"We hold that the right to attend criminal trials is implicit in the guarantees of the First Amendment. ..."—Chief Justice BURGER

"[T]he First Amendment ... has a *structural* role to play in ... our Republican system of self-government."—Justice BRENNAN

"Being unable to find any prohibition [against excluding spectators at a trial when neither side objects] in the First, Sixth, Ninth, or any other Amendments ... or in the Constitution itself, I dissent."—Justice REHNQUIST

Richmond Newspapers, Inc. v. Virginia

448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980).

In 1976 a state court in Richmond convicted a man named Stevenson of second-degree murder. The Virginia supreme court reversed, and the second and third trials ended in mistrials. In 1978, just before the fourth trial began, defense counsel asked the judge to close the courtroom to spectators and journalists so that jurors would not read inaccurate news summaries of testimony or speculation about evidence the judge had excluded. The prosecution did not object, and the judge so ordered, citing his statutory authority to exclude persons in order to ensure a fair trial, "provided that the right of the accused to a public trial shall not be violated." Richmond Newspapers, Inc., objected to being barred from the courtroom; and, after a hearing, from which reporters were also barred, the judge reaffirmed his order. The state supreme court dismissed an appeal of the ruling, and Richmond Newspapers, Inc., obtained certiorari from the U.S. Supreme Court.

Mr. Chief Justice **BURGER** announced the judgment of the Court and delivered an opinion in which Mr. Justice **WHITE** and Mr. Justice **STEVENS** joined. ...

II ...

A

The origins of the proceeding which has become the modern criminal trial in Anglo–American justice can be traced back beyond reliable historical records. ... What is significant for present purposes is that throughout its evolution, the trial has been open to all who cared to observe.

In the days before the Norman Conquest, cases in England were generally brought before moots, such as the local court of the hundred or the county court, which were attended by the freemen of the community. Somewhat like modern jury duty, attendance at these early meetings was compulsory on the part of the freemen, who were called upon to render judgment. ... From these early times, although great changes in courts and procedure took place, one thing remained

constant: the public character of the trial at which guilt or innocence was decided. ...

We have found nothing to suggest that the presumptive openness of the trial, which English courts were later to call "one of the essential qualities of a court of justice," Daubney v. Cooper (1829), was not also an attribute of the judicial systems of colonial America. In Virginia, for example, such records as there are of early criminal trials indicate that they were open. ... In some instances, the openness of trials was explicitly recognized as part of the fundamental law of the colony. ...

B

... [T]he historical evidence demonstrates conclusively that at the time when our organic laws were adopted, criminal trials both here and in England had long been presumptively open. This is no quirk of history; rather, it has long been recognized as an indispensable attribute of an Anglo–American trial. ... The early history of open trials in part reflects the widespread acknowledgment, long before there were behavioral scientists, that public trials had significant community therapeutic value. Even without such experts to frame the concept in words, people sensed from experience and observation that, especially in the administration of criminal justice, the means used to achieve justice must have the support derived from public acceptance of both the process and its results.

When a shocking crime occurs, a community reaction of outrage and public protest often follows. ... Thereafter the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion. Without an awareness that society's responses to criminal conduct are underway, natural human reactions of outrage and protest are frustrated and may manifest themselves in some form of vengeful "self-help," as indeed they did regularly in the activities of vigilante "committees" on our frontiers. ...

Civilized societies withdraw both from the victim and the vigilante the enforcement of criminal laws, but they cannot erase from people's consciousness the fundamental, natural yearning to see justice done—or even the urge for retribution. The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is "done in a corner [or] in any covert manner." It is not enough to say that results alone will satiate the natural community desire for "satisfaction." ... To work effectively, it is important that society's criminal process "satisfy the appearance of justice," Offutt v. United States (1954), and the appearance of justice can best be provided by allowing people to observe it. ...

C

From this unbroken, uncontradicted history, supported by reasons as valid today as in centuries past, we are bound to conclude that a presumption of openness inheres in the very nature of a criminal trial under our system of justice. ...

