NOTES

CONSTRUCTING A PUBLIC RIGHT OF ACCESS TO PRETRIAL PROCEEDINGS: HOW SOUND IS THE STRUCTURE?

"Without falling, no bridge, once spanned, can cease to be a bridge."[1]

The last twenty years have witnessed increased litigation concerning the scope of public access to various stages of civil and criminal proceedings. While the Supreme Court has set standards for public access in criminal trial[2] and pretrial proceedings,[3] lower courts have extended these principles in a flurry of decisions recognizing public rights of access to civil trials,[4] pretrial discovery materials,[5] and, most recently, pretrial discovery proceedings.[6]

---

1. "The Bridge," FRANZ KAFKA: THE COMPLETE STORIES (G. Glatzer ed., 1946).

2. *See, e.g.*, Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980); discussed *infra* notes 43-65 and accompanying text.

3. *See, e.g.*, Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986); Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984), discussed *infra* notes 66-72 and accompanying text. *See also* Waller v. Georgia, 467 U.S. 39 (1984) (defendant's sixth amendment rights violated when pretrial suppression hearings were closed to public).

4. *See, e.g.*, Westmoreland v. Columbia Broadcasting Sys. Inc., 752 F.2d 16 (2d Cir. 1984), *cert. denied*, 472 U.S. 1017 (1985); Wilson v. American Motors Corp., 759 F.2d 1568 (11th Cir. 1985); Publicker Indus., Inc. v. Cohen, 733 F.2d 1059 (3d Cir. 1984), discussed *infra* notes 104-05; *In re* Continental Ill. Sec. Litig., 732 F.2d 1302 (7th Cir. 1984), discussed *infra* notes 113-21; Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165 (6th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984).

5. *See, e.g.*, Bank of Am. Nat'l Trust and Sav. Ass'n. v. Hotel Rittenhouse Assoc., 800 F.2d 339 (3d Cir. 1986) (settlement agreements); *In re* Continental Ill. Sec. Litig., 732 F.2d 1302 (7th Cir. 1984); Tavoulareas v. Washington Post Co., 724 F.2d 1010 (D.C. Cir. 1984); American Tel. & Tel. Co. v. Grady, 594 F.2d 594, 596 (7th Cir. 1978), *cert. denied sub nom.* American Tel. & Tel. Co. v. MCI Communications Corp., 440 U.S. 971 (1979) (pretrial discovery must take place in public unless compelling reasons exist for denying the public access to the proceedings). *See also* A. Epstein, *Open Courts, Closed Trials*, 13 LITIG. 23, 26 (1987) (discovery materials—including depositions, interrogatory answers, and documents—are presumptively open to the public); Note, *Access to Pretrial Documents Under the First Amendment*, 84 COLUM. L. REV. 1813 (1984) (arguing first amendment rights of access apply to pretrial documents and discovery).

6. Avirgan v. Hull, 118 F.R.D. 257 (D.D.C. 1987) discussed *infra* notes 12-30 and accompanying text.

Generally, courts in reviewing public access to pretrial proceedings, presume the right of access to discovery materials and then apply "good cause" analysis under Rule 26(c) to determine whether the party opposing disclosure has shown sufficient threat of injury to close the information to the public. While this analysis clearly applies to information filed into evidence with the court, the analysis

Several courts, without much discussion, have looked to Supreme Court first amendment criminal trial access precedent,[7] common law,[8] or the Federal Rules of Civil Procedure[9] to embrace a presumptive public right of access to pretrial discovery proceedings.[10] This Note addresses first amendment, common law, and statutory lines of access analysis to determine the soundness of recent decisions that presume a public right of access to pretrial discovery proceedings. This Note also examines whether such decisions further the policies underlying the established principles of public access. Finally, this Note concludes that the public[11] may have a non-presumptive right of access if a party can prove some first amendment concern to override the presumptive closure of discovery and pretrial discovery proceedings.

I. *AVIRGAN V. HULL*: THE RIGHT OF NONPARTIES TO ATTEND DEPOSITIONS

In *Avirgan v. Hull*[12] the district court for the District of Columbia considered whether the press has a right to attend a pretrial deposition. *Avirgan* was a civil Racketeering Influenced and Corrupt Organizations Act (RICO) suit[13] on behalf of two ABC journalists for injuries sustained in the bombing of a Nicaraguan Contra leaders' press conference.[14] Co-plaintiff, the Christic Institute, named twenty-nine defendants, several of

becomes less sound if applied to discovered information not entered into evidence, or to access to discovery proceedings. *See infra* notes 147-61.

7. *See Avirgan*, 118 F.R.D. 257. *See also Continental Ill.*, 732 F.2d 1302.

8. *See, e.g.*, Bank of Am. Nat'l. Trust and Sav. Ass'n. v. Hotel Rittenhouse Assoc., 800 F.2d 339 (3d Cir. 1986).

9. *See, e.g.*, Tavoulareas v. Washington Post Co., 724 F.2d 1010 (D.C. Cir. 1984); American Tel. & Tel. Co. v. Grady, 594 F.2d 594 (7th Cir. 1978), *cert. denied sub nom.* American Tel. & Tel. Co. v. MCI Communications Corp., 440 U.S. 971 (1979).

10. First amendment attorneys have noted that *Avirgan*, 118 F.R.D. 257, if followed, could signal greater and more timely access by the press to court information. "*Open Depositions to Press?*," 74 A.B.A. J. 22 (1988). Others have recognized *Avirgan* as an important first amendment decision. *Id.* (Comments of John Koefl, attorney with Debevoise & Plimpton, New York and Stephen Kohn, attorney for *Avirgan* intervenor Village Voice).

11. While this Note concentrates on a "public" right of access to discovery, most often the press asserts this right on behalf of the public. Some decisions discussed in this Note refer to the press' right of access. The press, however, merely asserts the public's right to access. Therefore, this Note does not differentiate between the two. *See infra* note 31.

12. *Avirgan* appears in two opinions: 118 F.R.D. 257 (D.D.C. July 31, 1987) (*Avirgan I*) (considering access issue); 118 F.R.D. 252 (D.D.C. Dec. 9, 1987) (*Avirgan II*) (considering deponent's showing of good cause).

13. *See "RICO Suite Alleges Contra Ties,"* 73 A.B.A. J. 20 (1987).

14. *Avirgan I*, 118 F.R.D. at 259.

whom later emerged as important Iran-Contral affair figures.[15] Plaintiffs sought third party Glen Robinette's testimony. Robinette apparently had accepted payments to develop vilifying information about the Christic Institute[16] in an attempt to undermine the original action, then pending in Florida.[17] The plaintiffs planned to take Robinette's deposition, and arranged for reporters from seven major publications and news services to view the deposition.[18] Robinette moved for a protective order to prevent press attendance at the deposition.[19]

In considering Robinette's motion, the *Avirgan* court first characterized the issue as whether a third party deponent may limit press and public access to the deposition proceedings.[20] The court cursorily reviewed Supreme Court decisions concerning public trial access[21] and protective orders[22] and concluded that, absent the deponent's showing of

15. *Id. See "RICO Suit Alleges Contra Ties,"* 73 A.B.A. J. 20 (1987).

16. In June 1987, Robinette testified before the Iran-Contra Congressional Committee that he had accepted money from Retired Major General Richard Secord to develop "derogatory" information about Christic Institute attorneys. *"Open Depositions to Press?"* 74 A.B.A. J. 22 (1988).

17. *Avirgan I*, 118 F.R.D. at 259.

18. The publications and news services were Time Magazine, U.S. News & World Report, The Village Voice, Rolling Stone Magazine, the Washington Post, the Associated Press and the Religious News Service. *Id.*

19. *Id.*

20. *Id.* at 260. Robinette framed the issue differently: "whether the press should have access to the deposition of a non-party." *Id.* at 260 n.4. The court rejected this statement of the issue as too broad. The court rephrased the issue as one concerning the "right of the press, parties, and deponent with regard to the *taking* of the deposition; the question of *ultimate* access to the information contained in the deposition through the transcript as it is affected by the filing requirements . . . ." *Id.* (emphasis in original). Thus, the court never explicitly decided the issue of "whether the press has a right to attend a deposition when the press is not a party," but merely presumed such a right. *Avirgan II*, 118 F.R.D. at 255. The Court concluded that Rule 26(c) balances these first amendment interests with the governmental interests. *Id.* at 257.

21. The court noted that the Supreme Court had recognized a constitutional right to attend criminal trial proceedings only recently, and that the court has not yet extended the right to civil trials. However, the court cited *In re* Reporters Comm. for Freedom of the Press, 773 F.2d 1325 (D.C. Cir. 1985) discussed *infra* notes 122-29 and accompanying text, and concluded it would follow the Supreme Court's "intimation" that the right applies to civil trials. *Avirgan I*, at 260 n.5. Ultimately, though, the court's decision turned on the protective order.

22. The court based its approach upon Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984), discussed *infra* notes 88-99 and accompanying text. The court stated *Seattle Times* was directly on point and rejected the Christic Institute's contentions that *Seattle Times* did not apply because the Christic Institute was not a party asserting a right to disseminate as the news paper had been in *Seattle Times*. Rather, the court claimed that the instant case involved the public's right to such information. *Avirgan I*, 118 F.R.D. at 260 n.6. The court apparently read *Seattle Times* as prohibiting a party from closing a discovery proceeding to the public unless the party shows good cause. *See id.* at 260-61; *see also Avirgan II*, 118 F.R.D. at 253.

