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COMMENT

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THE LOGIC OF EXPERIENCE: THE ROLE OF HISTORY IN  
RECOGNIZING PUBLIC RIGHTS OF ACCESS UNDER  
THE FIRST AMENDMENT

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INTRODUCTION ..... 1561  
I. THE SUPREME COURT’S RIGHT OF ACCESS JURISPRUDENCE . 1566  
II. LOWER COURTS’ APPLICATION OF THE EXPERIENCE PRONG... 1573  
III. REASONS FOR AND AGAINST RELYING ON HISTORY TO  
RECOGNIZE A FIRST AMENDMENT RIGHT OF ACCESS ..... 1590  
    A. *Why Is History Relevant?* ..... 1590  
    B. *Why Not Rely on History?* ..... 1591  
IV. ANALYZING WHETHER THE TAXONOMIES ARE IN LINE WITH  
OR DEPART FROM THE SUPREME COURT’S CONSTRUCTION  
AND REASONING ..... 1594  
CONCLUSION ..... 1600

INTRODUCTION

“It is gratifying . . . to see the Court now looking to and relying upon legal history in determining the fundamental public character of the criminal trial,” Justice Blackmun wrote in his concurrence in *Richmond Newspapers, Inc. v. Virginia*, in which the Supreme Court first recognized a First Amendment public right of access.<sup>1</sup> “The Court’s return to history is a welcome change in

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<sup>1</sup> 448 U.S. 555, 601 (1980) (Blackmun, J., concurring).

direction.”<sup>2</sup> History is central to the Supreme Court’s recognition of a constitutional right of access. The use of history in this context also raises questions about why history should play a role in recognizing constitutional rights and what types and durations of historical traditions should be required to justify constitutional protection. These questions underlie circuit and district courts’ application of *Richmond Newspapers* and its progeny.

In *Richmond Newspapers*, the Court held that a public right to attend criminal trials is implicit in the First Amendment, based on the longstanding history of public trials and the positive value of their openness.<sup>3</sup> This seminal case, decided in 1980, departed from three cases decided in the 1970s, in which the Court found that journalists do not have a First Amendment right to enter prisons to interview inmates.<sup>4</sup> The Court subsequently extended its holding in *Richmond Newspapers* to grant a right of access to criminal trials at which juvenile victims of sexual assault testify,<sup>5</sup> to voir dire proceedings<sup>6</sup> and to preliminary hearings.<sup>7</sup>

In *Press-Enterprise Co. v. Superior Court*, the Court synthesized its prior case law and articulated a two-part test to determine if the First Amendment recognizes a right of access to a particular proceeding.<sup>8</sup> First, courts are to consider “whether the place and process have historically been open to the press and general public.”<sup>9</sup> Second, courts are to evaluate whether “public

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<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 580.

<sup>4</sup> *Houchins v. KQED, Inc.*, 438 U.S. 1, 15 (1978); *Saxbe v. Wash. Post Co.*, 417 U.S. 843, 849-50 (1974); *Pell v. Procunier*, 417 U.S. 817, 833-35 (1974).

<sup>5</sup> *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 610-11 (1982).

<sup>6</sup> *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 511 (1984) [hereinafter *Press-Enterprise I*].

<sup>7</sup> *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 13 (1986) [hereinafter *Press-Enterprise II*]. In addition to a First Amendment right of access, the Supreme Court has also recognized a common law public right of access to inspect and copy judicial records and documents. See *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978) (“It is clear that the courts . . . recognize a general right to inspect and copy public records and documents, including judicial records and documents.”). This Comment does not address the common law right of access. The First Amendment guarantee of access provides greater protection than the common law right because there is a higher bar to overcome the First Amendment right than the common law one. To overcome the First Amendment right, “it must be shown that the denial [of access] is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.” *Globe Newspaper Co.*, 457 U.S. at 606-07. In contrast, a court may seal judicial documents if competing interests outweigh the public’s common law right of access. *Nixon*, 435 U.S. at 598-99. Even though courts usually do not begin with constitutional claims, “[s]ometimes constitutional adjudication is essential, as when a case comes to the Supreme Court from a state court and only federal issues are open to consideration.” *United States v. Blagojevich*, 612 F.3d 558, 563 (7th Cir. 2010). One circuit judge also wrote that “[g]iven the need for robust protection of a free press . . . , resolving the constitutional issues directly would ordinarily be the appropriate and sensible course for district courts to take, notwithstanding the general rule that we avoid such questions whenever possible.” *United States v. Kaczynski*, 154 F.3d 930, 933 (9th Cir. 1998) (Reinhardt, J., concurring).

<sup>8</sup> 478 U.S. at 8.

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

access plays a significant positive role in the functioning of the particular process in question.”<sup>10</sup> If the particular proceeding “passes these tests of experience and logic,” a qualified First Amendment right attaches.<sup>11</sup> A court must then evaluate if the countervailing interests favoring closure override the First Amendment right of access.<sup>12</sup>

Lower courts have applied this test, dubbed the “experience and logic test,” to evaluate rights of access to a variety of proceedings beyond criminal trials and different government documents.<sup>13</sup> The test has been applied

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 9.

<sup>12</sup> *Id.* In *Globe Newspaper Co.*, the Court analyzed whether a qualified right of access can be overridden in a different manner. It held that only a compelling governmental interest pursued by a means that is narrowly tailored to serve that interest can overcome a First Amendment right of access. 457 U.S. at 607.

<sup>13</sup> It is beyond the scope of this Comment, but circuit courts diverge on whether the experience and logic test is a test of general applicability or whether it should exclusively be applied in the criminal context. The Third, Sixth, and Ninth Circuits have consistently applied the test in contexts other than criminal proceedings. For the Third Circuit, see *PG Publ'g Co. v. Aichele*, 705 F.3d 91, 104-07 (3d Cir. 2013) (summarizing Third Circuit case law on the application of the experience and logic test, and recognizing that the Third Circuit has applied the test to find a right of access to township meetings, deportation hearings, and administrative records). For the Sixth Circuit, see, e.g., *In re Search of Fair Finance*, 692 F.3d 424, 429-30 (6th Cir. 2012) (arguing that notwithstanding the fact that the experience and logic test initially was applied to criminal proceedings, the test can be applied in a variety of other contexts, and citing circuit case law applying the test to administrative hearings, deportation proceedings, and a variety of documents, including voter lists and state agency reports); *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 694-96, 700-05 (6th Cir. 2002) (holding that the experience and logic test is a test of general applicability and applying it to recognize a right of access to deportation hearings). For the Ninth Circuit, see, e.g., *Leigh v. Salazar*, 677 F.3d 892, 899-901 (9th Cir. 2012) (holding that the district court erred in not applying the experience and logic test to determine whether a photographer had a right of access to observe a wild horse gather roundup); *Cal. First Amendment Coal. v. Woodford*, 299 F.3d 868, 875-77 (9th Cir. 2002) (applying the experience and logic test to recognize a right of access to executions); *Cal-Almond, Inc. v. U.S. Dep't of Agric.*, 960 F.2d 105, 109 (9th Cir. 1992) (applying the experience and logic test to recognize a right of access to voter lists). In some cases, courts in the D.C., First, and Tenth Circuits have refused to apply the experience and logic test outside of the criminal justice context. For the D.C. Circuit, see, e.g., *Dhiab v. Trump*, 852 F.3d 1087, 1092-93 (D.C. Cir. 2017) (holding that the experience and logic test does not apply to access to habeas corpus proceedings involving sensitive information); *Ctr. for Nat. Sec. Studies v. U.S. Dept. of Justice*, 331 F.3d 918, 935 (D.C. Cir. 2003) (declining to apply the experience and logic test to a challenge to disclosure of information compiled during a governmental investigation because “[n]either the Supreme Court nor this Court ha[d] applied the *Richmond Newspapers* test outside the context of criminal judicial proceedings or the transcripts of such proceedings”). For the First Circuit, see *El Dia, Inc. v. Hernandez Colon*, 963 F.2d 488, 491, 495 (1st Cir. 1992) (declining to apply the experience and logic test to a challenge to a district order denying enjoinder of the Puerto Rico governor’s order restricting access to public documents because the court “seriously question[ed] whether *Richmond Newspapers* and its progeny carry positive implications favoring rights of access outside the criminal justice system”). For a court in the Tenth Circuit, see *Okla. Observer v. Patton*, 73 F. Supp. 3d 1318, 1325 (D. Okla. 2014) (citing multiple Tenth Circuit cases questioning the applicability of the experience and logic test to contexts beyond the individual cases in which the Supreme Court applied it); see also Matthew D. Bunker & Clay Calvert, *Could*

inconsistently by many courts, even when different courts evaluated a right of access to the same proceeding. As a result, diverging case law has emerged on whether the First Amendment grants a right of access to deportation hearings<sup>14</sup> and executions,<sup>15</sup> for example.

Scholarship on the application of the Supreme Court's First Amendment right of access jurisprudence has addressed the topic from both broad and narrow perspectives.<sup>16</sup> Analyzing the issue holistically, some scholars have criticized the experience and logic test and charted its inconsistent application by lower courts.<sup>17</sup> Some judges and academics maintain that the test—and its use of history to justify a right of access—is not a sound analytical framework in light of the evolving nature of judicial and governmental proceedings<sup>18</sup> and, in particular, the increasing movement of some government affairs from public court-like fora to private proceedings.<sup>19</sup> The majority of scholars analyzing the First Amendment right of access have taken a more narrow approach, focusing on whether a First Amendment right of access should attach to a particular proceeding or assessing how different courts have addressed access to a specific proceeding or judicial document.<sup>20</sup>

But scholars have not analyzed the role of history in the Supreme Court and lower courts' First Amendment right of access doctrine in depth. Professors Raleigh Hannah Levine and David Ardia both acknowledge that

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*Wild Horses Drag Access Away from Courtrooms? Expanding First Amendment Rights to New Pastures*, 18 COMM. L. & POL'Y 247, 253-64 (2013) (analyzing the application of the experience and logic test beyond the criminal justice context).

<sup>14</sup> Compare *N. Jersey Media Grp., Inc. v. Ashcroft*, 308 F.3d 198, 209 (3d Cir. 2002) (rejecting a First Amendment right of access to deportation hearings), with *Detroit Free Press*, 303 F.3d at 700 (recognizing a First Amendment right of access to deportation hearings).

<sup>15</sup> For cases recognizing a First Amendment right of access to view executions, see, e.g., *Associated Press v. Otter*, 682 F.3d 821, 824 (9th Cir. 2012); *Cal. First Amendment Coalition*, 299 F.3d at 875-77; *Guardian News & Media LLC v. Ryan*, 225 F. Supp. 3d 859, 869 (D. Ariz. 2016); *Phila. Inquirer v. Wetzel*, 906 F. Supp. 2d 362, 370-71 (M.D. Pa. 2012). For cases rejecting a First Amendment right of access to view executions, see, e.g., *Okla. Observer v. Patton*, 73 F. Supp. 3d 1318, 1324-28 (W.D. Okla. 2014); *Ark. Times, Inc. v. Norris*, 2008 U.S. Dist. LEXIS 3500 at \*12 (E.D. Ark. 2008).

<sup>16</sup> For recent scholarship on lower courts' application of the experience and logic test, see, e.g., David Ardia, *Court Transparency and the First Amendment*, 38 CARDOZO L. REV. 835 (2017); Raleigh Hannah Levine, *Toward a New Public Access Doctrine*, 27 CARDOZO L. REV. 1739 (2006); Kathleen Olson, *Courtroom Access After 9/11: A Pathological Perspective*, 7 COMM. L. & POL'Y 461, 485-88 (2002).

<sup>17</sup> See Ardia, *supra* note 16, at 840 (describing the experience and logic test as a "confusing and inconsistent doctrinal roadmap for dealing with public access questions"); Levine, *supra* note 16, 1758-76 (detailing the different ways lower courts have applied the experience and logic prongs, and showing how whether a court conducts a broad or narrow historical inquiry affects whether the experience prong is met).

<sup>18</sup> Kimba M. Wood, *Re-Examining the Access Doctrine*, COMM. LAW., Winter 1994, at 3, 4-5.

<sup>19</sup> Judith Resnik, *The Contingency of Openness in Courts: Changing the Experiences and Logics of the Public's Role in Court-Based ADR*, 15 NEV. L. J. 1631, 1670-71 (2015).

<sup>20</sup> Seven hundred and forty-three law review articles on Westlaw cite *Press-Enterprise II*, the majority of which adopt this second approach.

history is applied and used in different ways, and Levine argues that some of the problems posed by the test are rooted in the Supreme Court's development of the doctrine.<sup>21</sup> But they do not chart different taxonomies of uses of history in the cases or analyze which approaches are in line with the Supreme Court's jurisprudence. This focus deserves attention for two reasons. First, some scholars have argued that the experience prong is the determinative factor.<sup>22</sup> For example, in reviewing the lower courts' application of the experience and logic test, Levine claimed that no court has held that a proceeding that passed the experience prong failed the logic prong.<sup>23</sup> Second, using history as a basis for constitutional rights raises interpretative questions. As Professor Jack Balkin articulated, "Appeals to tradition are complicated by the fact that consensus in practice and belief often disappears when we inspect history more closely."<sup>24</sup> Balkin continued, "To argue from tradition or ethos, one must make interpretive judgments about what aspects of American history are central and . . . what aspects are peripheral . . . or have been . . . repudiated as time has passed."<sup>25</sup> Using history as a basis for a constitutional right also raises questions about "what kind of history counts, [and] how unequivocal the history must be . . ."<sup>26</sup> These challenges are demonstrated by this area of law because close examination of the case law reveals that lower courts have interpreted the Supreme Court's mandate to evaluate history to recognize a constitutional right of access in different ways.

