TOWARD A NEW PUBLIC ACCESS DOCTRINE

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INTRODUCTION

Two men, neither a United States citizen, are threatened with deportation for violating the nation’s immigration laws.1 The Department of Justice believes that both men may be among the hundreds or thousands of non-citizens who might be connected, or have information relevant, to terrorist activities against the United States. In

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1 The facts in this scenario are drawn from the opinions in Detroit Free Press v. Ashcroft, 303 F.3d 681 (6th Cir. 2002), and North Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198 (3d Cir. 2002), cert. denied, 538 U.S. 1056 (2003).
the post-9/11 world, it is horrifying to contemplate that in making its case against these men, the government might unwittingly reveal information that could aid the very terrorists we hope to purge from our shores. Vigilant terrorists who monitor the proceedings might learn too much about the United States’ investigative tactics and what the government knows about terrorists and their activities. Those within the terrorist network could piece together even the seemingly harmless details, such as the names of detainees, and use them to shift their activities to terrorist cells that have not yet been discovered.

Consequently, the nation’s Chief Immigration Judge drops a veil of secrecy over the fact-finding hearings in which the government and the men will present their evidence and witnesses for and against deportation. No members of the press or public will be allowed into the courtroom; not even the men’s families may witness the proceedings. No one will confirm or deny that the men’s cases have been docketed or scheduled for hearing. The information blackouts are absolute.

Members of the press and public are outraged. Our executive branch—which has a history of banishing non-citizens because of their race or political beliefs—enjoys a nearly unrestrained ability to control our borders. The only check on this extraordinary power is the citizenry’s ability to keep an eye on the proceedings, most often by way of the journalists who report back to the public. Only by staying informed can the public act when the government oversteps its bounds. But now the government is threatening to uproot people’s lives by banishing them from this country on the basis of a suspicion it has no need even to articulate publicly, and to make its banishment decision entirely in secret.

Eventually, the issue of the legality of these deportation hearing closures makes its way to two different federal appellate courts. Following the teachings of the United States Supreme Court in Richmond Newspapers, Inc. v. Virginia and its progeny—the youngest of them now nearly twenty years old—the circuit courts evaluate the validity of the blackouts using two tests.

Under the first test, called the “experience and logic” or “history and function” pre-test, the courts must ask two questions. First, is there a history or tradition of public access to the proceedings? Second, will public access play a positive role in the way that the proceeding functions, by reassuring the public that the proceeding is being conducted fairly and properly, checking governmental abuses or mistakes, discouraging perjury and witness misconduct, serving as a cathartic outlet for community concern and outrage, reassuring the

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2 448 U.S. 555 (1980).
public that justice will be done, and ensuring that the public debate critical to self-governance is appropriately informed?

If the court is satisfied that the proceedings pass the experience and logic pre-test, a First Amendment right of access attaches. That right is qualified. It can be overcome if closure survives a second, strict scrutiny test. The court must be convinced, and must explain its conviction in specific, detailed, particularized findings, that barring press and public scrutiny will serve compelling governmental interests, and that the closure is necessary and narrowly tailored to achieve those interests because there are no less restrictive alternatives—such as redaction of documents, or partial or temporary closures of the proceedings—that would suffice.

Both courts apply the same tests to the same set of facts. One court decides that the deportation proceedings satisfy both prongs of the experience and logic pre-test, and thus that there is a qualified First Amendment right of public access to the hearings. That court further concludes that the closure cannot survive strict scrutiny, and thus that the access right becomes absolute. The other court determines that the deportation proceedings satisfy neither prong of the pre-test. Thus, there is no First Amendment access right to the hearings, and no need to subject the closure to strict scrutiny. In the end, then, one circuit holds that United States Supreme Court precedent mandates that the courtroom doors must be opened, and the other holds that the same precedent dictates that they may stay closed. The Supreme Court remains silent.

What is wrong with this picture?

This article posits that the problem stems from the Supreme Court’s quarter-century-old tests. It concludes that the tests are irreparably flawed, and should be discarded in favor of a new public access doctrine—a new test to determine when closures of judicial and quasi-judicial proceedings and documents are justified despite the First Amendment right of access that the Supreme Court first recognized twenty-five years ago in Richmond.

While other commentators have seen flaws in the tests developed in the Richmond line of cases,4 this article offers a unique and thorough analysis of the many ways in which the lower courts have applied, and misapplied, the Court’s First Amendment public access doctrine since its inception. The Third and Sixth Circuit cases from which the scenario above was drawn, North Jersey and Detroit Free Press, have received their share of scholarly attention in the past few years.5 But the conflict between those federal appellate courts, which purported to

4 See infra Part III.
5 On September 1, 2005, the author’s Lexis search on those cases turned up 175 law review articles.
apply the same tests to the same set of facts, is just one example of the chaos and confusion that the Richmond tests have caused in the lower courts.

Part I examines the Supreme Court’s sparse and outdated pronouncements on the right of public access to criminal proceedings, and explains the reasoning that gave rise to the experience and logic pre-test and the strict scrutiny test. Part I also explains how the inherent inconsistencies and contradictions in the Richmond line have left the lower courts without proper guidance in determining whether a proposed closure survives—or is even subject to—constitutional review. The Richmond line does not tell the courts which benefits of access matter most: the fairness and justice benefits that public scrutiny confers on the proceeding itself and the justice system generally, or the structural values that access serves by exposing the public to the information necessary for informed self-governance. It does not adequately explain whether a history of access is critical, and if so, whether that history is critical because history tells us what the First Amendment means, or because a history of openness is evidence of the role that access plays in self-government. Richmond and progeny do not tell a court whether, in evaluating the history and logic prongs, it should focus on the broad category of proceedings to which the proceeding at bar belongs (e.g., judicial—or perhaps even judicial and quasi-judicial—proceedings), or on sub-categories (e.g., criminal proceedings, specific types of trials, the various stages of a trial). The Richmond line does not guide the courts in cases in which only one of the pre-test’s two prongs is satisfied, and does not address how courts should treat the documents that are filed in connection with, or that relate to or reflect, the decision-making process.

Part II describes the chaotic state of the lower courts’ access decisions. It points to several disturbing patterns heretofore undetailed in the academic literature. The lower courts vary widely on when the Richmond tests should be applied to settings other than criminal trials. The inconsistency and confusion are particularly evident in two contexts—sealings of court documents and closures of administrative proceedings—but pervade the entire body of access decisions. The contradictory analyses from which the courts pick and choose are troubling not only because they lead to inconsistent and unpredictable results, but also because such inconsistency suggests that the choice is outcome-driven.

Some courts find that there is no First Amendment access right to documents. These courts hold that access to documents should be tested under a less access-friendly common-law analysis, under which closures are judged by an abuse of discretion standard. Other courts hold that the First Amendment access right attaches to documents if
they are filed in connection with a proceeding that satisfies the experience and logic pre-test. A third group requires that documents themselves independently pass the pre-test. Unsurprisingly, the test chosen determines whether the court finds that a particular sealing is proper.

The inconsistencies mean that in some cases, access to the decision-making process is limited to those who can be physically present during that process. In others, document access and proceeding access are considered fungible. But proceeding access does not substitute for document access because the significance of a proceeding is not always obvious at the time that it is held, and time and space constraints mean that even when access is theoretically available, it is not always realistically possible. And document access cannot replace proceeding access because documents, which are usually not contemporaneously issued, may be stale, and in any event do not reflect the body language, pregnant pauses, and vocal tones that may shed light on the decision-making process.

Some courts find that there is no First Amendment access right to administrative proceedings, but most apply the history and function pre-test to such proceedings. Whether they determine that a qualified access right attaches, however, tends largely to depend on whether they view the particular proceeding as in a class by itself, and therefore scrutinize the (usually limited or nonexistent) access history of that proceeding, or whether they view it as part of or analogous to a broader class of judicial proceedings that have an unbroken access history. Some decree that there is no access right if there is no long history of openness. Others downplay or disregard the proceeding’s access history, which may be absent simply because the proceeding is a relatively new one. That pattern surfaces in connection with the courts’ review not only of access claims to administrative proceedings, but of access claims to specific civil and criminal proceedings with a history of closure, such as juvenile dependency and delinquency hearings.

In evaluating access claims to such judicial and administrative proceedings under the logic prong, some courts focus only on the benefits of access, as the Supreme Court did. But public scrutiny of virtually any governmental proceeding will bring at least some of those benefits, so virtually all proceedings pass the logic prong under that analysis. Other courts weigh the benefits of access to a proceeding against its drawbacks, a non-standard analysis that double-counts pro-closure interests, since they (and not pro-access interests) are weighed again in the strict scrutiny portion of the test. Unsurprisingly, that atypical logic prong analysis has consistently resulted in a finding that the proceeding fails the logic prong and that no access right attaches.
Finally, Part II details the lower courts’ disagreement as to the circumstances that justify closure under the strict scrutiny portion of the \textit{Richmond} test. Many courts pay lip service to the strict scrutiny test, but seem to stop before giving any real analysis when they find that the pro-closure interests asserted are compelling. These courts legitimize closures with unsubstantiated speculation about the harms that public access might cause, making general assumptions about the effects of pre-trial publicity or the willingness of participants to be candid, for example, without recognizing that what is true as a statistical matter may not be true of a particular case or individual. They do not sufficiently explore the measures, short of total closure, that could adequately serve the compelling interests at stake. The courts seem especially willing to bow to pro-closure interests when closure proponents claim that national security is at stake, and in highly controversial and contentious criminal proceedings. The result is that the proceedings in which the public has the most interest are most often the ones that are closed.

Part III begins by reiterating the many benefits that access brings to open proceedings, as well as to the process of self-governance. Public scrutiny assures the fairness of proceedings by checking mistakes and abuse, keeping the participants honest. It enhances public confidence in the decision-making process and fosters respect for the law, where closure breeds suspicion and distrust. It assures the public that justice will be done, and provides the information necessary for the informed public debate critical to self-governance.

Given that access is highly desirable, it should—as the Supreme Court has said—be denied only rarely. Unfortunately, that is not the case. The history and function pre-test is so manipulable that closures and sealings are far too common. The manipulability leads to inconsistency, which itself is problematic. Consistency in the decision-making process is desirable for many of the reasons that access to the decision-making process is desirable: it makes the process appear fair, and thus enhances public confidence in it. Further, like closures, inconsistent and apparently outcome-driven analyses breed suspicion and distrust of the adjudicative process; consistent analyses offer assurance that they are not outcome-driven, arbitrary, or biased. Moreover, consistent, clear rules protect judges by letting them make unpopular decisions because the law compels them to do so. When rules are vague and confusing, as is the current public access doctrine, the courts feel unconstrained and begin a slow creep toward legitimizing closures, especially when threats to the national security are invoked.

Part III suggests that the Court should discard the infinitely-manipulable pre-test and use the strict scrutiny test alone to evaluate the
constitutionality of closures of judicial and quasi-judicial proceedings, as well as of documents that are filed in connection with, or that relate to or reflect, the decision-making process in such proceedings. These proceedings and documents should be presumptively open because they demand the fairness and objectivity that public scrutiny can ensure, and are especially subject to the mistakes and abuses that public scrutiny can prevent.

The proposed strict scrutiny test puts the burden on the proponents of closure to justify it by establishing, with specific findings rather than unsubstantiated speculation, that it is necessary and narrowly tailored to accomplish a compelling interest that cannot be served by a less access-restrictive alternative. This new public access doctrine should make closures as rare as the Court intended, offer consistency and clarity, protect judges so that they can make unpopular decisions, prevent the appearance and actuality of outcome-driven analyses, and stay flexible enough to allow closure in the limited cases in which it is genuinely necessary. The proposed test does not artificially distinguish between proceedings and documents, since the public must be able to scrutinize the basis of the decision to evaluate its fairness and integrity. As Part III explains, the proposed test is more likely to achieve the benefits of access than alternative tests proposed by other commentators, including both categorical approaches that forbid closure no matter what the countervailing interests might be, and balancing approaches that are likely to result, more often than not, in closure.

It is especially critical in these post-9/11 days, when national security concerns are heightened and many access claims are decided in a pervasive atmosphere of fear, that we have in place rules that protect us against our own tendencies to excuse incursions on civil rights simply because the government assures us that safety demands that we sacrifice such rights. The rules must reassure the public that secrecy will be permitted when it is necessary, but only when it is necessary. The current public access doctrine does not provide these rules. The new public access doctrine proposed here will, and will thus prevent the access denials that lead democracy to “die behind closed doors.”

I. The Supreme Court’s Courtroom Access Cases

The Supreme Court’s jurisprudence on a First Amendment right of public access to court proceedings is fundamentally inconsistent, and therefore hopelessly confusing. Because all five major cases considered the right of access to criminal proceedings, one question with which the

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*Detroit Free Press*, 303 F.3d at 683.
lower courts have had to wrestle is whether, and to what extent, the Court’s analyses in these cases apply to civil trials, or even to trial-like proceedings, such as quasi-judicial administrative hearings. Even in terms of its application to criminal proceedings, however, the Court’s jurisprudence is hardly a model of clarity.

A. Gannett Co. v. DePasquale

The first case in the group, *Gannett Co. v. DePasquale*,7 signaled that the Court would tolerate courtroom closures.8 The *Gannett* Court found that the trial court properly closed a suppression hearing when the defendants, claiming that pre-trial publicity had jeopardized their right to a fair trial, requested that the public and press be excluded.9 The Court found the Sixth Amendment guarantee of a public trial10 “personal to the accused”; it conferred no right of trial access on the public.11

As for a First Amendment access right, said Justice Stewart for the majority, the Court did not need to decide whether any such right existed.12 Even assuming *arguendo* that it did, it had not been violated.13 First, under the circumstances, any First Amendment access right was outweighed by the defendants’ right to a fair trial.14 Second, the public access ban was only temporary, since the press and public were free to peruse the transcript of the suppression hearing once the danger of prejudice was past.15

As in subsequent access cases, the *Gannett* Court was fractured. Although Justice Stewart garnered a majority, three of the four justices who joined him wrote concurring opinions. One—Justice Powell—would have held that the First Amendment protected public access, but that in the circumstances at bar, the press and public had been properly excluded.16 The four dissenters—Justice Blackmun, joined by Justices Brennan, White, and Marshall—would have held that the Sixth

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9 See *Gannett*, 443 U.S. at 375.
10 U.S. CONST. amend. VI.
12 See id. at 392.
13 See id.
14 See id. at 392-93.
15 See id. at 393.
16 See id. at 397-403 (Powell, J., concurring).
Amendment gives the public and press a right of access that can be denied only if the closure survives strict scrutiny. In *Gannett*, then, there were five votes for the proposition that the Constitution confers a (qualified) right of public access to (at least some) criminal proceedings, but four of the five found that the right emanated from the Sixth Amendment. Only Justice Powell located it in the First Amendment.

B. Richmond Newspapers, Inc. v. Virginia

One year after *Gannett* issued, the Court—in another series of fragmented opinions—found, for the first time, that the First Amendment confers a right of public access to criminal trials. In that watershed case, *Richmond Newspapers, Inc. v. Virginia*, the trial court granted the defendant’s motion to close his fourth trial on the same murder charge to prevent jurors from seeing possibly inaccurate published information. The next day, the defendant was found not guilty after the judge declared a mistrial. Tapes of the trial were made publicly available once it had ended.

