APA's formal definition of quasi-adjudicative proceedings and the insights of scholarship and case law suggest that quasi-adjudications typically involve claims brought by or against discrete persons or groups involving the application or interpretation of existing statutes, rules or other laws to discrete factual circumstances. First, the APA's definitional dichotomy between adjudications and rules, while cryptic, suggests that quasi-legislative activity by definition is prospective while quasi-adjudicative activity by definition is retrospective.[247] Just as the forward-looking

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[242] *See, e.g.*, Seacoast Anti-Pollution League v. Costle, 572 F.2d 872, 875–78 (1st Cir. 1978).

[243] *See* 5 U.S.C. §§ 556–557.

[244] *See id.* § 555. *See also* STRAUSS ET AL., *supra* note 226, at 376–77. Section 555 does not, on its face, purport to specify informal adjudicative procedures. The Section does, however, refer to procedures for "ancillary matters," and the Supreme Court has suggested that the Section indeed spells out the procedures for informal adjudications. *See* STRAUSS ET AL., *supra* note 226, at 376–77 (citing Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633 (1990)).

[245] *See* Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (citing, *e.g.*, Wolff v. McDonnell, 418 U.S. 539, 557–58 (1974)). *See also, e.g.*, Dusenbery v. United States, 543 U.S. 161, 173 (2002) (Ginsburg, J., dissenting) (noting that the *Dusenbery* Court correctly cites Mullane v. Cent. Hanover Bank Trust Co., 339 U.S. 306, 313 (1950), for the proposition that: "'deprivation of . . . property by adjudication [must] be preceded by notice and opportunity for hearing appropriate to the nature of the case'"). *See generally* Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975).

[246] *Compare, e.g.*, United States v. James Daniel Good Real Prop., 510 U.S. 43, 53 (1993) (describing presumption requiring hearings prior to initial forfeiture decisions) *with* Mathews v. Eldridge, 424 U.S. at 344–45 (deeming opportunity for written comment prior to initial deprivation of disability benefits sufficient).

[247] *Compare* 5 U.S.C. §§ 551(4)–(5) (2000) *with id.* §§ 551(6)–(7) (2000).

nature of rulemaking suggests that such activity is broadly directed,[248] the backward-looking nature of quasi-adjudicative activity suggests that such activity purports to reach conclusions about discrete, existing disputes or fact patterns. As Justice Holmes noted, "[a] judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist," while legislation "looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power."[249] As Justice Holmes' logic suggests, a backward-looking adjudicative inquiry looks to the existing circumstances of discrete parties, while a forward-looking legislative inquiry seeks to anticipate a range of circumstances that might affect broad groups of people. Furthermore, as Part III notes, case law long has assumed that quasi-adjudicative decision-making is characterized in part by its particularized nature while quasi-legislative decision-making is characterized in part by generality.[250]

While Part III's discussion of particularity and access rights suggests that the typically particularized nature of quasi-adjudicative activity militates in favor of constitutional access rights, it is important to consider a potential objection to that conclusion. Specifically, while adjudication is generated through case-specific disputes, these disputes can serve as vehicles for the development of far-reaching agency policy through adjudicative orders, just as litigation can lead to the development of far-reaching common law or constitutional principles. Certainly, the factual basis of any such objection is sound. Indeed, the Supreme Court has made clear that while rulemaking should be the preferred means of agency policy development, it is not categorically inappropriate for policies to develop in the quasi-adjudicative context, since unanticipated policy questions can arise on case-by-case bases.[251]

This objection does not overcome the logic of presumptive constitutional access rights to quasi-adjudicative activity. First, even where quasi-adjudications gain public attention because of their policymaking aspects, such attention is unlikely to generate enough political pressure to open the proceedings: individual proceedings are usually disconnected from effective channels for political recourse, and they do not derive their core normative legitimacy from opportunities for popular influence.[252] Second, assuming that a quasi-adjudication proceeds on a closed basis but that the public eventually learns of and debates the results of any broad adjudicative policymaking, case-specific elements of procedure and of

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[248] *See supra* Part IV.A.1.

[249] Prentis v. Atl. Coast Line Co., 211 U.S. 210, 226 (1908).

[250] *See supra* note 191 and accompanying text. *See also, e.g.*, STRAUSS ET AL., *supra* note 226, at 233–35.

[251] *See, e.g.*, *Chenery Corp.*, 332 U.S. at 202–03.

[252] *See supra* Part IV.B.3.

factual application will have occurred, nonetheless, without opportunity for public oversight.

2. Status of Political Channels of Recourse

The status of political recourse channels in the quasi-adjudicative context generally militates in favor of presumptive constitutional access rights for two reasons. First, such channels are minimized, by and large, in quasi-adjudicative decision-making. Second, to the extent that political channels for recourse do exist, they paradoxically bolster, rather than diminish, the argument for constitutional access rights when they are considered in tandem with quasi-adjudications' other characteristics.

