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Constitutional Law - First Amendment - Public Does Not Have Absolute Right of Access to Government Agency Information

Richard W. Riley

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The United States Supreme Court has decided that the first\(^1\) and fourteenth\(^2\) amendments to the Constitution guarantee the public and the press a right of access to criminal trials.\(^3\) This constitutional right of access was reinforced when the Court extended first amendment public access to trials involving minor victims of sexual offenses,\(^4\) to \textit{voir dire}

\(^1\) U.S. Const. amend. I. The first amendment provides in pertinent part that “Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .” Id. The first amendment does not expressly guarantee or preclude a right of access to information with respect to the public or press. See id.

\(^2\) Id. amend. XIV. The fourteenth amendment provides in pertinent part: No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

\(^3\) Richmond Newspapers Inc. v. Virginia, 448 U.S. 555 (1980). In Richmond Newspapers, the criminal defendant requested that his fourth trial for murder be closed to the public to prevent the possibility of another mistrial. Id. at 559. The prosecution left the motion for closure to the discretion of the court. Id. at 560. Relying on a state statute giving the court discretionary power to exclude persons whose presence might impair a fair trial, the trial judge ordered closure. Id. Richmond Newspapers’ motion to vacate the closure order was unsuccessful. Id. at 560-61. The newspaper appealed, but the Virginia Supreme Court dismissed the newspaper’s mandamus and prohibition petition and denied its petition for appeal. Id. at 562. After granting certiorari, the United States Supreme Court held that the first and fourteenth amendment guaranteed the public a right of access to criminal trials which could only be denied by an overriding interest in closure. Id. at 580-81. Without defining the circumstances that would constitute an overriding interest, the Supreme Court suggested various alternatives to closure. Id. at 581. For example, the Court believed that sequestering the jurors would guard against their receiving any improper information. Id. The Court recognized that these alternatives would be difficult for trial courts to carry out, but not unmanageable. Id. The Supreme Court reversed the trial court because the trial court had made no findings of an overriding interest. Id.

\(^4\) Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982). In \\textit{Globe Newspaper}, the Court reiterated its belief that the first amendment right of access to criminal trials is not absolute. Id. at 606 (citing Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 581 n.18 (1980); Nebraska Press Ass’n v. Stuart, 427 U.S. (789)
proceedings\textsuperscript{5} and to preliminary hearings.\textsuperscript{6} In the cases involving access to court proceedings, the Supreme Court has been influenced by the history of open trials and the positive role of public access in the fairness of the trial.\textsuperscript{7} In \textit{Capital Cities Media, Inc. v. Chester},\textsuperscript{8} the United States Court of Appeals for the Third Circuit recently had the opportunity to extend the first amendment right of access to government-held documents.\textsuperscript{9} Instead, the Third Circuit refused to extend the constitu-

\textsuperscript{5}39, 570 (1976)). While the Court found the interest in protecting minor victims of sexual offenses from further psychological distress to be compelling, it nonetheless found that such a compelling interest did not justify mandatory closure since the interest could be protected on a case-by-case determination of whether closure is necessary. \textit{Id.} at 607-08. Because the Virginia closure statute was not narrowly tailored to protect the state's compelling interest, the Court found the statute unconstitutional. \textit{Id.} at 609-11.

5. \textit{Press-Enterprise Co. v. Superior Court}, 464 U.S. 501 (1984) (\textit{Press Enterprise I}). \textit{Press Enterprise I} involved the right of access to \textit{voir dire} proceedings of a trial for the rape and murder of a teenage girl. \textit{Id.} at 505. Although petitioner, \textit{Press-Enterprise Co.}, moved for access to the entire \textit{voir dire} transcript, the trial court granted access only to the "general \textit{voir dire}" which consisted of three days out of six weeks. \textit{Id.} Additionally, the trial court refused to give the petitioner access to the transcripts of the \textit{voir dire}, thereby agreeing with the parties that the transcripts contained statements by the jurors "that do not appear to be appropriate for public discussion." \textit{Id.} at 503-04. The court of appeals denied petitioner's request for a writ of mandamus for the release of the transcripts and to vacate the closure order. \textit{Id.} at 504-05. Additionally, petitioner's request for a hearing by the California Supreme Court was also denied. \textit{Id.} at 505. The United States Supreme Court found that closed proceedings were only appropriate when "based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." \textit{Id.} at 510. Finding that the trial court failed to consider alternatives to closure of the \textit{voir dire} and that the order to close the transcripts was too sweeping, the court vacated the judgment and remanded the case. \textit{Id.} at 513.

6. \textit{Press-Enterprise Co. v. Superior Court}, 106 S. Ct. 2735 (1986) (\textit{Press-Enterprise II}). The issue in \textit{Press Enterprise II} concerned the right to access to preliminary hearings in a criminal trial. \textit{Id.} at 2738. The petitioner, \textit{Press-Enterprise Co.}, sought and was denied access to the transcripts of the preliminary hearings on the complaint in a case involving the alleged murder of 12 patients by a nurse. \textit{Id.} After the defendant nurse waived his right to a jury trial, the trial court released the transcripts because there was no longer the threat of a biased jury. \textit{Id.} at 2739. Nevertheless, the Supreme Court considered the case and concluded that "[t]he considerations that led the Court to apply the First Amendment right of access to criminal trials . . . and the selection of jurors . . . lead . . . to . . . [the conclusion] that the right of access applies to preliminary hearings as conducted in California." \textit{Id.} at 2741.

7. See, e.g., \textit{id.} at 2740 ("In . . . [cases regarding access to trials] the Court has traditionally considered whether public access plays a significant positive role . . . "); \textit{Richmond Newspapers, Inc. v. Virginia}, 448 U.S. 555, 564 (1980) (history of criminal trial is instructive because "throughout its evolution, the trial has been open to all who cared to observe"). For a discussion of the Court's consideration of history and the role of the public, see \textit{infra} notes 99-118 and accompanying text.

8. 797 F.2d 1164 (3d Cir. 1986).

tional right of access to such documents, reasoning that access decisions are best left to the legislature.\textsuperscript{10}

In \textit{Capital Cities}, a major northeast Pennsylvania supplier of drinking water, Pennsylvania Gas & Water Company, restricted the water use of 250,000 customers in Wilkes-Barre, Pennsylvania, after an outbreak of giardiasis, an intestinal illness caused by the contamination of drinking water by giardia cysts.\textsuperscript{11} Following the giardiasis outbreak, a Wilkes-Barre newspaper, the \textit{Times Leader},\textsuperscript{12} began an in-depth investigation into the cause of the contamination and the possible culpability of the Pennsylvania Department of Environmental Resources (D.E.R.).\textsuperscript{13} During the course of the investigation, the \textit{Times Leader} published articles\textsuperscript{14} implying that the D.E.R. selectively enforced environmental laws, particularly those regarding sewage discharges in Roaring Brook and Spring Brook Townships, the two townships which were the most likely sources of giardia cyst contamination in the Pennsylvania Gas and Water Company watershed.\textsuperscript{15}

In order to facilitate its investigation, the \textit{Times Leader} sought access to documents and records respecting the activities of the D.E.R. in the

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For a further discussion of the facts of \textit{Capital Cities}, see \textit{infra} notes 11-27 and accompanying text.

\textsuperscript{10} \textit{Capital Cities}, 797 F.2d at 1167. The Third Circuit found that "affirmative rights of access to government-held information . . . depend upon political decisions made by the people and their elected representatives." \textit{Id.} For a discussion of the Third Circuit's holding and the reasoning supporting its holding, see \textit{infra} notes 79-84 and accompanying text.

