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Voting for Balance: The Third Circuit Splits with the Sixth Circuit over the Press's Right to Access Polling Stations in *PG Publishing Co. v. Aichele*

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VOTING FOR BALANCE: THE THIRD CIRCUIT SPLITS WITH THE SIXTH CIRCUIT OVER THE PRESS'S RIGHT TO ACCESS POLLING STATIONS IN *PG PUBLISHING CO. v. AICHELE*

Abstract: In 2013, in *PG Publishing Co. v. Aichele*, the U.S. Court of Appeals for the Third Circuit applied the experience and logic test to the voting process, contradicting the U.S. Court of Appeals for the Sixth Circuit's previous application of a traditional forum analysis to the voting process in its 2004 *Beacon Journal Publishing Co. v. Blackwell* decision. This Comment argues that the experience and logic test properly balances the government's interest in privacy against the public's interest in access to information. In contrast, applying a traditional forum analysis to the right of access creates the potential for the government to hide behind a veil of secrecy.

INTRODUCTION

The First Amendment of the U.S. Constitution confers the right of freedom of press.[1] Courts, however, have disagreed over the scope of this right—specifically, whether the press's right of access extends to polling places during elections.[2] In 2013, in *PG Publishing Co. v. Aichele* (*PG II*), the U.S. Court of Appeals for the Third Circuit examined the constitutionality of a provision of the Pennsylvania Election Code that mandated that all persons, except elections officials and voters, remain at least ten feet from polling places.[3] The Third Circuit upheld the constitutionality of the provision, reasoning that the

[1] U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."); *see also* James R. Ferguson, *Government Secrecy After the Cold War: The Role of Congress*, 34 B.C. L. REV. 451, 476 (1993) (discussing the importance of the press's Constitutional protections). Under the First Amendment, the freedom of press includes a qualified right to access information. *See* Pell v. Procunier, 417 U.S. 829, 832 (1974); Branzburg v. Hayes, 408 U.S. 665, 681 (1972) (plurality opinion).

[2] *See* PG Publ'g Co. v. Aichele (*PG II*), 705 F.3d 91, 112 (3d Cir. 2013); Beacon Journal Publ'g Co. v. Blackwell, 389 F.3d 683, 685 (6th Cir. 2004). The right of access in this context means the right to access information and gather news. *See PG II*, 705 F.3d at 98. As the U.S. Supreme Court noted in its 1974 decision in *Pell v. Procunier*, the right of freedom of the press safeguards the public interest in the free flow of information. *See* 417 U.S. at 832.

[3] 705 F.3d at 94; *see* 25 PA. CONS. STAT. ANN. § 3060(d) (West 2014).

First Amendment's right of access did not extend to the voting process.[4] In so holding, the Third Circuit split with the U.S. Court of Appeals for the Sixth Circuit's 2004 decision in *Beacon Journal Publishing Co. v. Blackwell*.[5] In *Beacon Journal*, the Sixth Circuit held that an Ohio statute that prohibited access to a polling station— except for officials and voters—abridged the press's right of free speech.[6]

This Comment examines why the Third Circuit's analysis and ultimate ruling is superior to that of the Sixth Circuit's.[7] In Part I, this Comment juxtaposes the right of free speech with the right of access, and also examines the procedural history of *PG II*.[8] Part II then compares and analyzes the Third Circuit's ruling in *PG II* with the Sixth Circuit's ruling in *Beacon Journal*.[9] Finally, Part III argues that the Third Circuit's framework for evaluating the constitutionality of a law restricting access to the voting process is a more sensible analysis than the Sixth Circuit's approach.[10] Part III justifies this conclusion by demonstrating that the experience and logic test—that the Third Circuit employed—properly accounts for both tradition and the public's contemporaneous role in the functioning of the challenged process.[11]

I. Analyzing The Right of Access Versus the Right of Free Speech

This Part examines the two distinctive constitutional tests used to evaluate whether one's freedom of speech or one's right to access information has been abridged.[12] Each right prompts a different mode of analysis: a traditional forum analysis is attached to free speech, while a balancing test is used to deter-

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[4] *See PG II*, 705 F.3d at 112.

[5] 389 F.3d at 684. The disputed Ohio statute at issue in *Beacon Journal* mandated that "no person shall . . . loiter [or] congregate" near the polling place and "no person . . . shall be allowed to enter the polling place during the election, except for the purpose of voting." OHIO REV. CODE ANN. § 3501.35 (West 2002); *see* OHIO REV. CODE ANN. § 3501.35(B)(1) (West 2014) (providing the current version of § 3501.35).

[6] *See* 389 F.3d at 685.

[7] *See infra* notes 12–85 and accompanying text.

[8] *See infra* notes 12–43 and accompanying text.

[9] *See infra* notes 44–67 and accompanying text.