First, while political checks exist within and outside of administrative agencies to prevent agencies from overstepping their congressional delegations or otherwise usurping political power as unelected bodies,[253] both the APA and due process case law take steps to isolate much quasi-adjudicative activity from political pressure. For example, the APA contains explicit protections against improper intra- or extra-agency influences on administrative law judges in the context of formal adjudications.[254] Where appeal is taken from the decision of an administrative law judge to the full agency, it raises the specter of conflict in light of agency heads' political and investigative roles. But even in these situations, statutory protections against partiality exist.[255] Furthermore, while courts have rejected the argument that adjudication by administrators who also perform investigative or political functions is per se illegal, they have made clear that bias in quasi-adjudications is constitutionally unacceptable and that remedies would exist were actual bias shown.[256]

Of course, even where adjudications are effectively isolated from political pressure and control, political recourse channels exist elsewhere in the agency and outside of the agency regarding any broad policy developments or interpretations that arise from adjudicative activity.[257] As in the judicial context, where common law development or statutory interpretation may occur, quasi-adjudicative policy development or interpretation may lead the public to petition the agency for responsive rulemaking or to lobby Congress for statutory change. The crucial factor in considering access rights, however, is that the relative political isolation of the quasi-adjudicative process itself means that any public outcries are unlikely to affect the particular adjudicative proceeding at issue. Hence, there is little if any political reason why public response to secrecy in a

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[253] *See supra* Parts IV.A.2–3.

[254] *See* 5 U.S.C. §§ 554(d), 557(d)(1) (2000).

[255] *See id.* §§ 554(d), 557(d)(1).

[256] *See, e.g.*, Withrow v. Larkin, 421 U.S. 35, 46–47 (1975); Ash Grove Cement Co. v. FTC, 577 F.2d 1368, 1376 (9th Cir. 1978).

[257] *See supra* Parts IV.A.2–3.

quasi-adjudicative proceeding would be met with a change in that proceeding's closure. Furthermore, as discussed in the preceding Section, whether the public learns of and responds to broad-reaching adjudicative developments will have little bearing on whether the public learns of and reacts to case-specific procedures, fact-findings and applications of law to fact in quasi-adjudications.

Finally, it is true that deviations from the ideal of apolitical adjudication are inevitable in any context and are particularly so in the administrative state given that adjudicative, political and other functions overlap within agencies.[258] Recently, for example, concerns have been raised about a number of steps Attorney General Ashcroft has taken to pressure immigration judges into rendering decisions unfavorable to potential deportees and asylum applicants.[259] Paradoxically, however, the fact that quasi-adjudicators may face political pressure bolsters, rather than diminishes, the rationale for constitutional access rights, especially when considered in tandem with adjudication's other characteristics. As in the case of judicial elections, any risk of politically motivated deviations from reason and fair procedure heightens the structural rationale for public oversight in adjudicative contexts. This is especially true because reason and fair procedure are the core legitimizing mechanisms in quasi-adjudicative contexts.[260] Furthermore, adjudications risk becoming "instruments of persecution" because of their typically discrete nature;[261] this further heightens the structural role that public access and the attendant threat of publicity have to play in bringing politically motivated deviations from reason and fairness to light.

3. Fairness and Rationality as Core Legitimizing Norms

Jurists and scholars alike have recognized that quasi-adjudications generally derive their normative legitimacy from the promise of fairness and restraint in decision-making, not from responsiveness to popular will; the courts and the legislature have therefore at least attempted to maintain impartiality in formal adjudicative settings.[262] For example, the APA provides a host of procedural protections for formal adjudications and

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[258] *See, e.g.*, Sunstein, *supra* note 231, at 445–47.

[259] *See, e.g.*, Elizabeth Amon, *Immigration Lawyers' Practices are Affected Deeply After Sept. 11*, N.Y. L.J., Oct. 15, 2002, at 1; Deirdre Davidson, *Immigration Bar Takes on Ashcroft*, LEGAL TIMES, Oct. 28, 2002, at 4; Deirdre Davidson, *In the Line of Fire: How John Ashcroft Wants to Crack Down on Immigration Judges*, PA. L. WKLY, Sept. 23, 2002, at 8; Lisa Getter & Jonathan Peterson, *Speedier Rate of Deportation Rulings Assailed*, L.A. TIMES, Jan. 5, 2003, *available at* http://www.latimes.com/news/nationworld/nation/la-adna-immig5jan05,0,3594492.story?coll=la%2Dhome%2Dheadlines; Lynn Waddell, *Court of No Return*, BROWARD DAILY BUS. REV., Apr. 1, 2002, at A6.

[260] *See supra* note 208 and accompanying text.

[261] *See supra* note 204 and accompanying text.

[262] *See supra* Part III.C.1.

impartiality rules for these activities, reflecting the importance of reason and fair procedure as core legitimizing mechanisms.[263] Additionally, where adjudications involve the potential deprivation of a person's liberty or property interests, procedural due process protections play an important role,[264] making clear that such adjudications are constitutionally constrained by norms of fair procedure. Finally, the Supreme Court and lower courts also have cited the importance of an unbiased administrative tribunal.[265] In the context of discussing administrative bias, the Supreme Court has noted, for example, that "a 'fair trial in a fair tribunal is a basic requirement of due process,'" and that "this applies to administrative agencies which adjudicate as well as to courts."[266]

As suggested in Part III, the significance of quasi-adjudication's normative grounding in reason and fair procedure is two-fold. First, the significance of reason and fair procedure in adjudicative decision-making makes it particularly important that the public have the opportunity not merely to learn of adjudication's results, but to witness its procedures and its underlying rationales. Second, quasi-adjudications attain their normative legitimacy primarily through reason and fair procedure rather than through opportunities for popular control. This diminishes the potential political resonance of access claims regarding adjudicative proceedings, even where such claims are made in response to broadly applicable closure policies.