\textsuperscript{11} \textit{Capital Cities}, 797 F.2d at 1165. As a result of the contamination by giardia cysts, over four hundred persons contracted giardiasis. \textit{Id.} The Pennsylvania Department of Environmental Resources (D.E.R.) and the Pennsylvania Department of Health made public announcements about the contamination and placed customers on water use restrictions. \textit{Id.} at 1179 (Gibbons, J., dissenting).

\textsuperscript{12} \textit{Id.} at 1165. The \textit{Times Leader} is a Wilkes-Barre, Pennsylvania newspaper published by Capital Cities Media, Inc. \textit{Id.}

\textsuperscript{13} \textit{Id.} The \textit{Times Leader} extensively examined the job performance of the D.E.R. and its officials because the D.E.R. was responsible for enforcing federal and state environmental laws respecting water quality. \textit{Id.} at 1179 (Gibbons, J., dissenting).

\textsuperscript{14} \textit{Id.} at 1165. The \textit{Times Leader} published approximately 400 news articles and opinion pieces dealing with the disease and investigation. \textit{Id.} Approximately one-fifth of the articles focused on the D.E.R. and the individual defendants. \textit{Id.} The individual defendants were officials of the Northeast Region of the D.E.R., namely, the Regional Director, the Community Relations Coordinator, and the Secretary. \textit{Id.} at 1164.

\textsuperscript{15} \textit{Id.} at 1165-66. Articles and opinions pieces concerning the D.E.R. questioned "whether political influence or other improper considerations led D.E.R. selectively to enforce its environmental mandate." \textit{Id.} at 1165. Because Roaring Brook Township and Spring Brook Township were "identified by [the] D.E.R. as the most likely sources of the giardia cyst contamination," the \textit{Times Leader} articles focused on the D.E.R.'s enforcement strategy in these townships. \textit{Id.} at 1165-66.
contaminated communities. The D.E.R. allowed the Times Leader to inspect a substantial number of documents at the D.E.R.'s Northeast Regional offices but certain other documents were withheld. To justify withholding these documents, the D.E.R. cited the statewide department policy preventing inspection of interoffice memorandum, documents relating to attorney/client relationships and citizen complaints. The D.E.R., however, was not able to find a copy of the statewide policy. An assistant counsel for D.E.R., moreover, informed the Times Leader that there was no formal policy on public access to information and that each regional D.E.R. office could implement its own standards. The D.E.R. furnished the Times Leader with a copy of its "Public Information General Policy and Guidelines" which allow public access to departmental records and documents with a few exceptions. Consistent with Pennsylvania statutory laws, the D.E.R. Guidelines do not require the agency to give access to non-public records. The D.E.R. thus believed

16. Id. at 1166. The Times Leader submitted a written request to the D.E.R. for access to documents, including: 1) records identifying the 80 to 85 known sewage violators in Spring Brook Township; 2) records showing dates of surveys made to identify the sewage violators; 3) correspondence between the D.E.R. and Spring Brook Township officials during the past 10 years; 4) permits issued and correspondence concerning the sewage problems in Roaring Brook Estates; 5) permits issued and correspondence concerning the sewage problems in Elmbrook Development; 6) correspondence between the D.E.R. and Roaring Brook Township officials during the past 10 years. Id.

17. Id. The documents withheld included 1) reports of citizen complaints; 2) letters to or received from the D.E.R.'s legal counsel; 3) technical personnel memoranda that discussed enforcement strategy and options; and 4) technical personnel memoranda that discussed the result of the D.E.R.'s investigations of the contamination. Id.

18. Id. In a letter from Mark R. Carmon, Community Relations Coordinator for the D.E.R., to the Times Leader, Mr. Carmon stated: "Department policy statewide allows for review of all files at Regional Offices and in Harrisburg with the following exceptions: 1) Interoffice memorandum; 2) Documents relating to attorney/client relationship; and 3) Citizen complaints." Id. at 1179-80 (Gibbons, J., dissenting).

19. Id. at 1166.

20. Id. The Times Leader requested a copy of the D.E.R.'s statewide policy on withholding documents but an assistant counsel for the D.E.R. later informed the newspaper that there was no formal statewide policy. Id. Additionally, the assistant counsel told the paper that each regional office could decide what information would be disclosed or withheld. Id.

21. Id. The D.E.R.'s "Public Information General Policy and Guidelines" states that "[a]ll citizens shall be provided access to [d]epartmental records and documents," with exceptions consistent with Pennsylvania's definition of "public record." Id. For the definition of "public record," under Pennsylvania law, see infra note 22.

22. Capital Cities, 797 F.2d at 1166. The D.E.R.'s "Public Information General Policy and Guidelines" cross references to PA. STAT. ANN. tit. § 66.1(2) for the definition of non-public records. Id. at 1180 (Gibbons, J., dissenting). The Pennsylvania statute provides in pertinent part:

The term "public records" shall not mean any report, communication or other paper, the publication of which would disclose the institution,
that Pennsylvania law granted it discretionary power to withhold the information requested by the Times Leader.23

The Times Leader brought an action in the United States District Court for the Middle District of Pennsylvania contending that the first and fourteenth amendments gave it a constitutional right of access to the withheld information.24 The Times Leader further contended that the D.E.R.’s arbitrary policy regarding disclosure of information deprived the newspaper of the equal protection of the law as guaranteed by the fourteenth amendment.25 The district court dismissed the complaint for failure to state a claim under the first amendment and equal protection clause.26 The Third Circuit, sitting en banc, affirmed the district court.

progress or result of an investigation undertaken by an agency in the performance of its official duties, . . . it shall not include any record, document, material, exhibit, pleading, report, memorandum or other paper, access to or the publication of which is prohibited, restricted or forbidden by statute law or order or decree of court, or which would operate to the prejudice or impairment of a person’s reputation or personal security, or which would result in the loss by the Commonwealth or any of its political subdivisions . . . of Federal funds, excepting therefrom however the record of any conviction of a criminal act.” PA. STAT. ANN. tit. 65, § 66.1(2) (Purdon Supp. 1986).

23. Capital Cities, 797 F.2d at 1180 (Gibbons, J., dissenting). Judge Gibbons believed that by the D.E.R.’s interpretation of the statute, the fact that a document is not designated a public record [by PA. STAT. ANN. tit. 65, § 66.1(2)] does not prevent its disclosure,23 but leaves that decision to the discretion of the agency official. Id. For a further discussion of Judge Gibbons’ dissent, see infra notes 65-81 and accompanying text.

24. Capital Cities, 787 F.2d at 1165-67. The Times Leader argued that the first amendment, as applied to the states through the fourteenth amendment, requires agency officials to allow public access to its agency’s investigative information or to set forth a compelling state interest to support its denial of access. Id. at 1166-67. The Times Leader contended that this right of access is necessary to have an informed electorate and to keep the government accountable to that electorate. Id.

25. Id. at 1165. The Times Leader’s equal protection argument was based on its allegations that the D.E.R. had allowed some individuals access to information while it denied access to the Times Leader in violation of the equal protection clause of the fourteenth amendment. Id. at 1176. For the relevant text of the fourteenth amendment, see supra note 2.