[10] *See infra* notes 68–85 and accompanying text.

[11] *See infra* notes 68–85 and accompanying text.

[12] *See infra* notes 13–43 and accompanying text (detailing the two tests). The U.S. Supreme Court has firmly recognized that the First Amendment—in addition to the protection of free of speech and the press—provides a qualified protection for newsgathering activity. *See Pell*, 417 U.S at 832; *Branzburg*, 408 U.S. at 681 (plurality opinion). In 1972, in *Branzburg v. Hayes*, a plurality of the U.S. Supreme Court acknowledged that, "without some [First Amendment] protection for seeking out the news, freedom of the press could be eviscerated." 408 U.S. at 681. The Court noted, however, that the press's right to access information, like the public's right, is not absolute. *See id*. at 684; Donna MacKenzie, Note, *Do Democracies Die Behind Closed Doors? The Third and Sixth Circuits Split Over the Closure of Removal Hearings*, 49 WAYNE L. REV. 813, 824 (2003) (stating that public's right to access is not absolute).

mine one's right of access.[13] Because the Sixth and Third Circuits disagreed on which right was at stake in the state statutes that banned access to polling stations, each court used a different test leading to dissimilar results.[14] Accordingly, Section A explicates these contrasting standards.[15] Then, Section B details the procedural history of *PG II*.[16]

A. *Different Modes of Analysis: Evaluating the Freedom of Speech Versus the Right of Access*

When evaluating the right to free speech, courts use a traditional forum analysis by applying different standards depending on whether the speech regulation is in a public or nonpublic forum.[17] In public fora—places which traditionally, or as designated by government order, "have been devoted to assembly and debate"—courts sharply circumscribe a state's right to limit expressive activity.[18] In both "traditional" and "designated" public fora, content-based restrictions on speech are subject to strict scrutiny.[19] Accordingly, a content-based restriction on speech in a public forum must be narrowly drawn to serve a compelling state interest.[20] In nonpublic fora—places dedicated solely to the

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[13] *See PG II*, 705 F.3d at 99–100 (explaining that courts use a traditional framework analysis when evaluating issues of free speech); *id.* at 102 (stating that courts use a balancing test to evaluate the right of access to information).

[14] *Compare id.* at 108 (employing the experience and logic test), *with Beacon Journal*, 389 F.3d at 685 (employing a traditional forum analysis).

[15] *See infra* notes 17–30 and accompanying text.

[16] *See infra* notes 31–43 and accompanying text.

[17] *See* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106–07 (2001) (discussing the standard for evaluating restricting access to nonpublic fora); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44–46 (1983) (discussing the difference between public and nonpublic fora); *PG II,* 705 F.3d at 99–100 (explaining when the traditional forum analysis is used).

[18] *See* United States v. Kokinda, 497 U.S. 720, 726–27 (1990) (explaining that strict scrutiny applies to regulation of speech on government property "that has been traditionally open to the public for expressive activity" and to property "expressly dedicated by the Government to speech activity"); *Perry Educ. Ass'n*, 460 U.S at 45 ("For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."); *see also* Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939) (concluding that the use of public places for expression is a part of citizens' privileges and immunities).

[19] *See Kokinda*, 497 U.S. at 721; *Perry Educ. Ass'n*, 460 U.S. at 45; PG Publ'g Co. v. Aichele (*PG I*), 902 F. Supp. 2d 724, 749 (W.D. Pa. 2012). A restriction on speech satisfies strict scrutiny only if it is "necessary to serve a compelling state interest" and is "narrowly drawn to achieve that end." *Perry Educ. Ass'n,* 460 U.S. at 45.

[20] *See Perry Educ. Ass'n*, 460 U.S at 45; *see also* Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 530, 536 (1980) (explaining that regulating speech on "on the basis of its subject matter" transitions a regulation from a neutral law to one concerned with content). Moreover, if the government attempts to regulate the time, place and manner of speech, rather than preventing the speech, such a regulation must be content-neutral and leave open alternative channels of communication. *See PG I*, 902 F. Supp. 2d at 749. For example, in 1992, in *Burson v. Freeman*, the U.S. Supreme Court held that a Tennessee statute, which prohibited the solicitation of votes and the display of distribution of campaign materials within 100 feet of the entrance of polling places, was content-based. *See*

discussion of certain subjects or places that only certain groups can utilize for speech—a state has more authority to regulate speech.[21] Restrictions on a speaker's access to a nonpublic forum need only be reasonable and viewpoint neutral.[22] Regardless of the nature of the forum, a regulation cannot be viewpoint based, that is, the speaker's "specific motivating ideology" cannot form the basis of the restriction on speech.[23]

In contrast, evaluating the right to access information involves a balancing test—the "experience and logic test" test—to determine the appropriate level of scrutiny.[24] In 1980, in the U.S. Supreme Court's case *Richmond Newspapers, Inc. v. Virginia*, Justice William Brennan concurred in the judgment and articulated this test as the framework for evaluating whether the press has the right to access information about government processes.[25] The experience and logic test balances the interests of the public in observing and monitoring government functions against both the government's interest (and the longstanding historical practice) in keeping certain information from public scruti-

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504 U.S. 191, 197 (1992). Still, the Court upheld the statute because it served a significant government interest in protecting the fundamental right to vote and it left open alternative avenues for free speech to occur. *See id.* at 199–200.

