FIRST AMENDMENT — PUBLIC ACCESS — THIRD CIRCUIT HOLDS THAT FIRST AMENDMENT DOES NOT AFFORD THE PUBLIC A PROTECTED RIGHT OF ACCESS TO POLLING PLACES FOR NEWS-GATHERING PURPOSES. — *PG Publishing Co. v. Aichele*, 705 F.3d 91 (3d Cir.), *cert. denied*, 133 S. Ct. 2771 (2013).

The First Amendment protects the free discussion of government affairs in order to promote an informed electorate who can meaningfully participate in government.[1] To this end, it affords the public a protected right of access to some government proceedings.[2] Recently, in *PG Publishing Co. v. Aichele*,[3] the Third Circuit held that the First Amendment does not afford the public a protected right of access to polling places for news-gathering purposes.[4] The Third Circuit's application of public access doctrine to polling places illustrates the flaws of simply considering whether there is a history of openness in the proceeding. Because it limited the historical inquiry of the doctrine to this question, the *PG Publishing* court did not consider the long history of racial discrimination and disenfranchisement that has accompanied the closed polling process. Courts should consider not only the facts of a proceeding's history but also the normative implications of that history in deciding whether to find a public right of access.

In March 2012, the Pennsylvania state legislature enacted a voter identification law requiring all Pennsylvania voters to present a government-approved photo identification in order to be eligible to vote.[5] The November 6, 2012, election was to be the first time that the state's voter identification law would be enforced,[6] but shortly before the election a state judge suspended the identification requirement, citing concerns about voter disenfranchisement.[7] The November election was still considered a "soft test" of the law because voters would be requested, but not required, to present photo identification in order to vote,[8] and *Pittsburgh Post-Gazette* reporters wished to gain access to polling places to observe firsthand this initial implementation.[9] How-

---

[1] Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 604 (1982).

[2] *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 585–86 (1980) (Brennan, J., concurring in the judgment).

[3] 705 F.3d 91 (3d Cir.), *cert. denied*, 133 S. Ct. 2771 (2013).

[4] *Id.* at 113.

[5] 25 PA. STAT. ANN. § 3050(a) (West 2012); *see also id.* § 2602(z.5) (defining "proof of identification").

[6] First Amended Complaint at ¶ 20, PG Publ'g Co. v. Aichele, 902 F. Supp. 2d 724 (W.D. Pa. 2012) (No. 12-CV-00960-NBF), 2012 WL 3964606.

[7] *See* Applewhite v. Commonwealth, No. 330 M.D.2012, 2012 WL 4497211, at *3 (Pa. Commw. Ct. Oct. 2. 2012).

[8] *PG Publishing*, 705 F.3d at 96 n.5.

[9] *Id.* at 115.

ever, a seventy-five-year-old portion of the Pennsylvania Election Code[10] prohibits all persons, save for voters and designated election officials, from being within ten feet of a polling place during the course of voting.[11] The Allegheny County Election Division interpreted section 3060(d) to prohibit members of the press from entering polling places or even photographing them through a door or window from outside.[12] After failing to reach an agreement with the county, PG Publishing Company, the publisher of the *Post-Gazette*, brought suit in the U.S. District Court for the Western District of Pennsylvania against the Secretary of the Commonwealth, the County Board of Elections, and its division manager,[13] challenging the constitutionality of section 3060(d) on two grounds: First, PG Publishing claimed that section 3060(d) infringed on its First Amendment "right to access and gather news at polling places."[14] Second, PG Publishing claimed that the Commonwealth's selective enforcement and inconsistent application of section 3060(d) violated the Equal Protection Clause of the Fourteenth Amendment.[15]

The district court granted the defendants' motion to dismiss.[16] With respect to the First Amendment claim, the court reasoned that section 3060(d) did not regulate the content of speech within a particular forum; rather it regulated the physical location of individuals with respect to polling places.[17] Proceeding under a content-neutral analysis, the district court held that section 3060(d) did not violate the *Post-Gazette*'s First Amendment rights because the government has a significant interest in protecting voters from intimidation, and "vindication of that interest is sufficient to justify the reasonable, nondiscriminatory restriction created by § 3060(d)."[18] With respect to the equal protection claim, the court held that the unequal enforcement of section 3060(d) merely demonstrated that a statute may be enforced more strictly in some parts of the state than it is in others, which does not amount to a violation of the Equal Protection Clause.[19] Finally, the

---

[10] *Id.* at 110.