4. Formal vs. Informal Adjudications

Finally, it is important to consider whether the distinction between formal and informal adjudication is significant from an access rights perspective. The major argument for deeming such distinction significant is that, where a given adjudication is constrained by few procedural norms,[267] a major rationale for presumptive constitutional access rights is undermined. Specifically, the rationale that the public must have the opportunity to assess adjudicative activity for conformity with fair procedure is significantly diminished. This Section concludes, however, that presumptive constitutional access rights generally are appropriate with respect even to informal quasi-adjudications. This conclusion relies first on the general notion that quasi-adjudication's reason-based nature, its individualized focus and its disconnect from political protections militate, on

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[263] *See supra* note 240 and accompanying text; Part IV.B.2.
[264] *See supra* Part IV.B.
[265] *See supra* note 256.
[266] *Larkin*, 421 U.S. at 46.
[267] Such a case could arise (1) where a quasi-adjudicative proceeding does not threaten to deprive an individual of a liberty or property interest and thus does not invoke due process concerns; and (2) where the proceeding is not required to be "on the record" and thus formal under the APA or other relevant statutory authority.

balance, in favor of presumptive access rights. Second, this conclusion relies on the notion that the modified strict scrutiny standard developed in this Article is flexible enough to accommodate the informal nature of particular quasi-adjudications.

First, even where a quasi-adjudication is constrained by few statutory or constitutional procedural norms, such proceeding is still likely to be legitimized by implicit promises of reason and fairness and to be relatively unconstrained by political protections. With respect to the former, the APA's respective definitions of adjudication and rulemaking appear to assume that adjudication will not involve prescriptive policymaking for its own sake but instead will involve the resolution of existing disputes.[268] This assumption arguably encompasses the additional assumption that the legitimacy of such dispute resolution turns on its fair and rational application of legal and policy principles to the facts at hand.[269] Moreover, informal adjudications receive none of the statutory political protections that accompany rulemakings,[270] a point that is unsurprising since adjudication's core democratic legitimacy stems from promises of reason and fairness rather than opportunities for political control.[271] Similarly, the typically discrete nature of quasi-adjudicative proceedings makes such proceedings unlikely targets for political mobilization with regard to the substance of the proceedings or to any secrecy in which they are shrouded.[272] On balance, then, the characteristics even of informal quasi-adjudicative activity generally militate in favor of presumptive public access rights.

Second, while the same level of scrutiny generally should apply to access denials regarding formal as well as informal quasi-adjudications, the applicable level of scrutiny is flexible enough to accommodate any informality integral to a given quasi-adjudication. As detailed in Part III, this Article supports the application of a slightly modified level of strict scrutiny with respect to quasi-adjudications, one that would accommodate "legitimate" and "important" government interests, including interests against fundamentally changing the nature of a proceeding. Hence, to the extent that privacy and discretion are legitimately integral to particular adjudications, highly tailored restrictions, such as those on live public access accompanied by the provision of narrowly redacted transcripts, conceivably could pass constitutional muster.[273] Similarly, to the extent that an informal quasi-adjudication is conducted entirely on paper, presumptive access rights should exist with respect to the paper record

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[268] *Compare* discussion at Part IV.A *with* discussion at Part IV.B.
[269] *See supra* Parts III.C.1 & IV.B.3.
[270] *Cf.* 5 U.S.C. §§ 553–555 (2000).
[271] *See supra* Parts III.C.1. & IV.B.3.
[272] *See supra* Part IV.B.1.
[273] *See supra* Part III.C.4.b.

but ought not to serve as a vehicle to demand the introduction of live proceedings.[274]

V. Reflections on the Creppy Memorandum and the Significance of Access in Quasi-Adjudicative Contexts

This Part returns to the constitutionality and significance of the Creppy Memorandum. This Memorandum directed all immigration judges to close certain proceedings on the orders of Chief Immigration Judge Creppy and to keep all details of these proceedings secret, including confirming or denying whether "a [designated] case is on the docket or scheduled for a hearing."[275] As already noted, the Justice Department has indicated that it is reconsidering the Memorandum's policy.[276] Nonetheless, it is useful to consider the Creppy Memorandum's constitutionality for two reasons. First, the Creppy Memorandum exemplifies a policy plainly unconstitutional under this Article's suggested approach. More significantly, the Creppy Memorandum's policy, regardless of its ultimate duration, exemplifies the type of government arrogance in exercising power through discrete proceedings that underscores the importance of presumptive openness in adjudicative settings.

Part V begins, in Section A, by explaining why the Creppy Memorandum is unconstitutional under the doctrinal approach embraced in this Article. Section B reflects on the larger significance of the Creppy Memorandum in exemplifying this Article's concerns regarding the special dangers of secrecy in adjudicative and quasi-adjudicative contexts, and the special resonance of these concerns in a post–September 11 world.

A. The Unconstitutionality of the Creppy Memorandum

1. Preliminary Immigration Law Issues

First, the immigration context raises threshold questions not germane to other contexts involving First Amendment access rights. While a detailed analysis of these questions is beyond this Article's scope, this Section discusses them briefly. On the one hand, this Section explains why the existence of these threshold questions complicates any First Amendment challenge to restrictions on access to deportation proceedings. On the other hand, this Section reiterates why these questions did not prevent either the Third or Sixth Circuits from reviewing the merits of challenges to the Creppy Memorandum and explains that such questions indeed should not prevent merits review in such contexts.