[21] *See Good News Club*, 533 U.S. at 106–07; *Kokinda*, 497 U.S. at 721; *PG I*, 902 F. Supp. 2d at 749.

[22] *See Good News Club*, 533 U.S. at 106–07.

[23] Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995) (explaining that speech regulation that targets a particular viewpoint violates the First Amendment).

[24] Richmond Newspapers, Inc. v. Virginia, 448 U.S 566, 597–98 (1980). The "experience and logic test" is also referred to as the "*Richmond Newspapers* Test." *See PG II,* 705 F.3d at 103. In 1972, in the U.S. Supreme Court case *Branzburg v. Hayes*, Justice Powell announced the need for such a balancing test in his concurring opinion. 408 U.S. at 710 (Powell, J., concurring). In *Branzburg*, a reporter claimed that testifying before a grand jury about confidential sources would violate his right to gather news. *See id.* at 667 (plurality opinion). The Court engaged in a balancing inquiry, weighing the freedom of the press against the obligation of all citizens to give relevant testimony with respect to criminal conduct, and ultimately held that the press was required to give relevant testimony. *See id.* at 682 (explaining the balancing test); *id.* at 709 (announcing the holding). Justice Powell reasoned that balancing "these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions." *Id.* at 710 (Powell, J., concurring). In 1974, in *Pell v. Procunier*, the Court engaged in a similar balancing test—balancing the security of prisons against the press's right to gather news—to decide whether to uphold a California Department of Corrections regulation that prohibited the press and others from interviewing specific inmates. *See* 417 U.S at 829. The Court ultimately agreed with the prison's administrators that the interest in preserving safety and security outweighed that of the press's right to access information, partly based on the fact that the press had an alternative means of obtaining this information. *See id.* at 832–35.

[25] *See* 448 U.S at 597–98 (Brennan, J., concurring) (stating that courts should balance the public's interest in monitoring the government with the state's interest in keeping certain information private). In *Richmond Newspapers*, reporters sought access to a criminal courtroom that had been closed to the public to prevent undue dissemination of witness-related information. *See id.* at 559–63 (majority opinion); *see also* Heidi Kitrosser, *Secrecy in the Immigration Courts and Beyond: Considering the Right to Know in the Administrative State*, 39 HARV. C.R.-C.L.L. REV. 95, 107–08 (2004) (explaining that Justice William Brennan's concurrence formulates a two step inquiry to analyze the press's right of access).

ny.[26] Under the experience prong, courts consider whether a place and process have historically been open to the press and general public.[27] Under the logic prong, courts objectively assess whether public access plays a significant positive role in the function of the process in question and whether openness impairs the public good.[28] Accordingly, if the experience and logic test reveals that a right of access exists, any restraint on that right is then evaluated under strict scrutiny.[29] It is through this analytical framework that the Third Circuit approached PG's assertions of freedom of access in *PG II*.[30]

B. *PG Publishing Company's Right of Access Claim*

In *PG II*, the Third Circuit held that PG Publishing Company ("PG") did not have a First Amendment right of access to the voting process.[31] PG is the

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[26] *See Richmond Newspapers*, 448 U.S. at 597–98 (Brennan, J., concurring) (explaining the balancing test); *PG II*, 705 F.3d at 103–04 (same). In two subsequent cases, the Court more fully articulated this balancing framework. *See* Press-Enter. Co. v. Superior Court of Ca. for Riverside Cnty., 478 U.S. 1, 8 (1986); Globe Newspaper Co. v. Superior Court for Norfolk Cnty., 457 U.S. 596, 605–06 (1982). In 1982, in *Globe Newspaper Co. v. Superior Court for Norfolk County*, the U.S. Supreme Court granted the press access to criminal trials involving the sexual abuse of underage victims. *See* 457 U.S. at 598. Writing for the majority, Justice William Brennan stated that the utility of open criminal trials rested in "both logic and experience." *See id.* at 606 (reasoning that the criminal trial had historically been open and that the right of access to criminal trials played a significant role in the functioning of the judicial process). Similarly, in 1986, in *Press-Enterprise Co. v. Superior Court of California for Riverside County*, the U.S. Supreme Court considered the right of access to a transcript of a preliminary hearing in a criminal trial. *See* 478 U.S. at 3. The Court held that a right of access requires a two-prong evaluation of "whether the place and process have historically been open to the press" and "whether public access plays a significant positive role in the functioning of the particular process in question." *Id.* at 8.

