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## Court Transparency and the First Amendment

David S. Ardia

University of North Carolina School of Law, [ardia@email.unc.edu](mailto:ardia@email.unc.edu)

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## COURT TRANSPARENCY AND THE FIRST AMENDMENT

David S. Ardia<sup>†</sup>

*“Publicity is the very soul of justice,” legal philosopher Jeremy Bentham once warned.<sup>1</sup> Regrettably, lady justice is at risk of losing her soul. In courts across the country, secrecy is increasingly the norm. Indeed, the extent of secrecy in American courts is astonishing, especially given the assumption by many that the First Amendment guarantees a right of public access to the courts. In reality, the United States Supreme Court has explicitly held only that there is a First Amendment right of public access to criminal trials and pre-trial proceedings. The Court has never addressed the question of whether there is a constitutional right of access to civil proceedings or to court records. Moreover, the Court’s last pronouncement on this issue occurred more than a quarter of a century ago and left the lower courts with a confusing and inconsistent doctrinal roadmap for dealing with public access questions. In the intervening decades, public access to the courts has been quietly under siege.*

*This is a critical time for court transparency because the courts, like so many institutions of government, are in the midst of a transformation from the largely paper-based world of the twentieth century to an interconnected, electronic world where physical and temporal barriers to information are disappearing. Not surprisingly, the shift to electronic access to the courts raises significant privacy concerns. As a result of these and other concerns, a number of courts and legislatures are considering sharply limiting public access to certain court proceedings and records.*

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<sup>†</sup> Assistant Professor of Law, University of North Carolina School of Law, and Faculty Co-Director, UNC Center for Media Law and Policy. Thanks to Heidi Kitrosser, Anne Klinefelter, Bill Marshall, Cathy Packer, Mary-Rose Papandrea, and participants at the 2016 Internet Law Works-in-Progress Symposium at New York Law School for helpful comments and discussion. Thank you also to Patrick Redmon, Maddie Salamone, Robert Sparks, and James Wudel for exceptional research assistance.

<sup>1</sup> 4 JEREMY BENTHAM, *Bentham’s Draught for the Organization of Judicial Establishments, Compared with That of the National Assembly, with a Commentary on the Same*, in THE WORKS OF JEREMY BENTHAM 305, 316 (John Bowring ed., London, Simpkin, Marshall, & Co. 1843) [hereinafter BENTHAM, THE WORKS OF JEREMY BENTHAM].

*We can, however, put court transparency on a firm theoretical foundation by focusing on the structural role the First Amendment plays in our constitutional system. In doing so, this Article makes two related arguments. First, a central purpose of the First Amendment is to ensure that citizens can effectively participate in and contribute to our republican system of self-government. Second, in order to effectuate this goal, the First Amendment must be understood to embody an affirmative right of access to information held by the courts, which by virtue of their unique institutional position possess information that is essential for the public to effectively evaluate the workings of government and, therefore, to act as sovereigns over the government. Drawing on these conclusions, this Article reworks existing First Amendment doctrine to shift the emphasis away from the question of whether experience and logic support a public right of access to individual judicial proceedings and records to whether the structural benefits of court transparency are outweighed by the need for secrecy. This reworking of public access doctrine provides a principled way for courts to evaluate the interests in secrecy while at the same time ensuring that the public's right of access to the courts is retained.*

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## INTRODUCTION

In 2008, the United States Court of Appeals for the Third Circuit published an opinion in a lawsuit that, as far as the public knew, did not exist. The case, *Doe v. C.A.R.S. Protection Plus, Inc.*,<sup>2</sup> was kept so secret over the course of seven years that it never appeared on a public docket. By order of the district court, all proceedings were closed and all records were sealed.<sup>3</sup> The case, and its extraordinary secrecy, only came to light because the Third Circuit issued a decision reversing the district court’s grant of summary judgment in favor of the defendants.<sup>4</sup> In the penultimate paragraph of that decision, the Third Circuit affirmed the district court’s sealing of the case, ruling that the judge did not abuse his discretion even though he did not provide the public with notice and an opportunity to be heard on the question of closure and did not issue any on-the-record findings supporting his closure order.<sup>5</sup> And then, without further explanation, the Third Circuit promptly sealed the appellate record.<sup>6</sup>

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<sup>2</sup> 527 F.3d 358 (3d Cir.), *order clarified*, 543 F.3d 178 (3d Cir. 2008).

<sup>3</sup> If a member of the public or press attempted to find the case on the district court’s Public Access to Court Electronic Records (PACER) system, they would have received a message saying either that no such case existed or that it was sealed. *See* Petition for Writ of Certiorari at 3, *N.Y. Law Publ’g Co. v. Doe*, 555 U.S. 1013 (2008) (No. 08-330), 2008 WL 4185426, at \*3 [hereinafter *Petition for Certiorari*].

<sup>4</sup> *C.A.R.S. Prot. Plus, Inc.*, 527 F.3d at 361–62.

<sup>5</sup> *Id.* at 371.

<sup>6</sup> *See* Order, *Doe v. C.A.R.S. Prot. Plus, Inc.*, 543 F.3d 178 (2008) (Nos. 06-3625 & 06-4508) (order filed on June 19, 2008 denying motion for intervention, for access to records and proceedings, and to alter/amend opinion) (the order is available in Appendix B to the Petition for Certiorari, *supra* note 3). The Third Circuit later modified its decision, stating: “It is not our intention that the order we entered sealing the record on appeal would prevent the district court from considering this issue anew . . . .” *C.A.R.S. Prot. Plus, Inc.*, 543 F.3d at 179. The district court did not modify its orders.

*C.A.R.S. Protection Plus* did not involve state secrets or the nation's security. It did not involve confidential police informants or clandestine law enforcement practices. It did not involve rape, child abuse, or lurid sexual conduct. According to the Third Circuit, the case involved an employment discrimination claim under Title VII, as amended by the Pregnancy Discrimination Act,<sup>7</sup> brought by "Jane Doe," who alleged that her employer fired her because she had an abortion.<sup>8</sup> Undoubtedly, the case contained sensitive information about the plaintiff's medical treatment and the unsympathetic actions of her employer, a car warranty company,<sup>9</sup> but such details are common in employment discrimination cases.<sup>10</sup>

Beyond the basic facts described in the Third Circuit's opinion, we still know very little about this case. Thirteen days after the Third Circuit revealed the lawsuit's existence, the New York Law Publishing Company, which publishes the *Legal Intelligencer* and *Pennsylvania Law Weekly*, sought to intervene in the proceedings and challenge the closure and sealing orders.<sup>11</sup> After the Third Circuit denied these requests, New York Law Publishing filed a petition for certiorari with the United States Supreme Court, asking the Court to decide whether the blanket sealing of an entire case is constitutional under the First Amendment.<sup>12</sup> The Supreme Court denied the petition for certiorari without further comment.<sup>13</sup> The case eventually settled and remains under seal today.

If the Third Circuit can so casually dismiss public access in an employment discrimination case, it prompts the troubling question of how many other cases have been litigated in secret. As New York Law Publishing asked in its petition for certiorari: "Is there a parallel justice system at work here, visible and accountable to no one?"<sup>14</sup> This is no idle concern. Judges across the country routinely close court

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<sup>7</sup> Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified as amended at 42 U.S.C. § 2000e(k) (2012)).

<sup>8</sup> *C.A.R.S. Prot. Plus, Inc.*, 527 F.3d at 363. The plaintiff proceeded anonymously under the pseudonym "Jane Doe." See *id.* at 371 n.2.

<sup>9</sup> *Id.* at 362.

<sup>10</sup> See, e.g., *Schoffstall v. Henderson*, 223 F.3d 818, 823 (8th Cir. 2000) (noting that the plaintiff's discrimination claims "placed her medical condition at issue, making the [medical records] sought by the [defendant] relevant, and absent a showing of bad faith, discoverable"). Medical details are a common enough matter in employment discrimination cases that a section on the discoverability of medical records is included in The American Law Institute Continuing Legal Education course materials for evidentiary developments in employment cases. See Richard T. Seymour, *Recurring Discovery and Evidence Problems in Employment Cases*, SX001 A.L.I.-C.L.E. 529 (2015).

<sup>11</sup> Petition for Writ of Certiorari, *supra* note 3, at 4.

<sup>12</sup> *Id.* at i.

<sup>13</sup> *N.Y. Law Publ'g Co. v. Doe*, 555 U.S. 1013 (2008).

<sup>14</sup> Petition for Writ of Certiorari, *supra* note 3, at 15.

proceedings and restrict public access to judicial records, including sealing entire cases.<sup>15</sup> In recent years, it has come to light that some courts have maintained secret dockets containing thousands of cases. For example, after the Second Circuit held that the State of Connecticut had been improperly sealing cases for decades,<sup>16</sup> the State's courts unsealed more than 10,000 cases that utilized secret dockets, most of which dealt with divorce or family law issues involving public officials and celebrities, including Clarence Clemons, Bruce Springsteen's former saxophonist.<sup>17</sup> As surprising as these statistics are, they do not even begin to capture the far more common closure and sealing of individual court proceedings and records that occur on a daily basis in courts across the country.<sup>18</sup>

Transparency is essential for the proper functioning of any judicial system. As legal philosopher Jeremy Bentham wrote in the early nineteenth century, “[p]ublicity is the very soul of justice.”<sup>19</sup> Without public oversight over the judicial system, Bentham warned, “all other checks are insufficient.”<sup>20</sup> Public oversight of the courts serves many salutary purposes, including ensuring that our system of justice functions fairly and is accountable to the public.<sup>21</sup> But the benefits of court transparency extend far beyond the courthouse. Public access to the courts also allows the public to measure and evaluate governmental (and private) power. This knowledge produces what Robert Post has called “democratic competence,” which enables citizens to engage in

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<sup>15</sup> See discussion *infra* Section I.B.

<sup>16</sup> *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83 (2d Cir. 2004).

<sup>17</sup> See Rory Eastburg, *Nothing to See Here*, NEWS MEDIA & L., Winter 2009, at 34.

<sup>18</sup> See, e.g., *United States v. Doe*, 629 F. App'x 69, 70 (2d Cir. 2015) (affirming district court's order closing courtroom and sealing records associated with pretrial criminal proceeding); *United States v. Nallani*, No. 11-cr-20365, 2016 WL 4138227, at \*6 (E.D. Mich. Aug. 3, 2016) (ordering redaction of sentencing materials); *United States v. Silver*, No. 15-CR-93 (VEC), 2016 WL 1572993, at \*9 (S.D.N.Y. Apr. 14, 2016) (ordering redaction of exhibits presented to court during oral argument); *United States v. Hoyt*, No. 1:15-cr-1, 2016 WL 776595, at \*3 (S.D. Ohio Feb. 29, 2016) (ordering redaction of portions of forensic mental health evaluation); *United States v. Grace*, No. CR 05-07-M-DWM, 2009 WL 5697923, at \*1 (D. Mont. Feb. 27, 2009) (ordering closure of trial testimony of twenty-six witnesses); *People v. Asturias*, No. A137391, 2015 WL 2148710, at \*19 (Cal. Ct. App. May 7, 2015) (affirming trial court's closure of courtroom during testimony of minor victim's parents); *Commonwealth v. White*, 33 N.E.3d 1265 (Mass. App. Ct. 2015) (ordering trial court to consider motion for a new trial because jury selection was closed to the public and noting that a “long-time court officer in that county had testified during the motion proceedings that the court room was routinely closed to the public during general voir dire”).

<sup>19</sup> BENTHAM, *THE WORKS OF JEREMY BENTHAM*, *supra* note 1, at 316.

<sup>20</sup> 1 JEREMY BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* 524 (1827) (“Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account.”).

<sup>21</sup> See, e.g., *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982) (“Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole.”).

self-government, a goal that underlies the First Amendment's commitment to freedom of speech.<sup>22</sup>

As *C.A.R.S. Protection Plus* demonstrates, lady justice is at risk of losing her soul. Rather than being an exceptional case, *C.A.R.S. Protection Plus* is emblematic of a court system that too frequently devalues transparency. Indeed, the extent of secrecy in American courts is astonishing, especially given the assumption by many commentators that the First Amendment guarantees a right of public access to the courts.<sup>23</sup> In fact, the United States Supreme Court has explicitly held only that there is a First Amendment right of public access to criminal trials and criminal trial-like proceedings.<sup>24</sup> The Supreme Court has never addressed the question of whether there is a constitutional right of access to civil proceedings or to court records. Moreover, the Court's last statement on this issue occurred more than a quarter of a century ago,<sup>25</sup> and left the lower courts with a confusing and inconsistent doctrinal roadmap for dealing with public access questions. In the intervening decades, public access to the courts—and to government information generally—has been quietly under siege.

Due to the Supreme Court's shifting pronouncements on whether a constitutional right of access to government information exists, public access to the courts has been the subject of scholarly attention for decades.<sup>26</sup> After the attacks on September 11, 2001, however, there was

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22 ROBERT C. POST, *DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE* 61 (2012) ("The value of democratic competence is undermined whenever the state acts to interrupt the communication of disciplinary knowledge that might inform the creation of public opinion.").

23 See, e.g., Dan Klau, Opinion, *Rebutting Misinformation About Crime Scene Photos and FOIA*, HERALD (New Britain, Conn.), Oct. 18, 2013, 2013 WLNR 26274091 ("[T]he public has a First Amendment right of access to court proceedings and documents, including trial exhibits."); Emma Morehart, *Justice Isn't Served by Secrecy About Death Penalty*, TULSA WORLD (Apr. 16, 2015, 8:15 AM), [http://www.tulsaworld.com/opinion/othervoices/emma-morehart-justice-isn-t-served-by-secrecy-about-death/article\\_4d58657a-e2bb-11e4-b394-17413999d34f.html](http://www.tulsaworld.com/opinion/othervoices/emma-morehart-justice-isn-t-served-by-secrecy-about-death/article_4d58657a-e2bb-11e4-b394-17413999d34f.html) ("[T]he First Amendment [] demands a right of access to information in the government's hands."); John Peck, Editorial, *Court Records in the Amy Bishop Murder Case Must Remain Open*, HUNTSVILLE TIMES (Ala.) (June 12, 2011, 7:30 AM), [http://blog.al.com/times-views/2011/06/editorial\\_court\\_records\\_in\\_the.html](http://blog.al.com/times-views/2011/06/editorial_court_records_in_the.html) ("The public and press have a First Amendment right of access to court proceedings. That extends to the copious motions, counter-motions, depositions and other filings in the growing case file.").

24 See discussion *infra* Section I.A.3.

25 See *Press-Enter. Co. v. Superior Court (Press-Enterprise II)*, 478 U.S. 1 (1986).

26 See, e.g., Lillian R. BeVier, *An Informed Public, an Informing Press: The Search for a Constitutional Principle*, 68 CALIF. L. REV. 482 (1980); Thomas I. Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U. L.Q. 1 [hereinafter Emerson, *Legal Foundations of the Right to Know*]; G. Michael Fenner & James L. Koley, *Access to Judicial Proceedings: To Richmond Newspapers and Beyond*, 16 HARV. C.R.-C.L. L. REV. 415 (1981); Anthony Lewis, *A Public Right to Know About Public Institutions: The First Amendment As Sword*, 1980 SUP. CT. REV. 1; Richard L. Marcus, *Myth and Reality in Protective Order Litigation*, 69 CORNELL L. REV. 1 (1983); Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*,

an especially large outpouring of scholarship and commentary critical of the government's wholesale closure of deportation hearings and other adjudications related to the "war on terror."<sup>27</sup> These scholars argued, based largely on doctrinal and normative grounds, that the right of access to criminal proceedings should be extended to other adjudicatory contexts. With few exceptions,<sup>28</sup> however, public access advocates have not acknowledged that the current doctrinal and theoretical bases for a First Amendment right of access are quite weak.

This Article strives to put court transparency on a firm theoretical foundation by focusing on the structural role the First Amendment plays in our constitutional system. It begins in Part I by describing the constitutional framework for analyzing public access disputes and lays bare the incoherence in the lower courts' application of current Supreme Court doctrine. The confusing state of the law on public access is particularly evident in civil cases and in disputes over court records, but inconsistency pervades the entire body of access law. Indeed, as one commentator has noted, incoherence and confusion in the lower courts regarding a First Amendment right of access "are troubling not only because they lead to inconsistent and unpredictable results, but also because such inconsistency suggests that the choice is outcome-driven."<sup>29</sup>

Part II examines the theories, or justifications, for a First Amendment right of access to the courts, noting that a central purpose of the First Amendment is to ensure that citizens can effectively participate in and contribute to our republican system of self-government.<sup>30</sup> Part II also traces the roots of constitutional

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105 HARV. L. REV. 427 (1991); Stephen Wm. Smith, *Kudzu in the Courthouse: Judgments Made in the Shade*, 3 FED. CTS. L. REV. 177 (2009).

<sup>27</sup> See, e.g., Heidi Kitrosser, *Secrecy in the Immigration Courts and Beyond: Considering the Right to Know in the Administrative State*, 39 HARV. C.R.-C.L. L. REV. 95 (2004); Raleigh Hannah Levine, *Toward a New Public Access Doctrine*, 27 CARDOZO L. REV. 1739 (2006); Kathleen K. Olson, *Courtroom Access After 9/11: A Pathological Perspective*, 7 COMM. L. & POL'Y 461 (2002); Mary-Rose Papandrea, *Under Attack: The Public's Right to Know and the War on Terror*, 25 B.C. THIRD WORLD L.J. 35 (2005); Susan Dente Ross, *Secrecy's Assault on the Constitutional Right to Open Trials*, 40 IDAHO L. REV. 351 (2004).

<sup>28</sup> See Kitrosser, *supra* note 27, *passim* (arguing that access denials to adjudicative proceedings are presumptively unconstitutional under a structuralist view of the First Amendment); Levine, *supra* note 27, at 1758-81 (noting the inconsistency and incoherence in the lower courts' approach to access claims).

<sup>29</sup> Levine, *supra* note 27, at 1742.

<sup>30</sup> This theory of the First Amendment is most commonly associated with Alexander Meiklejohn. See ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* (Oxford Univ. Press 1965) (1960). It is not my contention that this is the only purpose underlying the First Amendment. Other purposes are clearly evident in the Supreme Court's First Amendment jurisprudence, including "advancing knowledge," "discovering truth," and "assuring individual self-fulfillment." THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 6 (1970). I return to these purposes in Part II.

structuralism and identifies the structural values of court transparency. For First Amendment structuralists, “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.”<sup>31</sup> The judiciary is the most insular branch of our government, and public access provides an important source of information for citizens to understand how the government exercises power across a broad range of societal activities. Without public access to such information, not only would the courts lack legitimacy, but our democratic system of government would as well. It is this latter point—that public access to the courts serves essential structural values by making self-governance possible—that differentiates the approach in this Article from the customary arguments offered in support of public access, which rely on the benefits of access to individual court proceedings or to the court system.<sup>32</sup>

Part II also answers a question that has vexed constitutional scholars for decades: Is the First Amendment implicated only when the government acts to censor or punish speech, or does the First Amendment also require recognition that speech *about* the government must be informed by information *from* the government? Drawing on the Supreme Court’s public access decisions, as well as the work of First Amendment theorists, this Article asserts that the First Amendment embodies an affirmative obligation on the part of the government to ensure that public discussion of the courts is well informed. In order to effectuate this goal, the First Amendment must be understood to embody a right of access to information held by the courts, which, by virtue of their unique institutional position, possess information that is essential for the public to effectively evaluate the workings of government.

Part III concludes by recasting public access doctrine in the mold of First Amendment structuralism. In doing so, it suggests that rather than attempt to evaluate whether public access plays a positive role in a particular court proceeding, judges should hold that a First Amendment right of access attaches to all court proceedings and records that are

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<sup>31</sup> Kitrosser, *supra* note 27, at 99.

<sup>32</sup> See, e.g., M.A. “Mike” Kautsch, *Press Freedom and Fair Trials in Kansas: How Media and the Courts Have Struggled to Resolve Competing Claims of Constitutional Rights*, 57 KAN. L. REV. 1075, 1085–88 (2009); Marcus, *supra* note 26, at 41–53; Miller, *supra* note 26, at 483–90; Ross, *supra* note 27, at 391–92; Smith, *supra* note 26, at 214–15; Paul Coppock, Article, *Doors to Remain Open During Business Hours: Maintaining the Media’s (and Public’s) First Amendment Right of Access in the Face of Changing Technology*, 58 S.D. L. REV. 319, 337–38 (2013); Nicole J. Dulude, Comment, *Unlocking America’s Courthouse Doors: Restoring a Presumption of First Amendment Access as a Means of Reviving Public Faith in the Judiciary*, 11 ROGER WILLIAMS U. L. REV. 193, 227–29 (2005).

material to a court's exercise of its adjudicatory power. Recognizing a constitutional right of public access does not require, however, that court proceedings and records must always be open to the public. When the countervailing interests in secrecy are sufficiently compelling, a court can limit public access, but it should do so only rarely.

This recasting of public access doctrine is particularly important because courts, like so many institutions of government, are in the midst of a transformation from the largely paper-based world of the twentieth century to an interconnected, electronic world where physical and temporal barriers to information are diminishing. Not surprisingly, the shift to electronic access to court proceedings and records can raise significant privacy concerns.<sup>33</sup> As a result of these concerns, a number of courts and legislatures have sharply limited public access to certain proceedings and records.<sup>34</sup> A reinvigorated public access right grounded in a structural interpretation of the First Amendment will help to ensure that courts take into account the full range of benefits that come from court transparency.

## I. PUBLIC ACCESS TO THE COURTS

The idea that the public has an interest in observing the operation of the courts is hardly controversial. From at least the time of Roman law, trials have been public events, *res publica*.<sup>35</sup> Public access to court proceedings has been the rule in England since “time immemorial,”<sup>36</sup> and is regarded there as “one of the essential qualities of a court of justice.”<sup>37</sup> Indeed, as discussed in the Sections that follow, American

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<sup>33</sup> See David S. Ardia & Anne Klinefelter, *Privacy and Court Records: An Empirical Study*, 30 BERKELEY TECH. L.J. 1807, 1825–26, 1882–90 (2015) (discussing the wide range of privacy interests implicated by public access to the courts).

<sup>34</sup> See, e.g., KY. REV. STAT. ANN. § 610.070 (West 2016) (closing juvenile delinquency and dependency proceedings); MD. CT. R. 16-906 (listing categories of cases in which court records are not publicly accessible, including adoption, guardianship, child abuse, and attorney grievance matters); MONT. CODE ANN. § 33-2-1323 (West 2009) (sealing records of supervision proceedings by the insurance commissioner); N.Y. CRIM. PROC. LAW § 160.50(1) (McKinney 2004) (sealing records in criminal cases decided in favor of the accused); *In re J. S.*, 438 A.2d 1125, 1131 (Vt. 1981) (“The juvenile shield law does not give the court below discretion to make the proceedings public.”).

<sup>35</sup> See *Craig v. Harney*, 331 U.S. 367, 374 (1947) (“A trial is a public event. What transpires in the court room is public property.”); BRUCE W. FRIER, *THE RISE OF THE ROMAN JURISTS: STUDIES IN CICERO’S PRO CAECINA* 57–62 (1985) (“[T]he Urban Praetor’s court was set up in the open air at the southeastern end of the Forum . . .”).

<sup>36</sup> *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1069 (3d Cir. 1984) (quoting EDWARD JENCKS, *THE BOOK OF ENGLISH LAW* 73–74 (Paul B. Fairsted ed., 6th ed. 1967)).

<sup>37</sup> *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 567 (1980) (quoting *Daubney v. Cooper* (1829) 109 Eng. Rep. 438, 440 (KB)).

jurists have long recognized that open courts serve many important societal interests.

The conclusion that the public has a First Amendment *right* to access the courts, however, is controversial. Although commentators often assume that such a right exists,<sup>38</sup> judges and scholars continue to debate whether the Constitution requires that the courts be open to the public. The disagreement over a First Amendment right of access to the courts can be traced to three divergent lines of Supreme Court cases addressing a constitutional right of access to government information. The first is a series of cases from the 1970s in which the Court held that the First Amendment does not prevent the government from restricting press access to prisoners and prisons.<sup>39</sup> In the second line of cases, the Court expanded on its decisions in the prison access cases, holding that there is no constitutional right to obtain information from the government generally.<sup>40</sup> In a third series of cases in the 1980s, however, the Court took a decidedly different tack when confronted with the question of public access to criminal trials and pre-trial proceedings.<sup>41</sup>

This Part examines the roots of this debate and describes the Supreme Court's constitutional framework for analyzing public access claims. It also explores how the lower courts have applied the Supreme Court's doctrinal framework, revealing that many judges are resistant to the idea that there is a First Amendment right of access, especially to civil proceedings and court records.

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<sup>38</sup> See *supra* note 23.

<sup>39</sup> See *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978) (plurality opinion) (finding no constitutional violation by county jail that refused to allow press to interview inmates); *Saxbe v. Wash. Post Co.*, 417 U.S. 843 (1974) (rejecting constitutional challenge to federal prison regulation prohibiting face-to-face interviews by the press); *Pell v. Procunier*, 417 U.S. 817 (1974) (rejecting constitutional challenge to state prison regulation under which media representatives were able to interview inmates, but were unable to select particular inmates, and prisoner himself could not initiate interview).

<sup>40</sup> See *McBurney v. Young*, 133 S. Ct. 1709, 1718 (2013) (“[T]here is no constitutional right to obtain all the information provided by FOIA laws.”); *L.A. Police Dep’t v. United Reporting Publ’g Corp.*, 528 U.S. 32, 40 (1999) (stating the government could decide “not to give out [police department] arrestee information at all”).

<sup>41</sup> See *Press-Enterprise II*, 478 U.S. 1 (1986) (holding that First Amendment provides a right of access to preliminary hearings); *Press-Enter. v. Superior Court (Press-Enterprise I)*, 464 U.S. 501 (1984) (finding right of access to jury voir dire); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982) (recognizing right of access to criminal trials); *Richmond Newspapers*, 448 U.S. at 580 (same).

### A. Constitutional Framework

Ever since the Supreme Court first invoked the Constitution's protections to invalidate a government restriction on speech in 1931,<sup>42</sup> scholars have debated whether the First Amendment, in addition to prohibiting direct government censorship, also includes a right to acquire information. Beginning in the 1960s, the Court heard a series of cases that tested whether such a right exists, but "the Court responded in a remarkably erratic and fragmented way."<sup>43</sup>

#### 1. A Right to Information Generally

One of the first access to information cases to reach the Supreme Court, *Zemel v. Rusk*, involved a challenge to the U.S. government's travel ban to Cuba.<sup>44</sup> While this might seem like an odd case for testing whether the First Amendment provides a right to gather information, the plaintiff explicitly couched his claim in terms of the First Amendment, asserting that the travel ban interfered with "the First Amendment rights of citizens to travel abroad so that they might acquaint themselves at first hand with the effects abroad of our Government's policies, foreign and domestic, and with conditions abroad which might affect such policies."<sup>45</sup> Although the Court agreed that the travel restrictions "render[ed] less than wholly free the flow of information concerning [Cuba],"<sup>46</sup> the Court stated that the government's prohibition on travel did not implicate the First Amendment because it was merely "an inhibition of action."<sup>47</sup> According to the Court, even though the government's travel restriction "diminishes the citizen's opportunities to gather information," this does not raise First Amendment concerns: "The right to speak and publish does not carry with it the unrestrained right to gather information."<sup>48</sup>

Less than a decade later, the Court appeared to retreat from this hardline position in *Branzburg v. Hayes*.<sup>49</sup> *Branzburg* involved the

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<sup>42</sup> *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 703, 706 (1931) (invalidating Minnesota law that provided for injunctions against those who created a "public nuisance" by publishing, selling, or distributing a "malicious, scandalous and defamatory newspaper").

<sup>43</sup> Barry P. McDonald, *The First Amendment and the Free Flow of Information: Towards a Realistic Right to Gather Information in the Information Age*, 65 OHIO ST. L.J. 249, 251 (2004).

<sup>44</sup> *Zemel v. Rusk*, 381 U.S. 1 (1965).

<sup>45</sup> *Id.* at 16.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 17.