26. Capital Cities, 797 F.2d at 1165. The district court further held that it was prohibited from considering the state law basis for the Times Leader’s claim of access to the records because of the Supreme Court’s interpretation of the eleventh amendment in Pennhurst State School and Hospital v. Halderman, 465 U.S. 89 (1984). Id. The eleventh amendment provides: “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. CONST. amend. XI. In Pennhurst, the Supreme Court held that the eleventh amendment does not permit a federal court to consider state-law claims brought into federal court under pendent jurisdiction. Pennhurst State School, 465 U.S. at 121. Applying the Supreme Court’s interpretation of the eleventh amendment to this case, the district court, therefore, could not consider the Times Leader’s state law claims. Capital Cities, 797 F.2d at 1165. On appeal, the Third Circuit affirmed the district court on this issue. Id. at 1176-77.
court’s dismissal of the *Times Leader*’s first amendment right of access claim, and reversed and remanded the district court’s dismissal of the equal protection claim.27

Judge Stapleton, writing for the majority,28 began his constitutional analysis by recognizing the value of an informed electorate in a democracy.29 The court realized, however, that an informed electorate does not necessitate that citizens be provided with access to all government information.30 The Third Circuit stated that while the ideal of an informed electorate is promoted by the first amendment’s prohibition of government interference with the flow of information to the public,31 an affirmative right of access to government-held information should be determined by a legislature elected by the people.32 As a basis for this conclusion, the court first found that it strained the text of the first amendment to interpret the explicit preclusion of government interference as giving each citizen a presumptive right of access to all government-held information.33 Secondly, the court reasoned that history

27. *Id.* at 1177. This casebrief will deal exclusively with the *Times Leader*’s first amendment right of access claim. To summarize only briefly, the district court dismissed the *Times Leader*’s equal protection claim because its complaint failed to identify the group receiving unfair treatment or to identify the particular information sought by those groups. *Id.* at 1176. On appeal, the Third Circuit held that the *Times Leader* had pleaded an equal protection claim. *Id.* The Third Circuit read the *Times Leader*’s complaint as claiming that the D.E.R. discriminated between newsseekers by giving access to friendly newsseekers and denying access to unfriendly ones. *Id.* Judge Garth, dissenting from the majority opinion, believed that the *Times Leader*’s complaint was insufficient as an equal protection claim because it did not specifically allege selectivity by the D.E.R. *Id.* at 1193 (Garth, J., dissenting).

28. *Id.* at 1165-77. Judge Stapleton was joined in his opinion by Chief Judge Aldisert, and Judges Seitz, Hunter, Weis and Becker. Judge Adams authored a concurring opinion. See *id.* at 1177-78 (Adams, J., concurring). Judge Gibbons dissented in a separate opinion in which Judges Higginbotham, Sloviter and Mansmann joined. See *id.* at 1178-92 (Gibbons, J., dissenting). Judge Garth also dissented in a separate opinion. *Id.* at 1192-95. (Garth, J., dissenting).

29. *Id.* at 1167. Judge Stapleton stated that the “core purpose of the free speech and press clause is to promote the circulation of information and ideas necessary to make government by the people a workable reality.” *Id.*

30. *Id.* The court found it was not necessary, desirable or even possible to provide citizens with access to all government information. *Id.* Therefore, the court believed that the issues to be resolved included which government information must be made available to the public and what criteria should be used to determine which information to make available. *Id.*

31. *Id.*

32. *Id.* For a discussion of the court’s reasoning, see *infra* notes 79-84 and accompanying text.

33. *Capital Cities*, 797 F.2d at 1168. The court believed that the first amendment explicitly precludes the government from: 1) interfering with or punishing anyone who is attempting to speak or publish; 2) interfering “with one reading or hearing that which someone else wishes to communicate”; 3) interfering with the flow of information at a prepublication stage; 4) interfering “with those seeking information to communicate to others”; and 5) interfering “with the flow of information through the closure of governmental proceedings that historically
indicates that the founders of our country left decisions concerning disclosure of government information to the democratic process. The court found that even those participants in the Constitutional Convention and state assemblies on ratification of the Constitution who believed that constitutional provisions concerning an informed public were inadequate conceded that the legislature has always had discretionary power to conceal certain important transactions. The court noted that history further revealed that the legislative and executive branches had a tradition of controlling access to information through the political process.

The court recognized that "[t]he concern for an informed public led to the adoption of a number of constitutional provisions." These provisions are: 1) Article I, Section 9 which provides in part that "a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time"; 2) Article II, Section 3 which provides in part that the President "shall from time to time give to the Congress Information of the State of the Union"; 3) Article I, Section 5 which provides in part that "[e]ach House shall keep a Journal of its Proceedings and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy"; and 4) the first amendment's preclusion of government interference with speech and press.

Denouncing the ambiguity of the publication clause, Patrick Henry, at the Virginia Ratification Convention, stated:

Give us at least a plausible apology why Congress should keep their proceedings in secret. They have the power of keeping them secret as long as they please (in article I, section 2, clause 3), for the provision for a periodical publication is too inexplicit and ambiguous to avail any thing. The expression from time to time, as I have more than once observed, admits of any extension. They may carry on the most wicked and pernicious of schemes under the dark veil of secrecy. The liberties of a people never were, nor ever will be, secure, when the transactions of their rulers may be concealed from them. The most iniquitous plots may be carried on against their liberty and happiness.

However, the Third Circuit noted that despite his criticism of the publication clause, Henry had conceded that not all transactions should be disclosed, such as those related to "military operations or affairs of great consequence... till the end which required their secrecy should have been effected." The court weighed the actions of the First Congress heavily in light of the Supreme Court's recent observation that "the First Congress was a Congress whose constitutional decisions have always been regarded, as they should be regarded, as of the greatest weight in the inter-
The Third Circuit then proceeded to review the Supreme Court decisions which have considered a first amendment right to government-held information.37 The court began by emphasizing the precedential value of *Houchins v. HQED, Inc.*38 in which the United States Supreme Court rejected the idea of a first amendment right of public access to all information held by the government.39 Because the Constitution affords no guidelines for standards governing disclosure or access to information, the Supreme Court in *Houchins* was concerned that judges would be forced to fashion ad hoc standards.40 Relying on *Houchins*, the

...
Third Circuit rejected the Times Leader's suggestion of invoking a "compelling state interest" analysis because it would necessarily "involve standardless decisionmaking."\(^{41}\)

Next, the Third Circuit considered the Supreme Court cases relied upon by the Times Leader, Richmond Newspapers, Inc. v. Virginia,\(^ {42}\) Globe Newspaper Co. v. Superior Court,\(^ {43}\) and Press-Enterprise Co. v. Superior Court,\(^ {44}\) in which the Court recognized a first amendment right of access to certain judicial proceedings.\(^ {45}\) Although the Third Circuit did not believe that these cases "expressly or impliedly overrule[d] Houchins,"\(^ {46}\) the court recognized that the cases do advance a two-tier analysis for determining ideas of what seems "desirable" or "expedient." We, therefore, reject the Court of Appeals' conclusory assertion that the public and the media have a First Amendment right to government information regarding the conditions of jails and their inmates and presumably all other public facilities such as hospitals and mental institutions.

\(^{41}\) *Capital Cities*, 797 F.2d at 1172. The Third Circuit found that a compelling state interest analysis does not eliminate the problem of the lack of discernible constitutional standards as identified in Houchins. \(^{1}\) The court believed that balancing the individual's right of access against a competing state interest would involve standardless decisionmaking when valuing the state's interest in secrecy. \(^{Id.}\) The court noted:

As one commentator has pointed out, while the need for military secrecy in time of war may be obvious, how can a court meaningfully value "the less obvious, less dramatic consequences of disclosure of any one of millions of documents that are the stuff of governing and of international relations?"

\(^{Id.}\) (quoting Henkin, *The Right to Know And the Duty to Withhold: The Case of the Pentagon Papers*, 120 U. Pa. L. Rev. 271, 278-79 (1971)).

\(^{42}\) 448 U.S. 555 (1980). For a discussion of Richmond Newspapers, see supra note 3 and accompanying text.