[27] *See Press-Enter. Co.*, 478 U.S. at 8 (stating that the first prong of the experience and logic test evaluates "whether the place and process have historically been open to the press"); N. Jersey Media Grp., Inc. v. Ashcroft, 308 F.3d 198, 209 (3d Cir. 2009) (applying experience and logic test).

[28] *See Press-Enter. Co.*, 478 U.S. at 8; *PG II*, 705 F.3d at 110–11; *see also N. Jersey Media Grp.*, 308 F.3d at 217 ("[W]ere the logic prong only to determine whether openness serves some good, it is difficult to conceive of a government proceeding to which the public would not have a First Amendment right of access."). The U.S. Court of Appeals for the Third Circuit has adopted six broad categories that are typically served by openness to the public: (1) promotion of informed discussion of governmental affairs; (2) promotion of the public perception of fairness; (3) providing a significant community therapeutic value; (4) serving as a check on corrupt practices; (5) enhancement of the performance of all involved; and (6) discouragement of fraud. *See* United States v. Simone, 14 F.3d 833, 839 (3d Cir. 1994). The *PG II* court emphasized, however, that these categories are not dispositive in determining the value of openness under the circumstances. *See* 705 F.3d at 111. Specifically, the court explained that, although an open voting process promotes the discussion of government affairs, there were not any apparent additional benefits derived from the press being inside the polling place as opposed to merely ten feet outside. *See id.*

[29] *See Globe Newspaper Co.*, 457 U.S. at 606–07; *see also* Kitrosser, *supra* note 25, at 109 (explaining that a regulation that fails the experience and logic test is presumptively invalid and analyzed under strict scrutiny). That is, even if the experience and logic test favors a right of access, the law must still stand up under strict scrutiny. *See* MacKenzie, *supra* note 12, at 824.

[30] *See PG II*, 705 F.3d at 106.

[31] *See id.* at 112.

publisher of the Pittsburgh Post-Gazette, a daily newspaper circulated throughout western Pennsylvania.[32] In light of Pennsylvania's new restrictive Voter ID laws, PG challenged the constitutionality of Section 3060(d) of the Pennsylvania Election Code.[33] The code mandates that all persons—except election officials and voters—remain at least ten feet away from the polling place during the voting process.[34] PG's complaint alleged that Section 3060(d) infringed on the press's First Amendment right to access and gather news at polling places.[35]

The U.S. District Court for the Western District of Pennsylvania dismissed PG's suit, reasoning that Section 3060(d) is a content-neutral law regulating physical location rather than a person's speech.[36] Applying the traditional forum analysis, the court concluded that a polling place is a nonpublic forum and analyzed the statute under the rubric of reasonable and viewpoint neutral laws.[37] Consequently, the court held that PG's First Amendment rights were not abridged, given that Section 3060(d) is a generally applicable content-neutral law that protects an individual's "right to cast a ballot in an election free from . . . intimidation and fraud."[38]

Rather than apply the traditional forum analysis, on appeal in *PG II*, the Third Circuit applied the experience and logic test to assess the press's access to information.[39] Specifically, the court considered whether the information in question—access to the voting process—should be available to the members of the press.[40] By applying the experience and logic test, the court posited that access to government proceedings, such as the voting process, must be ana-

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[32] *PG I*, 902 F. Supp. 2d at 730.

[33] *See id.* at 731. PG contended that, given the new strict Voter ID laws passed in Pennsylvania, access to the polling place was particularly necessary. *See PG II*, 705 F.3d at 96. It should be noted though, as of now, the implementation of the Voter ID laws have been suspended until ongoing litigation is decided. *Id.* at 96 n.5.

[34] 25 PA. CONS. STAT. ANN. § 3060(d) (West 2014); *see PG I*, 902 F. Supp. 2d at 731. Section 3060(d) defines a "polling place" as the room provided in each election district for voting at a primary election. 25 PA. CONS. STAT. ANN. § 3060(d).

[35] *See* Complaint at 2, *PG I*, 902 F. Supp. 2d 724 (W.D. Pa. 2012) (No. 12-CV-00960-NBF).

[36] *See PG I*, 902 F. Supp. 2d at 750–51.

[37] *See id.*; *see also PG II*, 705 F.3d at 96 (discussing the trial court's analysis).

[38] *See PG I*, 902 F. Supp. 2d at 754–56.