Despite the history of criminal trials being presumptively open since long before the Constitution, the State presses its contention that neither the Constitution nor the Bill of Rights

contains any provision which by its terms guarantees to the public the right to attend criminal trials. Standing alone, this is correct, but there remains the question whether, absent an explicit provision, the Constitution affords protection against exclusion of the public from criminal trials.

III

A

The First Amendment, in conjunction with the Fourteenth, prohibits governments from "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." These expressly guaranteed freedoms share a common core purpose of assuring freedom of communication on matters relating to the functioning of government. Plainly it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted; as we have shown, recognition of this pervades the centuries-old history of open trials and the opinions of this Court.

The Bill of Rights was enacted against the backdrop of the long history of trials being presumptively open. ... [T]he First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees. ... Free speech carries with it some freedom to listen. "In a variety of contexts this Court has referred to a First Amendment right to 'receive information and ideas.' " Kleindienst v. Mandel (1972). What this means in the context of trials is that the First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time that amendment was adopted. "For the First Amendment does not speak equivocally. ... It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow." Bridges v. California (1941). ... The explicit, guaranteed rights to speak and to publish concerning what takes place at a trial would lose much meaning if access to observe the trial could, as it was here, be foreclosed arbitrarily.

B

The right of access to places traditionally open to the public, as criminal trials have long been, may be seen as assured by the amalgam of the First Amendment guarantees of speech and press; and their affinity to the right of assembly is not without relevance. ...[1]

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[1]When the First Congress was debating the Bill of Rights, it was contended that there was no need separately to assert the right of assembly because it was subsumed in freedom of speech. Mr. Sedgwick of Massachusetts argued that inclusion of "assembly" among the enumerated rights would tend to make the Congress "appear trifling in the eyes of their constituents. ... If people freely converse together, they must assemble for that purpose; it is a self-evident, unalienable right which the people possess; it is certainly a thing that never would be called in question. ..."

... Since the right existed independent of any written guarantee, Sedgwick went on to argue that

"The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental." DeJonge v. Oregon (1937). People assemble in public places not only to speak or to take action, but also to listen, observe, and learn; indeed, they may "assembl[e] for any lawful purpose," Hague v. C.I.O. (1939) (opinion of Stone, J.). Subject to the traditional time, place, and manner restrictions, see, e.g. Cox v. New Hampshire (1941); see also Cox v. Louisiana (1965), streets, sidewalks, and parks are places traditionally open, where First Amendment rights may be exercised. ... [A] trial courtroom also is a public place where the people generally—and representatives of the media—have a right to be present, and where their presence historically has been thought to enhance the integrity and quality of what takes place. ...

C

The State argues that the Constitution nowhere spells out a guarantee for the right of the public to attend trials, and that accordingly no such right is protected. The possibility that such a contention could be made did not escape the notice of the Constitution's draftsmen; they were concerned that some important rights might be thought disparaged because not specifically guaranteed. It was even argued that because of this danger no Bill of Rights should be adopted. See, e.g., A. Hamilton, *The Federalist* no. 84. In a letter to Thomas Jefferson in October of 1788, James Madison explained why he, although "in favor of a bill of rights," had "not viewed it in an important light" up to that time: "I conceive that in a certain degree ... the rights in question are reserved by the manner in which the federal powers are granted." He went on to state "there is great reason to fear that a positive declaration of some of the most essential rights could not be obtained in the requisite latitude."[2]

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if it were the drafting committee's purpose to protect all inherent rights of the people by listing them, "they might have gone into a very lengthy enumeration of rights," but this was unnecessary, he said, "in a Government where none of them were intended to be infringed." ...

Mr. Page of Virginia responded, however, that at times "such rights have been opposed," and that "people have ... been prevented from assembling together on their lawful occasions":

[T]herefore it is well to guard against such stretches of authority, by inserting the privilege in the declaration of rights. If the people could be deprived of the power of assembly under any pretext whatsoever, they might be deprived of every other privilege contained in the clause. *Ibid.* The motion to strike "assembly" was defeated. ...

