# THE RIGHT TO A PUBLIC TRIAL, CONDITIONAL COURTROOM ENTRY AND TIERS OF CONSTITUTIONAL SCRUTINY

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ABSTRACT

*The constitutional test the Supreme Court has prescribed to review courtroom closures for compliance with the Sixth Amendment's right to a public trial is in the nature of strict scrutiny. The Court requires an "overriding interest" to justify the closure, and a narrow, minimally restrictive scope to the closure. Many lower courts have imposed a less demanding test for "partial" closures, which admit to the courtroom some, but not all, of the public. These courts require a less demanding justification before closing the courtroom to certain individuals—the justification need be only "substantial," rather than "overriding." This standard is in the nature of intermediate scrutiny, as applied in other constitutional contexts. There is a third type of "closure," however, beyond the complete closures the Supreme Court has reviewed, and the partial closures encountered by other courts. This third type is the imposition of entry conditions on would-be audience members, such as requiring a form of identification. These generally applicable conditions may not actually exclude anyone but could conceivably dissuade some audience members from attending a trial. For instance, an attendee might prefer not to provide identification to court personnel and might be turned away as a result. In keeping with the doctrinal model already followed by the courts—applying "tiered scrutiny" to courtroom closures—conditional courtroom entry should be reviewed according to the most lenient of the tiers, rational basis scrutiny. A sliding scale should apply to public trial scrutiny, "Waller" scrutiny, the most demanding, when all are excluded. "Substantial reason" scrutiny, less demanding, should apply when some are excluded. And rational basis scrutiny, much less demanding, should apply when no one need be excluded, but for their non-compliance with a general rule. A lesser standard should apply in the case of entry conditions because they differ from other closures and cause minimal prejudice to the purposes of the right to a public trial.*

TABLE OF CONTENTS



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## INTRODUCTION

Many courthouses in the United States are equipped with metal detectors. Entry to those courthouses requires passing through those devices. Some people, however, may prefer not to be subject to a metal detector's pulse induction system. They may be carrying objects they do not wish to be discovered. They may have idiosyncratic concerns about the system's safety. Should would-be courtroom entrants have reservations about subjecting themselves to metal detectors, they have an alternative—they may decline, turn around, and leave the courthouse. The court has conditioned entry on agreement to be scanned. Some would-be entrants may choose not to satisfy that condition.

Making entry to a courthouse contingent on satisfying a condition is not what we might think of as a "closure" of a courtroom. Nonetheless, imposing a condition that may result in reduced openness implicates Sixth Amendment values.[1] The right to a public trial presumes courtrooms will be open to all.[2]

Entry to a courtroom may be conditioned in many ways. During the recent COVID-19 pandemic, some courts required vaccination.[3] In an ongoing way, courts often have a dress code.[4] Regularly, there are metal detectors.[5] These common—and common sense—measures go largely unnoticed. But some criminal defendants have raised entry conditions as potential violations of their right to a public trial.[6] While they have not succeeded, by and large, courts have

1. U.S. CONST. amend. VI.

2. *See* United States v. Gupta, 699 F.3d 682, 687 (2d Cir. 2011).

3. *See* United States v. Roberts, Crim. 19-134 (FLW) (D.N.J. Sept 21, 2021), https://casetext.com/case/united-states-v-roberts-501 [https://perma.cc/4FFU-43DK].

4. *See infra* note 79 and accompanying text.

5. *See infra* note 76 and accompanying text.

