Catholic University Law Review

Volume 65
Issue 1 *Fall 2015*

Article 10

2-2-2016

A First Amendment Right to Observe Elections: Fulfilling the Dream of *Richmond Newspapers* by Extending It to the Polling Place

Andrew D. Howell

A First Amendment Right to Observe Elections: Fulfilling the Dream of *Richmond Newspapers* by Extending It to the Polling Place

Cover Page Footnote
J.D. Candidate, May 2016, The Catholic University of America, Columbus School of Law; B.A., 2009, The College of William and Mary. The author extends his deep gratitude to Professor William Wagner for his insightful comments and guidance during the drafting of this Comment, as well as Professor Wagner's excellent instruction in constitutional law. The author also expresses his thanks and appreciation to his family and friends who have encouraged him during all of his law school endeavors, including the drafting of this Comment. Finally, the author extends his sincere thanks to the staff members of the *Catholic University Law Review* for their patience and meticulous work during the writing and editing process of this Comment.

A FIRST AMENDMENT RIGHT TO OBSERVE ELECTIONS: FULFILLING THE DREAM OF *RICHMOND NEWSPAPERS* BY EXTENDING IT TO THE POLLING PLACE

Andrew D. Howell[+]

The First Amendment not only protects the right to speak, but also the right to gather information.[1] When evaluating whether the public has a presumptive constitutional right to access a government process, either by itself or via the press, courts use the "experience and logic" test first described in *Richmond Newspapers, Inc. v. Virginia*.[2] This test, which has been further developed since *Richmond Newspapers* was decided, determined a presumptive First Amendment right of access to criminal trials, and has subsequently been applied by lower courts in civil trials and administrative proceedings.[3]

The Third and Sixth Circuits, however, disagree as to whether certain administrative proceedings pass the "experience and logic" test, and whether the press has a presumptive right of access to the polling place.[4] In 2004, the Sixth Circuit held that the press has a presumptive right of access to the polling place, although it is not clear whether the Sixth Circuit fully engaged the "experience and logic" test.[5] However, in 2013, the Third Circuit held that the press does not have a right of access to the polling place, finding the "experience and logic" test unsatisfied.[6] By examining the history of access to the polling place as well

[+] J.D. Candidate, May 2016, The Catholic University of America, Columbus School of Law; B.A., 2009, The College of William and Mary. The author extends his deep gratitude to Professor William Wagner for his insightful comments and guidance during the drafting of this Comment, as well as Professor Wagner's excellent instruction in constitutional law. The author also expresses his thanks and appreciation to his family and friends who have encouraged him during all of his law school endeavors, including the drafting of this Comment. Finally, the author extends his sincere thanks to the staff members of the *Catholic University Law Review* for their patience and meticulous work during the writing and editing process of this Comment.

1. U.S. CONST. amend. I; *see infra* Part I.A–B.

2. 448 U.S. 555 (1980); *see infra* Part I.C.

3. *See infra* Part I.C.

4. *Compare* PG Publ'g Co. v. Aichele, 705 F.3d 91, 95 (3d Cir. 2013) (affirming the constitutionality of a state statute restricting the media's access to the polling place), *and* N. Jersey Media Grp. v. Ashcroft, 308 F.3d 198, 221 (3d Cir. 2002) (holding that there is no First Amendment right of access to deportation proceedings), *with* Beacon Journal Publ'g Co., Inc. v. Blackwell, 389 F.3d 683, 685 (6th Cir. 2004) (affirming the right of access to the polling place for news gatherings and reporting), *and* Detroit Free Press Corp. v. Ashcroft, 303 F.3d 681, 682–83 (6th Cir. 2002) (affirming that a blanket closure of deportation proceedings is unconstitutional).

5. *See infra* Part I.F.1.

6. *See infra* notes 135–49 and accompanying text.

as the public interest in access, this Comment evaluates and argues that the two-part "experience and logic" test is satisfied.[7]

This Comment begins by providing a broad overview of certain rights and protections afforded by the First Amendment, including the rights to speak and gather information. Next, to determine if a qualified presumptive First Amendment right of access to the polls exists, this Comment highlights Supreme Court and subsequent lower court jurisprudence applying the "experience and logic" test to governmental proceedings. This Comment then proceeds to explain current state laws concerning access to the polling place for individuals not specifically there to vote. Examining the already robust history of openness of the polls to "outsiders,"[8] and analogizing the public interests at stake in the polling place with those at stake in other governmental processes, Part II of this Comment argues that when the "experience and logic" test is applied to instances of media access to the polling place, the test is satisfied, creating a presumptive First Amendment right of media access to the polls. Such a presumptive right of access does not have to ignite mayhem at the polling place that critics may fear, as reasonable restrictions can be placed on rights of access, so long as strict scrutiny is satisfied.

I. THE FIRST AMENDMENT PROTECTS THE RIGHT TO SPEAK AND THE RIGHT TO GATHER INFORMATION

A. The First Amendment Protects the Right to Free Expression

The First Amendment is described by one commentator as "form[ing] the foundation for what many consider to be defining American traits: individualism, boundless creative expression, and the spirit of protest."[9] It states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[10] As part of the Bill of Rights, the First Amendment was enacted to serve as a check on the power of the new Congress.[11] The first word of this well-known amendment, notably, is "Congress."[12] The First Amendment, similar to much of the rest of the Bill of

7. *See infra* Part II. Although issues of voting rights and its jurisprudence are discussed, this Comment is not meant to serve as a comprehensive examination of these topics. *See infra* notes 187–208 and accompanying text.

8. *See infra* Part II.B.1.a–c.

9. Jon G. Furlow, *The Price of Free Speech*, WIS. LAW. (2000), http://www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx?volume=73&issue=6&articleid=19758.

10. U.S. CONST. amend. I.

11. *See* Ronald K.L. Collins, *The Speech & Press Clauses of the First Amendment*, 29 DEL. LAW. 8, 9 (2012) (noting the fears that gave rise to the drafting of the Bill of Rights and the First Amendment).

12. U.S. CONST. amend. I.

Rights, is incorporated against the states through the Fourteenth Amendment.[13] On its face, the First Amendment, among other rights, protects the right to speak freely.[14] It, nonetheless, protects more than the rights specifically enumerated within it.[15]

B. An Implicit "Right to Listen" Exists Within the First Amendment

Courts have consistently held that the First Amendment includes a freedom to listen to and receive information.[16] This right developed out of the First Amendment because the freedom to listen to and receive information promotes "the marketplace of ideas."[17] The "marketplace of ideas," first described by Justice Oliver Wendell Holmes in his dissent in *Abrams v. United States*,[18] "represents one of the most powerful images of free speech, both for legal thinkers and for laypersons."[19] Justice Brandeis later embraced this concept, writing:

> [The Founding Fathers] believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that

---

13. *See* Collins, *supra* note 11, at 9–10; *see also* Gitlow v. New York, 268 U.S. 652, 666 (1925) (holding that freedoms of speech and the press fall within fundamental liberties protected by the Fourteenth Amendment). The Supreme Court has incorporated nearly all of the Bill of Rights amendments against the states via the Fourteenth Amendment. *See* Jessica A. Roth, *The Anomaly of Entrapment*, 91 WASH. U.L. REV. 979, 989 (2014); *see, e.g.*, McDonald v. City of Chicago, 561 U.S. 742, 791 (2010) (incorporating the Second Amendment's right to bear arms against the states); Mapp v. Ohio, 367 U.S. 643, 655–56 (1961) (incorporating the Fourth Amendment's prohibition against unreasonable searches and seizures and its exclusionary rule against states).

14. U.S. CONST. amend. I.

15. *See infra* note 16 and accompanying text.

16. *See* Stanley v. Georgia, 394 U.S. 557, 564 (1969) ("This right to receive information and ideas, regardless of their social worth is fundamental to our free society.") (citation omitted).

17. *See* Clay Calvert & Mirelis Torres, *Staring Death in the Face During Times of War: When Ethics, Law, and Self-Censorship in the News Media Hide the Morbidity of Authenticity*, 25 NOTRE DAME J.L. ETHICS & PUB. POL'Y 87, 102 (2011) (citing MATTHEW D. BUNKER, CRITIQUING FREE SPEECH: FIRST AMENDMENT THEORY AND THE CHALLENGE OF INTERDISCIPLINARITY 2 (2001)); Peter J. Ferrera & Carlos S. Ramirez, *The Constitutional Freedom to Listen*, 6 LIBERTY U.L. REV. 1, 5–6 (2011).

18. 250 U.S. 616 (1919) (Holmes, J., dissenting).

19. *Id.* at 630 ("But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out."); *See* Ferrera & Ramirez, *supra* note 17, at 5; Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L. J. 1, 2–3 (1984).

> public discussion is a political duty; and that this should be a fundamental principle of the American government.[20]

Tracing back to John Stuart Mill and John Milton,[21] the "marketplace of ideas" theory of free speech provides, among other things, constitutional limitations on the rights of public officials to sue for damages in defamation cases[22] and allows First Amendment protections for commercial speech.[23] Thus, in the same manner that the "best product" ultimately wins in the economic marketplace, "the truth or the best policy arises out of the competition of alternative ideas in free public debate, with the listening public free to determine the truth out of that clash of ideas."[24] Justice Powell, overturning a state law significantly restricting the ability of corporations to spend money promoting political positions, summarized the idea of the so-called "marketplace of ideas," writing: "the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw."[25] Essentially, the right to speak freely fuels a parallel right to gather freely information about which one will speak.[26]

C. Richmond Newspapers *and Its Progeny Grant a Presumptive Constitutional First Amendment Right of Access to Criminal Trials to the Public and Press*

1. Richmond Newspapers *Puts a Constitutional Right of Access Into Action*

Richmond Newspapers concerned a Virginia statute relied upon by the trial judge that allowed a criminal trial to be closed to the public upon a defendant's

---

20. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

21. *See* Ingber, *supra* note 19, at 3.