Chief Justice Burger, in a plurality opinion joined by Justices White and Stevens, said that criminal trials must be open to the public “[a]bsent an overriding interest articulated in findings” because “the right to attend criminal trials is implicit in the guarantees of the First Amendment.” The plurality opinion relied heavily on a recounting of the “historical evidence” that “demonstrate[d] conclusively that at the time when our organic laws were adopted, criminal trials both here and in England had long been presumptively open.” Moreover, such openness was key to the “proper functioning of a trial,” as it assured fairness by discouraging perjury and decisions based on secret biases, and served to educate the public. Equally important were the “perception of fairness” that open trials created, thus enhancing confidence in the judicial system, and the “therapeutic value” served by providing an outlet for the community’s “concern, hostility, and emotion” and its desire for justice and even retribution, thus

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17 See id. at 440-41 (Blackmun, J., dissenting).
18 448 U.S. 555 (1980).
19 The defendant’s first trial ended in a conviction that was overturned on appeal, and his second and third trials ended in mistrials. Id. at 559.
20 See id. at 560-61.
21 See id. at 561-62.
22 Id. at 562 n.3.
23 Id. at 581 (plurality opinion).
24 Id. at 580 (plurality opinion) (footnote omitted).
25 Id. at 569 (plurality opinion).
26 See id.
discouraging vigilantism. The First Amendment constitutionalized the right of public access to criminal trials because the presence of the press and public “historically has been thought to enhance the integrity and quality of what takes place,” and “[t]he explicit, guaranteed rights to speak and publish concerning what takes place at a trial would lose much meaning if access to observe the trial could . . . be foreclosed arbitrarily.”

Justice Brennan, joined by Justice Marshall, concurred in an opinion that similarly relied on both the historical fact of openness and the values that openness serves. However, Justice Brennan linked those values more closely to the First Amendment. Whereas the plurality looked to the function that openness played within the judicial system itself, Justice Brennan stressed the “structural” function of openness within “our republican system of self-government.” Rooted in the Meiklejohnian theory that access to information is critical to self-governance, Justice Brennan posited that the First Amendment fosters democracy by ensuring that public debate is “‘uninhibited, robust, . . . wide-open,’” and “informed.” The First Amendment, he argued, guarantees not only free speech, but public access to the information that makes speech meaningful.

Justice Brennan was aware of the “theoretically endless” nature of the access right he proposed. Virtually any action could be justified by the need to gather information, and virtually any restriction could be challenged as resulting in “‘decreased data flow.’” Thus, he urged, claims of access for information gathering should be weighed against the countervailing interests. Such claims are weightier when there is “an enduring and vital tradition of public entree to particular proceedings or information” because the Constitution “carries the gloss of history” and should be read in light of that history, and, more significantly, because “a tradition of accessibility implies the favorable judgment of experience.”

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27 See id. at 569-71 (plurality opinion).
28 Id. at 576-78 (plurality opinion).
29 Id. at 587 (Brennan, J., concurring).
30 See, e.g., ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 25 (1948) (concluding that our system of democratic self-government requires that “all facts and interests relevant to the problem shall be fully and fairly presented [so] that all the alternative lines of action can be wisely measured in relation to one another”).
32 See id. at 587-88 (Brennan, J., concurring).
33 Id. at 588 (Brennan, J., concurring) (quoting Zemel v. Rusk, 381 U.S. 1, 16-17 (1965)).
34 See id. at 588-89 (Brennan, J., concurring).
35 Id. at 589 (Brennan, J., concurring).
process." The appropriate analysis would thus focus on the “historical and current practice with respect to” openness, and “the importance of public access to the trial process itself.”

In *Richmond*, Justice Brennan found, both prongs of the analysis favored public access. The long history of public criminal trials was beyond dispute. Most significant, in Justice Brennan’s view, was that public scrutiny of trials serves to check possible abuse of judicial power. Public access promotes the perception of fairness and thus enhances confidence in the judicial system; closed trials breed suspicions of bias and arbitrariness and thus spawn disrespect for law. Additionally, the publicity that results from public access promotes justice by facilitating accurate fact-finding, as it encourages truth-telling and may compel previously-undiscovered witnesses to come forward.

Chief Justice Burger’s plurality opinion and Justice Brennan’s concurrence thus represented a majority for the proposition that in determining whether a particular proceeding gives rise to a qualified First Amendment public access right, the courts must first ask whether the historical evidence establishes that such proceedings have traditionally been open to the public—the “experience” or “history” prong of the *Richmond* pre-test. Second, they must determine whether such openness serves important goals—the *Richmond* pre-test’s “logic” or “function” prong.

However, the two opinions diverged in terms of which goals were sufficiently important. The Burger opinion looked to the values of fairness and justice, the values that openness serves in the judicial process itself. The Brennan opinion looked beyond the judicial process to the role that free expression and access to information play in the functioning of our system of self-government. The two opinions also differed in their assessment of the importance of a history of openness. To Chief Justice Burger, history seemed to be important in and of itself, while to Justice Brennan, history was important in that it provided evidence of the important structural role that open trials play in self-government.

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36 Id.
37 Id. at 588 (Brennan, J., concurring).
38 See id. at 589-97 (Brennan, J., concurring).
39 See id.
40 See id.
41 See id.
42 See id.
43 The other concurring and dissenting opinions did not affect the analysis on which the majority agreed.
C. Globe Newspaper Co. v. Superior Court

The next case in the series, Globe Newspaper Co. v. Superior Court, saw the Court refine Richmond in two ways. First, a majority adopted Justice Brennan’s structural analysis, thus minimizing the importance of the history prong. Second, the Court articulated the proper test for determining the importance of the countervailing interests in closure.

At issue in Globe was a Massachusetts law that, as construed by that state’s highest court, required that the press and public be excluded from the courtroom when a minor victim testified in a rape, incest, or other sexual offense case. The Massachusetts high court determined that the law did not violate the First Amendment under Richmond because the history of public access—or more precisely, the history of closure—was controlling. Since the Massachusetts tradition was to exclude the press and public from portions of rape trials, there was no qualified public access right access to such trials, and mandatory closure was thus constitutional.

The Supreme Court reversed. This time, Justice Brennan wrote for the majority and Chief Justice Burger wrote in dissent. Both applied the Richmond history and function pre-test, but their differing analyses led to dramatically different results. Justice Brennan’s majority opinion reiterated his focus on the structural role of the First Amendment: “To the extent that the First Amendment embraces a right of access to criminal trials,” he began, “it is to ensure that the constitutionally protected ‘discussion of governmental affairs’ is an informed one.” That criminal trials have traditionally and uniformly been open to the public sheds light on the scope of the First Amendment access right. Moreover, public access to such trials plays a positive role in the trial itself, as well as in the process of self-government: public scrutiny of criminal trials enhances and safeguards the fact-finding process; leads to fairness as well as a perception of fairness, which ensures public respect for the judicial system; and permits the public to participate in and thereby “check” the judicial process, thus enhancing democratic self-government.

The majority agreed that because criminal trials have long been publicly open, and because public access to them plays such an

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45 See id. at 598.
46 See id. at 598-602.
47 See id.
48 Id. at 604-05.
49 See id. at 604-06.
50 See id.
important role in both the judicial process and the government as a whole, the fact that the type of criminal trial at issue was a rape trial, from which the press and public had, historically, been excluded, was irrelevant. Richmond had already established that public access to criminal trials satisfied both prongs of the “history and function” pre-test, so there was no need to apply that test to a particular sub-category of criminal trial (e.g., a rape trial). Instead, the burden shifted to the state to prove that its closure could survive “strict scrutiny,” by showing that the closure was “necessitated by a compelling government interest, and . . . narrowly tailored to serve that interest.”

The Court found that the closure did not survive strict scrutiny. Protecting minor victims of sex crimes from the further trauma and embarrassment of testifying publicly was a compelling governmental interest, but it did not necessitate mandatory closure. Some minors might want to testify publicly, and would not feel traumatized or embarrassed. The state’s interest in encouraging minor victims of sex crimes to come forward and testify truthfully also did not necessitate mandatory closure; there was no record evidence that automatic closure would increase the number of minor sex victims willing to testify. Further, to the extent that the state believed that willingness to testify was premised on the secrecy of the victim’s identity and testimony, the statute did not actually serve the government’s interest: it did not and could not bar the press from discovering and publicizing that information.

Although Justice Brennan’s opinion in Globe garnered a clear majority, it left unclear a number of issues that have resulted in confusing and inconsistent decisions by the lower courts that attempt to apply the pre-test. First, the outcome of a case under the experience prong could vary wildly, depending on how broadly or narrowly the court defined the category of proceedings at issue (e.g., criminal as opposed to sexual assaults against minors). The majority held that criminal trials have a history of openness, so the fact that the sub-category of rape trials had no such history was irrelevant. It is not clear, however, how broadly other types of proceedings should be defined. For example, civil trials also have a history of openness, but many sub-categories of such trials—say, family court proceedings—do not.

51 See id. at 605-07.
52 Id.
53 Id. at 607.
54 See id. at 607-09.
55 See id.
56 See id. at 609-10.
57 See id.
Similarly, depending on how broadly or narrowly they are defined, administrative proceedings may or may not have a history of openness.\textsuperscript{59}

Second, the Court did not clarify whether the presumptive public access right should attach if the lower court were to find that one, but not both, of the prongs was satisfied. Chief Justice Burger apparently would have held that if the history prong was not met, there could be no constitutional access right.\textsuperscript{60} Justice Brennan found both prongs satisfied in \textit{Globe}, but his treatment of the history prong was so cursory that one might infer that he would find a qualified access right even with no history of access, so long as the function prong was satisfied. Lower courts have gone in three different directions on this issue.\textsuperscript{61} Some find a qualified right of access if the history prong is met, even if the logic prong is not.\textsuperscript{62} Some find the right if the logic prong is met, even if the history prong is not.\textsuperscript{63} A third group finds no qualified right of access unless both prongs are met.\textsuperscript{64}

D. Press-Enterprise Co. v. Superior Court (Press-Enterprise I)

The Court did little to clear up the confusion in its next two cases. Two years after \textit{Globe}, the Court issued its decision in \textit{Press-Enterprise Co. v. Superior Court (Press-Enterprise I)}.\textsuperscript{65} Now Chief Justice Burger wrote for the Court, and Justice Brennan joined the majority. The issue was whether the qualified public access right could arise in criminal jury selection proceedings.\textsuperscript{66} The Press-Enterprise newspaper company had requested that the voir dire in a capital rape and murder trial be open to the press and public.\textsuperscript{67} The prosecution objected that if the press were present, juror responses would not be as candid as necessary to assure a fair trial.\textsuperscript{68} The trial judge agreed and excluded the press and public from all but the “general” voir dire, which accounted for about

\textsuperscript{59} Compare First Amendment Coalition v. Judicial Inquiry & Review Bd., 784 F.2d 467, 472 (3d Cir. 1986) (the “administrative proceedings [of judicial disciplinary boards], unlike conventional criminal and civil trials, do not have a long history of openness”), with Soc’y of Prof’l Journalists v. Sec’y of Labor, 616 F. Supp. 569, 575 (D. Utah 1985) (the Mine Safety and Health Administration “has almost always closed its hearings to the public,” but “to the extent that there is a tradition of holding [administrative fact-finding] hearing[s], there is a tradition that the hearings have been open to the public”), vacated as moot, 832 F.2d 1180 (10th Cir. 1987).

\textsuperscript{60} See \textit{Globe}, 457 U.S. at 614-19 (Burger, C.J., dissenting).

\textsuperscript{61} See infra Part II.B.

\textsuperscript{62} See infra Part II.B.

\textsuperscript{63} See infra Part II.B.

\textsuperscript{64} See infra Part II.B.


\textsuperscript{66} See \textit{id.} at 503-04.

\textsuperscript{67} See \textit{id.}

\textsuperscript{68} See \textit{id.}
three days of the six-week process. After the jury was impaneled, the trial court refused to release the transcript of the voir dire proceedings, convinced that the release would violate the jurors’ right of privacy.\(^{69}\)

In determining that the press and public do have a qualified access right to criminal voir dire proceedings, the Press-Enterprise I Court first considered the history of public access to jury selection proceedings. Though the Court seemed to agree that jury selection was part of the criminal trial, as opposed to a pretrial proceeding,\(^{70}\) the majority opinion did not adopt Justice Brennan’s position in *Globe* that *Richmond* had already settled the question of historical openness for all criminal trials. Rather, the Court focused specifically on the question of whether jury selection proceedings themselves were traditionally open to the public, and decided that they were.\(^{71}\)

As to the function prong, the Court reiterated that openness enhances both the fairness of the trial and the perception of fairness essential to public confidence in the system.\(^{72}\) Further, openness has a “community therapeutic value,” since when the public knows that “the law is being enforced and the criminal justice system is functioning,” it has an outlet for the feelings of outrage and hostility, and desire for retribution and justice, provoked by criminal acts.\(^{73}\)

Having declared both prongs satisfied, the majority found a presumptive access right.\(^{74}\) It then applied the strict scrutiny test, which requires that closure be necessitated by “an overriding interest based on [specific and articulated] findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.”\(^{75}\) The state asserted that two interests necessitated the closure of the voir dire examination and the sealing of the transcript: the defendant’s right to a fair trial and the prospective jurors’ right to privacy.\(^{76}\)

The Court said that while the fair trial interest was compelling, and—in some circumstances—a prospective juror’s privacy interest could also be compelling, there were no fact-based findings that an open proceeding would threaten those interests.\(^{77}\) Moreover, even if the trial court had made such findings, it was required to, but did not, consider whether alternatives to total closure and sealing (such as limited access

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\(^{69}\) See id.

\(^{70}\) See id. at 506 (jury selection is “the outset of the trial”); id. at 507 (jury selection took place “[a]s the trial began”); id. at 509 n.8 (for double jeopardy purposes, a trial begins when the first witness or the jurors are sworn, but “the question we address—whether the *voir dire* process must be open—focuses on First, rather than Fifth, Amendment values”).

\(^{71}\) See id. at 505-08.

\(^{72}\) See id. at 508-09.

\(^{73}\) Id.

\(^{74}\) See id. at 508-10.

\(^{75}\) Id. at 510.

\(^{76}\) See id.

\(^{77}\) See id. at 510-11.
or partial suppression) could adequately safeguard those interests. Therefore, the closure and suppression orders did not survive strict scrutiny.

Press-Enterprise I thus created more uncertainty. The Globe majority had found that Richmond had settled the openness question for all criminal trials, but the Press-Enterprise I majority considered whether criminal jury selection proceedings have historically been open. Consequently, the lower courts are unclear on what the proper analysis should be: Should a discrete portion of, or an adjunct to, a criminal trial be categorized as a criminal trial, which definitely satisfies the experience and logic pre-test, or should it be categorized as a separate proceeding that needs to be separately tested?

E. Press-Enterprise Co. v. Superior Court (Press-Enterprise II)

Press-Enterprise Co. v. Superior Court (Press-Enterprise II), the last of the Court’s major First Amendment public access cases, came in 1986—two decades ago—and again added to the lower courts’ uncertainty. Once again, Chief Justice Burger wrote for the Court; six justices, including Justice Brennan, joined him. At issue was the constitutionality of a California trial court’s decision to seal the transcript of a forty-one-day preliminary hearing to determine whether there was probable cause to bind over for trial nurse Robert Diaz, the so-called “Angel of Death” who was eventually convicted of murdering twelve patients. The magistrate had granted Diaz’s unopposed motion to close the preliminary hearing. After the hearing but not the trial was over, the Press-Enterprise Company requested release of the transcript; the magistrate refused and ordered it sealed.