"good cause" under Federal Rule 26(c),[23] a court should allow press attendance.[24] The court stayed its final decision and granted Robinette an opportunity to show good cause for the protective order.[25]

In a later memorandum,[26] the *Avirgan* court determined Robinette's allegations of harm[27] were insufficient to warrant a closed deposition.[28] Accordingly, the court denied Robinette's motion to exclude the press,[29] and also declined his request to supervise the deposition.[30]

II. LAYING THE FOUNDATIONS FOR PUBLIC ACCESS: THE SUPREME COURT DECISIONS

The Supreme Court has grappled with issues of public and press[31] ac-

23. FED. R. CIV. P. 26(c). Rule 26(c) provides in pertinent part:

> Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: . . . (1) that the discovery not be had; (2) that the discovery may be had only on specific terms and conditions . . .; (3) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (4) that discovery be conducted with no one present except person designated by the court; (5) that a deposition after being sealed be opened only by order of the court . . . .

24. *Avirgan I*, 118 F.R.D. at 261.

25. *Id.* at 262.

26. *Avirgan II*, 118 F.R.D. at 252.

27. Robinette alleged violation of his privacy, damage to his reputation as well as emotional and monetary harm, in the forms of threatening letters and damaged business, as a result of media attention. Robinette claimed the Christic Institute had distributed press releases "riddled with false statements and accusations" in anticipation of his deposition. *Id.* at 254. He further averred media attention had led to threatening phone calls and reluctancy of his clients to bring their matters to him while he was the focus of media attention. *Id.*

28. The *Avirgan* court also cited Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984) discussed *infra* notes 88-98 and accompanying text, for the authority that the trial court has broad discretion in determining whether a movant has shown good cause. *Avirgan II*, 118 F.R.D. at 255. The *Avirgan* court noted that Robinette focused on annoyance and harassment as a result of publication of the case, and compared his allegations to those in Koster v. Chase Manhattan Bank, 93 F.R.D. 471 (S.D.N.Y. 1982). The court concluded that, like *Koster*, Robinette had not established that the information likely to be disclosed would be worthy of protection, or irrelevant to the action. *Id.* at 256.

29. *Id.* at 253.

30. *Id.* at 259 n.1.

31. This Note is mainly concerned with public access. However, public access issues arise most often when a court excludes the press. The press has no greater right of access than does the public, so that to litigate one is to litigate the other. *See* Nixon v. Warner Communications, Inc., 435 U.S. 589, 609 (1978); Branzburg v. Hayes, 408 U.S. 665, 684 (1972). *See generally* Lewis, *A Public Right to Know About Public Institutions: The First Amendment as a Sword*, 1980 SUP. CT. REV. 1, 19-20 (*Richmond Newspapers*, 448 U.S. 555 (1980) foreclosed any special right of access for the press).

On the dangers of recognizing a preferred status for the press, *see* Van Alstyne, *The First Amendment and Free Press: A Comment on Some New Trends and Some Old Theories*, 9 HOFSTRA L. REV.

cess to trials, and court-controlled access to information in a variety of contexts. With each subsequent analysis, the Court has altered its focus to recognize broader public interests in access. In early public trial decisions, the Court grounded the right to a public trial not upon public rights but upon the criminal defendant's sixth amendment right to be heard before the public.[32] Similarly, early cases addressing a party's access to court records limited access to records pertinent to the party's action.[33] Over the years, the Court has shifted the focus of its access analysis from protection of the defendant's right to a fair trial to a party's need of evidence for trial toward recognition of the social utility of public criminal trials,[34] and of public review of court documents.[35]

The Supreme Court first addressed public access to trials in *Gannett v. DePasquale*.[36] *Gannett* involved a nonparty newspaper who sought access to both a criminal pretrial suppression hearing and the hearing's transcripts.[37] The Court found the trial court's exclusionary order valid on sixth amendment grounds[38] because it protected the defendant's right to a fair trial.[39] The Court rejected the newspaper's contention that the

1, 19-23 (1980) (recognition of a specific press right of access would lead to government regulation of press). *But see Note: A Press Privilege for the Worst of Times*, 75 GEO. L. J. 361, 366-72 (1980) (discussing Press as the Fourth Estate Theory).

Similarly, the court has refused to prohibit the press from publishing information obtained in open court. Oklahoma Publishing Co. v. Dist. Court, 430 U.S. 308 (1977) (courts may not restrict publication of minor's name and picture when the press obtained this information from an open hearing).

32. *See In re* Oliver, 333 U.S. 257 (1948) (A judge's investigation and punishment of witness for contempt must take place in open court, not in the judge's chambers).

33. *See Ex parte* Uppercu, 239 U.S. 435 (1915) (party has a right of access to evidence on file with a court from another action when that evidence pertains to his action).

34. *Compare* Gannett v. DePasquale, 443 U.S. 368 (1979), discussed *infra* notes 36-42, *with* Richmond Newspapers v. Virginia, 448 U.S. 555 (1980), discussed *infra* note 43-53 and accompanying text, and Globe Newspaper Co. v. Superior Court 457 U.S. 596 (1942), discussed *infra* notes 54-65 and accompanying text.

35. *Compare Ex parte* Uppercu, 239 U.S. 435 (1915) (litigant has right to access evidence of another action if the evidence pertains to his action) *with Seattle Times*, 467 U.S. 20 (1984) (party has qualified first amendment right to disseminate information to the public), *infra* notes 88-98, and Nixon v. Warner Communications Co., 435 U.S. 589 (1978) (recognizing a common law right of access to court records generally), *infra* notes 74-82.

36. 443 U.S. 368 (1979).

37. *Id.* at 375.

38. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.").

39. The order excluded the newspaper from the hearing. The trial judge, on reconsideration, recognized that the press had a constitutional right of access to judicial proceedings but stressed that the right should be balanced against a defendant's right to a fair trial. The jury found that the open hearing would have posed a reasonable probability of prejudice to the defendants and refused to

sixth amendment provides a public right to attend trials,[40] but reserved judgment on the newspaper's first amendment argument, concluding that the defendant's sixth amendment rights outweighed any first amendment right the press might have.[41] Despite the divergent grounds of the Court's opinions, the Court demonstrated almost perfect alignment in failing to adopt the newspaper's first amendment contentions.[42]

The Court recast its public access analysis in *Richmond Newspaper, Inc. v. Virginia*.[43] In *Richmond*, the Court held that a criminal trial must be open to the public unless the trial court articulates an overriding interest in closing the proceeding.[44] The Court posited three rationales for the right of public access to criminal proceedings: historical practice, the function of public trials and the first amendment. First, the Court noted that historical evidence suggests Anglo-American criminal trials were presumptively open.[45] Originally, public criminal trials allowed the public to vent community concerns, hostility and emotion over events affect-

---

vacate the exclusionary order, thus denying the newspaper a copy of the transcript of the proceeding. 443 U.S. at 376.

40. Justice Stewart, writing for the Court, stated that the sixth amendment does not create a public right of access. Rather, its guarantee is "personal" to the accused, and is intended as a safeguard against possible abuses of the judicial process. 443 U.S. at 379-80.

The Court found a strong societal interest in public trials because openness may improve the quality of testimony, induce unknown witnesses to come forward, cause each trial participant to perform his or her duties more conscientiously and provide the public with an opportunity to observe the judicial system. On the other hand, this societal interest also extends to the constitutional rights of the accused, such as swift and fair administration of justice, *Id.* at 383. The Court concluded that the public interest in fair trials is fully protected by the participants in the litigation. *Id.* at 384. While the Court did acknowledge a common law rule of open proceedings, it expressed apprehension toward elevating the rule to the status of a constitutional right. *Id.* at 385.

41. *Id.* at 392-93.

42. The Justices wrote five separate opinions concurring only in the result. Chief Justice Burger's concurring opinion limited the holding to pretrial proceedings. *Id.* at 394 (Burger, C.J., concurring). Justice Rehnquist's concurring opinion posited the press and the public have no right of access under the first or sixth amendments. *Id.* at 404 (Rehnquist, J., concurring). In contrast, Justice Blackmun, concurring and dissenting in part, joined by Justices Brennan, White and Marshall, recognized a sixth amendment right of public access. *Id.* at 446-47 (Blackmun, J. concurring and dissenting in part). Every Justice except Justice Powell either did not reach the first amendment issue or declined to reach the first amendment issue or declined to reach the first amendment issue.

43. 448 U.S. 555 (1980).

44. *Id.* at 581. In *Richmond*, the third retrial of a murder trial, the trial court had granted defense counsel's closure motion with no objections from the prosecution or the newspaper whose reporters were present before the trial began. *Id.* at 555.

45. *Id.* at 569. The Court traced public proceedings to years before the Norman Conquest, *Id.* at 565, and chronicled their development from Blackstone and English common law to their incorporation into American law. *Id.* at 569-73.

ing the community,[46] and permitted public participation in government, thus, minimizing public concern over unchecked judicial power.[47] The Court also articulated a function-based amendment rationale.[48] The first amendment, the court reasoned, protects the public's access to trials because the public has a first amendment right to receive information and ideas as well as a right to assemble.[49] Thus, the first amendment and its concomitant public scrutiny of trials enhances the quality and integrity of trials.[50] Finally, the Court found the right to attend criminal trials implicit in the first amendment guarantees.[51] In stark contradiction to *Gannett*, seven justices recognized a first amendment right of public access[52] and one insisted that the right extends to civil trials as well.[53]

In *Globe Newspaper Co. v. Superior Court*[54] the Supreme Court reiterated the *Richmond* approach and clarified its rationale. In *Globe*, a Massachusetts statute mandated public exclusion from alleged victims' testimony in child sexual abuse trials.[55] On its second hearing of *Globe*,[56]

46. This effect may be loosely termed the "cathartic" aspect of public trial. Its value is in providing an outlet for the desire for retribution as an alternative to vigilante enforcement. *Id.* at 571.