<sup>49</sup> 408 U.S. 665 (1972).

consolidation of four cases brought by journalists who claimed that the First Amendment protected them from having to identify their confidential sources before a grand jury. The journalists argued that compelling them to testify would unduly burden their right to gather news by deterring their sources from providing information “to the detriment of the free flow of information protected by the First Amendment.”<sup>50</sup> In a 5-4 decision, the Court declined to recognize a privilege for journalists in the context of grand jury investigations, noting that even those who gather the news must comply with civil and criminal statutes of general applicability.<sup>51</sup> Citing *Zemel*, the Court went on to state that “[i]t has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally.”<sup>52</sup>

Yet the *Branzburg* Court seemed to evidence some ambivalence about the reach of its holding in *Zemel*. Utilizing language that has perplexed lawyers who represent the press for nearly half a century,<sup>53</sup> the Court stated:

We do not question the significance of free speech, press, or assembly to the country's welfare. Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated.<sup>54</sup>

The Court's suggestion in *Branzburg* that there might be some limits on the government's ability to restrict newsgathering activity, however, did not presage an immediate change in the Court's approach

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<sup>50</sup> *Id.* at 680.

<sup>51</sup> *Id.* at 682 (“[N]either the First Amendment nor any other constitutional provision protects the average citizen from disclosing to a grand jury information that he has received in confidence.”).

<sup>52</sup> *Id.* at 684.

<sup>53</sup> See, e.g., James C. Goodale, *Branzburg v. Hayes and the Developing Qualified Privilege for Newsmen*, 26 HASTINGS L.J. 709, 716 (1975) (“Justice Stewart called the Powell opinion ‘enigmatic.’ It is opaque at best. Since it is, however, the key to understanding *Branzburg*, an attempt must be made to penetrate it.” (footnote omitted)); Donna M. Murasky, *The Journalist's Privilege: Branzburg and Its Aftermath*, 52 TEX. L. REV. 829, 842 (1974) (“In its *Branzburg* decision the Supreme Court, without adequate explanation or justification, departed from previously announced principles of constitutional adjudication.”); John E. Osborn, *The Reporter's Confidentiality Privilege: Updating the Empirical Evidence After a Decade of Subpoenas*, 17 COLUM. HUM. RTS. L. REV. 57, 61 (1985) (“[T]he case law in the aftermath of *Branzburg* has thus far failed to provide clear and consistent guidelines for editors and reporters forced to choose between disclosure or possible incarceration.”).

<sup>54</sup> *Branzburg*, 408 U.S. at 681. Returning to this idea at the end of its decision, the Court again remarked that “news gathering is not without its First Amendment protections, and grand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment.” *Id.* at 707.

to the First Amendment. In fact, “[s]omewhat paradoxically,”<sup>55</sup> the Court held shortly after *Branzburg* that when the information at issue is held by the government,<sup>56</sup> no First Amendment rights are implicated.<sup>57</sup>

## 2. A Right to Information from the Government

In *Pell v. Procunier*<sup>58</sup> and *Saxbe v. Washington Post Co.*,<sup>59</sup> a newspaper publisher and several reporters challenged various prison regulations that restricted their ability to interview inmates who had not been specifically made available by the prisons. Invoking the First Amendment’s speech and press clauses, the petitioners asserted that “the press have a constitutional right to interview any inmate who is willing to speak with them, in the absence of an individualized determination that the particular interview might create a clear and present danger to prison security or to some other substantial interest served by the corrections system.”<sup>60</sup> Justice Potter Stewart, writing for 5-4 majorities in both cases, declined to recognize that the First Amendment provided the press with a right of access to the requested information.<sup>61</sup> Although Stewart acknowledged that in *Branzburg* the Court had suggested that newsgathering was entitled to some First Amendment protection, he saw the issue in *Pell* and *Saxbe* as whether the press had a constitutional right of access that was greater than that afforded the general public.<sup>62</sup> Without clarifying the extent of the public’s right of access, Justice Stewart rejected this superior access argument, stating that the Constitution did not “require [the] government to accord the press special access to information not shared by members of the public generally.”<sup>63</sup>

Given Justice Stewart’s characterization of the issue in *Pell* and *Saxbe* as involving special press access, the Court’s decisions in those cases arguably left open the possibility that the First Amendment might be implicated if the government refused to provide any public access to

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<sup>55</sup> McDonald, *supra* note 43, at 251.

<sup>56</sup> Both *Zemel* and *Branzburg* dealt with claims that the government was unduly interfering with access to information that was outside of the government’s direct control.

<sup>57</sup> See discussion *infra* Section I.A.2.

<sup>58</sup> 417 U.S. 817 (1974) (rejecting constitutional challenge to state prison regulation under which media representatives were able to interview inmates, but were unable to select particular inmates, and prisoner himself could not initiate interview).

<sup>59</sup> 417 U.S. 843 (1974) (rejecting constitutional challenge to federal prison regulation prohibiting face-to-face interviews by the press).

<sup>60</sup> *Pell*, 417 U.S. at 829.

<sup>61</sup> See *id.* at 833; *Saxbe*, 417 U.S. at 850.

<sup>62</sup> *Pell*, 417 U.S. at 833–34; *Saxbe*, 417 U.S. at 849–50.

<sup>63</sup> *Pell*, 417 U.S. at 834; see also *Saxbe*, 417 U.S. at 850.

the prisons.<sup>64</sup> In *Houchins v. KQED, Inc.*, however, a fractured court seemed to snuff out any glimmer of a First Amendment right of access to information under such circumstances.<sup>65</sup> In *Houchins*, a broadcasting company and members of the NAACP sued a sheriff who refused to provide access to a portion of a county jail that had been the site of a recent suicide by an inmate, as well as the subject of allegations regarding deplorable prison conditions.<sup>66</sup> Emphasizing the public interest at stake, the plaintiffs argued that the sheriff “had violated the First Amendment by refusing to permit media access and failing to provide any effective means by which the public could be informed of conditions prevailing in the [prison] facility or learn of the prisoners’ grievances.”<sup>67</sup> They further asserted that “[p]ublic access to such information was essential . . . in order for NAACP members to participate in the public debate on jail conditions in Alameda County.”<sup>68</sup>

In a 4-3 decision that failed to produce a majority opinion,<sup>69</sup> the Court rejected the plaintiffs’ First Amendment claims. Writing for a plurality of three justices, Chief Justice Warren Burger stated that “[t]his Court has never intimated a First Amendment guarantee of a right of access to all sources of information within government control.”<sup>70</sup>

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<sup>64</sup> The Court concluded at the outset of its analysis in *Pell* that the government was not attempting to conceal prison conditions or to frustrate the press’ investigation and reporting of those conditions because “both the press and the general public [were] accorded full opportunities to observe prison conditions.” *Pell*, 417 U.S. at 830. The Court made similar observations in *Saxbe*:

The policies of the Federal Bureau of Prisons regarding visitations to prison inmates do not differ significantly from the California policies considered in *Pell v. Procunier* . . . . Indeed, journalists are given access to the prisons and to prison inmates that in significant respects exceeds that afforded to members of the general public.

417 U.S. at 846-47.

<sup>65</sup> 438 U.S. 1 (1978) (plurality opinion) (finding no constitutional violation by county jail that refused to allow the press to interview inmates and make sound recordings, films, and photographs).

<sup>66</sup> *Id.* at 3-6.

<sup>67</sup> *Id.* at 4.

<sup>68</sup> *Id.*

<sup>69</sup> Justices Marshall and Blackmun did not participate in the case.

<sup>70</sup> *Houchins*, 438 U.S. at 9. Justice Stewart concurred in the judgment, but declined to join the plurality opinion. *Id.* at 16-19 (Stewart, J., concurring). Nevertheless, he agreed with the plurality that:

The First and Fourteenth Amendments do not guarantee the public a right of access to information generated or controlled by government, nor do they guarantee the press any basic right of access superior to that of the public generally. The Constitution does no more than assure the public and the press equal access once government has opened its doors.

Characterizing the language in *Branzburg* as dictum, Burger asserted that the decision in *Branzburg*

in no sense implied a constitutional right of access to news sources. . . . There is an undoubted right to gather news “from any source by means within the law,” but that affords no basis for the claim that the First Amendment compels others—private persons or governments—to supply information.<sup>71</sup>

Burger then went on to note that “[w]hether the government should open penal institutions in the manner sought by respondents is a question of policy which a legislative body might appropriately resolve one way or the other.”<sup>72</sup>

The Court applied similar reasoning in *Nixon v. Warner Communications, Inc.*,<sup>73</sup> where it held that the press had no First Amendment right to obtain physical copies of tape recordings made by President Nixon that the media had heard when they were played in open court.<sup>74</sup> Citing, inter alia, *Pell*, *Saxbe*, and *Zemel*, the Court concluded that “[t]he First Amendment generally grants the press no right to information about a trial superior to that of the general public.”<sup>75</sup> Because the tapes had already been played in open court, the Court concluded that no further public or press access was necessary.<sup>76</sup>

Although *Nixon*, like *Pell* and *Saxbe* before it, appeared to leave open the possibility that the First Amendment might be implicated if the government refused to provide any public access to the White House tape recordings, the Court rejected such a right in *Los Angeles Police Department v. United Reporting Publishing Corp.*<sup>77</sup> In *United Reporting*, a commercial data broker challenged a California statute that imposed restrictions on the use of arrestee addresses collected by the Los Angeles Police Department.<sup>78</sup> In dismissing the publisher’s First Amendment claim, the Court remarked that “what we have before us is

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*Id.* at 16. Stewart explained in a footnote that “[f]orces and factors other than the Constitution must determine what government-held data are to be made available to the public.” *Id.* at 16 n.\*.

<sup>71</sup> *Id.* at 10–11 (plurality opinion) (citations omitted).

<sup>72</sup> *Id.* at 12.

<sup>73</sup> 435 U.S. 589 (1978).

<sup>74</sup> *Id.* at 609. Twenty-two hours of taped conversations were played at the trial and admitted into evidence. *Id.* at 594.

<sup>75</sup> *Id.* at 609.

<sup>76</sup> *Id.* at 610. The respondents also argued that release of the tapes was required by the Sixth Amendment guarantee of a public trial. *Id.* According to the Court, any right of public access under the Sixth Amendment had been satisfied: “The requirement of a public trial is satisfied by the opportunity of members of the public and the press to attend the trial and to report what they have observed. That opportunity abundantly existed here.” *Id.* (citation omitted).

<sup>77</sup> 528 U.S. 32, 40 (1999).

<sup>78</sup> *Id.* at 34–36.

nothing more than a governmental denial of access to information in its possession.”<sup>79</sup> Removing any doubt that the First Amendment might encompass the right to demand this information from the government, the Court went on to opine that “California could decide not to give out arrestee information at all without violating the First Amendment.”<sup>80</sup>

The Court’s most recent pronouncement on the question of public access to government information occurred in 2013 in *McBurney v. Young*,<sup>81</sup> and left little reason to think the Court is willing to revisit its rejection of a general First Amendment right of access to government information. Although *McBurney* involved a challenge under the Privileges and Immunities Clause and dormant Commerce Clause to Virginia’s requirement that only citizens of Virginia are allowed to request information under the state’s Freedom of Information Act, the Court rejected the idea that there is a general constitutional right to obtain information from the government under the First Amendment. In a unanimous decision authored by Justice Alito, the Court wrote:

[W]e reject petitioners’ sweeping claim that the challenged provision of the Virginia FOIA violates the Privileges and Immunities Clause because it denies them the right to access public information on equal terms with citizens of the Commonwealth. We cannot agree that the Privileges and Immunities Clause covers this broad right. This Court has repeatedly made clear that there is no constitutional right to obtain all the information provided by FOIA laws.<sup>82</sup>

If we were to end our analysis here, we would conclude that the question of whether the First Amendment encompasses a right to acquire information from the government has been answered in the negative. But in a parallel line of cases, the Court has carved out one area of government activity that the public is entitled to access under the First Amendment: criminal trials and criminal trial-like proceedings.

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<sup>79</sup> *Id.* at 40.

<sup>80</sup> *Id.* (citing *Houchins v. KQED, Inc.*, 438 U.S. 1, 14 (1978) (plurality opinion)). Chief Justice Rehnquist wrote the majority opinion and was joined by six other Justices, all of whom wrote or joined concurring opinions. Justice Ginsburg, joined by Justices O’Connor, Souter, and Breyer, concluded that the fact that the statute at issue was “properly analyzed as a restriction on access to government information, not as a restriction on protected speech,” was sufficient grounds in and of itself for rejecting the publisher’s First Amendment claim. *Id.* at 42 (Ginsburg, J., concurring). In their view, “California could, as the Court notes, constitutionally decide not to give out arrestee address information at all.” *Id.* at 43.

<sup>81</sup> 133 S. Ct. 1709 (2013).

<sup>82</sup> *Id.* at 1718 (citing *Houchins*, 438 U.S. at 14).

### 3. A Right to Information from the Courts

As an initial matter, it would appear that the Sixth Amendment, which states that the accused in all criminal prosecutions has “the right to a speedy and *public* trial,”<sup>83</sup> provides a right of public access to the courts. But the Sixth Amendment, the Supreme Court held in *Gannett Co. v. DePasquale*,<sup>84</sup> merely grants a criminal defendant the right to a public trial, it does not give members of the public a right to attend the proceedings.<sup>85</sup> “The Constitution nowhere mentions any right of access to a criminal trial on the part of the public,” the Court observed in *Gannett*.<sup>86</sup> “Its guarantee, like the others enumerated, is personal to the accused.”<sup>87</sup>

Although the Court refused to allow the press or public to object to the closure of criminal proceedings under the Sixth Amendment, *Gannett* marked an important shift in the Court’s approach to a First Amendment right of access. Unlike in the prison access cases, where the media plaintiffs had argued that they have a First Amendment right of access to government information beyond that provided to the public, *Gannett* involved a claim that the closure of a pre-trial suppression hearing in a murder case violated the *public’s* right of access under the First and Sixth Amendments.<sup>88</sup> Even though the *Gannett* decision came down only a year after *Houchins*, the Court appeared to be more receptive to a right of public access to the courts, at least in the context of criminal proceedings. Instead of rejecting the Gannett Company’s First Amendment claim outright, Justice Stewart, who had concurred in the judgment in *Houchins*,<sup>89</sup> expressly declined to address the question

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<sup>83</sup> U.S. CONST. amend. VI (emphasis added).

<sup>84</sup> 443 U.S. 368 (1979).

<sup>85</sup> *Id.* at 383–86, 391. As a leading media law casebook reports, the Court’s decision in *Gannett* was widely criticized by the media:

The aftermath of *Gannett* was extraordinary. The decision came under severe media criticism. In August 1979, the American Newspaper Publishers Association reported that “[j]udges all over the United States have closed or upheld the closing of more than 21 courtrooms in the five weeks since the U.S. Supreme Court’s July 2 decision in *Gannett*.” Shortly thereafter, a number of the Justices began speaking out in public about the *Gannett* decision. In August 1979, for example, Chief Justice Burger commented to a reporter that judges who were closing trials might be misreading *Gannett*. In an article in *Editor and Publisher*, Justice Brennan suggested that *Gannett* involved only the Sixth Amendment, not the First, and Justice Stevens published an article in *Bar Leader* magazine discussing the case.

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<sup>86</sup> *Gannett*, 443 U.S. at 379.

<sup>87</sup> *Id.* at 379–80.

<sup>88</sup> *Id.* at 370–71, 391.

<sup>89</sup> *Houchins v. KQED, Inc.*, 438 U.S. 1, 16 (1978) (Stewart, J., concurring).

of whether the closure of the pre-trial proceeding violated the First Amendment: “[E]ven assuming, *arguendo*, that the First and Fourteenth Amendments may guarantee such access in some situations, a question we do not decide, this putative right was given all appropriate deference by the state *nisi prius* court in the present case.”<sup>90</sup>

For the first time since the Court’s vague admonition in *Branzburg* that there must be “some protection” under the First Amendment for newsgathering,<sup>91</sup> Justice Stewart’s opinion in *Gannett* explicitly acknowledged the possibility that the public might have a right of access to judicial proceedings under the First Amendment.<sup>92</sup> In a series of cases that came to the Court over the following decade, the Court tackled this question head on, concluding that the First Amendment’s press and speech clause guarantees do necessitate a public right to attend criminal trials and other types of criminal proceedings.<sup>93</sup>

The first of these cases, *Richmond Newspapers, Inc. v. Virginia*, involved the exclusion of the press and public from a murder trial in Virginia state court.<sup>94</sup> In a 7-1 decision<sup>95</sup> that produced four separate opinions, the Court held that the public has a First Amendment right of access to criminal trials.<sup>96</sup> Chief Justice Burger, who wrote the plurality opinion, began by scrutinizing the history of the American and English criminal justice systems and concluded that “the historical evidence demonstrates conclusively that . . . criminal trials both here and in England had long been presumptively open” to the public.<sup>97</sup> This openness, Burger observed, provided “significant community therapeutic value,”<sup>98</sup> “gave assurance that the proceedings were conducted fairly to all concerned, and . . . discouraged perjury, the misconduct of participants, and decisions based on secret bias or partiality.”<sup>99</sup>

Although Burger conceded in *Richmond Newspapers* that the First Amendment does not explicitly require public access to criminal trials, he concluded that the Amendment’s provisions implied that such a right exists: “In guaranteeing freedoms such as those of speech and press, the

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<sup>90</sup> *Gannett*, 443 U.S. at 392.

<sup>91</sup> *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972).

<sup>92</sup> See *supra* note 90 and accompanying text.

<sup>93</sup> See *Press-Enterprise II*, 478 U.S. 1 (1986); *Press-Enterprise I*, 464 U.S. 501 (1984); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982); *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980) (plurality opinion).

<sup>94</sup> *Richmond Newspapers*, 448 U.S. 555.

<sup>95</sup> Justice Powell did not participate in the case.

<sup>96</sup> *Richmond Newspapers*, 448 U.S. at 575–76.

<sup>97</sup> *Id.* at 569.

<sup>98</sup> *Id.* at 570.

<sup>99</sup> *Id.* at 569; see also *id.* at 571 (noting that public scrutiny of criminal trials fostered “acceptance of both the process and its results”).

First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees.”<sup>100</sup> In doing so, Burger’s plurality decision in *Richmond Newspapers* diverged sharply from the Court’s parallel line of cases rejecting a First Amendment right of access to information controlled by the government.<sup>101</sup> At least in the context of criminal trials, *Richmond Newspapers* foreshadowed a far broader understanding of the First Amendment that protects not just the right to speak, but also the right to acquire information. The First Amendment, Burger wrote, “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.”<sup>102</sup>

Two years later, in *Globe Newspaper Co. v. Superior Court*, a majority of the Court adopted this view of the First Amendment when it invalidated a Massachusetts statute that required trial judges, at trials for specified sexual offenses involving a victim under the age of eighteen, to exclude the public from the courtroom during the testimony of the victim.<sup>103</sup> In striking down the statute, Justice William Brennan’s majority opinion affirmed that the First Amendment is “broad enough to encompass those rights that, while not unambiguously enumerated in the very terms of the Amendment, are nonetheless necessary to the enjoyment of other First Amendment rights.”<sup>104</sup> Underlying the First Amendment right of access to criminal trials, Brennan noted, “is the common understanding that ‘a major purpose of that Amendment was to protect the free discussion of governmental affairs.’”<sup>105</sup> Echoing Burger’s plurality decision in *Richmond Newspapers*, Brennan remarked that a right of public access helps to ensure that the “constitutionally protected ‘discussion of governmental affairs’ is an informed one.”<sup>106</sup>

The Court’s decisions in *Richmond Newspapers* and *Globe Newspaper* left unresolved the question of how far a First Amendment right of access to the courts extends. Both cases involved access to criminal trials, which have historically been open to the public. Yet the question of public access also arises in other types of court proceedings. The first case to arrive at the Court testing the reach of the First

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<sup>100</sup> *Id.* at 575.

<sup>101</sup> See discussion *supra* Section I.A.2.

<sup>102</sup> *Richmond Newspapers*, 448 U.S. at 575–76 (quoting *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 783 (1978)); see also *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972) (noting in dictum that “without some protection for seeking out the news, freedom of the press could be eviscerated”).

<sup>103</sup> *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982).

<sup>104</sup> *Id.* at 604 (citing *Richmond Newspapers*, 448 U.S. at 579–80).

<sup>105</sup> *Id.* (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)).

<sup>106</sup> *Id.* at 605.

Amendment's right of public access to the courts involved criminal voir dire proceedings and was followed shortly thereafter by a second case arising from a preliminary hearing.

In *Press-Enterprise Co. v. Superior Court (Press-Enterprise I)*,<sup>107</sup> a trial judge closed nearly all of the voir dire proceedings in a case involving the rape and murder of a teenage girl based on the stated belief that if the press were present in the courtroom, jurors "would lack the candor necessary to assure a fair trial."<sup>108</sup> In a unanimous decision, the Supreme Court held that the First Amendment right of access extends to criminal voir dire proceedings. The Court first noted that public jury selection was the "common practice in America when the Constitution was adopted," and emphasized that openness "enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system."<sup>109</sup>

Two years later, in the identically named *Press-Enterprise Co. v. Superior Court (Press-Enterprise II)*,<sup>110</sup> the Supreme Court faced the question of whether a First Amendment right of access applies to preliminary hearings.<sup>111</sup> In that case, a magistrate judge excluded the public, pursuant to a California statute, from a forty-one day preliminary hearing in a high-profile murder prosecution in order to protect the defendant's right to a fair trial.<sup>112</sup> At the conclusion of the hearing, the judge refused to release the transcript of the hearing and sealed the record.<sup>113</sup>

Pulling the various strands together from *Richmond Newspapers*, *Globe Newspaper*, and *Press-Enterprise I*, Chief Justice Burger set out to clarify the test for determining whether a First Amendment right of access applies to a specific judicial proceeding. Explicating what is now known as the "tests of experience and logic,"<sup>114</sup> Burger wrote: "our decisions have emphasized two complementary considerations."<sup>115</sup> First, a court is to consider "whether the place and process have historically

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<sup>107</sup> 464 U.S. 501 (1984).

<sup>108</sup> *Id.* at 503–04. The voir dire took six weeks, and all but approximately three days was closed to the public. *Id.* at 503. Citing the jurors' right to privacy, the judge also refused to release the transcript of the proceedings even after the trial began and continued to keep the transcript under seal post-conviction. *Id.* at 503–04.

<sup>109</sup> *Id.* at 508 (citing *Richmond Newspapers*, 448 U.S. at 569–71).

<sup>110</sup> 478 U.S. 1 (1986).

<sup>111</sup> *Id.* at 3.

<sup>112</sup> *Id.* at 3–4.

<sup>113</sup> *Id.* at 4–5.

<sup>114</sup> See, e.g., *El Vocero de Puerto Rico v. Puerto Rico*, 508 U.S. 147, 149 (1993) (referring to the "tests of experience and logic" enunciated in *Press-Enterprise II*).

<sup>115</sup> *Press-Enterprise II*, 478 U.S. at 8.

been open to the press and general public” (the “experience” prong).<sup>116</sup> Second, the court must assess “whether public access plays a significant positive role in the functioning of the particular process in question” (the “logic” prong).<sup>117</sup> If both prongs are met, a First Amendment right of access attaches to the proceeding in question, which can be denied only if the government’s justification for closure withstands strict scrutiny. As Burger observed: “These considerations of experience and logic are, of course, related, for history and experience shape the functioning of governmental processes. If the particular proceeding in question passes these tests of experience and logic, a qualified First Amendment right of public access attaches.”<sup>118</sup>

Examining California’s and other states’ practices with regard to preliminary hearings, Burger concluded that such hearings have historically been open to the public and thus the “experience” prong was satisfied.<sup>119</sup> Turning to the “logic” prong, he determined that in California preliminary hearings are “sufficiently like a trial to justify the . . . conclusion” that public access “is essential to the proper functioning of the criminal justice system.”<sup>120</sup> Burger rejected the argument that public access to a preliminary hearing is unnecessary because the hearing cannot result in the conviction of the accused and it is held before a magistrate without a jury, noting that “these features, standing alone, do not make public access any less essential to the proper functioning of the proceedings in the overall criminal justice process.”<sup>121</sup> To the contrary, the absence of a jury, Burger observed, “makes the importance of public access to a preliminary hearing even more significant.”<sup>122</sup> Finding both prongs satisfied, the Court held that a qualified First Amendment right of access attached to the preliminary hearing.<sup>123</sup>

Since *Press-Enterprise I* and *II*, the Supreme Court has not revisited its conclusion that the First Amendment provides a qualified right of access to criminal trials and trial-like proceedings, nor has the Court

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<sup>116</sup> *Id.* (citing *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 605 (1982) and *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 589 (1980) (Brennan, J., concurring in judgment)).

<sup>117</sup> *Id.* (citing *Globe Newspaper*, 457 U.S. at 606).

<sup>118</sup> *Id.* at 9.

<sup>119</sup> *Id.* at 10–11.

<sup>120</sup> *Id.* at 11–12. The Court noted that in California a defendant “has an absolute right to an elaborate preliminary hearing before a neutral magistrate. . . . [and] has the right to personally appear at the hearing, to be represented by counsel, to cross-examine hostile witnesses, to present exculpatory evidence, and to exclude illegally obtained evidence.” *Id.* at 12 (citation omitted).

<sup>121</sup> *Id.* at 12.

<sup>122</sup> *Id.* at 13.

<sup>123</sup> *Id.*

had occasion to resolve whether the experience and logic test mandates a right of access to other judicial activities, including civil proceedings and court records. In *El Vocero de Puerto Rico v. Puerto Rico*,<sup>124</sup> the Court did clarify one possible ambiguity in the application of the “experience” prong of the *Press-Enterprise II* standard, instructing that when assessing the historical record for a “tradition of open[ness],”<sup>125</sup> a court “does not look to the particular practice of any one jurisdiction, but instead ‘to the experience in that type or kind of hearing throughout the United States.’”<sup>126</sup>

In summary, the Supreme Court’s decisions addressing a putative First Amendment right of access to information paint a conflicting doctrinal picture. In *Zemel*, the Court held that governmental restrictions on information-gathering activities do not implicate the First Amendment.<sup>127</sup> In *Branzburg*, however, the Court suggested that newsgathering activities are entitled to at least some First Amendment protection, although the Court did not clarify the extent of this protection.<sup>128</sup> In the prison access cases (*Pell*, *Saxbe*, and *Houchins*) and government records cases (*Nixon*, *United Reporting*, and *McBurney*) the Court seemed to reverse course again by holding that any First Amendment protection for gathering information did not extend to information held by the government.<sup>129</sup>

Against this backdrop, *Richmond Newspapers*, *Globe Newspaper*, and *Press-Enterprise I & II* stand out as outliers in the Supreme Court’s jurisprudence concerning a First Amendment right of access to information. In order to make sense of these decisions, we must ask what it is about criminal trials and the information they generate that distinguish them from other governmental activities that are not subject to a First Amendment right of access. To answer this question, it will be helpful first to examine how the lower courts are applying the experience and logic test.

### B. *Application in the Lower Courts*

Lower courts have struggled to make sense of the Supreme Court’s conflicting guidance on whether a First Amendment right of access to government information exists. This Section summarizes the most

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<sup>124</sup> 508 U.S. 147 (1993).

<sup>125</sup> *Id.* at 150.

<sup>126</sup> *Id.* (quoting *Rivera-Puig v. Garcia-Rosario*, 983 F.2d 311, 323 (1st Cir. 1992)).

<sup>127</sup> See *supra* notes 44–48 and accompanying text.

<sup>128</sup> See *supra* notes 49–55 and accompanying text.

<sup>129</sup> See *supra* notes 58–82 and accompanying text.

important trends in these decisions and highlights patterns in how judges resolve disputes over public access to the courts.

As a starting point, it is clear that lower courts treat the three branches of government dissimilarly when it comes to claims that the First Amendment provides a right of public access. Most courts, for example, refuse to recognize a First Amendment right of access to the activities of the executive and legislative branches, relying on either the outright rejection of such a right in *Houchins* and *United Reporting*,<sup>130</sup> or by finding that the government activity at issue does not pass the experience and logic test from *Press-Enterprise II*.<sup>131</sup> Although there may be good reason to question the refusal to recognize a First Amendment right of access to government information in some of these contexts,<sup>132</sup> those arguments can be left to another day because the focus here is on a right of public access to court proceedings and records.