The majority opinion established that the qualified access right attaches not only to criminal trials, but also to preliminary hearings—at least where, as in California, the preliminary hearing “functions much

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78 See id.
79 See id.
80 478 U.S. 1 (1986).
81 Some commentators consider two additional cases part of the Richmond line: Waller v. Georgia, 467 U.S. 39 (1984), and El Vocero de Puerto Rico v. Puerto Rico, 508 U.S. 147 (1993) (per curiam). Neither adds significantly to the analyses of Gannett, Richmond, Globe, Press-Enterprise I and Press-Enterprise II. Waller was decided under the Sixth rather than the First Amendment, and El Vocero was a three-page per curiam decision that simply reiterated Press-Enterprise II’s conclusion that the history prong of the pre-test should look to the access tradition throughout the United States, not of any particular jurisdiction.
82 See Press-Enter. II, 478 U.S. at 3-5; see also Dan Bernstein, Magnet for the Bizarre, PRESS-ENTERPRISE, Feb. 27, 1994, at B1.
83 See Press-Enter. II, 478 U.S. at 5.
84 See id. at 4-5.
like a full-scale trial.”85 California’s preliminary hearings were often lengthy proceedings at which the court decided whether there was probable cause to bind over the accused for trial, and at which the accused had the rights to appear, be represented by counsel, cross-examine witnesses, present exculpatory evidence, and move to exclude illegally-obtained evidence.86 The label of “‘trial’ or otherwise” was not determinative.87 Rather, the right attached to criminal “proceedings,” including at least some types of preliminary hearings.88

But while the opinion made clear that at least some pretrial proceedings were among the criminal proceedings to which the presumptive access right may attach, it left the lower courts wondering whether the right might also extend to other kinds of proceedings. The Court’s language did not go beyond “criminal proceedings,”89 but, as Justice Stevens pointed out in dissent, its reasoning certainly did.90

The Court again set forth the two-pronged experience and logic pre-test as the standard by which to determine whether a particular criminal proceeding was presumptively open. Under the experience prong, courts must first ask “whether the place and process have historically been open to the press and general public,” because a “tradition of accessibility implies the favorable judgment of experience.”91 Under the logic prong, courts are to consider “whether public access plays a significant positive role in the functioning of the particular process in question.”92 Some proceedings, such as grand jury proceedings, would be “totally frustrated” if conducted openly; others, such as criminal trials, “plainly require public access,” as such access enhances the actual and apparent fairness of the trial and thus promotes public confidence in the justice system.93 The majority opinion then suggested that “[t]hese considerations of experience and logic are, of course, related, for history and experience shape the functioning of governmental processes.”94

85 Id. at 7.
86 See id. at 12.
87 See id. at 7.
88 See id. at 13.
89 See id. at 13 (“We . . . conclude that the qualified First Amendment right of access to criminal proceedings applies to preliminary hearings as they are conducted in California.”).
90 Id. at 26-27 (Stevens, J., dissenting):
The obvious defect in the Court’s approach is that its reasoning applies to the traditionally secret grand jury with as much force as it applies to California preliminary hearings. . . . In fact, the logic of the Court’s access right extends even beyond the confines of the criminal justice system to encompass proceedings held on the civil side of the docket as well.
91 Id. at 8 (internal quotations omitted).
92 Id.
93 See id. at 9.
94 Id.
Unfortunately, that formulation of the test does not tell the lower courts what to do when one prong but not the other is satisfied. If there is no “tradition of accessibility,” does that necessarily mean that there is no qualified access right? A tradition of accessibility may imply that the experience of openness has been a good one, but the lack of such a tradition does not always imply that openness would not be beneficial.95

The Court then reiterated that if a particular proceeding passes the experience and logic pre-test, a qualified First Amendment access right attaches.96 In “limited circumstances,” an “overriding” countervailing interest may trump the access right.97 However, the court must make specific, on-the-record findings that closure is both “essential to preserve higher values” and “narrowly tailored to serve that interest.”98

The Court then applied the pre-test to California’s preliminary hearing. The experience prong was satisfied, the Court found, because preliminary or probable cause hearings have been open in most state and federal courts since at least the turn of the nineteenth century.99 The function prong was satisfied because public access to such hearings plays a positive role in their actual functioning.100 Because the preliminary hearing is often the final step in the criminal proceeding, it often provides the only occasion for public observance of the criminal justice system.101 Moreover, because no jury is present during the hearing to guard against a “corrupt or overzealous prosecutor” or a “compliant, biased, or eccentric judge,” the public must play that role.102 Denying the public the transcript of the hearing would frustrate the goals of providing an outlet for the public concern, outrage, and hostility that violent crimes provoke.103 Allowing public access to the hearing would enhance both its actual and its apparent fairness.104

A close reading of this section of the decision explains why so many lower courts are confused about the extent to which the qualified access right might attach to documents as well as to proceedings. The majority’s discussion jumps between access to the hearing itself and post-hearing access to the transcript as if they were fungible—indeed,

95 Justice Stevens implied that the lack of a history of openness was not fatal; rather, he said, the determination to open a proceeding that was not open when the First Amendment was ratified “must stand or fall on whether it satisfies the second component of the Court’s test”—the logic prong. Id. at 25 (Stevens, J., dissenting).
96 See id. at 9-10.
97 Id.
99 See id. at 10-11.
100 See id. at 11-13.
101 See id.
102 Id. at 12-13.
103 See id. at 10-13.
104 See id.
as if they were indistinguishable. But if the transcript is considered independently of the hearing, the experience and logic prongs do not necessarily point to the same result. Thus, for example, when a hearing is traditionally closed, there may still be a tradition of access to the hearing transcript. Similarly, under the logic prong, allowing public access to the hearing itself might affect its fairness by making witnesses behave differently, but post-hearing access to the transcript would not necessarily have the same effect.105

Because, in the majority’s view, preliminary hearings as a class passed the pre-test, closure of the hearing (and therefore, presumably, of the transcript) was subject to, but failed, strict scrutiny.106 The closure was unconstitutional because the trial court did not make specific findings that there was a “substantial probability” that the defendant’s right to a fair trial would be prejudiced by publicity that closure would prevent, nor that closure was necessary because reasonable alternatives, short of complete closure, would not adequately protect the fair trial right.107 The risk that pretrial publicity might prejudice the jurors by exposing them to excluded evidence did not justify closure of the preliminary hearing, because a thorough voir dire or closure of the suppression hearing could sufficiently reduce that risk.108 Mere conclusory assertions that publicity would deprive the defendant of a fair trial were insufficient to overcome the access right.109

In at least three different ways, Press-Enterprise II added to the lack of clarity its predecessors left in their wake. First, while the Court did explain that preliminary hearings are included in the criminal “proceedings” to which a presumptive right of access may attach, the Court’s opinion did little to illuminate the scope of the proceedings to which the right may attach. Given the Court’s reasoning, it is no wonder that so many lower courts have found support for their belief that the presumptive right attaches to a wide variety of proceedings, including civil trials and administrative proceedings. On the other hand, given the Court’s carefully-restricted language, it is also unsurprising that other courts have refused to recognize an access right to anything other than criminal proceedings.110

Second, because the Court, in applying the pre-test, jumped between the hearing itself and the hearing transcript, the lower courts have been unsure of the extent to which the access right attaches to documents in addition to proceedings. Further, those courts that do find

105 See infra Part II.A.1.
107 See id.
108 See id.
109 See id.
110 See infra Part II.A.2.
that the right attaches to documents have no guidance on whether the fact that a proceeding is presumptively open under the pre-test necessarily means that the documents filed in connection with that proceeding are also presumptively open, or whether documents must be independently tested.111

Third, Press-Enterprise II, like its predecessors, failed to explain what the courts should do if they find that a particular proceeding or document satisfies one prong of the pre-test but not the other. No case in the Richmond line tells the lower courts whether the qualified access right may attach to a proceeding that fails the experience test but survives the logic test, or vice versa.112

II. THE LOWER COURT EXPERIENCE: DISAGREEMENT AND DISARRAY

Given the gaps left by Richmond and progeny, it is hardly surprising that the lower courts’ decisions have been wildly inconsistent. In the hundreds of state and federal cases to consider claims of access to proceedings and documents, most courts have applied, or purported to apply, the experience and logic pre-test.113 But many remain unsure of the extent to which the pre-test should be applied to settings other than criminal proceedings—most notably, whether the test should be applied to administrative proceedings114 or court records.115

Even when the lower courts conclude that the test should be applied in a given setting, they often disagree about the relative importance of the two prongs. Some find the qualified access right when the experience prong is satisfied; others find the right when the logic prong is met; and others determine that no right arises unless both prongs are satisfied.116

Lower courts that agree on the test’s applicability and the relative importance of the two prongs may still disagree about whether particular settings satisfy one or both prongs. It is not unusual to see different courts come to different conclusions when they apply the same test to the same or similar fact patterns, as in the Detroit Free Press and North Jersey cases.117

111 See infra Part II.A.1.
112 See infra Part II.B.
114 See infra Part II.A.2.
115 See infra Part II.A.1.
116 See infra Part II.B.
117 See infra Part II.C.
Finally, courts often disagree as to which closures satisfy strict scrutiny. For some, the test is “strict in theory but fatal in fact”;\(^{118}\) for others, searching for a way to justify closure, the test is strict in theory but quite flexible in fact.\(^{119}\) While this Article advocates retaining the strict scrutiny test, it urges that application of the test be clarified, so that courts understand that unsubstantiated speculation about the possibly deleterious effects of open access is not sufficient to establish that closure is necessary.

To explain the scope of the problem and the reason that a new public access doctrine is so desperately needed, this Article looks closely at the questions that the Richmond line left open and the dramatically different ways in which the lower courts have attempted to answer them. This section considers those issues, and describes the lower courts’ inconsistent and contradictory efforts to resolve them.

A. Beyond the Trial Context

The Richmond line makes clear that, at the very least, criminal trials\(^ {120}\) and other criminal proceedings—specifically, voir dire\(^ {121}\) and certain preliminary hearings\(^ {122}\)—are subject to and satisfy the pre-test, and thus give rise to a qualified First Amendment access right. In such cases, then, the only question for the lower courts is whether a particular closure survives strict scrutiny. But though the lower courts largely recognize that both criminal and civil trials\(^ {123}\) are subject to and satisfy the Richmond pre-test, and thus that closures of such proceedings must


\(^{119}\) See infra Part II.D.


\(^{123}\) Most lower courts hold that the qualified First Amendment access right attaches to civil trials. See, e.g., Rushford v. New Yorker Magazine, Inc., 846 F.2d 249 (4th Cir. 1988); F.T.C. v. Standard Fin. Mgmt. Corp., 830 F.2d 404 (1st Cir. 1987); Westmoreland v. Columbia Broad. Sys., Inc., 752 F.2d 16, 23 (2d Cir. 1984); Publicker Indus. v. Cohen, 733 F.2d 1059 (3d Cir. 1984); In re Cont’l Ill. Sec. Litig., 732 F.2d 1302 (7th Cir. 1984); Brown & Williamson Tobacco Corp. v. F.T.C., 710 F.2d 1165 (6th Cir. 1983); Newman v. Graddick, 696 F.2d 796 (11th Cir. 1983); NBC Subsidiary (KNBC-TV), Inc. v. Superior Court, 20 Cal. 4th 1178 (1999); Barron v. Fla. Freedom Newspapers, Inc., 531 So. 2d 113 (Fla. 1988); State v. Cottman Transmission Sys., Inc., 542 A.2d 859 (Md. Ct. Spec. App. 1988); see also In re Iowa Freedom of Info. Council, 724 F.2d 658, 661 (8th Cir. 1983) (“the protection of the First Amendment extends to contempt, a hybrid containing both civil and criminal characteristics”). But see Ctr. for Nat’l Sec. Studies v. U.S. Dep’t of Justice, 331 F.3d 918, 935 (D.C. Cir. 2003) (“[N]either this Court nor the Supreme Court has ever indicated that it would apply the Richmond Newspapers test to anything other than criminal judicial proceedings.”).
be strictly scrutinized, the lower courts offer inconsistent answers to the question of whether the Richmond test should be applied in other settings. Much of the disagreement arises in two key areas: claims of a right of access to court documents and claims of a right of access to administrative proceedings.

1. Judicial Documents

Press-Enterprise II could have settled the issue of whether and how the pre-test applies to judicial documents, but it did not. As noted, the majority jumped between discussing access to the transcript of the preliminary hearing at issue and discussing access to the hearing itself. The decision did not make explicit whether the Court intended that the First Amendment access right attach to judicial documents in general, to judicial documents that independently satisfy the pre-test, or to judicial documents filed in connection with proceedings that satisfy the pre-test.

Consequently, most lower courts have taken one of three different approaches to claims of an access right to court documents. The first approach views access to documents as a common-law, rather than constitutional, right, and applies a closure validity test that is, in most jurisdictions, easier to satisfy than strict scrutiny. The second approach dictates that if a particular proceeding gives rise to a qualified First Amendment access right, the right attaches to documents filed in connection with that proceeding. A third approach applies the pre-test to the documents themselves.

The first approach, in which the courts disregard the pre-test, focuses on the Supreme Court’s decision in Nixon v. Warner Communications, which pre-dated the Richmond line. At issue in Nixon were tapes, made in the Nixon White House, that were played for the jury and the attending members of the press and public during the Watergate trials of several of President Nixon’s former advisers. After the trial, several media organizations sought access to the tapes. The Court recognized a common-law right of access to judicial records, but left the decision to permit access to the “sound discretion” of the relevant court.

124 See Press-Enter. II, 478 U.S. at 9-13; see also supra text accompanying notes 104-05.
125 See infra notes 126-40 and accompanying text. But see infra text accompanying note 181 (discussing a test that views access as a common-law right but requires that sealing survive strict scrutiny).
127 See id. at 591-94.
128 See id.
129 The federal Freedom of Information Act (FOIA) excludes the federal courts from those
The Court then dismissed the media groups’ claim that the First Amendment guaranteed them a right of access to the exhibits and materials displayed in open court.131 Because those who attended the trial were able to listen to the tapes and were furnished with tape transcripts, the Court said that the question at issue was not whether the press should be permitted access to materials to which the general public had access, but whether the press should have a special right of physical access to material to which the public was not given access.132 The answer to that question was “no”; the Court has said repeatedly that the “First Amendment generally grants the press no right to information about a trial superior to that of the general public.”133

While the Nixon Court found that the press has no First Amendment access right superior to that of the general public, the decision begs the question of what the public’s access right might be. The Court pointed out that the public never actually had physical access to the tapes, but that does not necessarily imply that the public therefore did not have a right of such access. Because Nixon was decided before Richmond, it is not clear whether the First Amendment right of courtroom access might include a corollary right of access to the physical evidence presented in open court or to the physical records of what transpired in open court. To date, the Court has declined the opportunity to comment on that question.134

The difference in potential outcomes under the Nixon and Richmond tests is significant. True, any particular judicial document might be found presumptively accessible to the public under either Nixon or the Richmond line. Indeed, more documents are presumptively available under Nixon because Nixon recognized a common-law right of access to all judicial records. Under Richmond, a judicial record—or at least the proceeding in connection with which it was filed—must satisfy the pre-test before it is deemed presumptively open. However, the Richmond presumption of openness is much more difficult to overcome than the Nixon presumption. Under Nixon, a document may be closed to public access if the court, reasonably exercising its discretion, determines that closure interests “outweigh” disclosure interests.135 Thus, a set of anti-access interests that a judge
deemed sufficiently weighty would, in and of itself, justify closure under *Nixon*. Under *Richmond*, however, compelling interests alone are insufficient; closure is unconstitutional unless it is both necessary and narrowly tailored to serve such interests. Moreover, because the right recognized in *Nixon* is a common-law right, it can be supplanted by statute, unlike the constitutional right recognized in the *Richmond* cases.