This Comment addresses this dearth in scholarship by identifying eight ways lower courts use history to analyze the experience prong of the experience and logic test. I identified these taxonomies by reviewing 185 federal circuit court opinions in Westlaw that cited *Press-Enterprise II*, seventy-six of which applied the experience and logic test. I also reviewed some federal district court and state court opinions cited in the circuit court opinions and scholarly articles. I focus on the range of ways courts have handled "mixed history"—a proceeding that is replete with examples of both open and closed practices. This Comment analyzes to what degree these different taxonomies are in line with, or depart from, the Supreme Court's jurisprudence on the topic. Like Levine, I argue that some of the different approaches reflect uncertainty and unanswered questions in the Supreme

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<sup>21</sup> See Ardia, *supra* note 16, at 859-61; Levine, *supra* note 16, at 1742, 1756-77.

<sup>22</sup> See Ardia, *supra* note 16, at 859 ("[F]or 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."); Wood, *supra* note 18, at 6 ("[T]he effect of the current emptiness of the function prong is to make the history prong of the access test even more influential than it would otherwise be.").

<sup>23</sup> Levine, *supra* note 16, at 1777-78.

<sup>24</sup> Jack M. Balkin, *The New Originalism and the Uses of History*, 82 *FORDHAM L. REV.* 641, 678 (2013).

<sup>25</sup> *Id.*

<sup>26</sup> Curtis A. Bradley & Neil Siegel, *After Recess: Historical Practice, Textual Ambiguity and Constitutional Adverse Possession*, 2014 *SUP. CT. REV.* 1, 21.

Court's opinions. This analysis demonstrates that lower courts have little direction regarding how to conceptualize historical traditions that are beset by open and closed practices, or proceedings that lack a historical tradition of access because they are relatively new. Nevertheless, while this Comment shows that a range of approaches to the experience prong are in line with the Supreme Court's jurisprudence, analyzing the different uses of history by lower courts in detail underscores scholars' critiques of the doctrine. In particular, it shows that the experience prong is not suited to address new practices when there may be no history of openness or closure, and that the emphasis on history does not allow the right of access doctrine to accommodate changes in governmental practice and innovation.<sup>27</sup>

This Comment proceeds in four parts. Part I analyzes the Supreme Court's right of access jurisprudence. Part II surveys lower courts' application of the experience prong by identifying eight ways courts apply this part of the experience and logic test. Part III articulates reasons for and against the use of history as a basis for constitutional protection. Part IV analyzes the degree to which the practices of lower courts are in line with or depart from the reasoning of, and the historical constructions in, the Supreme Court jurisprudence. The Comment concludes by assessing what the varied ways courts use history in this context demonstrates about the foundations of this right.

## I. THE SUPREME COURT'S RIGHT OF ACCESS JURISPRUDENCE

The Supreme Court's jurisprudence on the First Amendment public right of access includes two lines of cases: one recognizing a First Amendment public right of access to observe criminal trials and other aspects of the criminal process in court,<sup>28</sup> and an earlier line of cases holding that members of the press do not have a First Amendment public right of access to interview inmates in prison.<sup>29</sup>

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<sup>27</sup> It is beyond the scope of this Comment, but after charting different taxonomies and analyzing to what degree they reflect the Supreme Court's jurisprudence, further study is required to compare lower courts' application of history in this context to other aspects of First Amendment jurisprudence, including the public forum doctrine, and other areas of constitutional law in which courts appeal to tradition and history, such as substantive due process.

<sup>28</sup> See generally *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

<sup>29</sup> *Houchins v. KQED, Inc.*, 438 U.S. 1, 15 (1978); *Pell v. Procunier*, 417 U.S. 817 (1974); *Saxbe v. Wash. Post Co.*, 417 U.S. 843 (1974). It is beyond the scope of this Comment, but the First Amendment right of access to criminal trials interacts with an accused's Sixth Amendment rights in myriad ways. See generally MATTHEW D. BUNKER, *JUSTICE AND THE MEDIA: RECONCILING FAIR TRIALS AND A FREE PRESS* (1997). For example, the Supreme Court has considered the public right of access when evaluating a convicted person's challenge to the closure of a courtroom. See *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1910 (2017) ("The public-trial right also protects some interests that do not belong to the defendant. After all, the right to an open courtroom protects the rights of the public at large, and the press, as well as the rights of the accused."). Additionally, in *Presley v.*

Less than a decade before recognizing a First Amendment public right of access to criminal trials, the Supreme Court decided three cases rejecting journalists' First Amendment challenges to various prison regulations limiting journalists' abilities to interview inmates. In *Pell v. Procunier*, journalists and inmates challenged a California law that prohibited members of the press from conducting face-to-face interviews with prisoners who they requested to interview.<sup>30</sup> In *Saxbe v. Washington Post Co.*, journalists argued that the Federal Bureau of Prison's policy precluding journalists from interviewing prisoners violated the First Amendment.<sup>31</sup> Four years later, in *Houchins v. KQED, Inc.*, a California prison denied journalists' request to inspect and take pictures of a jail facility after they reported on the suicide of a prisoner.<sup>32</sup> The journalists claimed that the prison's refusal to provide a means for the public to be informed about the conditions in the jail violated the First Amendment.<sup>33</sup>

Garnering a full majority of the Court in *Pell* and *Saxbe* and a splintered Court in *Houchins*, the Supreme Court rejected the three claims on the same basis.<sup>34</sup> It cited prior precedent that "the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally."<sup>35</sup> Because the public does not have access to prisoners, "newsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public."<sup>36</sup> The Court claimed that whether prisons should be open to the public is a question of policy best decided by a legislative body.<sup>37</sup> It did not give credence to journalists' arguments that the need to inform the public about prison conditions and shed light on abuse justified a right of access.<sup>38</sup> These cases are important

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*Georgia*, the Court held that an accused has a Sixth Amendment right to a public voir dire proceeding because the First Amendment recognizes a public right of access to voir dire proceedings. 558 U.S. 209, 212-13 (2010). Additionally, in *Tennessee v. Lane*, the Supreme Court articulated that the public right of access to criminal proceedings is one of four access-to-courts rights that Title II of the Americans with Disabilities Act enforces. 541 U.S. 509, 523 (2004). The other rights are the right of a criminal defendant to be present at all critical stages of the trial, the right of a litigant to have a meaningful opportunity to be heard in judicial proceedings, and the right of a criminal defendant to a trial by a jury composed of a fair crosssection of the community. *Id.* Conceptualizing the public right of access as on par with these foundational rights of the accused underscores the importance of, and deference to, the First Amendment right of access.

<sup>30</sup> 417 U.S. at 819.

<sup>31</sup> 417 U.S. at 844.

<sup>32</sup> 438 U.S. at 3.

<sup>33</sup> *Id.* at 4.

<sup>34</sup> In *Houchins*, Justices White and Rehnquist joined Chief Justice Burger's opinion, Justice Stewart filed an opinion concurring in the judgement, and Justice Stevens filed a dissent that Justices Brennan and Powell joined. Justices Blackmun and Marshall did not participate in the case. *Id.* at 1.

<sup>35</sup> *Pell*, 417 U.S. at 833 (quoting *Branzburg v. Hayes*, 408 U.S. 665, 684-85 (1972)).

<sup>36</sup> *Id.* at 834.

<sup>37</sup> *Houchins*, 438 U.S. at 12.

<sup>38</sup> *Id.* at 8-9.

background for the subsequent cases recognizing a First Amendment right of access because they stand for the proposition that the press does not have a greater right of access than the public.

In 1980, the Supreme Court next addressed whether the First Amendment recognizes a right of access to criminal trials. Criminal trials are a foil to prisons because criminal trials have historically been open to the public. In *Richmond Newspapers v. Virginia*, journalists challenged a judicial order closing a murder trial to the press and to the public.<sup>39</sup> In its plurality opinion, authored by Chief Justice Burger, the Court held for the first time that “the right to attend criminal trials is implicit in the guarantees of the First Amendment.”<sup>40</sup> The Court acknowledged that “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.’”<sup>41</sup>

The Court recognized this constitutional right based on the long history of trials being open to the public and multiple positive benefits of the practice. The Court sketched the history of open trials, noting that trials were open to the public in England since before the Norman Conquest in the eleventh century, and remained so through the fourteenth to sixteenth centuries.<sup>42</sup> Open trials were also an aspect of the judicial systems of colonial America, and some colonies codified by law that trials must remain open to the public.<sup>43</sup> Chief Justice Burger’s opinion concluded its review of the history of open trials with evidence from the First Continental Congress in 1774, and described the historical tradition as “unbroken” and “uncontradicted.”<sup>44</sup> Based on its historical survey, the Court concluded, “[T]he historical evidence demonstrates conclusively that at the time when our organic laws were adopted, criminal trials both here and in England had long been presumptively open.”<sup>45</sup>

The Court continued that the public quality of trials is “no quirk of history” but “has long been recognized as an indispensable attribute of an Anglo-American trial.”<sup>46</sup> The plurality opinion offered multiple policy justifications for the practice. It argued that open trials increase confidence in the administration of justice because they assure the public that proceedings are conducted fairly, discourage perjury, and provide the public with an

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<sup>39</sup> 448 U.S. 555, 561-62 (1980).

<sup>40</sup> *Id.* at 580. Justice Rehnquist was the sole justice to dissent in *Richmond Newspapers*. Justice Rehnquist was unwilling to recognize an implied constitutional right of access and also raised federalism concerns about a First Amendment right of access. *Id.* at 605-06 (Rehnquist, J., dissenting).

<sup>41</sup> *Id.* at 580 (majority opinion) (quoting *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972)).

<sup>42</sup> *Id.* at 565-66.

<sup>43</sup> *Id.* at 567-68.

<sup>44</sup> *Id.* at 568, 573.

<sup>45</sup> *Id.* at 569.

<sup>46</sup> *Id.* at 569.

opportunity to understand the criminal justice system.<sup>47</sup> The Court also found that open trials have “community therapeutic value” as open proceedings provide an “outlet for community concern, hostility, and emotion” after a shocking crime and decrease the likelihood that people will resort to vigilante measures in response to a tragic incident.<sup>48</sup> The Court acknowledged that these reasons are “as valid today as in centuries past.”<sup>49</sup> Even though the First Amendment does not expressly address a right of access, the plurality opinion wrote that it is implicit in the First Amendment because the amendment “assure[s] freedom of communication on matters relating to the functioning of government.”<sup>50</sup> The plurality opinion acknowledged that the First Amendment “prohibit[s the] government from limiting the stock of information from which members of the public may draw.”<sup>51</sup> Thus it held that in the context of trials, “the First Amendment . . . prohibit[s the] government from summarily closing courtroom doors which had long been open to the public at the time that [the] Amendment was adopted.”<sup>52</sup>

Justice Brennan’s concurrence is an important complement to the plurality opinion, and it was incorporated into the majority opinions of later Supreme Court cases involving the First Amendment right of access. Justice Brennan explained why history is an important consideration in recognizing a constitutional right of access to criminal trials. Justice Brennan wrote that “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” because “the Constitution carries the gloss of history” and because “a tradition of accessibility implies the favorable judgment of experience.”<sup>53</sup> Justice Brennan’s construction of the historical tradition of public trials was more expansive than the one Chief Justice Burger provided. Justice Brennan extended his historical inquiry beyond the framing of the Constitution and recognized that the majority of states secure the right to public trials by statute and that the Supreme Court has “persistently defended the public character of the trial process.”<sup>54</sup>

In addition to the justifications offered for a right to attend trials in Chief Justice Burger’s opinion, Justice Brennan emphasized the “structural value of public access” to criminal trials.<sup>55</sup> In particular, Justice Brennan recognized the “structural role [the First Amendment] play[s] in securing and fostering

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<sup>47</sup> *Id.* at 569-72.

<sup>48</sup> *Id.* at 570-71.

<sup>49</sup> *Id.* at 573.

<sup>50</sup> *Id.* at 575.

<sup>51</sup> *Id.* at 576 (quoting *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978)).

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

<sup>53</sup> *Id.* at 589 (Brennan, J., concurring).

<sup>54</sup> *Id.* at 591.

<sup>55</sup> *Id.* at 598.

our republican system of self-government” and the underlying assumption that “public debate . . . must be informed.”<sup>56</sup> The “structural model links the First Amendment to that process of communication necessary for a democracy to survive,” Justice Brennan wrote.<sup>57</sup> But Justice Brennan recognized that the “structural value” of increased information can be applied to “theoretically endless” situations, and thus maintained that “resolution of First Amendment public access claims in individual cases must be strongly influenced by the weight of historical practice and by an assessment of the specific structural value of public access in the circumstances.”<sup>58</sup> Thus Justice Brennan conceived appeals to history and an assessment of the “specific structural value of public access” as limiting the application of the First Amendment right the Court recognized in *Richmond Newspapers*.