\(^{43}\) 457 U.S. 596 (1982). For a discussion of Globe Newspaper, see supra note 4 and accompanying text.


\(^{46}\) *Capital Cities*, 797 F.2d at 1173. The court stated:

While these cases clearly represent a significant development, they do not expressly or impliedly overrule Houchins. These cases hold no more than that the government may not close government proceedings which historically have been open unless public access contributes nothing of significant value to that process or unless there is a compelling state interest in closure and a carefully tailored resolution of the conflict between that interest and First Amendment concerns.

\(^{Id.}\) For a discussion of Houchins, see supra notes 36-39 and accompanying text.
mining whether there is a first amendment right of access to various aspects of judicial proceedings. Specifically, the Third Circuit noted that under Richmond Newspapers and its progeny, in cases dealing with an asserted first amendment right of access, a court should first evaluate whether the place or process has historically been open to the press and general public. Cases involving access to judicial proceedings show that a tradition of open trials dating back to colonial times gives rise to a presumption of openness regarding judicial proceedings. The second consideration is "whether public access plays a significant positive role in the functioning of the particular process in question . . . ." When both "tests of experience and logic" are satisfied, a first amendment right of access is upheld unless that right is overridden by a compelling state interest in closing the proceedings.

Finally, the Third Circuit applied the two-tier analysis to the facts of the case before it. Conceding that the second tier was satisfied, the

47. Capital Cities, 797 F.2d at 1173. The Third Circuit recognized that each of the three cases applied the same two-tier analysis which is currently espoused by a majority of the court. Id. This analysis provides that "resolution of First Amendment public access claims in individual cases must be strongly influenced by the weight of historical practice and by an assessment of the specific structural value of public access in the circumstances." Id. (quoting Richmond Newspapers Inc. v. Virginia, 448 U.S. 555, 597-98 (1980) (Brennan, J., concurring)). The two-tier analysis originated as two "helpful principles" in Justice Brennan's concurrence in Richmond Newspapers v. Virginia. See Richmond Newspapers Inc. v. Virginia, 448 U.S. 555, 588-89 (1980) (Brennan, J., concurring). For a further discussion of the two-tier analysis, see infra notes 48-54 and accompanying text.

48. Capital Cities, 797 F.2d at 1174. The court recognized that "tradition of accessibility implies the favorable judgment of experience." Id. (quoting Press-Enterprise Co. v. Superior Court, 106 S. Ct. 2735, 2740 (1986)).

49. Id. The Third Circuit believed that a tradition of access played a crucial role in Supreme Court precedent. See, e.g., Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 508 (1984) (Press Enterprise I) (presumption of open trials as important today as has been for centuries); Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 605 (1982) (since time organic laws were adopted presumption of openness of criminal trials has remained secure); Richmond Newspapers Inc. v. Virginia, 448 U.S. 555, 569 (1980) (historic evidence of time when our organic laws were adopted demonstrates that criminal trials had long been presumptively open).

50. Capital Cities, 797 F.2d at 1174 (quoting Press-Enterprise II, 106 S. Ct. at 2740). This requirement has the effect of avoiding access to government operations that function best in secret, such as the grand jury system. Press-Enterprise II, 106 S. Ct. at 2741.

51. Capital Cities, 797 F.2d at 1173 (quoting Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606 (1982)). The Third Circuit stated that if there is a compelling state interest in closure, resolution of the conflict between the state interest and first amendment concerns must be carefully tailored. Id.

52. Id. at 1174-76. Although not certain, the Third Circuit assumed that the Supreme Court would apply its two-tier analysis of access to judicial proceedings to the question of access to executive agency records. Based on this assumption, the Third Circuit applied the analysis to the facts of the case. Id. at 1174.
Third Circuit stated that the *Times Leader* did not satisfy the first historic tier of the analysis because it neither pleaded nor offered to prove the existence of a tradition of public access to administrative records. The Third Circuit indicated that the evidence offered by the *Times Leader*—a Pennsylvania statute ordering disclosure of public documents and evidence of the D.E.R.'s practice respecting access “refer[red] solely to present, not historic practice.”

Judge Adams, in a concurring opinion, also concluded that the *Times Leader*’s evidence offered in support of a tradition of access was “far too recent and far too narrow to bear the weight assigned to it.”

53. *Id.* at 1174-75. The court conceded that the structural value requirement of the access analysis was satisfied by the *Times Leader*’s allegations that public access was necessary to evaluate the D.E.R.’s job performance in protecting the environment in Northeast Pennsylvania. *Id.* The court was required to assume that the *Times Leader* would be able to prove the facts which it alleged since the case was before the Third Circuit on appeal from an order denying the newspaper’s motion for a preliminary injunction and dismissal of its complaint. *Id.* at 1165.

54. *Id.* at 1175. Because the *Times Leader* failed to allege a tradition of public access, the Third Circuit concluded that the district court’s dismissal of the paper’s amended complaint must be sustained. *Id.*


56. *Capital Cities*, 797 F.2d at 1175. The *Times Leader* filed an affidavit, indicating that the D.E.R. was inconsistent in its disclosure of non-public documents and that some non-public documents had been provided to the paper for inspection. *Id.*

57. *Id.* at 1175 (emphasis in original). Because the Supreme Court’s analysis of historic practice in judicial proceeding access cases dated back to colonial times and beyond, the Third Circuit seemed to indicate that post-colonial history is not relevant to the tradition of access analysis. *Id.* at 1175 n.27. The Third Circuit stated that in the Supreme Court’s view, historic analysis is valuable for “what is revealed about the intentions of the Framers and Ratifiers of the First Amendment.” *Id.* (quoting Press-Enterprise Company v. Superior Court, 106 S. Ct. at 2748 (Stevens, J., dissenting)).

58. *Id.* at 1177-78 (Adams, J., concurring).

59. *Id.* at 1178 (Adams, J., concurring). Judge Adams believed that the *Times Leader* could not demonstrate a tradition of openness. *Id.* Judge Adams rejected the historical showing offered by Judge Gibbons in his dissent which included the following:

- A Pennsylvania statute, enacted in 1957, which mandates that members of the public shall have access to agency records, with the exception of certain types of documents, such as agency investigative reports and materials subject to attorney-client privilege; and
- Pennsylvania law permits the disclosure of all of the documents sought by the plaintiffs, with the arguable exception of materials covered by attorney-client privilege.

*Id.* (Adams, J., concurring) (emphasis in original). Compared to the historic practices dating back to colonial times examined in judicial proceeding access cases, Judge Adams believed that the *Times Leader*’s evidence was too recent and narrow. *Id.* (Adams, J., concurring).
Distinguishing this case from his dissent in First Amendment Coalition v. Judicial Inquiry and Review Board, Judge Adams asserted the relevant historical inquiry required consideration not only of the D.E.R.'s prior practice, but also of access to administrative records in general. While emphasizing the importance of history to a claim of access, Judge Adams recognized that in certain circumstances, access to government proceedings might be so essential to democracy that it would be mandated without a demonstration of a tradition of access. However, because Capital Cities was not such a case, and a tradition of access had not been demonstrated, Judge Adams agreed with the majority's conclusion that a right of access to the D.E.R.'s records was not warranted under the first amendment.