Given the apparent conflict between *Nixon* and the *Richmond* line, and the significantly different resolutions likely under the Supreme Court’s tests, the lower courts have, understandably, exhibited some confusion about which case should govern when a litigant claims an access right to judicial documents. For example, the Tenth Circuit held that criminal justice records—including judicial records—are governed by the *Nixon* test, at least where no statutory scheme supplants the common-law right that *Nixon* found. In any case, the court said, the *Richmond* line was irrelevant.

Under this *Nixon*-dominant analysis, even if a particular proceeding is concededly subject to, and passes, the history and function pre-test, no qualified First Amendment access right attaches to the documents filed in connection with that proceeding. Thus, a Texas appellate court found that, even assuming *arguendo* that the qualified First Amendment access right applies to civil trials, the “limited” common-law access right to the judicial records in a settled civil case meant that those records could be sealed at the court’s discretion, absent “a showing of some extraordinary circumstances or compelling need” by the access-seeker.

As the Third Circuit has noted, the problem with these split analyses—a stricter one for proceeding closures, a laxer one for document sealings—is that it “would be an odd result indeed were we to declare that our courtrooms must be open, but that transcripts of the proceedings occurring there may be closed, for what exists of the right of access if it extends only to those who can squeeze through the door?” The *Nixon*-dominant analysis is thus problematic, to say the least. It makes little sense to say that a trial may not be closed unless

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136 See, e.g., Ctr. for Nat’l Sec. Studies v. United States Dep’t of Justice, 331 F.3d 918, 936-37 (D.C. Cir. 2003) (statutory access scheme preempts common-law access right).
137 Lanphere & Urbaniak v. Colorado, 21 F.3d 1508, 1510 n.1 (10th Cir. 1994) (defining “criminal justice records” to include all papers and other documentary materials that are made, maintained, or kept by any criminal justice agency, including any court with criminal jurisdiction, for use in the exercise of functions required or authorized by law).
138 Id. at 1511-12; see also United States v. Hickey, 767 F.2d 705, 709 (10th Cir. 1985) (finding that the *Richmond* line “neither expressly nor sub silentio overruled or questioned *Nixon*”); McVeigh, 119 F.3d at 812 (same).
140 United States v. Antar, 38 F.3d 1348, 1360 (3d Cir. 1994).
the closure survives strict scrutiny, but that the paper records of that trial may be sealed at the court’s discretion. Under the Nixon-dominant analysis, a request for access to the hearing in which particular information is presented must be granted unless the closure survives strict scrutiny, but a request for access to the record in which precisely the same information is presented may be denied at the court’s discretion.

More common than the Nixon-dominant analysis of claims of access to judicial documents are the other two approaches, both of which use the Richmond tests to resolve such claims. The major difference between these latter two approaches lies in whether they apply the experience and logic pre-test to the document itself, or to the proceeding in connection with which it was filed. In the “test-the-proceeding” approach, the court applies the pre-test to the proceeding in connection with which the document was filed, and holds that if the proceeding is presumptively open, then so is the document. In the “test-the-document” approach, the court holds that the document itself must independently satisfy the pre-test.

Thus, for example, the Second Circuit used the test-the-proceeding approach to hold that because the qualified First Amendment access right attaches to plea hearings, it attaches a priori to documents—such as plea agreements—filed in connection with those hearings. The Fourth Circuit has similarly applied the pre-test to the proceeding in connection with which the document in question was filed, rather than to the document itself.

The D.C. Circuit, on the other hand, applied the test-the-document approach in a case in which a plea agreement had been sealed, holding that because plea agreements (considered independently of plea hearings) have traditionally been open to the public, and because public access to them enhances both the actuality and appearance of fairness in the criminal justice system, the First Amendment access right attaches to plea agreements and “related documents.” The Ninth, Seventh, and Third Circuits have also looked to the history and function of access to the document itself.

Under the test-the-document approach, the

141 See United States v. Haller, 837 F.2d 84, 87 (2d Cir. 1988); see also In re N.Y. Times Co., 828 F.2d 110, 114 (2d Cir. 1987) (the qualified access right attaches to “written documents submitted in connection with judicial proceedings that themselves implicate the right of access”). In a subsequent case, a different Second Circuit panel noted that courts have used both the test-the-proceeding and the test-the-document approach, and, rather than choosing between them, applied both. See Hartford Courant Co. v. Pellegrino, 380 F.3d 83 (2d Cir. 2004); see also infra text accompanying note 156.

142 See In re Wash. Post Co., 807 F.2d 383, 389-90 (4th Cir. 1986) (finding that “the First Amendment right of access also applies to written documents submitted in connection with judicial proceedings which themselves implicate the right of access”).


144 See Oregonian Pub’l’g Co. v. U.S. Dist. Court, 920 F.2d 1462, 1466 (9th Cir. 1990).
Eighth Circuit held that even though a particular proceeding failed the pre-test and thus no qualified First Amendment access right attached to it, a document filed in connection with that proceeding was presumptively open because it independently survived the pre-test.145

Some courts combine these two approaches, jumping between the test-the-document and test-the-proceeding approaches, as did *Press-Enterprise II*. Take, for example, the Sixth Circuit’s decision on a media request for access to the sealed records of two pretrial proceedings that were themselves closed to the public.146 The proceedings arose in connection with the embezzling trial of top Teamsters Union officials.147 At issue was the sealing of the defendants’ motions to disqualify the judge originally assigned to the case, the government’s motion alleging that the defendants’ attorneys had conflicts of interest, all supporting documents, and the transcripts of *in camera* hearings and meetings on the motions.148 As to the motion for disqualification, the court found a tradition of access to disqualification motions, as well as to the hearings held on them.149 The court then went on to discuss the positive role that access plays in disqualification proceedings, without applying the function prong to the motions.150 It concluded that there was a qualified access right to “documents and records that pertain to” a disqualification proceeding.151

As for the motion alleging attorney conflicts of interest, the court focused solely on the hearings into possible conflicts, concluding that

(discussing history and function of access to plea agreements); Associated Press v. United States Dist. Court for Cent. Dist., 705 F.2d 1143, 1145 (9th Cir. 1983) (discussing history and function of access to “pretrial documents in general”); United States v. Corbit, 879 F.2d 224, 229 (7th Cir. 1989) (“Whether or not the public and the press have a first amendment right of access to sentencing hearings, we must determine independently whether there is a right to disclosure of presentence reports submitted at such hearings.”); United States v. Smith, 776 F.2d 1104, 1111-12 (3d Cir. 1985) (discussing history and value of open indictments). In a later case, a different Third Circuit panel preferred the test-the-proceeding approach, holding that “the right of access to voir dire examinations encompasses equally the live proceedings and the transcripts which document those proceedings. It is access to the content of the proceeding—whether in person, or via some form of documentation—that matters.” *Antar*, 38 F.3d at 1359-60.

145 *See In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d 569, 573 (8th Cir. 1988):

[A]lthough the process of issuing search warrants has traditionally not been conducted in an open fashion, search warrant applications and receipts are routinely filed with the clerk of court without seal. . . . [P]ublic access to documents filed in support of search warrants is important to the public’s understanding of the function and operation of the judicial process and the criminal justice system and may operate as a curb on prosecutorial or judicial misconduct.

146 *See In re Applications of NBC*, 828 F.2d 340, 341 (6th Cir. 1987).

147 *See id.* at 341-45.

148 *See id.*

149 *See id.*

150 *See id.*

151 *See id.*
the pre-test was met as to such proceedings.152 The court then concluded that because “proceedings inquiring into conflicts of interest by attorneys” satisfy the Richmond pre-test, there is a qualified right of access to the “materials” filed in connection with such proceedings.153

Recognizing that courts had followed both approaches, the Second Circuit, which had previously chosen a test-the-proceeding approach,154 decided to apply both analyses to the docket sheets at issue in Hartford Courant Co. v. Pellegrino.155 It concluded that both approaches established a qualified First Amendment access right to docket sheets.156

A New York federal district court followed yet another path.157 The court first applied the pre-test to sentencing-related letters that the wife and the mistress of accused mob boss Peter Gotti had sent directly to the court.158 Under the test-the-document approach, the court decided, no qualified First Amendment access right attached to the letters, which failed both prongs of the pre-test.159 Then, switching to a variant of the test-the-proceeding approach, the court said that even if the sentencing proceeding was presumptively open, the letters filed in connection with it were not, because the letters were not a “necessary corollary to attending the sentencing proceeding since they have nothing to do with ‘the ability of the public and press to attend civil and criminal cases.’”160

Whether a court chooses a Nixon-dominant approach, a test-the-document approach, or a test-the-proceeding approach can make a critical difference in whether access to a given category of documents is granted or denied. Take, for instance, the claim of an access right to a probable cause affidavit filed in connection with a search warrant application. The circuit courts have come up with vastly different answers to the question of whether such access is mandated, depending on which approach they use.

In Gunn, the Eighth Circuit used a test-the-document analysis to find a presumptive First Amendment access right to such affidavits.161 The court recognized that a test-the-proceeding approach would mean no presumptive access right because the process of issuing search warrants failed both pre-test prongs: “[H]istorically the process of

152 See id.
153 Id. at 345 (emphasis added).
154 See supra note 141.
155 See Hartford Courant Co. v. Pellegrino, 380 F.3d 83, 92-96 (2d Cir. 2004).
156 See id.
158 See id. at 232-34. Apparently, Gotti’s mistress had asked that he be treated leniently and his wife had requested that he receive the maximum sentence.
159 See id.
160 Id. at 249-50 (quoting Hartford Courant Co. v. Pellegrino, 371 F.3d 49 (2d Cir. 2004)).
161 See In re Search Warrant for Secretarial Area Outside Office of Gunn, 855 F.2d 569, 572-75 (8th Cir. 1988).
issuing search warrants involves an *ex parte* application by the
government and *in camera* consideration by the judge or magistrate.
Moreover, the very objective of the search warrant process, the seizure
of evidence of crime, would be frustrated if conducted openly.\footnote{162}

But the *documents* filed in support of search warrant applications
passed both prongs. They passed the history prong because
although the process of issuing search warrants has traditionally not
been conducted in an open fashion, search warrant applications and
receipts are routinely filed with the clerk of court without seal.
Under the common law judicial records and documents have been
historically considered to be open to inspection by the public.\footnote{163}

They met the function prong because “a search warrant is certainly
an integral part of a criminal prosecution. Search warrants are at the
center of pre-trial suppression hearings,” to which the presumptive First
Amendment right of access attaches.\footnote{164}

While the *Gunn* court found that the sealing of the affidavits at
issue survived strict scrutiny because it was necessary and narrowly
tailored to protect the ongoing investigation,\footnote{165} the Eighth Circuit’s test-
the-document approach would mandate access when the pro-closure
interests were insufficiently compelling, or closure was not necessary or
narrowly tailored to achieve those interests. Indeed, following *Gunn*, an
Eighth Circuit district court held that certain previously-sealed search
warrant affidavits had to be unsealed.\footnote{166} The court said that while the
government’s interest in sealing the affidavits to avoid compromising its
ongoing investigation was compelling, that interest expired when the
investigation ended.\footnote{167} Similarly, while the privacy interests of
individuals identified in the affidavits might be compelling, those
interests could be served by redacting the names of those accused but
not yet convicted of serious criminal misconduct.\footnote{168} It was unnecessary,
and therefore unconstitutional, to redact the names of people identified
in the affidavits who were not implicated in misbehavior, had been
indicted, had pled guilty, or had been subjected to public searches that
diminished their privacy claims.\footnote{169}

Under a test-the-proceeding approach, however, such affidavits
could remain sealed in perpetuity. That is the view that the Ninth

\footnote{162 Id. at 573.} \footnote{163 Id.} \footnote{164 Id. This analysis highlights the lower courts’ confusion: Here, the *Gunn* court seemed to switch to a test-the-proceeding approach, but to use it on a proceeding that was *not* the one in connection with which the affidavits were filed.} \footnote{165 See id. at 574.} \footnote{166 See *In re Search Warrants Issued on June 11, 1988*, 710 F. Supp. 701 (D. Minn. 1989).} \footnote{167 See id. at 704-05.} \footnote{168 See id.} \footnote{169 See id.}
Circuit took in *Times Mirror Co. v. United States.* Search warrant proceedings (not the supporting affidavits) did not pass Richmond’s experience prong because “the issuance of search warrants has traditionally been carried out in secret.” They also failed the logic prong. Open warrant proceedings would promote open discussion of the process, act as a check on potential government abuses, enhance the quality and integrity of the fact-finding process, and serve as an outlet for community outrage over crime. But public access would hinder the government’s ability to conduct criminal investigations, since the targets of the investigation might learn of it and destroy evidence or flee before the investigation was complete. Moreover, the privacy rights of those who were identified in the affidavits but turned out to be innocent of criminal activity would also be unjustly compromised. Thus, there was no qualified access right to the affidavits. The court did not decide whether the access right attaches to warrant materials after the investigation is complete or indictments have been returned, but the Fourth Circuit has said it does not.

The differing applications of the Richmond pre-test thus lead to completely different results. Under the test-the-document approach, a search warrant affidavit cannot be sealed unless the closure proponent can establish that the closure survives strict scrutiny. Under the test-the-proceeding approach, a search warrant affidavit can be kept from public scrutiny forever.

Additional divergent outcomes spring from varying applications of the Nixon-dominant approach. Thus, for example, in the *Times Mirror* case, in addition to deciding that there was no First Amendment access right to search warrant affidavits, the Ninth Circuit held that there was also no common-law access right. Where documents have traditionally been kept secret for important policy reasons, held the court, there can be no common-law access right without a threshold showing that disclosure would serve the ends of justice. However, “the ends of justice would be frustrated, not served, if the public were

170 873 F.2d 1210 (9th Cir. 1989).
171 See id. at 1213-14.
172 See id. at 1214-16.
173 See id.
174 See id. This weighing of access harms against access benefits is an atypical logic prong analysis. See infra text accompanying notes 224-239.
175 See Times Mirror, 873 F.2d at 1214-16.
176 See id. at 1211.
177 See Baltimore Sun Co. v. Goetz, 886 F.2d 60, 64-65 (4th Cir. 1989) (no access right to search warrant affidavits can ever arise because proceedings for the issuance of search warrants are traditionally closed).
178 See Times Mirror, 873 F.2d at 1218-19.
179 See id.
allowed access to warrant materials in the midst of a pre-indictment investigation into suspected criminal activity."^{180}

Under the Ninth Circuit’s *Nixon*-dominant approach, search warrant affidavits can be kept from public scrutiny unless and until the access proponent proves that justice requires disclosure. But under the Fourth Circuit’s more access-friendly *Nixon*-dominant approach, there is a presumptive common-law access right to such affidavits, and denial of that right must satisfy strict scrutiny^{181}—a result similar to that mandated by the First Amendment test-the-document approach.

Yet another result is dictated by the Second Circuit’s *Nixon*-dominant common-law analysis. That circuit held that, at least once the warrant has been executed and a plea bargain reached, a common-law access right attaches to search warrant affidavits, but the trial court’s decision to grant or deny access is reviewable only for abuse of discretion.^{182} That means that under this *Nixon*-dominant variant, the outcome of a given access claim to search warrant affidavits is anyone’s guess.

In the single example of search warrant affidavits, then, we can see that the differing approaches lead to at least three different results. Under both the test-the-document approach and one variant of the *Nixon*-dominant approach, affidavits are available unless the closure proponent establishes that the closure survives strict scrutiny. Under another variant of the *Nixon*-dominant approach, each trial court may, in a reasonable exercise of discretion, grant or deny access. Under the test-the-proceeding approach, the affidavit can be shielded from public view forever, even after the investigation has been completed and the trial is over.