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[274] *See supra* note 212 and accompanying text.
[275] *See supra* notes 2–4 and accompanying text.
[276] *See supra* note 13 and accompanying text.

Most notably, the immigration context raises the specter of the plenary power doctrine. While the doctrine's continued vitality and reach has been called into some question as of late,[277] its basic premise is that the substantive immigration judgments of Congress deserve substantial and possibly complete deference.[278] The plenary power precedent most intuitively relevant to First Amendment challenges is *Kleindienst v. Mandel*.[279] *Mandel*, a 1972 case, involved the United States' refusal to grant a temporary visa to Belgian journalist Ernest Mandel due in part to Mandel's advocacy of communism.[280] The other plaintiffs in *Mandel*, several professors, had invited Mandel to speak at their universities or at other forums.[281] The professors argued that the denial of Mandel's visa application infringed on their First Amendment rights to hear Mandel speak and to exchange ideas with him in person.[282] Invoking the plenary power doctrine, the Supreme Court rejected the professors' challenge. The Court made three major points. First, the Court cited the general doctrine of plenary power, explaining that "[t]he Court without exception has sustained Congress' 'plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.'"[283] Second, the Court reasoned that an exception to the plenary power doctrine for litigants who wished to exchange ideas with those denied entry or deported would have no logical stopping point.[284] Finally, the Court declined to address petitioners' claim that a First Amendment exception to the doctrine should exist in those cases in which entry is denied without explanation, as the Court observed that an explanation had been provided in Mandel's case.[285]

While immigration case law relies on the plenary power doctrine, it also provides tools to distinguish *Mandel* and other plenary power cases from the Creppy Memorandum cases. Specifically, the case law contains significant precedent supporting the contention that the plenary power doctrine extends only to substantive immigration law and not to the procedures by which such law is implemented, such as secrecy in conduct-

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[277] *See, e.g.*, Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1631 (1992); Peter J. Spiro, *Explaining the End of Plenary Power*, 16 GEO. IMMIGR. L.J. 339 (2002).

[278] *See, e.g.*, Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 329 (2002).

[279] 408 U.S. 753 (1972).

[280] *Id.* at 754–60.

[281] *Id.* at 759–60.

[282] *Id.* at 760.

[283] *Id.* at 766 (quoting Boutilier v. INS, 387 U.S. 118, 123 (1967)).

[284] *Id.* at 768.

[285] *Id.* at 769. Specifically, petitioners argued that an exception should apply where the Attorney General declines, without explanation, to exercise his or her power to grant a waiver under the statutory provision at issue. The Court found, however, that the Attorney General had explained his refusal to exercise his statutory waiver power.

ing immigration proceedings.[286] Indeed, this is the basis on which both the Third and Sixth Circuits rejected the government's plenary power arguments before turning to the constitutional merits of the challenge to the Creppy Memorandum.[287]

Of course, reliance on the substance/procedure distinction as developed in existing case law is not entirely unproblematic. First, there is a longstanding distinction drawn in the case law between deportation and related proceedings concerning persons who already have entered the United States, versus "exclusion" and related proceedings concerning persons seeking initial entry to the United States. Traditionally, courts have extended the plenary power rationale even to procedural matters in the latter cases.[288] Second, while the Supreme Court has made clear that constitutional procedural protections apply to aliens subject to deportation, the Court also has indicated that some degree of deference is due to the executive branch with respect to such matters.[289]

In spite of these complications, the substance/procedure distinction has proven effective in challenging the Creppy Memorandum. Indeed, both the Third and Sixth Circuits embraced such distinction in the Creppy Memorandum cases.[290] The appeal of the distinction in the Creppy Memorandum cases is not surprising. First, insofar as the Creppy Memorandum pertains to deportation proceedings, any rules of judicial deference unique to exclusion hearings would not factor into cases assessing the Memorandum's constitutionality.[291] Second, any deference due executive branch judgments can be considered when applying the applicable legal standards. Indeed, for adjudicative bodies to invoke deference to avoid review rather than as a factor in the review itself would amount to complete abdication of judicial review. This would effectively be indistinguishable from full application of the plenary power doctrine.[292]

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[286] *See* Zadvydas v. Davis, 533 U.S. 678, 695–96 (2001); Yamataya v. Fisher, 189 U.S. 86, 100–01 (1903).

[287] *North Jersey Media Group*, 308 F.3d at 219 n.15; *Detroit Free Press*, 303 F.3d at 687–93.

[288] *See, e.g.*, *Zadvydas*, 533 U.S. at 692–94; Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953).

[289] *See, e.g.*, Demore v. Kim, 123 S.Ct. 1708, 1720 (2003) ("[W]hen the Government deals with deportable aliens, the Due Process Clause does not require it to employ the least burdensome means to accomplish its goal.").

[290] *North Jersey Media Group*, 308 F.3d at 219 n.15; *Detroit Free Press*, 303 F.3d at 687–93.

[291] Indeed, all case law and commentary generated by the Creppy Memorandum appears to assume that the Memorandum relates solely to deportation proceedings. *See North Jersey Media Group*, 308 F.3d at 212 (discussing appellees' argument that the Creppy Memorandum violates the "experience" test as deportation hearings, in contrast to exclusion hearings, traditionally have been open); *Detroit Free Press*, 303 F.3d at 687–93 (drawing distinction between exclusion and deportation proceedings toward the end of arguing that the Creppy Memorandum is subject to full judicial review). This assumption is quite logical, given the Memorandum's application to proceedings conducted in the United States.