With regard to the activities of the judicial branch, lower courts frequently do find a First Amendment right of access.<sup>133</sup> Nevertheless, due to the Supreme Court's opaque guidance on when and why such a right exists, courts vary substantially with regard to how they evaluate First Amendment access claims. The chaotic state of the law on public access is particularly evident in cases involving access to civil proceedings and in disputes over the sealing of court records,<sup>134</sup> but inconsistency pervades the entire body of court access law. Indeed, scholars have described the lower courts' application of the Supreme Court's access precedents as "convoluted,"<sup>135</sup> "confus[ed],"<sup>136</sup> and

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<sup>130</sup> See, e.g., *Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 935 (D.C. Cir. 2003) (rejecting First Amendment right of access to names of detainees); *Amelkin v. McClure*, 205 F.3d 293, 296 (6th Cir. 2000) (no First Amendment right of access to state accident reports); *Capital Cities Media, Inc. v. Chester*, 797 F.2d 1164, 1171–73 (3d Cir. 1986) (no First Amendment right of access to state environmental agency's records pertaining to water contamination); *United States v. Loughner*, 807 F. Supp. 2d 828, 834–35 (D. Ariz. 2011) (no First Amendment right of access to law enforcement investigation materials); *Copley Press, Inc. v. Superior Court*, 141 P.3d 288, 309–10 (Cal. 2006) (no First Amendment right of access to records of county Civil Service Commission).

<sup>131</sup> See, e.g., *Calder v. IRS*, 890 F.2d 781, 784 (5th Cir. 1989) (refusing to recognize First Amendment right of access to Internal Revenue Service documents pertaining to tax investigation of Al Capone); *Okla. Observer v. Patton*, 73 F. Supp. 3d 1318, 1323–25 (W.D. Okla. 2014) (no First Amendment right of access to executions); *Sorenson v. Superior Court*, 161 Cal. Rptr. 3d 794, 809–11 (Cal. Ct. App. 2013) (no First Amendment right of access to involuntary commitment proceedings); *Mayhew v. Wilder*, 46 S.W.3d 760, 776–77 (Tenn. Ct. App. 2001) (no First Amendment right of access to state legislative meetings).

<sup>132</sup> See McDonald, *supra* note 43, at 340–46 (arguing for a general First Amendment right of access to government information).

<sup>133</sup> The unique role of the courts within the American constitutional system is discussed in Section II.B.4.

<sup>134</sup> See *infra* notes 425–33 and accompanying text.

<sup>135</sup> Olson, *supra* note 27, at 473.

“wildly inconsistent.”<sup>137</sup> One judge even compared the increasing secrecy in the courts to “kudzu,” a nearly uncontrollable creeping vine that “blocks access to sunlight, slowly strangling fields and forests in its wake.”<sup>138</sup>

### 1. Inconsistency and Uncertainty

Following the approach outlined in *Press-Enterprise II*, most courts apply, or at least purport to apply, the Supreme Court’s “experience and logic” test to determine whether a First Amendment right of access applies to a particular judicial proceeding or record. When we examine these cases closely, however, we see that the courts are not uniform in their application of this test. Instead, judges often disagree about the relative importance of the test’s two prongs and about whether particular types of court proceedings and records satisfy one or both of the prongs. Some courts, for example, rely exclusively on the experience prong,<sup>139</sup> while others find a First Amendment right of access if the logic prong is met.<sup>140</sup> Still other courts hold that a right of access attaches only if both prongs are satisfied.<sup>141</sup>

Courts also appear uncertain whether the experience and logic test is applicable in situations that do not closely resemble the settings in which the test arose. Although most courts recognize a First Amendment right of access to criminal and civil trials,<sup>142</sup> as well as to

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<sup>136</sup> Lewis F. Weakland, Note, *Confusion in the Courthouse: The Legacy of the Gannett and Richmond Newspapers Public Right of Access Cases*, 59 S. CAL. L. REV. 603, 625 (1986).

<sup>137</sup> Levine, *supra* note 27, at 1758.

<sup>138</sup> Smith, *supra* note 26, at 180–81.

<sup>139</sup> See *infra* notes 145–48 and accompanying text.

<sup>140</sup> See *infra* notes 149–54 and accompanying text.

<sup>141</sup> See *infra* notes 155–60 and accompanying text.

<sup>142</sup> Following the Supreme Court’s decisions in *Richmond Newspapers* and *Globe Newspaper*, nearly all courts have held that the First Amendment requires a presumption of public access to criminal trials. See LEE LEVINE ET AL., *NEWSGATHERING AND THE LAW* § 3.01[3] (4th ed. 2011). Most courts also recognize a First Amendment right of public access to civil trials. See, e.g., *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988); *Westmoreland v. Columbia Broad. Sys., Inc.*, 752 F.2d 16, 23 (2d Cir. 1984); *Publiker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1067–70 (3d Cir. 1984); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1178 (6th Cir. 1983); *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 980 P.2d 337, 358 (Cal. 1999); *Barron v. Fl. Freedom Newspapers, Inc.*, 531 So. 2d 113, 117–18 (Fl. 1988); *Rapid City Journal v. Delaney*, 2011 SD 55, ¶ 17, 804 N.W.2d 388, 395; see also *In re Cont’l Ill. Sec. Litig.*, 732 F.2d 1302, 1308 (7th Cir. 1984) (“[T]he policy reasons for granting public access to criminal proceedings apply to civil cases as well.”); *Newman v. Graddick*, 696 F.2d 796, 801 (11th Cir. 1983) (holding right of access applies to civil trials pertaining to release or incarceration of prisoners); *Del. Coal. for Open Gov’t v. Strine*, 894 F. Supp. 2d 493, 498 (D. Del. 2012) (noting that “every Court of Appeals to consider the issue . . . has held that there is a right of access to civil trials” and citing cases from Second, Third, Fourth, Sixth, Seventh, Eighth, and Eleventh Circuits), *aff’d*, 733 F.3d 510 (3d Cir. 2013). *But see* Ctr. for Nat’l Sec.

many criminal trial-like proceedings,<sup>143</sup> judicial activities that do not fit these precise molds are treated with far more variability. Indecision about the scope of a First Amendment right of access is most acute in cases involving public access to pre-trial civil proceedings, court records, and administrative hearings, but even in the criminal context some courts are reluctant to venture very far from the trial-like proceedings at issue in the *Press-Enterprise* cases.<sup>144</sup> Given the three decades that courts have had to work out these issues since the Supreme Court's *Press-Enterprise* decisions, it is notable that so much uncertainty still remains about the scope of this important First Amendment right.

For many courts, whether there has been a history of public access to a particular court proceeding is determinative of whether a First Amendment right of access exists. For example, in situations where public access has not been a tradition in American law—such as grand jury<sup>145</sup> and settlement<sup>146</sup> proceedings—most courts refuse to recognize a right of access under the First Amendment regardless of whether public access could play a positive role in the functioning of the proceeding in question. Showing how strong the allure of history can be, even courts that do not rely exclusively on the experience prong often place significant weight on whether the proceeding or court record has historically been open to the public. When a proceeding does not have a long history of access, courts have sought to draw analogies with

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Studies v. U.S. Dep't of Justice, 331 F.3d 918, 935 (D.C. Cir. 2003) (“[N]either this Court nor the Supreme Court has ever indicated that it would apply the *Richmond Newspapers* test to anything other than criminal judicial proceedings.”).

<sup>143</sup> See LEVINE ET AL., *supra* note 142, §§ 3.01–3.02. In the criminal context, courts have extended a First Amendment right of access to “preliminary hearings, suppression hearings, bail and detention hearings, competency hearings, and plea hearings.” *Id.* § 3.01[1] (“Today, almost all pretrial [criminal] proceedings are presumptively open.”). Even though the Federal Rules of Civil Procedure and many state court rules call for open civil trials, *see id.* § 3.02, we see far more variability in the application of a First Amendment right to pre-trial civil proceedings. *See id.* § 3.02[2]–[5].

<sup>144</sup> See, e.g., *People v. Kelly*, 921 N.E.2d 333, 358–59 (Ill. App. Ct. 2009) (finding no First Amendment right of access to criminal pre-trial hearings on jury questionnaires or the State's other crimes evidence); *Eagle-Tribune Publ'g Co. v. Clerk-Magistrate*, 863 N.E.2d 517, 524–26 (Mass. 2007) (finding no First Amendment right of access to show cause hearings because they “bear[] little resemblance to a trial”); *Tacoma News, Inc. v. Cayce*, 256 P.3d 1179, 1187, 1191 (Wash. 2011) (rejecting right of access to transcript and videotape of prisoner's deposition in criminal case taken in closed courtroom with judge present because it resembled “mere discovery”).

<sup>145</sup> See, e.g., *United States v. Index Newspapers L.L.C.*, 766 F.3d 1072, 1084 (9th Cir. 2014); *In re N.Y. Times Co. to Unseal Wiretap & Search Warrant Materials*, 577 F.3d 401, 410 & n.4 (2d Cir. 2009); *In re Donovan*, 801 F.2d 409, 410 (D.C. Cir. 1986) (per curiam).

<sup>146</sup> See, e.g., *Cincinnati Gas & Elec. Co. v. Gen. Elec. Co.*, 854 F.2d 900, 903–04 (6th Cir. 1988); *United States v. Town of Moreau*, 979 F. Supp. 129, 133 (N.D.N.Y. 1997), *aff'd sub nom.* *United States v. Glens Falls Newspapers, Inc.*, 160 F.3d 853 (2d Cir. 1998).

proceedings that do have an established history of openness<sup>147</sup> or have relied on the history, however short, of the specific proceeding involved.<sup>148</sup>

Other courts discount the importance of history in favor of examining the logic of public access, focusing on whether public access “plays a significant positive role in the functioning of the particular process in question.”<sup>149</sup> In *Press-Enterprise II*, the Supreme Court itself noted that several courts had held that a right of access attaches to pre-trial proceedings even when those proceedings had “no historical counterpart.”<sup>150</sup> Since *Press-Enterprise II*, courts have continued to find a right of access in circumstances where no extensive history of access can be demonstrated if the logic of openness supports a right of access.<sup>151</sup> In *Seattle Times Co. v. United States District Court*,<sup>152</sup> for example, the United States Court of Appeals for the Ninth Circuit held that public access to pre-trial detention hearings should not be foreclosed simply because these proceedings do not have an “unbroken history of public access.”<sup>153</sup> Reasoning that because pre-trial detention hearings deal with issues that “are often important to a full understanding of the way in which the judicial process and the

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<sup>147</sup> See, e.g., *United States v. A.D.*, 28 F.3d 1353, 1358 (3d Cir. 1994) (“[T]he detention and delinquency proceedings called for in the Act are closely analogous to criminal proceedings . . . .”); *Soc’y of Prof’l Journalists v. Sec’y of Labor*, 616 F. Supp. 569, 575 (D. Utah 1985) (analogizing administrative fact-finding proceedings to civil trials, which enjoyed long history of openness), *appeal dismissed and judgment below vacated and remanded as moot*, 832 F.2d 1180 (10th Cir. 1987); *Freitas v. Admin. Dir. of the Courts*, 92 P.3d 993 (Haw. 2004) (comparing Administrative Driver’s License Revocation Office proceedings to deportation proceedings and Civil Service Commission hearings).

<sup>148</sup> See, e.g., *Index Newspapers, L.L.C.*, 766 F.3d at 1094–95 (holding that a right of access attached to transcripts of confinement status hearings despite lack of evidence supporting a history of openness); *United States v. Simone*, 14 F.3d 833, 837–40 (3d Cir. 1994) (holding that a right of access attached to post-trial inquiries into jury misconduct even though the practice had only had a fourteen-year recorded history); *First Amendment Coal. v. Judicial Inquiry & Review Bd.*, 784 F.2d 467, 469 n.1, 472 (3d Cir. 1986) (concluding that public access must be guided by “unique history and function” of fourteen-year-old Judicial Review Board).

<sup>149</sup> *Press-Enterprise II*, 478 U.S. 1, 8 (1986).

<sup>150</sup> *Id.* at 10 n.3.

<sup>151</sup> See, e.g., *Simone*, 14 F.3d at 840 (recognizing right of access to post-trial hearing in criminal case even though “experience provides little guidance”); *United States v. Suarez*, 880 F.2d 626, 631 (2d Cir. 1989) (finding right of access to fee request forms from court-appointed counsel despite the lack of a “tradition” of openness under a recent statute requiring such applications); *Seattle Times Co. v. U.S. Dist. Court*, 845 F.2d 1513, 1516–17 (9th Cir. 1988) (discounting the historical aspect of the *Press-Enterprise II* test and holding that a right of access attaches to pre-trial detention hearings); *United States v. Doherty*, 675 F. Supp. 719, 722 (D. Mass. 1987) (“While the history of post-verdict interviews appears scant, the broad latitude afforded the press in gathering news, especially in recent years, tends to favor accessibility [sic] in this areas as well.”).

<sup>152</sup> 845 F.2d 1513.

<sup>153</sup> *Id.* at 1516 (“This history and the prevalent use of informal procedures should not automatically foreclose a right of access.”).

government as a whole are functioning,” the court concluded that the same societal interests that mandated a First Amendment right of access in *Globe Newspaper* apply to pre-trial detention hearings.<sup>154</sup>

A majority of courts, however, do treat the experience and logic test as a two-part test and require that both prongs be established before a First Amendment right of access attaches to a particular court proceeding or record.<sup>155</sup> But this does not mean that these courts agree as to what is required to satisfy the individual prongs. In fact, it is not unusual to see different courts come to opposite conclusions when they apply the experience and logic test to the same or similar proceedings. Application of the test has thus led to inconsistent results in a wide variety of cases, including civil commitment proceedings,<sup>156</sup> deportation proceedings,<sup>157</sup> guardianship proceedings,<sup>158</sup> judicial misconduct hearings,<sup>159</sup> and juvenile proceedings.<sup>160</sup> We also see a great deal of variability in the approaches that courts take with regard to court records.<sup>161</sup> As a consequence, there is considerable variance from state to state—and sometimes even from judge to judge—with regard to whether many types of court proceedings and records are open to public scrutiny.

## 2. The Limits of Experience and Logic

The problems with the experience and logic test, however, run much deeper than the idiosyncratic assessments of the history and logic

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<sup>154</sup> *Id.* at 1516–17.

<sup>155</sup> See Levine, *supra* note 27, at 1778 n.242 (citing cases).

<sup>156</sup> See LEVINE ET AL., *supra* note 142, § 3.03 (citing cases).

<sup>157</sup> Compare *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002) (finding a First Amendment right of access to deportation proceedings and associated records), with *N. Jersey Media Grp., Inc. v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002) (finding no First Amendment right of access to deportation proceedings or records and explicitly disagreeing with *Detroit Free Press*).

<sup>158</sup> Compare *N.J. Div. of Youth & Family Servs. v. J.B.*, 576 A.2d 261 (N.J. 1990) (finding a First Amendment right of access to guardianship hearings), with *Mayer v. State*, 523 So. 2d 1171 (Fla. Dist. Ct. App. 1988) (finding no First Amendment right of access to guardianship/custody hearings).

<sup>159</sup> Compare *Bradbury v. Idaho Judiciary Council*, 28 P.3d 1006 (Idaho 2001) (finding no First Amendment right of access to Judiciary Council proceedings), with *Griffen v. Ark. Judicial Discipline & Disability Comm’n*, 247 S.W.3d 816 (Ark. 2007) (finding formal probable-cause meeting of the Judicial Discipline Commission should have been open to the public where the judge waived confidentiality and judicial discipline may be imposed, but avoiding the First Amendment question).

<sup>160</sup> Compare *In re Application for News Media Coverage in the Matter of M.S.*, 662 N.Y.S.2d 207, 209 (Fam. Ct. 1997) (finding First Amendment right of access to delinquency proceeding), with *In re J. S.*, 438 A.2d 1125 (Vt. 1981) (affirming mandatory closure of all juvenile court proceedings).

<sup>161</sup> See *infra* notes 240–43 and accompanying text.

of openness in particular court proceedings. The real problem is that the experience and logic prongs focus on the wrong things when evaluating whether public access should be required under the First Amendment. By ignoring the role that court transparency plays in our constitutional structure, the test turns out to be both too broad and too narrow a gauge for determining whether a right of public access exists.

a. Experience Is a Poor Guide for a Constitutional Right of Access

There are several reasons that experience is a poor guide for a constitutional right of access. First, uncertainty inevitably arises concerning how long public access must continue for there to be a “tradition of accessibility.” Second, and more fundamentally, it is not at all clear why the past provision of public access should be determinative of the First Amendment’s contemporary reach.

As the preceding Section noted, the lower courts have struggled to come up with a consistent yardstick for evaluating whether public access has been sufficiently longstanding to satisfy the Court’s requirement of a tradition of accessibility.<sup>162</sup> This has generated confusion and frustration for both judges and access advocates. As the prominent First Amendment lawyer Lee Levine has lamented, the Court’s experience prong has left lawyers who represent the media wondering: “How long must public access exist for there to be a tradition of openness? How widespread must a tradition of public access to a particular proceeding be before openness is blessed by the judgment of experience?”<sup>163</sup>

Part of the problem is due to the contrasting traditions of public access in different courts and in various parts of the country. Although the Supreme Court has clarified that a court should consider the history of access “throughout the United States” when assessing the experience prong,<sup>164</sup> the fact remains that public access has varied historically from state to state. While past experience may provide a useful guidepost in some situations, the lack of a tradition of openness should not be determinative of whether a First Amendment right of access attaches to a particular proceeding or record.

The idea that history should inform the analysis of when a First Amendment right of access exists originated in Chief Justice Burger’s plurality opinion in *Richmond Newspapers*, in which he concluded that the First Amendment “prohibit[s] government from summarily closing courtroom doors which had long been open to the public at the time

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<sup>162</sup> See *supra* notes 145–48 and accompanying text.

<sup>163</sup> LEVINE ET AL., *supra* note 142, § 2.02[8].

<sup>164</sup> *El Vocero de Puerto Rico v. Puerto Rico*, 508 U.S. 147, 150 (1993).

that Amendment was adopted.”<sup>165</sup> This use of tradition is understandable. If, as Burger wrote, the First Amendment is intended to “prohibit government from limiting the stock of information from which members of the public may draw,”<sup>166</sup> then it makes sense to say that it prevents the government from closing court proceedings that have long been open to the public.

It does not follow, however, that the converse should be true: that the absence of historical access forecloses a First Amendment right of access. Under such an approach, courts can inoculate themselves from a First Amendment right of access by consistently refusing to open their proceedings to the public. Although tradition can be a useful consideration in assessing the legitimacy of the government’s interests in closure, its value is limited when determining whether a First Amendment right of access exists in the first place.<sup>167</sup> As Heidi Kitrosser notes, evaluating “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.”<sup>168</sup> Justice Brennan, who concurred in *Richmond Newspapers* and wrote for the Court in *Globe Newspaper*, took pains to tie the Court’s consideration of history to broader concerns, noting that a past history of access is “significant in constitutional terms not only ‘because the Constitution carries the gloss of history,’ but also because ‘a tradition of accessibility implies the favorable judgment of experience.’”<sup>169</sup>

The history of public access to a particular proceeding or record should be relevant, if at all, because it informs the analysis of whether public access advances constitutional values. In other words, history can aid a court’s consideration of the benefits of access, but it does not substitute for it. Just because a court proceeding has been open in the past does not mean that the First Amendment should require that it remain open; similarly, a lack of historical access should not preclude the recognition of a right of access in the future. As Judge Kimba Wood has observed:

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<sup>165</sup> *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 (1980).

<sup>166</sup> *Id.* at 576 (quoting *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 783 (1978)).

<sup>167</sup> The Supreme Court’s inconsistent use of history in interpreting the scope of First Amendment rights has been criticized in other contexts as well. See Mary-Rose Papandrea, *The Government Brand*, 110 NW. U. L. REV. 1195, 1210 (2016) (“If the Court consistently relied on history, it would be forced to roll back protections it has extended for all sorts of speech that were traditionally unprotected (or at least not clearly protected), and perhaps extend protections to speech that the Court has excluded, such as obscenity.”).

<sup>168</sup> Kitrosser, *supra* note 27, at 114.

<sup>169</sup> *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 605 (1982) (quoting *Richmond Newspapers*, 448 U.S. at 589 (Brennan, J., concurring)).

[I]f the reasons why things were the way they were then have largely disappeared, or if new aspects of an old proceeding have changed that proceeding's nature, then we do not really have the judgment of experience—because that which experience judged no longer exists. In other words, things developed the way they did for particular reasons, and took into account the circumstances that existed and the values that were important back then; unless we also examine whether our circumstances and our values should prompt us to maintain the tradition, we risk making the wrong decisions on access and of erring either on the side of openness or of closure.<sup>170</sup>

When we make history determinative of future rights of access, we lock in a static set of practices that may have little to do with the First Amendment justification for public access in the first place. Indeed, it makes little sense to utilize a test that says that the public's right of access to the courts is limited to what the public could observe in 1789 or even 1868, when the Fourteenth Amendment was ratified. The fact is, our judicial system is constantly evolving. Take criminal law as an example. Criminal cases are increasingly resolved without any pre-trial appearances by a defendant, let alone a full blown jury trial; today, most criminal cases go straight from indictment to plea, with no suppression hearing, no presentation of evidence, and no examination of witnesses.<sup>171</sup>

b. The Logic Prong Is Focused on the Wrong Things

Although some judges and commentators have called for jettisoning the experience prong,<sup>172</sup> it would be a pyrrhic victory for

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<sup>170</sup> Kimba M. Wood, *Reexamining the Access Doctrine*, 69 S. CAL. L. REV. 1105, 1109 (1996). Oliver Wendell Holmes made a similar point when he famously wrote that “[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.” Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897). Holmes went on to remark that “[i]t is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.” *Id.*

<sup>171</sup> See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2466 n.9 (2004) (“In fiscal year 2000, of 69,283 criminal cases disposed of in federal district court by trial or plea (thus excluding dismissals), 64,939 (93.7%) were disposed of by pleas of guilty or nolo contendere. In 2000, of approximately 924,700 felony convictions in state courts, about 879,200 (95%) were by guilty plea. Though it is impossible to be sure, most of these pleas probably resulted from plea bargains.” (internal citations omitted)).

<sup>172</sup> See, e.g., *United States v. Chagra*, 701 F.2d 354, 363 (5th Cir. 1983) (“Because the first amendment must be interpreted in the context of current values and conditions, the lack of an historic tradition of open bail reduction hearings does not bar our recognizing a right of access to such hearings.” (citations omitted)); *Barber v. Shop-Rite of Englewood & Assocs., Inc.*, 923 A.2d 286, 292 (N.J. Super. Ct. App. Div. 2007) (concluding that the history prong “provides little guidance”); Olson, *supra* note 27, at 490 (arguing that “[h]istorical tradition alone cannot be dispositive”); Alice Cole Ortiz, Note, *Our “Eternal Struggle Between Liberty and Security”: A First Amendment Right of Access to Deportation Hearings*, 55 BAYLOR L. REV. 1203, 1234–37 (2003) (proposing a replacement test that looks to whether a proceeding involves liberty or

clarity to rely solely on the logic prong—as it is currently understood—to determine whether a First Amendment right of access exists. When we examine how courts apply the logic prong, we see two related problems that limit its efficacy as a threshold test for a right of access under the First Amendment.

First, courts take too narrow a view of the benefits of openness, focusing only on the role that public access plays in a particular court proceeding and eschewing a broader structural perspective that considers how public access advances democratic self-government. While the Supreme Court alluded to the structural benefits of public access in *Richmond Newspapers* and *Globe Newspaper*,<sup>173</sup> the test it laid out in *Press-Enterprise II* directs courts to assess the benefits of access to the functioning of the specific proceeding in question.<sup>174</sup> As a result, the Court's access cases have left the lower courts confused as to which values matter most when considering public access claims: the benefits that public access confers on a specific proceeding; the impact that public access has on the court system as a whole; or the structural role that access serves by exposing the public to information necessary for self-governance. Most courts focus on the first of these benefits with an occasional mention of the value of openness to the overall system of justice. Very few courts spend any time analyzing the third, and most important, benefit of public access: the role that court transparency plays in our constitutional system.<sup>175</sup>

Second, because courts focus on the role that access plays in individual court proceedings, the logic prong ends up being too indeterminate to facilitate reasoned line drawing between proceedings where public access would advance First Amendment values and those in which secrecy is necessary to preserve other interests.<sup>176</sup> Although an inquiry directed at assessing whether public access is important to the functioning of a specific court proceeding has intuitive appeal, such a narrow view of the logic of openness fails to provide useful guidance to courts when evaluating cases where there are significant competing interests opposing openness. For example, public access will almost certainly enhance the perception of fairness, discourage perjury, and reduce the influence of bias and partiality in nearly every court

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property interests and whether due process rights are required); see also Michelle Kundmueller, *The Devil Is in All the Details (Not Just in Georgia)*, 13 FIRST AMEND. L. REV. 221, 260–61 (2014) (rejecting the use of history as a determinate of constitutional rights generally).

<sup>173</sup> See *supra* notes 100–06 and accompanying text.

<sup>174</sup> *Press-Enterprise II*, 478 U.S. 1, 8 (1986) (commanding courts to assess “whether public access plays a significant positive role in the functioning of the particular process in question”).

<sup>175</sup> See *infra* Section II.B.

<sup>176</sup> See, e.g., Kitrosser, *supra* note 27, at 99, 115; Weakland, *supra* note 136, at 620–21.

proceeding.<sup>177</sup> It is difficult to imagine a court proceeding in which public access would not further its functioning to some degree. Justice Stevens pointed this out in his dissent in *Press-Enterprise II*, arguing that the Court's logic test could require that even grand jury proceedings be open to the public.<sup>178</sup>

All of which is to say that although the experience and logic test ostensibly offers a way for courts to evaluate public access claims, in practice it leaves courts with little actual guidance in deciding difficult cases.

### 3. The Danger of Ad Hoc Balancing

Because of uncertainty about how to apply the experience and logic test, many courts default to a form of ad hoc balancing, treating public access as simply one of many equally important competing considerations. Courts that engage in such balancing subvert the Supreme Court's two-step approach to evaluating access claims. Under the framework laid out in *Globe Newspaper* and further refined in the *Press-Enterprise* cases, courts are first charged with determining whether a right of access exists under the First Amendment by examining whether there has been a history of public access and whether public access would play a significant positive role in the functioning of the process in question.<sup>179</sup> If this threshold test is met, a right of access attaches and the proceeding is presumptively open to the public unless closure is necessary to serve a compelling interest, and is narrowly tailored to serve that interest.<sup>180</sup>

Rather than apply this two-step inquiry, which makes the benefits of public access a primary consideration in whether a First Amendment right of access attaches to the proceeding in question, some courts simply evaluate all of the competing interests at once.<sup>181</sup> In doing so,

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<sup>177</sup> See, e.g., *United States v. Criden*, 675 F.2d 550, 556 (3d Cir. 1982) (identifying "at least six societal interests" advanced by public access and finding that these interests supported a First Amendment right of access to pre-trial suppression, due process, and entrapment hearings).

<sup>178</sup> *Press-Enterprise II*, 478 U.S. at 25–26 (Stevens, J., dissenting). Stevens warned: "[T]here are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow." *Id.* at 28 (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 588 (Brennan, J., concurring)).

<sup>179</sup> See *supra* notes 114–18 and accompanying text.

<sup>180</sup> The Supreme Court has used slightly different wording for evaluating the state's interests supporting closure, but the test basically matches the Court's strict scrutiny test as applied in other First Amendment contexts. See *infra* notes 436–41 and accompanying text.