The vague and confusing *Richmond* line has led directly to this motley assortment of lower court decisions on access rights to judicial documents. The lower courts have gone in so many different directions because the Supreme Court has not spoken on this issue for nearly twenty years, and the pronouncements it did make in the 1980s failed to give the lower courts the guidance they needed. For obvious reasons, this state of affairs is unacceptable. Consistency in both approach and result is highly desirable: it assures the public that similar cases are treated similarly and that the courts’ analyses are not outcome-driven.

This article posits that just as it is critical that the test used to evaluate closures of judicial proceedings validate closures only in limited circumstances,^{183} it is critical that the test used to evaluate

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^{180} *Id.* at 1219.

^{181} See *Goetz*, 886 F.2d at 65-66.

^{182} See *In re Newsday*, Inc., 895 F.2d 74, 79 (2d Cir. 1990).

^{183} See *Press-Enter. I*, 464 U.S. 501, 511 n.10 (1984) (noting that closure is warranted only in “limited circumstances”).
sealings of related documents legitimize sealings only rarely.\footnote{\textsuperscript{184} See infra Part III.} That the proceedings to which the documents relate are presumptively open does not alleviate constitutional concerns. As other commentators and courts have recognized, access to a transcript does not substitute for attendance at the proceeding itself.\footnote{\textsuperscript{185} See, e.g., Eugene Cerruti, “Dancing in the Courthouse”: The First Amendment Right of Access Opens a New Round, 29 U. RICH. L. REV. 237, 322 (1995); ABC, Inc. v. Stewart, 360 F.3d 90, 99-100 (2d Cir. 2004).} Transcript preparation may require some time, so that the information the transcript contains may become stale before it is released.\footnote{\textsuperscript{186} See, e.g., Soc’y of Prof’l Journalists v. Sec’y of Labor, 616 F. Supp. 569, 577-78 (D. Utah 1985).} Moreover, transcripts cannot reflect facial expressions, gestures, voice tones, pregnant pauses, and body language that may be highly revealing\footnote{\textsuperscript{187} See, e.g., United States v. Antar, 38 F.3d 1348, 1360 n.13 (3d Cir. 1994).} and even belie a speaker’s words.

For similar reasons, access to a proceeding does not substitute for a transcript of the proceeding or for the evidence submitted at it. The press and public are not always aware of the occurrence and significance of a particular proceeding at the time that it takes place. Moreover, courtrooms can hold only a limited number of people, and even those in the courtroom are not always permitted to examine a particular document or exhibit closely. As the Third Circuit recognized, the right of access would be narrow indeed “if it extends only to those who can squeeze through the [courtroom] door.”\footnote{\textsuperscript{188} Id. at 1360.}

To address the problems identified above, this Article proposes a single strict scrutiny test for documents that are filed in connection with a judicial proceeding or a quasi-judicial administrative proceeding\footnote{\textsuperscript{189} See generally infra Part II.A.2 (discussing Richmond and administrative proceedings), Part III (defining quasi-judicial administrative proceedings).} or that relate to, or reflect, the decision-making process in such proceedings. Such documents would be presumptively open to press and public access unless the closure proponent could demonstrate that closure was necessary and narrowly tailored to serve a compelling interest that would not be served adequately by less restrictive alternatives, such as partial redaction or later production.

Part III explores the contours, benefits and disadvantages of the proposed test in greater detail, but here, I note simply that a single test will give more consistent results than a host of different tests and variations on them. While the abuse of discretion test common to some of the Nixon-dominant approaches is also a single test, such tests lead to inconsistent results when both granting and denying access are reasonable exercises of discretion, as they often are.
2. Administrative Proceedings

As with their treatment of documents, the lower courts’ treatment of a claimed access right to administrative proceedings is inconsistent and contradictory. Some courts have suggested that the Richmond pre-test should not be applied to administrative proceedings at all. Other courts apply it and find it satisfied. Still others find—even under identical sets of facts—that it is not satisfied.

A few courts have intimated, without actually deciding, that the Richmond test applies only to a specific, limited set of court proceedings. The Fifth Circuit has suggested that application of the pre-test in contexts outside of criminal court proceedings is “questionable.” Similarly, the Third Circuit has said that it doubts whether the access right can attach outside the limited context of historically-open court proceedings. The D.C. Circuit has come closest to finding that the pre-test does not apply outside the criminal trial context, but it, too, has not squarely so held. However, in all three cases, the access sought was to administrative records, rather than administrative proceedings, so the question remains open.

Most courts that have considered the issue of a First Amendment access right to administrative proceedings have applied the pre-test to such proceedings. Their outcomes vary widely, though, depending on how broadly or narrowly they define the type of proceeding at issue, and on what other kinds of proceedings they find analogous.

Those courts that define the type of proceeding broadly, typing it in the same class as criminal and civil trials, tend to find that a qualified First Amendment access right does attach to the proceeding at bar because the logic prong is met. Those courts that define the type of proceeding narrowly tend to find that no qualified First Amendment access right attaches because the experience prong is not met. The first approach downplays or disregards the access history of the actual proceeding; the second finds its failure to satisfy the experience prong determinative.

The Sixth Circuit’s analysis in Detroit Free Press is the leading example of the access-embracing, logic-determinative approach.

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190 Calder v. IRS, 890 F.2d 781, 783 (5th Cir. 1989). However, the court did apply the pre-test to the administrative records sought in that case and found it not satisfied. See id. at 784.

191 Capital Cities Media, Inc. v. Chester, 797 F.2d 1164, 1167-76 (3d Cir. 1986). Again, however, the court applied the Richmond pre-test to the administrative records sought there, and also found it not satisfied. See id.; see also N. Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198, 201 (3d Cir. 2002) (“[W]e believe that the notion that Richmond Newspapers applies [to administrative proceedings] is open to debate.”).

192 See Ctr. for Nat’l Sec. Studies v. U.S. Dep’t of Justice, 331 F.3d 918, 934 (D.C. Cir. 2003) (“The narrow First Amendment right of access to information recognized in Richmond Newspapers does not extend to non-judicial documents that are not part of a criminal trial . . . .”).
Although the court found that the administrative proceeding in question did satisfy the experience prong, it did so by downplaying the importance of that prong and analogizing the proceeding at issue to judicial proceedings that have unbroken histories of access.

The administrative hearings in *Detroit Free Press* were a class of deportation proceedings known as “special interest” hearings.193 In the wake of the September 11, 2001, attacks, Chief Immigration Judge Michael Creppy issued a directive to all federal immigration judges requiring that they close to the press and public all “special interest” hearings.194 The “special interest” designation attached to non-citizens who were subject to deportation for violating immigration laws, and who allegedly were connected to, or had information about, terrorist activities against the United States.195 The closure order, known as the Creppy Directive, barred the deportee’s family and friends, as well as the press and public, from the deportation proceedings.196 Pursuant to the Creppy Directive, the presiding immigration judge closed the deportation hearing of Rabih Haddad, who was suspected of supplying funds to terrorist organizations and was subject to deportation because he had overstayed his tourist visa. Several newspapers objected, claiming that, pursuant to the *Richmond* line, they had a First Amendment access right to the deportation proceedings.197

The circuit court found, first, that the pre-test does apply to civil and administrative proceedings outside of the criminal proceeding context, including deportation proceedings.198 In applying the test, the court found the experience prong less important than the function prong, and thus “a brief historical tradition” of openness “might be sufficient to establish a First Amendment right of access where the beneficial effects of access . . . are overwhelming and uncontradicted.”199 In any event, deportation proceedings, unlike exclusion proceedings,200 have

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194 See id.
195 See *N. Jersey*, 308 F.3d at 202. As of May 2003, the United States had deported some 500 “special interest” aliens. Linda Greenhouse, *Supreme Court Roundup; Police Questioning Allowed to the Point of Coercion*, N.Y. TIMES, May 28, 2003, at A18.
196 See *Detroit Free Press*, 303 F.3d at 683-84.
197 See id. at 684.
198 See id. at 695-96. The court reasoned that a deportation proceeding is “an adversarial, adjudicative process, designed to expel non-citizens from this country,” in which the stakes are as high as, or higher than, in criminal and civil cases. *Id. at 696*. Moreover, deportation hearings are procedurally similar to trials in that the non-citizen is served with notice of the claims against her; the government bears the burden of proof; and the alien has the rights to defend herself, be represented by counsel, be present at the hearing, present evidence on her behalf, examine and object to evidence presented against her, and cross-examine witnesses. *Id. at 698-99*.
199 Id. at 701.
200 “The deportation hearing is the usual means of proceeding against an alien already physically in the United States, and the exclusion hearing is the usual means of proceeding against an alien outside the United States seeking admission.” *Landon v. Plasencia*, 459 U.S. 21,
historically been open—at least for as long as such proceedings have existed.\textsuperscript{201} To the extent that they are too recent in origin to have a meaningful “history” of access, the court reasoned, they should be compared to “other proceedings that have the same effect as deportation”: criminal proceedings, which have historically been open.\textsuperscript{202}

Deportation proceedings passed the logic portion of the test with flying colors. The court found it unquestionable that public access to such hearings acts as a check on potential government abuses and mistakes, serves as an outlet for community concern and hostility, enhances the perception of integrity and fairness, and helps ensure an informed electorate.\textsuperscript{203} Thus, a qualified First Amendment access right attached to the proceedings.\textsuperscript{204}

A Utah district court used the same logic-determinative approach to a claimed access right to administrative hearings that the Mine Safety and Health Administration (MSHA) convened as part of an investigation into a coal mine fire that killed twenty-seven miners.\textsuperscript{205} The hearings were formal fact-finding proceedings at which several witnesses were to give sworn testimony that would be recorded by a court reporter.\textsuperscript{206} News media representatives objected when MSHA closed the hearings to the press and the public.\textsuperscript{207}

The court first decided that, like criminal and civil trials, formal administrative fact-finding hearings may give rise to a qualified right of access under \textit{Richmond} and progeny.\textsuperscript{208} The court then determined that the MSHA fact-finding hearings satisfied the experience prong, despite the fact that MSHA had virtually always closed its hearings to the public.\textsuperscript{209} Because MSHA had not held many hearings, the court said it had to look to the “broad spectrum” of administrative hearings in general.\textsuperscript{210} While administrative fact-finding hearings in general were also “of fairly recent origin,” they were analogous to civil trials, which

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\textsuperscript{201} See \textit{Detroit Free Press}, 303 F.3d at 701.
\textsuperscript{202} See \textit{id.} at 702.
\textsuperscript{203} See \textit{id.} at 703-05.
\textsuperscript{204} See \textit{id.} at 705. The court held that the blanket closure did not survive strict scrutiny. Closure was not necessary and narrowly tailored to serve the government’s compelling interest in preventing terrorism, because the detainees and their lawyers could still publicize the information revealed during the hearing, and the government could keep sensitive information out of public view with protective orders and \textit{in camera} reviews. The risk that even seemingly innocuous information would aid terrorists was too speculative to justify the complete closure of all “special interest” deportation proceedings. See \textit{id.} at 706-10.
\textsuperscript{206} See \textit{id.}
\textsuperscript{207} See \textit{id.}
\textsuperscript{208} See \textit{id.} at 573-75.
\textsuperscript{209} See \textit{id.}
\textsuperscript{210} \textit{Id.} at 575-76.
do have a history of public accessibility. Thus, the court reasoned, “to the extent that there is a tradition of holding this type of hearing, there is a tradition that the hearings have been open to the public.”

The court quickly moved on to the function prong, finding that access to the proceeding would provide an emotional catharsis for a terrible disaster, assure the community that justice would be done, serve as a check against possible mistakes and abuses, and guarantee an informed electorate. The hearings were thus presumptively open under *Richmond* and progeny.

In each of these cases, the courts downplayed the importance of the experience prong, concentrating on the benefits of access under the logic prong. To the extent that they thought that the experience prong mattered at all, they found it satisfied by looking beyond the specific administrative proceeding at issue and instead analyzing analogous proceedings that did have the requisite history of access.

More common than that access-embracing, logic-determinative approach to administrative proceedings is the access-rejecting, experience-determinative approach typified by the Third Circuit’s decision in *North Jersey*. Using this alternate analysis, the lower courts have found that various administrative proceedings should not be analogized to criminal or civil trials and do not satisfy the experience prong, and that no presumptive access right attaches because the logic prong is either unsatisfied or irrelevant.

As in *Detroit Free Press*, the issue before the *North Jersey* court was whether there was a First Amendment access right to the post-9/11 “special interest” deportation proceedings that the Creppy Directive ordered closed. The court first determined that it was bound by Third Circuit precedent to apply the experience and logic pre-test to the deportation hearings at stake.

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211 Id. at 575.
212 Id.
213 See id. at 576.
214 See id. at 574-75. The closure did not survive strict scrutiny. The government’s pro-closure interests—in achieving more smoothly-run hearings and preventing the publication of possibly-inaccurate information—were insufficiently compelling. See id. at 578-79.
215 A New York state court similarly found a public access right to an unemployment insurance compensation hearing by minimizing the importance of historical access, analogizing the hearing to civil and criminal trials, and emphasizing the benefits of access. See Herald Co. v. Weisenberg, 455 N.Y.S.2d 413 (N.Y. App. Div. 1982). The court deemed administrative hearings analogous to historically-open criminal and civil judicial proceedings. Public access to quasi-judicial administrative proceedings would promote public participation in government and safeguard the integrity of the decision-making process. The closure failed strict scrutiny because there was no showing of any compelling interest necessitating it. See id. at 415-16.
216 See N. Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198, 199 (3d Cir. 2002).
217 See id. at 204-09. But see id. at 201 (“[W]e believe that the notion that *Richmond Newspapers* applies [to administrative proceedings] is open to debate.”).
The court then found that the hearings failed the experience prong. It is improper to class deportation hearings with civil trials, the court said, even though they "walk[], talk[], and squawk[]" like such trials.218 The appropriate analogy is to administrative proceedings in general, many of which have historically been closed to public view, mandatorily or presumptively.219 Deportation proceedings as a subclass of administrative hearings do have a history of access, but that history is "too recent and inconsistent to support a First Amendment right of access."220

The court proceeded to hold that the proceedings’ failure on the experience prong doomed the access claim: even if the hearings passed the logic prong, there could be no access right.221 In any event, they did not survive the logic prong, either.222 While openness in deportation proceedings did serve the values typically served by public access, a "properly applied" logic prong analysis should consider access disadvantages as well as benefits.223 Because public hearings posed too great a risk of revealing too much to terrorist organizations, there was no presumptive access right to "special interest" deportation proceedings.224

Several other courts have similarly elevated the experience prong over the logic prong to find no presumptive right of access to administrative proceedings. As in the North Jersey case, these courts seem to hinge their analyses on the proceedings’ failure to satisfy the experience prong. While some explicitly find the logic prong irrelevant and unnecessary,225 others purport to apply it. However, they do so, as the North Jersey court did, by considering not only the values that access may serve, but also (or only) its disadvantages—an approach that is atypical. The typical logic prong analysis, as set forth in Richmond and progeny, discusses “only the policies favoring openness,” saving the “flip side of the coin”—the countervailing interests in closure—for the strict scrutiny test.226


219 See id. at 210-15.

220 Id. at 211.

221 See id. at 200-01, 216-21.

222 See id.

223 See id.

224 See id.

225 See, e.g., First Amendment Coal. v. Judicial Inquiry & Review Bd., 784 F.2d 467, 472-74 (3d Cir. 1986) (finding no access right to recently-instituted judicial disciplinary proceedings because they had no long history of access; satisfaction of the logic prong was thus irrelevant); WBZ-TV4 v. Executive Office of Labor, 610 N.E.2d 923, 925 (Mass. 1993) (finding no access right to employment agency licensing hearings because administrative licensing hearings were not open to the press and public when “our organic laws were adopted”; satisfaction of the logic prong was thus irrelevant).