[11] 25 PA. STAT. ANN. § 3060(d) (West 2012). The statute defines "polling place" as "the room provided in each election district for voting at a primary or election." *Id.* § 2602(q).

[12] *See* PG Publ'g Co. v. Aichele, 902 F. Supp. 2d 724, 731 (W.D. Pa. 2012).

[13] First Amended Complaint, *supra* note 6, at ¶¶ 4–7.

[14] *Id.* at ¶ 25.

[15] *Id.* at ¶¶ 34–35. This claim was based on the fact that some counties routinely allowed press photography within polling places. Brief of Appellant at 6, *PG Publishing*, 705 F.3d 91 (No. 12-3863), 2012 WL 5231601.

[16] *PG Publishing*, 902 F. Supp. 2d at 730.

[17] *Id.* at 750–51.

[18] *Id.* at 755.

[19] *Id.* at 757–58.

court denied the motions to enter the consent decree that PG Publishing had reached with the County Board of Elections and its director.[20]

The Third Circuit affirmed. Writing for a unanimous panel, Judge Greenaway[21] upheld the district court's grant of the defendants' motion to dismiss.[22] Exercising plenary review of the grant,[23] Judge Greenaway considered PG Publishing's claim that the press enjoys a First Amendment right of access to polling places and that any restriction on this right must be reviewed under strict scrutiny. He acknowledged that the First Amendment does offer some "qualified" protections for certain news-gathering activity,[24] but declined to recognize that the press possesses any special right of access to polling places that extends beyond that of the public.[25] Judge Greenaway was not persuaded by a Sixth Circuit decision holding that an Ohio law that similarly restricted access to polling places violated the press's First Amendment rights.[26] He disagreed with the Sixth Circuit's decision to apply strict scrutiny because the Ohio and Pennsylvania laws limited the right of access to a nonpublic forum for news-gathering, rather than to a public forum for speech, and thus did not warrant strict scrutiny.[27]

Rather than apply strict scrutiny, the court applied the *Richmond Newspapers, Inc. v. Virginia*[28] public access test to determine if the First Amendment presumptively entitles the public, including the *Post-Gazette*, to a First Amendment right of access to polling places.[29] The test is two-pronged: the experience prong asks whether a "place and process have historically been open to the press and general public,"[30] while the logic prong considers "whether public access plays a significant positive role in the functioning of the particular process in question"[31] by weighing the benefits of public access against its risks.[32]

---

[20] *Id.* at 760–62. The court held that the decree, which would have enjoined the enforcement of section 3060(d) against media representatives in the county, was impermissible because the prohibition was constitutional. *Id.* at 760.

[21] Judges Hardiman and Vanaskie joined Judge Greenaway.

[22] *PG Publishing*, 705 F.3d at 95.

[23] *Id.* at 97.

[24] *Id.* at 98 (citing Zemel v. Rusk, 381 U.S. 1, 17 (1965)).

[25] *Id.* at 99.

[26] *See id.* at 112–13 (discussing Beacon Journal Publ'g Co. v. Blackwell, 389 F.3d 683 (6th Cir. 2004)).

[27] *Id.* at 113.

[28] 448 U.S. 555, 584–98 (1980) (Brennan, J., concurring in the judgment).

[29] *PG Publishing*, 705 F.3d at 104.

[30] N. Jersey Media Grp., Inc. v. Ashcroft, 308 F.3d 198, 209 (3d Cir. 2002) (quoting Press-Enter. Co. v. Superior Court, 478 U.S. 1, 8 (1986)).

[31] *PG Publishing*, 705 F.3d at 104 (quoting *Press-Enterprise*, 478 U.S. at 8) (internal quotation marks omitted).

[32] *See id.* at 111.

Both prongs must be satisfied in order to establish a presumptive public right of access.[33] Once a presumptive right is established, courts must apply strict scrutiny to any restriction of that right.[34] Based on the Third Circuit's past application of the *Richmond Newspapers* test to a variety of government proceedings,[35] the court concluded, for the first time, that the test is also applicable to the voting process.[36]