<sup>181</sup> See, e.g., *Times Mirror Co. v. United States*, 873 F.2d 1210, 1213 (9th Cir. 1989) ("[T]he public has no right of access to a particular proceeding without first establishing that the benefits of opening the proceedings outweigh the costs to the public."); *Cincinnati Gas & Elec. Co. v. Gen. Elec. Co.*, 854 F.2d 900, 904 (6th Cir. 1988) (balancing interest in closure against

they discount the benefits of access and overweigh the interests in closure. Whereas the Supreme Court's two-step approach requires that the interests supporting closure be compelling, courts that engage in ad hoc balancing can avoid this high standard for closure if they conclude at the threshold that *on balance* public access does not play a significant positive role in the proceeding. For many courts, their analysis ends with just such a balancing of interests, which is increasingly becoming the de facto test for a First Amendment right of access.<sup>182</sup>

A simple balancing test for access is especially appealing to judges because it offers greater flexibility than the more stringent requirements outlined in *Globe Newspaper* and the *Press-Enterprise* cases.<sup>183</sup> In fact, this was the approach put forth by Justice Stevens in his dissent in *Press-Enterprise II*.<sup>184</sup> Yet the Court has been reluctant to adopt ad hoc balancing in First Amendment cases because such tests are highly subjective and open ended.<sup>185</sup> Furthermore, balancing tests cannot account for the presumption of public access the First Amendment requires. A majority of the Court rejected this approach in *Press-Enterprise II*, preferring to apply a threshold test focused on the benefits of openness followed by an assessment of whether the interests supporting closure are compelling.<sup>186</sup>

Two circuit court decisions in cases involving public access to deportation proceedings illustrate the problems that invariably follow when courts engage in ad hoc balancing under the logic prong. In

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limitation of First Amendment freedom as a substitute for an assessment of whether access plays a positive role in the functioning of summary jury trials); *Crowe v. Cty. of San Diego*, 210 F. Supp. 2d 1189, 1197 (S.D. Cal. 2002) (balancing fair trial concerns against the value of access as part of the logic prong); *B.H. v. Ryder*, 856 F. Supp. 1285, 1290 (N.D. Ill. 1994) (considering a number of logistical complications in opening the particular conferences in question and failing to articulate whether a right attached in the first place). Some courts skip any analysis of the benefits of access and go straight to the disadvantages. *See, e.g., Ky. Press Ass'n v. Kentucky*, 355 F. Supp. 2d 853, 864 (E.D. Ky. 2005) (considering only the drawbacks of public access to juvenile delinquency proceedings and concluding that "opening juvenile proceedings would frustrate the purpose of juvenile court" by "depriv[ing] the juvenile of a fair trial" and "diminish[ing] . . . [the] prospect for rehabilitation").

<sup>182</sup> As Raleigh Hannah Levine notes, courts that apply this "atypical logic prong analysis . . . consistently . . . find[] that the proceeding fails the logic prong and that no access right attaches." Levine, *supra* note 27, at 1743.

<sup>183</sup> *See, e.g., Michael J. Hayes, Note, What Ever Happened to 'The Right to Know'?: Access to Government-Controlled Information Since Richmond Newspapers*, 73 VA. L. REV. 1111, 1137 (1987) (noting the flexibility offered by a balancing test).

<sup>184</sup> *Press-Enterprise II*, 478 U.S. 1, 28–29 (1986) (Stevens, J., dissenting).

<sup>185</sup> *See, e.g., United States v. Stevens*, 559 U.S. 460, 470–71 (2010) ("The Government thus proposes that . . . [w]hether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs.' As a free-floating test for First Amendment coverage, that sentence is startling and dangerous. The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits." (citations omitted)).

<sup>186</sup> *Press-Enterprise II*, 478 U.S. at 7–9.

*Detroit Free Press v. Ashcroft*,<sup>187</sup> members of the press and public brought actions against the U.S. Attorney General seeking a declaration that the closure of “special interest” deportation proceedings after the attacks on September 11, 2001 violated their First Amendment right of access.<sup>188</sup> The Sixth Circuit began its analysis of the plaintiffs’ First Amendment claim by concluding that the case would be governed by the experience and logic test, rejecting the government’s argument that the test is inapplicable to deportation proceedings.<sup>189</sup> As to the first prong of the test, the court found that a wealth of evidence supported the conclusion that deportation proceedings historically have been open.<sup>190</sup>

Turning to the logic prong, the Sixth Circuit concluded that “[p]ublic access undoubtedly enhances the quality of deportation proceedings.”<sup>191</sup> According to the court, “public access acts as a check on the actions of the Executive by assuring us that proceedings are conducted fairly and properly”; “openness ensures that government does its job properly [and] that it does not make mistakes”; and, “after the devastation of September 11 and the massive investigation that followed,” open deportation proceedings “serve a ‘therapeutic’ purpose as outlets for ‘community concern, hostility, and emotions.’”<sup>192</sup> Quoting Justice Brennan’s opinion in *Globe Newspaper*, the Sixth Circuit also remarked that public access to deportation proceedings “helps ensure that ‘the individual citizen can effectively participate in and contribute to our republican system of self-government.’”<sup>193</sup> As to this latter benefit, the court went on to observe:

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<sup>187</sup> 303 F.3d 681 (6th Cir. 2002).

<sup>188</sup> *Id.* at 682–83. On September 21, 2001, Chief Immigration Judge Michael Creppy issued a directive to all United States Immigration Judges requiring closure of “special interest” cases. *Id.* at 683. The directive required that “all proceedings in such cases be closed to the press and public, including family members and friends.” *Id.* at 684.

<sup>189</sup> *Id.* at 695. According to the court, the experience and logic test is not limited solely to criminal proceedings and other courts have properly applied the test to administrative proceedings. *Id.* (citing *United States v. Miami Univ.*, 294 F.3d 797, 824 (6th Cir. 2002) (university’s student disciplinary board proceedings); *Brown & Williamson Tobacco Corp. v. FTC.*, 710 F.2d 1165, 1177–79 (6th Cir. 1983) (civil action against administrative agency); *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059 (3d Cir. 1984) (civil trial); *Whiteland Woods, L.P. v. Twp. of W. Whiteland*, 193 F.3d 177, 181 (3d Cir. 1999) (municipal planning meeting); *Cal-Almond, Inc. v. U.S. Dep’t of Agric.*, 960 F.2d 105, 109 (9th Cir. 1992) (agriculture department’s voters list); *Soc’y of Prof. Journalists v. Sec’y of Labor*, 616 F. Supp. 569, 574 (D. Utah 1985) (administrative hearing), *vacated as moot*, 832 F.2d 1180 (10th Cir. 1987)).

<sup>190</sup> *Id.* at 701–03 (noting that the first general immigration act was enacted in 1882; the tradition had been to conduct open deportation proceedings, and deportation proceedings have been presumptively open to the public by statute since 1965).

<sup>191</sup> *Id.* at 703.

<sup>192</sup> *Id.* at 703–04 (quoting *Richmond Newspapers v. Virginia*, 448 U.S. 555, 571 (1980)).

<sup>193</sup> *Id.* at 704 (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982)).

“[A] major purpose of [the First Amendment] was to protect the free discussion of governmental affairs.” Public access to deportation proceedings helps inform the public of the affairs of the government. Direct knowledge of how their government is operating enhances the public’s ability to affirm or protest government’s efforts. When government selectively chooses what information it allows the public to see, it can become a powerful tool for deception.<sup>194</sup>

Having found a First Amendment right of access to deportation hearings, the Sixth Circuit concluded that the closure of all “special interest” deportation proceedings, while justified by a compelling interest in national security,<sup>195</sup> was not “narrowly tailored to serve that interest.”<sup>196</sup> According to the court, the government’s wholesale closure of these deportation proceedings was over-inclusive and indiscriminate.<sup>197</sup> If a hearing will disclose information that is likely to harm national security, that information “could be kept from the public on a case-by-case basis through protective orders or in camera review.”<sup>198</sup>

Following closely on the heels of the Sixth Circuit’s decision in *Detroit Free Press*, the Third Circuit considered a nearly identical set of facts in *North Jersey Media Group, Inc. v. Ashcroft (NJMG)*.<sup>199</sup> In *NJMG*, a consortium of media organizations also sought access to “special interest” deportation hearings.<sup>200</sup> Just as the Sixth Circuit had done, the Third Circuit concluded that the case was governed by the experience and logic test, but it came to the opposite conclusion regarding whether the test was satisfied.<sup>201</sup> Whereas the Sixth Circuit had found ample evidence that deportation proceedings have historically been open to the public,<sup>202</sup> the Third Circuit concluded that the hearings failed the experience prong.<sup>203</sup> Applying an exceedingly high standard for evaluating a history of access, the Third Circuit concluded that while deportation hearings have been presumptively open since at least 1964, when federal regulations began to provide explicitly for public access, “a

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<sup>194</sup> *Id.* at 704–05 (alterations in original) (quoting *Globe Newspaper*, 457 U.S. at 604).

<sup>195</sup> *Id.* at 707.

<sup>196</sup> *Id.* at 705 (quoting *Globe Newspaper*, 457 U.S. at 606–07).

<sup>197</sup> *Id.* at 708.

<sup>198</sup> *Id.*

<sup>199</sup> 308 F.3d 198 (3d Cir. 2002).

<sup>200</sup> *Id.* at 199.

<sup>201</sup> *Id.* at 204–05.

<sup>202</sup> See *supra* note 190 and accompanying text.

<sup>203</sup> *NJMG*, 308 F.3d at 214–15.

recent—and rebuttable—regulatory presumption is hardly the stuff of which Constitutional rights are forged.”<sup>204</sup>

Although the Third Circuit found that a lack of a history of access to deportation proceedings was enough to doom the petitioners’ First Amendment access claim,<sup>205</sup> the court went on to consider whether the logic prong was satisfied. It is in the Third Circuit’s analysis of the logic prong that we see the depth of the problem with the way many courts approach the logic of openness. Instead of considering the interests supporting secrecy in its analysis of whether the closure of the proceedings survived strict scrutiny, the Third Circuit concluded that the arguments for closure “are equally applicable to the question whether openness, on balance, serves a positive role in removal hearings.”<sup>206</sup> Acknowledging that such an approach would result in “overlap between the *Richmond Newspapers* logic prong and the subsequent ‘compelling government interest’ strict scrutiny investigation necessary upon a finding of a First Amendment access right,” the court reasoned that this double counting was proper because it “would simply require that the policy rationales supporting openness be even more compelling than those supporting closure.”<sup>207</sup>

By requiring that the rationales supporting openness must be *more compelling* than the interests supporting closure, the Third Circuit turned the right of public access on its head. Under *Richmond Newspapers* and its progeny, the courts are presumed to be open to the public.<sup>208</sup> Accordingly, public access is the default unless countervailing interests justify closure. Yet under the Third Circuit’s approach, courts are to start with the presumption that court proceedings are closed and must remain so unless the benefits of public access are more compelling than the interests supporting closure.<sup>209</sup> By flipping the presumption of access, the Third Circuit has stacked the deck in favor of closure.

But the Third Circuit’s approach is even more pernicious because of the way the court went about evaluating the relevant interests. In assessing whether “openness, on balance, serves a positive role in removal hearings,”<sup>210</sup> the Third Circuit did not consider the positive and

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<sup>204</sup> *Id.* at 213. The Third Circuit also rejected the argument that despite “undeniable similarities” between deportation proceedings and criminal and civil trials, the case law did not support a right of public access to deportation proceedings. *Id.* at 214–15.

<sup>205</sup> *Id.* at 215–16.

<sup>206</sup> *Id.* at 217.

<sup>207</sup> *Id.* at 217 n.13.

<sup>208</sup> See, e.g., *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 610 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980) (plurality opinion).

<sup>209</sup> See *NJMG*, 308 F.3d at 217 n.13 (conceding that the court’s approach “require[s] that the policy rationales supporting openness be even more compelling than those supporting closure”).

<sup>210</sup> *Id.* at 217.

negative aspects of open deportation hearings generally. Instead, it weighed the benefits of public access to deportation proceedings as a general matter against the negative impacts of public access solely in the “special interest” cases singled out for closure by the government.<sup>211</sup> In other words, the Third Circuit evaluated whether any deportation hearings should be open by focusing only on cases where the interests in closure were strongest. As Heidi Kitrosser observes, the Third Circuit’s application of the logic prong “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.”<sup>212</sup> Judge Scirica made this very point in his dissent, arguing that while closure might be warranted in specific cases, “the demands of national security under the logic prong of *Richmond Newspapers* do not provide sufficient justification for rejecting a qualified right of access to deportation hearings in general.”<sup>213</sup> “To conclude otherwise,” he warned, “would permit concerns relevant only to a discrete class of cases to determine there is no qualified right of access to any of the broad range of deportation proceedings.”<sup>214</sup> This is, of course, precisely what the majority did under the logic prong in *NJMG*.

As the preceding discussion shows, there are deep flaws in the experience and logic test which have led courts to engage in ad hoc balancing to determine whether a First Amendment right of access exists. To be sure, some evaluation of the reasons why closure would be beneficial must be undertaken when considering the logic of public access, but even if public access has a negative impact on a particular proceeding, that does not necessarily mean that the interests in closure outweigh the advantages that public access provides in all hearings of that type.

#### 4. Common-Law Access and the Dilemma of Court Records

As in many areas of First Amendment law, how a court decides the threshold question of whether a First Amendment right is implicated will largely determine whether public access is required at all. Although most courts acknowledge that the public can also have a common-law

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<sup>211</sup> Judge Scirica noted this problem in his dissent: “At [the experience and logic test] 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).

<sup>212</sup> Kitrosser, *supra* note 27, at 125.

<sup>213</sup> *NJMG*, 308 F.3d at 225 (Scirica, J., dissenting).

<sup>214</sup> *Id.*

right of access to court proceedings and their associated records,<sup>215</sup> there is an enormous difference between the standard a judge must employ when considering common-law access claims compared to claims premised on the First Amendment. Whereas the First Amendment requires that restrictions on access must be necessary to serve a compelling interest and be narrowly tailored to serve that interest,<sup>216</sup> a judge need only find under the common law that the interests in closure outweigh the interests in access.<sup>217</sup> Moreover, when there is no First Amendment right of access, judges who impose restrictions on public access are granted broad deference by reviewing courts and are typically subject only to an “abuse of discretion” standard when they restrict access.<sup>218</sup>

Most of the case law regarding a common-law right of access to the courts has arisen in the context of disputes over court records and dockets.<sup>219</sup> The Supreme Court’s only pronouncement on a common-law right of access to the courts came in *Nixon v. Warner Communications, Inc.*,<sup>220</sup> which preceded by two years the Court’s decision in *Richmond Newspapers*, recognizing a First Amendment right of access to criminal trials.<sup>221</sup> In *Nixon*, the press sought access to tape recordings that had been introduced as evidence at the trial of several of

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<sup>215</sup> See, e.g., *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 597 (1978) (recognizing a federal common law “right to inspect and copy public records and documents, including judicial records and documents” (footnote omitted)).

<sup>216</sup> See, e.g., *Press-Enterprise II*, 478 U.S. 1, 13–14 (1986); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982).

<sup>217</sup> See, e.g., *Nixon*, 435 U.S. at 602; *United States v. Graham*, 257 F.3d 143, 153–55 (2d Cir. 2001); *United States v. Beckham*, 789 F.2d 401, 409–10 (6th Cir. 1986). Moreover, unlike a First Amendment right of access, a common law right can be supplanted by statute. See, e.g., *Ctr. for Nat’l Sec. Studies v. U.S. Dep’t of Justice*, 331 F.3d 918, 936 (D.C. Cir. 2003) (“[T]he common law right of access is preempted by FOIA.”).

<sup>218</sup> See, e.g., *United States v. McDougal*, 103 F.3d 651, 657 (8th Cir. 1996); *Belo Broad. Corp. v. Clark*, 654 F.2d 423, 430 (5th Cir. 1981). There is some disagreement among the federal courts of appeal as to whether they should apply a more searching review than abuse of discretion. See *Graham*, 257 F.3d at 148–49 (discussing the disagreement among the circuits but deciding that it could leave the decision to another day because the panel would affirm the district court’s decision under either an abuse of discretion standard or a more stringent standard); *Beckham*, 789 F.2d at 412–13 (applying more searching review); *United States v. Criden*, 648 F.2d 814, 818 (3d Cir. 1981) (same).

<sup>219</sup> See Joe Regalia, *The Common Law Right to Information*, 18 RICH. J.L. & PUB. INT. 89, 101–03 (2015). Indeed, there are only a few cases delineating the common-law right of access to court proceedings. See, e.g., *Doe v. Santa Fe Indep. Sch. Dist.*, 933 F. Supp. 647, 650 (S.D. Tex. 1996) (“[T]he right of the public to attend civil trials is grounded in the First Amendment as well as the common law.”); *Sentinel Star Co. v. Edwards*, 387 So. 2d 367, 374 (Fla. Dist. Ct. App. 1980) (“The press and public had a common law right of access to the hearing.”); *In re Conservatorship of Brownstone*, 594 N.Y.S.2d 31, 32 (App. Div. 1993) (“The statutory and common law of this State have long recognized that civil actions and proceedings should be open to the public in order to ensure that they are conducted efficiently, honestly, and fairly.”).

<sup>220</sup> 435 U.S. 589.

<sup>221</sup> *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (plurality opinion).

President Nixon's former advisors on charges of conspiring to obstruct justice in connection with the Watergate investigation.<sup>222</sup> Although the trial court made transcripts of the recordings available, the press argued that the public should be able to hear the actual conversations, replete with nuance and inflection.<sup>223</sup>

As discussed in Section I.A, the Supreme Court rejected the argument that the First Amendment mandated disclosure of the tapes.<sup>224</sup> Nevertheless, the Court did conclude that the common-law right to “inspect and copy public records and documents, including judicial records and documents,” extended to the tapes.<sup>225</sup> The Court emphasized, however, that this common-law right was not absolute. According to the Court, “[e]very court has supervisory power over its own records and files” and, even when a common-law right of access exists, a court can deny access to its files when they “might . . . become a vehicle for improper purposes.”<sup>226</sup> Although the Court conceded that the balance of interests was close, it found that the Presidential Recordings Act, which provides an administrative procedure for the press to seek release of the tapes, tipped the scale against ordering their disclosure from the trial court's files.<sup>227</sup> The Court also remarked that the public had a chance to listen to the contents of the tapes at the time they were played in open court and requiring release of the physical copies would raise the “danger that the court could become a partner in the use of the subpoenaed material ‘to gratify private spite or promote public scandal,’ with no corresponding assurance of public benefit.”<sup>228</sup>

By focusing on the public availability of the transcripts, the Court sidestepped the question of whether the First Amendment provided a right of access to the tapes.<sup>229</sup> Because the tapes had already been played

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<sup>222</sup> *Nixon*, 435 U.S. at 592–94.

<sup>223</sup> *Id.* at 600.

<sup>224</sup> See *supra* notes 73–76 and accompanying text.

<sup>225</sup> *Nixon*, 435 U.S. at 597 (footnote omitted).

<sup>226</sup> *Id.* at 598.

<sup>227</sup> *Id.* at 600–02. President Nixon, who argued against making the tapes available, asserted a property interest in the tapes, a right to privacy, and executive privilege. *Id.* He also highlighted the “unseemliness” of a court facilitating the commercialization of the tapes. *Id.* at 602. “On respondents’ side of the scales,” the Court noted, “is the incremental gain in public understanding of an immensely important historical occurrence that arguably would flow from the release of aural copies of these tapes, a gain said to be not inconsequential despite the already widespread dissemination of printed transcripts.” *Id.*

<sup>228</sup> *Id.* at 603 (quoting *In re Caswell*, 29 A. 259, 259 (1893)). The Court also noted that the proper method for seeking physical copies of the tapes was through the Presidential Recordings Act. *Id.*

<sup>229</sup> See *Nixon*, 435 U.S. at 609. According to the Court,

the press—including reporters of the electronic media—was permitted to listen to the tapes and report on what was heard. Reporters also were furnished transcripts of the

in open court, the Court determined that “[t]here is no question of a truncated flow of information to the public.”<sup>230</sup> The only issue the Court saw with regard to the First Amendment was whether “copies of the White House tapes—to which the public has never had *physical* access—must be made available for copying.”<sup>231</sup> Seeing this as a case about special access for the press, the Court held that “[t]he First Amendment generally grants the press no right to information about a trial superior to that of the general public,” which could have listened to the tapes in the courtroom.<sup>232</sup> In framing the issue as it did, however, the Court left open the possibility that the First Amendment might have been implicated if the trial court had refused to provide any public access to the contents of the tapes.<sup>233</sup>

The Court’s decision eight years later in *Press-Enterprise II* could have settled the question of whether a First Amendment right of access extends to trial exhibits and other judicial records,<sup>234</sup> but the Court inexplicably failed to do so. In *Press-Enterprise II*, a magistrate judge excluded the press and public from a forty-one day preliminary hearing in a murder case.<sup>235</sup> At the conclusion of the closed hearing, the judge refused to release the transcript and sealed the hearing record.<sup>236</sup> As discussed in greater detail in Section I.A, the Supreme Court applied the experience and logic test to the hearing in question and concluded that it satisfied both prongs of the test for a First Amendment right of access.<sup>237</sup> Rather confusingly, however, the Court analyzed the logic of openness by discussing access to both the preliminary hearing and to the transcript of the hearing as if they were indistinguishable for purposes of satisfying the public’s right of access under the First

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tapes, which they were free to comment upon and publish. The contents of the tapes were given wide publicity by all elements of the media.

*Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> See *supra* notes 73–76 and accompanying text.

<sup>234</sup> *Press-Enterprise II*, 478 U.S. 1 (1986).

<sup>235</sup> *Id.* at 3–4.

<sup>236</sup> *Id.* at 4–5.

<sup>237</sup> *Id.* at 13.

Amendment,<sup>238</sup> yet the Court's statement of its holding mentions only a First Amendment right of access to the preliminary hearing itself.<sup>239</sup>

Perhaps not surprisingly, the Court's analysis in *Press-Enterprise II* left the lower courts uncertain as to whether the First Amendment right of access recognized in *Richmond Newspapers*, *Globe Newspaper*, and the *Press-Enterprise* cases extends to judicial records. A review of the many cases involving public access claims to court records reveals that the courts have largely taken one of three approaches to the question of public access: some courts bypass a First Amendment inquiry and simply apply a common-law test for access;<sup>240</sup> other courts analyze whether a First Amendment right applies to the record in question by examining whether the judicial proceeding that the record is associated with passes the experience and logic test;<sup>241</sup> and still other courts apply the experience and logic test to the court record itself.<sup>242</sup> In fact, several federal circuits cannot seem to make up their minds and apply more than one approach.<sup>243</sup>

Because of these divergent approaches to resolving disputes over public access, it is possible that a court proceeding could be subject to a First Amendment right of access—with the attendant requirement that closure must pass strict scrutiny and survive narrow tailoring—but the documents associated with that proceeding are subject only to a common-law right that leaves their fate to the discretion of the trial

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<sup>238</sup> Compare *id.* at 12–13 (“[T]he absence of a jury, long recognized as ‘an inestimable safeguard against the corrupt or overzealous prosecutor and against the complaint, biased, or eccentric judge,’ makes the importance of public access to a preliminary hearing even more significant.” (quoting *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968))), with *id.* at 13 (“Denying the transcript of a 41-day preliminary hearing would frustrate what we have characterized as the ‘community therapeutic value’ of openness.” (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 570 (1980) (plurality opinion))).

<sup>239</sup> *Id.* (“We therefore conclude that the qualified First Amendment right of access to criminal proceedings applies to preliminary hearings as they are conducted in California.”).

<sup>240</sup> See, e.g., *United States v. Amodio*, 71 F.3d 1044, 1049 (2d Cir. 1995); *United States v. Webbe*, 791 F.2d 103, 106 (8th Cir. 1986); *United States v. Edwards*, 672 F.2d 1289, 1294 (7th Cir. 1982); *Howard v. State*, 291 P.3d 137, 142 (Nev. 2012).

<sup>241</sup> See, e.g., *United States v. Antar*, 38 F.3d 1348, 1359–60 (3d Cir. 1994); *United States v. Haller*, 837 F.2d 84, 87 (2d Cir. 1988); *In re Nat'l Broad. Co., Inc.*, 828 F.2d 340, 342–44 (6th Cir. 1987); *In re Wash. Post Co.*, 807 F.2d 383, 389–90 (4th Cir. 1986).

<sup>242</sup> See, e.g., *Wash. Post v. Robinson*, 935 F.2d 282, 288 (D.C. Cir. 1991); *Oregonian Publ'g Co. v. U.S. Dist. Court*, 920 F.2d 1462, 1466 (9th Cir. 1990); *United States v. Corbitt*, 879 F.2d 224, 229 (7th Cir. 1989); *In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d 569, 573 (8th Cir. 1988); *United States v. Smith*, 776 F.2d 1104, 1111–12 (3d Cir. 1985); *Associated Press v. U.S. Dist. Court*, 705 F.2d 1143, 1145 (9th Cir. 1983).

<sup>243</sup> Compare *Antar*, 38 F.3d at 1359–60 (applying experience and logic test to court records), with *Smith*, 776 F.2d at 1111–12 (applying experience and logic test to proceeding associated with records); *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 92–96 (2d Cir. 2004) (applying experience and logic test to court dockets), with *In re N.Y. Times Co.*, 828 F.2d 110, 114 (2d Cir. 1987) (applying experience and logic test to proceeding associated with records).

court.<sup>244</sup> Of course, the converse situation can occur as well in which there is a First Amendment right of access to the documents but not to the proceeding itself.<sup>245</sup> This can lead to some anomalous results where the public has only partial access to the workings of the courts.<sup>246</sup>

Returning to our earlier criticism of the Supreme Court's experience and logic test, we can see that the test is particularly ill suited to dealing with public access claims directed at court records. Court records may not share the same history of public access as court proceedings and, as to the logic of public access, the interests implicated by public access to court proceedings and their associated records may be quite different. In fact, the test may point in opposite directions. For example, even when a court proceeding has traditionally been closed to the public, there may still be a history of public access to the transcript of the proceeding.<sup>247</sup> Similarly, under the logic prong, allowing public access to a court proceeding might affect its functioning, but with the

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<sup>244</sup> See, e.g., *Corbitt*, 879 F.2d at 228–29 (finding only a common-law right of access to pre-trial sentence reports despite First Amendment right of access to the proceedings); *United States v. Gotti*, 322 F. Supp. 2d 230, 249–50 (E.D.N.Y. 2004) (recognizing First Amendment right of access to sentencing hearing but finding no right of access to presentence letters sent directly to the court); *Times Herald Printing Co. v. Jones*, 717 S.W.2d 933, 938–39 (Tex. Ct. App. 1986) (noting that even if a First Amendment right of access applies to civil trials, the “limited” common-law access right to the judicial records meant that the records could be sealed at the court’s discretion), *vacated for lack of jurisdiction*, 730 S.W.2d 648 (Tex. 1987).

<sup>245</sup> See, e.g., *Gunn*, 855 F.2d at 573 (finding no First Amendment right of access to search warrant proceedings but nevertheless determining that a First Amendment right attaches to documents filed in support of search warrants); *Edwards*, 823 F.2d at 117–19 (finding no First Amendment right of access to mid-trial questioning of jurors regarding potential misconduct, but holding that a right of access attached to the transcript of the hearing); *United States v. Koubriti*, 252 F. Supp. 2d 424, 436 (E.D. Mich. 2003) (holding that closure of voir dire in terrorism trial did not violate First Amendment right of access so long as transcript was released).

<sup>246</sup> See *Antar*, 38 F.3d at 1360 (“It would be an odd result indeed were we to declare that our courtrooms must be open, but that transcripts of the proceedings occurring there may be closed, for what exists of the right of access if it extends only to those who can squeeze through the door?”); *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 504 (1st Cir. 1989) (finding First Amendment right of access to criminal court records and stating, “[i]f the press is to fulfill its function of surrogate, it surely cannot be restricted to report on only those judicial proceedings that it has sufficient personnel to cover contemporaneously”). *But see* *United States v. McVeigh*, 119 F.3d 806, 812 (10th Cir. 1997) (“There is not yet any definitive Supreme Court ruling on whether there is a constitutional right [in addition to the common-law right] of access to court documents and, if so, the scope of such a right.”).