[39] *See PG II*, 705 F.3d at 102, 106; *see also Richmond Newspapers*, 448 U.S. at 597–98 (outlining when courts should employ the experience and logic test). Applying the experience and logic test to the voting process was a matter of first impression for the court. *See PG II*, 705 F.3d at 104. The court, however, relied on the Third Circuit's previous applications of the experience and logic test. *See id.*; Capital Cities Media, Inc. v. Chester, 797 F.2d 1164, 1174 (3d. Cir. 1986) (en banc) (reasoning that the experience logic test is the general analysis for evaluating the right of access to all traditionally open government proceedings and applying the test to certain administrative records); Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1067–68 (3d Cir. 1984) (expanding the application of *Richmond Newspapers* beyond criminal trials to include civil trials).

[40] *See PG II*, 705 F.3d at 102.

lyzed in the context of a proceeding's historical and structural role.[41] Noting the long-standing trend toward a closed electoral process and the potential for the press's abuse of voters, the Third Circuit held that the right of access did not extend to the polling place.[42] Accordingly, the court did not analyze the statute under strict scrutiny and thus upheld the restraint on the press's access to the polling place.[43]

II. Different Standards Leading to Different Results: The Third and Sixth Circuit Split over the Right of Access to Polling Places

In 2013, in *PG II*, the U.S. Court of Appeals for the Third Circuit applied the experience and logic test to the voting process, contradicting the U.S. Court of Appeals for the Sixth Circuit's previous application of a traditional forum analysis to the voting process in a 2004 case *Beacon Journal Publishing Co. v. Blackwell*.[44] An analysis of these decisions reveals how each court's mode of analysis culminated in dissimilar results.[45] Section A analyzes the Third Circuit's application of the experience and logic test in *PG II*.[46] Section B then explores the Sixth Circuit's use of a traditional forum analysis in *Beacon Journal*.[47]

A. *A Balanced Approach: The Third Circuit Applies the Experience and Logic Test and Limits Access to the Polling Place*

Focusing on tradition and function, the Third Circuit applied the experience and logic test to evaluate the constitutionality of Section 3060(d) of the Pennsylvania Election Code.[48] In applying the experience prong of the experience and logic test, the Third Circuit examined whether there existed a tradition of openness for the polling place and for the voting process occurring inside.[49] Accordingly, the Third Circuit conducted a historical examination of the voting process, relying heavily on the U.S. Supreme Court's 1992 decision in

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[41] *See id.* at 106–08. According to the court, access to governmental proceedings includes access to information about governmental actions and decisions. *See id.* at 106–07.

[42] *See id.* at 112.

[43] *See id.*

[44] *Compare PG II*, 705 F.3d 91, 108 (3d Cir. 2013) (applying the experience and logic test), *with* Beacon Journal Publ'g Co. v. Blackwell, 389 F.3d 683, 685 (6th Cir. 2004) (applying a traditional forum analysis).

[45] *Compare PG II*, 705 F.3d at 112 (concluding that a statute restricting press access to a polling station did not violate the press's right of access), *with Beacon Journal*, 389 F.3d at 685 (holding that a statute restricting press access to a polling station violated the press's right of free speech).

[46] *See infra* notes 48–62 and accompanying text.

[47] *See infra* notes 63–67 and accompanying text.

[48] *See* 25 Pa. Cons. Stat. Ann. § 3060(d) (West 2014); *PG II*, 705 F.3d at 108.

[49] *See PG II*, 705 F.3d at 108.

Burson v. Freeman.[50] Focusing on the nation's shift toward privacy in the polling place, the *PG II* court held that the historical record was insufficient to establish a presumption of openness in the voting process.[51] Additionally, the court noted that the Pennsylvania Constitution requires that voting be done in private.[52] Considering all of these factors, the court held that no objective tradition existed towards openness in the voting process.[53]

Moreover, the Third Circuit held that the logic prong weighs against a constitutionally protected right of access to the voting process.[54] The court acknowledged that openness of the voting process prevents various electoral problems such as fraud and intimidation.[55] Where the press is already permitted to be relatively close to the voting place, however, the court emphasized that "the benefits of additional oversight are inversely proportional to the distance of the press."[56] Thus, the court concluded that the public good would scarcely benefit from the press being inside the polling station, rather than several feet away.[57]

Further, the *PG II* court noted the fundamental dangers in open voting proceedings.[58] First, the court emphasized the concern that granting access to one member of the press would require all other members of the press to share

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[50] *See id.* at 108–09 (citing Burson v. Freeman, 504 U.S. 191, 200–06 (1992) (plurality opinion)). Because the experience prong is demanding, assessing relevant history is often essential. *See id.* at 108. In 1992, in *Burson v. Freeman*, a plurality of the Court examined the history of the voting process in America, relying on numerous historical sources, including comments made by the framers of the U.S. Constitution, practice at the English courts of law, congressional procedures, relevant regulatory schemes, and court decisions. *See* 504 U.S. at 200–06. The Third Circuit relies heavily on this historical investigation. *See PG II*, 705 F.3d at 109. In the colonial era, voting was conducted by voice vote, which was open and accessible to the public. *See Burson*, 504 U.S. at 200. As time progressed, however, the newly formed states adopted systems based on the paper ballot. *See id.* In the late 1800s, though, states began to move toward privacy in the voting process by adopting "the Australian system" of voting, which introduced election booths and a single ballot. *See id.* at 203. Thus, while the act of voting was originally open and accessible, a thorough examination of United States history establishes a shift towards a closed electoral process. *See PG II*, 705 F.3d at 110.