47. *Id.* at 572. This aspect is really a combination of the educative aspect (public access to trials educates the public in the workings of our justice system), the balance of power aspect (public exposure curbs judicial power abuse through subjecting judicial acts to public exposure), and the good faith aspect (public access to trials reinforces the public's faith and confidence that the justice system is fair and just). *Id.* at 571-73.

48. *Id.* at 575-77.

49. Chief Justice Burger's plurality opinion referred to the free speech clause, the press clause and the right of assembly components of the first amendment, *id.* at 577-78, and made mention of the ninth amendment and supporting unenumerated fundamental rights, *id.* at 579 n.15, (thus "the First Amendment can be read as protecting the right of everyone to attend free trials so as to give meaning to those explicit guarantees"). *Id.* at 575. Thus, in the Chief Justice's opinion, the first amendment provides protection necessary for its operation. *Cf. infra* note 59 (Justice Brennan's first amendment theory in *Richmond*).

50. 448 U.S. at 575-77.

51. *Id.* at 580.

52. The Court generally recognized the first amendment speech and press clauses were the basis for any such right of access. *Id.* (Burger, J., plurality opinion); *id.* at 582 (White, J., concurring); *id.* (Stevens, J., concurring); *id.* at 584 (Brennan, J., concurring in judgment); *id.* at 601 (Blackmun, J., concurring in judgment). Justice Powell took no part in the consideration or decision of the case. However, on the basis of his concurring opinion in *Gannett*, Powell probably also would have recognized the first amendment basis for access. *See* 443 U.S. at 403 (Powell, J., concurring).

53. *Id.* at 599 (Stewart, J., concurring in the judgment). Chief Justice Burger, writing for the Court, stated that historically both civil and criminal trials were presumptively open, but added that this case did not raise this particular question. *Id.* at 580 n.17.

54. 457 U.S. 596 (1982).

55. MASS. GEN. LAWS. ANN. ch. 278, § 16A (West 1981).

56. On the first hearing, the Court vacated the state supreme court's holding that closure was

the Court rejected the lower court's first amendment analysis[57] and held the state statute unconstitutional.[58] Initially, the Court noted that the first amendment includes unenumerated first amendment rights which are necessary to enjoy the enumerated first amendment rights.[59]

The Court then reaffirmed the functional aspect of public criminal trials because they ensure individual participation in government, and are necessary to inform public decisions pertaining to governmental functions.[60] The Court also employed the historical openness and public quality control rationales of *Richmond*[61] as further support, adding that public access heightens public respect for the judicial process as well.[62] The Court did not go so far as to hold the public's first amendment right of access to be absolute. A court may close a criminal trial to the public in order to inhibit disclosure of sensitive information, but its closure order must meet strict scrutiny.[63] The Court ultimately found the Massachusetts closure statute overbroad and thus unconstitutional.[64] Despite this victory for the press, the Court did not extend its holding outside the context of criminal proceedings.[65]

---

within the trial court's discretion and directed the state court to reconsider its decision in light of *Richmond*, 449 U.S. 894 (1980).

57. The state court had recognized the historical openness of criminal trials, but noted an exception to the tradition of openness: cases involving sexual assaults. 383 Mass. 838, 845, 423 N.E. 2d 773, 777-78 (1981).

58. 457 U.S. at 610-11.

59. Justice Brennan tracked Chief Justice Burger's treatment of unenumerated first amendment rights in *Gannett, supra* note 49, in which the Chief Justice noted that free access to proceedings furthers the explicit first amendment guarantees of free speech, freedom of the press, and the right of association. *See Gannett*, 448 U.S. at 577-78 (plurality opinion). Justice Brennan also added his own first amendment theory: the first amendment protects those rights essential to republican government. 457 U.S. 596 at 604-05. *See also* Brennan, *Address*, 32 RUTGERS L. REV. 173, 175 (1979) (quoting, Time Inc., v. Hill 385 U.S. 374, 389 (1967)) ("the guarantees of the first amendment 'are not for the benefit of the press so much as for the benefit of all of us. A broadly defined freedom of the press assures the maintenance of our political system and an open society.' ").

60. 448 U.S. at 604.

61. *See supra* notes 45-50 and accompanying text.

62. 448 U.S. at 605.

63. *Id.* at 606-07. The denial of access must be "necessitated by a compelling governmental interest and . . . narrowly tailored to serve that interest." *Id.* at 607.

64. *Id* at 608. The Court noted that if the court had reviewed on a case-by-case basis, it might have been constitutional. *Id.* However, because the statute closed all child testimony, it was not "narrowly tailored." *Id.* at 609.

65. The majority opinion made no reference to applications outside the context of criminal trials. Justice O'Connor's concurrence specifically limited the *Globe* and *Richmond* holdings to criminal trials. *Id* at 611. Chief Justice Burger, joined by Justice Renquist, stated that although a presumption of public openness of criminal proceedings exists, it is rebuttable. *Id.* at 619 (Burger, C.J., dissenting). The Justices proposed a lower level of scrutiny for statutory closure: whether the

In the two subsequent cases, the Supreme Court extended the first amendment rights of public access to pretrial proceedings in criminal trials. In *Press-Enterprise v. Superior Court* (*Press-Enterprise* I)[66] the Court addressed the right of public access in voir dire hearings. The Court, without reaching the first amendment claim,[67] reiterated *Globe*'s historical and functional approaches and reaffirmed the necessity of strict scrutiny to overcome the presumptive openness of criminal proceedings.[68]

In *Press-Enterprise v. Superior Court* (*Press-Enterprise* II)[69] the Court considered public access to pretrial suppression hearings. The Court stressed the first amendment access right and clearly articulated a two-prong test for public access to judicial proceedings. First, a court must determine whether the proceeding has a "tradition of accessibility."[70] Secondly, a court must look to whether public access plays a significant, positive role in the process function as a whole.[71] If these two factors are affirmative, a qualified first amendment right of access attaches to the process and a reviewing court will strictly scrutinize a closure order.[72]

In a related group of cases, the Supreme Court has addressed the right of public access to court documents.[73] In *Nixon v. Warner Communications, Inc.*,[74] the Court considered whether the press had a common law

---

restrictions imposed are reasonable and whether the state's interests override the very limited incidental effects of first amendment rights. *Id.* at 616. Justice Steven stressed that the Court had only recognized a first amendment right of access to newsworthy matters. *Id.* at 620-21. (Stevens, J., dissenting).

66. Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984) (*Press-Enterprise I*).

67. *See* 467 U.S. at 509 n.8. But Justice Steven's concurring opinion urged that the decision should rest on the first amendment. *Id.* at 516.

68. *Id.* at 510.

69. Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986) (*Press-Enterprise II*).

70. *Id.* at 8.

71. *Id.*

72. "[T]he presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Id.* at 9 (citing *Press-Enterprise I*, 464 U.S. at 510).

73. Normally, in cases concerning public access to trials, access to document claims do arise. This Note also addresses discovery, however, which encompasses both proceedings (e.g., depositions) and documents (e.g., interrogatories). Various commentators have recognized a correlation between the Supreme Court's trial access and document access analyses. *See Contemporaneous Access to Judicial Records in Civil Trials*, 9 WHITTIER L. REV. 67 (1987) (advocating application of first amendment balancing test for access to court records); Note, *Access to Pretrial Documents Under the First Amendment*, 84 COLUM. L. REV. 1813 (1984) (same approach). *But see Recent Development, Public Access to Civil Court Records: A Common Law Approach*, 39 VAND. L. REV. 1465 (1986) (arguing first amendment trial access decisions should not be applied to document access issues).

74. 435 U.S. 589 (1978).

right, a first, or sixth amendment right[75] to Watergate transcripts that the trial court entered into evidence in a criminal trial. The Court rejected the press' common law and constitutional[76] arguments. The Court conceded a general common law right to inspect and copy public records and documents. Such a right promotes the public's interest in observing government's workings.[77] Despite this interest, the common law right to copy and inspect judicial records is not absolute.[78] Justice Powell, writing for the majority, stated courts have the inherent power to "insure that . . . [their] records are not used to gratify private spite or promote public scandal" and that courts have refused to permit their files to serve as "reservoirs of libelous statements for press consumption."[79] The Court concluded that the decision to allow common law access to trial documents is best left to the sound discretion of the trial court.

In addressing the press' first amendment press clause argument, the Court conceded a court cannot prevent the press from publishing what it had learned and what it was entitled to know.[80] Courts may not interfere with the press when it publishes material already in the public domain.[81] Because the public has no first amendment right of access to trial documents, the press also has none.[82]

The Supreme Court has also addressed an asserted first amendment public right to receive information, or "right to know."[83] While the

75. The press contended the sixth amendment required release of the Watergate tapes because that amendment's requirement of public trials would not be met if the public's understanding of the proceedings was incomplete. Thus, the press argued that the Court must allow the public to listen to the tape to judge meaning from the speakers' inflection and emphasis. *Id.* at 610.

76. The Court found the sixth amendment right to public trial exists to protect courts from becoming instruments of persecution. *Id.* In addition, the Court held that the sixth amendment confers no special benefit on the press. *Id.* The amendment only protects the defendant by allowing the public and press to attend the trial, but not to broadcast it. *Id.*

77. *Id.* at 597.

78. *Id.* at 598.

79. *Id.* (quoting excerpt from *In re* Caswell 18 R.I. 835, 836, 29 A.2d 259 (1893)).