The principles outlined in *Richmond Newspapers* were applied two years later in *Globe Newspaper Co. v. Superior Court*. A Massachusetts statute, as construed by the Massachusetts Supreme Judicial Court, required trial judges to exclude the general public and the press from courtrooms when victims of some sexual offenses who were under the age of eighteen testified.<sup>59</sup> After being denied access to a rape trial involving the rapes of a seventeen-year-old and two sixteen-year-olds, the *Globe Newspaper Company* argued that the statute violated the press’s First Amendment right to attend a public trial.<sup>60</sup> In an opinion authored by Justice Brennan that garnered a five-vote majority, the Supreme Court held that the statute violated the First Amendment because, citing *Richmond Newspapers*, criminal trials have historically been open to the press and public, and because, repeating many of the arguments for public access articulated in the plurality opinion and in Justice Brennan’s concurrence in *Richmond Newspapers*, public access to trials plays a “significant role in the functioning of the judicial process and the government as a whole.”<sup>61</sup>

The Court’s opinion focused on the history of open trials broadly and did not mention that historically trials have been closed while sexual assault victims testified. This prompted Chief Justice Burger, who authored the plurality opinion in *Richmond Newspapers*, to dissent in *Globe Newspapers*.<sup>62</sup> Chief Justice Burger argued that the Court’s historical inquiry “ignores the weight of historical practice” because “[t]here is clearly a long history of exclusion of the public from trials involving sexual assaults, particularly those

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<sup>56</sup> *Id.* at 587.

<sup>57</sup> *Id.* at 587-88.

<sup>58</sup> *Id.* at 588, 597-98.

<sup>59</sup> *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982).

<sup>60</sup> *Id.* at 598.

<sup>61</sup> *Id.* at 606.

<sup>62</sup> *Id.* at 612 (Burger, C.J., dissenting).

against minors” and because “[s]everal states have longstanding provisions allowing closure of cases involving sexual assaults against minors.”<sup>63</sup> The majority of the Court conducted a broad historical inquiry, but Chief Justice Burger’s dissent argued for a more narrow construction.

Two years later, in *Press-Enterprise I*, the Court extended the First Amendment right of access to voir dire proceedings with a unanimous judgment.<sup>64</sup> In a California murder trial, voir dire took six weeks, and all but approximately three of the days were closed to the public.<sup>65</sup> The petitioner sought the transcript of the proceedings, which the judge denied.<sup>66</sup> Like in *Richmond Newspapers*, the Court charted the history of public jury examinations in England and in colonial America, and ended its inquiry with the trial of two British soldiers charged with murder after the Boston Massacre.<sup>67</sup> The Court claimed that the justifications for open trials offered in *Richmond Newspapers* apply to this part of the trial as well, and recognized a First Amendment right to attend voir dire proceedings.<sup>68</sup>

In *Press-Enterprise II*, the Court recognized a qualified First Amendment right of access to preliminary hearings in a criminal case.<sup>69</sup> Synthesizing its case law, the Court articulated a test to determine if a right of access attaches.

[O]ur decisions have emphasized two complementary considerations. First, because a ‘tradition of accessibility implies the favorable judgment of experience’ (citation omitted) we have considered whether the place and process have historically been open to the press and general public . . . . Second, in this setting the Court has traditionally considered whether public access plays a significant positive role in the functioning of the particular process in question . . . . These considerations of experience and logic are, of course, related, for history and experience shape the functioning of governmental processes.<sup>70</sup>

The Court also maintained that whether a First Amendment right of access attaches does not revolve on the “label we give the event, i.e. ‘trial’ or otherwise.”<sup>71</sup>

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<sup>63</sup> *Id.* at 614. Chief Justice Burger also argued that the law was constitutional in light of the weight of the state’s interest in protecting minor victims of rape. *Id.* at 615-16.

<sup>64</sup> *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 511 (1984). Chief Justice Burger wrote the Court’s opinion, and Justices Blackmun, Stevens and Marshall wrote separate concurring opinions, of which Justice Marshall’s concurred in the judgment.

<sup>65</sup> *Id.* at 503.

<sup>66</sup> *Id.* at 503-04.

<sup>67</sup> *Id.* at 505-08.

<sup>68</sup> *Id.* at 508-11.

<sup>69</sup> *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986).

<sup>70</sup> *Id.* at 8-9

<sup>71</sup> *Id.* at 7.

The scope of the historical inquiry in this case differed from the three prior Supreme Court opinions. Unlike the prior plurality and majority opinions that surveyed English history and early eighteenth century American history, the Court began its inquiry with the trial of Aaron Burr in 1807, and concluded that from this trial “until the present day, the near uniform practice of state and federal courts has been to conduct preliminary hearings in open court.”<sup>72</sup> The Court acknowledged that several states allow preliminary hearings to be closed on the motion of the accused, but claimed that the proceedings are still presumptively open to the public and are only closed for cause.<sup>73</sup> The Court claimed that the justifications for public access to criminal trials cited in its prior cases are applicable to preliminary hearings as well.<sup>74</sup>

Justice Stevens dissented in *Press-Enterprise II* because he reached the opposite conclusion applying the experience and logic test. On the experience prong, Justice Stevens argued that “[t]he historical evidence proffered in this case is far less probative than the evidence adduced in prior cases granting public access.”<sup>75</sup> In particular, there was no common-law right of access to preliminary proceedings at the time of the adoption of the First Amendment, and while in some states the proceedings have been open to the public, in other states, including California and Michigan, they have been closed.<sup>76</sup> Thus, the majority and dissent articulated two different approaches to interpreting historical phenomenon that involve both open and closed practices. The majority is satisfied that the continuous evidence of open preliminary hearings is sufficient to satisfy the experience prong, even if at times preliminary hearings have been closed and the practice was not rooted in common law. But Justice Stevens cited specific states in which preliminary hearings were closed to undermine the historical tradition of openness.

In 1993, the Supreme Court refined the experience prong in *El Vocero de Puerto Rico v. Puerto Rico* by holding in a per curiam decision that 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.’”<sup>77</sup> Besides this wrinkle, the Supreme Court has not revisited its First Amendment right of access jurisprudence. The Court has not considered what type of history is necessary or sufficient to satisfy the experience prong,

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<sup>72</sup> *Id.* at 10.

<sup>73</sup> *Id.* at 11.

<sup>74</sup> *Id.* at 11-12.

<sup>75</sup> *Id.* at 21 (Stevens, J., dissenting).

<sup>76</sup> *Id.* at 22-24.

<sup>77</sup> 508 U.S. 147, 150 (1993).

or addressed whether a right of access extends to, and whether the experience and logic test applies to, contexts outside of the criminal trial process.

## II. LOWER COURTS' APPLICATION OF THE EXPERIENCE PRONG

Lower courts have applied the Supreme Court's mandate to evaluate history to determine if a First Amendment right of access attaches in different ways. Careful review of lower court case law reveals eight different modes of applying the experience prong, summarized in the table below.

Table 1: Lower Courts' Eight Different Applications of the Experience Prong

Requiring History	Deemphasizing History
1. Faithful to the Supreme Court's experience prong	6. Rejecting historical analysis altogether
2. Framing-era history	7. Analogous historical inquiry
3. State statutes	8. Not deciding the First Amendment question because closure was justified
4. Recent history and practices	
5. Mixed history	

### 1. *Faithful to the Supreme Court's Experience Prong*

Some courts have been faithful to the Supreme Court's construction of the experience prong. In such situations, courts have either held that because there is no historical tradition of access to a particular proceeding or document, no constitutional right of access attaches, or courts have recognized a right of access because they found a sufficient historical tradition of openness. In some scenarios, courts have denied a right of access because there was no history of openness including access to discovery in criminal cases,<sup>78</sup> to wiretap applications,<sup>79</sup> to student disciplinary records,<sup>80</sup> and to presentencing reports.<sup>81</sup> In various cases, journalists have sought access to records from grand jury proceedings and search warrants; circuit courts have repeatedly held that there is no First Amendment right of access to these

<sup>78</sup> *United States v. Kravetz*, 706 F.3d 47, 54 (1st Cir. 2013).

<sup>79</sup> *In re Application of the New York Times Co. to Unseal Wiretap & Search Warrant Materials*, 557 F.3d 401, 410 (2d Cir. 2009).

<sup>80</sup> *United States v. Miami Univ.*, 294 F.3d 797, 823 (6th Cir. 2002).

<sup>81</sup> *United States v. Corbitt*, 879 F.2d 224, 229 (7th Cir. 1989).

records because the proceedings are historically and presumptively secret.<sup>82</sup> Of the eight approaches outlined, this seems to be the most common.<sup>83</sup>

In some situations, courts have found that there is no longstanding tradition of access, and accordingly denied a right of access, because the proceedings, documents, or laws at issue were of recent creation. Three examples illustrate this point.<sup>84</sup> In 2013, the Fourth Circuit held that there is no First Amendment right of access to a sealed order, issued pursuant to the Stored Communications Act, that required social network providers to turn over subscriber information to the government for an ongoing criminal investigation.<sup>85</sup> The court found that there was no long tradition of access to orders required by the law because the law was only enacted in 1986.<sup>86</sup>

In addition, journalists in 1997 sought access to a plea agreement that was submitted to a district court in Washington, D.C., so the court could

<sup>82</sup> For cases denying right of access to grand jury-related proceedings, see, e.g., *In re Grand Jury Subpoena*, Judith Miller, 493 F.3d 152, 154 (D.C. Cir. 2007); *In re Motions of Dow Jones & Co., Inc.* 142 F.3d 496, 502-03 (D.C. Cir. 1998); *United States v. Smith*, 123 F.3d 140, 148 (3d Cir. 1997); *In re Subpoena to Testify Before Grand Jury Directed to Custodian of Records*, 864 F.2d 1559, 1562 (11th Cir. 1989). For cases denying right of access to search warrant affidavits and materials, see, e.g., *In re Search of Fair Finance*, 692 F.3d 424, 430-31 (6th Cir. 2012); *In re Application of the New York Times Co. to Unseal Wiretap & Search Warrant Materials*, 577 F.3d at 410; *Baltimore Sun Co. v. Goetz*, 886 F.2d 60, 64 (4th Cir. 1989); *Times Mirror Co. v. United States*, 873 F.2d 1210, 1213 (9th Cir. 1989). *But see In re Search Warrant for Secretarial Area Outside Office of Thomas Gunn*, 855 F.2d 569, 573 (8th Cir. 1988) (recognizing a First Amendment right of access to search warrant applications and receipts because they are routinely filed with the clerk of the court without seal, and because judicial records and documents have historically been open to public inspection).

<sup>83</sup> For other cases adopting this approach, see *In re Copay Press, Inc.*, 518 F.3d 1022, 1028 (9th Cir. 2008) (denying right of access to a memorandum and documents supporting the government's motion to seal because there is "no historical experience of access to such documents, and logic militates against granting such access"); *United States v. Wolfson*, 55 F.3d 58, 60 (2d Cir. 1995) (recognizing that there is no history "of access on the part of the public to documents to which the defendant himself has been denied"); *Calder v. Internal Revenue Serv.*, 890 F.2d 781, 784 (5th Cir. 1989) (denying right of access to Al Capone's IRS records because there is no history of access to such documents); *Capital Cities Media, Inc. v. Chester*, 797 F.2d 1164, 1175 (3d Cir. 1986) (denying right of access to administrative records of the Pennsylvania Department of Environmental Resources because plaintiff has not alleged the existence of a historic tradition of access).

<sup>84</sup> For other cases that hold that there is no historical tradition of access because the proceeding at issue was relatively new, see *In re Morning Song Bird Food Litigation*, 831 F.3d 765, 768, 777 (6th Cir. 2016) (denying right of access to objections attached to a presentence reports sought by class members in a civil lawsuit because objections historically have not been publicly available, as before 1975, most courts did not even permit defendants to access their presentence report and disclosure to defendants only became automatic in 1983); *Cincinnati Gas & Elec. Co. v. General Elec. Co.*, 854 F.2d 900, 903-04 (6th Cir. 1988) (holding that there is no history of access to summary jury trials because they have been in existence for less than ten years); *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 11-12 (1st Cir. 1986) (denying right of access to discovery proceedings because "the pretrial discovery process is a fairly recent invention," although discovery rules were enacted in 1938).

<sup>85</sup> *In re Application of the United States for an Order Pursuant to 18 U.S.C. Section 2703(D)*, 707 F.3d 283, 291-92 (4th Cir. 2013).

<sup>86</sup> *Id.* at 291.

rule on the government's motion to seal the agreement.<sup>87</sup> The D.C. Circuit requires the government to file a plea agreement and a motion to seal the agreement with a district court and mandates the district court to enter notice of the motion in the public docket.<sup>88</sup> This procedure, established by the court in *Washington Post v. Robinson*<sup>89</sup> in 1991, was created to ensure "that the press and public have a fair opportunity to assert their presumptive First Amendment right of access to any agreement on which a plea is entered."<sup>90</sup> Nonetheless, assessing journalists' right of access to the agreement, the court found that "there can hardly be a historical tradition of access to the documents accompanying a procedure that did not exist until *Robinson* imposed it in 1991."<sup>91</sup> This example is instructive because it recognizes a court's awareness of a need to change its procedures to accommodate the First Amendment right of access, but then does not provide a way for the experience and logic test to account for the change in practice.