226 N. Jersey, 308 F.3d at 200.
The New York Court of Appeals took the experience-determinative approach and engaged in the atypical logic prong analysis when it found no qualified right of access to a dentist’s disciplinary proceeding before a licensing board, at the stage at which the board was to decide whether to recommend to the state’s Board of Regents that the dentist be found guilty of misconduct. A tradition of openness was critical, the court said, but “there is no suggestion that professional disciplinary hearings have any tradition of being open to the public.” The proceeding also failed the logic prong because potential complainants might not complain about professional misconduct if information they regarded as private or confidential was publicly accessible and innocent dentists’ reputations might be harmed if unfounded accusations against them were publicized. The court did not discuss any positive role that access might play.

The Sixth Circuit, in \textit{United States v. Miami University}, also used the experience-determinative and atypical logic prong analysis when it decided that no qualified First Amendment right of access attached to student disciplinary proceedings. Unlike its sister panel in \textit{Detroit Free Press}, the \textit{Miami University} panel rejected any analogy to the kinds of civil and criminal proceedings with a clear tradition of access. Student disciplinary proceedings failed the experience prong because they had never been open to the press and public. They failed the logic prong because public access could force the school to adopt more procedural safeguards, which would make disciplinary proceedings more costly and a less effective part of the teaching process. Again, the court did not discuss any possible benefits of allowing public access.

An Ohio appellate court took the same path in determining that no qualified First Amendment right of access attached to police disciplinary hearings. Such hearings failed the experience prong because police disciplinary hearings have not historically been open to the public. They failed the logic prong because the officers’ privacy rights outweighed the benefits that public access might bring to the proceeding—benefits that the court did not discuss.

\bibitem{228} \textit{Id.} at 1049.
\bibitem{229} \textit{Id.} at 1047-51.
\bibitem{230} 294 F.3d 797 (6th Cir. 2002).
\bibitem{231} \textit{See id.} at 822-23.
\bibitem{232} \textit{See id.}
\bibitem{233} \textit{See id.}
\bibitem{234} \textit{See id.}
\bibitem{235} Smith v. City of Cleveland, 641 N.E.2d 828 (Ohio Ct. App. 1994).
\bibitem{236} \textit{See id.} at 832-33.
\bibitem{237} \textit{See id.}
These experience-determinative analyses elevate the history prong over the function prong in much the same way that the logic-determinative approach elevates the function prong over the history prong. The courts that follow the logic-determinative approach essentially write the experience prong out of the equation by downplaying the experience prong and finding it satisfied either by a very abbreviated history of openness or by an absence of a long history of closure, and by looking beyond the particular proceeding, and even the general class of administrative proceedings, to the indisputable history of access to the civil and criminal trials they deem analogous. The problem with that approach is that public access to virtually any governmental proceeding imaginable would produce at least some of the benefits traditionally considered under the logic prong—enhancing informed discussion of governmental affairs, discouraging perjury, promoting a perception of fairness, providing an outlet for community concern, or helping to check governmental abuses.238

On the other hand, the experience-determinative approach is at least as problematic. By insisting on an age-old tradition of openness for each and every proceeding, it freezes the status quo for any newly-instituted proceedings that start out or become closed to public access, as well as for proceedings that have long been closed to the public, no matter how beneficial access might prove to be. Moreover, courts that follow the experience-determinative approach also often adopt the atypical logic prong analysis. By considering the negative aspects of access in addition to, or instead of, the benefits of access, that analysis essentially double-counts closure interests. Such interests are already factored into the standard Richmond analysis in the strict scrutiny test, in which the court considers the drawbacks of access as among the compelling reasons that closure might be justified despite the qualified access right.239

The differences in outcome between the courts that follow the logic-determinative model and those that follow the experience-determinative model are dramatic. As the cases discussed in this section demonstrate, the logic-determinative model tends to result in access to proceedings, and the experience-determinative model tends to

238 See Press-Enter. II, 478 U.S. 1, 26-27 (1986) (Stevens, J., dissenting) (noting that the Supreme Court’s logic prong analysis could result in a finding that traditionally-secret grand jury proceedings should be presumptively open); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 588-89 (1980) (Brennan, J., concurring) (noting the “theoretically endless” nature of his analysis); N. Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198, 217 (3d Cir. 2002) (noting that the court could not find any case in which “a proceeding passed the experience test through its history of openness yet failed the logic test by not serving community values”).

239 The North Jersey court recognized but was unconcerned by the “evidentiary overlap” between its atypical logic prong analysis and the strict scrutiny test. See N. Jersey, 308 F.3d at 217 n.13.
result in closures of proceedings. As in the document setting, it may be fair to infer that, given the smorgasbord of approaches from which courts can choose, the chosen analysis is outcome-driven. It does seem possible that at least some courts choose closure or access, and then select the analyses that will produce the desired result. That possibility is one of the many reasons that this Article espouses dropping the Richmond pre-test entirely. Even where the analyses are not outcome-driven, however, the courts’ struggles with the experience and logic pre-test, and their attempts to find ways around it, suggest that the test itself is the problem.

Under the enhanced strict scrutiny test I propose, discussed in detail in Part III, quasi-judicial fact-finding administrative hearings such as the proceedings at issue in the cases discussed above would be presumptively open, and could be closed only if the closure were truly necessary to serve a compelling governmental interest and there were no viable alternatives, short of closing the entire proceeding, adequate to serve those interests. The lower courts would no longer be able to elevate one prong over the other, resulting in inconsistent decisions that provide little guidance to future litigants. Nor would the lower courts be allowed to engage in rampant speculation about the possible harms of openness, preventing public access to the kinds of proceedings for which, as the Supreme Court has acknowledged, access provides critical fairness and justice benefits.

B. Experience, Logic, or Both?

As the preceding sections illustrate, even when the lower courts agree that a particular document or proceeding should be subject to the Richmond pre-test, they often disagree on the relative importance of the experience and logic prongs. Under Richmond and progeny, there are four possible outcomes of the pre-test that could, conceivably, result in a presumptive right of access. First, a court could determine that a qualified access right arises only if the proceeding passes both prongs. Second, a court could determine that the right arises so long as the proceeding passes the logic prong, even if it fails the experience prong. Third, a court could determine that the right arises so long as the proceeding survives the experience prong, even if it fails the logic prong. And fourth, a court could determine that the right arises if the proceeding passes either prong.

The only one of these outcomes that no court has ever found appropriate under the Richmond line is the third, in which a right of access would arise if a proceeding passed the experience prong but failed the logic prong. That result is to be expected, for two reasons.
First, it appears that no court has ever held that a proceeding passed the experience prong but failed the logic prong, so no court has had occasion to determine whether an access right would arise in that context. Second, because most courts interpret the logic prong to require only that openness serve some important community value, including promoting an informed discussion among the citizenry, it would be difficult to conceive of any governmental proceeding that does not satisfy the prong.

Most courts find that a presumptive right of access attaches to a proceeding under the pre-test only if both prongs are met. Less commonly, courts find that even if a proceeding fails the experience prong, a qualified First Amendment right of access arises so long as the proceeding passes the logic prong. And one Ninth Circuit panel stated in dicta that satisfaction of either prong would give rise to a qualified access right.

That the courts have not agreed on the relative importance of the two prongs is again the fault of the Richmond line—or more precisely, the Court’s silence in the wake of those cases. Richmond and progeny all found that the proceedings addressed in each case satisfied both the experience and the logic prongs, and none of those decisions told the lower courts what to do if one prong but not the other was satisfied.

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240 See id. at 217.
241 Not all courts so construe the logic prong, however. See, e.g., supra text accompanying notes 224-39 (discussing atypical logic prong analyses).
242 See, e.g., N. Jersey, 308 F.3d at 213 (refusing to “dispense with the Richmond Newspapers ‘experience’ requirement where history is ambiguous or lacking, and to recognize a First Amendment right based solely on the ‘logic’ inquiry”); United States v. El-Sayegh, 131 F.3d 158, 161 (D.C. Cir. 1997) (noting that the experience prong is the “first of the two necessary criteria for a First Amendment right of access”); Balt. Sun Co. v. Goetz, 886 F.2d 60, 64 (4th Cir. 1989) (holding that the “claim of a first amendment right of access . . . fails because it does not satisfy the first prong” of the pre-test); see also supra note 225 (citing additional cases).
243 See, e.g., United States v. Simone, 14 F.3d 833, 838-40 (3d Cir. 1994) (finding a First Amendment right of access to post-trial hearing to investigate juror misconduct where the proceeding passed the logic prong but there was no tradition of openness and the majority of post-trial inquiries into jury misconduct were conducted in camera); Seattle Times Co. v. U.S. Dist. Court., 845 F.2d 1513, 1516 (9th Cir. 1988) (finding a right of access to pretrial release proceedings and documents because they passed the logic prong, even though such proceedings were often held out of public view); United States v. Chagra, 701 F.2d 354, 363 (5th Cir. 1983) (pre-Press-Enterprise II case holding that “the lack of an historic tradition of open bail reduction hearings does not bar our recognizing a right of access to such hearings”); United States v. Criden, 675 F.2d 550, 555 (3d Cir. 1982) (pre-Press-Enterprise II decision concluding that “historical analysis is [not] relevant in determining whether there is a first amendment right of access to pretrial criminal proceedings”).
244 See Phoenix Newspapers v. U.S. Dist. Court, 156 F.3d 940, 949 (9th Cir. 1998) (finding that “either under an historic analysis or by considering whether access ‘would serve as a curb on prosecutorial or judicial misconduct or would further the public’s interest in understanding the criminal justice system’, the Press had a qualified right of access to the transcript of the . . . closed hearings” (emphases added and citation omitted)).
245 See supra Part I.
C. Same Tests, Same Facts, Different Results

The preceding sections on the lower courts’ treatment of claims of access rights to administrative proceedings and to documents include examples of the ways in which the lower courts apply the same test to the same or similar sets of facts and arrive at inconsistent and contradictory outcomes, as in the conflicting decisions in *Detroit Free Press* and *North Jersey*. But even in the criminal and civil trial settings in which application of the pre-test tends to go unquestioned, the same kinds of problems arise.

For instance, the lower courts are split on whether a qualified First Amendment access right attaches to juvenile court proceedings under the pre-test. Typically, the courts find no right of access to either juvenile delinquency proceedings or juvenile dependency proceedings, on the ground that such proceedings flunk the history prong because they have historically been closed—even if the courts find that public access would satisfy the function prong.

Thus, a Kentucky federal district court found that there was no qualified access right to juvenile delinquency proceedings. Such proceedings did not satisfy the experience prong because “juvenile proceedings and records have been historically closed to the public.” Using an atypical logic prong analysis, the court found that the disadvantages of access established that the logic prong was not met: “[O]pening juvenile proceedings would frustrate the purpose of juvenile court” by “depriv[ing] the juvenile of a fair trial” and “diminish[ing] the prospect of rehabilitation.”

Similarly, a California state appellate court found that there was no qualified access right to juvenile dependency proceedings. The court found that juvenile dependency proceedings did not meet the experience prong because they have historically been closed to the public. Using the standard logic prong analysis, the court determined that such proceedings satisfied that prong, as public access to them would enhance their actual and apparent fairness, lead to more accurate fact-finding by discouraging perjury and encouraging witnesses to come

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248 *Id.* at 864.

249 *Id.*


251 See *id.* at 339-43.
forward, check judicial and governmental abuses and misuses of power, provide an outlet for community concern and outrage, and promote informed discussion of the need for changes to the juvenile justice system. Nonetheless, because the proceedings failed the experience prong, no presumptive access right attached.

Other courts have found that juvenile proceedings do give rise to a qualified First Amendment right of access. The New York Family Court held that juvenile delinquency proceedings belong to the same general class as civil and criminal trials, which have a long history of openness, and thus satisfy the experience prong. They also satisfy the logic prong, since public access to them assures their integrity, promotes confidence in their fairness, and informs and educates the public.

A New Jersey state court found a qualified First Amendment right of access to juvenile custody hearings using similar reasoning. The access tradition of the broad class of civil and criminal trials, which included juvenile dependency hearings, satisfied the history prong. The proceedings satisfied the function prong because access to them would promote public confidence in the judiciary and inform the public.

The Third Circuit intimated that, in the appropriate case, it too would find a presumptive access right to juvenile delinquency hearings. While such hearings would likely fail the history prong, since “[n]o centuries-old tradition of openness exists for juvenile proceedings,” they would pass the function prong, as access to them would promote informed discussion, assure their actual and apparent fairness, provide an outlet for community concern, check governmental abuse, discourage perjury, and enhance the performance of all parties. A blanket closure of such proceedings would thus “pose a substantial constitutional issue.”

On one level, it is significant that of the five cases discussed above, three found, or said that in the appropriate case they would find, a presumptive First Amendment right of access and two did not. The split reflects one kind of inconsistency that is highly undesirable in a judicial

252 See id.
253 See id.
254 See In re Chase, 446 N.Y.S.2d 1000, 1001-02 (Fam. Ct. 1982).
255 See id. at 1002-04. Total closure of the proceeding at issue did not survive strict scrutiny because it was unnecessary; the accused delinquent’s privacy would be adequately protected if neither his name nor the names of any witnesses were revealed in open court. See id. at 1006-09.
257 See id. at 264-66. The court further found that while confidentiality would often be necessary to encourage child abuse victims and witnesses to testify, it was not necessary in the case at bar. See id. at 268-70.
258 See United States v. A.D., 28 F.3d 1353 (3d Cir. 1994).
259 Id. at 1358.
260 See id. at 1357-58.
system. But the cases reflect a more subtle, and perhaps more troubling, inconsistency: even among the cases that ended at the same bottom line (qualified access right or no qualified access right), the courts reached that conclusion through very different paths. Courts that found no access right held that the proceedings in question satisfied and did not satisfy the function prong. Courts that found an access right said that the proceedings satisfied and did not satisfy the experience prong. In terms of the predictability and consistency that are critical in a judicial system, two courts that reach the same result through contradictory analyses are as problematic as two courts that reach different results through contradictory analyses.

The fissures thus run deeper than is evident in a review of the cases’ outcomes (access right to juvenile proceedings/no access right to juvenile proceedings). In order to formulate a solution to the problems of inconsistency and contradiction in the lower court cases, then, it is less helpful to categorize the cases on the basis of the proceeding to which they grant or deny an access right, and more helpful to examine the ways in which the courts’ varying applications of the governing test led them in different directions, and to consider the ways that the test can be changed for better consistency and predictability of both outcomes and analyses.

D. When Strict Scrutiny Isn’t

A final problem arises in the lower courts’ application of the second of the two Richmond line’s tests. When a proceeding or document satisfies the history and function pre-test, the courts subject its closure to a strict scrutiny test—or give lip service to that test, in any event. Often, a lower court will laxly apply the strict scrutiny test in a case in which the court must hold, given Supreme Court precedent, that the proceeding or document at issue passes the pre-test. The court will acknowledge that closure of the proceeding or document must survive strict scrutiny review, and then find a reason to claim that it does.