22. *See* New York Times v. Sullivan, 376 U.S. 254, 279–80 (1968).

> The constitutional guarantees require . . . a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

Id.; *see also* Curtis Publ'g Co. v. Butts, 388 U.S. 130, 154–55 (1967) (extending the "public official" doctrine of *New York Times v. Sullivan* to "public figures").

23. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 761–65 (1976).

24. *See* Ferrera & Ramirez, *supra* note 17, at 4–5; *see also* Ingber, *supra* note 19, at 3.

> This theory assumes that a process of robust debate, if uninhibited by governmental interference, will lead to the discovery of truth, or at least the best perspectives or solutions for societal problems. A properly functioning marketplace of ideas, in Holmes's perspective, ultimately assures the proper evolution of society, wherever that evolution might lead.

Id.

25. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978).

26. *See id.*

motion without a showing of a compelling need for closure.[27] In the disputed trial, the trial judge ordered that the press and public were to be barred from the courtroom.[28] After Richmond Newspapers, Inc. was granted the right to intervene *nunc pro tunc*, it "petitioned the Virginia Supreme Court for writs of mandamus and prohibition and filed an appeal from the trial court's closure order."[29] The Virginia Supreme Court denied each request, and the case was appealed to the U.S. Supreme Court.[30]

Rejecting any suggestion of mootness,[31] the Supreme Court reviewed the history of the criminal trial in both English and American law.[32] Noting the unquestionable history of criminal trials being open to the public in both the United States and England, from Norman feudal rule to early colonial Virginia, the Court stressed the societal importance of maintaining open criminal trials and concluded "that a presumption of openness inheres in the very nature of a criminal trial under our system of justice."[33]

The Court also noted that the attendance of the public at criminal trials not only satisfies a need for members of the public to see justice carried out fairly, but also for a sort of "community catharsis" of emotions, especially for trials addressing particularly heinous crimes.[34] The Court, going as far as to label media members attending criminal trials as "surrogates for the public," indicated that with the rise of technology in the modern world, as well as changes in modern society, the public through the vehicle of the press often obtains news and information about trials.[35] "People in an open society," the Court explained, "do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing."[36]

Ultimately, the Court held that "the right to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and 'of the press could be eviscerated.'"[37] Despite establishing presumptive openness to the public for criminal trials, the Court was careful to

27. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 561, 564 (1980).
28. *Id.* at 561. The jury ultimately found the defendant not guilty. *Id.* at 562.
29. *Id.*
30. *Id.*
31. *Id.* at 563.
32. *See id.* at 564–70.
33. *Id.* at 567–73.
34. *See id.* at 570–72.
35. *See id.* at 572–73.
36. *Id.* at 572.
37. *Id.* at 580 (quoting Branzburg v. Hayes, 408 U.S. 665, 681 (1972)).

clarify that a presumptive right of the public to attend trials (whether directly or via the press) was not absolute.[38]

The public, accordingly, has what is described as a qualified First Amendment right of access to criminal trials, relying upon a test of "logic and experience."[39] Justice Brennan, in his concurrence, articulated the inquiry necessary to inspect the applicability of this qualified right.[40] First, drawing upon the majority's examination of historical practices, Justice Brennan identified judicial *experience* as a prong.[41] Second, Justice Brennan expounded that "the value of access must be measured in specifics," thereby fashioning an individualized *logical* prong aimed at considering the "particular government process" and its importance as it relates to the "terms of that very process."[42] Brennan's concurrence, and not the plurality opinion, soon thereafter operated as the precedential opinion.[43]

2. Globe Newspaper Co. *Clearly Names the* Richmond Newspapers *"Experience and Logic" Test*

Only two years later, Justice Brennan, by definitively labeling his prior test in his *Richmond Newspapers* concurrence as one of "logic and experience," explained the rationale for presumptive openness of criminal trials.[44] In *Globe Newspaper Co. v. Superior Court for Norfolk*,[45] the Court reiterated that the

---

38. *See id.* at 581 n.18 ("[O]ur holding today does not mean that the First Amendment rights of the public and representatives of the press are absolute. . . . [A] trial judge, in the interest of the fair administration of justice, [may] impose reasonable limitations on access to a trial.").

39. *See* Waller v. Georgia, 467 U.S. 39, 44 (1984); *see also Richmond Newspapers*, 448 U.S. at 589 (Brennan, J., concurring) ("To resolve the case before us, therefore, we must consult historical and current practice with respect to open trials, and weigh the importance of public access to the trial process itself.").

40. *See Richmond Newspapers*, 448 U.S. at 589 (Brennan, J., concurring).

> First, the case for a right of access has special force when drawn from an enduring and vital tradition of public entree to particular proceedings or information. Such a tradition commands respect in part because *the Constitution carries the gloss of history*. More importantly, a tradition of accessibility implies the favorable judgment of experience. Second, the value of access must be measured in specifics. Analysis is not advanced by rhetorical statements that all information bears upon public issues; what is crucial in individual cases is *whether access to a particular government process is important in terms of that very process*. To resolve the case before us, therefore, we must consult historical and current practice with respect to open trials, and weigh the importance of public access to the trial process itself.

Id. (emphasis added) (citations omitted).

41. *Id.*

42. *Id.*

43. *See* Harlan Grant Cohen, *The (Un)favorable Judgment of History: Deportation Hearings, the Palmer Raids, and the Meaning of History*, 78 N.Y.U. L. REV. 1431, 1441 (2003) (noting the Court's movement away from a historical analysis dating back to the Norman conquests, and instead focusing on matters exclusively after the Bill of Rights).

44. Globe Newspaper Co. v. Superior Court for Norfolk, 457 U.S. 596, 606 (1982).

45. 457 U.S. 596 (1982).

presumptive openness at trials, while a constitutional right, was not absolute.[46] In writing for the Court, Justice Brennan made clear that when the prongs of logic and experience are satisfied, as they are presumptively in the case of a criminal trial,[47] restrictions on the ability of the public or press to access a trial must be evaluated under strict scrutiny.[48]

Ultimately, the Court held that a mandatory closure rule,[49] even for the testimony of minors who were victims of sexual abuse, could not satisfy strict scrutiny.[50] The *Globe Newspaper* Court mandated that speculative arguments in support of closure, without sustaining empirical evidence, would not justify closing a criminal proceeding.[51]

3. Press-Enterprise I *Continues the Trend of Presumptive Openness Found in* Richmond Newspapers *and* Globe Newspaper

Two years after *Globe Newspaper*, the Supreme Court in *Press-Enterprise Co. v. Superior Court of California* (*Press-Enterprise I*)[52] evaluated a law of presumptive closure of voir dire procedures to the public and press.[53] Press-Enterprise, excluded from voir dire by a law mandating presumptive closure, sought the release of transcripts from the closed portions of the voir dire hearing, a request denied by the trial judge.[54] The Supreme Court, again stressing the strict scrutiny standard, emphasized that there must be a case-by-case analysis before closing criminal proceedings to the press and public.[55] Such a requirement, the Court reasoned, helps ensure the existence of a compelling reason for closure.[56]

4. Press-Enterprise II *Solidifies the Test of "Experience and Logic"*

In 1986, Press-Enterprise, hoping to compel public disclosure of transcripts from a forty-one day preliminary hearing in the murder trial of Robert Diaz, again challenged the Superior Court of California in *Press-Enterprise Co. v. Superior Court of California* (*Press-Enterprise II*).[57] The California Supreme

46. *Id.* at 606.

47. *See supra* notes 37–38 and accompanying text.

48. *Globe Newspaper*, 457 U.S. at 606–07 ("Where, as in the present case, the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.").

49. *See id.* at 598 (stating that Massachusetts law requires trial judges to exclude the press and public from the courtroom during the testimony of a minor victim in a sexual offense case).

50. *Id.* at 607–09.

51. *Id.* at 609–10.

52. 464 U.S. 501 (1984).

53. *See id.* at 503.

54. *Id.* at 503–04.

55. *See id.* at 509–11.

56. *See id.* at 511–12.

57. 478 U.S. 1, 3–4 (1986).

Court held that preliminary hearings were not governed by the *Richmond Newspapers* test, theorizing that a preliminary hearing is not a criminal trial.[58] The Court hinted that the "logic and experience" test should extend beyond criminal trials, stating, "the First Amendment question cannot be resolved solely on the label we give the event, *i.e.*, 'trial' or otherwise, particularly where the preliminary hearing functions much like a full-scale trial."[59] The Court explained that as with criminal trials, there is a long history of openness of preliminary trials.[60] The openness of such hearings, the Court continued, fosters both fairness and the public perception of fairness, just like the open nature of a criminal trial.[61] Reiterating its previous definitions of the "experience" and "logic" prongs,[62] the *Press-Enterprise II* Court summarized its jurisprudence on the issue:

> 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. But even when a right of access attaches, it is not absolute.[63]

The *Press-Enterprise II* Court clarified that for closure of a criminal proceeding, there must be "specific findings" by a court that an unfair trial will occur without closure and that no other means will suffice to protect the defendant's interests.[64]

5. El Vocero *Holds that the Label of "Trial" Is Not Necessary*

In *El Vocero de Puerto Rico v. Puerto Rico*,[65] the Supreme Court reaffirmed that the existence of a "trial," or at least the explicit label of one, is not dispositive when determining whether a governmental procedure is presumptively open to the public and press.[66] A local newspaper challenged a

58. *Id.* at 5–7.