<sup>247</sup> See, e.g., *United States v. A.D.*, 28 F.3d 1353, 1362 n.8 (3d Cir. 1994) (“There well may be situations in which a proper weighing of the public’s interest and the interests of the juvenile will call for a denial of access to a hearing and nevertheless require access at a later point to the transcript of that hearing.”); *Edwards*, 823 F.2d at 116–18 (“We conclude that the first amendment guarantees a limited right of access to the record of closed proceedings concerning potential jury misconduct and raises a presumption that the transcript of such proceedings will be released within a reasonable time.”); *Alvarez v. Superior Court*, 64 Cal. Rptr. 3d 854, 864–65 (Ct. App. 2007) (applying California statute that required closure of grand jury proceedings but granted public access to post-indictment grand jury transcripts).

passage of time those concerns may dissipate and, thus, access to the transcript or other records would not necessarily have the same effect on the logic of openness.<sup>248</sup>

Given the confusion in the lower courts about the experience and logic test's applicability and appropriate application to court records, many courts disregard the two-part test just as we saw in the context of court proceedings, and either engage in an outright balancing of interests,<sup>249</sup> or ignore the First Amendment completely and apply the common-law test for access.<sup>250</sup>

Although the common-law test does force judges to start with a presumption of public access, it grants them too much discretion to restrict access. As others have observed, “[t]here are virtually no clear standards [under the common law] guiding the court’s decision, and the determination is inherently fact-based.”<sup>251</sup> Remarking on the discretionary nature of the common-law balancing test, the Supreme Court wrote in *Nixon*:

It is difficult to distill from the relatively few judicial decisions a comprehensive definition of what is referred to as the common-law right of access or to identify all the factors to be weighed in determining whether access is appropriate. . . . [T]he decision as to access is one best left to the sound discretion of the trial court, a

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<sup>248</sup> See, e.g., *B.H. v. McDonald*, 49 F.3d 294, 301 (7th Cir. 1995) (“We do not hereby deny the public a right of access to *information* about the in-chambers hearings; rather, we hold only that the public has no right to follow the negotiators into the negotiation room. . . . Moreover, as we noted *supra*, the public will have access to records of the in-chambers conferences [afterwards].”).

<sup>249</sup> See, e.g., *Wendt v. Wendt*, 706 A.2d 1021, 1023 (Conn. Super. Ct. 1996) (stating that a First Amendment right of access to court records exists, but explicitly applying a balancing test to determine if sealing was permissible); *Mancheski v. Gabelli Grp. Capital Partners*, 835 N.Y.S.2d 595, 598 (App. Div. 2007) (recognizing First Amendment right of access, but concluding that the court’s “task involves weighing the interests of the public against the interests of the parties”).

<sup>250</sup> See, e.g., *In re Application of Newsday, Inc.*, 895 F.2d 74, 78–79 (2d Cir. 1990); *In re Application of Kan. City Star Co.*, 143 F.R.D. 223, 227 (W.D. Mo. 1992); *Ashworth v. Bagley*, 351 F. Supp. 2d 786, 789 (S.D. Ohio 2005).

<sup>251</sup> *Regalia*, *supra* note 219, at 103; see also *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 599 (1978) (“[T]he decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case.”); *United States v. Webbe*, 791 F.2d 103, 107 (8th Cir. 1986) (“[W]e think the decision as to [common-law] access is properly handled on an ad hoc basis by the district judge, who is in the best position to recognize and weigh the appropriate factors on both sides of the issue.”); *United States v. Rosenthal*, 763 F.2d 1291, 1295 (11th Cir. 1985) (“The proper balancing of the foregoing factors is a matter which is vested in the first instance in the sound discretion of the trial court.”); *United States v. Criden*, 648 F.2d 814, 817 (3d Cir. 1981) (“[A]ll parties agree that release of the tapes is a matter committed to the discretion of the trial court . . . .”); *Belo Broad. Corp. v. Clark*, 654 F.2d 423, 430–31 (5th Cir. 1981) (“Only an egregious abuse of discretion should merit reversal.” (quoting *Nixon*, 435 U.S. at 614 (Stevens, J., dissenting))).

discretion to be exercised in light of the relevant facts and circumstances of the particular case.<sup>252</sup>

In practice, the common law's reliance on the discretion of trial courts results in far too many closure orders. Take the case that opened the introduction to this Article, *Doe v. C.A.R.S. Protection Plus, Inc.*<sup>253</sup> In a lawsuit involving a discrimination claim under the Pregnancy Discrimination Act, the trial court imposed what can only be described as extreme measures to prevent public access to the case: the court allowed the plaintiff to proceed pseudonymously, closed all court proceedings, sealed all judicial records, and sealed the case docket.<sup>254</sup> When the defendant appealed the wholesale sealing and closure of the case, the Third Circuit devoted a single paragraph to the issue, stating: "[W]e review the grant or modification of a confidentiality order for an abuse of discretion. There was no abuse of discretion. The record fully supports the District Court's order."<sup>255</sup> Presumably, the Third Circuit concluded that there was no reason to even consider whether the public had a First Amendment right to access any aspect of this case, including the summary judgment proceedings, their associated records, and the district court's summary judgment decision.<sup>256</sup> But we do not know because neither the district court nor the Third Circuit issued any public findings to support the closure of this case. The two perfunctory sentences at the end of the Third Circuit's opinion provide the only public discussion of the issue. Even under the highly deferential common-law right of access, the question of public access deserves more analysis than this.

Unfortunately, *Doe v. C.A.R.S. Protection Plus, Inc.* is not unique. In jurisdictions all across the country, trial courts maintain secret dockets containing thousands of cases, "often [on] mundane legal matters involving the rich and politically powerful."<sup>257</sup> For example,

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<sup>252</sup> *Nixon*, 435 U.S. at 598–99.

<sup>253</sup> 527 F.3d 358 (3d Cir.), *order clarified*, 543 F.3d 178 (3d Cir. 2008).

<sup>254</sup> *See supra* notes 2–6 and accompanying text.

<sup>255</sup> *C.A.R.S. Prot. Plus, Inc.*, 527 F.3d at 371 (citing *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 783 (3d Cir. 1994)). The defendant also challenged the plaintiff's use of a pseudonym. The Third Circuit spent little time disposing of this issue as well, noting in a footnote:

Although we have yet to address the issue, the decision whether to allow a plaintiff to proceed anonymously rests within the sound discretion of the court. After a careful review of all the circumstances of this case (including the District Court's thorough hearing), we cannot say the trial court abused its discretion in granting Doe's motion to proceed anonymously.

*Id.* at 371 n.2 (citations omitted).

<sup>256</sup> It is not possible to know what proceedings took place in the district court and what records were in the case file because the district court sealed the case docket, as well.

<sup>257</sup> Brief Amici Curiae of the Reporters Committee for Freedom of the Press and Twenty-Nine Media Organizations in Support of Petitioners at 11, *N.Y. Law Publ'g Co. v. Doe*, 555 U.S.

following the Second Circuit's decision in *Hartford Courant Co. v. Pellegrino* invalidating the state's practices on First Amendment grounds,<sup>258</sup> the State of Connecticut unsealed more than 10,000 cases on its secret docket, most of which "comprised divorce or family law matters involving state officials, judges, prominent attorneys, corporate officers, and celebrities."<sup>259</sup> Even within the federal system, there are thousands of cases that are being adjudicated in secret, although it is impossible to know how many. A survey by the Reporters Committee for Freedom of the Press (RCFP) "found that most district courts surveyed admitted to having secret civil cases pending."<sup>260</sup> Although many district courts would not say how many cases they had, the RCFP reported that "[a]s of June 2003, the Middle District of Georgia had 33 secret civil cases pending, the Northern District of Florida had seven secret civil cases pending, the Western District of Arkansas and the Eastern District of Wisconsin each had two secret civil cases pending."<sup>261</sup>

As with *C.A.R.S. Protection Plus, Inc.*, we often hear about these cases only when an appellate court issues a public decision addressing some aspect of the case. In a lawsuit that bears shockingly similar procedural facts to *C.A.R.S. Protection Plus, Inc.*, the Fourth Circuit reversed a district court's sealing of the entire record in *Doe v. Public Citizen* and stated:

By sealing the entire docket sheet during the pendency of the litigation, as the district court permitted in this case, courts effectively shut out the public and the press from exercising their constitutional and common-law right of access to civil proceedings. But there is a more repugnant aspect to depriving the public and press access to docket sheets: no one can challenge closure of a document or proceeding that is itself a secret. . . . Because access to docket sheets is integral to providing meaningful access to civil proceedings, we hold that the public and press enjoy a presumptive right to inspect docket sheets in civil cases under the First Amendment.<sup>262</sup>

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1013 (2008) (No. 08-330), 2008 WL 4618213, at \*11 [hereinafter Amicus Brief in Support of Petitioners].

<sup>258</sup> *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 85–86 (2d Cir. 2004).

<sup>259</sup> Meliah Thomas, Comment, *The First Amendment Right of Access to Docket Sheets*, 94 CALIF. L. REV. 1537, 1552 (2006).

<sup>260</sup> Rory Eastburg, *Nothing to See Here*, NEWS MEDIA & L., Winter 2009, at 34.

<sup>261</sup> Amicus Brief in Support of Petitioners, *supra* note 257, at 12 (quoting SARA THACKER, REPORTERS COMM. FOR FREEDOM OF THE PRESS, SECRET JUSTICE: SECRET DOCKETS 5 (2003), <http://www.rcfp.org/rcfp/orders/docs/SJDOCKETS.pdf>).

<sup>262</sup> *Doe v. Pub. Citizen*, 749 F.3d 246, 268–69 (4th Cir. 2014); *see also* *United States v. Valenti*, 987 F.2d 708, 715 (11th Cir. 1993) (holding that secret dockets are "inconsistent with

Cases like *Doe v. C.A.R.S. Protection Plus, Inc.* and *Doe v. Public Citizen* lead one to wonder how it is possible that more than thirty years after the Supreme Court remarked in *Richmond Newspapers, Inc. v. Virginia* that “[i]n guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees,”<sup>263</sup> so many courts continue to reject the proposition that the public has a constitutional right to observe the activities of the courts. Clearly, the message from *Richmond Newspapers* has not been fully received.

The Supreme Court’s conditional, ad hoc approach to public access is at least partially to blame and is in need of substantial reformulation. The lower courts appear to be hopelessly confused as to when the experience and logic test applies outside of the narrow confines of criminal trials and trial-like proceedings. Moreover, the test itself is too indeterminate to provide courts with meaningful guidance in resolving public access claims. As a result, many courts either engage in an unstructured balancing test that discounts the benefits of public access or they simply default to the common-law test for access.

The deficiencies with the current doctrinal framework for a public right of access to the courts, however, mask a deeper underlying problem with the Court’s access jurisprudence: the lack of a coherent theoretical basis for a First Amendment right of public access in the first place. The next Parts provide this theoretical grounding and outline an analytically consistent public access doctrine that advances the First Amendment values at stake in disputes over public access to the courts.

## II. FIRST AMENDMENT STRUCTURALISM

The confusion and inconsistency regarding a right of public access to the courts is not simply a doctrinal issue that can be fixed by fine-tuning the experience and logic test. The problem is more fundamental and stems from uncertainty over why the First Amendment should have anything to say about access to the courts in the first place. In other words, why does public access to the courts advance First Amendment values? Until we answer this question, we cannot ascertain the proper scope of a First Amendment right of access.

Part of the challenge in answering this question is that the values advanced by the First Amendment are contested. Indeed, scholars have

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affording the various interests of the public and the press meaningful access” to judicial records and proceedings).

<sup>263</sup> 448 U.S. 555, 575 (1980) (plurality opinion).

long debated the purposes underlying the First Amendment.<sup>264</sup> It is not my aim here to crown a single unifying theory of the First Amendment. Instead, my goal is to identify a theory (or set of theories) that explains the Supreme Court's recognition of a First Amendment right of public access to criminal trials, can serve as a basis for extending that right to other judicial activities, and can guide courts in deciding hard cases.

In the following Sections, I argue that a right of public access to the courts flows from the recognition that the First Amendment's speech and press protections are intended to ensure that Americans are capable of self-governance, a rationale most closely associated with Alexander Meiklejohn, but also advanced by a number of First Amendment scholars including Robert Post and Cass Sunstein.<sup>265</sup> Section A examines the relevance of this theory to public access claims and explains how a First Amendment right of access to the courts plays a critical structural role in our constitutional system. Section B then elucidates the structural values of court transparency and translates those values into insights that can help courts resolve public access disputes.

#### A. *The First Amendment's Purpose and Structural Role*

Although the text of the First Amendment is mute about its purposes, we can assume that the admonition that "Congress shall make no law . . . abridging the freedom of speech, or of the press."<sup>266</sup> is based on the belief that protecting speech and the press will have salutary effects on America's "great experiment in democracy."<sup>267</sup> Precisely how the framers envisioned the First Amendment playing this role, however, remains a mystery. The historical record is nearly as mute about the purposes of the First Amendment as the text is itself.<sup>268</sup>

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<sup>264</sup> See, e.g., Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 877 (1963) [hereinafter Emerson, *Toward a General Theory of the First Amendment*] ("Despite the mounting number of decisions and an even greater volume of comment, no really adequate or comprehensive theory of the first amendment has been enunciated, much less agreed upon."); Alexander Tsesis, *Free Speech Constitutionalism*, 2015 U. ILL. L. REV. 1015, 1017 (2015) (noting the need "to identify a unified statement of free speech theory").

<sup>265</sup> See *infra* notes 282–88 and accompanying text.

<sup>266</sup> U.S. CONST. amend. I.

<sup>267</sup> CARL BECKER, *OUR GREAT EXPERIMENT IN DEMOCRACY: A HISTORY OF THE UNITED STATES*, at x (1920) ("American 'democracy' was, and is, an experiment . . ."); see also 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 12 (Henry Reeve trans., 3d ed., London, Saunders & Otley 1838) (1835).

<sup>268</sup> See 5 RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW—SUBSTANCE & PROCEDURE* § 20.5(a) (5th ed. 2012) ("There is little that anyone can draw from the debates within the House concerning the meaning of the First Amendment. In addition, there is the absence of useful records of debates in the Senate—or the states—on its ratification." (footnotes omitted)); Ashutosh Bhagwat, *The Democratic First Amendment*, 110

## 1. Theories of the First Amendment

Despite a lack of historical evidence regarding the First Amendment's purposes, scholars and jurists have largely coalesced around three theories justifying the First Amendment's protections for speech.<sup>269</sup> The first and perhaps most widely recognized justification for protecting speech is the advancement of knowledge or truth,<sup>270</sup> which has come to be embodied by Justice Oliver Wendell Holmes's famous metaphor of a "marketplace of ideas."<sup>271</sup> A second theory posits that free speech should be protected because it advances individual autonomy and self-fulfillment.<sup>272</sup> The third theory asserts that the First Amendment's purpose is to facilitate self-governance and participatory democracy.<sup>273</sup> Although some scholars have identified a fourth justification for the First Amendment—to serve as a check on

NW. U. L. REV. 1097, 1101 (2016) [hereinafter Bhagwat, *The Democratic First Amendment*] ("[T]he Free Speech Clause has the most shallow and obscure history of any provision of the First Amendment.").

<sup>269</sup> See Ashutosh Bhagwat, *Details: Specific Facts and the First Amendment*, 86 S. CAL. L. REV. 1, 32 (2012) [hereinafter Bhagwat, *Details*]; Tsesis, *supra* note 264, at 1016. Because the Supreme Court has largely eschewed giving the First Amendment's Free Press Clause independent meaning, see David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 430 (2002) ("[A]s a matter of positive law, the Press Clause actually plays a rather minor role in protecting the freedom of the press."), I focus only on the theoretical justifications for the Free Speech Clause.

<sup>270</sup> See, e.g., *Davis v. FEC*, 554 U.S. 724, 755–56 (2008) (Stevens, J., concurring in part and dissenting in part) ("[I]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . ." (quoting *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969))).

<sup>271</sup> See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . ."). The first articulation of the marketplace theory is typically attributed to poet John Milton, who criticized the English system of licensing in *Areopagitica* in 1644:

And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously, by licensing and prohibiting, to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?

JOHN MILTON, *AREOPAGITICA* 35 (Jim Miller ed., Dover Thrift ed. 2016) (1644).

<sup>272</sup> See, e.g., C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 47–69 (1989) (arguing that speech is protected because it "promotes both the speaker's self-fulfillment and the speaker's ability to participate in change"); Emerson, *Toward a General Theory of the First Amendment*, *supra* note 264, at 879 (describing freedom of expression's role in "[t]he achievement of self-realization").

<sup>273</sup> See, e.g., CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 121–65 (1993) (contending that free speech is a "precondition" for democracy); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20–21 (1971) (arguing that freedom of speech is necessary for "democratic organization"); Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CALIF. L. REV. 2353, 2362 (2000) [hereinafter Post, *Reconciling Theory and Doctrine*] ("The democratic theory of the First Amendment . . . protects speech insofar as it is required by the practice of self-government.").

government<sup>274</sup>—for our purposes this theory is subsumed by the self-governance theory.<sup>275</sup>

The Supreme Court has never definitively adopted one theory over the others and each has its merits.<sup>276</sup> Moreover, there are echoes of all of them in the Court’s First Amendment jurisprudence, with the justices drawing on different theories depending on the nature of the First Amendment conflict at issue. Nevertheless, as I describe below, the self-governance theory best explains the Court’s recognition of a right of access to the courts.

The self-governance theory rests on the conviction that speech is a necessary precondition for a representative democracy. While scholars and jurists point to other values that are advanced by the First Amendment, few would dispute that a democracy cannot function without protections for speech about the government. As the Supreme Court noted in *Mills v. Alabama*, “[w]hatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.”<sup>277</sup> Since *Mills*, the Court has continued to emphasize the importance of speech to self-governance,<sup>278</sup> including most recently in *Snyder v. Phelps*, where the Court held that the First Amendment provides a defense to a claim of intentional infliction of emotional distress when the speech at issue

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<sup>274</sup> See, e.g., Vincent Blasi, *The Checking Value in First Amendment Theory*, 2 AM. B. FOUND. RES. J. 521, 527 (1977) [hereinafter Blasi, *Checking Value*] (discussing “the value that free speech, a free press, and free assembly can serve in checking the abuse of power by public officials”).

<sup>275</sup> See *infra* notes 282–88 and accompanying text.

<sup>276</sup> See, e.g., Post, *Reconciling Theory and Doctrine*, *supra* note 273, at 2372 (“First Amendment jurisprudence contains several operational and legitimate theories of freedom of speech, so that it is quite implausible to aspire to clarify First Amendment doctrine by abandoning all but one of these theories.”); Tesis, *supra* note 264, at 1017 (“The Supreme Court has been inconsistent in its application [of free speech theory], and, indeed, has never definitively adopted one over the others.”).

<sup>277</sup> 384 U.S. 214, 218 (1966).

<sup>278</sup> See, e.g., *Walker v. Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2246 (2015) (“[T]he Free Speech Clause helps produce informed opinions among members of the public, who are then able to influence the choices of a government that, through words and deeds, will reflect its electoral mandate.”); *Knox v. Serv. Emps. Int’l Union, Local 1000*, 132 S. Ct. 2277, 2288 (2012) (“Our cases have often noted the close connection between our Nation’s commitment to self-government and the rights protected by the First Amendment.”); *Brown v. Hartlage*, 456 U.S. 45, 52 (1982) (“At the core of the First Amendment are certain basic conceptions about the manner in which political discussion in a representative democracy should proceed.”); *Buckley v. Valeo*, 424 U.S. 1, 93 n.127 (1976) (per curiam) (“[T]he central purpose of the Speech and Press Clauses was to assure a society in which ‘uninhibited, robust, and wide-open’ public debate concerning matters of public interest would thrive, for only in such a society can a healthy representative democracy flourish.” (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964))).

relates to “a matter of public concern.”<sup>279</sup> According to the Court, “[s]peech on ‘matters of public concern’ . . . is ‘at the heart of the First Amendment’s protection,’”<sup>280</sup> and “speech concerning public affairs is more than self-expression; it is the essence of self-government.”<sup>281</sup>

Given the Court’s repeated statements that discussion of government affairs is at the core of the First Amendment’s protections, a broad consensus has emerged among constitutional scholars that the primary purpose of the First Amendment is to make self-governance possible.<sup>282</sup> This position has been adopted by a wide range of scholars, including Ashutosh Bhagwat,<sup>283</sup> Robert Bork,<sup>284</sup> Alexander Meiklejohn,<sup>285</sup> Robert Post,<sup>286</sup> Cass Sunstein,<sup>287</sup> and James Weinstein.<sup>288</sup>

This is not to say that there is unanimity as to the precise contours of the self-governance theory. Indeed, there continues to be deep disagreement over how broadly speech relating to self-governance should be defined. At least initially for Meiklejohn, such speech would have to be explicitly political.<sup>289</sup> This exceedingly narrow definition faced significant criticism from a number of quarters,<sup>290</sup> and Meiklejohn ultimately revised his theory, concluding that speech about education,

<sup>279</sup> 562 U.S. 443, 451–52 (2011).

<sup>280</sup> *Id.* (quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758–59 (1985) (plurality opinion)).

<sup>281</sup> *Id.* at 452 (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964)).

<sup>282</sup> See KOHLER ET AL., *supra* note 85, at 61 (noting that the self-governance theory has “come to dominate the field”); BeVier, *supra* note 26, at 502 (“[T]here is one principle [in the First Amendment area] which both commands widespread agreement and is derived from constitutional structure: the core first amendment value is that of the democracy embodied in our constitutionally established processes of representative self-government.”); Bhagwat, *The Democratic First Amendment*, *supra* note 268, at 1102 (“[A] broad consensus has emerged over the past half-century regarding the fundamental reason why the Constitution protects free speech: to advance democratic self-governance.”).

<sup>283</sup> Bhagwat, *Details*, *supra* note 269, at 32–44; Ashutosh Bhagwat, Comment, *Patronage and the First Amendment: A Structural Approach*, 56 U. CHI. L. REV. 1369, 1384–91 (1989) [hereinafter Bhagwat, *Patronage and the First Amendment*].

<sup>284</sup> Bork, *supra* note 273, at 20–21.

<sup>285</sup> MEIKLEJOHN, *supra* note 30, at 75; Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255.

<sup>286</sup> Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 482 (2011); Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601, 670 (1990).

<sup>287</sup> SUNSTEIN, *supra* note 273, at 121–65.

<sup>288</sup> James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 VA. L. REV. 491, 497 (2011).

<sup>289</sup> See ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 105–07 (1948).

<sup>290</sup> See, e.g., Zechariah Chafee, Jr., *Free Speech: And Its Relation to Self-Government*. By Alexander Meiklejohn. New York: Harper Bros., 1948, 62 HARV. L. REV. 891, 899 (1949) (book review) (“The most serious weakness in Mr. Meiklejohn’s argument is that it rests on his supposed boundary between public speech and private speech.”); Harry Kalven, Jr., *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 15–16.

philosophy, science, literature, and the arts could also be necessary for self-governance.<sup>291</sup> Today, the debate largely revolves around defining the modes of self-government, with scholars such as Robert Post advancing what he calls the “participatory” theory, which “does not locate self-governance in mechanisms of decision making, but rather in the processes through which citizens come to identify a government as their own.”<sup>292</sup>

For our purposes, we need not resolve these debates because under any definition of self-governance, public discussion about the activities of the courts, a coordinate branch of government, would fall within even the narrowest conception of democratic speech. But concluding that the First Amendment protects speech *about the courts* only gets us part of the way to understanding why the First Amendment should incorporate a right of public access to information *from the courts*. To grasp the nature of this link, we have to examine the structural role that the First Amendment plays in the American constitutional system.

## 2. Constitutional Structuralism

Constitutional structuralism proceeds from the insight that we should interpret the Constitution by examining the structures of government; i.e., the Constitution’s overall arrangement of offices, powers, and relationships.<sup>293</sup> In the words of Laurence Tribe:

To understand the Constitution as a legal text, it is essential to recognize the sort of text it is: a constitutive text that purports, in the name of the People of the United States of America, to bring into being a number of distinct but interrelated institutions and practices,

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<sup>291</sup> Meiklejohn, *supra* note 285, at 256–57.

<sup>292</sup> Post, *Reconciling Theory and Doctrine*, *supra* note 273, at 2367; *see also* POST, *supra* note 22, at 61; Robert Post, *Meiklejohn’s Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109, 1116–18 (1993).

<sup>293</sup> SOTIROS A. BARBER & JAMES E. FLEMING, CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS 120 (2007) (“The phrase ‘constitutional structures’ usually refers to the constitutional relationships between the national government and the states, the branches of the national government, the government and the people and, in sum, the general arrangement of offices, powers, and relationships allegedly manifest in the Constitution’s text and the settled facts of constitutional history.”); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1236 (1995) (“I put such great emphasis upon text *and* structure, both the structure *within* the text—the pattern and interplay in the language of the Constitution itself and its provisions—and the structure (or architecture) *outside* the text—the pattern and interplay in the governmental edifice that the Constitution describes and creates, and in the institutions and practices it propels.” (emphasis added)).

at once legal and political, and to define the rules governing those institutions and practices.<sup>294</sup>

Charles Black and John Hart Ely, two of the more influential proponents of structural interpretation, have both offered convincing arguments for considering constitutional rights within a structural context.<sup>295</sup> In a series of lectures entitled *Structure and Relationship in Constitutional Law*, Black implored his audience “to develop a full-bodied case-law of inference from constitutional structure and relation.”<sup>296</sup> According to Black, difficult constitutional cases are resolved “not fundamentally on the basis of . . . textual exegesis which we tend to regard as normal, but on the basis of reasoning from the total structure which the text has created.”<sup>297</sup> Ely makes a similar argument when he asserts that the Constitution and Bill of Rights were intended to be blueprints for government rather than repositories of specific values; “the body of the original Constitution is devoted almost entirely to structure,” he observed.<sup>298</sup> For Ely, this insight led him to conclude that the First Amendment was “intended to help make our governmental processes work, to ensure the open and informed discussion of political issues, and to check our government when it gets out of bounds.”<sup>299</sup>

The First Amendment serves a structural function by facilitating the communicative processes necessary for democratic self-governance. The Amendment’s speech protections, for example, prevent the government from stifling criticism of public officials and ensure that debate on public issues can be “uninhibited, robust, and wide-open.”<sup>300</sup> Other provisions, such as the rights of assembly, association, and petition, serve similar ends by helping to alleviate collective-action problems that can undermine the effective exercise of popular sovereignty.<sup>301</sup> Taken together, the interrelated freedoms in the First

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<sup>294</sup> Tribe, *supra* note 293, at 1235.

<sup>295</sup> See CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

<sup>296</sup> BLACK, *supra* note 295, at 8.

<sup>297</sup> *Id.* at 15. Responding to potential criticism that structural interpretation would be too imprecise and speculative, Black said:

The question is not whether the text shall be respected, but rather how one goes about respecting a text of that high generality and consequent ambiguity which marks so many crucial constitutional texts. I submit that the generalities and ambiguities are no greater when one applies the method of reasoning from structure and relation.

*Id.* at 30–31.

<sup>298</sup> ELY, *supra* note 295, at 90.

<sup>299</sup> *Id.* at 93–94.

<sup>300</sup> *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

<sup>301</sup> See Tabatha Abu El-Haj, *The Neglected Right of Assembly*, 56 UCLA L. REV. 543, 543 (2009); see also Jason Mazzone, *Freedom’s Associations*, 77 WASH. L. REV. 639, 743 (2002); Ozan

Amendment serve critical structural purposes in our constitutional system.

The Supreme Court has long relied on structural insights to interpret the First Amendment. In fact, one cannot make sense of modern First Amendment jurisprudence without acknowledging the Court's reliance on the structural role of the First Amendment. For more than a century after ratification of the First Amendment, the consensus among jurists and scholars was that the Amendment's reach was quite limited, prohibiting only prior restraints on speech.<sup>302</sup> Even Justice Holmes, in a decision that predated his famous defense of the First Amendment in *Abrams v. United States*,<sup>303</sup> initially believed that the First Amendment imposed no limits on the government's ability to levy criminal penalties against publishers.<sup>304</sup> It was not until well into the twentieth century that the Supreme Court settled on a broader interpretation of the First Amendment, and it has gradually expanded the First Amendment's ambit ever since.

During the 1930s, for example, the Court moved from the cramped understanding of the First Amendment as applying only to prior restraints and began striking down government penalties directed at speech, noting that "free political discussion" plays an essential role in "our constitutional system" and remarking that in such discussion "lies the security of the Republic, the very foundation of constitutional government."<sup>305</sup> Further emphasizing the role that speech plays under the Constitution, the Court also began to expand the First Amendment's protections to cover indirect forms of government censorship, such as

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O. Varol, *Structural Rights*, 105 GEO. L.J. (forthcoming 2016) (manuscript at 37–39) (on file with author).