[51] *See PG II*, 705 F.3d at 110. Analyzing the facts under the experience prong, the court properly accounted for historical trends by examining the history of the voting process and noting the trend away from openness, toward privacy in the voting process. *See id.*; *see also Burson*, 504 U.S. at 200–06 (examining the historical trend towards privacy in the polling place).

[52] PA. CONST. art. VII, § 4 (stating that "[a]ll elections by the citizens shall be by ballot or by such other methods as may be prescribed by law; Provided, That secrecy in voting be preserved"); *see PG II*, 705 F.3d at 110.

[53] *See PG II*, 705 F.3d at 110.

[54] *See id.* at 112.

[55] *Id.* at 111.

[56] *Id.* For example, in Pennsylvania, the press is allowed to be ten feet away from the public polling place. *Id.* Accordingly, the court concluded that allowing the press to be in the room would not significantly enhance the public good. *Id.*

[57] *Id.*

[58] *See id.* at 112.

in that right.[59] Second, if the press has a First Amendment right of access, this finding raises the concern of who is included as a member of the press.[60] That is, the class of persons to whom such a right is applicable is almost limitless.[61] Accordingly, the Third Circuit held the experience and logic test militates against finding a right of access in the context of the voting process.[62]

B. *A Public Forum: The Sixth Circuit's Traditional Framework Analysis Allows Access to the Polling Place*

In *Beacon Journal*, the Sixth Circuit held that an Ohio statute prohibiting access to polling places could not be constitutionally enforced against members of the press.[63] Unlike the Third Circuit, the Sixth Circuit focused on access to a forum for speech purposes and therefore applied a traditional forum analysis.[64]

Applying this rubric, the *Beacon Journal* court classified a polling place as a public forum and analyzed the Ohio statute under strict scrutiny.[65] The court held that the statute did not survive strict scrutiny, as the government failed to show that the law was necessary to further the state's interest in ensuring orderly elections or that the law was narrowly drawn to achieve that end.[66] Consequently, the court concluded that the Section 3501.35 likely abridged the freedom of the press.[67]

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[59] *See id.*

[60] *Id.*

[61] *See id.* Furthermore, in evaluating the potential dangers inherent in openness, the court reasoned that the presence of reporters during the sign-in period could potentially "concern, intimidate or even turn away potential voters." *See id.*

[62] *Id.*

[63] *See Beacon Journal*, 389 F.3d at 685. The Ohio law mandated, in part, that no person "shall be allowed to enter the polling place during the election, except for the purpose of voting." OHIO. REV. CODE ANN. § 3501.35(B) (West 2002); *see* OHIO REV. CODE ANN. § 3501.35(B)(1) (West 2014) (providing the current version of § 3501.35). The plaintiff—the publisher of a daily newspaper—sought injunctive relief against the statute. *See Beacon Journal*, 389 F.3d at 684. The Sixth Circuit, vacating the trial court's decision, ordered that the injunction be granted. *See id.* at 685.

[64] *See Beacon Journal*, 389 F.3d at 685. In contrast, the Third Circuit in *PG II* focused on right of access for information gathering purposes. *See* 705 F.3d at 108 (describing the court's analysis in *Beacon Journal*).

[65] *See Beacon Journal*, 389 F.3d at 685.

[66] *See id.*

[67] *See id.*

III. Protecting the Public's Right to Know Through a Balancing Framework

The Third Circuit appropriately applied the experience and logic test in *PG II* to evaluate whether the press should have access to the voting process.[68] By utilizing the experience and logic test, the Third Circuit properly framed the constitutional issue as a question of right of access to information, forestalled the government from potentially exploiting nonpublic fora, and protected contemporaneous First Amendment principles.[69]

First, analyzing restrictions on the press's access to polling places as a question of the press's right to access information correctly characterizes the constitutional issue.[70] Because the press's access to a polling place involves access to a forum to gather news, rather than for speech, the experience and logic test applies to balance the government's interest in privacy against the public's interest in accessing information.[71] In contrast, applying a traditional forum analysis—as the Sixth Circuit did in its 2004 case *Beacon Journal Publishing Co. v. Blackwell*—mischaracterizes the constitutional issue as the right of access to a forum for speech purposes rather than the right of access for information gathering purposes.[72]

Second, extending the experience and logic test to the voting process prevents the government from potentially engaging in systematic concealment of

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[68] *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 566, 597–98 (1980) (holding that public access claims should be evaluated under the experience and logic test); *PG II*, 705 F.3d 91, 108 (3d Cir. 2013) (applying the experience and logic test to the press's right to access the voting process); Capital Cities Media, Inc. v. Chester, 797 F.2d 1164, 1174 (3d Cir. 1986) (explaining that the experience and logic test is the general framework for examining the right to access open governmental proceedings).