Judge Gibbons wrote a lengthy dissent to the majority opinion. After a detailed recitation of the facts of the case, Judge Gibbons believed a tradition of access was satisfied. In Capital Cities, 797 F.2d at 1177 (Adams, J., concurring), Judge Adams referred to the majority opinion in which Judge Stapleton noted that the relevant historic practice was not specifically that of the D.E.R., but rather the practice of access to the type of administrative records in dispute. In First Amendment Coalition, the Third Circuit found that neither the press nor the public have a right of access to proceedings of Pennsylvania's Judicial Inquiry and Review Board before formal charges have been pressed because the judicial disciplinary process lacks a tradition of openness. Id. at 472. Judge Adams, dissenting from the majority opinion, believed that the historic inquiry required consideration of impeachment proceedings which are analogous to the modern-day judicial disciplinary process. Id. at 481 (Adams, J., concurring in part and dissenting in part). When impeachment proceedings are included in the historic analysis, Judge Adams believed the tradition of access tier was satisfied. Id. at 485 (Adams, J., concurring in part and dissenting in part).

Id. at 1177 (Adams, J., concurring). Judge Adams stated: "As Justice Brennan has written, a prior history of openness has been viewed as significant not only 'because the Constitution carries the gloss of history' but also because 'a tradition of accessibility implies the favorable judgment of experience.'" Id. (Adams, J., concurring) (quoting Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 605 (1982) (quoting Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 589 (1980) (Brennan, J., concurring))).

Id. at 1177 (Adams, J., concurring). Judge Adams stated: One could envision a special case, perhaps, where access to governmental proceedings might be deemed so significant to a democratic government that the First Amendment would mandate access even without a showing of a tradition of openness. This, however, is not such a case. And under the analysis set forth in the Supreme Court's First Amendment jurisprudence, a showing of historical access appears essential in the usual situation.

Id. (Adams, J., concurring).

Id. at 1177-78. For discussion of Judge Adams' belief that a showing of tradition of access was not made, see supra note 57 and accompanying text.

60. 784 F.2d 467, 481-90 (3d Cir. 1986) (Adams, J., concurring in part and dissenting in part). In First Amendment Coalition, the Third Circuit found that neither the press nor the public have a right of access to proceedings of Pennsylvania's Judicial Inquiry and Review Board before formal charges have been pressed because the judicial disciplinary process lacks a tradition of openness. Id. at 472. Judge Adams, dissenting from the majority opinion, believed that the historic inquiry required consideration of impeachment proceedings which are analogous to the modern-day judicial disciplinary process. Id. at 481 (Adams, J., concurring in part and dissenting in part). When impeachment proceedings are included in the historic analysis, Judge Adams believed the tradition of access tier was satisfied. Id. at 485 (Adams, J., concurring in part and dissenting in part).

61. Capital Cities, 797 F.2d at 1177 (Adams, J., concurring). Judge Adams referred to the majority opinion in which Judge Stapleton noted that the relevant historic practice was not specifically that of the D.E.R., but rather the practice of access to the type of administrative records in dispute. Id. at 1177, 1178 (Adams, J., concurring) (emphasis added).

62. Id. at 1177 (Adams, J., concurring). Judge Adams stated: "As Justice Brennan has written, a prior history of openness has been viewed as significant not only 'because the Constitution carries the gloss of history' but also because 'a tradition of accessibility implies the favorable judgment of experience.'" Id. (Adams, J., concurring) (quoting Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 605 (1982) (quoting Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 589 (1980) (Brennan, J., concurring))).

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64. Id. at 1177-78. For discussion of Judge Adams' belief that a showing of tradition of access was not made, see supra note 57 and accompanying text.

65. Capital Cities, 797 F.2d at 1178-92 (Gibbons, J., dissenting). Judge Higginbotham, Sloviter and Mansmann joined in Judge Gibbons' dissent. Id. at 1178 (Gibbons, J., dissenting).

66. Id. at 1179-82 (Gibbons, J., dissenting).
gan an analysis of the first amendment access involved in *Capital Cities*. 67

First, Judge Gibbons reviewed the purposes of the first amendment speech-press clause. 68 He found that the most widely accepted purpose of the speech-press clause is "its value in serving as a restraint upon the abuse of power by public officials." 69 Judge Gibbons then examined the majority's rejection of this "checking value" 70 of the speech-press clause, 71 criticizing the majority's interpretation of the speech-press clause 72 and the historical justification for its rejection of the checking value of the clause. 73

67. *Id.* at 1181-82 (Gibbons, J., dissenting). Judge Gibbons began by noting that the following issues were not presented by the *Capital Cities* case: 1) whether the first amendment applies to the commonwealth; 2) whether the *Times Leader* was entitled to right of access superior to that of the general public; 3) whether reasonable time, place and manner restrictions upon access to information were present; 4) whether certain types of government information must be withheld; and 5) whether the executive branch official had attempted to make a showing of a legitimate governmental interest which is protected by nondisclosure. *Id.* at 1182 (Gibbons, J., dissenting).

68. *Id.* at 1183-86 (Gibbons, J., dissenting). Judge Gibbons gave examples of purposes advanced for the speech-press clause: 1) freedom of expression is essential to individual autonomy; 2) speech-press clause assures competition in the marketplace of ideas; and 3) speech-press clause is essential to the fundamental constitutional principle of self-government. *Id.* at 1183 (Gibbons, J., dissenting).

69. *Id.* at 1184 (Gibbons, J., dissenting). James Madison, the author of the speech-press clause was the first to justify the clause as a restraint on the abuse of government power by government officials. *Id.* at 1183, 1184 (Gibbons, J., dissenting). Judge Gibbons found that Justice Brennan had relied on Madison's "checking value" of the speech-press clause in the landmark first amendment case, *New York Times Co. v. Sullivan*. *Id.* at 1184 (Gibbons, J., dissenting) (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 273-76 (1964)). Judge Gibbons further found that Madison's "checking value" and the self-government principle were relevant whenever the government attempts to withhold information from the public. *Id.* (Gibbons, J., dissenting).

70. *Id.* at 1184-85 (Gibbons, J., dissenting). Judge Gibbons noted that leading first amendment commentators refer to Madison's restraint on the abuse of government power by government officials as the checking value of the first amendment. *Id.* at 1184 (Gibbons, J., dissenting); see also Blasi, *The Checking Value in First Amendment Theory*, A.B. FOUND. RESEARCH J. 523 (1977).

71. *Capital Cities*, 797 F.2d at 1184 (Gibbons, J., dissenting). Judge Gibbons believed that the majority's rejection of the checking value of the first amendment is demonstrated by the court's statement that: "It simply does not seem reasonable to suppose that the free speech clause would speak, as it does, solely to government interference if the drafters had thereby intended to create a right to know and a concomitant governmental duty to disclose." *Id.* (Gibbons, J., dissenting).

72. *Id.* at 1185 (Gibbons, J., dissenting). Judge Gibbons found illogical the majority's reasoning that the first amendment imposes no duty on the government because it only limits governmental action. *Id.* (Gibbons, J., dissenting) (emphasis added). Judge Gibbons believed that the majority's reasoning was as illogical as saying that the fourth amendment does not require the government to recognize a right of privacy because the fourth amendment does not address invasions of privacy. *Id.* at 1184-85 (Gibbons, J., dissenting).

73. *Id.* at 1185-86 (Gibbons, J., dissenting). Because many of the historical
Finally, after noting that nondisclosure of government information was a prior restraint upon free speech which demanded an extremely high level of justification, Judge Gibbons examined the governing case law. Judge Gibbons, unimpressed with the Houchins decision, focused his attention on the Supreme Court’s reasoning in Gannet Co., Inc. v. DePasquale which demonstrated to him that there was no majority support for Houchins. Judge Gibbons concluded that the cases from references made by the majority antedate the first amendment, Judge Gibbons found that material unpersuasive. In addition, the precedential value of Jefferson's claim of executive privilege in the Burr case referred to by the majority was unanimously rejected in United States v. Nixon. Judge Gibbons also criticized the majority's reliance on the Freedom of Information Act of 1967, the Privacy Act of 1974, and the Government in Sunshine Act of 1976 as support for their holding. Although legislative enactments may support the fact that elected legislative officials are responsive to the information needs of the public, Judge Gibbons asserted that legislative action does not negate the constitutional right of access to information. 