80. 435 U.S. at 604.

81. *Id.*

82. *Id. See also Recent Development, supra,* note 73 (preferring *Nixon* common law approach to recent federal appellate application of first amendment to civil court records access issue).

83. The "right to know" stems from Professor Alexander Meiklejohn's theory that the first amendment protects the citizens' right to participate in America's democratic government. *See* A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948). *See also* BeVier, *An Informed Public, An Informing Press: The Search for A Constitutional Principle*, 68 CALIF. L. REV. 482, 501-02 (1980); O'Brien, *The First Amendment and the Public's "Right to Know,"* 7 HASTINGS CONST. L.Q. 579 (1980); Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U. L.Q. 1, 14-20.

Court has long recognized a first amendment right to receive information from a willing person,[84] the Court has been reluctant to establish a right to know or a right to gather information for either the press or the public.[85] The Court has, to an extent, intimated a first amendment protection for news-gathering.[86] The Court, however, has refused to extend a first amendment right of access to government controlled information.[87]

---

84. *See* Virginia Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (first amendment right to receive commercial information); Procunier v. Martinez, 416 U.S. 396 (1974) (first amendment right to receive personal correspondence); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (right to receive information generally); LaMont v. Postmaster Gen., 381 U.S. 301 (1965) (first amendment right to receive political information).

85. *See, e.g.*, Zemel v. Rusk, 381 U.S. 1 (1965). In *Zemel*, the plaintiff asserted a first amendment right to gather information in Cuba about the overseas effects of government policies, despite a government ban on trade with Cuba. *Id.* at 16. The Court held that no first amendment right existed under the circumstances, and noted that if such a right existed, many individuals could raise constitutional issues merely by alleging a decreased data flow. *Id.* at 16-17. The Court concluded: "The right to speak and publish does not carry with it the unrestrained right to gather information." *Id.* at 17.

However, the Court has softened its no "right to gather" approach in the dicta of more recent cases. *See, e.g.*, Branzburg v. Hayes, 408 U.S. 665, 707 (1972) ("newsgathering is not without its first amendment protection"); *see also* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) discussed *supra* notes 52-63 and accompanying text. Some commentators consider *Richmond* the advent of first amendment right to know. *See, e.g.*, Note, *What Ever Happened to the "Right to Know"?: Access to Government-Controlled Information Since Richmond Newspapers*, 73 VA. L. REV. 1111, 1115 (1987). In addition, one court has read *Globe* as supplying reporters with "a right to make the government give them access to nonpublic information." United States v. Dorfman, 690 F.2d 1230, 1233 (7th Cir. 1982). One court has gone even as far as applying first amendment analysis to a photographer's "right to photograph" a rock concert despite a general "no-camera" rule. D'Amario v. Providence Civil Center Authority, 639 F. Supp. 1538 (D.R.I. 1986).

86. *See* Branzburg v. Hayes, 408 U.S. 665, 707 (1972). *Branzburg* involved a reporter's assertion that the first amendment provided protection against a grand jury's efforts to force disclosure of his sources. The Court rejected this argument, but noted some first amendment newsgathering protection. *Id.* at 700-09. *See also* Houchins v. KQED, Inc., 438 U.S. 1, 11 (1978) ("an undoubted right exists to gather news 'from any source by means within the law' ") (quoting *Branzburg*, 408 U.S. at 681-82); Saxbe v. Washington Post Co., 417 U.S. 843 (1974) (political objectives of first amendment require access to information because "[p]ublic debate must not only be unfettered, it must be well informed"). *Id.* at 862-63 (Powell, J., dissenting); Gannett v. DePasquale, 443 U.S. 368 (1979) (importance of the public's having accurate information concerning the criminal justice system).

87. Houchins v. KQED, Inc., 438 U.S. 1, 12-14 (1978). The Court stated:

> The [press] argument is flawed, not only because it lacks precedential support and is contrary to statements in this Court's opinions, but also because it invites the Court to involve itself in what is clearly a legislative task . . . . Because the Constitution affords no guidelines, absent statutory standards, hundreds of judges would . . . be at large to fashion ad hoc standards . . . according to their own ideas of what seems "desirable" or "expedient."

Id. at 12-14; Saxbe v. Washington Post Co., 417 U.S. 843 (1974); Pell v. Procunier, 417 U.S. 817 (1974) (no right of public access to prisons to interview inmates).

In *Seattle Times Co. v. Rhinehart*[88] the Court addressed a first amendment issue related to document access.[89] In *Seattle Times*, Rhinehart, a leader of a religious order, brought a defamation suit in Washington State Court against a newspaper.[90] The newspaper subsequently discovered, through requests for documents, the names of the order's members.[91] Rhinehart moved for and obtained a protective order under Washington Civil Procedures Rule 26(c) to prevent the newspaper from publishing the names.[92] The newspaper claimed the protective order infringed upon its first amendment right to disseminate information which had been obtained in discovery. The Supreme Court rejected the newspaper's challenge, noting that there is no unrestrained first amendment right to gather information.[93] The court observed that parties obtain information only by virtue of liberal discovery rules which are a "matter of legislative grace."[94] Thus, a litigant has no general first amendment right of access to information made available for the sole purpose of trying his suit.[95] Further, the Court noted that pretrial depositions and interrogations are not a public component of a civil trial.[96]

The Court avoided the newspaper's urgings to subject the protective order to strict scrutiny as a prior restraint, and left the decision to the discretion of the trial court.[97] The Court concluded that when a court enters a protective order on a party's showing of good cause, and does not restrict information gained outside of discovery, the protective order

88. 467 U.S. 20 (1984).

89. Any attempt to characterize *Seattle Times* as strictly an access case is unsound. Unlike true access cases, the party newspaper had already obtained the information through discovery. Access was not an issue; the issue was what a party could do with the information once obtained. *See* Note, *Access to Pretrial Documents Under the First Amendment* 84 COLUM. L. REV. 1813, 1839-41 (1984) (criticizing attempts to characterize *Seattle Times* as an access case).

90. 467 U.S. at 23.

91. *Id.* at 24.

92. The state rule was based on a similar provision in the Federal Rules of Civil Procedure; *see supra* note 23.

93. 467 U.S. at 32.

94. *Id.*

95. However, he may publish that same information if obtained through other sources. *Id.*

96. "Discovery rarely takes place in public. Depositions are scheduled at times and places most convenient to those involved. Interrogatories are answered in private." *Id.* at 33 n.19. *See also* Gannett v. DePasquale, 443 U.S. 368 (1979). "[D]uring the last 40 years in which pretrial processes have been enormously expanded, it has never occurred to anyone, so far as I am aware, that a pretrial deposition or pretrial interrogatories were other than wholly private to the litigants. A pretrial deposition does not become part of a 'trial' until and unless the contents of the deposition are offered into evidence." *Id.* at 396 (Burger, C.J., concurring).

97. *Id.* at 36.

does not implicate the other party's first amendment rights.[98] Because *Seattle Times* concerned a party's limited right to disseminate discovered information, it did not answer conclusively the issues of public access in civil proceedings or public rights to discovered information.

Although the Supreme Court has accorded a qualified first amendment status to public attendance at most criminal proceedings, it has expressed ambivalence toward a public right of access to civil proceedings.[99] Further, the Court has recognized only a limited press right to court documents. This lack of clear guidance has lead to a good deal of confusion in the lower federal courts.

III. A VARIETY OF POSSIBLE STRUCTURAL CONFIGURATIONS FOR A RIGHT OF PUBLIC ACCESS

In the wake of the Supreme Court's access decisions, the circuit courts of appeal have addressed a variety of public access rights to trial and pretrial proceedings, both civil and criminal. While some circuit courts have recognized common law and first amendment rights of access to various proceedings[100] and documents,[101] they have denied access to

98. *Id.* at 37.

99. *See supra* note 53 and accompanying text. *See also* Note, *First Amendment Rights of Access to Civil Trials After* Globe Newspaper Co. v. Superior Court, 51 U. CHI. L. REV. 1286 (1984) (Commentator applies *Globe* and *Richmond* tests to civil trial and finds first amendment right).

100. *See, e.g.*, Publicker Industries, Inc. v. Cohen, 733 F.2d 1059, 1071 (3d Cir. 1984) (first amendment provides right of access to civil trials); *In re* Continental Ill. Sec. Litig., 732 F.2d 1302 (7th Cir. 1984) (presumptive right of access to proceedings in motion to terminate derivative claims in shareholder derivative action); Newman v. Graddick, 696 F.2d 796 (11th Cir. 1983) (recognizing press' right to attend civil suit regarding prison overcrowding); Bank of America Nat'l. Trust and Sav. Ass'n. v. Hotel Rittenhouse Associates, 800 F.2d 339 (3d Cir. 1986); Wilson v. American Motors Corp. 759 F.2d 1568 (11th Cir. 1985). *See also* Note, *A First Amendment Right of Access to Judicial Disciplinary Proceedings*, 132 U. PA. L. REV. 1163 (1984) (first amendment grants right of access to post-investigatory disciplinary proceedings).