A year after the D.C. Circuit's decision in *United States v. El-Sayegh*, the Tenth Circuit was presented with the question whether a newspaper has a right of access to sealed information about fees and costs filed under the Criminal Justice Act by court appointed criminal defense attorneys.<sup>92</sup> The court held that there was no right of access to the material.<sup>93</sup> Because the Criminal Justice Act was only passed in 1964, the "CJA is too recent in origin to have developed any 'history' or 'tradition' with respect to press access to documents required by that Act."<sup>94</sup> These three cases all found that there was no history of access because the documents sought were related to laws or procedures of recent creation.

Some courts' historical analyses resemble *Richmond Newspapers's* treatment of the experience prong. In *Hartford Courant Co. v. Pellegrino*, two newspapers challenged the Connecticut state courts' practice of sealing some docket sheets.<sup>95</sup> The Second Circuit relied on history from England and the United States to demonstrate that docket sheets historically were open to the public, including state statutes passed in the early years of the United States that required clerks to maintain open records of judicial proceedings in the form of docket books.<sup>96</sup>

In *Globe Newspaper Co. v. Pokaski*, journalists challenged a Massachusetts statute that required records in criminal cases that did not result in

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<sup>87</sup> *United States v. El-Sayegh*, 131 F.3d 158, 159 (D.C. Cir. 1997).

<sup>88</sup> *Id.*

<sup>89</sup> 935 F.2d 282 (D.C. Cir. 1991).

<sup>90</sup> *El-Sayegh*, 131 F.3d at 159 (emphasis omitted).

<sup>91</sup> *Id.* at 161.

<sup>92</sup> *United States v. Gonzales*, 150 F.3d 1246, 1250 (10th Cir. 1998).

<sup>93</sup> *Id.* at 1254-55.

<sup>94</sup> *Id.* at 1257.

<sup>95</sup> 380 F.3d 83, 85 (2d Cir. 2004).

<sup>96</sup> *Id.* at 94-95.

convictions to be sealed.<sup>97</sup> The court relied on the delegates to the Constitutional Convention and Congress's use of pamphlets reproducing proceedings of political prosecutions and centuries of treason, heresy, and sedition trials in England housed in the Philadelphia Library to demonstrate historical access and the "value placed on access to records of secretive criminal proceedings."<sup>98</sup> The court used "historical materials available to the framers of the Constitution" to rebut the appellee's position that "our historical tradition has not been one of presumptive openness."<sup>99</sup>

In addition, when assessing constitutional claims of access to plea and sentencing hearings, some courts have merely written that plea and sentencing hearings are typically held in open court in order to satisfy the experience prong.<sup>100</sup> Notably, the cases in which courts appear most faithful to the Supreme Court's construction of the experience prong and find that this part of the test is met involve access to different aspects of the judicial system.

## 2. Framing-Era History

Taking the most extreme approach, one court required Framing-era history to satisfy the experience prong. The Tennessee Press Association challenged the Tennessee General Assembly's practice of closing legislative meetings to the public.<sup>101</sup> The court rejected the plaintiff's claim of a First Amendment right of access to state legislative meetings because "the First Amendment was not adopted against a backdrop of a long history of legislative sessions being presumptively open."<sup>102</sup> The court required

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<sup>97</sup> 868 F.2d 497, 499-500 (1st Cir. 1989).

<sup>98</sup> *Id.* at 503.

<sup>99</sup> *Id.*

<sup>100</sup> For plea and sentencing hearings, see *In re Heart Newspapers, L.L.C.*, 641 F.3d 168, 177 (5th Cir. 2011) ("Sentencing proceedings have historically been open to the press and public."); *Wash. Post v. Robinson*, 935 F.2d 282, 288 (D.C. Cir. 1991) ("In accord with the rulings of our sister Second, Fourth, and Ninth Circuits, we now find that plea agreements have traditionally been open to the public."); *Oregonian Publ'g Co. v. United States Dist. Court*, 920 F.2d 1462, 1465 (9th Cir. 1990) ("[W]e observe that plea agreements have typically been open to the public. Nothing has been provided to suggest historical practice is to the contrary."); *United States v. Haller*, 837 F.2d 84, 86-87 (2d Cir. 1988) ("Plea hearings have typically been open to the public, and such access, as in the case of criminal trials, . . . serves to allow public scrutiny of the conduct of courts and prosecutors."); *In re Wash. Post Co.*, 807 F.2d 383, 389 (4th Cir. 1986) ("[H]istorical and functional considerations weigh in favor of finding a First Amendment right of access here. Sentencings have historically been open to the public; while plea hearings do not have the same long tradition, they are typically held in open court."). In addition, this approach was adopted with respect to access to oral arguments in appellate proceedings. See *United States v. Moussaoui*, 65 F. App'x 881, 890 (4th Cir. 2003) (arguing that appellate oral arguments "have historically been open to the public, and the very considerations that counsel in favor of openness of criminal trial support a similar degree of openness in appellate proceedings").

<sup>101</sup> *Mayhew v. Wilder*, 46 S.W.3d 760, 765 (Tenn. Ct. App. 2001).

<sup>102</sup> *Id.* at 777.

Framing-era history to justify a right of access in spite of the fact that Tennessee's Sunshine Law, which required some branches of state government to hold some meetings in public, was passed in 1974.<sup>103</sup>

### 3. *State Statutes*

Other courts found evidence that state statutes guarantee openness to a particular proceeding sufficient to satisfy the experience prong. In *Whiteland Woods, L.P. v. Township of West Whiteland*, a township planning commission banned the videotaping of a meeting, and a building company filed a lawsuit against the township arguing that the policy violated the First Amendment.<sup>104</sup> The Third Circuit recognized that the company had a constitutional right of access to the planning commission meeting, although it held that the right did not extend to videotaping the meeting.<sup>105</sup> The court maintained that the experience prong was satisfied because public access to such meetings is guaranteed by two Pennsylvania statutes: the Sunshine Act of 1986 and the Pennsylvania Municipalities Planning Code of 1968.<sup>106</sup>

In *Cal-Almond, Inc. v. U.S. Department of Agriculture*, the U.S. Department of Agriculture did not provide an almond processor and distributor a list of California almond growers eligible to vote in a referendum that it requested via a freedom of information request.<sup>107</sup> The Ninth Circuit recognized a First Amendment right of access to voter lists.<sup>108</sup> It held that "it seems likely that a tradition of public access to voter lists exists" both because several state statutes expressly provide for access, including Hawaii, Idaho, Montana, Nevada, Oregon, and Washington, and because none bar public access.<sup>109</sup> Thus, these cases relied on access guaranteed by laws, many of which were passed in the last half of the twentieth century, to satisfy the experience prong.

### 4. *Recent History and Practices*

Some courts have relied on recent histories and practices to satisfy the experience prong. Three cases illustrate this approach.<sup>110</sup> In August 2011, Erie

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

<sup>104</sup> 193 F.3d 177, 178-79 (3d Cir. 1999).

<sup>105</sup> *Id.* at 184.

<sup>106</sup> *Id.* at 181.

<sup>107</sup> 960 F.2d 105, 106 (9th Cir. 2012).

<sup>108</sup> *Id.* at 109.

<sup>109</sup> *Id.*

<sup>110</sup> For other cases adopting this approach, see *N.Y. Civil Liberties Union v. N.Y.C. Transit Auth.*, 684 F.3d 286, 301 n.11 (2d Cir. 2012) (holding that Transit Authority Bureau hearings are presumptively open to the public in part because for the two decades that the hearings were only held in criminal court, and were not also held in a separate administrative proceeding, they were

County, New York, entered into a settlement agreement with the Department of Justice following an investigation into violations of prisoners' constitutional rights at prisons in the county.<sup>111</sup> As part of the settlement, the parties agreed that a monitor would file compliance reports, and the district court permitted the reports to be filed under seal.<sup>112</sup> The New York Civil Liberties Union intervened for the reports to be unsealed.<sup>113</sup> Reversing the district court's determination that a First Amendment right of access did not attach to the reports, the Second Circuit relied on the fact that monitor reports in four recent, similar cases were public to demonstrate a tradition of openness.<sup>114</sup>

In *Applications of National Broadcasting Co.*, a television station sought to obtain sealed documents relating to a motion to disqualify a judge, and the district court held that the television station did not satisfy the experience and logic test.<sup>115</sup> The Sixth Circuit reversed the district court's ruling, and found a qualified right of access to the information sought.<sup>116</sup> The Sixth Circuit held that there is "clearly a tradition of accessibility to disqualification proceedings" because, reviewing Sixth Circuit cases involving the disqualification of judges from 1924 to 1984, it found no cases in which the proceedings were closed or the records were sealed.<sup>117</sup> The court found that the absence of a closed proceeding in the Sixth Circuit during a sixty-year period was enough to satisfy the experience prong.

In addition, in July 1981, the White House excluded television media representatives from the press pool, and various news stations claimed that this action violated their First Amendment right of access.<sup>118</sup> The district court held that the experience prong of the test was satisfied because there is a "history of pool coverage of presidential activities going back through several past Administrations in which television news representatives took

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open to the public); *United States v. Alcantara*, 396 F.3d 189, 197 (2d Cir. 2005) (holding that "historically, sentences have been imposed in open court" as demonstrated by "[n]umerous cases from over a century ago describ[ing] sentencing proceedings held in open court"); *Leigh v. Salazar*, 954 F. Supp. 2d 1090, 1100-01 (D. Nev. 2013) (holding that wild horse gathers have historically been open to the public based on the Bureau of Labor Management's policy directive of holding guided public observation days and testimony from a journalist that for twelve years she has attended public wild horse gathers on public land). The district court in *Leigh v. Salazar* applied the experience and logic test after the Ninth Circuit reversed and remanded the district court's initial ruling because the district court had not applied the experience and logic test to determine whether a photographer had a right of access to observe a wild horse gather roundup. *Id.* at 899.

<sup>111</sup> *United States v. Erie Cty., N.Y.*, 763 F.3d 235, 236-37 (2d Cir. 2014).

<sup>112</sup> *Id.* at 237-38.

<sup>113</sup> *Id.* at 238.

<sup>114</sup> *Id.* at 241-42.

<sup>115</sup> 828 F.2d 340, 341-42 (6th Cir. 1987).

<sup>116</sup> *Id.* at 345.

<sup>117</sup> *Id.* at 344.

<sup>118</sup> *See, e.g., Cable News Network, Inc. v. Am. Broad. Cos.*, 518 F. Supp. 1238, 1239-40 (N.D. Ga. 1982).

part.”<sup>119</sup> In these cases, courts surveyed practices, and as long as they found a continuous practice of openness—even a recent one or one of relatively short duration—courts have held that the experience prong was satisfied. None of these cases acknowledge that the tradition of access they presented is narrower and more limited than those in the Supreme Court cases.

### 5. *Mixed History*

Courts have approached cases of “mixed history”—proceedings that are replete with evidence of open and closed practices—differently. Some courts have held that the experience prong is satisfied if the proceeding at issue has been predominantly open, even if there are instances in which it was closed, or if there are elements of openness in spite of other aspects indicating that the procedure is closed to the public. Other courts, in contrast, have cited examples in which the proceeding was closed to the public to demonstrate that the experience prong was not met, even if there was ample evidence of public access.

#### a. *Mixed History Is Sufficient*

In *Detroit Free Press v. Ashcroft*, the Sixth Circuit relied on the general presumption and practice of open deportation hearings to satisfy the experience prong and did not give weight to the instances of closed deportation hearings the government cited to argue against a historical tradition of openness.<sup>120</sup> On September 21, 2001, the chief immigration judge issued a directive to all federal immigration judges to close certain cases to the press and public, including deportation hearings.<sup>121</sup> In 2002, the family of a man who was subject to deportation and members of the press and public, including Congressman John Conyers, were denied access to a deportation hearing.<sup>122</sup> Journalists and Congressman Conyers filed complaints under the First Amendment and other constitutional and statutory provisions seeking injunctive and declaratory relief.<sup>123</sup> The Sixth Circuit held that a First Amendment right of access attaches to deportation hearings.<sup>124</sup> Analyzing the history of access to deportation hearings, the court found that, although at times deportation hearings may have been closed to the public, deportation hearings have generally been open.<sup>125</sup> The

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<sup>119</sup> *Id.* at 1244.

<sup>120</sup> 303 F.3d 681, 700-03 (6th Cir. 2002).

<sup>121</sup> *Id.* at 684.

<sup>122</sup> *Id.* at 684-85.

<sup>123</sup> *Id.* at 685.

<sup>124</sup> *Id.* at 705.