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74. Id. at 1186 (Gibbons, J., dissenting). Judge Gibbons stated that it has been long recognized that prior restraints upon the dissemination of information required an extremely high level of justification. 

75. Capital Cities, 797 F.2d at 1187-91 (Gibbons, J., dissenting). For a discussion of the governing case law, see infra notes 76-80 and accompanying text. 

76. Capital Cities, 797 F.2d at 1187-88 (Gibbons, J., dissenting). Judge Gibbons believed that the dicta in Houchins relied on by the majority is ambiguous. 

77. 447 U.S. 368 (1979). In DePasquale, the petitioner sought, and was denied, access to the transcripts of a pretrial hearing in a murder case. The hearing had been closed to the public at the request of the defendant and without objection by the prosecution in order to ensure defendant’s right to a fair trial. The issue in DePasquale was whether the public has a constitutional right of access to the information sought by the petitioner. The New York Court of Appeals held that the presumption of access to criminal trials was “overcome in this case because of the danger posed to the defendants’ ability to receive a fair trial.” The Supreme Court held that notwithstanding the petitioners’ argument to the contrary, there is no sixth amendment right “in members of the public to insist upon a public trial.” Additionally, the Court held that there is no constitutional right of access to this pretrial proceeding, and affirmed the New York judgment. 

78. Capital Cities, 797 F.2d at 1188 (Gibbons, J., dissenting). Judge Gibbons reasoned that since Justice Stewart assumed in DePasquale that there was a first
DePasquale through Press-Enterprise demonstrate that the right of access to government-held information is guaranteed by the first amendment and can only be denied by a compelling state interest in nondisclosure, and that such a denial must be narrowly defined. 79 In addition, Judge Gibbons criticized the majority's reliance on the lack of a tradition of access to administrative records. 80 According to Judge Gibbons, this reliance allowed the majority to avoid a compelling state interest test which the government's case could not otherwise withstand. 81

As a threshold consideration of the divergent opinions in this case, it is submitted that by following the Houchins decision, the Third Circuit
tactically ignored differences in the mediums from which the information was requested. 82 However, the court was willing to recognize differences when comparing administrative records to judicial proceedings. 83 Therefore, the primary focus of the Third Circuit in Capital Cities was on the United States Supreme Court’s decision in Houchins, rather than on constitutional considerations articulated in the recent Supreme Court decisions concerning access to judicial proceedings. 84

In Houchins, the Supreme Court rejected the assertion of a first amendment right of access to government information regarding jail conditions. 85 To recognize such a right, the Court asserted, would necessitate the making of ad hoc decisions because there are no constitu-

82. Id. at 1171-73. The majority adopted reasoning analogous to the Houchins Court but failed to identify a number of respects in which the access issues in the two cases differ. For example, the press in Houchins asserted a right of access to information superior to that of the general public; Houchins involved physical access to facilities; and prison security concerns were important in Houchins. See 438 U.S. 1-11. For a further discussion of Houchins and the Third Circuit’s reliance on the Supreme Court’s reasoning, see supra notes 36-39 and accompanying text.

The relevant differences to consider are the differences in the mediums from which the information is sought rather than differences in the nature of the information sought. The Third Circuit recognized this distinction in United States v. Smith, 776 F.2d 1104 (3rd Cir. 1985). Regarding the application the two-tier analysis formulated in Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) the court noted:

[T]he Supreme Court has not examined whether there has been a tradition of access with respect to information of the particular character involved or whether that information is of significant public interest. Rather, it has inquired whether there has historically been public access to this particular part of the judicial process and whether access to that portion of the process will significantly enhance public understanding and appreciation of the judicial process or improve the process itself.


83. Capital Cities, 797 F.2d at 1174. The Third Circuit’s recognition of the differences between administrative records and judicial proceedings is implicit in their reluctance to apply the same analysis used in cases involving judicial proceedings to this case. Id. Specifically, the Third Circuit stated: “We do not yet know whether the Supreme Court will apply its analysis of access in the context of judicial proceedings to the context of executive branch files.” Id. For a further discussion of the Third Circuit’s application of the judicial proceedings access analysis, see supra notes 46-52 and accompanying text.

84. Capital Cities, 797 F.2d at 1171-77. The trilogy of Supreme Court cases concerning access to judicial proceedings includes Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (access to criminal trials); Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) (access to trials involving minor victims of sexual offenses); and Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984) (access to voir dire proceedings). The Third Circuit discussed these recent Supreme Court access cases and applied the Court’s analysis to the facts of Capital Cities but support for the majority’s decision was rooted in Houchins. See Capital Cities, 797 F.2d at 1171-77. For a further discussion of Richmond Newspapers and its progeny, see supra notes 3-7, 40-49 and accompanying text.

tional guidelines. Similarly, the majority in Capital Cities focused on the absence of a discernible basis for defining a constitutional duty to disclose information as articulated in Houchins. In Capital Cities, the majority reasoned that, because of this lack of standards, the judiciary was not competent to make access decisions and, therefore, such decisions should be left to the legislature. It is submitted, however, that the recent Supreme Court decisions regarding access to judicial proceedings provide the standards by which a court may, and should, analyze first amendment right of access issues. Therefore, it is submitted that these recent decisions effectively emasculate the Supreme Court’s reasoning in Houchins and thus, the Third Circuit’s reliance on such reasoning was misplaced.

The Supreme Court cases dealing with the claim of a first amendment right of access to judicial proceedings, beginning with Richmond Newspapers, Inc., have emphasized two complementary considerations. First, the history of the government institution must demonstrate that it has been presumptively open to the public. Second, public access must have a structural value to the functioning of the specific government process to which access is sought. This structural analysis involves assessing the social benefits of public access to the specific information sought to be disclosed. In other words, public access to the particular government institution must play “a significant role in the functioning of the [particular government] process and the government as a whole.” These two considerations substantially allay the fear of

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86. Id. For the full text of Chief Justice Burger’s position on this issue, see supra note 40.
87. Capital Cities, 797 F.2d at 1172. For a discussion of the absence of a discernible basis upon which a court can support its decisions, see supra notes 39-40 and accompanying text.
88. Capital Cities, 797 F.2d at 1171. The Third Circuit stated:
[T]he judiciary has never asserted the institutional competence to make such [access to information] decisions. The reason seems apparent. Neither the free speech clause nor the structure of the government described by the Constitution yields any principled basis for deciding which government information must be available to the citizenry and which need not.
89. For a discussion of these standards as presented in the recent Supreme Court cases, see supra notes 40-49 and accompanying text.
90. 448 U.S. 555 (1980). For the trilogy of Supreme Court cases dealing with the claim of a first amendment right of access to judicial proceedings, see supra note 82.
91. For a discussion of the tradition of access tier of the Supreme Court’s analysis, see supra notes 46-47 and accompanying text.
92. For a discussion of the positive value tier of the Supreme Court access analysis, see supra notes 48-49 and accompanying text.
93. Globe Newspaper, 457 U.S. 596, 606 (1982). Evaluating the structural value of public access to a criminal trial, Justice Brennan, writing for the majority, stated: “The right of access to criminal trials plays a particularly significant
standardless decision-making. Because courts have the standards of history and the structural value of public access for guidance, courts faced with a claim of a first amendment right of access are not forced to fashion ad hoc standards as the majority in Capital Cities suggests.