[292] *Cf.* Campbell v. Dep't of Justice, 164 F.3d 20, 30 (D.C. Cir. 1998) (quoted in Ctr.

Review of the Creppy Memorandum cases can be justified not only by mechanically applying existing Supreme Court precedent regarding the substance/procedure distinction, but also by considering the distinction as it relates to First Amendment access challenges in particular. As Justice Frankfurter stated in 1953, and as the *Mandel* Court quoted approvingly roughly two decades later, while "[p]olicies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government[,] [i]n the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process."[293] In short, even though Congress is fully entrusted with developing substantive standards for entry and exit, the Executive Branch is not necessarily unchecked in implementing these standards. When the challenge made is a procedural due process challenge, aliens, once they are deemed to have procedural due process rights, are entitled to merits review.[294] By the same token, the Executive Branch is not unchecked in its ability to implement immigration policy in secret. Rather, since a structuralist understanding of the First Amendment requires that the public be able to access government activities and information, the plenary power doctrine logically should have no bearing on these rights as they relate to the Executive Branch's implementation of Congressional immigration policy.

Indeed, the logic of the plenary power doctrine lends itself to the argument that even those immigration decisions deemed purely "political" in nature and thus unreviewable for their substance have First Amendment access implications. The argument, quite simply, is that the legitimacy, even of purely "political" decisions, presumptively is conditioned on the ability of the public to access and hence to respond to information about such decisions.[295] Thus, assuming *arguendo* that it is solely for Congress to determine who shall enter and remain in the country and even to determine some of the procedures that aliens are due, it does not follow that such decisions "belong" to Congress. Theoretically, these decisions belong to the people of the United States and are legitimate only to the extent that the people retain opportunities to respond to these decisions through political if not legal channels. It thus follows from the rationale of structuralism that the public's First Amendment interests are implicated by secrecy regarding immigration-related decisions and activities, even where the decisions and activities themselves are purely political matters under the plenary power doctrine.

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for Nat'l Sec. Studies v. Dep't of Justice, 331 F.3d 918, 940 (D.C. Cir. 2003) (Tatel, J., dissenting) ("[D]eference is not equivalent to acquiescence.")).

[293] *Mandel*, 408 U.S. at 766–67 (quoting Galvan v. Press, 347 U.S. 522, 531–32 (1954)).

[294] *See, e.g.*, *Zadvydas*, 533 U.S. at 693.

[295] *See supra* Part III.A.

Insofar as the public's First Amendment interests are implicated by secrecy in immigration-related contexts, this Article's general analyses regarding First Amendment access rights apply. Thus, as detailed in the next Section, openness in the deportation hearings context is a presumptive constitutional mandate since deportation hearings are quasi-adjudicative proceedings. It also bears noting that this Section's analysis could well have implications for secrecy in the context of exclusion hearings. Exclusion hearing procedures typically have been deemed purely political in nature because aliens are not deemed to have due process rights until they enter the United States.[296] Yet the public's constitutional interest in witnessing the proceedings remains. Certainly, one may argue that exclusion proceedings should not presumptively be open since there are no constitutional constraints on such proceedings for the public to "oversee" and as such proceedings are legitimized by their connection to political channels of control. One also may argue that foreign policy and security interests with respect to such proceedings should lead courts to allow for closure even under a modified strict scrutiny standard.[297] Nonetheless, it is difficult to see why secrecy in the conduct of such proceedings does not have First Amendment implications, regardless of the results that might ultimately be reached under First Amendment analyses.

Of course, the main point of this Section is simply that the immigration context raises unique threshold questions not present in the context of other access challenges. However, these concerns are not insurmountable. To the contrary, existing case law provides basic tools for responding to these questions and for proceeding to the merits, and these tools proved effective in the cases analyzing the constitutionality of the Creppy Memorandum. Additionally, it is possible to articulate stronger arguments that are better tailored to First Amendment access challenges than those reflected in the Creppy Memorandum cases. Having addressed the threshold questions raised in the immigration context, this Article now turns to the question of the Creppy Memorandum's constitutionality.

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[296] *See, e.g.*, *Zadvydas*, 533 U.S. at 693.

[297] While such arguments would be colorable, it is not at all clear that they would or should be successful if made. The contention that there are no constitutionally prescribed processes for persons to oversee, for example, could be countered by the argument that persons have a structural interest in witnessing procedures purporting to be "politically" determined in nature, and that political channels could not be expected to protect openness in the exclusion hearing context in light of the discrete and insular nature of the individual proceedings. Furthermore, national security or foreign affairs arguments could be countered by the point that such concerns should result in careful review under the applicable legal standards, not abdication of review at a threshold stage. *Cf. infra* note 310 and accompanying text.

2. The Creppy Memorandum's Constitutionality

Under the doctrinal approach embraced in this Article, the Creppy Memorandum is unconstitutional because it applies to quasi-adjudicative proceedings that require presumptive openness and because the Memorandum is not the necessary, least restrictive means of achieving an important government interest. With respect to the former, deportation and related hearings clearly purport to reason from legal or policy principles to the facts of a particular case brought by or against a discrete person or group and to do so through channels in which opportunities for popular influence and control are not standard legitimizing mechanisms. Furthermore, even though political pressure sometimes plays a role in deportation hearings, this pressure, combined with the other characteristics of deportation hearings, actually bolsters the rationale for presumptive openness.