59. *Id.* at 7–9.

60. *See id.* at 10–11.

61. *Id.* at 11–13.

62. *Id.* at 8 (noting that the experience prong looks to "whether the place and process have historically been open to the press and general public," while the logic prong examines "whether public access plays a significant positive role in the functioning of the particular process in question").

63. *Id.* at 9 (emphasis added); *see also* Erik Ugland, *Demarcating the Right to Gather News: A Sequential Interpretation of the First Amendment*, 3 DUKE J. CONST. L. & PUB. POL'Y 113, 141–42 (2008).

64. *Press-Enter. II*, 478 U.S. at 13–14. ("[T]he proceedings 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 Enter. Co. v. Superior Court of Cal., 464 U.S. 501, 510 (1984)).

65. 508 U.S. 147 (1993).

66. *Id.* 149–50.

Puerto Rico law closing preliminary hearings for accused criminals.[67] As such, the key inquiry under *El Vocero* and *Press-Enterprise II* is not whether this proceeding is labeled a trial, but instead whether the proceeding functions like a trial.[68] Moreover, the Court clarified that the experience analysis is not jurisdictionally dependent.[69] The experience prong of the *Richmond Newspapers* inquiry, the Court explained, must consider the "whole North American experience, not just the tradition of the local state or territory."[70] Ultimately, Puerto Rico's rule that a preliminary hearing in a criminal trial was presumptively closed, unless the defendant moved otherwise, was overturned as contrary to the First Amendment right of access.[71]

D. The First Amendment Right of Access Provides Greater Protection of Public Interests Than the Common Law Right of Access

In addition to the First Amendment right of access that is the centerpiece of this Comment, a common law presumptive right of access to public records and documents also exists.[72] Courts generally hold that this common law presumptive right of access imparts a lower form of protection than the First Amendment right of access.[73] Unlike a First Amendment right of access, a common law presumption of access may be defeated upon a mere showing that interests in preventing public disclosure of the information are greater than the public's interest in accessing it.[74]

The common law presumptive right of access, while not the focus of this Comment, often overlaps with the First Amendment presumptive right of access, and courts often consider them together.[75]

---

67. *Id.* at 148–49.

68. *See id.* at 149–50.

69. *See* Richard J. Peltz et. al., *The Arkansas Proposal on Access to Court Records: Upgrading the Common Law with Electronic Freedom of Information Norms*, 59 ARK. L. REV. 555, 607 n.310 (2006).

70. *Id.*

71. *El Vocero de Puerto Rico*, 508 U.S. at 151.

72. *See* Nixon v. Warner Communications, Inc., 435 U.S. 589, 597 (1978) ("It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents."); *see also* Joe Regalia, *The Common Law Right to Information*, 18 RICH. J.L. & PUB. INT. 89, 95–96 (2014).

73. *See, e.g.*, Rushford v. New Yorker Magazine, Inc., 846 F.2d 249, 253 (4th Cir. 1988) ("The common law does not afford as much substantive protection to the interests of the press and the public as does the First Amendment. Under common law, there is a presumption of access accorded to judicial records. This presumption of access, however, can be rebutted if countervailing interests heavily outweigh the public interests in access.") (citations omitted).

74. *See id.* This lower burden is juxtaposed with the strict scrutiny requirement when the First Amendment right of access attaches. *See id.*; *see also* Press Enter. Co. v. Superior Court of Cal., 464 U.S. 501, 509–10 (1984) (citing Globe Newspaper Co. v. Superior Court for Norfolk, 457 U.S. 596, 606–07 (1982)).

75. *See* Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1067 (3d Cir. 1984) ("Therefore, we hold that appellants . . . possess a common law right of access to civil trials. Although we could

E. Courts Extend "Experience and Logic" Outside the Narrow Confines of the Criminal Trial

1. Civil Trials Are Also Presumptively Open Under the "Experience and Logic" Test

While the Supreme Court has hinted that the right of access *should* extend to civil trials, it has never specifically *held* that the public and press's rights of access extend to civil trials.[76] The Third Circuit recognized this in *Publicker Industries, Inc. v. Cohen*.[77] Nevertheless, the *Publicker* court also found that an examination of the same authorities relied upon by the *Richmond Newspapers* Court in reaching its decision likewise established a long history of a common law right of access for the press to civil trials and proceedings.[78]

The *Publicker* court then proceeded through a First Amendment analysis of access to civil proceedings, relying on the *Richmond Newspapers* "experience and logic" test and its progeny.[79] Evaluating the history of public civil trials, the *Publicker* court identified a long history of public civil proceedings in both the English and American systems of justice.[80] The public benefit to having civil trials open to the public, noted the *Publicker* court, includes: the increased likelihood of truthful testimony, the pressure on judicial officers to perform their duties properly under public scrutiny, and the public's benefit of education about the workings of government.[81]

---

rest our decision on a common law right of access, the importance in guaranteeing freedoms at issue here compel us to reach the constitutional issues."); *see also* United States v. Wecht, 484 F.3d 194, 208 n.19 (3d. Cir. 2007) (citing Gulf Oil Co. v. Bernard, 452 U.S. 89, 99 (1981) ("The parties also dispute whether the media outlets have a First Amendment right to the [judicial] records. . . . Because we find that a common law right of access attaches to the [judicial] records, we need not engage in the First Amendment analysis."); *Rushford*, 846 F.2d at 253 ("With regard to substantive requirements, we find it necessary to decide whether the interests of The Washington Post arise from the First Amendment or from the common law right of access.").

76. *See* Gannett Co., Inc. v. DePasquale, 443 U.S. 368, 386–87 n.15 (1979) ("[I]n some civil cases the public interest in access, and the salutary effect of publicity, may be as strong as, or stronger than, in most criminal cases"); *see also* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 n.17 (1980) ("Whether the public has a right to attend trials of civil cases is a question not raised by this case, but we note that historically both civil and criminal trials have been presumptively open."); *but see* Globe Newspaper Co. v. Superior Court for Norfolk, 457 U.S. 596, 611 (1982) (O'Connor, J., concurring) ("I interpret neither *Richmond Newspapers* nor the Court's decision today to carry any implications outside the context of criminal trials.").

77. *See* 733 F.2d 1059, 1066–67 (3d Cir. 1984).

78. *See id.*

79. *Id.* at 1067–68 ("Therefore, we must decide whether the Court's analysis in *Richmond Newspapers, Inc.* and in *Globe Newspaper Co.* leading to its recognition of a First Amendment guarantee of the public's and press' right of access to criminal trials is applicable to civil trials.").

80. *See id.* at 1068–70. The *Publicker* court, for example, considered the writings of Sir Edward Coke, Sir Matthew Hale, and Sir William Blackstone. *Id.*

81. *See id.* at 1069–70 (stating that like criminal trials, access to civil trials "plays an important role in the participation and the free discussion of governmental affairs").

The *Publicker* court determined the "experience and logic" test was satisfied, concluding that the First Amendment qualified right of access attaches and that civil trials are, presumptively, open to the public.[82] As with criminal trials, the *Publicker* court made it clear that the right of access to civil proceedings is not absolute and could be restricted if a particular restriction on access survived strict scrutiny.[83]

Other courts have also held that both the public and the press hold a qualified First Amendment right of access to proceedings in civil cases.[84] The Sixth Circuit employed a similar rationale to the Third Circuit in *Brown & Williamson Tobacco Corp. v. FTC*.[85] The Fourth Circuit, relying on *Richmond Newspapers* and its progeny, including *Publicker*, found a First Amendment qualified right of access to documents filed in support of summary judgment motions.[86] In reaching this holding, the Fourth Circuit noted that such motions were akin to "documents filed in connection with plea hearings and sentencing hearings in criminal cases," which were the kind of documents the court previously understood to have attached a qualified First Amendment right of access.[87]

2. Courts Extend "Experience and Logic" to Government Processes in the Administrative State

A circuit split remains, however, as to whether a presumptive right of access for the public and press attaches to administrative proceedings.[88] Access to deportation hearings held in the wake of the September 11th terrorist attacks exemplify this circuit split.[89] The Third and Sixth Circuits, while agreeing that

---

82. *Id.*

83. *See id.* at 1070–71.

84. *See* NBC Subsidiary (KNBC-TV), Inc. v. Superior Court, 980 P.2d 337, 359 (Cal. 1999).

> [T]he high court has not accepted review of any of the numerous lower court cases that have found a general First Amendment right of access to civil proceedings, and we have not found a single lower court case holding that generally there is no First Amendment right of access to civil proceedings.

Id.

85. 710 F.2d 1165, 1179 (6th Cir. 1983) (stating that "[t]he policy considerations discussed in *Richmond Newspapers* apply to civil as well as criminal cases").

86. *See* Rushford v. New Yorker Magazine, Inc., 846 F.2d 249, 253 (4th Cir. 1988).

87. *Id.*

88. *See infra* Part I.E.2.a–c.