Numerous examples of this “relaxed” strict scrutiny standard can be seen in lower court decisions that consider whether it was proper, despite the qualified First Amendment right of access, to close voir dire proceedings to the press and public. Recall that Press-Enterprise I concluded that a qualified First Amendment right of access attaches to voir dire proceedings because they satisfy the pre-test. In applying strict scrutiny to the voir dire closure at issue in Press-Enterprise I, the Court noted that the state had asserted two interests allegedly served by

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closure that were or could be compelling: the defendant’s right to a fair trial and the prospective jurors’ right to privacy.\textsuperscript{262} The state had argued that the defendant’s right to a fair trial could be compromised if the press presence led jurors to be less than candid in their responses, and that the jurors’ own privacy rights could be violated if they were forced to discuss sensitive issues in the public domain.\textsuperscript{263} But neither the fair trial interest nor the privacy interest was supported by the required findings that an “open proceeding in fact threatened those interests.”\textsuperscript{264}

The Court suggested that, in future cases, the judge should let prospective jurors know that if they felt that public questioning on especially sensitive issues would be unduly embarrassing, they could request an \textit{in camera} but on-the-record meeting with judge and counsel.\textsuperscript{265} If a juror were to make such a request, the court should first hear out the juror to ensure that disclosure would in fact infringe on a “significant interest” in privacy, and if so, determine whether to excise the juror or order a limited closure.\textsuperscript{266} If the judge determined that a limited closure was appropriate, she should later release a transcript, possibly partial or redacted, of the juror’s voir dire questioning, if “disclosure [could] be accomplished while safeguarding the juror’s valid privacy interests.”\textsuperscript{267}

Many lower courts have seized on the Court’s acknowledgement that defendants’ fair trial rights and jurors’ privacy rights can be compelling, and have essentially jumped from there to a conclusion that closure is justified, without explaining, in sufficiently detailed factual findings, why closure is necessary and less restrictive measures will not suffice.

Thus, for example, the Second Circuit, in \textit{United States v. King},\textsuperscript{268} approved the voir dire closure in the trial of boxing promoter Don King on charges of filing a false insurance claim.\textsuperscript{269} The trial court had reasoned that if prospective jurors were aware that their views might be publicly disseminated, they would feel pressured not to express unpopular racist views, and would thus not be fully forthcoming.\textsuperscript{270} Their lack of candor would, in turn, mean that a fairly-selected jury could not be impaneled, thus prejudicing the defendant’s fair trial right.\textsuperscript{271} The court explained that King was a “controversial” person.
who had received much negative publicity, and jurors were likely to have “strong views” about him.\textsuperscript{272} Jurors might fear that friends and employers would disapprove of them if they expressed their views publicly.\textsuperscript{273} Thus, the judge had jurors fill out questionnaires, available only to the court and parties until the jury was impaneled, and then conducted individual follow-up questioning away from the public and press.\textsuperscript{274} Transcripts of the individual questioning were to be made publicly available once the jury was impaneled.\textsuperscript{275} However, if a juror expressed concern that anything she said during the questioning touched on “deeply personal matters” that she had “legitimate reasons” for keeping out of the public domain, the court would then determine whether to release the transcript in full or with redactions, or to seal it.\textsuperscript{276}

The appellate court found that the trial court’s process survived strict scrutiny.\textsuperscript{277} That court agreed that jurors would not publicly admit their possible racial biases, nor publicly acknowledge that their candor would be inhibited by public questioning, so closed proceedings were indeed necessary.\textsuperscript{278} Less restrictive alternatives such as immediately releasing the questionnaires and transcripts of the follow-up questioning, with the jurors’ names redacted, would not suffice.\textsuperscript{279} The prospective jurors’ candor could be inhibited if they heard about other jurors’ “racially-charged” views, even if those views were not attributed to named jurors.\textsuperscript{280}

As the dissenting judge argued, however, the majority’s reasoning proved too much. Don King was indeed a controversial person who had received much negative publicity. But so were most of the defendants in the kind of high-profile trials to which the press and public would want access:

Were mere notoriety to be deemed a sufficient basis for courtroom closure, the broad presumption of openness established by the Supreme Court in \textit{Press Enterprise I} would soon lose all force. Indeed, it is precisely in those cases involving controversial or notorious defendants that the public—and its media proxies—are likely to take an interest in criminal proceedings. It would be perverse to enshrine a constitutional right of public access to

\begin{footnotes}
\footnotetext[272]{Id.}
\footnotetext[273]{See id.}
\footnotetext[274]{See id.}
\footnotetext[275]{See id.}
\footnotetext[276]{Id.}
\footnotetext[277]{See id. at 82-83.}
\footnotetext[278]{See id.}
\footnotetext[279]{See id.}
\footnotetext[280]{Id.}
\end{footnotes}
criminal proceedings, and then to enforce that right only in cases in which the public has no interest.281

There was simply no showing that King’s notoriety was so extraordinary that the court could find that jurors were especially unlikely to be candid. Moreover, if there had been such a showing, immediate release of voir dire transcripts with the jurors’ names and other identifying information redacted, and repeated assurances to the jurors that they would not be identified, would alleviate the jurors’ concerns that publication of their candid responses might antagonize their communities.282

In a subsequent case, ABC, Inc. v. Stewart,283 the same circuit deemed insufficient a trial court’s “findings” that in a very high-profile case that had garnered much publicity and speculation about the defendants’ guilt or innocence, prospective jurors were likely to have pre-judged the defendants and were unlikely to disclose their biases if the press and public were permitted at the voir dire.284 The defendants, domestic doyenne Martha Stewart and her stockbroker, were accused of attempting to cover-up an insider trading scheme.285 The trial court reasoned that if media members were present, there would be a substantial risk that they would disclose juror names, and that risk might keep the veniremembers from giving full and frank answers to the questions posed.286

The appellate court concluded that the trial judge’s findings were insufficient to establish a substantial probability that open voir dire would prejudice the defendants’ rights to a fair trial and impartial jury.287 In any high-profile case, prospective jurors are likely to have preconceptions.288 The notion that they would be willing to admit their anti-defendant biases in the defendants’ presence, but not in the media’s presence, was simply unfounded.289

The circuit court did not disavow its decision in King, but distinguished it on the ground that the potential bias at issue in King was racially-based, while the Stewart case raised no issue as sensitive or contentious as racism.290 In any event, the court continued, there were less restrictive alternatives to closure.291 The prospective jurors’

281 Id. at 84-85 (Cabranes, J., dissenting).
282 See id. at 85-86 (Cabranes, J., dissenting).
283 360 F.3d 90 (2d Cir. 2004).
284 Id. at 101.
285 See id. at 93-94.
286 See id. at 101.
287 See id.
288 See id.
289 See id.
290 See id. at 101-05.
291 See id.
identities could be concealed, and the venire so informed. Moreover, assuming that there was any evidence that the jurors’ candor in response to particular lines of questioning might be restricted by a press presence, the media could be barred from that portion of the questioning, rather than the entire voir dire.

The notion that prospective jurors in general are less likely to reveal race-based biases than other controversial biases—gender, sexual orientation, religion, ethnicity, class, wealth, or otherwise, any of which might arise at virtually any trial imaginable—may or may not be true as a statistical matter. As with any generalization about a group of people, however, it is not necessarily true about any particular person within that group. Just as some minor victims of sexual assaults are willing to testify publicly about their experiences, some prospective jurors are willing to admit to their controversial views.

Moreover, to the extent that the Supreme Court meant what it said when it decreed that closed proceedings in a criminal case must be “rare,” it can hardly have intended to legitimize closure in any controversial and high-profile case in which juror candor might conceivably be inhibited by the knowledge that answers given in voir dire will be publicly available. Such high-profile and controversial cases are precisely the kinds of cases that the Supreme Court had before it in Richmond and progeny, including Press-Enterprise I—in which the Court dismissed the suggestion that voir dire closure was appropriate simply because jurors’ candor might be inhibited if they knew their responses would be public.

In addition, to the extent that courts are engaging in speculation about when jurors (and witnesses, for that matter) might be less than candid, it seems at least as likely that the threat of public disclosure will prompt candor as opposed to discouraging it. Further, it is hard to

292 See id.
293 See id. at 101-05.
294 See, e.g., Newton N. Minow & Fred H. Cate, Who is an Impartial Juror in an Age of Mass Media?, 40 AM. U.L. REV. 631, 650-51 (1991) (citing studies that indicate that prospective jurors are unlikely to publicly admit bigotry or any of their “true prejudices and preconceptions,” though acknowledging that some jurors admit to biases in order to be excused from jury duty).
296 See, e.g., Leonard B. Sand & Steven Alan Reiss, A Report on Seven Experiments Conducted by District Court Judges in the Second Circuit, 60 N.Y.U. L. REV. 423, 436 (1985) (“[A]t least one study has shown that jurors do not regard traditional voir dire as sufficiently embarrassing or upsetting to warrant a change toward in camera examination.” (citing Dale W. Broeder, Voir Dire Examinations: An Empirical Study, 38 S. CAL. L. REV. 503, 525-26 (1965))).
298 See id. at 503.
299 Compare Sand & Reiss, supra note 296, at 437 (noting that some judges surveyed “felt jurors are more candid about themselves after listening to the questioning of other panelists”), with Kimba M. Wood, Reexamining the Access Doctrine, 69 S. CAL. L. REV. 1105, 1119-20 (1996) (arguing that in the author’s experience as a judge, prospective jurors were more likely to
imagine that a juror with some kind of racial, ethnic, gender, or other bias against a defendant would be willing to admit it in the defendant’s presence, but not if reporters were present as well.\textsuperscript{300}

For all these reasons, several lower courts have acknowledged that even in high-profile, controversial cases, speculation about the effects of publicity on veniremembers’ impartiality and their concomitant lack of candor as to their biases simply does not establish that closure is necessary to protect the defendant’s fair trial right or the jurors’ privacy right.\textsuperscript{301} But others have echoed the logic of the Second Circuit, allowing closure on the insufficiently-founded assumption that the defendant will be denied a fair trial because pretrial publicity will bias the venire pool, the presence of the press and public will make veniremembers less than candid about their biases, and veniremembers will be unwilling to avail themselves of the opportunity to discuss especially-sensitive topics in private.\textsuperscript{302}

The test this article proposes for closures of presumptively-open proceedings and documents is true strict scrutiny review, in which such unsubstantiated speculation as to the possible harms of access cannot legitimize a closure. Not only must there be a compelling interest in closing a proceeding or sealing a document, but the court must make findings, supported by evidence, that closure is truly both necessary and narrowly tailored to serve that interest. Below, I explain the types of findings needed to justify closure.

be candid in a private setting, with only the judge, counsel, defendant(s), and court reporter present, than in a public courtroom); see also Susan E. Jones, Judge-Versus Attorney-Conducted Voir Dire: An Empirical Investigation of Juror Candor, 11 L. & HUM. BEHAV. 131, 143 (1987) (study shows lack of juror candor is exacerbated by judge-conducted questioning); Linda L. Marshall & Althea Smith, The Effects of Demand Characteristics, Evaluation Anxiety, and Expectancy on Juror Honesty During Voir Dire, 120 J. PSYCHOL. 205, 209 (1986) (same).

\textsuperscript{300} See, e.g., ABC, Inc. v. Stewart, 360 F.3d 90, 101 (2d Cir. 2004).

\textsuperscript{301} See, e.g., United States v. Antar, 38 F.3d 1348, 1351 (3d Cir. 1994); In re Dallas Morning News Co., 916 F.2d 205, 206 (5th Cir. 1990); In re Petitions of Memphis Pub’g Co., 887 F.2d 646, 647-48 (6th Cir. 1989); \textit{CNN, Inc. v. United States}, 824 F.2d 1046, 1049 (D.C. Cir. 1987); United States v. Peters, 754 F.2d 753, 760-61 (7th Cir. 1985); see also United States v. Simone, 14 F.3d 833, 841-42 (3d Cir. 1994) (mid-trial voir dire).

\textsuperscript{302} See, e.g., \textit{In re S.C. Press Ass’n}, 946 F.2d 1037, 1041 (4th Cir. 1991) (finding that in a trial of African-American state legislators accused of vote-selling, voir dire closure was justified because veniremembers would likely be reluctant to respond to questions about their racial biases, their criminal records and those of their families, and their attitudes about sting operations, vote-buying, bribery, and illicit drugs unless they were guaranteed that voir dire would be completely closed, even if they were assured that they would remain anonymous and could request an \textit{in camera} meeting for any topics they found sensitive); \textit{In re Greensboro News Co.}, 727 F.2d 1320, 1325 (4th Cir. 1984) (finding voir dire closure justified in a trial involving civil rights violations and murder charges stemming from a fracas among anti-KKK protesters, Klansmen and Nazis, because veniremembers were not likely to be candid about their pre-existing biases and if they were, other veniremembers would be tainted by their public responses); United States v. Koubriti, 252 F. Supp. 2d 424, 427-34 (E.D. Mich. 2003) (using the same reasoning to justify voir dire closure in a post-9/11 trial in which the defendants were charged with providing support to terrorists).
There are three major sets of governmental interests that the courts have deemed sufficiently compelling to legitimize strictly-scrutinized closures. These are the defendant’s Sixth Amendment right to a fair trial before an impartial jury; the right to privacy of the parties involved in the proceeding—jurers, witnesses, victims, defendants, and plaintiffs—which may be deemed compelling even if it does not affect the defendant’s right to a fair trial; and the public right to national security.

As the cases discussed above exemplify, the courts tend to find that the defendant’s fair trial right is prejudiced by public access in two ways. First, jurors may be unduly influenced by publicity, forming biases that they will not be able to overcome. Second, jurors may fear that because their responses to questioning will be publicized, they will be shunned by friends and neighbors or lose their jobs or otherwise suffer, and they may therefore choose not to reveal those biases.

However, the first reason is a real problem only if the second reason is true. If the veniremember reveals that she has a bias she cannot overcome, she will not be seated. Moreover, in addition to conducting a thorough voir dire, there are several measures a court can take to ensure that jurors will render a verdict based on the evidence adduced at trial and not on extra-record information. The court can continue a proceeding to let the effects of pretrial publicity die down; change the venue to one where the venire is less likely to be tainted; repeatedly caution the jurors against, and question them about, their exposure to extra-record information; and/or sequester the jurors.

The difficulty, of course, is that no one can tell whether these measures have been effective if jurors are not honest in confessing that they have biases or prejudices or pre-formed opinions that will keep them from being as fair and impartial as they are supposed to be. That is why the second concern is so pivotal: in the end, our ability to
guarantee a fair and impartial jury depends largely on jurors letting us
know when they cannot be fair and impartial.

However, while veniremembers may feel intimidated and
embarrassed when they are questioned closely on sensitive subjects by a
judge or lawyers and must confess to their prejudices, or to their
experiences and relationships that might lead to such prejudices, the
structure of our judicial system means that we must hope and believe
that jurors will cooperate and be candid. We have to trust that if they
are given the opportunity to tell the court that they have something to
discuss in private, they will do so, and the judge can then decide if
secrecy is indeed warranted.308

The contrary position is untenable. It means that we must accept
the proposition that in high-profile cases with controversial defendants,
veniremembers are likely to have pre-existing opinions that will affect
their impartiality, and will be unwilling to reveal them if they know that
the public will learn of their responses. We have to assume that
guaranteeing their anonymity and offering them an opportunity to
discuss sensitive topics in camera will not suffice to prompt their candid
responses. At the same time, though, we must assume that their
reticence will not extend to confessing their prejudices before the judge
and the very defendant on whom those prejudices center. We must
presume that no person is more willing to confess to her biases when
she hears others confessing to theirs. And we must ignore the
possibility that there may be veniremembers who have discussed their
biases with others, outside the courtroom; that those others might be
monitoring the trial; and that the prospective jurors may therefore feel
more constrained to be honest if they know that their answers will be
publicized than if they are assured that their responses will be kept
secret.