It is fairly intuitive that deportation hearings meet this Article's definition of adjudicative activity and thus meet the rationale for presumptive openness, but this point is also clarified by statutes outlining the hearings' nature and by case law discussing the importance of fair procedures in such hearings. First, the Immigration and Nationality Act ("INA") outlines the criteria for deportation, and it indicates that an individual can only be deported pursuant to one of the listed grounds.[298] Thus, the statute makes it clear that deportation hearings are particularized inquiries that apply broader statutory directives to individual fact patterns. Second, statutes direct that deportation hearings must be commenced by individual notices to appear,[299] that a deportee may be represented by counsel (at the deportee's own expense), and that numerous procedural safeguards must be available. For example, the Immigration Court must maintain a record, and the deportee must be able to cross-examine witnesses, to review evidence, and to appeal adverse judgments.[300] Such directives suggest that reason and procedural fairness are major legitimizing mechanisms of deportation proceedings.

Additionally, constitutional case law makes clear that the legitimacy of deportation hearings depends on their employing fair procedures comporting with reasoned decision-making and due process requirements.[301] Indeed, the Supreme Court has observed the grave property and liberty deprivation inherent in deportation, noting that "although deportation technically is not criminal punishment it may nevertheless visit as great a hardship as the deprivation of the right to pursue a vocation or a call-

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[298] 8 U.S.C. §§ 1227, 1229a(b) (2000).

[299] *Id.* § 1229(a).

[300] 8 U.S.C. §§ 1229(b)–(c).

[301] *See, e.g.*, *Detroit Free Press*, 303 F.3d at 688 (citing Wong Wing v. United States, 163 U.S. 228, 238 (1896)); *id.* at 688–89 (citing Kwock Jan Fat v. White, 253 U.S. 454, 464–65 (1920)).

ing. . . . [D]eportation may result in the loss 'of all that makes life worth living.'"[302] This observation has significant due process implications, given the correlation in due process case law between the gravity of the deprivation at issue and the amount of process deemed constitutionally necessary.[303] Deportation hearings, then, are quasi-adjudicative in nature and meet the rationale for presumptive openness, as such hearings purport to reason from legal or policy principles to the facts of particular cases and to do so through channels in which reason and fair procedure, rather than connections to popular will, are standard legitimizing mechanisms.

While reason and fair procedure, rather than popular controls, are the standard legitimizing mechanisms of deportation hearings, such hearings are not categorically immune from political pressure. Indeed, as noted above, concerns have been raised recently about purported attempts by Attorney General Ashcroft to influence the outcome of deportation and other immigration hearings.[304] Yet as also noted above, any such pressure actually bolsters the rationale for constitutional openness, when one takes into account deportation hearings' other characteristics. Specifically, any risk of politically motivated deviations from reason and fair procedure heightens the structural rationale for public oversight in deportation hearings.[305]

Since deportation hearings meet the rationale for presumptive openness, the Creppy Memorandum should pass constitutional muster only if it is the necessary and least restrictive means of achieving an important government interest. On the one hand, the Creppy Memorandum invokes an interest in national security that naturally is deeply compelling. On the other hand, as the Sixth Circuit points out in *DFP*, there appears to be no convincing reason why national security concerns cannot be addressed on case-by-case bases through case-specific motions for closure and *in camera* presentations concerning the potential for harm through evidentiary disclosures. The government justifies the Creppy Memorandum's blanket policy by invoking a "mosaic" theory that information innocuous in isolation may be pieced together by terrorists to create a mosaic of dangerous intelligence. However, this argument simply assumes too much with far too little support. Indeed, the very purpose of a narrow tailoring requirement in certain areas of constitutional law is to sift out policy justifications grounded in broad and unsupported speculation about evils that might arise if the government were not granted the discretion that it requests.[306] Hence, speculation that open proceedings in cases involving potentially threatening information simply cannot pass muster if the con-

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[302] Bridges v. Wixon, 326 U.S. 135, 147 (1945) (citations omitted).
[303] *See, e.g.*, Mathews v. Eldridge, 424 U.S. at 334–35, 339–43.
[304] *See supra* note 259 and accompanying text.
[305] *See supra* notes 258–261 and accompanying text.
[306] *See supra* note 213.

stitutional significance of openness in adjudicative proceedings is to have any real meaning.[307]

B. Reflections on the Creppy Memorandum's Larger Significance

Apart from the fairly straightforward application of this Article's doctrinal insights to the Creppy Memorandum, the Memorandum is significant in that it reflects precisely the type of power aggrandizement through secrecy with which structuralism is concerned and which poses special dangers in adjudicative contexts. Indeed, the Memorandum purports to give the Attorney General unfettered and unreviewed power to declare that a case raises security concerns and to classify all information about the case upon such declaration.[308] Certainly, national security is a deeply compelling interest, and there is a long tradition of judicial deference to Congressional and executive branch judgments in this area.[309] There is and must remain, however, a distinction between a degree of deference and complete abdication of review. Were this distinction to evaporate upon mere utterance of the words "national security," so too would the rule of law.[310]

Indeed, given the unchecked power assumed by the Attorney General under the Creppy Memorandum, it is deeply striking that no serious security problems arose in the one case in which the government was forced to disclose information that it initially kept secret.[311] It is similarly striking that the government has "so much as argue[d] that certain noncitizens known to have no links to terrorism will be designated 'special interest' cases."[312]

Nor has the Creppy Memorandum been applied just to a few unusual cases. To the contrary, over 600 secret hearings had been held pursuant to the Memorandum as of mid-2003.[313] Each closure represents an instance in which the government wielded significant power over a deportee's life under conditions of secrecy. In each such instance, any member of the public interested in witnessing these proceedings was denied the opportunity to do so. The public thus could not assure itself that justice was done, or understand how the government implemented immigration policy in many concrete cases after September 11.