89. *See* Kathleen K. Miller, *Do Democracies Die Behind Closed Doors? Finding a First Amendment Right of Access to Deportation Hearings by Re-evaluating the* Richmond Newspapers *Test*, 72 GEO. WASH. L. REV. 646, 658 (2004) (noting how a revision in the way courts interpret the *Richmond Newspapers* test could resolve the circuit splits on deportation hearings); *see also* Jonathan L. Hafetz, *The First Amendment and the Right of Access to Deportation Hearings*, 40 CAL. W.L. REV. 265, 268 (2004) (arguing that a First Amendment right of access to deportation hearings should exist).

a qualified right to access civil proceedings attaches,[90] reached different conclusions on this particular matter.[91]

a. Detroit Free Press v. Ashcroft*: Deportation Hearings Are Presumptively Open*

In *Detroit Free Press v. Ashcroft*,[92] the Sixth Circuit examined whether there was a First Amendment right of access to deportation hearings in light of the government's closure of special interest deportation hearings following the September 11th terrorist attacks.[93] Given *Press-Enterprise II*'s command that a strict label of "trial" is not required to apply the test, the Sixth Circuit applied the "experience and logic" test utilized by numerous courts to proceedings outside of criminal trials.[94]

In applying the *Richmond Newspapers* test to the deportation hearings at issue, the Sixth Circuit found that a long history of openness measured in years alone was not dispositive of experience, and further found that hearings on deportation were traditionally open.[95] First, the Sixth Circuit pointed out that no specific congressional intent to keep such hearings closed existed.[96] It also noted the experience prong was satisfied by deportation hearings because they "'walk, talk, and squawk' very much like a judicial proceeding."[97] As for the logic prong, the Sixth Circuit concluded that, pursuant to *Richmond Newspapers* and its progeny, public access to deportation hearings would meet the logic prong, as public access would help to ensure fairness of the proceedings by pressuring the government to carry out its duties properly.[98] Additionally, the Sixth Circuit held that opening such proceedings to the public in this context could provide for "public catharsis" in the wake of the September 11th attacks.[99] Further, the Sixth Circuit stated that having such proceedings open would enhance public perception of the proceedings' fairness and would inform citizens about the inner workings of government.[100]

---

90. *See* Publicker Industries, Inc. v. Cohen, 733 F.2d 1059, 1066–67 (3d Cir. 1984); *Brown & Williamson Tobacco Corp.*, 710 F.2d at 1179.

91. *See* Detroit Free Press Court v. Ashcroft, 303 F.3d 681, 683–85 (6th Cir. 2002) (holding that deportation hearings are presumptively open under a *Richmond Newspapers* analysis); *see also* N. Jersey Media Grp. v. Ashcroft, 308 F.3d 198, 201–02 (3d. Cir. 2002) (finding the *Richmond Newspapers* test unsatisfied).

92. 303 F.3d 681 (6th Cir. 2002).

93. *Id.* at 682–83.

94. *See id*. at 695–96.

95. *See id*. at 701.

96. *See id*. at 701–02.

97. *Id.* at 702 (paraphrasing Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 744 (2002)).

98. *See id*. at 703–05.

99. *See id*. at 704.

100. *See id*. at 704–05.

b. North Jersey Media Group: *Deportation Hearings Do Not Satisfy "Experience and Logic"*

The Third Circuit, in *North Jersey Media Group, Inc. v. Ashcroft*,[101] agreed with the Sixth Circuit that access to deportation hearings should be examined under the "experience and logic" test.[102] The Third Circuit, however, held that there was not a sufficient history of open deportation hearings to support an argument that the experience prong of the *Richmond Newspapers* test was met.[103] While conceding that the experience prong did not necessarily require an extensive centuries-long historical examination, the court, nonetheless, called for a "rigorous experience test" regarding access to administrative proceedings.[104] According to the Third Circuit, any policy to the contrary would undermine the long-standing flexibility given to administrative agencies in conducting their own business by their own rules.[105] Nonetheless, the court did not prescribe a bright-line rule for how to establish history sufficient to meet the "experience" prong.[106]

In evaluating the logic prong, the court admitted that deportation hearings resembled judicial trials, but found the logic prong unsatisfied for other reasons.[107] The court did not dispute that openness of such hearings would likely serve the "public benefit" in a number of ways as described under *Richmond Newspapers* and its progeny.[108] Rather, the Third Circuit invoked a balancing test focusing on a number of concerns raised by the government, all centered on the concern that opening such hearings could undermine the government's ability to fight terrorism.[109] While the concern that opening such a proceeding to the public undermines the ability of the government to combat terrorism is

101. 308 F.3d 198 (3d Cir. 2002).

102. *See id.* at 206–09 (stating "*Richmond Newspapers* is a test broadly applicable to issues of access to government proceedings, including removal").

103. *See id.* at 211.

104. *See id.* at 213, 216.

105. *See id.* at 216.

106. *See id.* ("By insisting on a strong tradition of public access in the *Richmond Newspapers* test, we preserve administrative flexibility and avoid constitutionalizing ambiguous, and potentially unconsidered, executive decisions.").

107. *See id.*

108. *Id.* at 217.

109. *See id.* at 218–19. The concerns expressed by the *North Jersey Media Group* court include: (1) "reveal[ing] sources and methods of investigation"; (2) creating opportunities for terrorists to "exploit weaknesses" in the national security apparatus; (3) putting terrorist prisoners on notice about what information the United States does or does not have about them; (4) if terrorists know a member is being subjected to a hearing, they may accelerate a particular attack in order to carry it through before the government discovers the plot; (5) allowing terrorist groups the opportunity to interfere with evidence needed for the hearing; (6) the privacy rights of those subjected to such hearings; and (7) the impracticality of closing such hearings on a case-by-case basis. *Id.*

speculative, the court rationalized its holding stating "the *Richmond Newspapers* logic prong is unavoidably speculative."[110]

The Third Circuit avoided the Supreme Court's command against closure based on speculative arguments by holding that such a bar existed only if a First Amendment right existed in the first place.[111]

c. Other Forms of Administrative Hearings Have Seen Mixed Results

Other types of administrative proceedings have seen mixed results when the "experience and logic" test is applied.[112] The Sixth Circuit, for example, found that administrative disciplinary adjudications at public universities could not satisfy the test because these proceedings have not been historically open to the public due to privacy concerns.[113] The Sixth Circuit noted that opening such proceedings to the public would serve no useful purpose, as the policies at stake affect only the relationship between a particular student and the university.[114] Thus, the public value of opening criminal or civil trials was not found to be present in university adjudication.[115]

The Second Circuit applied the "experience and logic" test to the adjudicative proceedings for violators of the New York City Transit Authority's regulations.[116] In finding the experience prong satisfied, the Second Circuit analogized the proceedings to the workings of a trial and noted that the administrative proceedings at issue determined whether an accused party violated a regulation and could be, as a result, punished by the force of a government entity.[117] Before the inception of the administrative body, the court further elaborated, such hearings were historically conducted as traditional court proceedings, and those hearings were presumptively open to the public.[118]

The Second Circuit agreed that public access would benefit the public's interest, thereby satisfying the logic prong, because open proceedings would help to provide a sense of fairness and justice in determining whether individuals were rightfully punished by a governmental body.[119] Because the transit authority is a governmental body, the Second Circuit found that open access to

110. *Id.* at 219.

111. *See id.* at 219 n.14.

112. *See infra* notes 113–21 and accompanying text.

113. *See* United States v. Miami Univ., 294 F.3d 797, 822–23 (6th Cir. 2002).

114. *See id.* at 822 ("[S]tudent disciplinary proceedings govern the relationship between a student and his or her university, not the relationship between a citizen and 'The People.'").

115. *See id.* at 823. ("We find that public access will not aid in the functioning of traditionally closed student disciplinary proceedings; accordingly, *The Chronicle* does not enjoy a qualified First Amendment right of access to such proceedings.").

116. *See* N.Y. Civil Liberties Union v. N.Y.C. Transit Auth., 684 F.3d 286, 301–03 (2d Cir. 2011).

117. *See id.* at 301.

118. *See id.* at 301–02.

119. *See id.* at 303.

its proceedings would also help to educate the public about the governmental process at play.[120] As such, the public values present in trials were found to be present in transit authority hearings, satisfying the logic prong.[121]

F. Access to the Polling Place: The Next Frontier for Applying Richmond Newspapers

As noted previously, the impetus for this Comment is whether the "experience and logic" test commands a presumption of openness to the governmental process at the polling place.[122] The Third and Sixth Circuits, again, are split on this issue.[123]

1. Beacon Journal: *Ohio Statute Restricting Press Access to the Polls Violated the First Amendment Rights of the Press*

In *Beacon Journal Publishing Co., Inc. v. Blackwell*,[124] the Sixth Circuit examined whether the First Amendment rights of a newspaper were violated under an Ohio state law restricting access to the polling place by prohibiting anyone from coming within a certain distance of the entrance to the polling place, except to vote or work at the polls.[125] Notably, the statute contained an exception for the press to have "reasonable access to a polling place,"[126] but in late October 2004, Ohio's Secretary of State, Ken Blackwell, issued a directive saying, "the statute's prohibition applies to *anyone*."[127] As such, the Beacon Journal Publishing Company challenged the law as it was enforced.[128] Ohio justified the law by citing "a compelling interest in making sure that voters vote freely and without intimidation."[129]

---

120. *Id.*

121. *See id.* at 302–03.

122. *See supra* text accompanying note 7.

123. *See* PG Publ'g Co. v. Aichele, 705 F.3d 91 (3d Cir. 2013); Beacon Journal Publ'g Co., Inc. v. Blackwell, 389 F.3d 683, 685 (6th Cir. 2004); *see also infra* notes 124–49 and accompanying text.