<sup>125</sup> *Id.* at 701.

court noted that although Congress has repeatedly passed statutes closing exclusion hearings, no statute has ever required deportation hearings to be closed.<sup>126</sup> Furthermore, since 1965, regulations promulgated by the United States Immigration and Naturalization Service have explicitly required deportation proceedings to be presumptively open.<sup>127</sup>

How to construe mixed history also affects whether there is a First Amendment right of access to view executions. In 1996, California's San Quentin prison instituted a policy whereby witnesses could not observe an inmate entering into an execution chamber and a prison employee strapping the inmate to the gurney and administering intravenous lines.<sup>128</sup> Witnesses could only begin watching an execution after the inmate was sedated and lay motionless on the gurney before lethal drugs were administered.<sup>129</sup> A coalition of journalists sued to enjoin the practice, and the Ninth Circuit held that the public has a First Amendment right to view the entirety of executions.<sup>130</sup> Analyzing the experience prong, the court noted that historically executions in England and in the United States were held in public places and open to the public.<sup>131</sup> When executions were moved from public locations into prisons, states instituted practices to allow executions to remain open to some public observation.<sup>132</sup> California, for example, passed a law that a minimum of twelve people should be present at a private execution, and every state authorizing the death penalty requires official witnesses to observe each execution.<sup>133</sup> Most states also allow journalists to attend executions.<sup>134</sup> Given this history, the court held that even though executions are now held in prisons where the public does not have right of access, a First Amendment right of access to view executions extends from the time the inmate is escorted into the chamber.<sup>135</sup> The Ninth Circuit articulated that while some features of executions—such as that they are conducted in prisons—suggest that they are private, other elements—such as allowing a few members of the public to view the events—are enough to satisfy the experience prong.

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<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> Cal. First Amendment Coalition v. Woodford, 299 F.3d 868, 871 (9th Cir. 2002).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 873.

<sup>131</sup> *Id.* at 875.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 876.

<sup>135</sup> *Id.* The holding and reasoning of *California First Amendment Coalition* was applied in another Ninth Circuit case, *Associated Press v. Otter*, 682 F.3d 821, 823 (9th Cir. 2012), and in district court cases in Arizona, *Guardian News & Media LLC v. Ryan*, 225 F. Supp. 3d 859, 868-69 (D. Ariz. 2016), and in Pennsylvania, *Philadelphia Inquirer v. Wetzel*, 906 F. Supp. 2d 362, 370 (M.D. Pa. 2012).

b. *Mixed History Is Not Sufficient*

Other courts have reviewed the same proceedings and history and have reached opposite conclusions regarding the experience prong. When presented with the identical issue as the Sixth Circuit in *Detroit Free Press*, the Third Circuit held that deportation hearings did not pass the experience prong because “the tradition of open deportation hearings is too recent and inconsistent to support a First Amendment right of access.”<sup>136</sup> The court recognized that statutes and regulations create a presumption that deportation hearings are accessible to the public.<sup>137</sup> But despite this presumption of openness, the court noted that deportation hearings are sometimes conducted in places where there is no general right of access, such as prisons, hospitals, or private homes.<sup>138</sup> In addition, deportation hearings involving abused alien children are closed by regulation, irrespective of where they are held, and deportation hearings of abused alien spouses are closed presumptively.<sup>139</sup> The court refuted the significance of Department of Justice regulations that created a presumption of openness by claiming that “regulatory presumption is hardly the stuff of which Constitutional rights are forged.”<sup>140</sup> The Third Circuit in great detail distinguished the historical tradition of access to deportation hearings to the history of access to criminal trials in *Richmond Newspapers* to explain why it declined to hold that deportation hearings satisfied the experience prong.

We ultimately do not believe that deportation hearings boast a tradition of openness sufficient to satisfy *Richmond Newspapers*. In *Richmond Newspapers* itself, the Court noted an “unbroken, uncontradicted history” of public access to criminal trials in Anglo American law running from “before the Norman Conquest” to the present, and it emphasized that it had not found “a single instance of a criminal trial conducted in camera in any federal, state, or municipal court during the history of this country . . .”

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<sup>136</sup> *N. Jersey Media Grp., Inc. v. Ashcroft*, 308 F.3d 198, 211 (3d Cir. 2002). This case prompted a strong dissent from Judge Scirica, who believed that the experience and logic test was satisfied. *Id.* at 222 (Scirica, J., dissenting). Judge Scirica wrote that the experience prong was met because “[d]eportation hearings have a consistent history of openness.” *Id.* When Congress first adopted immigrant statutes at the end of the nineteenth century, Congress expressly closed exclusion proceedings and left deportation hearings presumptively open. *Id.* Department of Justice regulations, promulgated in 1964, mandate that all hearings other than exclusion hearings shall be open to the public, subject to a few exceptions. *Id.*

<sup>137</sup> *Id.* at 211-12 (majority opinion).

<sup>138</sup> *Id.* at 212.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 213.

The tradition of open deportation hearings is simply not comparable. While the *expressio unius* distinction between exclusion and deportation proceedings is a tempting road to travel, we are unwilling effectively to craft a constitutional right from mere Congressional silence, especially when faced with evidence that some deportation proceedings were, and are, explicitly closed to the public or conducted in places unlikely to allow general public access.<sup>141</sup>

Unlike the Sixth Circuit, the Third Circuit emphasized instances in which deportation hearings are closed, and minimized the statutory and regulatory presumptions of openness, to hold that the experience prong was not met.

Just as the Third Circuit approached the mixed history of deportation hearings differently than the Sixth Circuit, district courts in Oklahoma and Arkansas reached a conclusion opposite to that reached by the Ninth Circuit in *California First Amendment Coalition*.<sup>142</sup> An Oklahoma district court claimed that the fact that executions in Oklahoma are conducted in private and that in 1890, the Supreme Court upheld a Minnesota statute that required executions to be conducted before sunrise, in a jail, or in a private enclosed area out of public view, with a limited number of people present, demonstrated that the history of public viewings of executions “is not the same ‘unbroken, uncontradicted history’ of access that the Supreme Court found persuasive in *Richmond* and its progeny.”<sup>143</sup> Similarly, the Arkansas district court claimed that unlike “the unbroken, uncontradicted history of public access to criminal trials,” executions in the United States became private events in the early 1800s when they were moved from the public square and into prisons.<sup>144</sup> Since 1887, Arkansas law dictated that executions in the state are private, and the court held that the fact that six to twelve people may watch an execution does not “transform a private execution into a public proceeding.”<sup>145</sup> In these cases, courts held that the limited public access to executions does not mitigate the private elements of executions codified in statutes.<sup>146</sup>

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<sup>141</sup> *Id.* at 212-13.

<sup>142</sup> *See* Okla. Observer v. Patton, 73 F. Supp. 3d 1318, 1325 (D. Okla. 2014).

<sup>143</sup> *Id.*

<sup>144</sup> Ark. Times, Inc. v. Norris, 2008 U.S. Dist. LEXIS 3500, at \*12 (E.D. Ark. Jan. 7, 2008).

<sup>145</sup> *Id.* at \*13.

<sup>146</sup> The question about how to construe mixed history also affects whether there is a First Amendment right of access to information about lethal injections. In Georgia, an inmate on death row challenged the constitutionality of Georgia’s execution-participant confidentiality statute, which classifies information about people and entities that participate in executions as “confidential state secret[s].” *Owens v. Hill*, 295 Ga. 302, 303 (2014). The Georgia Supreme Court ruled that the inmate had did not have a First Amendment right to receive information about his execution. *Id.* at 316-17. Applying the experience and logic test, the court held that although there has been a tradition of allowing some public access to execution proceedings, the fact that there is a longstanding tradition of concealing the identities of people who carry out executions is enough to fail the experience prong. *Id.* The Ninth Circuit reached the opposite conclusion in *Wood v. Ryan*, 759 F.3d 1076 (9th Cir.), *vacated*, 135 S. Ct. 21 (2014). The Ninth

*PG Publishing Co. v. Alchele*, a Third Circuit case involving access to polling sites, also involved mixed history, although in this case, the court addressed the history of a proceeding that initially was public and did not retain public elements when it became private over time.<sup>147</sup> A trade group representing media outlets in Pennsylvania challenged a Pennsylvania statute, passed in 1937, that required all people, except voters, election officials, and police officers, to remain at least ten feet away from a polling place during voting.<sup>148</sup> The group claimed that the law infringed their First Amendment right to access and gather news at polling places.<sup>149</sup> Assessing the history of public access to polling sites, the court noted that in the colonial period, voting was conducted by voice vote, a process that was freely accessible to the public.<sup>150</sup> Newly formed states then used paper ballots, and voters crafted ballots at home and cast them at polling sites.<sup>151</sup> In the late 1800s, states abandoned this method and adopted the Australian system of voting, in which candidates' names were placed on a single ballot and citizens cast their votes in polling booths.<sup>152</sup> By 1896, about ninety percent of states had adopted the Australian method.<sup>153</sup> Accordingly, the court concluded that “[w]hile the act of voting—and the process by which voting was carried out—began its life as a public affair, our Nation’s history demonstrates a decided and long-standing trend away from openness, toward a closed electoral process.”<sup>154</sup> As such, the court held that the “historical record is insufficient to establish a presumption of openness in the context of the voting process.”<sup>155</sup> Reviewing these cases

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Circuit held that the fact that executions historically have been open to the public and that some states have provided the public with information about lethal injection drug protocols is sufficient to satisfy the experience prong at the preliminary injunction stage. *Id.* at 1083-84.

<sup>147</sup> 705 F.3d 91, 108-10 (3d Cir. 2013).

<sup>148</sup> *Id.* at 95.

<sup>149</sup> *Id.* at 95, 98.

<sup>150</sup> *Id.* at 109.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 110.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* In 2004, the Sixth Circuit also addressed whether denying access to polling sites in accordance with an Ohio statute violates the First Amendment. *Beacon Journal Publ’g Co., Inc. v. Blackwell*, 389 F.3d 683, 684 (6th Cir. 2004) The Sixth Circuit held that the First Amendment was violated and ordered journalists “to have reasonable access to any polling place for the purpose of news-gathering and reporting so long as [they] do not interfere with poll workers and voters.” *Id.* at 685. Unlike the Third Circuit *PG Publishing Co.*, the Sixth Circuit analyzed this question under the public forum doctrine. *Id.* Under the public forum doctrine, for a state to “enforce a content-based exclusion” “in places which by long tradition or by government fiat have been devoted to assembly and debate,” the state “must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.” *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45-46 (1983). The Third Circuit strongly criticized the Sixth Circuit’s application of the public forum doctrine. *PG Publ’g Co.*, 705 F.2d at 113. First, the Third Circuit maintained that, under Supreme Court and Third Circuit precedents, polling places are not public forum. *Id.* As such, it maintained that

demonstrates two different ways courts construe historical traditions that include public and private elements when applying the experience prong.

### 6. *Rejecting Historical Analysis Altogether*

In cases in which there is a paucity of history, some courts have sidestepped the experience prong altogether and have exclusively analyzed whether the logic prong justified a First Amendment right of access. Three federal criminal cases illustrate this approach.<sup>156</sup>

In *United States v. Suarez*, a Connecticut newspaper petitioned a district court to intervene in an armed robbery case to request access to sealed records of payments the defendants made under the Criminal Justice Act.<sup>157</sup> The district court granted the newspapers' motion, and the defendants appealed.<sup>158</sup> The Second Circuit acknowledged that there is no long tradition of accessibility to forms required by the Criminal Justice Act because the statute, enacted in 1964, is a fairly recent development.<sup>159</sup> Nonetheless, it relied on the strength of the logic prong to recognize a First Amendment right of access to the documents. "The lack of 'tradition' with respect to the [Criminal Justice Act] forms does not detract from the public's strong interest in how its funds are being spent in the administration of criminal justice," the court found.<sup>160</sup> Accordingly, it recognized a First Amendment right of access to the documents sought "[b]ecause there is no persuasive reason to ignore

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"adopting a traditional forum analysis for cases such as the one at bar sets a dangerous precedent which permits the government too much freedom to hide their activities from the public's view" because the government would only have to satisfy a reasonableness standard for a ban on access to be upheld. *Id.* But the Third Circuit maintained that the public forum doctrine is not appropriate to decide this issue because the doctrine involves the regulation of expressions that take place on or seek access to public property, while the access to polling sites at issue in the case involves access to "a government proceeding for news-gathering purposes." *Id.* The right of access doctrine does not involve the regulation of expressions—it involves the right to be present, to observe and to obtain information.

<sup>156</sup> For other cases that have adopted this approach, see, e.g., *United States v. DeJournett*, 817 F.3d 479, 484-85 (6th Cir. 2016) (recognizing a constitutional right of access to plea agreements because "plea agreements play a central role in our criminal justice system" and access "plays a significant role in monitoring the administration of justice by plea" and not addressing the experience prong); *In re Copay Press, Inc.*, 518 F.3d 1022, 1027 (9th Cir. 2008) (acknowledging that there is no history of access to a hearing on a motion to seal because the proceeding is relatively new, as it was created by the Ninth Circuit twenty-five years prior, but holding that a First Amendment right of access attaches to the transcript of the hearing nonetheless because the hearings were created "to give the public an opportunity to be heard," and recognizing a right of access to a plea colloquy transcript on the basis of the logic prong alone).

<sup>157</sup> 880 F.2d 626, 627-28 (2d Cir. 1989).

<sup>158</sup> *Id.* at 628.

<sup>159</sup> *Id.* at 631.