Judge Greenaway considered each prong of the test separately and found neither prong satisfied. With respect to the experience prong, he relied on a historical review that the Supreme Court had conducted of the tradition of openness in the voting process.[37] Voting in the United States began as an open process conducted through a public voice vote, but by the turn of the twentieth century, voting had evolved into a closed-access process with paper ballots, private polling booths, and restrictions on speech around polling places.[38] Judge Greenaway concluded that this historical record "demonstrate[d] a decided and long-standing trend away from openness, toward a closed electoral process" and thus was "insufficient to establish a presumption of openness" in the voting process.[39] Next, he considered the logic prong and weighed the benefits of public access to the voting process against the disadvantages. He concluded that the logic prong's balancing analysis disfavored finding a presumption of openness because the risks of voter intimidation and suppression introduced by public access outweighed its benefits.[40] Given that both prongs of the *Richmond Newspapers* test "militate[d] against finding a right of access,"[41] the court concluded that section 3060(d) did not violate PG Publishing's First Amendment rights because there is no protected First Amendment right of access to polling places for information-gathering purposes.[42]

In applying the experience prong inquiry, courts should consider not only a proceeding's history but also what lessons they can learn from that history. Framing the inquiry in this way would be more

---

[33] *See Press-Enterprise*, 478 U.S. at 9 (explaining that a presumptive right of access is found only if a proceeding passes both "these tests of experience *and* logic" (emphasis added)).

[34] *See* Press-Enter. Co. v. Superior Court, 464 U.S. 501, 510 (1984).

[35] *See PG Publishing*, 705 F.3d at 104–06 ("[O]ur own jurisprudence demonstrates a willingness to apply the test more broadly." *Id.* at 104.).

[36] *Id.* at 106.

[37] *Id.* at 109–110 (citing Burson v. Freeman, 504 U.S. 191, 200–06 (1992)).

[38] *Id.* at 110.

[39] *Id.*

[40] *Id.* at 112.

[41] *Id.*

[42] *Id.* at 113–14. The Third Circuit also held that the nonuniform enforcement of section 3060(d) did not violate the Equal Protection Clause because PG Publishing did not show discriminatory intent. *See id.* at 114–16. Finally, under an abuse of discretion standard of review, the court upheld the district court's refusal to enter the proposed consent decree because the decree would have "violate[d] a valid state law." *Id.* at 117.

faithful to the experience prong as it was originally articulated in *Richmond Newspapers* and would better align the inquiry with how courts consider history in other areas of the law. As courts apply the *Richmond Newspapers* test to an increasingly diverse array of government proceedings, they continue to restrict the experience prong to an inflexible inquiry into whether the proceeding has a sufficient history of openness. While this inquiry was well suited to criminal trials, given their well-established, lengthy history of openness, it does not adapt well to proceedings with more ambiguous histories. A more nuanced experience prong inquiry — one that asks not just *whether* there is a history of openness but also *what lessons* can be learned from that history — would ensure that courts meaningfully consider history as they apply the test to proceedings that look increasingly dissimilar to criminal trials in both substance and history.

An experience prong inquiry that considers not only the existence of a tradition of openness, but also the implications of that tradition, would be more faithful to the *Richmond Newspapers* test as originally articulated. In his concurrence laying out what would become the foundation of the public access doctrine,[43] Justice Brennan argued that the Court must consult the historical record because "a tradition of accessibility implies the favorable judgment of experience."[44] Yet his analysis did not simply defer to the tradition of openness in trials but instead considered whether the tradition was a positive one: after finding a long history of openness in trials, he then considered the normative value of this openness, observing that scholars had "unreservedly acknowledged *and applauded* the public character" of criminal trials.[45] He noted that the Court had previously offered positive appraisals of open criminal trials as "bulwarks of our free and democratic government."[46] His emphasis on the normative value of the history of openness in criminal trials shows that courts should endeavor not just to consult but also to learn from a proceeding's history. Disregarding the history of a proceeding simply because it is a history of closed access would run counter to the care Justice Brennan took to consider the normative value of the proceeding's historical record.

Framing the experience prong inquiry so that it endeavors to learn from history would also be more consistent with the way courts typi-

---

[43] *See* Michael J. Hayes, Note, *What Ever Happened to "The Right to Know"?: Access to Government-Controlled Information Since* Richmond Newspapers, 73 VA. L. REV. 1111, 1117 (1987) ("Of more lasting importance than the Chief Justice's opinion was the concurrence of Justice Brennan, which became the foundation for subsequent decisions in this area.").

[44] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 589 (1980) (Brennan, J., concurring in the judgment).

[45] *Id.* (emphasis added).