124. 389 F.3d 683 (6th Cir. 2004).

125. *See id.* at 684; *see also* OHIO REV. CODE ANN. § 3501.35(B)(1) (West 2014).

> Except as otherwise provided . . . no person who is not an election official, employee, observer, or police officer shall be allowed to enter the polling place during the election, except for the purpose of voting or assisting another person to vote as provided in section 3505.24 of the Revised Code.

Id.

126. OHIO REV. CODE ANN. § 3501.35(B)(2). "Notwithstanding any provision of this section to the contrary, a journalist shall be allowed reasonable access to a polling place during an election. As used in this division, 'journalist' has the same meaning as in division (B)(2) of section 2923.129 of the Revised Code." *Id.*

127. *Beacon Journal*, 389 F.3d at 684.

128. *Id.*

129. *Id.*

Pointing out that the newspaper's intent was to report on the events taking place at the polling place on Election Day, and not to disturb the voting rights of Ohio citizens, the Sixth Circuit found strict scrutiny unsatisfied by the government, and that, therefore, the law unconstitutionally burdened the First Amendment rights of the press.[130] Whether "experience and logic" provided the foundation for this holding is unclear from the court's opinion.[131] The Sixth Circuit, however, quotes *Detroit Free Press*, saying "[t]his [c]ourt has recently observed that '[d]emocracies die behind closed doors,'" and that "the public 'deputize[s] the press as the guardians of their liberty.'"[132]

As such, the court hints, at minimum, that it considered the public values recognized in its earlier First Amendment right of access jurisprudence without explicitly saying so.[133] Further, it suggests that it intended to build upon its *Detroit Free Press* jurisprudence.[134]

2. PG Publishing*: Access to the Polling Place Does Not Satisfy the "Experience and Logic" Test*

The Third Circuit, in *PG Publishing Co. v. Aichele*,[135] reviewed a press entity's challenge to a Pennsylvania statute that required "[a]ll persons, except election officers, clerks, machine inspectors, overseers, watchers, persons in the course of voting, persons lawfully giving assistance to voters, and peace and police officers . . . remain at least ten (10) feet distant from the polling place during the progress of the voting."[136] First noting a public right of access exists generally within the First Amendment, the Third Circuit then devoted several pages to the balancing test prescribed for the First Amendment right of access—

130. *Id.* (citing U.S. CONST. amend I) (finding the "fear of 'turmoil that could be created by hordes of reporters and photographers' is purely hypothetical and cannot, therefore, support [Ohio's] proposed restriction of the First Amendment's guarantee that state conduct shall not abridge 'freedom . . . of the press'").

131. It is not abundantly clear what test the *Beacon Journal* court applied to reach its conclusion. *See* PG Publ'g Co. v. Aichele, 705 F.3d 91, 112–13 (3d Cir. 2013) (averring that the *Beacon Journal* opinion failed to establish a "basis for its decision"). In fact, the court in explaining its rationale uses neither the term "experience" nor "logic." *See Beacon Journal*, 389 F.3d at 685. Nevertheless, one can infer that the Sixth Circuit at least considered the *Richmond Newspapers* test, as the court cites to *Detroit Free Press* and remarks that the state's purported justification for the law is "purely hypothetical and cannot, therefore, support Defendants' proposed restriction." *Id.*

132. *Beacon Journal*, 389 F.3d at 685 (quoting Detroit Free Press v. Ashcroft, 303 F.3d 681, 683 (6th Cir. 2002)).

133. *See id.* ("With these principles in mind, we find that Plaintiffs present a strong likelihood of success on the merits of their challenge to Defendants' enforcement of Blackwell's directive.").

134. *See id.*

135. 705 F.3d 91 (3d Cir. 2013).

136. *Id.* at 95; 25 PA. CONS. STAT. ANN. § 3060(d) (2014).

ultimately leading to the "experience and logic" test prescribed by *Richmond Newspapers* and its progeny.[137]

The court then detailed the Third Circuit's jurisprudence on the "experience and logic" test, acknowledging that it had extended the analysis to governmental processes other than criminal trials, including civil trials and administrative proceedings.[138] The court considered the "experience and logic" test the proper inquiry for analyzing a right of access to the polling place, as it involved "access to information about governmental bodies and their actions or decisions."[139] Moreover, the Third Circuit had previously applied the "experience and logic" test to Article I and II proceedings, and held that voting is covered by Article I.[140] The Third Circuit then evaluated voting under the experience prong.

Because polling advanced from voice vote to secret ballot at the polling place since the founding of the United States, the Third Circuit concluded that no such long-standing history of openness to the polling place existed.[141] The Third Circuit, finding the experience prong not satisfied, focused on the history of openness as viewed through the lens of the individual voter himself, rather than through the lens of the public's right to information about the process in play.[142]

In applying the logic prong, the court stated that it must balance both the benefits of opening the process to the public and press, as well as the potential harms of such openness.[143] The Third Circuit conceded that openness could be useful in preventing voter fraud and in allowing the public to examine the fairness of the process.[144] But in evaluating the harm, the court noted that the potential access of numerous reporters to the polling place, particularly when citizens were "necessarily exchanging personal information in preparation for casting a private vote, could concern, intimidate or even turn away potential voters."[145] Finding the "experience and logic" test unsatisfied, the Third Circuit

---

137. *See PG Publ'g Co.*, 705 F.3d at 98–99, 100–02. The Third Circuit also devotes several pages to explaining that a right of access is not the same as a right to speech itself. *See id.* at 99–102.

138. *See id.* at 104–06.

139. *Id.* at 106–07 ("[A]ccess to information about governmental bodies and their actions or decisions—must be evaluated with an eye toward the historical and structural role of the proceeding.").

140. *See id.* at 107 ("In *North Jersey*, we held that the 'experience and logic' test applies to government proceedings under Articles I and II of the Constitution. Such proceedings include, among other things, the process of voting.").

141. *See id.* at 109–10 (relying on Burson v. Freeman, 504 U.S. 191, 200–05 (1992)).

142. *See id.*

143. *Id.* at 111 (quoting N. Jersey Media Grp., Inc. v. Ashcroft, 308 F.3d 198, 217 (3d Cir. 2002)) ("Indeed, the logic analysis *must* account for the negative effects of openness, for otherwise 'it is difficult to conceive of a government proceeding to which the public would not have a First Amendment right of access.'").

144. *See id.* at 111–12.

145. *Id.* at 112.

concluded that no presumptive right of access to the polling place for the press existed.[146]

Notably, the Third Circuit criticized the holding in *Beacon Journal*, stating that the Sixth Circuit inappropriately applied strict scrutiny under a "public forum access" test, instead of the appropriate "experience and logic" test.[147] According to the *PG Publishing* court, applying a "public forum access" analysis to the polling place—what the Third Circuit considered to be a nonpublic forum—could actually allow for less access to governmental proceedings than the *Richmond Newspapers* balancing test.[148] The Third Circuit also noted that the only court decision that relied on the *Beacon Journal* court's holding was, in fact, the district court decision under review in this case.[149]

Even overlooking the potentially narrow historical inquiry undertaken by the Third Circuit,[150] it remains difficult to understand how applying a lesser "reasonableness" standard of scrutiny to the government in polling place access legislation better prevents the very same government from "hid[ing] their activities from the public's view" than a strict scrutiny standard.[151]

II. THE *RICHMOND NEWSPAPERS* TEST, WHEN APPLIED, SHOULD OPEN THE POLLING PLACE TO THE PRESS AND PUBLIC

While it is not necessarily clear that the Sixth Circuit avoided the "experience and logic" test altogether in deciding *Beacon Journal*,[152] the Third Circuit unambiguously relied upon the analytical framework, saying "access to government proceedings—in effect, access to information about governmental bodies and their actions or decisions—must be evaluated with an eye toward the historical and structural role of the proceeding."[153] One commentator recently argued that the use of the "experience and logic" test, in the manner the Third Circuit applied it, "properly framed the constitutional issue as a question of right of access to information, forestalled the government from potentially exploiting nonpublic fora, and protected contemporaneous First Amendment principles."[154]

---

146. *Id.*

147. *See id.* at 113.

148. *See id.*

149. *See id.* at 113 n.25; *see also* PG Publ'g Co. v. Aichele, 902 F.Supp.2d 724, 754 (W.D. Pa. 2012).

150. *See First Amendment —Public Access —Third Circuit Holds that First Amendment Does Not Afford the Public a Protected Right of Access to Polling Places for News-Gathering Purposes.*— PG Publishing Co. v. Aichele, 705 F.3d 91, 127 HARV. L. REV. 1067 (2014) (believing the Third Circuit ignored "the long history of racial discrimination and disenfranchisement that has accompanied the closed polling process").

151. *See PG Publ'g Co.*, 705 F.3d at 113.

152. *See supra* note 131 and accompanying text.

153. *PG Publ'g Co.*, 705 F.3d at 106–07.

154. Nicole Lessin, *Voting for Balance: The Third Circuit Splits with the Sixth Circuit Over the Press's Right to Access Polling Stations in* PG Publishing Co. v. Aichele, 55 B.C. L. REV. E-SUPPLEMENT 183, 192 (2014).