101. *See* United States v. Haller, 837 F.2d 84 (2d Cir. 1988) (first amendment right of access extends to sealed plea agreements in criminal trial); FTC v. Standard Fin. Management Corp., 830 F.2d 404 (1st Cir. 1987) (common law presumption of access attaches to financial statements used in reaching settlement agreement); *In re* National Broadcasting Co., Inc., 828 F.2d 340 (6th Cir. 1987) (qualified first amendment right of access attaches to documents and records pertaining to both proceedings to disqualify judge and proceedings to inquire into attorney's conflict of interest in a criminal trial); Anderson v. Cryovac, Inc., 805 F.2d 1 (1st Cir. 1986) (common law privilege of access extends to materials used in determining the litigant's substantive rights); United States v. Martin, 746 F.2d 964 (3d Cir. 1984) (common law access rights attach to tape transcripts not admitted into evidence in a criminal trial); Tavoulareas v. Washington Post Co., 724 F.2d 1010 (D.C. Cir. 1984) (common law-based presumption of public openness for discovery material extends to documents used at trial); *In re* Agent Orange Prod. Liab. Litig., 104 F.R.D. 559 (E.D.N.Y. 1985) (Rule 26(c) creates a presumptive public openness of discovery).

other proceedings[102] and documents.[103] Courts have blended issues and tests so that either result might be legally supportable. In an access decision, the outcome essentially depends upon whether the court characterizes the asserted access right as a right to access proceedings or court documents, or as a right to gather newsworthy information or disseminate information under a party's control.

In *Publicker Industries, Inc. v. Cohen*[104] the Third Circuit recognized a right of public access to civil trials. On the basis of Supreme Court dicta, footnotes, and dissenting opinions, the Third Circuit applied the *Globe* test[105] and determined the public has both a common law and a first amendment right of access to civil trials.[106] The court first noted the right to attend civil trials existed throughout history and thus recognized a common law right of access.[107] The court also employed the *Globe* first amendment test, examined the historical nature of civil trials and found that they, like criminal trials, were historically open to the public.[108] The court then considered whether civil trials play "a significant role in the functioning of the judicial process and as government as a whole."[109] The *Publicker* court recognized that public access in civil trials enhances the quality of court proceedings, heightens public respect for the judicial process, and serves as a check against plenary judicial authority.[110] The court, however, held that a court must show the denial "serves an impor-

102. First Amendment Coalition v. Judicial Inquiry Review Bd., 784 F.2d 467 (3d Cir. 1986) (no first amendment right of access to judicial inquiry board proceeding); Westmoreland v. Columbia Broadcasting Sys., Inc., 752 F.2d 16, 23 (2d Cir. 1984) (first amendment articulates right to attend a trial, but not a right to view them on the television screen).

103. The Courier-Journal v. Marshall, 828 F.2d 361 (6th Cir. 1987) (protective order with good cause shown is sufficient to prevent non-party newspaper from obtaining Ku Klux Klan membership list entered into discovery); Anderson v. Cryovac, Inc., 805 F.2d 1 (1st Cir. 1986) (common law presumption of access to documents does not extend to materials used in discovery); United States v. Beckham, 789 F.2d 401 (6th Cir. 1986) (constitutional right to attend criminal trials but not to copy tape recordings entered into evidence therein); *In re* Reporters Committee for Freedom of the Press, 773 F.2d 1325 (D.C. Cir. 1985) (no first amendment or common law rights of access to prejudgment discovery materials); Travoulareas v. Washington Post Co., 724 F.2d 1010 (D.C. Cir. 1984) (no first amendment or common law right of access to discovery materials not used at trial); Belo Broadcasting Corp. v. Clark, 654 F.2d 423, 428 (5th Cir. 1981) (no constitutional right of physical access to courtroom exhibits).

104. 773 F.2d 1059 (3d Cir. 1984).

105. *See supra* notes 60-64, 70-72 and accompanying text.

106. 773 F.2d at 1071.

107. *Id.* at 1066-67.

108. *Id.* at 1068-69.

109. *Id.* at 1068.

110. *Id.* at 1069-70.

tant governmental interest" and that no less restrictive way exists to serve that interest.[111] Curiously, the court recognized a good cause exception for court documents to the presumptive openness of civil proceedings but intimated the exception must also meet first amendment scrutiny.[112]

Several circuits have made similar findings of a right of public access to civil proceedings.[113] However, the Third Circuit has restricted the apparent breadth of the *Publicker* first amendment right of access by rejecting a right of access to judicial inquiry board proceedings.[114] The court has similarly rejected a general first amendment right of access to government documents of general public interest.[115]

In *In re Continental Illinois Securities Litigation*[116] the Seventh Circuit applied the policies underlying the Supreme Court criminal access decisions to create a right of access to civil proceedings and documents.[117] In this shareholder derivative action, the district court granted access to a litigation committee's report that it had used in reaching its conclusion that the derivative action should continue.[118] The committee obtained a stay of the court's disclosure order and collaterally appealed, contending that the district court erred in presuming a right of public access to pretrial proceedings in civil cases.[119] The Seventh Circuit upheld the order and pronounced that a presumption of public access inures to hearings on motions to terminate and documents used in connection with those hearings.[120] However, the court expressly reserved opinion upon access in any pretrial stage other than a hearing on termination.[121]

The District of Columbia Circuit Court of Appeals in *In re Reporters*

111. *Id.* at 1070.

112. *Id.* at 1073.

113. *See supra* note 4. *See also* Note, *Publicker Industries v. Cohen: Public Access to Civil Proceedings and a Corporation's Right to Privacy*, 80 N.W.U.L. REV. 1319 (1986).

114. First Amendment Coalition v. Judicial Inquiry and Review Bd., 784 F.2d 467 (3d Cir. 1986).

115. Capital Cities Media, Inc. v. Chester, 797 F.2d 1164 (3d Cir. 1986).

116. 732 F.2d 1302 (7th Cir. 1984).

117. *Id.* at 1308-09.

118. *Id.* at 1306. The report was made in connection with a motion to terminate and recommended that the trial court discuss all but one of the claims. After the court expressed its tentative opinions about the use and the report, the parties settled. *Id.*

119. *Id.* at 1309.

120. *Id.* In particular, the court noted a motion to terminate was in essence, a "hybrid summary judgment" with the same effect as a final hearing and thus, a greater reason for a presumption of public access. *Id.*

121. *Id.* at 1309 n.10.

Committee for Freedom of the Press,[122] considered an intervenor's[123] asserted first amendment right of access to prejudgment documents in a defamation action. The documents were the subject of a district court's protective order.[124] Judge Scalia, now Justice Scalia, first noted that the intervenor had not pleaded a common law right of access, but a first amendment right, and doubted whether even a common law right of public access exists for prejudgment documents.[125] He further noted that he could find neither historical authority for a general right of access to prejudgment records,[126] nor any evidence that such access plays an essential role in the functioning of the judicial process.[127] Judge Scalia concluded that even if the functional justification of public trials were as important in civil trials as in criminal trials, public access to prejudgment documents would not enhance these interests.[128] The court concluded that the district court's refusal of access had not violated even a common

122. 773 F.2d 1325 (D.C. Cir. 1985).

123. Four individual newspaper reporters and an unincorporated association, the Reporters Committee for Freedom of the Press, intervened in order to petition the district court to reconsider its pretrial orders. *Id.* at 1327. The district court allowed intervention, but denied reconsideration. *Id.*

124. *Id.* at 1326.

125. *Id.* at 1337. The court examined at length the "prejudgment rule" which states that as a common law rule no public access to prejudgment records in a civil case exists. *Id.* at 1334. The court cited a number of state and federal cases which opposed the prejudgment rule. On the other hand, the court asserted that the "public records privilege" supports the prejudgment rule. The public records privilege generally protects persons reporting public records from liability for defamation. However, the privilege does not extend to prejudgment records. Judge Scalia concluded: "It would be strange, if not unthinkable, to assess civil liability for bringing to the public's attention government records which the public is entitled to see." *Id.* at 1335 (citations omitted).

126. The court examined several cases which cast doubt upon public access prior to judgment, *e.g.*, *Ex parte* Drawbaugh, 2 App. D.C. 404 (1894); Cowley v. Pulsifer, 137 Mass. 392 (1884) (Holmes, J.), and concluded that

> [b]ecause of their sparseness [these] authorities . . . are perhaps weak support for a general common law rule of non-access to pre-judgment records in private civil cases. But when laid beside our inability to find *any* historical authority, holding or dictum, to the contrary, they are more than enough to rule out a general tradition of *access* to such records.

773 F.2d at 1335-36 (emphasis in original).

127. 773 F.2d at 1336-37. The court examined the *Globe* and *Richmond* functional assertions that open trials preserve the integrity of factfinding, and the appearance of fairness function as a check on judicial and governmental process, and play a cathartic role in permitting the community to see justice being done. *Id.* The court concluded, "even assuming, as seems unlikely, that these functions are as important as in the context of civil suits between private parties as they are in criminal prosecutions, they are not greatly enhanced by access to documents . . . *before* judgment rather than *after*." *Id.* (emphasis in original). For an opposing view to Judge Scalia's see Note, *Contemporaneous Access to Judicial Records in Civil Trials*, 9 WHITTIER L. REV. 67 (1987) (criticizing prejudgment rule and advocating *In re Continental* dissent's balancing test).

128. 773 F.2d at 1339.

law right of access.[129]

Other circuits use a different test to determine whether a right of access exists. These courts ignore the historical basis and functional justification factors and simply judge the right of access upon the public interest in access to the information.[130] If the public's interest in obtaining access outweighs the government's interest in refusing the right of access, then the court recognizes the right of access.[131]

Most circuits after *Seattle Times* recognize a litigant has a first amendment right to disseminate discovered information unless the trial court has found good cause and accordingly entered a protective order under Federal Rule of Civil Procedure 26(c).[132] In *Anderson v. Cryovac*,[133] the First Circuit adopted this approach to the litigants' first amendment right to disseminate. *Anderson* was a class action against a chemical company who had allegedly contaminated a town's water with toxic chemicals. The press showed particular interest in this action and the district court subsequently entered a protective order to prevent press influence of prospective jurors.[134] The court then allowed media production companies to intervene and modified the protective orders to allow general statements about the suit while still barring general distribution of discovered information.[135] Later, newspapers and television networks obtained intervention, but the district court refused to grant access to the protected information.[136] The newspaper sought modification of the protective orders but the district court refused to modify them until final disposition of the case.