[46] *Id.* at 592.

cally conduct historical analysis for the purposes of deciding whether a present right exists. In areas of the law such as substantive due process, where some members of the Supreme Court endeavor to remain faithful to historical traditions, they still make value-laden judgments in determining how to consider history for present purposes.[47] When the law considers history, it does not blindly defer to a practice simply because it is supported by tradition.[48] Rather, in consulting history jurists must also make a "value judgmen[t]" in determining how this history weighs in the determination of a present right.[49] For example, in *Moore v. City of East Cleveland*,[50] Justice Powell argued that the Court's substantive due process determinations should be guided by a "respect for *the teachings* of history."[51] The experience prong inquiry should seek not only the historical fact of past proceedings but also the normative lessons to be learned from this history.

The unnecessarily narrow way in which lower courts formulate the experience prong inquiry likely stems from the doctrine's limited history. The Supreme Court developed the *Richmond Newspapers* test solely in the context of criminal trial proceedings, first announcing the test in a case involving the public right of access to attend criminal trials.[52] The Court affirmed and clarified the doctrine in subsequent cases involving the question of public access to criminal trials involving the testimony of a minor,[53] criminal jury selection proceedings,[54] and the transcript of a pretrial hearing in a criminal case.[55] In all these cases, the Court found there was a presumptive right of access, partially based on the long, unambiguous history of public access to criminal trials.[56] Because in all four cases the Court found a long history of public access, it never had occasion to address the question of how to apply the experience prong inquiry to a proceeding with a history of closed access. Yet there is no indication that the Court intended for history to factor into public access doctrine only when the history of

---

[47] *See* Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63, 94 (2006); Moore v. City of E. Cleveland, 431 U.S. 494, 549 (1977) (White, J., dissenting) (arguing that, in the substantive due process analysis, whether a practice is supported by history and whether it should receive the protections of the Due Process Clause are two separate questions).

[48] Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1087 (1990).

[49] *Id.*

[50] 431 U.S. 494.

[51] *Id.* at 503 (emphasis added) (quoting Griswold v. Connecticut, 381 U.S. 479, 501 (1965) (Harlan, J., concurring)) (internal quotation mark omitted).

[52] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 558 (1980) (plurality opinion).

[53] Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 598 (1982).

[54] Press-Enter. Co. v. Superior Court, 464 U.S. 501, 503 (1984).

[55] Press-Enter. Co. v. Superior Court, 478 U.S. 1, 3 (1986).

[56] *See id.* at 10–11; *Press-Enterprise*, 464 U.S. at 505–08; *Globe Newspaper*, 457 U.S. at 605; *Richmond Newspapers*, 448 U.S. at 564–69 (plurality opinion).

openness is as firmly established as it was in the case of criminal trials. While the Court has applied the *Richmond Newspapers* test only once since 1986,[57] lower courts have actively applied it to a broad array of proceedings, including civil trials,[58] administrative records,[59] deportation hearings,[60] and finally, polling places. As lower courts expand the test far beyond the criminal trial context, it becomes increasingly important that they heed Justice Brennan's example of not simply examining a proceeding's history but also considering the normative value of that history.

If the courts considered the implications of the polling place's history, they might conclude that closed polling places foster invidious practices such as racially discriminatory laws and treatment. As the court in *PG Publishing* noted, there has been a shift toward closed polling places in the United States since the late nineteenth century.[61] Because the Third Circuit effectively stopped its historical analysis at this point in history, however, it did not consider the fact that this shift was accompanied by racially discriminatory laws, despite the Fourteenth and Fifteenth Amendments' guarantee of the right to vote free of racial discrimination.[62] It was not until these racially discriminatory laws received widespread media coverage that Congress was spurred to action,[63] enacting the Voting Rights Act of 1965[64] (VRA), which required federal preclearance of changes in voting laws in those jurisdictions with a history of racially discriminatory voting practices.[65] While the VRA has been successful in reducing the most blatant forms of voter discrimination,[66] more subtle forms per-

---

[57] *See* El Vocero de P.R. v. Puerto Rico, 508 U.S. 147, 149 (1993) (applying the *Richmond Newspapers* test to a special pretrial criminal hearing).

[58] *See* Publicker Indus., Inc. v. Cohen, 733 F.2d 1059 (3d Cir. 1984).

[59] *See* Capital Cities Media, Inc. v. Chester, 797 F.2d 1164 (3d Cir. 1986).