[69] *See infra* notes 70–85 and accompanying text (explaining this point in greater detail).

[70] *See PG II*, 705 F.3d at 108.

[71] *See id.* at 113.

[72] *See id.* 108 (arguing that applying a traditional framework analysis in right of access cases would allow the government to "shut down nonpublic fora completely, thereby hiding any activities behind a veil of secrecy"); *cf.* Beacon Journal Publ'g Co. v. Blackwell, 389 F.3d 683, 685 (6th Cir. 2004). The *Beacon Journal* court's reliance on this forum test was incorrect because the case did not only involved access to a forum for *newsgathering*, rather than for speech. *Cf.* 389 F.3d at 685 (indicating that the reporters were attempting to report news). This distinction becomes clear, where the *Beacon Journal* court incorrectly cites to a 1983 U.S. Supreme Court case, *Perry Education Ass'n v. Perry Local Educators' Ass'n*, as precedent. *See id.* at 685 (citing Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 45 (1983)). That particular case concerned a law regulating expressive activity in a public school. *See Perry Educ. Ass'n*, 460 U.S. at 44. Although the Sixth Circuit explained that *Perry Education Association* concerned the right of access to a forum for speech purposes, the *Beacon Journal* court mischaracterized the Ohio law, which restricted access to a forum for newsgathering purposes. *See Beacon Journal*, 389 F.3d at 685; *see also* C. Thomas Dienes, Commentary, *The Trashing of the Public Forum: Problems in First Amendment Analysis*, 55 Geo. Wash. L. Rev. 109, 109–10 (1986) (arguing that courts can use the nonpublic forum doctrine as a basis for denying free speech claims).

information.[73] Applying this test promotes openness, and thereby prevents the government from secreting information, because it properly accounts for the public's role in the process and its interest in access to the information in question.[74] By engaging in the test's balancing inquiry, a court may consider both the government's interest in keeping private what has always been private as well as the public's positive role in the particular process in question.[75] Indeed, as illustrated in *PG II*, even when a forum has historically remained closed to the public—such as a polling place—courts must still consider whether the public's access to the forum positively contributes to the functioning of the proceeding.[76]

In contrast, using the *Beacon Journal* court's forum analysis to determine one's right to access information enables the government to shroud its activities in secrecy.[77] Because the state has the ability to create nonpublic fora, coupled with the fact that statutes only need to satisfy rational basis, the state can thus rely on the forum analysis framework to restrict and limit access.[78] Accordingly, due to the risk that a state may manipulate the forum analysis

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[73] *See PG II*, 705 F.3d at 108 ("By applying the experience and logic test, [the court] ensures that the government cannot shroud its activities behind a veil of secrecy merely by banning everyone from a nonpublic forum."); Michael Hayes, Note, *Whatever Happened to 'The Right to Know'?: Access to Government-Controlled Information Since* Richmond Newspapers, 73 VA. L. REV. 1111, 1129 (1987) (arguing that the balancing test properly accounts for the public's right of access to government-controlled information).

[74] *Cf. PG II*, 705 F.3d at 100, 113 (stating that "a traditional forum analysis for [right of access] cases . . . sets a dangerous precedent which permits the government too much freedom to hide their activities from the public's view"); *see also* Hayes, *supra* note 73, at 1136 (explaining that a flexible balancing test allows courts to adapt to changes in the importance of the proceeding).

[75] *See PG II*, 705 F.3d at 102, 107–08 (explaining the benefits of using the experience and logic test); *see also* Hayes, *supra* note 73, at 1136 (emphasizing that the balancing test is consistent with general First Amendment jurisprudence and avoids rewarding governmental bodies that close their proceedings).

[76] *See PG II*, 705 F.3d at 108, 110 ("[A] showing of openness at common law is not required." (quoting N. Jersey Media Grp., Inc. v. Ashcroft, 308 F.3d 198, 213 (3d Cir. 2009)) (internal quotation marks omitted)). Accordingly, although the polling place did not have a tradition of openness, the Third Circuit still evaluated the benefits of the public having access to the polling place. *See id.* at 111–12 (evaluating the positive role that public access would play in the voting process such as an informed electorate and the ability to oversee new voter legislation). The experience prong also accounts for historical trends in which a forum started out as public but evolved into a closed forum, such as the polling place. *See* Burson v. Freeman, 504 U.S. 191, 200–06 (1992) (examining the voting processes historical evolution from a public event into a private affair).