Indeed, simply understanding the framework's applicability to the polling place is achievable by examining the polling place through the lens of Justice Brennan's *Richmond Newspapers* concurrence.[155]

Justice Brennan's concurrence states "[f]irst, the case for a right of access has special force when drawn from an enduring and vital tradition of public entree to particular proceedings or information."[156] Justice Brennan further opined, "what is crucial in individual cases is whether access to a particular government process is important in terms of that very process."[157] He then writes, "[t]o resolve the case before us . . . we must consult historical and current practice . . . and weigh the importance of public access."[158] Justice Brennan suggests that the test should be used for all governmental processes, not just trials, broadly characterizing trials as "a genuine governmental proceeding."[159]

A. The "Experience and Logic" Test Is the Correct Test Because Voting Is a Government Process

Article I of the Constitution states: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."[160] The Supreme Court has stated that this Elections Clause gives states the power to "prescribe the procedural mechanisms for holding congressional elections."[161]

Most scholars, as well as the Supreme Court, agree that there is no explicit federal right to vote granted in the Constitution.[162] Yet, the right of a citizen to vote has been directly addressed several times in amendments to the U.S. Constitution,[163] and more specifically, the Voting Rights Act of 1965, which

---

155. *See supra* notes 40–42 and accompanying text.

156. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 589 (1980) (Brennan, J., concurring).

157. *Id.*

158. *Id.*

159. *See id.* at 595–96.

160. U.S. CONST. art. I, § 4, cl. 1. The Seventeenth Amendment now overrides the final provision of Section 4, clause 1 regarding the "chusing of Senators." U.S. CONST. amend. XVII. As noted previously, voting rights and the controversial jurisprudence surrounding it in recent years are not the focus of this paper.

161. Cook v. Gralike, 531 U.S. 510, 523 (2001).

162. *See, e.g.*, Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 91 (2014) (noting that the explicit right to vote is granted to citizens via the constitutions of their respective states).

163. U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."); U.S. CONST. amend. XVII (constitutionalizing the popular election of U.S. Senators); U.S. CONST. amend. XIX ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."); U.S. CONST. amend. XXIII, § 1 (granting electoral votes for President and Vice President to the District of Columbia); U.S. CONST. amend. XXIV, § 1 ("The right of citizens of the United States to vote in

protects the rights of all citizens to vote regardless of race or color and bars the use of any "standard, practice, or procedure" to interfere with citizens' voting rights.[164] Judicially, any abridgement of the right to vote has been explicitly subjected to strict scrutiny.[165] Voting, therefore, is clearly a government process, and access to it should be evaluated under the "experience and logic" test of *Richmond Newspapers*.

B. Experience and Logic Are Necessarily Satisfied When Applied to the Polling Place

1. Experience: It is Common Practice to Have "Others" in the Polling Place

As the Court stated in *El Vocero*, when considering experience, a court should "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.'"[166]

---

any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax."); U.S. CONST. amend. XXVI, § 1 ("The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.").

164. 52 U.S.C. § 10301(a) (2015).

165. *See* United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938). The *Carolene* Court upheld the statute at issue under a deferential standard, but it noted a less deferential standard would be needed

> when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth. It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. *On restrictions upon the right to vote*, on restraints upon the dissemination of information, on interferences with political organizations as to prohibition of peaceable assembly. Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

Id. at 152 n.4 (emphasis added) (citations omitted); *see also* Burdick v. Takushi, 504 U.S. 428, 434 (1992) (quoting Norman v. Reed, 502 U.S. 279, 289 (1992)).

> [T]he rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subjected to 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance.'

Id.

166. El Vocero de Puerto Rico v. Puerto Rico, 508 U.S. 147, 150 (1993) (quoting Rivera-Puig v. Garcia-Rosario, 983 F.2d 311, 323 (1st Cir. 1992)).

Though the *El Vocero* Court referred specifically to preliminary criminal hearings, *Press-Enterprise II* consistently refers to analyzing government "processes" under the "experience and logic" test.[167]

a. A Number of States Allow for Public and News Media Access Beyond Just Voters

A survey of a number of states' voting laws suggests that it is actually common practice to allow members of the public, as well as news media, into the polling place for purposes beyond simply casting a ballot.[168] Virginia, Tennessee, and Oklahoma, for example, specifically allow members of the news media to enter the polling place, although there are reasonable limits placed on their access.[169] Wisconsin permits entry to the polls rather broadly, allowing "[a]ny member of the public [to] be present at any polling place . . . or . . . [location where] absentee ballots may be cast."[170] The language of Nevada's administrative code is similarly broad, allowing "any person [to] observe the conduct of voting at a polling place" subject only to minor restrictions.[171]

167. Press-Enter. Co. v. Superior Court of California (*Press-Enter. II*), 478 U.S. 1, 8–9 (1986).

168. *See, e.g.*, ME. REV. STAT. ANN. tit. 21-A, § 681(4) (2014) ("If sufficient space exists, *party workers and others, in addition to the pollwatchers allowed pursuant to section 627*, may remain in the voting place outside the guardrail enclosure as long as they do not attempt to influence voters or interfere with their free passage.") (emphasis added); OKLA. STAT. tit. 26, § 7-112 (2014) ("[A] news reporter or photographer may, in the course of covering the election being conducted, be allowed inside the election enclosure for a period not to exceed five (5) minutes."); TENN. CODE ANN. § 2-7-103(a) (2014) ("No person may be admitted to a polling place while the procedures required by this chapter are being carried out except election officials, voters, persons properly assisting voters, *the press*, poll watchers appointed under § 2-7-104 and others bearing written authorization from the county election commission.") (emphasis added); VA. CODE ANN. § 24.2-604(J) (2014) ("The officers of election *shall permit representatives of the news media* to visit and film or photograph inside the polling place for a reasonable and limited period of time while the polls are open.") (emphasis added); WIS. STAT. § 7.41(1) (2014) ("*Any member of the public may be present at any polling place*, in the office of any municipal clerk whose office is located in a public building on any day that absentee ballots may be cast in that office, or at an alternate site under § 6.855 on any day that absentee ballots may be cast at that site *for the purpose of observation of an election* and the absentee ballot voting process, except a candidate whose name appears on the ballot at the polling place or on an absentee ballot to be cast at the clerk's office or alternate site at that election.") (emphasis added). The author of this article does not represent that this list of statutes is exhaustive. Instead, in conducting a survey of such state statutes, the author, in the spirit of a "general" look at the "experience" in various jurisdictions, attempted to include a wide range of geographically and culturally diverse sections of the United States.

169. *See* select statutes cited *supra* note 168.

170. WIS. STAT. § 7.41(1) (2014).

171. NEV. ADMIN. CODE § 293.245(1) (2014).

b. "Poll Watchers"

Moreover, numerous states allow for so-called "poll watchers" to be present in the polling places.[172] These "poll watchers" are typically representatives of candidates seeking office or political parties.[173] A number of state statutes specifically reference poll watchers and allow them to access the polls on behalf of candidates or political parties.[174]

c. When Examined Broadly—as Prescribed by the Supreme Court—Access to the Polling Place Satisfies the "Experience" Prong

History suggests a broad reading of the experience prong. In *Globe Newspaper*, the Supreme Court solidified Justice Brennan's *Richmond Newspapers* concurrence, stating, "a tradition of accessibility implies the

---

172. Gilda R. Daniels, *Senator Edward Kennedy: A Lion for Voting Rights*, 14 N.Y.U. J. LEGIS. & PUB. POL'Y 415, 434–35 (2011) (noting that a number of states allow for so-called "poll watchers" or "challengers"); John Tanner, *Effective Monitoring of Polling Places*, 61 BAYLOR L. REV. 50, 77 (2009) ("There is a provision in each state for poll watchers appointed by political parties, candidates, or other groups, although their number, qualifications, and role varies considerably.").

173. *See* Daniels, *supra* note 172, at 434–35; Tanner, *supra* note 172, at 77–78.

174. *See, e.g.*, ALASKA ADMIN. CODE tit. 8, § 97.140(b) (2014) ("A party may be represented at the polling places by observers."); GA. CODE ANN. § 21-2-408 (2014); ME. STAT. tit. 21, § 627(4) (2014) ("Municipalities must provide a polling place large enough to allow *at least one worker from each political party* to remain outside the guardrail enclosure as a pollwatcher.") (emphasis added); MD. CODE ANN., ELEC. LAW § 10-311(a)(1) (West 2014) ("The following persons or entities have the right to designate a registered voter as a challenger or a watcher at each place of registration and election: (i) the State Board for any polling place in the State; (ii) a local board for any polling place located in the county of the local board; (iii) *a candidate*; (iv) *a political party*; and (v) any other group of voters supporting or opposing a candidate, principle, or proposition on the ballot.") (emphasis added); MONT. CODE ANN. § 13-13-120 (2014) ("The election judges *shall permit one poll watcher from each political party* to be stationed close to the poll lists in a location that does not interfere with the election procedures.") (emphasis added); MONT. CODE. ANN. § 13-13-121 (2014) ("A candidate, a group of candidates, or any group having an interest in the election may request the election administrator to allow additional poll watchers at any precinct."); N.C. GEN. STAT. ANN. § 163-45(a) (West 2014) (granting the right of the chair of political parties, and campaign managers for unaffiliated candidates, the power to appoint poll watchers); tit. 19 R.I. GEN. LAWS ANN. § 17-19-22 (West 2014) (allowing for representatives, runners, and watchers from each political party to be present at the polling place and observe the voting process); TENN. CODE ANN. § 2-7-104(a) (2014) (allowing political parties, citizen organizations, and candidates to have poll watchers present at the polling place); TEX. ELEC. CODE ANN. § 33.001 (West 2014) (defining a "watcher" as "a person appointed under this subchapter to observe the conduct of an election *on behalf of a candidate, a political party, or the proponents or opponents of a measure*.") (emphasis added); (West 2014); VA. CODE ANN. § 24.2-604(c) (2014) ("The officers of election shall permit *one authorized representative of each political party or independent candidate in a general or special election*, or *one authorized representative of each candidate in a primary election*, to remain in the room in which the election is being conducted at all times.") (emphasis added). Again, with this survey of state statutes and regulations, the author of this article does not represent the aforementioned laws to be an exhaustive list of state statutes and regulations regarding this matter. Instead, the author has intended to provide examples of similar state statutes and regulations that represent a wide geographic and cultural diversity among jurisdictions.