<sup>160</sup> *Id.*

the presumption of openness that applies to documents submitted in connection with a criminal proceeding.<sup>161</sup>

The Second Circuit's rejection of the experience prong in this case is of particular interest because, as previously discussed, the Tenth Circuit relied on the relative recent passage of the Criminal Justice Act to find that there was no history of access to documents filed under the act and to reject a First Amendment right of access in *United States v. Gonzales*.<sup>162</sup>

Similarly, in *United States v. Simone*, the Third Circuit recognized a First Amendment right of access to post-trial examinations of a jury, even though the court acknowledged that there is no "rich historical tradition" of access to post-trial examinations of jury misconduct.<sup>163</sup> In constructing the history of access to post-trial examinations of jury misconduct, the plaintiff only cited three Florida state court cases from after 1980.<sup>164</sup> Accordingly, the court held that the experience prong is not instructive in this case, and relied solely on the logic prong to recognize the right, partly because of the "overwhelming historical support for access in other phases of the criminal process . . ." <sup>165</sup>

Lastly, the Fifth Circuit was presented with the question of whether the public has a First Amendment right of access to bail reduction hearings after journalists challenged an order of a magistrate judge closing a bail reduction hearing of a man indicted for killing a federal judge in 1979.<sup>166</sup> The court acknowledged that there is no "unbroken, uncontradicted history" of public bond hearings because they are not always conducted in open court, and bond amounts may be fixed at the police station, during telephone conversations or in chambers.<sup>167</sup> But the court held that "[b]ecause the [F]irst [A]mendment 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."<sup>168</sup> Instead, the court claimed that the justifications for the First Amendment right of access articulated in the Supreme Court cases are implicated in bail processes, which compelled the court to recognize a First Amendment right of access.<sup>169</sup> Thus, some lower courts recognize that the experience prong is not instructive when evaluating access to

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<sup>161</sup> *Id.*

<sup>162</sup> *See supra* text accompanying notes 91–93.

<sup>163</sup> 14 F.3d 833, 837 (3d Cir. 1994).

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 838.

<sup>166</sup> *United States v. Chagra*, 701 F.2d 354, 355–57, 360 (1983); *see also* *Seattle Times Co. v. U.S. Dist. Court for the W. Dist. Of Wash.*, 845 F.2d 1513, 1516–17 (9th Cir. 1988) (holding that the lack of a history of open pretrial detention bail proceedings should not automatically foreclose a right of access and recognizing a right of access because of the importance of bail proceedings).

<sup>167</sup> *Chagra*, 701 F.2d at 362–63.

<sup>168</sup> *Id.* at 363 (internal citations omitted).

<sup>169</sup> *Id.*

proceedings that lack a historical tradition of openness, and in turn have entirely relied on the logic prong when applying the experience and logic test.

### 7. *Analogous Historical Inquiry*

Some courts have compared relatively recent proceedings, which are too new to have historical traditions of access, to older proceedings with such histories to satisfy the experience prong. Three cases illustrate this approach.<sup>170</sup> When a police officer in New York City issues a citation for a violation of transit bureau rules, he issues a summons, either to criminal court or to an administrative proceeding in which the person may contest the citation in an in-person hearing.<sup>171</sup> The proceedings in criminal court are open to the public, but the person contesting the violation may exclude an individual from the administrative proceeding.<sup>172</sup> In 2012, the New York Civil Liberties Union filed a lawsuit under 42 U.S.C. § 1983 claiming that the policy violated the First Amendment right of access to government proceedings, and the district court granted an order enjoining the policy, which the transit authority appealed.<sup>173</sup> Analyzing the history of access to the particular administrative proceeding, the Second Circuit maintained that the proceeding is analogous to a criminal trial because the Transit Authority Bureau “acts as an adjudicatory body, operates under procedures modeled on those of the courts,” and because the two proceedings are “functionally comparable” as either the Criminal Court or the Transit Authority Bureau has jurisdiction.<sup>174</sup> The Second Circuit elaborated why it is appropriate to analogize to other proceedings.

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<sup>170</sup> For other cases adopting this approach, see *In re Cincinnati Enquirer*, 94 F.3d 198, 199 (6th Cir. 1996) (holding that the experience prong was not met because a summary jury trial proceeding is “essentially a settlement proceeding,” which is historically closed, because a summary jury trial “does not present any matter for adjudication by the court, but functions to facilitate settlement”); *In re Guantanamo Bay Detainee Litig.*, 630 F. Supp. 2d 1, 10 (D.D.C. 2009) (comparing the history of access to habeas proceedings to civil proceedings because a petition for a writ of habeas corpus is a form of civil litigation, and concluding that because “there has been a history of public access to civil proceedings . . . access to habeas proceedings has been historically available,” even though there is virtually no case law on whether habeas proceedings have historically been open to the public); *Soc’y of Prof’l Journalists v. Sec’y of Labor*, 616 F. Supp. 569, 575 (D. Utah 1985) (acknowledging that there is little historical tradition of public access to administrative fact-finding hearings, in part because they are of recent origin, but holding that the experience prong was satisfied nonetheless because congressional sessions have been open to the public “since the early history of our country” and because civil trials, which are “analogous to administrative fact-finding proceedings,” have historically been accessible to the public).

<sup>171</sup> *N.Y. Civil Liberties Union v. N.Y.C. Transit Auth.*, 684 F.3d 286, 289 (2d Cir. 2011).

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 300-01.

[W]idespread administrative adjudication is a relatively new phenomenon. But changes in the organization of government do not exempt new institutions from the purview of old rules. Rather, they lead us to ask how the new institutions fit into existing legal structures. If, as the NYCTA suggests, government institutions that did not exist at the time of the Framers were insulated from the principles of accountability and public participation that the Framers inscribed in the First Amendment, legislatures could easily avoid constitutional strictures by moving an old governmental function to a new institutional location. Immunizing government proceedings from public scrutiny by placing them in institutions the Framers could not have imagined, as the NYCTA urges, would make avoidance of constitutional protections all too easy.<sup>175</sup>

The court recognized that it would be problematic if new proceedings were immunized from constitutional scrutiny solely because they are new. But given the right of access doctrine's emphasis on history, the court found a way for the "new institution" of administrative proceedings contesting traffic violations to "fit into existing legal structures" by comparing administrative proceedings to criminal trials.<sup>176</sup>

In *Delaware Coalition for Open Government, Inc. v. Strine*, the Third Circuit adopted a "broad historical approach" and evaluated the history of access to both arbitration proceedings and civil trials.<sup>177</sup> The case revolved around public access to the Delaware Court of Chancery's arbitration program, which serves as an alternative to trial for some disputes.<sup>178</sup> According to the statutes and rules governing the proceedings, arbitration petitions are confidential and are not included in the court's public docketing system, only parties to the arbitration and their representatives may attend, and all materials produced during the arbitration are protected from disclosure.<sup>179</sup> A watchdog group argued that the confidentiality of the program violated the First Amendment.<sup>180</sup> In evaluating the watchdog group's claim, the Third Circuit separately analyzed the history of access to arbitration proceedings and to civil trials. It noted that civil trials are generally open to the public, while arbitration proceedings have a "mixed record of openness" because modern arbitrations are generally private, although in some jurisdictions alternative dispute resolution proceedings supplement civil litigation and are public.<sup>181</sup> Nonetheless, the court held that "[t]aking the private nature of many arbitrations into account, the history of civil trials and

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<sup>175</sup> *Id.* at 299 (citation omitted).

<sup>176</sup> *Id.*

<sup>177</sup> 733 F.3d 510, 515-18 (3d Cir. 2013).

<sup>178</sup> *Id.* at 512.

<sup>179</sup> *Id.* at 513.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 516-18.

arbitrations demonstrates a strong tradition of openness for . . . Delaware’s government-sponsored arbitrations” because of similarities between civil litigation and the Delaware program.<sup>182</sup> In particular, the court justified the analogy because of the similarities between the two proceedings—including that active judges preside over arbitration proceedings in a courthouse, and that the arbitrations “result in a binding order of the Chancery Court, and . . . allow only a limited right of appeal.”<sup>183</sup> Even though the Third Circuit analyzed the histories of arbitration proceedings and civil trials, its conclusion that the experience prong was met rested largely on the similarities between the Delaware arbitration program and civil proceedings.

Analogous reasoning also was a basis for the Sixth Circuit’s determination in *Detroit Free Press* that the experience prong was satisfied, although it was less central to the court’s conclusion than in the other cases discussed.<sup>184</sup> In addition to focusing on the history of deportation hearings, the court compared deportation hearings to the sentencing phase of a trial.<sup>185</sup> Deportation hearings, the court noted, “‘walk, talk, and squawk,’ very much like a judicial proceeding.”<sup>186</sup> The court held that the long-standing history of openness to trials is instructive because “the only other federal court that can enter an order of removal is a United States District Court during sentencing in a criminal trial.”<sup>187</sup> Thus, in some cases, analogous reasoning forms the primary basis for courts’ determination on the experience prong, while in other cases, the use of analogies complements courts’ consideration of the history of access to particular proceedings.

#### 8. *Not Deciding the First Amendment Question Because Closure Was Justified*

Lastly, some courts have not decided whether a First Amendment right of access attaches to a particular proceeding. Instead they have resolved the questions presented by claiming that a supposed right of access would not survive strict scrutiny. Two cases illustrate this approach.<sup>188</sup> In *American Civil Liberties Union v. Holder*, the American Civil Liberties Union and other watchdog groups challenged the False Claims Act’s requirement that *qui tam*

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<sup>182</sup> *Id.* at 518.

<sup>183</sup> *Id.*

<sup>184</sup> *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 702 (6th Cir. 2002).

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> For another case that adopts this approach, see *United States v. Brice*, 649 F.3d 793, 796 (D.C. Cir. 2011) (declining to decide whether there is a First Amendment right of access to material witness proceedings because a supposed right would be overcome because in the case at issue closure served a compelling interest, there was a substantial probability that the compelling interest would be harmed in the absence of closure, and there were no alternatives to closure).

complaints must be filed under seal and remain sealed for sixty days.<sup>189</sup> The appellants argued that the seal provision violated the public's First Amendment right of access to judicial proceedings and also raised a First Amendment prior restraint challenge.<sup>190</sup> The Fourth Circuit declined to address whether the First Amendment right of access extends to *qui tam* complaints and docket sheets sealed in accordance with the False Claims Act.<sup>191</sup> Instead, it held that a supposed right of access would be overcome by the government's compelling interest in "protecting the integrity of ongoing fraud investigations" and because the seal provisions are narrowly tailored to serve the compelling governmental interest.<sup>192</sup> In support of its deflection of the constitutional question, the court cited *Pearson v. Callahan* for the proposition that "lower federal courts should not 'pass on questions of constitutionality . . . unless such adjudication is unavoidable.'"<sup>193</sup>

Similarly, in *Webster Groves School District v. Pulitzer Publishing Co.*, the Pulitzer Publishing Company intervened to gain access to court records filed under seal in a lawsuit against a school district following an incident in which a handicapped child threatened a classmate with a loaded handgun.<sup>194</sup> At the time of the case in 1990, the Eighth Circuit had not yet ruled whether the First Amendment right of access applied to civil proceedings or court files in civil lawsuit.<sup>195</sup> The court declined to decide these questions.<sup>196</sup> Instead, it held that in the particular case, the minor's privacy interest and the state's interest in protecting minors from the dissemination of hurtful information overcame the publishing company's supposed right to access the records because the records included information about the child's disability and educational records.<sup>197</sup> In these cases, courts did not decide whether a First Amendment right of access attached, and instead analyzed whether denying access is justified.

Accordingly, careful review of the case law demonstrates eight different ways courts apply the experience prong. They differ most with regards to how to construe the history of new proceedings, ones that lack a lengthy history of access, and ones with mixed, ambiguous histories of openness.

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<sup>189</sup> 673 F.3d 245, 247 (4th Cir. 2011).

<sup>190</sup> *Id.* at 247.

<sup>191</sup> *Id.* at 252.

<sup>192</sup> *Id.* at 252-53.

<sup>193</sup> *Id.* at 252.

<sup>194</sup> 898 F.2d 1371, 1373 (8th Cir. 1990).

<sup>195</sup> *Id.* at 1374, 1377.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 1375, 1377.

### III. REASONS FOR AND AGAINST RELYING ON HISTORY TO RECOGNIZE A FIRST AMENDMENT RIGHT OF ACCESS

Before I analyze these taxonomies, it is important to distill why, according to the Supreme Court, lower courts, and scholars, history is a basis for a constitutional right of access, as well as various drawbacks of relying on history to justify a constitutional right.