[Footnote by the Chief Justice.]

[2]Madison's comments in Congress also reveal the perceived need for some sort of constitutional "saving clause," which, among other things, would serve to foreclose application to the Bill of Rights of the maxim that the affirmation of particular rights implies a negation of those not expressly defined. Madison's efforts, culminating in the Ninth Amendment, served to allay the fears of those who were concerned that expressing certain guarantees could be read as

But arguments such as the State makes have not precluded recognition of important rights not enumerated. Notwithstanding the appropriate caution against reading into the Constitution rights not explicitly defined, the Court has acknowledged that certain unarticulated rights are implicit in enumerated guarantees. For example, the rights of association and of privacy, the right to be presumed innocent and the right to be judged by a standard of proof beyond a reasonable doubt in a criminal trial, as well as the right to travel, appear nowhere in the Constitution or Bill of Rights. Yet these important but unarticulated rights have nonetheless been found to share constitutional protection in common with explicit guarantees.[3] The concerns expressed by Madison and others have thus been resolved; fundamental rights, even though not expressly guaranteed, have been recognized by the Court as indispensable to the enjoyment of rights explicitly defined.

We hold that the right to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and "of the press could be eviscerated." Branzburg [v. Hayes (1972)]. ...

D

... Absent an overriding interest articulated in findings [of a particular set of circumstances], the trial of a criminal case must be open to the public.[4]

Reversed.

Mr. Justice **POWELL** took no part in the consideration or decision in this case.

Mr. Justice **WHITE,** concurring. ...

Mr. Justice **STEVENS,** concurring. ...

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excluding others. [Footnote by the Chief Justice.]

[3]See, e.g., NAACP v. Alabama (1958); Griswold v. Connecticut (1965) and Stanley v. Georgia (1969); Estelle v. Williams (1976) and Taylor v. Kentucky (1978); In re Winship (1970); United States v. Guest (1966) and Shapiro v. Thompson (1969). [Footnote by the Chief Justice.]

[4]We have no occasion here to define the circumstances in which all or parts of a criminal trial may be closed to the public ..., but our holding today does not mean that the First Amendment rights of the public and representatives of the press are absolute. ... [A] trial judge, in the interest of the fair administration of justice, [may] impose reasonable limitations on access to a trial. ... [Footnote by the Chief Justice.]

Mr. Justice **BRENNAN,** with whom Mr. Justice **MARSHALL** joins, concurring in the judgment. ...

I ...

The Court's approach in right of access cases simply reflects the special nature of a claim of First Amendment right to gather information. Customarily, First Amendment guarantees are interposed to protect communication between speaker and listener. When so employed against prior restraints, free speech protections are almost insurmountable. See Nebraska Press Assn. v. Stuart (1976); New York Times Co. v. United States (1971). See generally Brennan, Address, 32 *Rutgers L.Rev.* 173, 176 (1979). But the First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a *structural* role to play in securing and fostering our republican system of self-government. See United States v. Carolene Prods. Co. n.4 (1938); Grosjean v. American Press Co. (1936); Stromberg v. California (1931); Ely, *Democracy and Distrust* 93–94 (1980); Emerson, *The System of Freedom of Expression* 7 (1970); Meiklejohn, *Free Speech and Its Relation to Self–Government* (1948). Implicit in this structural role is not only "the principle that debate on public issues should be uninhibited, robust, and wide-open," New York Times [v. Sullivan (1964)], but the antecedent assumption that valuable public debate—as well as other civic behavior—must be informed. The structural model links the First Amendment to that process of communication necessary for a democracy to survive, and thus entails solicitude not only for communication itself, but for the indispensable conditions of meaningful communication.[1]

... [S]o far as the participating citizen's need for information is concerned, "[t]here are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow." Zemel v. Rusk (1965). An assertion of the prerogative to gather information must accordingly be assayed by considering the information sought and the opposing interests invaded. This judicial task is as much a matter of sensitivity to practical necessities as it is of abstract reasoning. But at least two helpful principles may be sketched. First, the case for a right of access has special force when drawn from an enduring and vital tradition of public entree to particular proceedings or information. Such a tradition commands respect in part because the Constitution carries the gloss of history. More importantly, a tradition of accessibility implies the favorable judgment of experience. Second, the value of access must be measured in specifics. Analysis is not advanced by rhetorical statements that all information bears upon public issues; what is crucial in individual cases is whether access to a particular government process is important in terms of that very process. ...