The First Circuit reviewed *Seattle Times* and concluded that a protec-

129. *Id.*

130. *See, e.g.*, United States v. Chagra, 701 F.2d 354 (5th Cir. 1983) (lack of historic tradition does not bar no right of access); *In re* Consumers Power Co. Sec. Litig., 109 F.R.D. 45, 54 (D. Mich. 1985); Herald Co. v. Board of Paule, 131 Misc. 2d 36, 45-46, 499 N.Y.S. 2d 301, 308 (Sup. Ct. 1985). *See generally* Note, *What Ever Happened to "The Right to Know"?: Access to Government-Controlled Information Since* Richmond Newspapers, 73 VA. L. REV. 1111 (1987).

131. *See supra* note 129.

132. *In re* Halkins, 598 F.2d 176, 188 (D.C. Cir. 1979) ("[W]ithout a protective order materials obtained in discovery may be used by a party for any purpose including dissemination to the public."). *See supra* note 23 for the text of FED. R. CIV. P. 26(c).

133. 805 F.2d 1 (1st Cir. 1986).

134. The original protective order prohibited the parties, their counsel, consultants and experts from divulging any information obtained through discovery. *Id.* at 3.

135. *Id.* The court later modified the order again to allow the media production companies to conduct interviews of the parties' attorneys, consultants and experts. *Id.*

136. The district court made available the documents it had used in deciding summary judgment, but did not allow access to all discovered information. *Id.* at 4.

tive order entered on good cause does not offend the first amendment if it applies only to the discovery context and does not restrict dissemination of information obtained from other sources.[137] The court then applied this test and determined the district court's protective order passed muster under the "good cause" standard.[138] Furthermore, the court then applied the *Richmond/Globe* inquiry and determined there is neither a first amendment nor a common law public right of access to documents in civil discovery.[139]

In sum, as a result of *Seattle Times*[140] most circuits recognize a first amendment right of parties to disseminate discovered information which a court may restrict only upon good cause shown and a narrowly drawn protective order. However, in access litigation, there is a vast difference between *gathering* information and *spreading* information obtained through discovery.[141] This treatment is consistent with Supreme Court precedent.[142] Despite expanded access rights to trials and expanded rights to disseminate information, courts have shown reluctance to recognize a right to gather.[143] While trials may be presumptively open and courts may close them only after passing strict constitutional scrutiny,[144] court-imposed restrictions on dissemination require only a showing of good cause and a narrowly drawn protective order.[145] No circuit has recognized a broad public or press right to gather information or proposed a test to apply in such a situation. This trichotomy of access precedent does not hold its separate doctrines distinct, and often leads to confusing applications, especially in cases in which an intervenor asserts a right to access discovery records or proceedings, or a litigant asserts a right to share discovery. An asserted public right of access to attend

137. *Id.* at 6.

138. *Id.* at 7-8.

139. The court recognized that the public has common law and first amendment rights of access to some parts of the judicial process, but held that the right does not extend to documents in connection with discovery proceedings. *Id.* at 10. The court reviewed public access decisions pertaining to criminal trials, civil trials, criminal pretrial hearings and civil pretrial reports used in the disposition of litigants' claims. *Id.* at 11. *See supra* notes 43-65 and accompanying text.

140. *See supra* notes 88-99 and accompanying text.

141. *See supra* notes 83-87 and accompanying text.

142. *See* Seattle Times v. Rhinehart, 467 U.S. 20, 34 (1984); Zemel v. Rusk, 381 U.S. 1, 17 (1965).

143. *See supra* note 85.

144. *Press-Enterprise II*, 478 U.S. 1 (1986); *Globe Newspaper*, 457 U.S. 596 (1982).

145. *Seattle Times*, 467 U.S. 20.

pretrial hearings, obtain pretrial documents, or disseminate shared discovery can also cause confusion.

IV. A PUBLIC RIGHT OF ACCESS TO DISCOVERY MATERIALS AND PROCEEDINGS, CAN IT STAND?: AN ANALYSIS OF APPLICABLE STATUTES AND PRECEDENT

Clearly, discovery is open to the parties in an action. The wording and policy of the Federal Rules of Civil Procedure support such a proposition.[146] However, when an intervenor or an outsider to the action successfully asserts a right of access to discovery materials or proceedings, a broader sort of openness, an unprecedented public openness, results.

Because the Federal Rules state that all papers must be filed with the court unless specified otherwise,[147] most discovery is eventually available to the public. Thus, public access to pretrial proceedings or discovery is usually only a question of how *soon*, and through what mechanisms, the public may obtain access. Once a party enters discovery into evidence, absent a protective order, the documents are subject to the public's common law right of access to court documents.[148] However, the basis for a right of public access is more tenuous when a nonparty member of the press or public asserts the right prior to the documents' admission into evidence or filing. One can plausibly construe the common law right of

146. *See* 8 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: § 2041 (2d ed. 1987) (referring to the provision which is now FED. R. CIV. P. 16(b)(5)).

> Prior to 1970 the corresponding provision . . . stated 'that the examination shall be held with no one present except the parties to the action and their officers or counsel.' By clear negative implication this was read to mean that the parties, their officers and counsel could not be excluded. This was a desirable result and there is no indication that the Advisory Committee intended to change it when it as prepared. . . . [26(b)(5) FED. R. CIV. P.].

Id.

See also Kerschbaumer v. Bell, 112 F.R.D. 426 (D.D.C. 1986) (party may not exclude other party from depositions absent clear allegations of serious harm). *Contra* Beacon v. R. M. Jones Apartment Rentals, 79 F.R.D. 141 (N.D. Ohio 1978) (allowed party to have other parties in suit excluded from depositions in order to ensure that witnesses would give independent testimony).

147. Rule 5(d) provides:

> All papers after the complaint required to be served upon a party shall be filed . . . either before service or within a reasonable time thereafter, but the court may . . . order that depositions . . . and interrogatories, requests for documents, requests for admissions, and answers and responses thereto not be filed unless on order of the court or for use in the proceeding.

FED. R. CIV. P. 5(d).

148. *See* Nixon v. Warner Communications Co., 435 U.S. 589 (1978). *See also* 8 Wright & Miller, FEDERAL PRACTICE & PROCEDURE: § 2042 at 298 (2d ed. 1987).

access to attach when a court admits information into evidence[149] or when parties file information with a court.[150] However, to allow public access prior to filing, a different access right must exist for a third party to gain access to discovery material. Because discovery involves documents, proceedings, and subject matter often of some interest to the public, a public right of access to discovery might find justification in various forms: through either a statutory or general presumption of discovery open to the public;[151] by analogy to recognized rights of access;[152] or through recognition of a public "right to know" about matters bearing on the public's governmental function.[153] This section discusses these possible bases for such a right of access to discovery.

A. Statutory Basis

The Federal Rules of Civil Procedure introduced a liberal discovery philosophy.[154] They also provide the general standards that govern discovery.[155] Unlike legislation regarding pretrial procedure in other con-

149. *See* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 529 F. Supp. 866 (E.D. Pa. 1981) (presumption of right of access applies to documents once an evidentiary hearing takes place).

150. *See In re* Continental Ill. Sec. Litig., 732 F.2d 1302, 1309 (D.C. Cir. 1984) (right of access attaches when documents filed with court in connection with motion). *See also In re* Coord, 101 F.R.D. 34, 43 (D. Cal. 1984) (strong common law presumption of access attaches before judgment). *But see* Simon v. G. D. Searle & Co., No. 4-80-160 slip op., (D. Minn. December 18, 1987) (no right of contemporaneous access to materials filed with court).

151. *See* Tavoulareas v. Washington Post Co., 724 F.2d 1010, 1015-16 (D.C. Cir. 1984) (finding statutory presumption under Federal Rules of Civil Procedure of openness for discovery materials whether used in trial or not); *see also Avirgan I*, 118 F.R.D. 257 (D.C.C. 1987), discussed *supra* notes 12-30 and accompanying text; *In re* Continental Ill. Sec. Litig., 732 F.2d 1302 (7th Cir. 1984), discussed *supra* notes 116-21 and accompanying text.

152. These rights include: first amendment right of access to criminal trials and pretrial hearings, *see supra* notes 36-72 and accompanying text; first amendment right of access to civil trials, *see supra* notes 104-15 and accompanying text; common law right of access to court documents, *see supra* notes 73-82 and accompanying text; first amendment right to disseminate information in one's possession, *see supra* notes 88-98 and accompanying text.

153. *See supra* notes 83-87 and accompanying text.

154. The scope of discovery is *very* broad. FED. R. CIV. P. 26(b) provides in pertinent part:

> Unless otherwise limited by order of the Court . . . the scope of discovery is as follows: (1) *In general* Parties may obtain any material, not privileged, which is relevant to the subject matter involved in the pending action . . . It is not grounds for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

FED. R. CIV. P. 26(b) (emphasis added). The liberality of the rules is intended to afford "each party full access to evidence in the control of his opponent." Martin v. Reynolds Metals Corp., 297 F.2d 49, 56 (9th Cir. 1961). *See also* FED. R. CIV. P. 30(c) (discovery *shall* be had over objections) (emphasis added).