Such secrecy also raises the specter of irrational or otherwise unfair procedures against a category of persons who are typically vulnerable to

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[307] Of course, the Sixth Circuit made similar points in *Detroit Free Press. See supra* notes 156–158 and accompanying text.

[308] *See, e.g.*, *Detroit Free Press*, 303 F.3d at 683, 692–93.

[309] *See, e.g.*, *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 926–28.

[310] *See supra* notes 306–307 and accompanying text.

[311] *See supra* note 158 and accompanying text.

[312] *Detroit Free Press*, 303 F.3d at 692.

[313] *See supra* note 5 and accompanying text.

government abuse but who are especially vulnerable in the wake of September 11.[314] This specter is of special concern because Arab and Muslim men, a group that has been targeted for negative treatment by the government[315] and the public,[316] are the foci of most cases designated as "special interest" pursuant to the Creppy Memorandum. Such specter is further compounded by the reality that the vast majority of deportees lack attorneys, and thus truly are alone in facing secret deportation proceedings.[317]

Furthermore, while the backdrop of September 11 and related concerns about civil liberties compound concerns about government secrecy, they also exemplify the distinct effects of secrecy in policymaking versus secrecy in adjudication. In the latter context, even where the occasional secret case becomes high-profile, the public nonetheless has no means for gaining the detailed information that it seeks as to the procedures followed and the manner in which the hearing was conducted short of access to the hearing itself or at the very least to transcripts. Furthermore, while an interested public may have some recourse to the legislative or executive branches with respect to the broad policy represented by the Creppy Memorandum itself, public outcry about secrecy will make little, if any, difference in individual cases given the obvious barrier of the Creppy Memorandum itself and the relative insulation of quasi-adjudicative processes from political controls. Finally, it is extremely unlikely, in any event, that most secret cases will capture significant public attention. The more typical scenario is one in which the cost of secrecy will not entail the high-profile frustration of many potential spectators, but will instead entail something far more invidious. Specifically, the cost of secrecy more typically will entail the inability of deportees' friends or family members or a few interested members of the public or press to attend otherwise unnoticed proceedings in which the government wields power over interests of grave significance to a (likely unrepresented) deportee, and in which such power is legitimized only by the implicit promise that it will be wielded fairly.

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[314] *See generally* Akram & Johnson, *supra* note 278; David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953 (2002).

[315] *See, e.g.*, Nick Madigan, *Complying, Anxiously, With an I.N.S. Roundup*, N.Y. TIMES, Jan. 13, 2003, at A9; *Judge Won't Bar Arrest, Deportation of Illegal Immigrants*, Jan. 10, 2003, *at* http://www.cnn.com/2003/LAW/01/10/immigration.arrests.ap/index.html.

[316] Indeed, the Justice Department itself has acknowledged the problem of private violence and other instances of backlash against Arabs and Muslims in the wake of September 11. *See, e.g.*, Civil Rights Division National Origin Working Group Initiative to Combat Post-9/11 Discriminatory Backlash, *at* http://www.usdoj.gov/crt/legalinfo/nordwg_mission.html (last updated Jan. 16, 2002).

[317] *See, e.g.*, Waddell, *supra* note 259 ("About 90 percent of INS detainees processed at the three federal immigration courts in Florida that handle detention cases . . . face the judge without benefit of counsel . . . . At the appellate level, in 1999, almost 2,400 of the more than 4,300 detainee appeals cases nationally proceeded without legal representation . . . .").

In contrast to the cost of secrecy in adjudicative proceedings, post–September 11 attempts at secrecy in broadly applicable policymaking appear to have come to the public's attention and to have begun imposing political costs on those involved in secretive activities and policymaking. Most recently, the Justice Department reportedly was engaged in secretly drafting new legislation, known colloquially as "Patriot Act II," that threatens to curtail civil liberties severely in a number of respects, including by stripping persons' citizenship for certain political associations.[318] Given the legislation's potentially serious, wide-reaching effects and the specter of political illegitimacy that accompanies secret legislative drafting, it is unsurprising that the draft legislation was leaked to the public.[319] It is also unsurprising that editorial accounts and political statements regarding the leaked draft typically refer to the secrecy in which the Justice Department attempted to draft the legislation.[320] For example, a recent ACLU press release notes that "[t]he Department of Justice has been tight-lipped about the proposed bill. At a hearing earlier this month, Sen. Russell Feingold (D-WI) quizzed Attorney General Ashcroft about the proposal. In response, the Attorney General, oddly, denied that a final bill existed."[321] Finally, leaking the draft legislation has provided those concerned about it with an important opportunity to learn of, and to speak out about, the legislation's substance. Indeed, liberal and conservative commentators alike have been outspoken about the legislation, and a group of over sixty high-profile organizations spanning the political spectrum recently signed a letter circulated to every member of Congress expressing concerns about the Patriot Act II.[322]