favorable judgment of experience."[175] Justice Brennan's concurrence, as some commentators suggest, sought to go beyond a mere number of years of openness and analyze the inherent or normative value of having such a process be open.[176] Other commentators suggest that, in applying the experience prong, the *El Vocero* Court, while exclusively analyzing the openness of preliminary hearings in Puerto Rico, further clarified that the experience test looks beyond the history of a particular jurisdiction or locality, and instead looks to prevailing laws across the United States—again, a judicial broadening of the experience inquiry.[177]

The number of states that allow news media, members of the public, and poll watchers into the polls, as detailed previously, demonstrates that public access to the polling place, beyond that of the simple voter, is common and meets the "experience" prong, especially when applied broadly.[178]

2. Logic: The Public Interests at Stake Will Necessarily Be Enhanced by Public Access

As detailed extensively above,[179] the experience prong is not the end of the analysis—the logic prong remains. In order to determine whether the logic prong is met, *Richmond Newspapers* and its progeny teach that a court must consider "whether public access plays a significant positive role in the functioning of the particular process in question."[180] Namely, courts must examine whether openness of the process in question would help ensure fairness of the process, promote the appearance of the process' fairness, and provide citizens with enhanced confidence in the government.[181]

a. The Public Interests Are Analogous to Those Interests Already Determined to be Presumptively Open

As detailed above, a presumption of openness to the public and the press in criminal trials and proceedings serves a number of valuable public interests, including: fairness to those subjected to criminal justice, the appearance of fairness to the public, a societal catharsis that justice and fairness have been

175. Globe Newspaper Co. v. Superior Court for Norfolk Cty., 457 U.S. 596, 605 (1982) (quoting Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 589 (1980) (Brennan, J., concurring)).

176. *See, e.g.*, *First Amendment—Public Access—Third Circuit Holds that First Amendment Does Not Afford the Public a Protected Right of Access to Polling Places for News-Gathering Purposes*, 127 HARV. L. REV. 1067, 1071–73 (2014).

177. *See* El Vocero de Puerto Rico v. Puerto Rico, 508 U.S. 147, 150–51 (1993).

178. *See supra* Part II.B.1.a–b.

179. *See supra* Part I.C.

180. Press Enter. Co. v. Superior Court of Cal. 478 U.S. 1, 8 (1986).

181. *See* Globe Newspaper Co. v. Superior Court of Norfolk Cty., 457 U.S. 596, 606 (1982).

carried out, and an enhancement of society's confidence in the workings of its government.[182]

Lower courts have extended this logic to civil trials on similar grounds: public scrutiny resulting in a greater likelihood of fairness to the parties involved, greater pressure on officials carrying out duties to do so in the proper manner, and enhancing the public's awareness of its government and the processes in which it engages.[183] In establishing the logic of allowing public and press attendance for administrative proceedings, lower courts have noted similar rationales: an assurance of fairness in the process, a catharsis of the public that justice and fairness have been properly administered, and education of the public about the workings of the government process in question.[184] Further, as the *Richmond Newspapers* Court stated, praising the role the press plays in serving as a funnel of information to society,[185] the public value served by access pertains not just to particular individuals, but also to the public as a whole.[186]

Whether in criminal or civil trials, administrative hearings, or at the polling place, similar interests are at stake. Voting is a fundamental right of citizens.[187] Many commentators, regardless of their stances on the overall correctness of such measures, agree that a number of new laws requiring voter identification have come to fruition in a number of states.[188] Indeed, in 2008, the Supreme

---

182. *See supra* Part I.C.; *see also* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 570–72 (1980); Press Enter. Co. v. Superior Court of Cal., 464 U.S. 501, 508 (1984).

> The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.

Id.; *see also Press-Enter. II*, 478 U.S. at 9.

183. *See* Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1069–70 (3d Cir. 1984); *see also supra* Part I.E.1.

184. *See supra* Part I.E.2.; *see also* New York Civil Liberties Union v. New York City Transit Auth., 684 F.3d 286, 303 (2d Cir. 2011); Detroit Free Press v. Ashcroft, 303 F.3d 681, 703–05 (6th Cir. 2002).

185. *See Richmond Newspapers*, 448 U.S. at 577 n.12.

186. *See id.* at 570–72.

187. *See supra* Part II.A.

188. *See, e.g.*, Brandon S. Baker, Note, Texas v. Holder*: How Texas Can Enact a Stringent Voter ID Law and Avoid Section 3(c) Clearance*, 8 LIBERTY U.L. REV. 371, 377–86 (2014); David M. Faherty, Comment, *The Post*-Crawford *Rise in Voter ID Laws: A Solution Still in Search of a Problem*, 66 ME. L. REV. 269, 278–85 (2013); Claire Foster Martin, Comment, *Block the Vote: How a New Wave of State Election Laws Is Rolling Unevenly Over Voters & the Dilemma of How to Prevent It*, 43 CUMB. L. REV. 95, 103–10 (2013); Richard L. Hasen, *The 2012 Voting Wars, Judicial Backstops, and the Resurrection of* Bush v. Gore, 81 GEO. WASH. L. REV 1865, 1872 (2013); Joel A. Heller, Note, *Fearing Fear Itself: Photo Identification Laws, Fear of Fraud, and the Fundamental Right to Vote*, 62 VAND. L. REV. 1871, 1877–78 (2009); Hans A. von Spakovsky, *Protecting the Integrity of the Election Process*, 11 ELECTION L.J. 90, 90–91 (2012).

Court upheld voter identification laws in Indiana.[189] Justifying its rationale, the Supreme Court noted, "flagrant examples of such fraud in other parts of the country have been documented throughout this Nation's history by respected historians and journalists."[190]

Again, the same policy interests enumerated in judicial opinions appear in legal arguments both for and against voter rights law. One commentator, in discussing the rise of new election laws in recent years, mentioned "a raft of new election laws that were passed by Republican-controlled legislatures and administrative actions taken mostly by Republican secretaries of state. Democrats and voting rights groups charged that these new laws and procedures made it harder for voters to register and cast their ballots."[191] In advocating for tough judicial scrutiny of voter identification laws, another commentator stated, "[p]hoto ID requirements make voting more difficult for some voters and impossible for others."[192] But another commentator, supporting voter identification laws, wrote, "[s]uch measures increase public confidence in our election process."[193] Indeed, as part of its justification for seeking access to the polls, the PG Publishing Company argued that a new voter identification law in Pennsylvania was a primary reason that the public needed full press access to the polling place.[194]

More recently, in September 2014, the Seventh Circuit vacated the Eastern District of Wisconsin's enjoinment of Wisconsin's voter identification law.[195] Wisconsin Governor Scott Walker, in response, praised the ruling as protective of the voting process.[196] Wisconsin Congresswoman Gwen Moore, by contrast,

---

189. Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 202 (2008) ("In sum, on the basis of the record that has been made in this litigation, we cannot conclude that the statute imposes 'excessively burdensome requirements' on any class of voters.").

190. *Id.* at 195.

191. Hasen, *supra* note 188, at 1872.

192. Heller, *supra* note 188, at 1891.

193. Von Spakovsky, *supra* note 188, at 90.

194. PG Publ'g Co. v. Aichele, 705 F.3d 91, 111–12 (3d Cir. 2013) The Third Circuit noted:

> Appellant argues that access to the polling place was particularly necessary during this past election because of the Voter ID Law. More specifically, Appellant argues that the Voter ID Law—part of which was suspended for purposes of the November 6, 2012 election—may have caused voter confusion as to whether identification is required in order to cast a vote. As a result, Appellant argues that it was of the utmost importance for reporters to observe and record the goings on *at the sign-in table* during this election.

Id.

195. Frank v. Walker, 766 F.3d 755, 756 (7th Cir. 2014) ("The panel has concluded that the state's probability of success on the merits of this appeal is sufficiently great that the state should be allowed to implement its law, pending further order of this court.").