<sup>302</sup> See David S. Ardia, *Freedom of Speech, Defamation, and Injunctions*, 55 WM. & MARY L. REV. 1, 34 (2013) [hereinafter Ardia, *Freedom of Speech*] (discussing early American conceptions of the First Amendment).

<sup>303</sup> 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.").

<sup>304</sup> See *Patterson v. Colorado ex rel. Attorney Gen.*, 205 U.S. 454, 462 (1907) (affirming criminal contempt sanction against the publisher of the Rocky Mountain News and concluding "the main purpose of [the First Amendment's free speech protections] is 'to prevent all such previous restraints upon publications as had been practised by other governments'" (quoting *Commonwealth v. Blanding*, 20 Mass. (3 Pick.) 304, 313 (1825))).

<sup>305</sup> *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937) (invalidating criminal conviction for subversive speech); *Stromberg v. California*, 283 U.S. 359, 369 (1931) ("The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.").

the imposition of a licensing tax on newspaper publishers<sup>306</sup> and restrictions on the right to receive information.<sup>307</sup>

In the 1960s, the Court further expanded the reach of the First Amendment by imposing constitutional limitations on the common-law of defamation. Explicitly invoking the structural role that speech plays in a democracy, the Court proclaimed in *New York Times Co. v. Sullivan* that even false speech about public officials is deserving of First Amendment protection.<sup>308</sup> In what has become an essential part of the First Amendment canon, the Court remarked that the First Amendment embodies “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”<sup>309</sup> Quoting extensively from the writings of James Madison, the Court in *Sullivan* observed that the “Constitution created a form of government under which ‘The people, not the government, possess the absolute sovereignty.’”<sup>310</sup> Agreeing with Madison about the critical role that speech plays in self-government, the Court concluded: “The right of free public discussion of the stewardship of public officials was thus . . . a fundamental principle of the American form of government.”<sup>311</sup>

Echoes of this view can also be heard in the Supreme Court’s decisions today.<sup>312</sup> Cautioning against allowing the government to dictate what information should be available to the public, Justice Douglas observed that “[t]he generation that made the nation thought secrecy in government one of the instruments of Old World tyranny and committed itself to the principle that a democracy cannot function unless the people are permitted to know *what their government is up*

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<sup>306</sup> See *Grosjean v. Am. Press Co.*, 297 U.S. 233, 249–50 (1936) (stating that “informed public opinion is the most potent of all restraints upon misgovernment” and concluding that the First Amendment protects not only against prior restraints but also “any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights”).

<sup>307</sup> See *Lamont v. Postmaster Gen.*, 381 U.S. 301, 306 (1965) (“Just as the licensing or taxing authorities in the *Lovell*, *Thomas*, and *Murdock* cases sought to control the flow of ideas to the public, so here federal agencies regulate the flow of mail.”); *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943) (noting that “freedom of speech and press has broad scope” and holding that “[t]his freedom embraces the right to distribute literature, and necessarily protects the right to receive it” (citation omitted)).

<sup>308</sup> 376 U.S. 254, 270 (1964). “The Court was concerned that public officials could stifle free debate by bringing defamation actions against their critics, much as they had stifled debate using the Sedition Act of 1798.” David S. Ardia, *Reputation in a Networked World: Revisiting the Social Foundations of Defamation Law*, 45 HARV. C.R.-C.L. L. REV. 261, 280 (2010).

<sup>309</sup> *Sullivan*, 376 U.S. at 270.

<sup>310</sup> *Id.* at 274.

<sup>311</sup> *Id.* at 275.

<sup>312</sup> See, e.g., *Walker v. Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2246 (2015) (“[T]he Free Speech Clause helps produce informed opinions among members of the public, who are then able to influence the choices of a government that, through words and deeds, will reflect its electoral mandate.”).

to.”<sup>313</sup> “This phrase should not be dismissed as a convenient formalism,” the Court warned in *National Archives and Records Administration v. Favish*, “[i]t defines a structural necessity in a real democracy.”<sup>314</sup>

We can draw three important conclusions from the preceding discussion. First, a primary purpose of the First Amendment is to make self-governance possible. Second, self-governance is not feasible without informed public discourse about the government. Third, the First Amendment plays an essential structural role in our constitutional system because it ensures that citizens can engage in expressive activities that are essential to self-government. The self-governance theory and constitutional structuralism, therefore, are mutually reinforcing. While uninhibited, robust, and wide-open discussion of government affairs may be beneficial in its own right, its value from a structuralist perspective is that it makes self-government possible.

### B. *The Structural Values of Court Transparency*

Prior to the Supreme Court’s plurality decision in *Richmond Newspapers, Inc. v. Virginia*, the Court had never held that the First Amendment provides a right of access to information of any kind. Instead, the Court seemed to view the question of whether the public should have access to information, including information held by the government, as a political issue beyond the purview of the courts.<sup>315</sup> Even after *Richmond Newspapers*, the Supreme Court has continued to reject the notion that there is a general First Amendment right of access to government information.<sup>316</sup> It is only in the context of criminal trial and trial-like proceedings that the Court has explicitly held that the First Amendment requires a right of public access.<sup>317</sup>

What is it about criminal court proceedings that explains this disparate treatment under the First Amendment? The following Sections examine the underpinnings of the Court’s recognition of a First Amendment right of access to criminal trials and the values that are advanced by public access to the courts. As discussed below, the

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<sup>313</sup> U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 772–73 (1989) (quoting *EPA v. Mink*, 410 U.S. 73, 105 (1973) (Douglas, J., dissenting)).

<sup>314</sup> 541 U.S. 157, 171–72 (2004) (citing *Reporters Comm. for Freedom of the Press*, 489 U.S. at 773).

<sup>315</sup> See *Houchins v. KQED, Inc.*, 438 U.S. 1, 12 (1978) (concluding that a claim of access to a county jail “invites the Court to involve itself in what is clearly a legislative task which the Constitution has left to the political processes”).

<sup>316</sup> See *McBurney v. Young*, 133 S. Ct. 1709, 1718 (2013); *L.A. Police Dep’t v. United Reporting Publ’g Corp.*, 528 U.S. 32, 40 (1999).

<sup>317</sup> See *supra* Section I.A.3.

judiciary, by virtue of its unique institutional position within the government, possesses information that is essential to informed self-government. By elucidating the distinctive characteristics of the courts and the information they contain, we will be able to understand the justification—and potential limits—of a First Amendment right of access to information about the courts.

### 1. The First Amendment as Sword

The First Amendment, as we have already noted, is mute about its purposes. History is similarly inscrutable as to what role, if any, the First Amendment was intended to play in ensuring that the public has access to information about the workings of the government. The framers do not appear to have ever confronted the question of whether the Constitution guarantees a right of access to information about the government, and the issue did not arise in the Supreme Court until well into the twentieth century. In the absence of guidance from the text and history of the First Amendment, we are left to reason from the structure of government established by the Constitution in order to assess whether a right of public access to the courts is demanded by the principles underlying the First Amendment's protections for speech.

Because speech related to self-governance is at the core of the First Amendment's protections, the Supreme Court, at least since 1931,<sup>318</sup> has roundly condemned government efforts to restrict or punish speech about the government, including speech about the activities of the courts.<sup>319</sup> But this does not establish that the First Amendment requires the government to provide access to information in its possession. There still remains an important conceptual jump from the conclusion that the First Amendment prohibits the government from punishing speech about the government (absent sufficiently compelling reasons) to the conclusion that the First Amendment requires the government to provide access to information about its activities. When the government

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<sup>318</sup> See *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931) (applying First Amendment to invalidate state law restricting speech).

<sup>319</sup> See, e.g., *Smith v. Daily Mail Publ'g. Co.*, 443 U.S. 97 (1979) (invalidating restriction on the publication of name of youth charged as a juvenile offender); *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829 (1978) (invalidating restrictions on the disclosure of information regarding proceedings before a state judicial review commission); *Okla. Publ'g. Co. v. Dist. Court*, 430 U.S. 308 (1977) (invalidating restriction on the publication of name or picture of minor child involved in juvenile proceeding); *Neb. Press Ass'n v. Stuart*, 427 U.S. 539 (1976) (invalidating restrictions on the publication or broadcasting of pre-trial accounts of admissions made by defendant to law enforcement officers); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975) (invalidating restriction on publication of rape victim name acquired from court records).

refuses to provide access to information in its possession, it neither directly restrains nor imposes punishment on information-gathering activities. To justify the conclusion that the First Amendment requires the government to provide public access to the courts, one must conclude that the First Amendment embodies an affirmative constitutional obligation to ensure that public discussion of governmental affairs is informed.

Although the question of whether the First Amendment embodies a general affirmative right to information continues to be vigorously debated by scholars,<sup>320</sup> the Supreme Court already has made this leap in the context of public access to certain criminal proceedings. The Court's decisions in *Richmond Newspapers*, *Globe Newspaper*, and *Press-Enterprise I & II* go beyond the view that the First Amendment only prohibits government censorship to encompass a right to acquire information from the courts. It cannot be overstated how important these cases were and how sharply they diverged from the Court's earlier decisions that had rejected a First Amendment right of access to government information.<sup>321</sup> Justice Stevens remarked on the significance of the Court's shift in his concurring opinion in *Richmond Newspapers*:

This is a watershed case. Until today the Court has accorded virtually absolute protection to the dissemination of information or ideas, but never before has it squarely held that the acquisition of newsworthy matter is entitled to any constitutional protection whatsoever. . . . I agree that the First Amendment protects the public and the press from abridgment of their rights of access to information about the operation of their government, including the Judicial Branch . . . .<sup>322</sup>

While Stevens was right that *Richmond Newspapers* was a watershed case, there are earlier hints of an affirmative First Amendment right to information in the opinions of various justices, many of whom adopted Meiklejohnian and Madisonian rhetoric. Recall, for example, that in *Branzburg v. Hayes*, the Court suggested that "news gathering is not without its First Amendment protections."<sup>323</sup> And, although a three-justice plurality in *Houchins v. KQED, Inc.* held that

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<sup>320</sup> Compare, e.g., Emerson, *Legal Foundations of the Right to Know*, *supra* note 26, at 5–14 (arguing that a complete "system of freedom of expression" must include an affirmative First Amendment right of access to information), with BeVier, *supra* note 26, at 516–17 ("The Constitution yields no normative standard by which the claim of access to governmental information can be evaluated."). Barry McDonald offers a thorough recounting of the historical debate on this issue and its contemporary resonance. See generally McDonald, *supra* note 43.

<sup>321</sup> See *supra* Sections I.A.1–I.A.2.

<sup>322</sup> *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 582, 584 (1980) (Stevens, J., concurring).

<sup>323</sup> *Branzburg v. Hayes*, 408 U.S. 665, 707 (1972).

the First Amendment did not mandate a right of access to prisons,<sup>324</sup> Justice Stevens's impassioned dissent joined by Justices Brennan and Powell asserted that "[t]he preservation of a full and free flow of information to the general public has long been recognized as a core objective of the First Amendment,"<sup>325</sup> and "[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."<sup>326</sup>

Given this view of the First Amendment, it is not surprising that when Justice Brennan penned the majority opinion in *Globe Newspaper Co. v. Superior Court*, he wrote that "[u]nderlying the First Amendment right of access to criminal trials is the common understanding that 'a major purpose of that Amendment was to protect the free discussion of governmental affairs,'" and that "[b]y offering such protection, the First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government."<sup>327</sup> Indeed, Brennan had made a similar argument in his *Richmond Newspapers* concurrence where he linked the First Amendment's purpose to its "structural role" of "fostering . . . self-government."<sup>328</sup> Brennan went on to explain what this meant:

Implicit in this structural role is not only "the principle that debate on public issues should be uninhibited, robust, and wide-open," but also the antecedent assumption that valuable public debate—as well as other civic behavior—must be informed. The structural model links the First Amendment to that process of communication necessary for a democracy to survive, and thus entails solicitude not only for communication itself, but also for the indispensable conditions of meaningful communication.<sup>329</sup>

Although the Court's decisions in *Richmond Newspapers* and *Globe Newspaper* relied explicitly on the structural values advanced by court access, the Court muddled the theoretical justifications for a First

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<sup>324</sup> *Houchins v. KQED, Inc.*, 438 U.S. 1, 15 (1978) (plurality opinion).

<sup>325</sup> *Id.* at 30 (Stevens, J., dissenting).

<sup>326</sup> *Id.* at 32.

<sup>327</sup> *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982) (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)).

<sup>328</sup> *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 587 (1980) (Brennan, J., concurring).

<sup>329</sup> *Id.* at 587–88 (Brennan, J., concurring) (footnote omitted) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)); see also William J. Brennan, Jr., Assoc. Justice of the Supreme Court of the U.S., Address at the Dedication of the S.I. Newhouse Center for Law and Justice in Newark, New Jersey (Oct. 17, 1979) ("[T]he First Amendment protects the structure of communications necessary for the existence of our democracy.").

Amendment right of access in the *Press-Enterprise* cases. While the outcomes in *Press-Enterprise I & II* support structuralist ends, the means the Court used to achieve those ends do not comport with a structuralist perspective of the First Amendment.<sup>330</sup> First, Chief Justice Burger, who wrote the majority opinions in both cases, did not adopt the expansive language that Brennan and Stevens had used in describing the need for public access. The advantages Burger articulates, enhancing the fairness of criminal proceedings, assuring public confidence in the justice system, and checking potential abuses of judicial power,<sup>331</sup> do not directly advance the democracy-enhancing structural goals of the First Amendment, although his reference to the “community therapeutic value”<sup>332</sup> of public access might be seen as doing so. By focusing on the instrumental benefits of public access, Burger left the impression that the First Amendment right of access to the courts rests solely on the benefits that public access provides in individual cases.<sup>333</sup>

Second, the experience and logic test that Burger announced and applied in *Press-Enterprise II* further obscures the locus of a constitutional right of access to the courts. In making a right of access contingent on “whether public access plays a significant positive role in the functioning of the *particular process in question*,”<sup>334</sup> Burger offered too cramped a view of the “logic of openness,” focusing only on the role that public access plays in individual court proceedings and eschewing a broader structural perspective that considers how public access advances democratic values. As a result, the *Press-Enterprise* cases have left the lower courts confused as to which benefits matter most when considering public access claims: the advantages that public access confers on a specific proceeding, the benefits that transparency provides for the court system as a whole, or the structural values that access

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<sup>330</sup> See Joseph F. Kobylka & David M. Dehnel, *Toward a Structuralist Understanding of First and Sixth Amendment Guarantees*, 21 WAKE FOREST L. REV. 363, 386–87 (1986).

<sup>331</sup> See *Press-Enterprise II*, 478 U.S. 1, 12–13 (1986); *Press-Enterprise I*, 464 U.S. 501, 508 (1984).

<sup>332</sup> *Press-Enterprise II*, 478 U.S. at 13; *Press-Enterprise I*, 464 U.S. at 508.

<sup>333</sup> Justice Stevens commented on this very point in his concurrence in *Press-Enterprise I*:

The focus commanded by the First Amendment makes it appropriate to emphasize the fact that the underpinning of our holding today is not simply the interest in effective judicial administration; the First Amendment’s concerns are much broader. The “common core purpose of assuring freedom of communication on matters relating to the functioning of government,” that underlies the decision of cases of this kind provides protection to all members of the public “from abridgment of their rights of access to information about the operation of their government, including the Judicial Branch.”

*Press-Enterprise I*, 464 U.S. at 517 (citations omitted).

<sup>334</sup> *Press-Enterprise II*, 478 U.S. at 8 (emphasis added).

serves by exposing the public to information necessary for self-governance.

In fact, it makes little sense to base a First Amendment right of access on the benefits that public access provides to individual court proceedings, or even to the court system as a whole. While a just and effective court system is undoubtedly an important public good, it is not a core First Amendment value. Public access takes on First Amendment significance because it advances the First Amendment's structural purpose. To wit, public access is of constitutional significance because it makes self-government possible. By putting the structural goals of the First Amendment in the foreground, we can arrive at a much clearer understanding of the justifications for—and potential limits of—a First Amendment right of access.

## 2. Higher-Order Constitutional Values

There is much to be said about the benefits of court transparency. Over the years judges and scholars have identified a variety of benefits that flow from allowing the public to observe the activities of the courts, including: (1) safeguarding the integrity of the fact-finding process;<sup>335</sup> (2) ensuring the fairness of judicial proceedings;<sup>336</sup> (3) educating the public about the implementation and impact of the law;<sup>337</sup> (4) promoting public confidence in the justice system;<sup>338</sup> (5) supporting the development of the common law;<sup>339</sup> (6) informing the public about important safety and welfare issues;<sup>340</sup> and (7) fostering discussion about

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<sup>335</sup> See, e.g., *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982) (“Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole.”).

<sup>336</sup> See, e.g., *Press-Enterprise I*, 464 U.S. at 509 (“[P]ublic proceedings vindicate the concerns of the victims and the community in knowing that offenders are being brought to account for their criminal conduct . . . .”); *In re Cont’l Ill. Sec. Litig.*, 732 F.2d 1302, 1313–14 (7th Cir. 1984) (noting that public access to court documents advances “the public’s interest in assuring that the courts are fairly run and judges are honest” (quoting *Crystal Grower’s Corp. v. Dobbins*, 616 F.2d 458, 461 (10th Cir. 1980))).

<sup>337</sup> See, e.g., *United States v. Criden*, 648 F.2d 814, 827 (3d Cir. 1981) (noting “the educational and informational value of public observation” of court records).

<sup>338</sup> See, e.g., *Press-Enterprise I*, 464 U.S. at 508 (“Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.”).

<sup>339</sup> See Symposium, *Panel Discussion Judicial Records Forum*, 83 *FORDHAM L. REV.* 1735, 1745–46 (2015) [hereinafter *Panel Discussion*] (Kenneth J. Withers asserting that access to court proceedings and records reveals how court decisions are made so that the basis for precedent is available for future litigants and courts to use in the development of the common law).

<sup>340</sup> See, e.g., *United States v. Mitchell*, 551 F.2d 1252, 1258 (D.C. Cir. 1976) (“[T]he right of inspection serves to produce ‘an informed and enlightened public opinion.’” (quoting Grosjean

matters of public concern.<sup>341</sup> Public access even provides therapeutic benefits to the community, as Chief Justice Burger noted in *Richmond Newspapers*:

The early history of open trials in part reflects the widespread acknowledgment, long before there were behavioral scientists, that public trials had significant community therapeutic value. Even without such experts to frame the concept in words, people sensed from experience and observation that, especially in the administration of criminal justice, the means used to achieve justice must have the support derived from public acceptance of both the process and its results.<sup>342</sup>

Although this is just a partial list, it highlights the broad range of benefits that can arise from public access to the courts. Not all of these benefits, however, support the recognition of a First Amendment right of access. Indeed, even a cursory review of the list above reveals that some of the purported advantages of public access serve only functionalist ends.

In order to identify which benefits provide support for a First Amendment right of access, it will be helpful to characterize the potential benefits of public access in terms of the type of impact they have: “first-order benefits” impact the functioning of specific court proceedings, “second-order benefits” affect the judicial system as a whole, and “third-order benefits” influence society broadly.

#### a. First-Order Benefits

Public access to the courts clearly provides significant first-order benefits and, indeed, this is where much of the attention has typically been directed in the debate over a First Amendment right of access. Judges and scholars have long recognized the first-order benefits that flow from public access to court proceedings, including keeping witnesses, judges, and other trial participants honest;<sup>343</sup> generating

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v. Am. Press Co., 297 U.S. 233, 247 (1936))), *rev'd sub nom*, *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 598 (1978).

<sup>341</sup> See, e.g., *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 839 (1978) (“The operation of the Virginia Commission, no less than the operation of the judicial system itself, is a matter of public interest, necessarily engaging the attention of the news media.”).

<sup>342</sup> 448 U.S. 555, 570–71 (1980) (plurality opinion).

<sup>343</sup> See, e.g., *Littlejohn v. Bic Corp.*, 851 F.2d 673, 678 (3d Cir. 1988) (observing that open access “promotes public confidence in the judicial system by enhancing testimonial trustworthiness and the quality of justice dispensed by the court”); *Ex parte Capital U-Drive-It, Inc.*, 630 S.E.2d 464, 469 (S.C. 2006) (“Public access discourages perjury and encourages bringing the truth to light because participants are less likely to testify falsely in a sunlit courtroom before their neighbors than in a private room before court officials.”).

additional witnesses and evidence;<sup>344</sup> and, in the criminal context, dissuading the government from engaging in unjust prosecutions.<sup>345</sup>

First-order benefits obviously serve functionalist ends by improving the operation of court proceedings. This is not to denigrate the importance of these instrumental benefits. In fact, courts should put great value on improving the fairness and functioning of court proceedings. But that does not mean that the First Amendment should require public access in order to secure these benefits. While first-order benefits might implicate other important rights,<sup>346</sup> they do not directly advance the core justificatory theories underlying the First Amendment's speech and press clause guarantees.<sup>347</sup>

#### b. Second-Order Benefits

Second-order benefits, which affect the functioning of the court system as a whole, also flow from providing public access to the courts. Public access, for example, promotes public confidence in the justice system,<sup>348</sup> supports the development of the common law,<sup>349</sup> and enables lawyers and parties to improve their arguments and predict the outcomes of their cases.<sup>350</sup> Public access also impacts the efficiency of the courts by decreasing the filing of frivolous claims and increasing the likelihood of settlements.<sup>351</sup> In addition, public access plays an important role in exposing and reducing bias and corruption within the court system. Public access, especially to court records, makes it more

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<sup>344</sup> See, e.g., *Waller v. Georgia*, 467 U.S. 39, 46 (1984) (“[A] public trial encourages witnesses to come forward and discourages perjury.”); *In re Oliver*, 333 U.S. 257, 270 n.24 (1948) (“Public trials come to the attention of key witnesses unknown to the parties.”); *United States ex rel. Bennett v. Rundle*, 419 F.2d 599, 606 (3d Cir. 1969) (“[A] public trial may lead, even accidentally, to the appearance of an important witness who, having heard the testimony, may come forward with relevant new evidence . . .”).

<sup>345</sup> See, e.g., *Westchester Rockland Newspapers, Inc. v. Leggett*, 48 N.Y.2d 430, 437 (1979) (noting that public access to court proceedings protects an accused from “unjust persecution [sic] by public officials”).

<sup>346</sup> See, e.g., U.S. CONST. amends. VI, VII.

<sup>347</sup> See *supra* Section II.A.1 for a discussion of the various theories underlying the First Amendment.

<sup>348</sup> See, e.g., *Press-Enterprise I*, 464 U.S. 501, 508 (1984) (“Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.”). The moral authority of judges, upon which their power is largely based, is dependent upon the public's trust, which cannot be gained or retained without public oversight.

<sup>349</sup> See *Panel Discussion*, *supra* note 339, at 1745–46.

<sup>350</sup> See Lynn M. LoPucki, *Court-System Transparency*, 94 IOWA L. REV. 481, 498–510 (2009) (describing how increased court transparency leads to better predictions of litigation outcomes).

<sup>351</sup> It is also believed that public access to the courts will reduce the frequency of legal malpractice because lawyers will be able to observe and learn from the mistakes of others. See *id.* at 510–13.

likely that systemic problems will be identified, corrected, and deterred.<sup>352</sup> As the California Supreme Court observed: “If public court business is conducted in private, it becomes impossible to expose corruption, incompetence, inefficiency, prejudice, and favoritism.”<sup>353</sup>

Again, these are laudable benefits. But like first-order effects, they serve functionalist goals in improving the functioning of the court system and do not directly support the recognition of a First Amendment right of access to the courts.

### c. Third-Order Benefits

As we move into identifying the third-order benefits of public access, we begin to see how public access to the courts can advance the structural values underlying the First Amendment. Third-order benefits include informing the public about the exercise of governmental power, educating individuals about the implementation and impact of the law, and fostering discussion about matters of public concern. These benefits, which extend beyond the justice system itself, play an important structural role in our constitutional system by increasing citizens’ ability to exercise self-governance.<sup>354</sup>

Public access to the courts, for example, makes it possible for individuals to know what laws govern them. Although the courts are often thought of merely as an instrument for resolving disputes, that misunderstands their importance in the American legal system. As every first-year law student discovers, statutes—and constitutions—are full of vague standards. Those standards do not begin to take on concrete meaning until the courts interpret and implement them. Public access to the courts, especially the raw materials with which the courts

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<sup>352</sup> Lynn LoPucki, who has done important work in this area, describes how researchers can use statistical tools to analyze case outcomes, noting that such tools can determine if judge-to-judge differences are attributable to the judges themselves or random differences in the cases assigned to the judges. *Id.* at 494–95; *see also* MD. COURTS, REPORT OF THE COMMITTEE ON ACCESS TO COURT RECORDS at 7, <http://www.courts.state.md.us/access/finalreport3-02.pdf> (last visited Oct. 31, 2016) (“Access to court records, and especially electronic court records, enables the public to learn of, and correct, lapses in the system—whether these take the form of injustice in an individual civil or criminal case or in a previously unrecognized pattern of cases.”).

<sup>353</sup> NBC Subsidiary (KNBC-TV), Inc. v. Superior Court, 980 P.2d 337, 360 n.28 (Cal. 1999) (quoting *In re Estate of Hearst*, 136 Cal. Rptr. 821, 824 (Ct. App. 1977)).

<sup>354</sup> Not all third-order effects advance structuralist goals. For example, public access to the courts informs the public about important safety and welfare issues. *See supra* notes 340–42 and accompanying text. In addition, access to information about businesses and individuals who are involved in criminal and civil cases allows members of the public to make better-informed decisions about what products to buy, where to work, who to hire, and who to take on as tenants, among other things. *See* REPORT OF THE COMMITTEE ON ACCESS TO COURT RECORDS, *supra* note 352, at 7. These are all important societal benefits, but they do not directly advance the First Amendment’s structural goals.

work (e.g., evidence, witnesses, legal arguments), is essential for the public to understand the application of the law and the mechanisms by which it is formed.<sup>355</sup> As the D.C. Circuit stated:

A court proceeding, unlike the processes for much decisionmaking by executive and legislative officials, is in its entirety and by its very nature a matter of legal significance; all of the documents filed with the court, as well as the transcript of the proceeding itself, are maintained as the official “record” of what transpired.<sup>356</sup>

The courts also provide a crucial forum where disputes over the proper application of government power are aired and, at least in some cases, resolved. Courtroom fights over the excessive use of police force make police tactics visible.<sup>357</sup> Lawsuits over the safety of drugs, automobiles, and other products reveal the research behind these widely used products and allow the public to assess their societal costs and benefits.<sup>358</sup> In fact, court cases are full of experts on every conceivable issue, from DNA sequencing to the safety of automobile ignition switches. As Lynn LoPucki has noted, “the courts are among the most information-rich institutions in society.”<sup>359</sup>

It is important to recognize, however, that a structuralist justification for a First Amendment right of access to the courts does not turn on whether public access to a particular court proceeding or record—standing alone—would advance democratic self-governance. This distinction marks a critical difference between structuralist and functionalist justifications for court transparency. Many judges and scholars who support a right of public access to the courts focus on the

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<sup>355</sup> See *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 502 (1st Cir. 1989) (“The basis for this [First Amendment] right is that without access to documents the public often would not have a ‘full understanding’ of the proceeding and therefore would not always be in a position to serve as an effective check on the system.” (citing *In re Globe Newspaper Co.*, 729 F.2d 47, 52 (1st Cir. 1984))); Peter W. Martin, *Online Access to Court Records—From Documents to Data, Particulars to Patterns*, 53 VILL. L. REV. 855, 859 (2008) (“[E]ffective public understanding and scrutiny of the judicial process require access to rulings of the court and to documents filed by parties.”).

<sup>356</sup> *Wash. Legal Found. v. U.S. Sentencing Comm’n*, 89 F.3d 897, 906 (D.C. Cir. 1996).