6. *See infra* Section III.

sometimes subjected these conditions to review under existing constitutional standards.[7]

Are all courtroom closures created equal and deserving of the same constitutional treatment? That cannot be. Excluding everyone from a courtroom (a "complete" closure[8]) is different in kind from excluding one person, or a few people. It creates a blackout.[9] It results in no members of the public being able to audit the proceedings.[10] Excluding some individuals (a "partial" closure[11]), on the other hand, is simply a dimming—a reduction in the number of people in the audience. Accordingly, each typically receives different constitutional treatment.[12]

The difference in courtroom closures is even greater when an entry condition is imposed. In the case of conditional courtroom entry, no one is excluded in an ongoing, irremediable way.[13] Instead, they are excluded—if there is exclusion at all—because of a failure to comply with some standard, one they could choose to satisfy, but have not.[14] The Sixth Amendment's right to a public trial should not require unconditional access to courtrooms. Open—but subject to rules—may still be open. A potential deterrent is different in kind from other "closures," where courts make individualized decisions to exclude either the entire public or particular individuals. Accordingly, the constitutional demands made of other, individualized closures should be different from those applied to review such minimal ones.

Constitutional doctrine already has in place a method for addressing, and treating differently, government actions that have a greater or lesser impact on constitutional rights—the use of tiered scrutiny. In many constitutional contexts, "[a]ctions that look particularly suspicious are subject to 'strict scrutiny,' those that are somewhat suspicious are subject to 'intermediate scrutiny,' and the most innocuous receive 'rational basis' review."[15] This Article proposes that conditional entry should be subject to constitutional review under a version of the rational basis standard.

The Supreme Court has applied a version of strict scrutiny to complete courtroom closures.[16] Lower courts have subsequently coalesced around applying intermediate scrutiny to partial courtroom closures (closures excluding only some

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7. *See id.*

8. *See infra* Section I.A (discussing types of courtroom closures).

9. *Id.*

10. *Id.*

11. *See id.*

12. *See id.*

13. *See infra* Section II.

14. *See id.*

15. Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CAL. L. REV. 297, 303 (1997).

16. *See* Waller v. Georgia, 467 U.S. 39 (1984). I have argued before that the public trial version of strict scrutiny is, in fact, a more lenient type of review. *See generally* Stephen E. Smith, *What's in A Name? Strict Scrutiny and the Right to A Public Trial*, 57 IDAHO L. REV. 447 (2021).

would-be audience members).[17] Conditional courtroom entry is different enough in degree (and maybe kind) from both complete and partial closures that the traditional third-tier of constitutional scrutiny—rational basis scrutiny—should be imported to review generally applicable conditions on courtroom access. This Article will begin with an explanation of existing doctrine on the right to a public trial and the scrutiny that is applied. It will then analyze whether and why the imposition of entry conditions should be subject to some form of Sixth Amendment scrutiny. Next it will explain why the degree of scrutiny should be reduced in conditional entry situations: there should be a "third way" based on minimal prejudice to the purposes of the right, a lack of intent to exclude, the presence of intervening actors, and the generally-applicable nature of entry conditions. Finally, it will explain briefly that the same analysis should apply to claims arising under the corresponding First Amendment right of public access to courts.

## I. BACKGROUND

### *A. Courtroom Closures and the* Waller *Test*

The Sixth Amendment to the United States Constitution provides, in part, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial."[18] The right manifests "[t]he traditional Anglo-American distrust for secret trials[.]"[19] It extends to many aspects of the trial, from voir dire[20] to sentencing.[21] The right applies to the states through the Fourteenth Amendment's due process guarantee.[22] Like many constitutional rights, the right to a public trial is not absolute.[23] Courtrooms may occasionally be closed to the public.[24] The right to a public trial may yield to other rights or interests, but only in rare circumstances, and "the balance of interests must be struck with special care."[25]

*Waller v. Georgia* is the seminal Supreme Court case on the Sixth Amendment's right to a public trial and courtroom closures.[26] In *Waller*, the

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17. *See* United States v. Simmons, 797 F.3d 409, 414 (6th Cir. 2015).

18. U.S. CONST. amend. VI.

19. *In re* Oliver, 333 U.S. 257, 268 (1948).

20. *See* Presley v. Georgia, 558 U.S. 209, 213 (2010).

21. *See* United States v. Rivera, 682 F.3d 1223, 1237 (9th Cir. 2012).

22. *Oliver*, 333 U.S. at 273.

23. *See* Waller v. Georgia, 467 U.S. 39, 45 (1984).