The Creppy Memorandum and the post–September 11 climate thus shed new light on the dangers of government secrecy in adjudicative decision-making and on the generally distinct effects of secrecy in policymaking versus secrecy in adjudication. Certainly, secrecy in policymaking is a cause for real concern. Yet secrecy in political contexts is relatively non-suspect from a constitutional perspective as the political process typically can absorb and offer avenues for response to such secrecy. Secrecy in adjudication, on the other hand, is a matter that the political process is poorly equipped to absorb and address. Worse still, such se-

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[318] *See, e.g.*, David Cole, *What Patriot II Proposes to Do*, Feb. 10, 2002, *at* http://www.cdt.org/security/usapatriot/030210cole.pdf; Press Release, American Civil Liberties Union, On Eve of War, New Right-Left Letter Opposes Justice Department Plans for Legislation That Would Diminish Liberty, Fail to Bolster Security (Mar. 17, 2003), *at* http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=12125&c=206 [hereinafter ACLU Press Release].

[319] *See, e.g.*, ACLU Press Release, *supra* note 318 (referring to draft's leaking); Joanne Mariner, *Patriot II's Attack on Citizenship*, Mar. 6, 2003, *at* http://www.cnn.com/2003/LAW/03/06/findlaw.analysis.mariner.patriotII/index.html.

[320] *See, e.g.*, ACLU Press Release, *supra* note 318; Mariner, *supra* note 319.

[321] ACLU Press Release, *supra* note 318.

[322] Sign-on Letter to Congress Urging Opposition to the Draft Domestic Security Enhancement Act (PATRIOT II), Mar. 17, 2003, *at* http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=12124&c=206.

crecy raises the specter of government abuse in contexts isolated enough and so structurally non-political as to fly below the public's radar. Furthermore, even where the worst fears engendered by secrecy are not realized and secret proceedings are entirely fair and reasonable, there remains a profound cost in the fact that the public is left only to guess at the existence of such fairness and reasonableness. There is, in short, a profound cost to the very notions of self-government and of free speech in support of self-government when the public is simply told to trust that proceedings dependent for their legitimacy on principles of fairness and restraint indeed are run in accordance with such principles.

V. CONCLUSION

> The restraints that matter most to me are those which ensure that I cannot be squashed by power, unnoticed by the rest of the world.
>
> —Aryeh Neier[323]

That government secrecy has First Amendment implications is a deeply important notion that stems from theoretical insights that persons have a role to play in their own governing and in checking government abuse and that free speech is a crucial precondition of this role. Such role would largely be thwarted were the government left entirely free to seal off information at its source. Furthermore, permitting government effectively to shield itself from scrutiny through secrecy would run counter to a basic premise of free speech theory and of political theories of self-government: government power is amenable to abuse, and such abuse must be guarded against.

Not only is it important to recognize the First Amendment implications of government secrecy, but it is also crucial to understand the development of principled bases for line-drawing between those instances of secrecy that raise heightened First Amendment concerns and those that are relatively non-suspect. Such principled line-drawing is necessitated most obviously by the practical impossibility of a fully transparent government, by the fact that courts clearly are disinclined to require such unbridled transparency, and by the fact that courts thus far have responded to such disinclination by developing relatively arbitrary line-drawing criteria. More fundamentally, principled line-drawing itself is necessitated by the political theories of self-government that underscore free speech protections because such theories suggest the importance of government's ability to manage its own institutions.

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[323] ARYEH NEIER, DEFENDING MY ENEMY: AMERICAN NAZIS, THE SKOKIE CASE, AND THE RISKS OF FREEDOM 5 (1979).

This Article offers a framework not only for understanding the First Amendment implications of government secrecy, but also for understanding why First Amendment concerns are heightened where secrecy occurs in relatively isolated contexts that lack political controls, and why First Amendment concerns are relatively minimal where secrecy occurs in the context of broad-reaching decision-making subject to political controls. As this Article explains, secrecy in the latter contexts is relatively unlikely to thwart the public's ability ultimately to learn of and to debate the merits of the information sought to be kept secret and also poses political risks to those engaged in such secrecy and to the success of the underlying policies at issue. Secrecy in the latter contexts thus generally can be absorbed and addressed through political channels. Secrecy in the context of discrete and politically insular proceedings such as adjudications, on the other hand, raise the troubling specter of government proceedings that are legitimized through promises of fairness and restraint, but that leave little room for the public to learn the details of such proceedings. Secrecy in such contexts, then, effectively prevents the public from seeing for itself whether the fairness and restraint that purport to legitimize such contexts are exercised.

This Article provides an alternative explanation for the results reached by the Supreme Court in those cases involving public access to criminal trial proceedings. More importantly, the approach developed herein sheds significant light on how First Amendment access claims should be handled in the more complicated context of the administrative state. While the provision of such analytical tools is important at any point, it is particularly so in the wake of September 11 and other recent world events, given the heightened significance of questions as to how to balance government discretion with civil liberties in difficult times. Specifically, it is crucial now more than ever that we assess government efforts to shield its own activities from scrutiny with a healthy but reasoned suspicion. Such suspicion involves, on the one hand, a certain mindfulness of the importance of government's ability to manage its own proceedings and of the existence of political checks against many instances of excessive secrecy. On the other hand, such suspicion entails remaining ever vigilant with respect to those instances of secrecy that raise the deeply troubling specter of a government that asks its citizens simply to take it on faith that insular and politically unchecked government actions are fair, reasonable and consistent with democratic ideals.