<sup>357</sup> See, e.g., Keith L. Alexander, *Baltimore Reaches \$6.4 Million Settlement with Freddie Gray’s Family*, WASH. POST (Sept. 8, 2015), [https://www.washingtonpost.com/local/crime/baltimore-reaches-64-million-settlement-with-freddie-grays-family/2015/09/08/80b2c092-5196-11e5-8c19-0b6825aa4a3a\\_story.html](https://www.washingtonpost.com/local/crime/baltimore-reaches-64-million-settlement-with-freddie-grays-family/2015/09/08/80b2c092-5196-11e5-8c19-0b6825aa4a3a_story.html) (reporting on the settlement of tort claims against the city of Baltimore, nearly five months after twenty-five-year-old was critically injured in police custody, sparking days of protests and rioting).

<sup>358</sup> See, e.g., Marie McCullough, *Cancer Questions over Popular Diabetes Drugs Raise Furor*, INQUIRER (Phila.) (Feb. 19, 2016, 3:31 AM), [http://www.philly.com/philly/health/cancer/20160221\\_Cancer\\_questions\\_over\\_popular\\_diabetes\\_drugs\\_raise\\_furor.html](http://www.philly.com/philly/health/cancer/20160221_Cancer_questions_over_popular_diabetes_drugs_raise_furor.html) (reporting on lawsuit against Merck claiming the company did not disclose the side effect of taking Januvia, the company’s blockbuster diabetes drug).

<sup>359</sup> LoPucki, *supra* note 350, at 510.

benefits that accrue from the public dissemination of specific types of information. Under this approach, public access is justified only when the information the public gains is relevant to a matter of public concern. If a court proceeding or record involves solely “private matters,” public access is assumed to serve no societal benefit.

Structuralists, on the other hand, see public access as justified regardless of whether the specific information gained by the public relates to a matter of public concern because what the public is observing is the exercise of judicial power. In other words, the structural benefits of public access transcend individual cases. Civil, criminal, juvenile, and family law cases all involve the exercise of government power regardless of the identity of the litigants or the legal issues involved.

Public access is therefore needed even in cases that do not appear to touch on issues of public concern. Justice Oliver Wendell Holmes, while still a jurist on the Supreme Judicial Court of Massachusetts, captured this understanding of the need for public access in *Cowley v. Pulsifer*, where he affirmed the privilege to report on court proceedings:

It is desirable that the trial of causes should take place under the public eye, not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed.<sup>360</sup>

Not surprisingly, functionalist and structuralist justifications can lead to different approaches to the question of court access. Functionalists tend to rely on balancing tests to assess whether First Amendment interests should be favored over other interests in particular cases.<sup>361</sup> Although these balancing tests can vary in the importance they assign to First Amendment values, the key distinguishing feature of a functionalist approach is that it views an informed public as only one value a court must consider when non-speech interests are implicated by public access.<sup>362</sup>

For structuralists, informed public discourse is the preeminent value because all other values rest on the capacity of citizens to self-govern. While not discounting the beneficial role that public access

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<sup>360</sup> *Cowley v. Pulsifer*, 137 Mass. 392, 394 (1884). Although Holmes is referring to the role that public access plays in ensuring the accountability of judges, the government as a whole is also held accountable by providing public access to the courts, regardless of whether individual cases are considered to be of public concern.

<sup>361</sup> See *supra* Section I.B.3.

<sup>362</sup> Kobyłka & Dehnel, *supra* note 330, at 369–71.

plays in specific court proceedings, a structuralist approach looks past individual court proceedings to focus on the broader public interest served by the dissemination of information about the courts, which play a uniquely important structural role in our constitutional system.<sup>363</sup> As described below, this may result in public access rights taking precedence in cases that would not pass a functionalist's balancing test, but such a result is deemed necessary to preserve higher-order values.

### 3. Court Transparency and Self-Governance

Public access to the courts is essential if the public is to understand the contours and operation of their government. The courts are a central locus where government policies are contested, where rights are recognized or disavowed, and where social change is often implemented or delayed. Because the public is generally precluded from observing the internal deliberations of government, public access to the courts helps to mitigate the informational asymmetry that exists between citizens and the government,<sup>364</sup> an asymmetry that challenges the very notion of democratic control. James Madison, the drafter of the First Amendment, understood the need for an informed populace when he warned that "popular government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both."<sup>365</sup>

As Madison recognized, public understanding of the distribution of power between citizens and the government and between the various branches of government is a precondition for any system of self-government. The entire theory of self-governance that animates the First Amendment rests on this basic insight about the link between informed public discourse and citizen sovereignty. In the words of Alexander Meiklejohn:

The welfare of the community requires that those who decide issues shall understand them. . . . Just so far as, at any point, the citizens who are to decide an issue are denied acquaintance with information or opinion . . . which is relevant to that issue, just so far the result must be ill-considered, ill-balanced planning for the general good. *It is that mutilation of the thinking process of the community against which the First Amendment to the Constitution is directed.*<sup>366</sup>

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<sup>363</sup> See *infra* Section II.B.4.

<sup>364</sup> See Varol, *supra* note 301 (manuscript at 36).

<sup>365</sup> Letter from James Madison to W.T. Barry (Aug. 4, 1822), in 9 THE WRITINGS OF JAMES MADISON 103, 103 (Gaillard Hunt ed., 1910).

<sup>366</sup> MEIKLEJOHN, *supra* note 30, at 26–27.

Although many of our most consequential legal, social, and political issues are debated in the courts, information that is relevant to self-governance does not arise only in controversial cases. The issues that are contested in the courts—even in apparently mundane cases—as well as the manner in which these disputes are addressed and resolved by the courts are of public concern because every case involves the exercise of government power. In her influential work on the benefits of open courts, Judith Resnik asked, “[w]hat is the utility of having a window into the mundane as well as the dramatic?”<sup>367</sup> According to Resnik, even ordinary legal disputes play an important role in informing the public about the exercise of governmental power:

That is where people live and that is where state control can be both useful and yet overreaching. The dense and tedious repetition of ordinary exchanges is where one finds the enormity of the power of both bureaucratic states and private sector actors. That power is at risk of operating unseen. The redundancy of various claims of right and the processes, allegations, and behaviors that become the predicates to judgments can fuel debate not only about the responses in particular cases but also about what the underlying norms ought to be.<sup>368</sup>

Resnick goes on to provide examples of disputes that have traditionally been considered as outside customary public discourse and explains how public awareness of how the courts treat these issues can generate new rights and limitations:

So-called “domestic violence” provides one ready example of the role of public processes in reorienting an understanding of what was once cabined as “private” and tolerated as within the familial realm. Civil and criminal litigation about violence against women has helped to shape an understanding of how gender-based violence is a mechanism of subordination and an abuse of power.<sup>369</sup>

As Resnik suggests, public access to the courts can alert the public to the need for legal and governmental reforms, thus allowing democratic sovereignty to remain located in the people. Courts are the principal mechanism through which the government exercises a broad range of powers, including allocating rights, transferring assets, recognizing and reconfiguring families, authorizing the receipt of government benefits, regulating commercial transactions, and legitimizing violence against individuals who violate the criminal law.

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<sup>367</sup> Judith Resnik, *Bring Back Bentham: “Open Courts,” “Terror Trials,” and Public Sphere(s)*, 5 *LAW & ETHICS HUM. RTS.* 2, 56 (2011).

<sup>368</sup> *Id.*

<sup>369</sup> *Id.*

Court transparency allows the public to observe the exercise of these powers and to “see that law varies by contexts, decision makers, litigants, and facts.”<sup>370</sup> Moreover, Resnik notes, the public and the parties involved “gain a chance to argue that the governing rules or their applications are wrong.”<sup>371</sup> Public access to the courts thus instantiates the democratic promise that laws can change through public input.

Although we might be skeptical that the public will make proper use of the information it gains from observing the courts,<sup>372</sup> this does not negate the need for access in the first place. If citizens are the ultimate sovereigns, as the Constitution presupposes, they must have access to the information necessary to evaluate the actions of their government, whether they actually make use of this information or not. This fundamental principle underlies the First Amendment’s structural role as a facilitator of democratic control. The Constitution’s protections would be hollow indeed if the government were able to foreclose public access to the courts, which sit at the critical interface between the exercise of governmental power and the public, simply because the government feels that the public is incapable of making effective use of the information. Moreover, if the government were to manage public access to the courts in this way, it would rob the government of its legitimacy. As Robert Post warns, “[t]he public sphere can sustain democratic legitimation only insofar as it is beyond the grasp of comprehensive state managerial control.”<sup>373</sup> For Post, “[a] state that controls our knowledge controls our minds.”<sup>374</sup>

#### 4. The Unique Structural Role of the Courts

At this point in our analysis, some readers may think that the courts are just another indistinct part of the government, and therefore the rationales for recognizing a First Amendment right of access to the courts apply equally well to the other branches of government. Although it may be the case that a First Amendment right of access should be

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<sup>370</sup> *Id.* at 61.

<sup>371</sup> *Id.*

<sup>372</sup> See Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 928–32 (2006) (questioning the existence of an interested public that needs and wants to be fully informed about the government). Self-governance also depends upon the existence of a virtuous and altruistic citizenry, see, for example, William P. Marshall, *Religion As Ideas: Religion As Identity*, 7 J. CONTEMP. LEGAL ISSUES 385, 388 n.16 (1996), which some would say bears little resemblance to civic life today. See generally ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000).

<sup>373</sup> POST, *supra* note 22, at 19.

<sup>374</sup> *Id.* at 33.

extended to other parts of the government,<sup>375</sup> we need not go that far because the courts play a unique structural role in our constitutional system that makes a right of public access to the courts particularly compelling from the standpoint of self-governance.

First, the courts do not exercise power in the same way the legislative and executive branches do. While all three branches are integral to the system of checks and balances created by the Constitution, the courts play a special role in the law-making process. Alexander Hamilton once remarked that the judiciary is “the least dangerous” branch because it has neither the ability nor the resources to create and enforce laws.<sup>376</sup> Perhaps Hamilton forgot about the common law, but even in the realm of statutes and regulations, the courts in matters both mundane and momentous often serve as the final arbiters of the reach and interpretation of the law.<sup>377</sup> Moreover, since *Marbury v. Madison*, the courts have assumed for themselves the final say in interpreting the Constitution’s provisions.<sup>378</sup>

Despite this outsized power, the courts do not share the same democratic constraints that the legislative and executive branches do. Federal judges have lifetime tenure, as do many state court judges.<sup>379</sup> And even in states that do elect judges, most of these elections are non-partisan or uncontested retention elections<sup>380</sup> that do not subject the courts to the same political controls as the legislative and executive branches. “Judges are not politicians, even when they come to the bench by way of the ballot,” Chief Justice John Roberts Jr. observed in *Williams-Yulee v. Florida Bar*.<sup>381</sup> As he noted, “[p]oliticians are expected to be appropriately responsive to the preferences of their supporters,”

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<sup>375</sup> Other scholars have argued this. See, e.g., Lewis, *supra* note 26, at 3 (concluding that the First Amendment should provide a right of access to all government institutions where it is necessary to ensure democratic control); McDonald, *supra* note 43, at 256–57 (asserting that the First Amendment should provide a right to gather information from the government and other sources).

<sup>376</sup> THE FEDERALIST NOS. 78, 81 (Alexander Hamilton).

<sup>377</sup> See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 595 (1980) (Brennan, J., concurring) (“Under our system, judges are not mere umpires, but, in their own sphere, lawmakers—a coordinate branch of government.”).

<sup>378</sup> 5 U.S. (1 Cranch) 137 (1803). To further cast doubt on Hamilton’s sanguine view of the courts, it should be noted that the courts are a significant and growing part of the government, both in terms of their reach and budget. “In 1850, fewer than forty federal judges worked at the trial level in the United States, . . . [b]y 2000, more than 1700 trial-level judges worked in more than 550 federal courthouse facilities.” Resnik, *supra* note 367, at 68.

<sup>379</sup> According to the American Bar Association, twelve states grant life tenure or use long-term appointments of some type for their highest courts. See Fact Sheet, Am. Bar Ass’n, Fact Sheet on Judicial Selection Methods in the States (Sept. 4, 2002), [http://www.americanbar.org/content/dam/aba/migrated/leadership/fact\\_sheet.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/leadership/fact_sheet.authcheckdam.pdf).

<sup>380</sup> *Id.*

<sup>381</sup> 135 S. Ct. 1656, 1662 (2015) (affirming restrictions on judicial candidate’s right to personally solicit campaign funds in an election).

whereas this “is not true of judges.”<sup>382</sup> To the contrary, “[a] judge instead must ‘observe the utmost fairness,’ striving to be ‘perfectly and completely independent.’”<sup>383</sup>

Yet, in one of the great ironies of our constitutional system, the courts are tasked with ensuring that the other branches of government remain democratic.<sup>384</sup> John Hart Ely, who has written extensively about constitutional structure, calls this the “representation-reinforcing” role of the judiciary, which involves “policing the mechanisms by which the system seeks to ensure that our elected representatives will actually represent.”<sup>385</sup> According to Ely, judges must guard against insiders using the system to “chok[e] off the channels of political change to ensure that they will stay in and the outs will stay out,” and against “representatives beholden to an effective majority . . . systematically disadvantaging some minority . . . thereby denying that minority the protection afforded other groups by a representative system.”<sup>386</sup>

Second, the other branches of government operate more directly in the public eye. The work of the legislative branch, for example, typically involves some degree of public debate and results in published legislation that is broadly targeted. Legislative enactments, as well as their implementation by the executive branch, are therefore hard to shield from public view and the public is thus able to mobilize in response and to exercise control over the legislative and executive branches through the political process. Courts, on the other hand, resolve specific disputes that generally involve a small number of parties. And, as we saw in *Doe v. C.A.R.S. Protection Plus, Inc.*, courts sometimes do not even allow the public to see their decisions.<sup>387</sup>

Moreover, although court rulings can have broadly felt effects, the public has no direct channels of political recourse to respond to the actions of the courts. Heidi Kitrosser describes the important distinction between political and adjudicative activities as follows:

[O]ne 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

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<sup>382</sup> *Id.* at 1667.

<sup>383</sup> *Id.* (quoting Address of John Marshall (Dec. 11, 1829), in PROCEEDINGS AND DEBATES OF THE VIRGINIA STATE CONVENTION OF 1829–1830 615, 616 (1830)).

<sup>384</sup> See Bhagwat, *Patronage and the First Amendment*, *supra* note 283, at 1386.

<sup>385</sup> ELY, *supra* note 295, at 102.

<sup>386</sup> *Id.* at 103.

<sup>387</sup> 527 F.3d 358, 371 (3d Cir.) (affirming sealing of case, including district court’s decisions), *order clarified*, 543 F.3d 178 (3d Cir. 2008).

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.<sup>388</sup>

Kitrosser's conclusion that adjudicative activities are legitimized by procedural constraints and norms of reason and fairness further supports the need for public access to the courts. Nearly all of the constraints imposed on the courts stem from due process and other procedural protections. The legitimacy of the courts therefore rests on the public's assurance that these protections are being followed by judges, a fact that did not escape the framers who included a right to a public trial in all criminal cases and a right to a jury trial in civil cases under the Sixth and Seventh Amendments respectively.<sup>389</sup> Judges also recognize that their legitimacy rests on public oversight. As Judge Frank Easterbrook has noted: "The political branches of government claim legitimacy by election, judges by reason. Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat and requires rigorous justification."<sup>390</sup> Recall Jeremy Bentham's admonition quoted in the introduction that "[p]ublicity is the very soul of justice."<sup>391</sup> Bentham later explained why this is so: "It keeps the judge himself, while trying, under trial."<sup>392</sup> Public access to the courts thus serves as an essential check on judges and, by extension, the power of government.<sup>393</sup>

Third, the courts play an important performative role in a democracy. In the words of Judith Resnik, "[o]pen court proceedings enable people to watch, debate, develop, contest, and materialize the exercise of both public and private power."<sup>394</sup> This view is echoed by Robert Post, whose "participatory" theory of self-governance rests on "the processes through which citizens come to identify a government as

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<sup>388</sup> Kitrosser, *supra* note 27, at 134–35.

<sup>389</sup> See Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 667–69, 678–79 (1973) (describing how the Seventh Amendment was intended to be a restraint on government power).

<sup>390</sup> *Hicklin Eng'g, L.C. v. Bartell*, 439 F.3d 346, 348 (7th Cir. 2006), *abrogated by* RTP L.L.C. v. ORIX Real Estate Capital, Inc., 827 F.3d 689 (7th Cir. 2016).

<sup>391</sup> BENTHAM, *THE WORKS OF JEREMY BENTHAM*, *supra* note 1, at 316.

<sup>392</sup> *Id.*

<sup>393</sup> Vincent Blasi has written extensively about the role of the First Amendment in checking government power. According to Blasi, "[t]he check on government must come from the power of public opinion, which in turn rests on the power of the populace to retire officials at the polls, to withdraw the minimal cooperation required for effective governance, and ultimately to make a revolution." Blasi, *Checking Value*, *supra* note 274, at 539.

<sup>394</sup> Resnik, *supra* note 367, at 54.

their own.”<sup>395</sup> Indeed, the courts are, as Resnik points out, at the center of a range of democratic practices: “Courts can be sites in which democratic norms of equal treatment, of popular engagement with legal rulemaking, and of constrained government authority are put into practice.”<sup>396</sup> As Resnik observes, the “normative obligations of judges in both criminal and civil proceedings to hear the other side, to welcome ‘everyone’ as an equal, to be independent of the government that employs and deploys them, and to provide public processes enable . . . democratic discourse[.]”<sup>397</sup>

Finally, unlike the other branches of government, the work of the courts is fundamentally about the discovery and disclosure of information. Judges and juries sift through conflicting claims and base their decisions on evidence and arguments presented in “open court.”<sup>398</sup> In practical terms, the courts serve an “information forcing” role for the government because the courts are where government power is contested, defined, and ultimately actualized. As David Pozen notes: “The quintessential structural feature of the Constitution, the distribution of powers across the coordinate branches, serves as an information-forcing device. To fulfill its responsibilities, each branch is required both to give and receive information from the others.”<sup>399</sup> This forced information sharing—among branches of the government and between the government and the people—is an essential part of our constitutional system. Courts, because of the nature of their work, sit at the critical interface between the government and the public. As a result, public access to the courts aids in legitimizing the exercise of all governmental powers.

### III. AN ANALYTICALLY COHERENT PUBLIC ACCESS DOCTRINE

In this Part we move from theory to application. As the preceding discussion has shown, the central purpose of the First Amendment is to ensure that citizens can effectively participate in and contribute to our republican system of government. In order to effectuate this goal, the First Amendment must embody an affirmative right of access to the courts, which, by virtue of their unique institutional position, possess

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<sup>395</sup> Post, *Reconciling Theory and Doctrine*, *supra* note 273, at 2367.

<sup>396</sup> Resnik, *supra* note 367, at 4.

<sup>397</sup> *Id.* at 53.

<sup>398</sup> See *Patterson v. Colorado ex rel. Attorney Gen.*, 205 U.S. 454, 462 (1907) (“The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court . . .”).

<sup>399</sup> David E. Pozen, *Deep Secrecy*, 62 *STAN. L. REV.* 257, 300 (2010).

information that is essential for the public to evaluate governmental power and to act as sovereigns over the government.<sup>400</sup>

Although the conclusion that the First Amendment embodies an affirmative right of access to the courts marks a significant expansion in our current understanding of the First Amendment's scope, the implementation of such a right can proceed largely through the application of established First Amendment doctrines. As with other First Amendment rights, the right of public access would not be absolute. In evaluating public access claims, a court should start with a presumption that the public has a First Amendment right of access to all court proceedings and filed records that are material to a court's exercise of its adjudicatory power. This presumption can, in appropriate circumstances, be overcome when the countervailing interests supporting secrecy are compelling. Before closure can be ordered, however, courts must conclude that the proposed restrictions are narrowly tailored and that there are no other alternatives to closure.

The following Sections describe these requirements in greater detail.

#### A. *Ensuring a Presumption of Public Access*

The Supreme Court's experience and logic test should be abandoned and replaced with a presumption that the public has a First Amendment right of access to all court proceedings and filed records that are material to a court's exercise of its adjudicatory power.<sup>401</sup> As explained in Part I, the current test for deciding whether a First Amendment right of access attaches to a particular proceeding or record is not based on sound constitutional principles.<sup>402</sup> Moreover, it fails to guide judges in difficult cases and leads to inconsistent results.<sup>403</sup>

There are a number of benefits that would flow from adopting a presumptive First Amendment right of public access. First, it would eliminate the uncertainty regarding whether a First Amendment

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<sup>400</sup> See *supra* Section II.B.

<sup>401</sup> For purposes of determining whether a right of access exists, proceedings and records should be considered material to a court's exercise of its adjudicatory power whenever they are relevant to the core judicial function of determining the facts and the law applicable to the case. Assessing the materiality of information is something that judges do in a wide range of contexts, including securities regulation, see THOMAS LEE HAZEN, *THE LAW OF SECURITIES REGULATION* § 12:6 (4th ed. 2002), and perjury, see *Kungys v. United States*, 485 U.S. 759, 770 (1988) (stating that a false statement is material if it had "a natural tendency to influence, or was capable of influencing, the decision of the decisionmaking body to which it was addressed" (quoting *Weinstock v. United States*, 231 F.2d 699, 701 (1956))).

<sup>402</sup> See *supra* Section I.A.

<sup>403</sup> See *supra* Section I.B.

standard or a common-law standard should govern access claims. No longer will courts need to scrutinize the history and logic of openness in order to determine whether the values underlying the First Amendment are implicated by public access to a particular court proceeding or record. Instead, courts will apply a single test for access and can immediately engage in the far more critical examination of whether the interests supporting secrecy are sufficiently compelling to justify closure. Raleigh Hannah Levine, who advocates applying a strict scrutiny test to all denials of public access to adjudicative proceedings, notes that applying such a rule would “offer consistency and clarity, protect judges so that they can make unpopular decisions, prevent the appearance and actuality of outcome-driven analyses, and stay flexible enough to allow closure in the limited cases in which it is genuinely necessary.”<sup>404</sup>

Second, adopting a presumptive First Amendment right of access will send a clear signal to judges and the public that the work of the courts is both relevant and important to the public. As Vincent Blasi has noted, First Amendment doctrines that embody clear principles, such as the prohibition against prior restraints,<sup>405</sup> have “thrust.”<sup>406</sup> That is, their use “represents a notable value commitment that says much about how particular disputes will be adjudicated.”<sup>407</sup> In comparison, Blasi points out that multi-factor balancing tests and context-dependent standards “do[] not provide a strong indication of how a particular dispute will be resolved.”<sup>408</sup> This is not to say that the right of access must be absolute in order to serve this signaling function. Even a qualified right can communicate clear principles:

A mode of analysis that emphasizes principles . . . can broaden the perspective of the decisionmaker and make the regulatory concerns of the moment seem less monumental. . . . A legal culture that talks and thinks in terms of principles is somewhat less likely, by virtue of that mode of discourse, to trivialize its ideals in the process of case-by-case application, or lose the capacity to subject its ad hoc, pragmatic impulses to some form of discipline.<sup>409</sup>

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<sup>404</sup> Levine, *supra* note 27, at 1745.

<sup>405</sup> See *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (“Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.”); see also Ardia, *Freedom of Speech*, *supra* note 302, at 34–38 (discussing the differences between the First Amendment’s treatment of prior restraints and subsequent sanctions).

<sup>406</sup> Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 473 (1985).

<sup>407</sup> *Id.*

<sup>408</sup> *Id.*

<sup>409</sup> *Id.* at 474.

Third, a presumptive First Amendment right of access will force the proponents of closure to justify restrictions on public access by demonstrating that the restrictions on access are necessary to advance a compelling interest. Courts will not be able to fall back on ad-hoc balancing that tends to discount the values of openness, but will instead have to issue findings “specific enough that a reviewing court can determine whether the closure order was properly entered.”<sup>410</sup> As discussed below, the courts can draw guidance on performing this task from the large, and growing, body of First Amendment case law applying strict scrutiny.<sup>411</sup> Of course, this will make closures less common, but that is in keeping with the Court’s directive that “[c]losed proceedings . . . must be rare and only for cause shown that outweighs the value of openness.”<sup>412</sup>

Applying a First Amendment right of public access to all court proceedings and filed records that are material to a court’s exercise of its adjudicatory power will undoubtedly result in an expansion of public access rights.<sup>413</sup> Yet a number of lower courts already impose a First Amendment right of access outside the criminal trial context. In fact, lower courts have held that a First Amendment right of access applies to almost all pretrial, mid-trial, and post-trial criminal proceedings, including: suppression hearings,<sup>414</sup> bail hearings,<sup>415</sup> entrapment hearings,<sup>416</sup> change of venue hearings,<sup>417</sup> competency hearings,<sup>418</sup> hearings on the disqualification or withdrawal of counsel,<sup>419</sup> judicial recusal hearings,<sup>420</sup> plea hearings,<sup>421</sup> hearings to reduce a sentence,<sup>422</sup>

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<sup>410</sup> *Press-Enterprise I*, 464 U.S. 501, 510 (1984).

<sup>411</sup> See *infra* notes 448–58 and accompanying text.

<sup>412</sup> *Press-Enterprise I*, 464 U.S. at 509.

<sup>413</sup> A presumptive First Amendment right of access would not extend to proceedings or documents that are not material to a court’s exercise of its adjudicatory power or to unfiled materials. See *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32–33 (1984) (denying a First Amendment right of access to unfiled discovery material and noting that “[m]uch of the information that surfaces during pretrial discovery may be unrelated, or only tangentially related, to the underlying cause of action”).

<sup>414</sup> See, e.g., *In re Herald Co.*, 734 F.2d 93 (2d Cir. 1984); *United States v. Brooklier*, 685 F.2d 1162 (9th Cir. 1982); *Associated Press v. Bell*, 510 N.E.2d 313 (N.Y. 1987); *State ex rel. Repository v. Unger*, 504 N.E.2d 37 (Ohio 1986) (per curiam).

<sup>415</sup> See, e.g., *In re Globe Newspapers Co.*, 729 F.2d 47 (1st Cir. 1984); *United States v. Chagra*, 701 F.2d 354 (5th Cir. 1983); *State v. Williams*, 459 A.2d 641 (N.J. 1983).

<sup>416</sup> See, e.g., *United States v. Criden*, 675 F.2d 550 (3d Cir. 1982).

<sup>417</sup> See, e.g., *In re Charlotte Observer*, 882 F.2d 850 (4th Cir. 1989); *Ex parte Birmingham News Co.*, 624 So. 2d 1117 (Ala. Crim. App. 1993).

<sup>418</sup> See, e.g., *In re Times-World Corp.*, 488 S.E.2d 677 (Va. Ct. App. 1997).

<sup>419</sup> See, e.g., *In re Nat’l Broad. Co.*, 828 F.2d 340 (6th Cir. 1987); *United States v. Ellis*, 154 F.R.D. 692 (M.D. Fla. 1993).

<sup>420</sup> See, e.g., *In re Nat’l Broad. Co.*, 828 F.2d 340.

<sup>421</sup> See, e.g., *In re Wash. Post*, 807 F.2d 383 (4th Cir. 1986).

<sup>422</sup> See, e.g., *United States v. Milken*, 780 F. Supp. 123 (S.D.N.Y. 1991).

and post-trial hearings relating to allegations of juror misconduct.<sup>423</sup> In the rare instance when a court has not found a public right of access to a criminal proceeding, it has done so because secrecy plays a critical role in the proceeding in question and public access would “destroy[] the effectiveness” of the proceeding.<sup>424</sup>

Although the Supreme Court has not directly addressed the issue of whether a First Amendment right of access extends to civil proceedings, it has noted that “historically both civil and criminal trials have been presumptively open.”<sup>425</sup> Indeed, the Court has observed that “in some civil cases the public interest in access . . . may be as strong as, or stronger than, in most criminal cases.”<sup>426</sup> Returning again to the case that opened the introduction to this Article, *Doe v. C.A.R.S. Protection Plus, Inc.*, it is clear that this is no run-of-the-mill lawsuit. As the Third Circuit itself remarked, the case raised a matter of first impression in the circuit: whether the protections afforded under the Pregnancy Discrimination Act extend to women who have elected to terminate their pregnancies.<sup>427</sup> How can the public know the extent and effectiveness of the nation’s anti-discrimination laws if it cannot see the application of these laws in specific cases?

Recognizing the importance of public access to civil proceedings, most federal appellate courts already apply a First Amendment right of access to civil cases,<sup>428</sup> as do a number of state supreme courts.<sup>429</sup> For

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<sup>423</sup> See, e.g., *United States v. Simone*, 14 F.3d 833 (3d Cir. 1994).