[60] *See* Detroit Free Press v. Ashcroft, 303 F.3d 681 (6th Cir. 2002); N. Jersey Media Grp., Inc. v. Ashcroft, 308 F.3d 198 (3d Cir. 2002). For examples of other proceedings to which courts have applied the test, see *United States v. Miami University*, 294 F.3d 797 (6th Cir. 2002) (student disciplinary records); *Whiteland Woods, L.P. v. Township of West Whiteland*, 193 F.3d 177 (3d Cir. 1999) (town planning meeting); *United States v. Simone*, 14 F.3d 833 (3d Cir. 1994) (post-trial juror examination); and *First Amendment Coalition v. Judicial Inquiry & Review Board*, 784 F.2d 467 (3d Cir. 1986) (judicial disciplinary board hearings).

[61] *See PG Publishing*, 705 F.3d at 110.

[62] Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2633 (2013) (Ginsburg, J., dissenting).

[63] *See* Chandler Davidson, *The Voting Rights Act: A Brief History*, *in* CONTROVERSIES IN MINORITY VOTING 7, 15–17 (Bernard Grofman & Chandler Davidson eds., 1992) (describing how intense press coverage of Dr. Martin Luther King Jr.'s Selma-to-Montgomery march protesting racially discriminatory laws awakened public awareness of these discriminatory practices and spurred Congress to action).

[64] 42 U.S.C. §§ 1973 to 1973bb-1 (2006 & Supp. V 2011).

[65] *Id.*

[66] *See Shelby Cnty.*, 133 S. Ct. at 2634 (Ginsburg, J., dissenting).

sist,[67] which might escape public awareness if the public and press are barred from observing polling places firsthand.

These historical concerns about discrimination still animate the modern debate about voting laws. Many who opposed Pennsylvania's voter identification law argued that it was racially discriminatory because it would have a disparate impact on minority voters[68] and would increase opportunities for discrimination by vesting discretion for its implementation in poll workers.[69] Further, these issues are not limited to Pennsylvania; voting laws all over the country are in a state of flux, increasing opportunities for discrimination.[70]

The court in *PG Publishing* concluded that history dictated that polling places should be closed to public access. Yet this conclusion, which flies in the face of the long history of voting rife with government abuse and misconduct, was reached because the court asked the wrong question. Rather than simply considering the history of openness, courts should consider the normative implications of that history for the question of granting public access. Unless they do so, they risk denying public access to those proceedings that could most benefit from the sunlight effects[71] of public discussion and scrutiny.

---

[67] Antony Page & Michael J. Pitts, *Poll Workers, Election Administration, and the Problem of Implicit Bias*, 15 MICH. J. RACE & L. 1, 33–39 (2009) (describing racially discriminatory impact of implicit bias of poll workers in administering voter identification laws).

[68] *See, e.g.*, Brief of Amici Curiae State Senator Anthony H. Williams and 18 Pennsylvania State Senators in Support of Appellants Applewhite et al. at 13–27, Applewhite v. Commonwealth, 54 A.3d 1 (Pa. 2012) (No. 71 MAP 2012), 2012 WL 8685082; Editorial, *Pennsylvania's Bad Election Law*, N.Y. TIMES, Sept. 13, 2012, at A30, *available at* http://www.nytimes.com/2012/09/13/opinion/pennsylvanias-bad-election-law.html (arguing that almost one-fifth of Philadelphia voters, the majority of whom are African American, may not have an acceptable form of identification under the law).

[69] *See* Rick Hasen, *The Problem of Pollworker Discretion in Implementing PA's Voter ID Law*, ELECTION L. BLOG (July 26, 2012, 3:13 PM), http://electionlawblog.org/?p=37605.

[70] As of October 2013, eight states have passed restrictive voting laws. *Voting Laws Roundup 2013*, BRENNAN CENTER FOR JUST. (Nov. 4, 2013), http://www.brennancenter.org/analysis/election-2013-voting-laws-roundup. In addition, the Supreme Court's recent decision in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), removes a significant barrier to changing voting rules or procedures in the states and counties that were previously covered under the VRA and thus increases the likelihood of restrictive new voting rules in those jurisdictions. *See* Thomas E. Mann & Raffaela L. Wakeman, *Voting Rights After* Shelby County v. Holder, BROOKINGS INSTITUTION (June 25, 2013, 5:00 PM), http://www.brookings.edu/blogs/up-front/posts/2013/06/25-supreme-court-voting-rights-act-mann wakeman.

[71] *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 305 (1964) (Goldberg, J., concurring in the result).