II ...

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[1]The technique of deriving specific rights from the structure of our constitutional government, or from other explicit rights, is not novel. The right of suffrage has been inferred from the nature of "a free and democratic society" and from its importance as a "preservative of other basic civil and political rights. ..." Reynolds v. Sims (1964). [Footnote by Justice Brennan.]

This Court too has persistently defended the public character of the trial process. In re Oliver [1948] established that the Due Process Clause of the Fourteenth Amendment forbids closed criminal trials. ... Even more significantly for our present purpose, *Oliver* recognized that open trials are bulwarks of our free and democratic government: public access to court proceedings is one of the numerous "checks and balances" of our system, because "contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power." Tradition, contemporaneous state practice, and this Court's own decisions manifest a common understanding that "[a] trial is a public event. What transpires in the court room is public property." Craig v. Harney (1947).

III

Publicity serves to advance several of the particular purposes of the trial (and, indeed, the judicial) process. Open trials play a fundamental role in furthering the efforts of our judicial system to assure the criminal defendant a fair and accurate adjudication of guilt or innocence. But, as a feature of our governing system of justice, the trial process serves other, broadly political, interests, and public access advances these objectives as well. To that extent, trial access possesses specific structural significance.

The trial is a means of meeting "the notion, deeply rooted in the common law, that 'justice must satisfy the appearance of justice.' " Levine v. United States (1960). For a civilization founded upon principles of ordered liberty to survive and flourish, its members must share the conviction that they are governed equitably. It also mandates a system of justice that demonstrates the fairness of the law to our citizens. One major function of the trial, hedged with procedural protections and conducted with conspicuous respect for the rule of law, is to make that demonstration. Secrecy is profoundly inimical to this demonstrative purpose of the trial process. ...

But the trial is more than a demonstrably just method of adjudicating disputes and protecting rights. It plays a pivotal role in the entire judicial process, and, by extension, in our form of government. Under our system, judges are not mere umpires, but, in their own sphere, lawmakers—a coordinate branch of *government.* While individual cases turn upon the controversies between parties, or involve particular prosecutions, court rulings impose official and practical consequences upon members of society at large. Moreover, judges bear responsibility for the vitally important task of construing and securing constitutional rights. Thus, so far as the trial is the mechanism for judicial factfinding, as well as the initial forum for legal decisionmaking, it is a genuine governmental proceeding.

It follows that the conduct of the trial is preeminently a matter of public interest. ...

IV

... What countervailing interests might be sufficiently compelling to reverse this presumption of openness need not concern us now, for the statute at stake here authorizes trial closures at the unfettered discretion of the judge and parties. ...

Mr. Justice **STEWART,** concurring in the judgment. ...

Mr. Justice **BLACKMUN,** concurring in the judgment. ...

... I remain convinced that the right to a public trial is to be found where the Constitution explicitly placed it—in the Sixth Amendment.

The Court, however, has eschewed the Sixth Amendment route. The plurality turns to other possible constitutional sources and invokes a veritable potpourri of them—the speech clause of the First Amendment, the press clause, the assembly clause, the Ninth Amendment, and a cluster of penumbral guarantees recognized in past decisions. This course is troublesome. ...

Having said all this, and with the Sixth Amendment set to one side in this case, I am driven to conclude, as a secondary position, that the First Amendment must provide some measure of protection for public access to the trial. ...

Mr. Justice **REHNQUIST,** dissenting.