<sup>424</sup> See, e.g., *United States v. Edwards*, 823 F.2d 111, 117 (5th Cir. 1987) (concluding that public access to a mid-trial inquiry into juror misconduct would “substantially raise the risk of destroying the effectiveness of the jury as a deliberative body”); *United States v. Gonzales*, 150 F.3d 1246, 1264–65 (10th Cir. 1998) (rejecting a right of access to Criminal Justice Act (CJA) proceedings and records because access would have a negative impact on the functioning of CJA process, given the importance of confidentiality to that process). Courts also have consistently held that there is no First Amendment right of access to grand jury proceedings. See, e.g., *United States v. Index Newspapers L.L.C.*, 766 F.3d 1072, 1084 (9th Cir. 2014) (“Because the grand jury is an integral part of the criminal investigatory process, these proceedings are always held in secret.”); *In re N.Y. Times Co. to Unseal Wiretap & Search Warrant Materials*, 577 F.3d 401, 410 n.4 (2d Cir. 2009) (“All grand jury proceedings . . . traditionally have been nonpublic.”).

<sup>425</sup> *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 n.17 (1980) (plurality opinion); see also *Craig v. Harney*, 331 U.S. 367, 374 (1947) (“A trial is a public event. What transpires in the court room is public property.”).

<sup>426</sup> *Gannett Co. v. DePasquale*, 443 U.S. 368, 386 n.15 (1979); see also *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1070 (3d Cir. 1984) (“Public access to civil trials, no less than criminal trials, plays an important role in the participation and the free discussion of governmental affairs.”); *Chi. Council of Lawyers v. Bauer*, 522 F.2d 242, 258 (7th Cir. 1975) (“Civil litigation in general often exposes the need for governmental action or correction. Such revelations should not be kept from the public.”).

<sup>427</sup> *Doe v. C.A.R.S. Prot. Plus, Inc.*, 527 F.3d 358, 363 (3d Cir.), *order clarified*, 543 F.3d 178 (3d Cir. 2008).

<sup>428</sup> See, e.g., *Courthouse News Serv. v. Planet*, 750 F.3d 776, 786 (9th Cir. 2014); *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994); *Republic of Philippines v.*

example, a unanimous California Supreme Court concluded that extending a First Amendment right of access to civil proceedings was fully in keeping with United States Supreme Court precedent: “Although the high court’s opinions in *Richmond Newspapers*, *Globe, Press-Enterprise I*, and *Press-Enterprise II* all arose in the criminal context, the reasoning of these decisions suggests that the First Amendment right of access extends beyond the context of criminal proceedings and encompasses civil proceedings as well.”<sup>430</sup>

The majority of federal circuits also have held that a First Amendment right of access attaches to court records submitted in connection with criminal proceedings,<sup>431</sup> as have several state supreme courts.<sup>432</sup> Many courts also recognize a First Amendment right of access

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Westinghouse Elec. Corp., 949 F.2d 653, 659 (3d Cir. 1991); *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249 (4th Cir. 1988); *FTC v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404 (1st Cir. 1987); *Westmoreland v. Columbia Broad. Sys., Inc.*, 752 F.2d 16, 23 (2d Cir. 1984); *Publicker Indus., Inc.*, 733 F.2d 1059; *In re Cont’l Ill. Sec. Litig.*, 732 F.2d 1302 (7th Cir. 1984); *In re Iowa Freedom of Info. Council*, 724 F.2d 658, 661 (8th Cir. 1983); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1178 (6th Cir. 1983); *Newman v. Graddick*, 696 F.2d 796 (11th Cir. 1983). Only the D.C. Circuit has held to the contrary. *See Ctr. for Nat’l Sec. Studies v. U.S. Dep’t of Justice*, 331 F.3d 918, 935 (D.C. Cir. 2003) (“[N]either this Court nor the Supreme Court has ever indicated that it would apply the *Richmond Newspapers* test to anything other than criminal judicial proceedings.”).

<sup>429</sup> *See, e.g.*, *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 980 P.2d 337, 358 (Cal. 1999); *Mokhiber v. Davis*, 537 A.2d 1100, 1107–08 (D.C. 1988); *Barron v. Fla. Freedom Newspapers, Inc.*, 531 So. 2d 113 (Fla. 1988); *Roman Catholic Diocese of Lexington v. Noble*, 92 S.W.3d 724, 733 (Ky. 2002); *N.J. Div. of Youth & Family Servs. v. J.B.*, 576 A.2d 261 (N.J. 1990); *Rapid City Journal v. Delaney*, 2011 SD 55, 804 N.W.2d 388.

<sup>430</sup> *NBC Subsidiary (KNBC-TV), Inc.*, 980 P.2d at 358.

<sup>431</sup> *See, e.g.*, *In re Providence Journal Co., Inc.*, 293 F.3d 1, 10 (1st Cir. 2002); *United States v. Valenti*, 987 F.2d 708, 710 (11th Cir. 1993); *Wash. Post v. Robinson*, 935 F.2d 282, 283 (D.C. Cir. 1991); *In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d 569, 573 (8th Cir. 1988); *In re N.Y. Times Co.*, 828 F.2d 110, 114 (2d Cir. 1987); *In re Storer Commc’ns, Inc.*, 828 F.2d 330, 336 (6th Cir. 1987); *United States v. Edwards*, 823 F.2d 111, 113 (5th Cir. 1987); *In re Wash. Post Co.*, 807 F.2d 383, 390 (4th Cir. 1986); *United States v. Peters*, 754 F.2d 753, 763 (7th Cir. 1985); *United States v. Smith*, 776 F.2d 1104, 1111 (3d Cir. 1985); *Associated Press v. U.S. Dist. Court*, 705 F.2d 1143, 1145 (9th Cir. 1983). The Tenth Circuit has avoided deciding whether there is a First Amendment right of access to criminal and civil court records. *See, e.g.*, *Riker v. Fed. Bureau of Prisons*, 315 F. App’x 752, 756 (10th Cir. 2009) (“Even assuming, without deciding, that there is a First Amendment right to court documents, that right is not absolute. . . . [A]ny interest Mr. Jordan has is outweighed by the safety needs of Mr. Riker.”); *United States v. McVeigh*, 119 F.3d 806, 812 (10th Cir. 1997) (“[F]or the purposes of this opinion, we assume without deciding that access to judicial documents is governed by the analysis articulated in *Press-Enterprise II*.”).

<sup>432</sup> *See, e.g.*, *State v. Ross*, 543 A.2d 284, 285 (Conn. 1988); *Oahu Publ’ns Inc. v. Ahn*, 331 P.3d 460, 485 (Haw. 2014); *Commonwealth v. Doe*, 648 N.E.2d 1255, 1258 (Mass. 1995), *abrogated by Commonwealth v. Pon*, 14 N.E.3d 182 (Mass. 2014); *In re VV Publ’g Corp.*, 577 A.2d 412, 417–18 (N.J. 1990); *Nichols v. Jackson*, 2002 OK 65, ¶ 12, 55 P.3d 1044, 1046; *State v. Archuleta*, 857 P.2d 234, 239 (Utah 1993); *Circuit Court of Eighth Judicial Dist. v. Lee Newspapers*, 2014 WY 101, 332 P.3d 523, 530 (Wyo. 2014).

to records in civil proceedings.<sup>433</sup> In fact, it makes little sense to treat court proceedings and court records differently under the First Amendment, given that trials and other courtroom proceedings make up only a small portion of the work of the courts.<sup>434</sup> Moreover, excluding court records from the First Amendment's reach would significantly diminish the benefits of public access. As the Third Circuit remarked in *United States v. Antar*:

Access to the documentation of an open proceeding . . . facilitates the openness of the proceeding itself by assuring the broadest dissemination. It would be an odd result indeed were we to declare that our courtrooms must be open, but that transcripts of the proceedings occurring there may be closed, for what exists of the right of access if it extends only to those who can squeeze through the door?<sup>435</sup>

### B. *Evaluating Countervailing Interests*

The presumptive right of public access described above would be a qualified right. As the Supreme Court has made clear, even a First Amendment right of access can be denied when the countervailing interests supporting closure are sufficiently compelling. Although the Supreme Court has used slightly different wording when evaluating

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<sup>433</sup> See, e.g., *Doe v. Pub. Citizen*, 749 F.3d 246, 267 (4th Cir. 2014); *Newsday L.L.C. v. Cty. of Nassau*, 730 F.3d 156, 164 (2d Cir. 2013); *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 86, 93 (2d Cir. 2004); *Grove Fresh Distribs., Inc.*, 24 F.3d at 897; *Leucadia, Inc. v. Applied Extrusion Techs., Inc.*, 998 F.2d 157, 164 (3d Cir. 1993); *Rushford*, 846 F.2d at 253; *In re Cont'l Ill. Sec. Litig.*, 732 F.2d at 1309; *Brown & Williamson Tobacco Corp.*, 710 F.2d at 1177; *Ex parte Capital U-Drive-It, Inc.*, 630 S.E.2d 464, 469 (S.C. 2006). *But see In re Reporters Comm. for Freedom of the Press*, 773 F.2d 1325, 1331-40 (D.C. Cir. 1985) (finding no First Amendment right to discovery materials); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 908 (E.D. Pa. 1981) ("With respect to the question whether the common law right to inspect and copy [discovery materials] has a constitutional dimension, we conclude that it does not.").

<sup>434</sup> See, e.g., *Hartford Courant Co.*, 380 F.3d at 93 (warning that "the ability of the public and press to attend civil and criminal cases would be merely theoretical if the information provided by docket sheets were inaccessible"); *Wash. Legal Found. v. U.S. Sentencing Comm'n*, 89 F.3d 897, 906 (D.C. Cir. 1996) ("[A]ll of the documents filed with the court, as well as the transcript of the proceeding itself, are maintained as the official 'record' of what transpired."). This is the approach taken by the American Bar Association, which has promulgated standards recommending that there should be a public right of access to "all judicial proceedings, related documents and exhibits, and any record made thereof," subject to specific narrowly defined circumstances. STANDARDS FOR CRIMINAL JUSTICE § 8-5.2 (AM. BAR ASS'N 2013). In the commentary to an earlier version of the standards, the ABA stated that its position was intended to conform to the Supreme Court's recognition in *Richmond Newspapers* of a First Amendment-based right of access premised on the "structural" design of the Constitution to guarantee a self-informed citizenry." STANDARDS FOR CRIMINAL JUSTICE § 8-3.2 cmt. at 23 (AM. BAR ASS'N 1991).

<sup>435</sup> 38 F.3d 1348, 1360 (3d Cir. 1994).

restrictions on access—sometimes requiring that closure be “essential to preserve higher values”<sup>436</sup> and at other times stating that restrictions must be “necessitated by a compelling governmental interest”<sup>437</sup>—the test otherwise matches the Court’s strict scrutiny test as applied in other First Amendment contexts.<sup>438</sup>

Strict scrutiny essentially involves a two-part, “ends and means” inquiry.<sup>439</sup> A court must first make a normative judgment about the ends: Is the interest in closure important enough to justify the restriction on public access? If so, the next step involves a “primarily empirical judgment about the means.”<sup>440</sup> As Eugene Volokh notes, “If the means do not actually further the interest, are too broad, are too narrow, or are unnecessarily burdensome, then the government can and should serve the end through [alternative means].”<sup>441</sup>

If a court concludes that public access may be restricted, it must then articulate specific on-the-record findings justifying its conclusion.<sup>442</sup> As the Supreme Court instructed in *Press-Enterprise I*:

The 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. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.<sup>443</sup>

Given the wide variety of disputes that come before the courts, it should come as no surprise that court proceedings and records are awash with private and sensitive information about the litigants, witnesses, jurors, and others who come into contact with the court system. For example, information ranging from bank account numbers to details about an individual’s past sexual activity can appear in court files raising, among other concerns, the risk of identity theft and

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<sup>436</sup> *Press-Enterprise II*, 478 U.S. 1, 13–14 (1986) (“[P]roceedings cannot be closed unless specific, on the record findings are made demonstrating that ‘closure is essential to preserve higher values and is narrowly tailored to serve that interest.’” (quoting *Press-Enterprise I*, 464 U.S. 501, 510 (1984))).

<sup>437</sup> *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606–07 (1982) (“Where . . . the State attempts to deny the right of access . . . it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.”).

<sup>438</sup> See, e.g., *Kamasinski v. Judicial Review Council*, 44 F.3d 106, 109 (2d Cir. 1994) (concluding that “strict scrutiny is the correct standard” to be applied in access disputes governed by the First Amendment).

<sup>439</sup> See Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2418 (1996).

<sup>440</sup> *Id.* at 2419.

<sup>441</sup> *Id.*

<sup>442</sup> *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 581 (1980) (plurality opinion).

<sup>443</sup> 464 U.S. 501, 510 (1984).

reputational harm.<sup>444</sup> For businesses and other organizations, court proceedings may disclose trade secrets and other confidential business information that can lead to substantial economic harm.<sup>445</sup> For the government, information disclosed in court proceedings and records, such as the names of confidential informants and descriptions of intelligence gathering techniques, can potentially harm national security or undermine law enforcement efforts.<sup>446</sup> Moreover, public access to criminal proceedings and records can result in significant prejudice to a defendant's right to a fair trial.<sup>447</sup>

The full list of interests that public access might implicate is too long to recount here, but judges can find guidance in evaluating these interests by reviewing the extensive body of precedent applying strict scrutiny in public access and other First Amendment contexts.<sup>448</sup> In *Press-Enterprise I*, for example, the Supreme Court applied strict scrutiny to the closure of voir dire proceedings.<sup>449</sup> In that case the trial judge asserted two interests in support of his closure orders: “[T]he right of the defendant to a fair trial, and the right to privacy of the prospective jurors.”<sup>450</sup> The Court found little reason to question the lower court's conclusion that these interests were compelling, noting that “the right of an accused to fundamental fairness in the jury selection process is a compelling interest.”<sup>451</sup> As to the interest in juror privacy, the Court stated that “[t]he jury selection process may, in some circumstances, give rise to a compelling interest of a prospective juror when interrogation touches on deeply personal matters that person has legitimate reasons for keeping out of the public domain.”<sup>452</sup>

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<sup>444</sup> See, e.g., Ardia & Klinefelter, *supra* note 33, at 1835–50 (identifying 140 distinct types of sensitive information in court records).

<sup>445</sup> See, e.g., Kyle J. Mendenhall, Note, *Can You Keep a Secret? The Court's Role in Protecting Trade Secrets and Other Confidential Business Information from Disclosure in Litigation*, 62 *DRAKE L. REV.* 885 (2014).

<sup>446</sup> See Arthur L. Burnett, Sr., *The Potential for Injustice in the Use of Informants in the Criminal Justice System*, 37 *SW. L. REV.* 1079, 1082–83 (2008).

<sup>447</sup> See, e.g., *Sheppard v. Maxwell*, 384 U.S. 333, 356–61 (1966) (discussing the prejudicial impact of pretrial publicity and a judge's duty to protect the defendant's constitutional right to a fair trial).

<sup>448</sup> Although the origin of the strict scrutiny test is obscure, the Supreme Court's first application of a compelling interest requirement in the First Amendment context occurred as early as 1958 in *Speiser v. Randall*, 357 U.S. 513 (1958). See Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 *UCLA L. REV.* 1267, 1279 (2007) (noting the first appearance of a compelling interest test in *Speiser* and concluding that “it is certainly fair to say that before the 1964 *McLaughlin [v. Florida]* decision, First Amendment free speech cases had begun to develop both a vocabulary and a set of doctrinal ideas that would shortly coalesce into the modern strict scrutiny test”).

<sup>449</sup> *Press-Enterprise I*, 464 U.S. 501, 510 (1984).

<sup>450</sup> *Id.*

<sup>451</sup> *Id.*

<sup>452</sup> *Id.* at 511.

Nevertheless, the Court concluded that the trial court's closure orders were improper because they were "unsupported by findings showing that an open proceeding in fact threatened those interests."<sup>453</sup>

Gerald Gunther famously declared that strict scrutiny is "'strict' in theory and fatal in fact."<sup>454</sup> Yet the test has not proven to be an insurmountable obstacle in First Amendment cases. In a comprehensive empirical study of all strict scrutiny cases in federal courts from 1990 through 2003, Adam Winkler found that government regulation of speech survived strict scrutiny in twenty-two percent of the cases.<sup>455</sup> Moreover, in the context of public access to court proceedings and records, Winkler found that fifty percent of closure orders survived strict scrutiny.<sup>456</sup> According to Winkler's study, the courts uniformly permitted restrictions on access to grand jury proceedings and restrictions designed to protect minors.<sup>457</sup> By contrast, Winkler found that courts were "relatively hostile to denials of access to ordinary criminal proceedings and records."<sup>458</sup>

Some court proceedings and records will undoubtedly remain closed under this new presumptive First Amendment test while others will have to be open. Grand jury proceedings, for example, will likely stay closed because secrecy is integral to the grand jury's screening and investigatory functions.<sup>459</sup> Many juvenile delinquency proceedings, on the other hand, will have to be open unless closure is justified on a case-by-case basis, a situation that a number of juvenile justice reformers have argued for.<sup>460</sup>

This case-by-case consideration of the interests closure advances is one of the primary benefits of a presumptive right of access under the

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<sup>453</sup> *Id.* at 510–11.

<sup>454</sup> Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

<sup>455</sup> Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 844 (2006).

<sup>456</sup> *Id.* at 849.

<sup>457</sup> *Id.* (finding that courts allowed the restriction in 100% of the cases he reviewed).

<sup>458</sup> *Id.* at 850 (finding that courts allowed the restriction in only sixteen percent of the cases).

<sup>459</sup> See, e.g., *Press-Enterprise II*, 478 U.S. 1, 9 (1986) ("[T]he proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings" (quoting *Douglas Oil Co. v. Petrol Stops Nw.*, 441 U.S. 211, 218 (1979))); *United States v. Index Newspapers L.L.C.*, 766 F.3d 1072, 1084 (9th Cir. 2014) ("Because the grand jury is an integral part of the criminal investigatory process, these proceedings are always held in secret.").

<sup>460</sup> See, e.g., Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083, 1120–29 (1991); Emily Bazelon, Note, *Public Access to Juvenile and Family Court: Should the Courtroom Doors Be Open or Closed?*, 18 YALE L. & POL'Y REV. 155, 192–93 (1999); Kelly Crecco, Note, *Striking a Balance: Freedom of the Press Versus Children's Privacy Interests in Juvenile Dependency Hearings*, 11 FIRST AMEND. L. REV. 490, 525–32 (2013); see also Kathleen S. Bean, *Changing the Rules: Public Access to Dependency Court*, 79 DENV. U. L. REV. 1, 54 (2001) (asserting that public access can check the shortcuts and abuses in juvenile dependency proceedings).

First Amendment. Under the current experience and logic test, the public is foreclosed from accessing entire classes of court proceedings and records because they fail the threshold test for a First Amendment right of access. Under the proposed test, courts will have to evaluate each closure and sealing independently to determine whether the interests supporting closure are compelling and whether the means chosen to limit access are narrowly tailored. Some court proceedings and records will—and should—remain closed, but wholesale closures will no longer be the norm.

### C. *Expanding Access to the Courts*

As courts consider how to implement a right of access, they should remain cognizant that many of the benefits that flow from public access can only be achieved if the public actually takes advantage of this access. Not everyone, of course, can or even desires to attend court proceedings in person. In our nation's early history, attending trials was a common mode of "passing the time."<sup>461</sup> Today, most people rely on surrogates, particularly the media, to inform them about the work of the courts.<sup>462</sup>

The courts, like many parts of the government, are in the midst of a transformation from the paper-based world of the twentieth century to an interconnected, electronic world where physical and temporal barriers to information are eroding. Over the past decade, courts across the country have been moving with alacrity to digitize their records and make them available to the public online.<sup>463</sup> A number of courts have also adopted or are considering adopting other forms of electronic access to their records and courtrooms. For example, Kansas and Utah amended their court rules in 2012 to allow some observers to use cell phones and laptop computers to report from their courtrooms.<sup>464</sup>

The move to allow electronic access to the courts has brought, and will continue to bring, substantial benefits to the public and to the courts themselves.<sup>465</sup> The committee of judges and attorneys that

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<sup>461</sup> 6 JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE § 1834 (James H. Chadbourn rev., Little, Brown & Co. 1976).

<sup>462</sup> *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572–73 (1980) (plurality opinion) ("Instead of acquiring information about trials by firsthand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media.").

<sup>463</sup> See Ardia & Klinefelter, *supra* note 33, at 1826.

<sup>464</sup> See Cathy Packer, *Should Courtroom Observers Be Allowed to Use Their Smartphones and Computers in Court? An Examination of the Arguments*, 36 AM. J. TRIAL ADVOC. 573, 591 (2013).

<sup>465</sup> See KEVIN P. KILPATRICK, NAT'L CTR. FOR STATE COURTS, THE ELECTRONIC HANDSHAKE: PUBLIC ACCESS TO COURT DATABASES 1–3 (1995) (describing how electronic

drafted Utah’s amended rule wrote that “[p]ermitting electronic media coverage will allow the public to actually see and hear what transpires in the courtroom, and to become better educated and informed about the work of the courts.”<sup>466</sup> Similarly, in Kansas the preface to the amended rules states that “electronic devices are redefining the news media” and that future court policies

should include enough flexibility to take into consideration that electronic devices have become a necessary tool for court observers, journalists, and participants and continue to rapidly change and evolve. The courts should champion the enhanced access and the transparency made possible by use of these devices while protecting the integrity of proceedings within the courtroom.<sup>467</sup>

Electronic access to court proceedings and records makes it possible for the benefits of court transparency to be widely dispersed throughout society.<sup>468</sup> By facilitating remote access to the court system and its records, many more people can stay informed—and inform their fellow citizens. Electronic access also has a leveraging effect because it makes it possible for the media and other interested parties to cover court proceedings at a lower cost and allows for greater depth of analysis at a time when many media organizations are cutting back on the number of reporters assigned full-time to the courts.<sup>469</sup>

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public access systems can aid court administrators); J. DOUGLAS WALKER, NAT’L CTR. FOR STATE COURTS, *ELECTRONIC COURT DOCUMENTS: AN ASSESSMENT OF JUDICIAL ELECTRONIC DOCUMENT AND DATA INTERCHANGE TECHNOLOGY* 15 (1999) (“With the nearly continuous rise in volume and complexity of the paperwork involved in the judicial process . . . technology and electronic communications could offer a better alternative to the flood of paper forms and documents.”).

<sup>466</sup> STATE OF UTAH JUDICIAL COUNCIL STUDY COMM. ON TECH. BROUGHT INTO THE COURTROOM, FINAL REPORT 11 (2012), [http://www.rcfp.org/sites/default/files/docs/20120501\\_130338\\_utah\\_camerasreport.pdf](http://www.rcfp.org/sites/default/files/docs/20120501_130338_utah_camerasreport.pdf).

<sup>467</sup> KAN. SUP. CT. R. 1001(a).

<sup>468</sup> See, e.g., Lynn E. Sudbeck, *Placing Court Records Online: Balancing Judicial Accountability with Public Trust and Confidence: An Analysis of State Court Electronic Access Policies and a Proposal for South Dakota Court Records*, 51 S.D. L. REV. 81, 91 (2006) (noting that a “frequently mentioned benefit” of electronic access to court records is that it responds “to the needs of South Dakota’s rural court users, that is, [it] ‘levels the geographic playing field’ by allowing persons located in great distances from the courthouse to access public information” (citation omitted)).

<sup>469</sup> Lucy Dalglish, former executive director of the Reporters Committee for Freedom of the Press, highlighted the important role that court records play for the media in testimony before the Privacy Subcommittee of the Judicial Conference Standing Committee on the Federal Rules:

We are in a situation where there are a lot fewer journalists in mainstream news organizations. By having easy access to this information, they are able to do a better job of reporting the news to the public. There are some jurisdictions—probably not Manhattan, but certainly in places like Utah—where you have many local newspapers and really only one federal court that covers an enormous geographic area. Now they are able to accurately and completely report news stories as well.

The movement by courts to increase electronic public access, however, has not escaped criticism from those who worry that such efforts will result in privacy harms due to the widespread disclosure of sensitive and private information.<sup>470</sup> As a result, court administrators, judges, lawyers, and legislators are in active discussion about how to navigate the transition to electronic public access, with some recommending a substantial curtailment of public access through redaction of electronic and print records, restricted public access to court proceedings, removal of categories of court records from Internet access, and increased filing of court documents under seal.<sup>471</sup>

The debate over how to balance public access and secrecy is an important one, but it cannot be resolved based on abstract assessments of the benefits and harms associated with public access to court proceedings and records. As courts consider how best to implement a First Amendment right of access to the courts, it will be essential that they keep in mind the structural values advanced by public access and the need to ensure that information about the courts is widely circulated so that the benefits of public access can be realized.

#### CONCLUSION

Information is power. If citizens are the ultimate sovereigns, as the Constitution presupposes, they must have access to the information necessary to evaluate the actions of their government. This fundamental principle underlies the First Amendment's structural role as a facilitator of democratic control. Because the courts sit at the critical interface where government power is contested, defined, and actualized, public

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Symposium, *Panel One: General Discussion on Privacy and Public Access to Court Files*, 79 *FORDHAM L. REV.* 1, 13 (2010).

<sup>470</sup> See, e.g., Steven C. Bennett, *Pleadings, Privacy and Ethics: Protecting Privacy in Litigation Documents*, 2 *REYNOLDS CTS. & MEDIA L.J.* 25 (2012); Amanda Conley et al., *Sustaining Privacy and Open Justice in the Transition to Online Court Records: A Multidisciplinary Inquiry*, 71 *MD. L. REV.* 772 (2012); Will Thomas DeVries, *Protecting Privacy in the Digital Age*, 18 *BERKELEY TECH. L.J.* 283, 301 (2003); Daniel J. Solove, *Access and Aggregation: Public Records, Privacy and the Constitution*, 86 *MINN. L. REV.* 1137 (2002).

<sup>471</sup> See, e.g., Natalie Gomez-Velez, *Internet Access to Court Records—Balancing Public Access and Privacy*, 51 *LOY. L. REV.* 365 (2005) (recommending the use of protective orders and sealing to remove from public view high risk data elements and describing some states' decisions to exclude categories of court records from online systems); Kristin A. Henderson, *Lessons from Bankruptcy Court Public Records*, 23 *LEGAL REFERENCE SERVICES Q.* 55, 73, 76–77 (2004) (proposing the redaction of sensitive information from bankruptcy court records accessible to the public through electronic case files); Caren Myers Morrison, *Privacy, Accountability, and the Cooperating Defendant: Towards a New Role for Internet Access to Court Records*, 62 *VAND. L. REV.* 921, 969–78 (2009) (recommending redaction of names of cooperating defendants and other informants).

access to the courts is essential to both the functioning and legitimacy of our republican system of government.

More than thirty years ago, the Supreme Court acknowledged in *Richmond Newspapers, Inc. v. Virginia* that “[i]n guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees.”<sup>472</sup> Yet the Supreme Court never finished the work it began in *Richmond Newspapers*. It never resolved the question of whether the First Amendment right of access to criminal trials and pre-trial proceedings extended to civil proceedings and to court records. Moreover, in the intervening years, the Court’s access decisions obscured the rationale for a First Amendment right of access and put the lower courts on a path to a doctrinal dead end.

This Article puts the First Amendment right of access back on a firm theoretical foundation by focusing on the structural role the First Amendment plays in our constitutional system. In doing so, it provides a principled way to distinguish a right of public access to the courts from a general right of access to government information. As described above, the courts play a unique structural role in society that makes a right of public access to the information they contain particularly compelling from the standpoint of self-governance.

This is a critical time to clarify the basis and scope of a First Amendment right of access to the courts because the courts are in the midst of a transformation from the largely paper-based world of the twentieth century to an interconnected, electronic world where physical and temporal barriers to information are diminishing. Because of these changes, a debate over how to balance public access and secrecy is taking place in courtrooms and legislatures across the country. As courts consider how best to implement a First Amendment right of access to the courts, it will be essential that they keep in mind that public access serves a preeminent value in our society: democratic self-governance.

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<sup>472</sup> 448 U.S. 555, 575 (1980) (plurality opinion).