155. *See* FED. R. CIV. P. 36-37.

texts, the Rules contain no explicit provision that mandates presumptive public openness of discovery materials or proceedings.[156] Rule 26(c)[157] provides that a court may enter a protective order preventing dissemination of discovery and attendance of any person except those whom the court specifies. Because Rule 26(c) provides some protection from exposure, it seems to imply some presumptive access to proceedings from which a party may need that protection.[158] However the Rules do not purport to regulate conduct of nonparties,[159] or to enlarge the substantive rights of any person.[160] Rule 26(c) exists merely to prevent party dissemination to the public.[161] Finally, the absence of any specific reference to public access to discovery or to pretrial proceedings casts further doubt on the existence of such a statutory right of public access to discovery proceedings or materials prior to filing.

B. Common Law Basis

As with statutory rights, a nonparty might assert a common law right of access[162] to attend pretrial hearings or obtain transcripts of pretrial hearings. The Supreme Court access decisions indicate, however, one

156. *See, e.g.*, The Publicity in Taking of Evidence Act, which provides that in antitrust suits: "In taking of depositions of witnesses for use in any suit in equity brought by the United States under Sections 1 to 7 of this title, . . . the proceedings shall be open to the public as freely as are trials in open court." 15 U.S.C. § 30 (1970).

See also United States v. International Business Mach. Corp., 66 F.R.D. 219 (S.D.N.Y. 1974) (Publicity in Taking Evidence Act requires that public access to documents made part of a deposition may only be limited by court order).

157. *See supra* note 23.

158. *See, e.g.*, American Tel. & Tel. Co. v. Grady, 594 F.2d 594, 596 (7th Cir. 1979), *cert. denied sub nom.* American Tel. & Tel. Co. v. MCI Communications Corp., 440 U.S. 971 (1979) (construing Rule 26(c): "As a general proposition, pretrial discovery must take place in public unless compelling reasons exist for denying public access to the proceedings.). *See also* Green, *The Folklore of Depositions*, 11 LITIG. 13 (1985) ("without a protective order in hand, a lawyer has no right to insist that anyone, party or nonparty, be excluded from a deposition").

159. One notable exception exists: the Rules permit parties to involve nonparties in discovery, *see* FED. R. CIV. P. 30(a), 30(d), 31(a), 34, and allow sanctions against nonparties for non-cooperation. *See* FED. R. CIV. P. 37 (court may grant order and compel discovery or find defendant in contempt).

160. *See* 28 U.S.C. § 2070 ("The Rules [of Civil Procedure] shall not abridge, enlarge, or modify any substantive right . . . .").

161. *See In re* Alexander Grant & Co. Litig., 820 F.2d 352, 356-57 (11th Cir. 1987). Courts have recognized that, absent a protective order, the Rules do not prohibit discovery sharing, Johnson Foils, Inc. v. Huyck Corp., 61 F.R.D. 905, 910 (N.D.N.Y. 1973), and that the Rules comprehend shared discovery in order to expedite trial preparation. Williams v. Johnson & Johnson, Inc., 50 F.R.D. 31, 32 (S.D.N.Y. 1970).

162. *See supra* notes 74-82.

may not successfully assert a common law right of access unless the right of access existed at common law or, in the Court's words, the right of access has a "historical basis."[163] While at common law most proceedings were open and nonparties could obtain access to trials and documents,[164] discovery itself was not open.[165] In fact, prior to the current Federal Rules of Civil Procedure, judiciary statutes did not provide for protective orders because discovery was much narrower.[166] In addition, the Supreme Court has indicated discovery was not historically open.[167]

---

163. *See supra* notes 70-78 and accompanying text. Commentators have criticized the Court's historical tradition prong because the Court has not determined what constitutes a sufficiently historical basis or what tradition a court should consider. *See* Note, *What Ever Happened to "The Right to Know?" Access to Government Controlled Information Since Richmond Newspapers*, 73 VA. L. REV. 1111, 1130 (1987).

164. English common law recognized a public right to attend trials. *See* Collier v. Hicks, 2 B & AD, 663, 667 (1831); Daubney v. Cooper, 10 B & C 237, 240 (1829); *see also* 14 HOLDSWORTH, A HISTORY OF ENGLISH LAW 181-82 (1st ed. 1964). *But see* Ogle v. Branding, 2 Russ. & M. 688 (1831) (judge may order private trial despite one party withholding consent).

Earlier American law also recognized open judicial proceedings. *See* Cowley v. Pulsifer, 137 Mass. 192 (1884) (Holmes, J.)

> It is desirable that the trial of causes should take place before the public eye, not because of the controversies of one citizen and public concern, but . . . that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed.

Id. at 394.

Although English common law cases forbid access to judicial records, *see* Browne v. Cummings, 10 B & C 70 (1829), early American cases recognized such a right of access; *see, e.g.*, *Ex parte* Uppercu, 239 U.S. 435, 440 (1915) (litigant has right to obtain access to records containing evidence material to his case); *Ex parte* Drawbaugh, 2 Ct. App. D.C. 404, 406. (1894) (records on appeal, upon filing, become subject to public inspection); Note, *All Courts Shall be Open: The Public's Right to View Judicial Proceedings and Records*, 52 TEMP. L.Q. 311 (1979) (discussion of historical development of common law right of access, including discussion of civil trials at 320-22).

Currently, FED. R. CIV. P. 77(b) provides that all trials are to be held in open court. FED. R. CIV. P. 43(a) indicates that testimony at trial should be public.

165. This is clearly the case in English common law. Publication of any matter pertaining to the trial before trial was grounds for contempt. *See In re* Cheltenham and Swansea Ry. Carriage and Wagon Co., 8 L.B. 580 (1869).

Similarly, in the United States courts, under the Judiciary Act of Sept. 24, 1798, 30th Sec., Vol. 1 p.68, depositions were to be taken before a judge and sealed until opened in court. In fact, if a deposition was opened out of court, the deposition was inadmissible for any purpose. *See* Beale v. Thompson & Maris, 12 U.S. (8 Cranch) 70 (1814) (Story, J.).

166. Historically, courts would allow depositions of witnesses only when the parties could not secure their testimony in court either because the defendant would be unavailable because of absence (deposition *de bene esse*) or inconvenience (deposition *in perpetuam*). *See* 28 U.S. REV. STAT. §§ 644-46 (1934); 2 M.U.S.C.A. §§ 639, 644 (1926); 13 U.S. REV. STAT. §§ 863-66 (2d ed., 1874). Subsequent code revisions allowed a much broader scope for depositions. *See* 28 U.S.C. Rules 26-36 (1946); FED. R. CIV. P. 30-32 (1985).

167. *Press-Enterprise I*, 478 U.S. 1, 21-22 (1984) (Stevens, J., Dissenting) (pretrial proceeding not historically open). Seattle Times v. Rhinehart, 467 U.S. 20, 33 (1984) (discovery rarely takes

Finally, court of appeals are undecided in regard to whether a common law right of access attaches to documents not admitted into evidence.[168]

C. *First Amendment Basis*

The public might also assert a first amendment right of access to attend pretrial proceedings. As noted above, the first amendment right of access only extends to *judicial* proceedings.[169] Furthermore, as *Globe* and the *Press-Enterprise* cases indicate, one prerequisite to asserting a first amendment right to attend is a showing that the proceeding in question was historically open.[170] Precedent and reason force the conclusion that if no common law right of access to the proceeding exists, no first amendment right can either.[171]

In addition, under the "public function" prong of the first amendment test, the public value of discovery does not rise to the level of importance that the public value of trials does. On the one hand, information related to the judicial process would serve the public's interest in observing the system of justice and providing a check against misuse of judicial power.[172] However, the public's interest in openness in civil pretrial proceedings and discovery must be subordinate to the government's interest in both maintaining discovery's liberality[173] and preventing undue press and public interference with the fair and orderly disposition of a private dispute.[174] Public access to discovery might provide the public with information helpful to making political decisions. However, because the information in discovery is not yet clearly associated with the facts of the case and because liberal rules permit discovery of a broad area of infor-

---

place in public); Gannett v. DePasquale, 443 U.S. 368, 396 (1979) (Burger, C.J., concurring) (pretrial depositions and interrogatories are wholly private to litigants). *See generally* Marcus, *Myth & Reality in Protective Order Litigation*, 69 CORNELL L. REV. 1 (1983).

168. *Compare In re* Reporters for Freedom of the Press, 773 F.2d 1325 (D.C. Cir. 1985), *with In re* Continental Ill. Sec. Litig., 732 F.2d 1302 (7th Cir. 1984).

169. *See* Fenner & Koley, *Access to Judicial Proceedings: To Richmond Newspaper and Beyond*, 16 HARV. C.R.-C.L. L. REV. 415, 434 (1981) (pretrial depositions and interrogatories are non-judicial proceedings, thus no first amendment access right exists). *But see* Comment, *Non Party Access to Depositions in Florida*, 39 U. MIAMI L. REV. 157, 167-68 (1984) (while depositions are non-judicial, they may have substantial impact on outcome if involved in pretrial termination).

170. *See supra* notes 60-72 and accompanying text.

171. *See In re* Alexander Grant & Co. Litig., 820 F.2d 352, 355 (11th Cir. 1987) (no common law or first amendment rights of public access attach to discovery prior to entry into trial record).

172. *See* Fenner & Koley, *supra* note 169, at 435-36.

173. *See* Marcus, *supra* note 167.