[77] *See PG II*, 705 F.3d at 100; Dienes, *supra* note 72, at 110 (arguing that the development of the public forum doctrine has evolved into a device for denying open and equal access).

[78] *See* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106 (2001). Restrictions in a nonpublic forum are only constitutionally required to be reasonable considering the forum's purpose. *See id.* at 106–07; *see also* Dienes, *supra* note 72, at 117 (observing that no government regulation of a nonpublic forum has been declared unconstitutional by the Supreme Court).

framework in this way, applying the experience and logic test more fully accounts for traditional First Amendment values.[79]

Finally, employing the experience and logic test protects contemporaneous First Amendment principles.[80] This is because the logic prong of the test accounts for the public's positive role in the functioning of the process.[81] For example, in *PG II*, the Third Circuit considered how access to the polling place would promote informed discussion of government affairs and allow the public to oversee the implementation of new voter legislation.[82] In contrast, a traditional forum analysis precludes courts from assessing present day values and conditions.[83] Under the forum rubric, regardless of the public's involvement in the forum, any restriction would be evaluated via a reasonableness standard—a much lower constitutional benchmark.[84] Thus, although the Third Circuit ultimately held that the potential dangers of access outweighed the advantages, the experience and logic test remains as the best way to account for contemporary circumstances.[85]

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[79] *See PG II*, 705 F.3d at 100; Daniel A. Farber & John E. Novak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219, 1224 (1984) (arguing that characterizing a forum as nonpublic may cause courts to disregard how the challenged regulation conflicts with First Amendment values). The traditional forum analysis, in contrast, fails to fully account for First Amendment values, as there is not a tradition of openness in a nonpublic forum such as a polling place. *See PG II*, 705 F.3d at 100. Such First Amendment values include protecting expressive speech and the marketplace of ideas, the freedom of the press, and the right to access information. *See* William E. Lee, *Cable Leased Access and the Conflict Among First Amendment Rights and First Amendment Values*, 35 EMORY L.J. 563, 564–65 (1986) (discussing First Amendment values); Hayes, *supra* note 73, at 1113 (discussing the First Amendment value of the right to access information).

[80] Hayes, *supra* note 73, at 1134 (arguing that courts which solely rely on the experience prong fossilize the First Amendment, which would make the right of access much more restricted than other First Amendment rights); *see PG II*, 91 F.3d at 110–11 (weighing the benefits of access to the polling place verses the dangers of such access, but ultimately holding that the logic prong disfavors a finding of a right of access in the context of voting).

[81] *See PG II*, 91 F.3d at 110 (explaining the logic prong and outlining the general categories when determining whether the public plays a positive role in the functioning of the process).

[82] *See id.* at 111–12 (demonstrating how the logic prong accounts for contemporary conditions as the court considered newly enacted Pennsylvania voter ID laws and the potential value of the public overseeing the implementation of the law).

[83] *See supra* notes 16–24 and accompanying text (analyzing the traditional framework standard); *see also PG II*, 91 F.3d at 100 (explaining the risk of utilizing the forum analysis for a statute that restricts the press's access to information); *cf. Beacon Journal*, 389 F.3d at 685 (applying a traditional forum analysis to evaluate a statute restricting the press's access to information).

[84] *See Good News Club*, 533 U.S. at 106–07 (holding that restrictions in a nonpublic fora are only constitutionally required to be reasonable in light of a forum's purpose); *see also* Dienes, *supra* note 72 (observing that the U.S. Supreme Court has never ruled a government regulation of a nonpublic forum unconstitutional).

[85] *See PG II*, 91 F.3d at 111–12. The Third Circuit emphasized this in a footnote, indicating that the analysis would have changed if Pennsylvania's restrictive voter ID laws had been implemented. *See id.* at 112 n.23.

Conclusion

The Third Circuit relied on the experience and logic test to evaluate the press's right of access to the voting process. In *PG Publishing Co. v. Aichele*, the court properly framed the constitutional issue as right of access to a forum for information gathering purposes, rather than right of access for speech purposes. In doing so, the Third Circuit disallowed access to the voting process, but avoided the dangerous precedent of using a traditional forum analysis to evaluate the right of access to information cases. Using a traditional forum analysis in this context would create the potential for the government to shroud its activities in secrecy. Unlike the traditional forum analysis, the experience and logic test properly accounts for present day values while considering historical precedent. The test thereby accounts for both the tradition of the process and the public's positive role in the functioning of the process.

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