196. Press Release, Office of Wisconsin Governor Scott Walker, Governor Scott Walker Statement on Voter ID Ruling (Sept. 12, 2014), http://www.wisgov.state.wi.us/newsroom/press-release/governor-scott-walker-statement-voter-id-ruling ("This ruling is a win for the electoral process and voters of Wisconsin. Voter ID is a common sense reform that protects the integrity of

criticized the decision as an attack on voters' rights and the principles of democracy.[197] Subsequently, the Seventh Circuit, reaching the merits, held Wisconsin's voter ID law constitutionally valid in October 2014.[198] Yet, only a few days later, the U.S. Supreme Court stayed the law's implementation.[199]

Other states' controversial voting laws have been the subject of recent federal cases. For example, on October 9, 2014, a federal district court held in *Veasey v. Perry*[200] that a Texas law mandating that voters produce photo ID in order to vote was an unconstitutional burden on the right to vote, as well as an unconstitutional poll tax.[201] On October 14, 2014, the Fifth Circuit stayed the ruling pending an appeal.[202] The Supreme Court left the stay in place, over a vigorous dissent from Justice Ginsburg, who wrote, "[t]he greatest threat to public confidence in elections in this case is the prospect of enforcing a purposefully discriminatory law, one that likely imposes an unconstitutional poll tax and risks denying the right to vote to hundreds of thousands of eligible voters."[203]

Ultimately, the Fifth Circuit affirmed the district court's determination that the law's discriminatory effects violated the Voting Rights Act, while vacating the district court's holding that the law had a discriminatory purpose, and that the law was a poll tax.[204] Texas Governor Greg Abbott responded by stating, "[i]n light of ongoing voter fraud, it is imperative that Texas has a voter ID law that prevents cheating at the ballot box. Texas will continue to fight for its voter ID requirement to ensure the integrity of elections in the Lone Star State."[205] In contrast, the lead plaintiff Texas Congressman Marc Veasey, applauded the ruling, stating "the U.S. Court of Appeals for the 5th Circuit has taken the first

---

our voting process. It's important that voters have confidence in the system. Today's ruling makes it easier to vote and harder to cheat.").

197. Press Release, Office of U.S. Representative Gwen Moore, Gwen Moore Responds to 7th Circuit's Ruling on Wisconsin Voter ID Law (Sept. 12, 2014), http://gwenmoore.house.gov/press-releases/gwen-moore-responds-to-7th-circuits-ruling-on-wisconsins-voter-id-law1/ ("This decision is a grave injustice for those who lack the necessary photo identification that this law requires. Creating unnecessary barriers at the polls, barriers that would significantly impact low-income, elderly, and racial and ethnic minority voters, is a blatant violation of the basic principles of American democracy.").

198. Frank v. Walker, 768 F.3d 744, 751–52 (7th Cir. 2014).

199. Frank v. Walker, 135 S. Ct. 7, 8 (2014).

200. 71 F.Supp.3d 627 (S.D. Tex. 2014).

201. *Id.* at 633 ("The Court holds that SB 14 creates an unconstitutional burden on the right to vote, has an impermissible discriminatory effect against Hispanics and African-Americans, and was imposed with an unconstitutional discriminatory purpose. The Court further holds that SB 14 constitutes an unconstitutional poll tax.")

202. Veasey v. Perry, 769 F.3d 890, 896 (5th Cir. 2014).

203. Veasey v. Perry, 135 S. Ct. 9, 9–10 (2014).

204. Veasey v. Abbott, 796 F.3d 487, 519–20 (5th Cir. 2015).

205. Press Release, Office of Texas Governor Greg Abbott, Governor Abbott Statement on Texas Voter ID Law (Aug. 6, 2015), http://gov.texas.gov/news/press-release/21284.

steps towards ensuring that all Texans have unfettered access to the ballot box."[206]

Also, in October 2014, the Fourth Circuit remanded a case concerning a restrictive North Carolina voting law to the district court, instructing the district court to enforce the provisions in the law that prohibited same-day voter registration and counting votes cast in the wrong precinct.[207] The Supreme Court stayed the Fourth Circuit ruling over a dissent from Justices Ginsburg and Sotomayor.[208]

The aforementioned cases, as well as the commentaries and statements in reaction to those cases, demonstrate that the public interests at stake regarding the polling place—notably fairness and the appearance of fairness to the public—are analogous to those considered by courts in applying the "experience and logic" test to criminal trials, civil trials, and administrative proceedings. For example, both supporters and critics of increased scrutiny of voter eligibility echo the idea of fairness and justice in the voting process.[209] Even the Supreme Court, divided over the merits of these state laws, stressed the potential threat of voter fraud, and the potential damage to the process's fairness.[210]

The sharp disagreements discussed above, moreover, suggest concerns by both sides about the perception of fair elections at the polling place.[211] Unlike the closed proceedings in *North Jersey Media Group* and *Miami University*, secretive processes at the polling place will not serve government interests, nor are the interests at stake strictly and solely between individuals and a particular institution or entity.[212]

b. The Public Will Benefit from Scrutiny of the Government Process by the Press

Because the fairness and the public perception of fairness are both implicated by the voting process, public access to the polling place, particularly by way of the press, will benefit the public, the voting process itself, and satisfy the logic prong. As discussed previously, a number of states allow for "poll watchers," who are individuals typically appointed by parties and candidates with interests in the outcome.[213] "Poll watchers," one particular group notes, "shine a partisan light on polling place procedures to prevent voter fraud—by the polling place

206. Press Release, Office of U.S. Representative Marc Veasey, Rep. Veasey Statement on Texas Voter ID Ruling (Aug. 5, 2015), http://veasey.house.gov/media-center/press-releases/rep-veasey-statement-on-texas-voter-id-ruling.

207. *See* League of Women Voters v. North Carolina, 769 F.3d 224, 248–29 (4th Cir. 2014).

208. *See* North Carolina v. League of Women Voters, 135 S. Ct. 6, 6 (2014).

209. *See supra* notes 191–98 and accompanying text.

210. *See supra* note 203 and accompanying text.

211. *See supra* notes 188–208 and accompanying text.

212. *See supra* notes 101–21 and accompanying text.

213. *See supra* notes 172–74 and accompanying text.

official, the putative voter, or a combination of both—from diluting legal votes."[214]

The press, in contrast to poll watchers, is defined broadly as "[t]he news media; print and broadcast news organizations collectively."[215] The press, in theory, does not have a dog in the fight. Proclaimed "surrogates for the public,"[216] the press is "designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve."[217]

If persons with a known interest in the outcome of an election can be allowed into polling places, members of the press should likewise have a presumptive First Amendment right to view the process. The attachment of a qualified First Amendment presumption for the press to access polling places, justifiably identical to notions of fairness at criminal trials, civil trials, and administrative proceedings, will likewise benefit society at large.

C. There Are Appropriate Checks in Place to Protect Against Adverse Effects of Allowing Public and Press Access to the Polling Place

A presumptive First Amendment right of access does not have to signal a mandate for mayhem at the polls. First, many of the statutes previously discussed that specifically allow for public and press access, have safety mechanisms built into them.[218] Second, courts that apply the "experience and logic" test generally remind readers that a presumptive right of access is not an absolute right.[219] Third, the closure or restriction on access of a presumptively open governmental process can be judicially approved if strict scrutiny is met.[220]

The Virginia statute, for example, allows for the news media to enter the polling place, while specifically prohibiting the media from filming voters

---

214. Heather Heidelbaugh, Logan Fisher & James Miller, *Protecting the Integrity of the Polling Place: A Constitutional Defense of Poll Watcher Statutes*, 46 HARV. J. ON LEGIS. 217, 218 (2009) (arguing, generally, that poll watcher statutes are constitutional); *see also* Tanner, *supra* note 172, at 79. He notes:

> There is potential for the perception of bias on the part of monitors, and many people who are willing to spend hours at the polls will have a dearly-loved dog in the fight. Others will monitor due to an interest in improvement of the election process. In the latter case, it is preferable, where good-government or academic sponsorship is not permitted, for the monitors to be associated with as neutral a candidate or organization as possible.

Id.

215. BLACK'S LAW DICTIONARY 1304 (9th ed. 2009).

216. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 573 (1980).

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

218. *See supra* Part II.B.1.a–b.

219. *See, e.g.*, *Richmond Newspapers*, 448 U.S. at 581; *see also* Press Enter. Co. v. Superior Court of Cal., 478 U.S. 1, 9 (1986).

220. *See* Press Enter. Co. v. Superior Court of Cal., 464 U.S. 501, 510 (1984).

without their permission.[221] The Virginia statute also prohibits filming in a manner that could potentially reveal anyone's vote.[222] Many of the poll watcher statutes have similar safety mechanisms protecting voters.[223] Such limitations may be instructive, informing states how to properly limit the scope of the media's qualified right of access. Most importantly, the Supreme Court has assured, if any limitation on access can pass strict scrutiny, a court can uphold that limitation on this *qualified* right.[224]

III. CONCLUSION

The well-established dual-pronged test of "experience and logic" exists to guide courts in determining whether a qualified First Amendment presumptive right of access to government processes exists. Historically, there are a number of instances throughout the United States in which "outsiders" other than ordinary voters are permitted to enter the polling place. Logically, the interests at stake in the polling place, particularly fairness and the public's perception of fairness, are analogous to those interests that provide for a constitutional presumptive right of access to a myriad of governmental processes. As this is a qualified right of access, proper limitations, if they pass strict scrutiny, may be put in place. As such, experience and logic mandate attaching a qualified First Amendment presumptive right of access for the public and the press to enter the polling place.

---

221. *See* VA. CODE ANN. § 24.2-604(J) (2015); *see also* OKLA. STAT. ANN. tit. 26, § 7-112 (West 2014) (limiting the time and specific observations reporters may make of particular voters at the polls).

222. *See* VA. CODE ANN. § 24.2-604(J) (2015).

223. *See, e.g.*, GA. CODE ANN. § 21-2-408(d) (2014) (prohibiting poll watchers from speaking to voters, trying to influence voters, or otherwise interfering with the voting process and providing for their removal if they do); N.C. GEN. STAT. ANN. § 163-45(c) (West 2014) (prohibiting poll watchers from electioneering or interfering with the voting process).

224. *See Press-Enter. II*, 478 U.S. at 9.