#### A. *Why Is History Relevant?*

*Richmond Newspapers* articulated a few reasons why a historical tradition is relevant to support a constitutional right of access. Justice Brennan's concurrence in *Richmond Newspapers* offered two explanations.<sup>198</sup> First, Justice Brennan wrote that "tradition commands respect in part because the Constitution carries the gloss of history."<sup>199</sup> Historical context shaped the drafting of the Constitution and in turn informs its meaning. Second, Justice Brennan continued that "a tradition of accessibility implies the favorable judgment of experience."<sup>200</sup> In other words, "tradition deserves deference because a historical practice reflects collective judgment over time that the particular practice is useful or beneficial."<sup>201</sup>

Chief Justice Burger's plurality opinion did not elaborate in detail why a historical tradition should support a constitutional right of access, but echoing Justice Brennan's first argument, he wrote that the "Bill of Rights was enacted against the backdrop of the long history of trials being presumptively open."<sup>202</sup> Professor Catherine McCauliff explained that the use of history in this context "indicated the Court's respect for long standing customs that continue to function well" and that "the constitutionalization of the open trial did not establish an unwarranted departure from custom itself."<sup>203</sup> However, *Press-Enterprise II*'s reliance on history from the early nineteenth century through the twentieth century to justify a right of access to preliminary hearings forecloses the possibility that a historical tradition of access from the framing of the Constitution is required. *Press-Enterprise II*'s historical construction also negates the arguments that history is a basis for a

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<sup>198</sup> *Id.* at 584-98 (Brennan, J., concurring).

<sup>199</sup> *Id.* at 589.

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

<sup>201</sup> *First Amendment—Public Access to Deportation Hearings—Third Circuit Holds That the Government Can Close "Special Interest" Deportation Hearings*, 116 HARV. L. REV. 1193, 1198 (2003) [hereinafter *First Amendment—Public Access to Deportation Hearings*].

<sup>202</sup> *Richmond Newspapers*, 448 U.S. at 575.

<sup>203</sup> C.M.A. McCauliff, *Constitutional Jurisprudence of History and Natural Law: Complementary or Rival Modes of Discourse?*, 24 CAL. W. L. REV. 287, 314 (1987).

constitutional right of access because it represents the original intent of the Framers and is necessary to provide an originalist constraint on judges.<sup>204</sup>

In addition, Chief Justice Burger grounded the right of access in the First Amendment in part because the First Amendment is intended to “prohibit [the] government from limiting the stock of information from which members of the public may draw.”<sup>205</sup> Accordingly, it is logical to look to history and to argue that the government cannot close “court proceedings that have long been open to the public.”<sup>206</sup>

In an opinion authored as a D.C. Circuit judge, then-Judge Scalia offered an additional explanation as to why history is important to recognize a First Amendment right of access. Judge Scalia wrote that a “historical tradition of at least some duration is obviously necessary” because “[w]ith neither the constraint of text nor the constraint of historical practice, nothing would separate the judicial task of constitutional interpretation from the political task of enacting laws currently deemed essential.”<sup>207</sup> Judge Scalia was wary of courts legislating from the bench and claimed that recognizing a right based on a history of access shifts judges’ roles from creating new rights to enforcing existing norms. This explanation was cited by some subsequent lower court opinions deciding whether a First Amendment right of access attaches to a particular proceeding.<sup>208</sup>

The Supreme Court cases do not address challenges posed by relying on history to recognize a First Amendment right of access, what sorts of historical traditions are sufficient to satisfy the experience prong, or how to apply the test when evaluating proceedings that do not have as lengthy, continuous, or old a history of access as criminal proceedings. This absence is not surprising given the extensive history of access to criminal trials on which the Supreme Court relied and the limited contexts in which the Supreme Court has subsequently applied the experience and logic test.

### B. *Why Not Rely on History?*

A circuit case and scholars provide multiple reasons why a historical tradition should not be required to recognize a constitutional right of access. Although most lower courts apply the experience and logic test without justifying their historical construction, the Fifth Circuit in *United States v.*

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<sup>204</sup> See *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 700 (6th Cir. 2002) (maintaining that *Press-Enterprise II*'s exclusive reliance on “post-Bill of Rights history in determining that preliminary hearings in criminal cases were historically open” “effectively silenced” the argument that a party must show that a tradition of access existed at the time of the adoption of the Bill of Rights to satisfy the experience prong).

<sup>205</sup> *Richmond Newspapers*, 448 U.S. at 576.

<sup>206</sup> *Ardia*, *supra* note 16, at 863.

<sup>207</sup> *In re Reporters Committee for Freedom of the Press*, 773 F.2d 1325, 1332 (D.C. Cir. 1985).

<sup>208</sup> See, e.g., *Dhiab v. Trump*, 852 F.3d 1087, 1093 (D.C. Cir. 2017); *N.Y. Civil Liberties Union v. N.Y.C. Transit Auth.*, 684 F.3d 289, 301 n.11 (2d Cir. 2012); *Detroit Free Press*, 303 F.3d at 701.

*Chagra* argued that historical practice should not be necessary to recognize a First Amendment right of access because the Supreme Court has articulated that “the [F]irst [A]mendment must be interpreted in the context of current values and conditions.”<sup>209</sup> According to this perspective, current values, norms and ethos should inform the meaning of the First Amendment—not only historical antecedents.

Scholars evaluating the experience and logic test fill in gaps not addressed by the Supreme Court and lower court opinions. They offer multiple reasons why history is not a sound basis for recognizing a First Amendment right of access. First, relying on history does not account for changes in the judicial system and practices. This is relevant in two respects. In cases where the reasons for openness in the past have disappeared, then a “tradition of access may *not* truly ‘imply the favorable judgment of experience’ . . . .”<sup>210</sup> This is illustrated by two examples. Judge Kimba Wood questioned why the history of voir dire proceedings from the seventeenth and early eighteenth century should inform access to jury selection in the twentieth century when the two proceedings dramatically differ.<sup>211</sup> Two hundred years ago, Judge Wood argued, there was less concern about the effect of pretrial publicity and jurors’ privacy interests, and less need to “ask questions of the type necessary to ferret out strangers’ biases.”<sup>212</sup> But, judges today must ask such “questions—but many jurors are too embarrassed to answer them candidly in open court.”<sup>213</sup> Thus, “[t]he Court’s emphasis on the historical openness of voir dire, divorced from its context, has led lower courts to favor openness at the expense of developing information . . . to pick a fair jury.”<sup>214</sup> In addition, during the seventeenth and eighteenth centuries, the time period *Richmond Newspapers* relied upon to chart the history of open trials, criminal defendants had fewer procedural protections, like the right to counsel.<sup>215</sup> As a result, the open trial rule then both benefitted the public and defendants.<sup>216</sup> But with increased procedural protections, “the defendant and her attorney [can] play a much larger role in maintaining the integrity of the judicial system—a function previously relegated primarily to the public. The historical argument for openness takes inadequate account of this shift.”<sup>217</sup>

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<sup>209</sup> *Chagra*, 701 F.2d at 363; *see also* sources cited *supra* notes 161–164.

<sup>210</sup> Wood, *supra* note 18, at 4.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

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

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

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

Second, requiring a historical tradition to recognize a constitutional right of access precludes new practices or procedures that lack a history of access from being subject to constitutional protection.<sup>218</sup> This is especially relevant because the judicial system is constantly evolving, public trials in criminal cases have largely been replaced by charge and plea bargaining, which mainly take place in private, and judges do much of their work off of the bench.<sup>219</sup> In other words, “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 justifications for public access in the first place.”<sup>220</sup>

Furthermore, relying on history is fraught because “history often appears equivocal: [p]ractices in the past were not as uniform as one Justice or another occasionally has claimed.”<sup>221</sup> “Events recorded in history may be recorded not because they are typical, but, in some cases, because they are atypical or sensational.”<sup>222</sup> As a result, basing a right on history raises evidentiary questions: how long and continuous must a history be to satisfy the experience prong? “What kind of history counts,” and how unequivocal must the history be?<sup>223</sup>

In addition, some scholars have argued that relying on history as a condition for a right of access does not logically mean that the absence of history should foreclose the right.<sup>224</sup> In other words, “a lack of tradition does not prove that a practice has no utility, or else new traditions would never take root.”<sup>225</sup>

Some scholars have also questioned the narrowness of courts’ historical inquiry. An article in the *Harvard Law Review* reviewing recent circuit cases argued that “[c]ourts should consider not only the facts of a proceeding’s history but also the normative implications of that history in deciding whether to find a public right of access.”<sup>226</sup> In particular, the article critiqued *PG Publishing Co.*, in which the Third Circuit reviewed the history of access to polling sites and voting but “did not consider the long history of racial discrimination and disenfranchisement that has accompanied the closed polling process.”<sup>227</sup> The

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<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at 4-5; see also Resnik, *supra* note 19, at 1670, 1682. Resnik cited a 2014 study that found a steady decline in total courtroom hours from 2008 to 2013, and that federal judges spent less than two hours a day on average in the courtroom, or about “423 hours of open court proceedings per active district judge’ annually.”

<sup>220</sup> Ardia, *supra* note 16, at 864.

<sup>221</sup> Wood, *supra* note 18, at 6.

<sup>222</sup> *Id.*

<sup>223</sup> Bradley & Siegel, *supra* note 26, at 21.

<sup>224</sup> See Ardia, *supra* note 16, at 863 (“It does not follow, however, that . . . the absence of historical access forecloses a First Amendment right of access.”).

<sup>225</sup> *First Amendment—Public Access to Deportation Hearings*, *supra* note 201, at 1198.

<sup>226</sup> *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, 1067 (2014).

<sup>227</sup> *Id.*

article continued that “[i]t was not until these racially discriminatory laws received widespread media coverage that Congress was spurred to action, enacting the Voting Rights Act of 1965.”<sup>228</sup> By not evaluating the normative implications of history, courts “risk denying public access to those proceedings that could most benefit from the sunlight effects of public discussion and scrutiny.”<sup>229</sup>

Lastly, some scholars have also critiqued the use of history in this line of cases because of the inconsistent ways in which lower courts apply the experience prong. While this objection could be remedied, it is important to recognize the problems posed by inconsistency in judicial decisionmaking. “[C]onsistency in decision-making enhances the actuality and appearance of fairness[,] . . . ensures that similar cases are and appear to be treated similarly” and increases predictability.<sup>230</sup> “Inconsistent decisions give rise to suspicions that the courts’ analyses are outcome-driven.”<sup>231</sup>

Thus, while lower courts are largely silent about the problems posed by relying on history to recognize a First Amendment right of access, scholars critique the centrality of history in this doctrine for four primary reasons: the ways in which the historical inquiry does not account for changes in government, the evidentiary issues it poses, the narrowness of the history inquiry, and the inconsistent application of the experience prong.

#### IV. ANALYZING WHETHER THE TAXONOMIES ARE IN LINE WITH OR DEPART FROM THE SUPREME COURT’S CONSTRUCTION AND REASONING

After charting lower courts’ different applications of the experience prong and surveying reasons for and against the use of history in recognizing a right of access under the First Amendment, it is now possible to analyze how the different approaches are in line with or depart from the Supreme Court’s reasoning.

##### 1. *Faithful to the Supreme Court’s Experience Prong*

At first glance, lower courts’ faithfulness to the experience prong undermines scholars’ critiques of the doctrine as many lower courts appear not to suggest that the current experience prong is unworkable. But the fact that many of the cases in which courts found no history of access involved new laws, proceedings or documents, including laws passed in 1964 and 1986, and procedures promulgated in 1991, underscores critiques that the test’s reliance on history is not well suited to address changes and innovations in

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<sup>228</sup> *Id.* at 1073.

<sup>229</sup> *Id.* at 1074.

<sup>230</sup> Levine, *supra* note 16, at 1792.

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

judicial and governmental practices. This is especially troublesome given that the justifications for a right of access to criminal trials articulated in *Richmond Newspapers*—including increasing confidence in the administration of justice and informing the public about the works of government—are applicable to areas of government outside of the judicial system and because of the importance of the First Amendment to “assur[e] freedom of communication on matters relating to the functioning of government.”<sup>232</sup> Additionally, highlighting that lower courts chart a history of access most similar to those in the Supreme Court cases in situations involving access to different parts of the judicial system strengthens the question whether the experience prong is applicable to scenarios outside of the judicial context.

### 2. *Framing-Era History*

*Press-Enterprise II*'s historical survey of access to preliminary hearings from the early nineteenth century through the twentieth century effectively silenced the argument that Framing-era history is required and that a historical tradition is a basis for a right of access because it demonstrates the intent of the Framers.<sup>233</sup> Accordingly, it is not surprising that none of the circuit case law surveyed required Framing-era history to satisfy the experience prong. But this approach is still important when analyzing the experience prong because in the cases surveyed, some defendants argued that under *Richmond Newspapers*, Framing-era history is required—an argument that the federal case law has emphatically rejected.<sup>234</sup>

### 3. *State Statutes*

Relying on the passage of state statutes to satisfy the experience prong is in line with the two main reasons for why history is relevant. The fact that state legislatures deliberated and passed laws guaranteeing access in the particular contexts, and that the laws continue to be in effect “reflects collective judgment over time that the particular practice is useful or

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<sup>232</sup> *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980).

<sup>233</sup> See *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 700 (6th Cir. 2002) (“The Supreme Court effectively silenced this argument in *Press-Enterprises II*, where the Court relied on exclusively post-Bill of Rights history in determining that preliminary hearings in criminal cases were historically open.”).

<sup>234</sup> See, e.g., *id.*; see also *N.Y. Civil Liberties Union v. N.Y.C. Transit Auth.*, 684 F.3d 286, 298-99 (2d Cir. 2011). (“The Supreme Court has not specified how courts should determine whether the experience and logic test applies to administrative proceedings. But we have good reason to think that this determination does not involve asking whether the proceedings in question have a history of openness dating back to the Founding.”).

beneficial.”<sup>235</sup> In addition, relying on state statutes does not require judges to make policy decisions or decide whether to create a new practice.