Richmond Newspapers and subsequent Supreme Court access cases provide courts with the impetus for expanding the constitutional right of access to government-held information. Since Richmond Newspapers, the Third Circuit has shown a willingness to apply the Richmond Newspapers analysis to right of access claims beyond the context of criminal trials but not beyond that of judicial proceedings. It is suggested, however, that the Third Circuit's limited expansion of the right of access reflects Justice Brennan's two-step analysis in Richmond Newspapers and Globe Newspaper v. Superior Court which can be used to analyze a constitutional right of access to government information held by the executive and legislative branches, as well as the judicial branch.

In Publicker Industries, Inc. v. Cohen, the Third Circuit addressed an issue closely analogous to the question presented in Richmond Newspapers: public access to civil trials. Narrowly reading Richmond Newspapers, the Third Circuit observed that "Richmond Newspapers provides the [Supreme] Court with an impetus to elaborate upon the structured conception of the first amendment that had previously only lurked in its decisions on speech and expression." Further, courts confronted with claims of access beyond the context of criminal trials must distinguish between 1) the existence of a right of access and 2) whether the right extends to the particular case. The extension of a right of access to information, according to the commentator, should be limited by "the constitutional vision of a self-governing people."

94. For a discussion of the Third Circuit's concern over standardless decisionmaking, see supra notes 38-39 and accompanying text.
96. The Supreme Court, 1979 Term, 94 Harv. L. Rev. 75, 149-59 (1980). The Harvard commentator believed that "Richmond Newspapers provides the [Supreme] Court with an impetus to elaborate upon the structured conception of the first amendment that had previously only lurked in its decisions on speech and expression." Id. at 159. Further, courts confronted with claims of access beyond the context of criminal trials must distinguish between 1) the existence of a right of access and 2) whether the right extends to the particular case. Id. at 157. The extension of a right of access to information, according to the commentator, should be limited by "the constitutional vision of a self-governing people." Id. at 159.
97. See e.g., First Amendment Coalition v. Judicial Inquiry and Review Bd., 784 F.2d 467 (3rd Cir. 1986) (two-tier analysis led to denial of right of access to record of Judicial Inquiry Board before court imposed discipline on judge); United States v. Smith, 776 F.2d 1104 (3rd Cir. 1985) (first amendment right of access to bill of particulars based on two-tier analysis); Publicker Indus., Inc. v. Cohen, 733 F.2d 1059 (3rd Cir. 1984) (access to civil trials analogous to access to criminal trials in Richmond Newspapers); United States v. Criden, 675 F.2d 550 (3rd Cir. 1982) (right of access to pretrial suppression, due process and entrapment hearings).
98. For a discussion of the cases in which the Third Circuit interpreted Chief Justice Brennan's two-tier analysis, see infra notes 99-118 and accompanying text.
99. 733 F.2d 1059 (3rd Cir. 1984).
100. In Publicker Industries, the district court closed a December 7, 1982 hearing on a preliminary injunction stemming from a proxy fight to determine control of Publicker Industries, Inc. 733 F.2d at 1061. Philadelphia Newspapers, Inc. and Dow Jones and Company sought access to the hearing but the district court denied their request because the information involved was confidential.
pers and Globe Newspaper,\textsuperscript{101} the Publicker Industries court found that the attributes of the criminal justice system which caused the Supreme Court to find a first amendment right of access to criminal trials were also features of the civil justice system.\textsuperscript{102} First, the Third Circuit found that civil proceedings had a tradition of access to the public.\textsuperscript{103} Second, the court reasoned that civil trials benefit from public access.\textsuperscript{104} Therefore, the Third Circuit concluded that because civil and criminal trials possess these similar attributes, the constitutional protection afforded the public in criminal trials in Richmond Newspapers extended to civil trials.\textsuperscript{105} In United States v. Criden,\textsuperscript{106} the Third Circuit decided a claim of access to pretrial suppression hearings which, unlike criminal and civil trials, do not share a common law history of access.\textsuperscript{107} As a basis for finding a first amendment right of access the Third Circuit placed

\textsuperscript{101} 457 U.S. 596 (1982). For a further discussion of Globe Newspaper, see supra note 4 and accompanying text.

\textsuperscript{102} 733 F.2d at 1070.

\textsuperscript{103} Id. at 1067-69. The Publicker Industries court surveyed English and American legal authorities similar to those reviewed in Richmond Newspapers. Id.

\textsuperscript{104} Id. at 1069-70. The Publicker Industries court found that public access to civil trials ensures the proper administration of justice and provides information which leads to a better understanding of the operations of government. Id.

\textsuperscript{105} Id. at 1070. For a further discussion of Publicker Industries, see Case Brief, Constitutional Law—First Amendment—Public Has Right Of Access To Civil Proceedings, 30 Vill. L. Rev. 980 (1985).

\textsuperscript{106} 675 F.2d 550 (3rd Cir. 1982).

\textsuperscript{107} Id. at 555. In Criden, a suppression hearing was held to determine whether statements by three "Abscam" defendants to FBI agents could be suppressed. Id. at 552. A reporter from the Philadelphia Inquirer sought access to the in camera hearing to which no prior notice had been given. Id. The reporter was denied access because the subject matter was confidential. Id. Philadelphia Newspapers, Inc. (PN) motioned to intervene in the pending case and filed a motion seeking access to the transcript from the suppression hearing. Id. The district court denied the motion and PN appealed. Id. At 553. The district court ordered the proceeding closed because the hearing was a pretrial proceeding and the testimony given by the defendants would not be admissible against them at the trial. Id. The Third Circuit held that the public has a first amendment right of access to pretrial suppression and due process hearings. Id. at 554. In so deciding, the Third Circuit was guided by the structural analysis in Richmond Newspapers. For a further discussion of the Criden court’s interpretation of Richmond Newspapers, see infra notes 108-09 and accompanying text.
greater weight on the structural values of public access than on the history of access. The Third Circuit concluded that a first amendment right of access to pretrial suppression hearings existed because the "six societal interests" which the Supreme Court used to find a strong presumption of access to criminal trials also applied to pretrial proceedings.

More recently, in *United States v. Smith* and *First Amendment Coalition v. Judicial Inquiry & Review Board*, the Third Circuit confronted claims of access to judicial proceedings which did not have traditions of being available to the public but which were similar to government institutions which were traditionally accessible to the public. In *Smith*, the Third Circuit found a constitutional right of access to a bill of particulars based on its close relationship to the indictment. The court reasoned that historically, indictments have been presumptively open to the public and access to the bill of particulars satisfies the same societal interests as access to indictments. In *First Amendment Coalition*, the Third Circuit analyzed the societal interests in public access to pretrial and trial proceedings:

1. Promoting educated debate over government affairs.
2. Assuring that proceedings are conducted fairly and perceived as being so.
3. Providing outlets for public concern.
4. Serving as a check on the practices of the judiciary.
5. Enhancing performance of proceedings.
6. Discovering perjury.

In *Smith*, a grand jury indicted two corporations and five individuals charging them with violations of the Interstate Transportation in Aid of Racketeering and Mail Fraud statutes and with conspiring to violate those statutes. The trial court ordered that the co-conspirators be identified and simultaneously granted a protective order regarding their names. Pennsylvania newspapers filed motions seeking access to the bills of particulars. The trial court denied access, finding that the risk of serious injury to persons named on the bill of particulars outweighed "any common law or First Amendment right of access" to the names. On appeal, the Third Circuit found both a first amendment and common-law right of access to bills of particulars. As a basis of a first amendment right of access the court considered the history of indictments because of their close relationship to the function of bills of particulars.