As for the argument that the right to privacy of the jurors or other
parties to the proceeding justifies closure, to the extent that the privacy
right is of concern because it will affect the candor necessary to a fair
trial, the discussion above applies equally. There will virtually always
be means short of total closure that will guarantee the kind of candor
necessary to ensure the defendant a fair trial. To the extent that the right
to privacy at stake does not involve the defendant’s right to a fair trial, it
seems dubious that protecting the privacy of jurors, parties or witnesses
could ever necessitate total closure. As the Supreme Court found in
Globe, even where a witness’s (or veniremember’s) willingness to
speak truthfully is premised on the secrecy of the person’s identity,
means short of total closure—such as limited closure during the

discussion of particularly sensitive topics, or assurances of anonymity—should suffice.309

The third interest that courts tend to find compelling enough to justify closure of presumptively-open proceedings and documents is the public interest in preserving our national security. Again, however, it should be the rare case in which selected, limited closure will not suffice. Granted, the possibility that public release of sensitive information will result in threats to our national security is frightening. The natural tendency in such cases is to err on the side of caution. Judges are not exempt from such tendencies; unlike cases in which privacy or fair trial rights are at stake, cases in which the national security is threatened will potentially affect the judge personally, along with every other community member. Moreover, the political pressure on judges in such cases is bound to be intense, as the general public is just as self-interested in national security as the judge herself. While judges know more than most of us about how trials work, and have informed opinions about the ways that juries and other trial participants will respond to trial publicity and other issues related to public access, in most cases they have no special understanding of which information disclosures aid terrorists and otherwise threaten the national security.

These are reasons to be especially cautious about simply accepting, without question, the government’s assertions that closure is necessary to protect national security. Of course, some courts have recognized and refused to bow to the special pressures that arise in cases in which the government argues that total closure is critical to the national security.310 As the Fourth Circuit explained:

History teaches us how easily the specter of a threat to “national security” may be used to justify a wide variety of repressive government actions. A blind acceptance by the courts of the government’s insistence on the need for secrecy, without notice to others, without argument, and without a statement of reasons, would impermissibly compromise the independence of the judiciary and open the door to possible abuse.311

Particularly troubling in this context is the courts’ embrace of the government’s closure-legitimizing “mosaic” argument. Here, the government argues that intelligence gathering is “‘akin to the construction of a mosaic,’ where an individual piece of information is

309 See Globe, 457 U.S. at 609-10.
310 See, e.g., Detroit Free Press v. Ashcroft, 303 F.3d 681, 707-10 (6th Cir. 2002); In re Wash. Post Co., 807 F.2d 383 (4th Cir. 1986); Ressam, 221 F. Supp. 2d 1252; Pelton, 696 F. Supp. 156; cf. Doe v. Ashcroft, 334 F. Supp. 2d 471, 524 (S.D.N.Y. 2004) (finding no authority for the “open-ended proposition” that national security interests demand that “perpetual secrecy” be imposed on “an entire category of future cases whose details are unknown and whose particular twists and turns may not justify [such secrecy] for all time and all places”).
311 Wash. Post, 807 F.2d at 391-92.
not of obvious importance until pieced together with other pieces of information.”®

Thus, “[b]its and pieces of information that may appear innocuous in isolation” can be “used by terrorist groups to help form a ‘bigger picture’ of the Government’s terrorism investigation.”®

Following this “mosaic” theory, several courts have, like the North Jersey court, approved a total information blackout when the government argued that national security required it. 314 The most pressing problem with the mosaic argument is, of course, that there is no way for a court to second-guess the government’s assertion that an information release will implicate national security. The government cannot, and therefore does not have to, point to specific information and the likely effects of its release; as the theory goes, even information that seems completely innocuous to all parties may aid our public enemies. The national security exception, then, would swallow the rule, as the Sixth Circuit explained: “The Government could use its ‘mosaic intelligence’ argument as a justification to close any public hearing completely and categorically. . . . The Government could operate in virtual secrecy in all matters dealing, even remotely, with ‘national security,’ resulting in a wholesale suspension of First Amendment rights.”®

In sum, then, in a significant number of cases, public access may implicate one or more of what are concededly compelling governmental interests: the defendant’s right to a fair trial before an impartial jury; the privacy rights of various proceeding participants; and the public’s right to national security. For the reasons detailed above, however, there are very few cases in which even these compelling interests truly necessitate the kinds of total closures that the lower courts have often found they do. Rather, in almost all of these cases, less restrictive measures would indeed suffice.

312 Detroit Free Press, 303 F.3d at 706
314 See, e.g., N. Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198, 219-20 (3d Cir. 2002) (noting that although there was “no concrete” evidence that closure of “special interest” deportation proceedings was necessary to prevent terrorist attacks, the court was “quite hesitant to conduct a judicial inquiry into the credibility” of the mosaic theory, as “national security is an area where courts have traditionally extended great deference to Executive expertise,” and finding such deference particularly appropriate “at a time when our nation is faced with threats of such profound and unknown dimension”); cf. Ctr. for Nat’l Sec. Studies v. U.S. Dep’t of Justice, 331 F.3d 918, 928 (D.C. Cir. 2003) (determining that the government’s mosaic argument justified nondisclosure of documents subject to FOIA because it was “abundantly clear” that the government’s top counterterrorism officials were “well-suited” to predict whether harm would result from information disclosures, while “the judiciary [was] in an extremely poor position to second-guess the executive’s judgment in this area of national security”).
315 Detroit Free Press, 303 F.3d at 709-10.
The current access doctrine does call for strict scrutiny of the closure of a proceeding that is presumptively open under the history and function pre-test. It properly requires specific, detailed findings that closure is necessitated by and narrowly tailored to a compelling governmental interest that would not adequately be served by less restrictive measures. As demonstrated above, however, lower courts have often merely paid lip service to this test, leaving it strict in theory but infinitely flexible in fact. Dropping the pre-test in favor of a single strict scrutiny analysis, as I propose, will result in fewer unnecessary closures only if the lower courts concurrently begin rigorously to apply that test in the manner that this article, and the Supreme Court, suggest is appropriate.

III. CONCLUSION: TOWARD A NEW PUBLIC ACCESS DOCTRINE

It has now been more than twenty-five years since the Supreme Court decided that public access to at least some types of judicial proceedings is constitutionally mandated. It is high time that the courts reached consensus on which proceedings. The Supreme Court has already told us why access is critical, and those reasons seem as self-evident now as they did when the Court first laid them out in *Richmond*.

Access enhances not only the particular proceedings at issue and the adjudicative process in general, but also the process of self-government.\(^\text{316}\) In terms of the proceedings themselves, access assures their fairness in two ways. First, the public presence itself serves as a check on governmental and judicial abuse and mistake, guarding against the participants’ corruption, overzealousness, compliancy, or bias. Second, the possibility of publicity facilitates accurate fact-finding, since publicity about a trial and the evidence and testimony proffered will discourage perjury and encourage hitherto-undiscovered witnesses to come forward. Access enhances public confidence in and fosters respect for the decision-making process; the very fact that the process is open assures the public that it is fair. Access can discourage vigilantism and satisfy the public desire for justice by providing a cathartic outlet for community outrage and concern. Access educates the public about the doings of its governmental players and thus ensures the properly-informed public debate necessary for self-governance.\(^\text{317}\)

Access, then, should not be lightly or inconsistently denied. It has been both. The Court’s current access doctrine allows courts to deny or

\(^{316}\) See discussion of *Richmond* and progeny supra Part I.

grant access simply by manipulating the experience and logic prongs. The pre-test’s history prong can be used either to foreclose or expand access, depending on how narrowly or broadly the court defines the proceeding at interest. But it is not clear in any event why history should be so determinative. As Judge Kimba Wood has explained:

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

The function prong is equally manipulable and equally dysfunctional. On the one hand, if courts focus primarily or exclusively on the self-governance access justification, virtually any proceeding will pass the function prong. If courts instead choose the atypical logic analysis, performing an ad hoc balance of the competing pro- and contra-closure interests, access is virtually always denied. Because closure issues are usually decided under intense time pressures, at least initially, the courts’ tendency is to err on the side of caution and thus closure, since publicity’s harms are usually more immediate and apparent than closure’s harms. Moreover, for those few proceedings that might theoretically pass the function prong under the balancing approach, pro-closure interests are over-represented since they are counted again in the strict scrutiny analysis.

The Richmond pre-test’s manipulability results in a lack of consistency among the lower courts’ access decisions; this is problematic for at least two reasons. First, like access to decision-making, consistency in decision-making enhances the actuality and appearance of fairness. Such consistency ensures that similar cases are and appear to be treated similarly. Inconsistent decisions give rise to suspicions that the courts’ analyses are outcome-driven. Like veils of secrecy, analyses that appear outcome-driven breed distrust of the adjudicative process. Further, consistency leads to predictability, which promotes fairness by giving citizens advance warning of how legal disputes will be decided.

318 See supra Part II.
319 Wood, supra note 299, at 1109; see also Heidi Kitrosser, Secrecy in the Immigration Courts and Beyond: Considering the Right to Know in the Administrative State, 39 HARV. C.R.-C.L. L. REV. 95, 99 (2004).
Second, consistently-stated and consistently-applied rules allow judges to make unpopular decisions in difficult times such as these, when the risk of terrorist attack seems high and the government argues that secrecy is necessary to preserve national security. Such claims create intense political pressure for judges and quasi-judicial adjudicators, who cannot help but be tempted by closure to protect themselves and society at large, especially when the harms caused by openness (e.g., a terrorist attack) seem immediate, concrete and irreparable, while the harms wrought by closure (e.g., incremental losses of faith in, and information about, the justice system) tend to be more abstract and less specific and immediate. Malleable, discretionary standards encourage judges to take the easy way out, knowing that in the next, less troublesome case, they can reach a contrary result without overruling the previous decision. Bright-line rules constrain discretion, and thus both compel and permit judges to stand firm.

For the reasons described here and in the preceding sections, this Article proposes scrapping the Richmond pre-test and applying the strict scrutiny test—as described in Part II.D—to determine whether it is constitutionally-permissible to close to public view the following presumptively-open proceedings and documents: all judicial and quasi-judicial proceedings, whether held in court or by an administrative agency; and all documents (which may include audio-and video-tapes or other recordings) that are filed in connection with, or that relate to or reflect, the decision-making process in such a proceeding.

The types of judicial and quasi-judicial proceedings to which I refer are those that "walk[], talk[], and squawk[] very much like a lawsuit." Their nature is essentially adjudicative, rather than political or legislative. They involve particularized, case-specific inquiries and the application of discrete rules or norms to discrete and specific facts and parties, rather than the production of a general rule or policy that is usually applicable to a more general class of individuals, interests, or situations. They are usually conducted by a trier of fact largely insulated from political influence, and the parties affected generally do not have a political recourse through which to remedy mistakes or bias.


321 See, e.g., Bunker, supra note 320, at 134-47; Vincent Blasi, The Pathological Perspective and the First Amendment, 85 COLUM. L. REV. 449, 449-50 (1985); see also Olson, supra note 113, at 488-94 (arguing that Blasi’s “pathological perspective” calls for a more consistent courtroom access doctrine).


323 See id.; see also infra note 325 (discussing elected state judges).
However, the types of proceedings subject to the presumption of openness are perhaps best described by reference to the reasons that they should be open. First, we demand fairness, restraint, rationality and impartiality of adjudicative decisions as opposed to legislative or political decisions, as the latter represent the subjective will of the majority as opposed to the ideally-objective application of specified laws or norms to specific evidentiary facts. Public scrutiny of the former helps guarantee the objectivity needed. Second, individualized decision-making poses a special risk of abuse because those affected generally have no opportunity to address mistakes or bias through political channels. Legislative activities, targeted not at individuals but at large groups, offer both incentives and opportunities for political recourse. Public scrutiny is needed to check abuses and mistakes, as no other real check is available.

The documents that are filed in connection with, or that relate to or reflect, the decision-making process in covered proceedings should also be presumptively open, for at least two reasons. First, just as access to a proceeding itself both keeps the proceeding fair and reassures the public of its fairness, access to the documents that relate to or reflect the decision-making process will serve the same purposes. Public scrutiny of the basis, and not just the result, of the process is necessary to evaluate its fairness and integrity. Second, as discussed above, just as access to a transcript or other proceeding record does not substitute for attendance at the proceeding itself, access to the proceeding does not substitute for a transcript of it, or evidence submitted at it. Physical access is necessarily limited to those who can squeeze into the courtroom, but even assuming adequate space, there may be no public representative at a proceeding if, when it is held, the public is unaware of its occurrence or significance.

The proposed test will make access denials rare, as the Court intended. It will offer consistency and clarity, prevent judges from bowing to majoritarian pressures by constraining their discretion and compelling them to follow the non-manipulable law, and prevent the appearance and actuality of outcome-driven analyses. It is flexible enough to allow for the few cases in which closure is genuinely

325 See, e.g., Kitrosser, supra note 319, at 132-42. Judges are elected in some states, and thus, theoretically, political pressure could be brought to bear on judges who make unpopular decisions. However, it is unlikely that where judges bow to majoritarian political pressures and close hearings, as when national security interests are invoked in support of closure, the same majority will force the judge from office.
326 Such documents are generally not available under statutory access schemes. See supra note 129.
327 See supra text accompanying notes 185-88.
necessary. It does not artificially distinguish between documents and proceedings, limiting access to those who happen to be present and able to find space in the courtroom, nor does it treat document access and proceeding access as fungible, when each offers the public information the other does not.

The proposed test will achieve the laudatory goals of access more effectively than both the Court’s current public access doctrine and the alternate tests that other commentators have suggested. Some have proposed a categorical rule that, regardless of the closure interests at stake, access to judicial proceedings may never be denied. While that rule corrects the manipulability of the pre-test and strict scrutiny test, it goes too far. It does not allow for cases in which compelling governmental interests may be served only by closure, such as those involving genuine, non-speculative, and immediate risks to national security or to an ongoing criminal investigation.

Others favor a balancing approach that would weigh pro- against anti-access interests, but such an approach would create the same kind of inconsistent and unpredictable results that the history and function pre-test produces. Moreover, to the extent that the results of such a test are predictable, they are predictably anti-access. As discussed above, access interests are often abstract and cumulative, while access harms tend to be individualized, immediate and concrete. It is hard to imagine that many courts would hold that incremental losses of faith in, and information about, the justice system “outweigh” the harms of denying a particular defendant a fair trial, or violating a given participant’s privacy, or enabling a terrorist attack.

The proposed test does contain an element of uncertainty, since it requires that closures be legitimized on a case-by-case basis. Richmond and progeny allow entire classes of proceedings and documents to be closed from public view if they fail the pre-test. Under the strict scrutiny test, each closure or sealing must be evaluated independently, on a case-by-case basis.

But where the choice is between a predictable but bad result (i.e., categorical closure no matter how weak the closure interests and how compelling the countervailing interests) and a less-predictable but more just result (i.e., presumptive access that can be overcome if closure is

328 Some scholars have suggested a test similar to the one proposed here, but with differences that are more than minor. See, e.g., Olson, supra note 113, at 490-94 (suggesting a strict scrutiny standard that would apply to proceedings but not documents); Kitrosser, supra note 319, at 143-45 (suggesting a “slightly less than strict” scrutiny in which closure could be justified by an important, rather than a compelling, interest).
329 See, e.g., BUNKER, supra note 320, at 140-44.
necessary and narrowly tailored to achieve a sufficiently compelling interest), the latter seems infinitely preferable. While some classes of documents and proceedings are especially sensitive—e.g., search warrant affidavits, certain disciplinary hearings, juvenile dependency and delinquency hearings—not every document and proceeding in each class will be so sensitive, at least not forever. If and while it is, a court may determine that some closure—perhaps partial, perhaps temporary—is necessary. It seems far better to force the court to explain each and every time why closure is necessary than to allow what may be an accident of history to dictate the course of the future.