However, the historical constructions in the cases that rely on state statutes to satisfy the experience prong are narrower than the historical constructions in the Supreme Court cases. The laws guaranteeing access to township planning commission meetings, at issue in *Whiteland Woods*, were only passed in 1968 and 1986, and some of the state laws granting access to voter lists, cited in *Cal-Almond*, were only passed in 1969 and 1970. This analysis thus demonstrates that narrower historical traditions than those in the Supreme Court cases can be in line with the reasoning of, and justifications provided by, the Supreme Court cases on the First Amendment right of access.

In addition, emphasizing the recent passage of these laws is critical because it underscores the different ways courts construe modern laws and recent practices when applying the experience prong. While laws passed in the last half of the twentieth century were sufficient in *Whiteland Woods* and *Cal-Almond* to satisfy the experience prong, other courts, as previously discussed, maintained that the passage of laws in 1964, at issue in *El-Sayegh*, and in 1986, at issue in *In re U.S. for an Order Pursuant to 18 U.S.C. Section 2703(d)*, for example, were too recent to have developed any history or tradition of public access. The laws in *Whiteland Woods* and *Cal-Almond* can be distinguished from the Criminal Justice Act, at issue in *El-Sayegh*, and the Stored Communications Act, at issue in *In re U.S. for an Order Pursuant to 18 U.S.C. Section 2703(d)*, because the laws in the former cases explicitly grant public access, while the latter laws do not. But the comparison nonetheless highlights the different ways courts construe recent laws and developments when applying the experience prong.

#### 4. *Recent History and Practices*

Like the usage of state statutes, relying on recent history and practices to satisfy the experience prong is in line with the justifications for why history is relevant to recognize a right of access. The fact that courts have found prior patterns of access suggests that there has been some judgment or consensus that access in the particular context is positive and. In addition, finding precedent in historical practice—even recent or narrow ones—limits a judge’s need to create policy or new practices.

However, although the lower court opinions adopting this approach do not acknowledge it, relying on recent history and practices to satisfy the experience prong affirms many of the problems articulated by scholars with basing a right of access on a historical tradition. For example, the timespan of

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<sup>235</sup> *First Amendment—Public Access to Deportation Hearings*, *supra* note 201, at 1198.

the historical inquiry affects a court's conclusion. In *Erie County*, for example, the Second Circuit relied on the fact that monitor reports in four recent cases were accessible to the public to find a tradition of access,<sup>236</sup> but if the timespan was broader and included additional cases, then the court may have reached a different conclusion. Similarly, in *Applications of National Broadcasting Co.*, the court held that the experience prong was satisfied because reviewing Sixth Circuit cases over a sixty-year period, it found no case involving the disqualification of judges in which the proceedings were closed or the records were sealed.<sup>237</sup> But had the court broadened its inquiry to include other courts or to cover a longer duration, it may have arrived at a different result. The Supreme Court cases give no direction as to how lengthy, continuous or strong a historical tradition of access must be. Thus, although relying on recent history and practices to satisfy the experience prong is in line with the reasons why history is relevant to recognize a constitutional right of access, the use of history in this context raises other interpretative questions.

### 5. Mixed History

As outlined previously, courts construe mixed history in two different ways, and I must analyze each approach. The construction of history by the Sixth Circuit in *Detroit Free Press* and by the Ninth Circuit in *California First Amendment Coalition* resemble the Supreme Court's construction of history in *Press-Enterprise II*. Like *Press-Enterprise II*, these circuit court opinions acknowledge that some historical evidence demonstrates a history of access to deportation hearings and executions, while other evidence suggests that the proceedings are not open to the public. This approach reinforces Justice Brennan's "favorable judgment of experience" argument because the courts find, overtime, an overall pattern of access. Like in the taxonomies involving state statutes and recent history and practices, this suggests that a longstanding, unanimous history of access, as was demonstrated in *Richmond Newspapers*, is not needed to demonstrate "collective judgment over time that the particular practice is useful or beneficial."<sup>238</sup>

However, comparing the construction of history in the execution cases to *Press-Enterprise II* raises another question. In *Press-Enterprise II*, the constructions of history suggested that access to preliminary hearings was "more open" than "closed," that assessing the historical evidence as a whole indicated that there

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<sup>236</sup> *United States v. Erie County, N.Y.*, 763 F.3d 235, 241-42 (2d Cir. 2014) ("Second, NYCLU points to several instances where reports like the ones at hand have been accessible to the public.").

<sup>237</sup> *Applications of Nat'l Broad. Co.*, 828 F.2d 340, 344 (6th Cir. 1987) ("We have surveyed reported Sixth Circuit cases involving the disqualification of judges from 1924 to 1984 and have not found one in which the proceedings were closed or the record sealed.").

<sup>238</sup> *First Amendment—Public Access to Deportation Hearings*, *supra* note 201, at 1198.

was greater evidence of public access than restricted access to the particular proceeding. But is the same true for executions? Must the analysis be so granular, and what point does a mixed history tilt more towards being closed than being opened? The Supreme Court cases do not help answer these questions.

Some of the opinions that maintain that mixed history is not sufficient to satisfy the experience prong, including the Third Circuit in *North Jersey Media Group* and Arkansas and Oklahoma district courts in cases involving access to executions, argue that the respective histories of access do not satisfy the experience prong because they are not “unbroken” and “uncontradicted.”<sup>239</sup> By focusing on the language of *Richmond Newspapers* and its historical construction in particular, these opinions suggest that the Supreme Court requires an “unbroken, uncontradicted” history of access to satisfy the experience prong. While it is important to differentiate between the respective histories of access to criminal trials and deportation hearings and executions, courts’ appeals to the “unbroken” and “uncontradicted” language in *Richmond Newspapers* suggest insufficient recognition of the differences between the historical constructions in *Press-Enterprise II* and in the prior three Supreme Court cases. *Press-Enterprise II* presents a more nuanced historical survey than the other Supreme Court cases, as the majority opinion acknowledges that the history of access to preliminary hearings is not monolithic, but is characterized by a general presumption of openness, in spite of examples in which such proceedings have been closed. The cases that argue that mixed history is not sufficient latch onto the language of *Richmond Newspapers*, but do not give sufficient credence to the subsequent Supreme Court cases that demonstrate that uniformity in practice is not required to satisfy the experience prong. Because the Supreme Court in *Press-Enterprise II* did not explicitly articulate that it was departing from the prior Supreme Court cases’ historical constructions, and because the Court in *Globe Newspaper* did not acknowledge that there was evidence that trials involving minor victims of sexual assault were closed, this absence allowed some lower court opinions to largely focus on the historical construction in *Richmond Newspaper* and to underappreciate the application of the experience prong in *Press-Enterprise II*.

Additionally, *PG Publishing Co.* raises important unaddressed questions about in what contexts a proceeding can lose its First Amendment right of access, given that voting was initially conducted in public but overtime became a private activity. While *PG Publishing Co.* was the only case I reviewed that dealt with the history of a proceeding that lost its public elements when it became private, this question may become more salient as

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<sup>239</sup> N. Jersey Media Grp. v. Ashcroft, 308 F.3d 198, 201 (3d Cir. 2002); Okla. Observer v. Patton, 73 F. Supp. 3d 1318, 1325-26 (W.D. Okla. 2014); Ark. Times, Inc. v. Norris, 2008 U.S. Dist. LEXIS 3500, \*12 (E.D. Ark. Jan. 7, 2008).

court-like and other governmental proceedings increasingly move out of the public sphere and assume more private dimensions.<sup>240</sup>

#### 6. *Rejecting Historical Analysis Altogether*

Courts' rejection of the experience prong departs from the two main reasons offered why history is relevant to recognize a First Amendment right of access and repudiates a defining feature of the First Amendment right of access doctrine. This approach challenges Judge Scalia's view that relying on a historical tradition precludes judges from legislating from the bench. Justice Brennan's "favorable judgment of experience" justification is not instructive when there is no history. Justice Brennan wrote that a "case for a right of access has special force when drawn from an enduring and vital tradition of public entree to a particular proceedings or information,"<sup>241</sup> but this perspective gives little direction as to whether a right of access should be recognized when such a history is lacking.

This approach is problematic, however, not only because of its divergence from Supreme Court precedents on the First Amendment right of access, but because of the diverging case law it generates as courts differ about how to apply the experience prong to proceedings that lack a history of access. This is reflected by comparing the Second Circuit's rejection of the experience prong in *Suarez* because the Criminal Justice Act was only passed in 1964, to the Tenth Circuit's denial of a right of access to documents filed under the Criminal Justice Act in *Gonzales* because it found that there is no history of access given the relative recent passage of the statute.<sup>242</sup> Not only does this approach reject tenets of the right of access doctrine, but its continued application generates divergent case law because lower courts have not uniformly rejected the experience prong.

#### 7. *Analogous Historical Inquiry*

Surveying the ways in which courts compare new proceedings to older ones with histories of access demonstrates the difficulty some courts face applying the experience prong to new proceedings and the creativity required

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<sup>240</sup> See Resnik, *supra* note 19, at 1670, 1682.

<sup>241</sup> *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 589 (1980).

<sup>242</sup> Compare *United States v. Suarez*, 880 F.2d 626, 631 (2d Cir. 1989) ("It is true that there is no long 'tradition of accessibility' to CJA forms. However, that is because the CJA itself is, in terms of 'tradition,' a fairly recent development, having been enacted in 1964 . . .") with *United States v. Gonzales*, 150 F.3d 1246, 1256-57 (10th Cir. 1998) ("Obviously, the CJA is too recent in origin to have developed any 'history' or 'tradition' with respect to press access to documents required by that Act."). See *supra* sources accompanying notes 91-93, 153-156.

to fit “new institutions” into “existing legal structures.”<sup>243</sup> This approach is not in line with Justice Brennan’s conception that appeals to history and an assessment of the “specific structural value of public access” can limit the potentially limitless application of the First Amendment right of access.

#### 8. *Not Deciding the First Amendment Question Because Closure Was Justified*

Not deciding whether the First Amendment recognizes a right of access to a particular proceeding is supported by principles of constitutional jurisprudence. However, it deflects hard questions posed by the doctrine’s use of history. This perspective is demonstrated by *American Civil Liberties Union v. Holder*, in which the Fourth Circuit did not decide whether there is a First Amendment right of access to sealed *qui tam* complaints.<sup>244</sup> The newness of the sealing of *qui tam* complaints may have been at issue because the requirement was only added to the False Claims Act in 1986.<sup>245</sup> While the court did not explicitly make this point, the argument can be supported by the fact that the Fourth Circuit in *In re U.S. for an Order Pursuant to 18 U.S.C. Section 2703(d)* found that there was no long tradition of access to orders required by a law that was also passed in 1986.<sup>246</sup>

### CONCLUSION

The Supreme Court’s recognition of a right of access under the First Amendment in *Richmond Newspapers* in 1980 and its formalization of the experience and logic test to determine if the right attaches in *Press-Enterprise II* in 1986 spawned lower court case law applying the test beyond the initial context in which it was developed and applied by the Supreme Court. Careful review of the case law reveals eight different ways lower courts have used history to analyze the experience prong. This analysis highlights that the divergent approaches reflect different viewpoints as to how to evaluate history when dealing with proceedings or documents that lack a history of access because they are new or because the particular historical traditions involve mixed practices of openness. Because the Supreme Court has not addressed the interpretative questions raised by relying on historical traditions in such contexts, this absence has allowed circuit and district courts to create different approaches. It has generated divergent, inconsistent case

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<sup>243</sup> N.Y. Civil Liberties Union v. N.Y.C. Transit Auth., 684 F.3d 286, 299 (2d Cir. 2012).

<sup>244</sup> 673 F.3d 245 (4th Cir. 2011).

<sup>245</sup> *Id.* at 247.

<sup>246</sup> *In re U.S. for an Order Pursuant to 18 U.S.C. Section 2703(d)*, 707 F.3d 283, 291 (4th Cir. 2013) (“Subscribers concede that there is no long tradition of access specifically for § 2703(d) orders, given that the SCA was enacted in 1986.”).

law on the First Amendment right of access. This result is problematic not only because it creates little consistency and offers little direction to litigants. It is also troubling because it undermines the impact and development of the First Amendment right of access doctrine, which was recognized in order to increase public confidence in the administration of justice, create an informed public, and strengthen and secure our system of government. While the Supreme Court emphasized the importance of the doctrine, the little direction offered as to how to evaluate history when applying the experience prong of the experience and logic test ultimately has challenged the doctrine's application to proceedings that are relatively new, lack a history of access, and are beset by histories of open and closed practices.

Justice Blackmun heralded the Court's reliance on history to fashion the First Amendment right of access doctrine, and Justice Brennan relied on historical traditions because history informs the meaning of constitutional rights and can reflect the "favorable judgment of experience." But, this review of circuit court opinions from the 31 years since the experience and logic test was first articulated demonstrates that using history as a tool for recognizing constitutional rights in this context has not lived up to its architects' lofty conceptions. Instead, it has generated interpretive challenges and inconsistent case law as judges apply the experience and logic test beyond the narrow context in which it was born.

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