In *First Amendment Coalition*, the Third Circuit found a historical and functional relationship between indictments and bills of particulars. The Third Circuit found that historically, indictments were detailed with no need for supplemental information.
circuit found that the history of open impeachment hearings was not relevant to the issue of access to the Judicial Inquiry & Review Board. The court reasoned that because the Judicial Inquiry & Review Board did not replace traditional impeachment hearings, they were not functionally equivalent and, therefore, the history of impeachment hearings was not a proper consideration. These Third Circuit cases, it is submitted, frame the relevant historical inquiry for courts confronting a claimed right of access to government-held information. It is thus suggested that these cases demonstrate that the appropriate historical inquiry concerns the evolution of a particular government institution or, in some cases, the history of a related government process which has been replaced by the institution to which access is sought.

Capital Cities presented the Third Circuit with the unique opportunity to extend the Richmond Newspapers analysis to executive branch files. The majority reluctantly applied the analysis developed in judicial access cases to the context of executive branch files. However, it is submitted that the majority squandered the opportunity to fit this case

115. 784 F.2d at 472-73. In First Amendment Coalition, the plaintiff petitioned the Pennsylvania Supreme Court for a writ of mandamus seeking access to records of a hearing of the Judicial Inquiry & Review Board which resulted in the dismissal of charges against Justice Larsen of the Pennsylvania Supreme Court. Id. at 69. The court denied the petition because it believed it was unable to grant the request when the Judicial Inquiry & Review Board did not suggest discipline. Id. Based on the history and practice of the Board, the district court held that access was permitted in all cases where the Board has preferred formal charges, but not until the Board files a record of the proceedings with the Pennsylvania Supreme Court. Id. Plaintiffs appealed, contending that the district court erred in restricting access to transcripts after the completion of formal proceedings. Id. at 470. The Third Circuit affirmed the district court decision because the state interests articulated in the Pennsylvania Constitution were not overridden by an interest in public disclosure. Id. at 477.

116. Id. at 472-73. The Third Circuit stated: "Had the state constitutional convention acted to replace traditional impeachment with a substitute vehicle like the Judicial Inquiry & Review Board, a closer question of public access to the successor proceedings would be presented." Id. at 472.

117. See, e.g., Publicker Industries, 733 F.2d at 1667 (traditional norm was open trials); see also Richmond Newspapers, 448 U.S. at 564 ("What is significant for present purposes is that throughout its evolution, the trial has been open.") (emphasis added).

118. See, e.g., First Amendment Coalition, 784 F.2d at 472 (closer question of public access to successor proceeding if earlier proceeding has tradition of access); Smith, 776 F.2d 1104 (history of indictment was consideration in question of access to bill of particulars).

119. For a discussion of the facts of Capital Cities, see supra notes 11-25 and accompanying text.

120. Capital Cities, 797 F.2d at 1174. For a discussion of the Third Circuit’s application of the access analysis, see supra notes 52-64 and accompanying text.
into the access analysis by focusing excessive attention on the historical inquiry. The Third Circuit failed to realize that because administrative agencies do not have a functional equivalent at common law, the relevant historical inquiry concerns access to administrative records since the creation of administrative agencies.\textsuperscript{121} The Pennsylvania statutes concerning access to administrative records are strong evidence of historic practice.\textsuperscript{122} Since 1957, Pennsylvania law has mandated that agency records shall be accessible to the public, with the exception of certain types of records, such as agency investigative records.\textsuperscript{123} The Third Circuit, it is suggested, should have concluded that the tradition there, although limited, does favor public access to some agency records. Instead, the strict application of the analysis led the majority to demand historic evidence from the "time when our organic laws were adopted," a time when governmental agencies did not exist and, thus, the Third Circuit precluded disclosure of all agency records.\textsuperscript{124}

Finally, it is submitted that a historical consideration was not meant to be conclusive, especially limited historic evidence of a modern government institution. As Justice Brennan, the originator of the two "helpful principles," recently commented: "History is only a starting point. It is arrogant to pretend that from our vantage we can gauge accurately the intent of the framers on application of principle to specific contemporary questions."\textsuperscript{125} When a government process has become important only recently, like administrative agencies, courts should give greater weight to the structural analysis with guidance from the purpose of the first amendment. The relevant purpose of the first amendment for courts dealing with a right of access to government information is the "purpose of assuring freedom of communication on matters relating to the functioning of the government."\textsuperscript{126} Because the complexity of the government which resulted in the need to delegate authority to administrative agencies also resulted in agencies being far removed from the electorate and thus less responsible to the people,\textsuperscript{127} the "six socie-

\begin{itemize}
\item 121. See \textit{Capital Cities} 797 F.2d at 1190 n.12 (Gibbons, J., dissenting) (rule that historical practice must date back to colonial times is absurd because governmental agencies did not exist at that time or for 100 years thereafter).
\item 123. \textit{Id.} For the text of \textit{PA. STAT. ANN. tit. 65, § 66.1(2)} which excepts four categories of documents from the definition of "public record", see \textit{supra} note 23.
\item 124. \textit{Capital Cities}, 797 F.2d at 1175 n.27 (quoting Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 569 (1980)).
\item 127. 1957 \textit{PA. LEGIS. J.}, 2186, 2 (1957). A proponent of House Bill 800 which became \textit{PA. Stat. Ann. tit. 65 § 66.1(2)} believed public access to agency records was necessary because the complexity of our modern government has caused "certain agencies, departments, bureaus and commissions [to] become little isolated mountains of power in their own right and are no longer responsible to our people." \textit{Id.}
\end{itemize}
tal interests” which mandate a strong presumption of access to criminal trials apply equally to administrative agencies.\textsuperscript{128} Most importantly, access to government-held information, namely agency records, will promote informed discussion of the government and serve as a check on the practices of administrative agencies.\textsuperscript{129}

In conclusion, it is submitted that the fear of standardless decision making that prevented the Third Circuit from recognizing a right of access in \textit{Capital Cities} was an unfounded fear.\textsuperscript{130} The Supreme Court has recently given specific guidelines for courts to follow when deciding first amendment right of access cases which can be extended to all types of government institutions.\textsuperscript{131} The two-tier analysis, when properly applied will result in consistent decisions—not the ad hoc decisions suggested by the Third Circuit. It is therefore submitted that the Third Circuit should have applied the two-tier analysis in \textit{Capital Cities} in a manner consistent with the purpose of the first amendment of promoting informed public debate on the government and should not have placed too much weight on the tradition of access in the face of a contemporary question.

\textit{Richard W. Riley}

\textsuperscript{128} For a discussion of the “six societal interests”, see \textit{supra} note 109.

\textsuperscript{129} \textit{Cf. The Supreme Court, 1979 Term,} 94 \textit{HARV. L. REV.} 75, 156 (1980).

The commentator stated: \textit{Richmond Newspapers} recognized that government, by virtue of its unique institutional position, may be the exclusive possessor of information that is necessary to informed self-government. Without a means of tapping that information, public discussion about government cannot be expected to achieve the “uninhibited, robust, and wide-open” quality envisioned by the framers. \textit{Id.} (quoting \textit{New York Times Co. v. Sullivan}, 376 U.S. 254, 270 (1964)). It is submitted that access to administrative records, like access to trials, dispels this problem.

\textsuperscript{130} For a discussion of the reasons why the fear of standardless decision-making is ungrounded, see \textit{supra} notes 90-95 and accompanying text.

\textsuperscript{131} For a discussion of the trilogy of Supreme Court cases which articulated guidelines for determining a constitutional right of access, see \textit{supra} notes 3-7, 45-49, & 90-98 and accompanying text.