174. *Id.*

mation of questionable relevance and meaningfulness to the trial,[175] public access provides a means by which the public may obtain misinformation rather than information relevant to the case. When access to discovery reaches irrelevant or even tangentially relevant information, the public function policy underlying access loses its justification.[176] Then, the right of access becomes a right to obtain unexpurgated and unevaluated information about parties and nonparties prior to any finding of relevancy or credibility.

D. Dissemination of Information

Through *Seattle Times*, however, a party may have a limited first amendment right to disseminate information obtained through discovery.[177] If a party chooses to give information to a non party when no protective order bars discovery sharing, first amendment rights attach to the information.[178] A court may only prohibit the public dissemination of the information in the possession of the press if the order will pass strict scrutiny.[179] On the other hand, because parties possess information by virtue of liberal discovery, a court may restrict their first amendment free speech rights through a protective order entered for good cause shown.[180] Thus party dissemination has only qualified first amendment protection. Because parties do not possess discoverable material prior to a deposition hearing, however, dissemination does not include the power to grant a nonparty access to a deposition or proceeding. A party may

175. Depositions especially tend to be overbroad. Usually only a small portion of discovery is ever admitted at trial. *See* Hazard, *Depositions: Modern Day Inquisitions*, 10 NAT'L L.J. 13-14 (March 14, 1988) ("[d]epositions often become nothing more than verbal sparring matches devoid of a useful product" and often result in badgering and irrelevancies).

176. *See* Joy v. North, 692 F.2d 880, 893 (2d Cir. 1982), *cert. denied*, 460 U.S. 1051 (1983) ("Discovery involves the use of compulsory process to facilitate orderly preparation for trial, not to educate or titillate the public .... At the adjudication stage, however, very different considerations apply. An [adjudication] should be subject to public scrutiny.") Wilk v. American Medical Ass'n, 635 F.2d 1295, 1299 n.7 (7th Cir. 1980) ("If the purpose of the common law right of access is to check judicial balances, then the right should only extend to materials upon which a judicial decision is based.").

177. *See supra* notes 140-42 and accompanying text.

178. *See* Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978) (criminal sanctions may not be imposed upon nonparticipants for publishing truthful information regarding confidential judicial inquiry proceedings); Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977) (press may not be prohibited from publishing information gathered in open court); *accord* Nebraska Press Ass'n v. Stuart, 426 U.S. 539 (1976).

179. *See supra* note 63 and accompanying text.

180. *See supra* notes 88-98 and accompanying text. *See also* Seattle Times v. Rhinehart, 467 U.S. 20, 34 (1980).

share information with a nonparty,[181] but that does not include conferring access rights upon that nonparty.

E. Policy Concerns

Aside from the lack of statutory or precedential support for the right of access, policy also weighs against a public right of access to pretrial proceedings and discovery. Perhaps the most disturbing aspect of a public access to discovery is the potential for private abuse. Unlike trials, courts rarely supervise depositions.[182] The parties may try to manipulate the press by badgering, irrelevancies and grandstanding,[183] to which the deponent may only note an objection.[184] Parties and their counsel often attempt to utilize press coverage in their trial strategy. Certainly, "good press" or "bad press" can influence potential jurors or possibly even the judge's perception of society's values upon which the judge might rely.[185] In addition, the Supreme Court has intimated that our system does not favor trial by press over trial by jury.[186] Similarly, threats of admitting the press to depositions and discovery at the early stages of trial could force parties to settle, not necessarily on the merits of their case, but because a nonparty may not want damaging information of little or no relevance to the action exposed to the public.[187]

However liberal discovery rules may be, courts recognize that the first

---

181. *See supra* note 161.

182. FED. R. CIV. P. 28(a).

183. *See* Hazard, *Depositions: Modern-Day Inquisitions*, 10 NAT'L L.J. 13-14 (March 14, 1988) (discussing common deposition tactics).

184. Clearly, unlike trial, an immediate ruling on admissibility is not possible at a deposition; thus an objection goes to the record and the deponent must respond whatever the question. FED. R. CIV. P. 30(c). *See* Ralston Purina Co. v. McFarland, 550 F.2d 967, 969 (4th Cir. 1977) (failure to answer is inappropriate following objection). *But see* Eggleston v. Chicago Journeymen Plumbers' Local Union No. 130, 657 F.2d 890, 903 (7th Cir. 1981) (deposition evidence is taken subject to objection, but where questions go beyond reasonable limits, refusal may be justified), *cert. denied sub nom.* Chicago Journeymen Plumbers' Local Union No. 130 v. Plummes, 455 U.S. 1017 (1982).

185. Some courts have recently found that media coverage does not necessarily prejudice the jury, *e.g.*, CBS Inc. v. United States Dist. Court for the Cent. Dist. of Cal., 729 F.2d 1174, 1179 (9th Cir. 1984) (Notwithstanding heavy media exposure "many, if not most, potential jurors are untainted by press coverage."); *In re* National Broadcasting Co., 635 F.2d 945, 948 (2d Cir. 1980) (Even after heavy media coverage, only one-half of prospective jurors had heard of Abscam and of that half very few recalled specifically what it was all about.).

186. "Legal trials are not like elections, to be won through the use of the meeting-hall, the radio and the newspaper." Bridges v. California, 314 U.S. 252, 281 (1941).

187. *See* Hazard, *Depositions: Modern-Day Inquisitions*, 10 NAT'L L.J. 13-14 (March 14, 1988). "[M]ost judges consider discovery to be preliminary and incidental; whereas for litigators discovery

amendment does not include a right to gather information.[188] On the other hand, the first amendment does recognize some public interest in information particularly important to the governmental function of the well informed populace.[189] While no *right* may exist to gather discovery information, courts may find it necessary in certain circumstances to recognize the importance of contemporaneous public access to the information.

V. CONCLUSION: A PRESUMPTION OF PUBLIC CLOSURE

This Note has shown that the approach taken in *Avirgan v. Hull*[190] is unsupportable and dangerous. Both history and Supreme Court precedent fail to support a presumptive right of access to either pretrial proceedings or discovery materials prior to filing.[191] In fact, both history and common law support closure of civil pretrial proceedings and discovery.[192] The lower court decisions that extend the first amendment right of public access from criminal proceedings to civil trials may have reached results consistent with history and precedent. Indeed, civil trials appear to have been historically open to the public.[193] In addition, public

---

is central and predominant . . . Judges have trial in mind; litigators have in mind that most cases are settled before trial, on the basis of the depositions." *Id.* at 14.

See also Kaufman, *Judicial Reform in the Next Century*, 29 STAN. L. REV. 1, 2 (1976) (the author, a federal judge, views high rate of settlements as indicative of party extortion via discovery tactics); Note, *Developments in the Law—Discovery*, 74 HARV. L. REV. 940, 1001 (1961) (discovery is "deliberately employed to delay the litigation, harass adversaries, or extort a settlement"); Recent Development: *Public Access to Civil Court Records: A Consumer Law Approach*, 39 VAND. L. REV. 1465, 1498 (1986) (access to court documents often forces parties to settle on grounds unrelated merits of case).

188. "To claim a value in access to information comparable to the value of freedom of expression is to ignore 200 years of First Amendment Jurisprudence." *In re* Herald Co., 734 F.2d 93, 100 (2d Cir. 1984); *see supra* notes 83-87; *see also* Legi-Tech v. Keiper, 601 F. Supp. 371, 377 (N.D.N.Y. 1984) (denial of access does not impinge upon freedom of speech); Epstein, *Open Courts, Closed Trials*, 13 LITIG. 23 (1987).

189. *See Globe*, 457 U.S. at 605-06 (Brennan, J., majority); *Gannett*, 443 U.S. 368 (1978) (Stevens, J., dissenting); Brennan, *Address*, 32 RUTGERS L. REV. 173, 176 (1979) (first amendment protects public's function in republican form of government). *But see* Capital Cities Media, Inc. v. Chester, 797 F.2d 1164, 1167 (3d Cir. 1986) (The first amendment operates only by barring government *interference* with the flow of information and ideas to the public.).

190. *See supra* notes 12-28 and accompanying text.

191. *See supra* notes 189-203. *See also* Gannett v. DePasquale, 443 U.S. 368, (1979) (pretrial depositions and interrogatories are wholly private to litigants) (Burger, C.J., concurring).

192. *See supra* notes 164-67.

193. *See supra* note 164.

attendance at civil trials may provide protection against judicial tyranny and may enhance the public's evaluation of the judicial system.

On the other hand, courts that have recognized public rights of access to civil discovery and pretrial proceedings in the absence of any common law or statutory support have, in essence, created a general first amendment right to gather information. Such a first amendment right extends beyond the support of historical practice, the language of the first amendment, its interpretation by the Supreme Court, and the policy underlying general first amendment rights of access to criminal and civil proceedings.

If courts are to determine discovery and civil pretrial proceedings are open to the public, the first amendment will not be a satisfactory vehicle to reach this result. Because discovery and pretrial proceedings are not presumptively open, courts should not place the burden of proof upon the party or deponent who seeks to close the proceeding to the general public. Rather, a court should place the burden of overcoming presumptive closure upon the party seeking public attendance when its opponent resists public attendance. A trial court exercises plenary power over discovery and the conduct of proceedings before the court. If a party desires to open a proceeding or discovery to the public, that party should only be allowed to do so if it can show the court good cause to overcome the presumptive closure of discovery.

Rather than stretching the first amendment access and dissemination rights beyond their tolerance, the presumptively closed approach to pretrial proceedings accords proper deference to history and precedent. More importantly, perhaps, the presumption of closed discovery minimizes public disclosure's adverse impact upon liberal and efficient discovery, and discourages litigant abuse of public attendance for the purpose of harassing parties or third parties during discovery.

Peter H. Love