In the Gilbert & Sullivan operetta *Iolanthe,* the Lord Chancellor recites:

The Law is the true embodiment

of everything that's excellent,

It has no kind of fault or flaw,

And I, my lords, embody the law.

It is difficult not to derive more than a little of this flavor from the various opinions supporting the judgment in this case. ...

... I do not believe that either the First or Sixth Amendments, as made applicable to the States by the Fourteenth, require that a State's reasons for denying public access to a trial, where both the prosecuting attorney and the defendant have consented to an order of closure approved by the judge, are subject to any additional constitutional review at our hands. And I most certainly do not believe that the Ninth Amendment confers upon us any such power to review orders of state trial judges closing trials in such situations.

We have at present 50 state judicial systems and one federal judicial system in the United States, and our authority to reverse a decision by the highest court of the State is limited to only those occasions when the state decision violates some provision of the United States Constitution. And that authority should be exercised with a full sense that the judges whose decisions we review are making the same effort as we to uphold the Constitution. As said by Mr. Justice Jackson, concurring in the result in Brown v. Allen [1953], "we are not final because we are infallible, but we are infallible only because we are final."

The proper administration of justice in any nation is bound to be a matter of the highest concern to all thinking citizens. But to gradually rein in, as this Court has done over the past generation, all of the ultimate decisionmaking power over how justice shall be administered, not merely in the federal system but in each of the 50 States, is a task that no Court consisting of nine persons, however gifted, is equal to. Nor is it desirable that such authority be exercised by such a tiny numerical fragment of the 220 million people who compose the population of this country. In the same concurrence just quoted, Mr. Justice Jackson accurately observed that "[t]he generalities of the Fourteenth Amendment are so indeterminate as to what state actions are forbidden that this Court has found it a ready instrument, in one field or another, to magnify federal, and incidentally its own, authority over the states." ...

The issue here is not whether the "right" to freedom of the press conferred by the First Amendment to the Constitution overrides the defendant's "right" to a fair trial conferred by other amendments to the Constitution; it is instead whether any provision in the Constitution may fairly be read to prohibit what the trial judge in the Virginia state court system did in this case. Being unable to find any such prohibition in the First, Sixth, Ninth, or any other Amendments to the United States Constitution, or in the Constitution itself, I dissent.

Editors' Notes

(1) **Query:** Burger, Brennan, and Rehnquist all claimed to follow a *structuralist* approach. How is it that they reason so differently? (In fact, how far apart were Burger and Brennan?) In this case, at least, how much of a *textualist approach* did each of the four justices follow? What was the implicit answer of each to the question, "What does the Constitution include?"

(2) **Query:** "Under our system," Brennan wrote, "judges are not mere umpires, but, in their own sphere, lawmakers—a coordinate branch of *government.*" What does such a claim imply for the structure of the national government and the so-called doctrine of separation of powers? (See Chapter 10, above.)

(3) **Query:** What was Burger's conception of the "core purpose" of the First Amendment? Brennan's conception of its “structural role” in “our republican system of self-government”?

(4) **Query:** Sometimes rights under the First Amendment to free speech and press may conflict with the Sixth Amendment's guarantee of a fair trial. How helpful are any of the opinions here in resolving such a conflict?

(5) **Query:** Burger's opinion for the plurality in *Richmond Newspapers,* together with Goldberg's concur. op. in Griswold v. Connecticut (1965; reprinted above, p. 147), are the most important judicial invocations of the Ninth Amendment in justifying the recognition of "unenumerated" constitutional rights. Was Burger's conception of the Ninth Amendment different from Goldberg's? What should be the role of the Ninth Amendment in interpreting the Constitution? For collections of essays on the Ninth Amendment, see *The Rights Retained by the People* (Randy Barnett ed.; Fairfax, VA: George Mason University Press, 1989 & 1993);

"Symposium on Interpreting the Ninth Amendment," 64 *Chi.-Kent L.Rev.* 1 (1988); and "Symposium: The Bill of Rights and the Unwritten Constitution," 16 *S. Ill.U.L.J.* 267 (1992).