24. *See, e.g.*, United States v. Akers, 542 F.2d 770, 772 (9th Cir. 1976) (per curiam) ("The court had been advised that the proceedings would be disrupted if the verdict were unfavorable to the appellants. The court could properly conclude that the threat of harm dictated partial closing of the proceedings.").

25. *Waller*, 467 U.S. at 45.

26. *Id.* Of course, constitutional standards existed before the Supreme Court's *Waller* decision. For instance, the Ninth Circuit approved a courtroom closure because the closure was "reasonably limited to the circumstances for which it was invoked." United States v. Hernandez, 608 F.2d 741,

defendants were charged with violating Georgia's gambling laws.[27] Much of the prosecution's case in chief revolved around wiretap evidence, and the defendants moved to suppress this evidence.[28] Following the defendants' motion, the prosecution moved to close the suppression hearing to the public.[29] The trial court granted the prosecution's motion, closing the suppression hearing "to all persons other than witnesses, court personnel, the parties, and the lawyers."[30] The trial court reasoned that if the hearing were open to the public, "insofar as the wiretap evidence related to alleged offenders not then on trial, the evidence would be tainted and could not be used in future prosecutions."[31] The Georgia Supreme Court held that the closure comported with the Sixth Amendment.[32]

The Supreme Court reversed, holding that the trial court's order was improper because it "failed to give proper weight to Sixth Amendment concerns."[33] The Court held that a courtroom closure must meet a four-part test to properly comply with the Sixth Amendment:

> [1] the party seeking to close the [proceeding] must advance an overriding interest that is likely to be prejudiced, [2] the closure must be no broader than necessary to protect that interest, [3] the trial court must consider reasonable alternatives to closing the proceeding, and [4] it must make findings adequate to support the closure.[34]

The *Waller* test is rigorous[35] in the nature of "strict scrutiny" review.[36] In some areas of constitutional law, courts apply familiar "tiered scrutiny" to review government actions.[37] These tiers include rational basis scrutiny, intermediate scrutiny, and strict scrutiny.[38] Like other government actions reviewed under a

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748 (9th Cir. 1979) (affirming court order closing the courtroom to the public, which was primarily issued to protect a witness and his family from "harassment and physical harm").

27. *Waller*, 467 U.S. at 41.

28. *Id.*

29. *Id.*

30. *Id.* at 42.

31. *Id.*

32. *Id.* at 43.

33. *Id.*

34. *Id.* at 48 (adopting test from a courtroom closure case arising under the First Amendment, Press-Enter. v. Superior Ct. of Cal., 464 U.S. 501, 511-12 (1984)).

35. Johnson v. Sherry, 586 F.3d 439, 447 (6th Cir. 2009), *abrogated by* Weaver v. Massachusetts, 582 U.S. 286 (2017).

36. *See generally* Smith, *supra* note 16; *cf. In re* Reporters Comm. for Freedom of Press, 773 F.2d 1325, 1354 (D.C. Cir. 1985) (Wright, J., concurring in part and dissenting in part) (*citing* Press-Enter. v. Superior Ct. of Cal., 464 U.S. 501, 509-11 (1984), and observing "[t]he Supreme Court has most recently spoken as if closure orders must meet the test of strict scrutiny.").

37. *E.g.*, Calvin Massey, *The New Formalism: Requiem for Tiered Scrutiny?*, 6 U. PA. J. CONST. L. 945, 949-51 (2004).

38. Clark v. Jeter, 486 U.S. 456, 461 (1988) (describing tiers of scrutiny in Equal Protection context).

strict scrutiny standard, a courtroom closure must be supported by a strong interest, along with an applied solution that has been narrowly tailored to serve that interest.[39] In the years preceding *Waller*, the Court reviewed the issue of open courtrooms in a First Amendment posture—the availability of access to the courts by the press and public.[40] This jurisprudence of courtroom access to non-parties predated and informed the *Waller* test; in fact, the *Waller* test was lifted verbatim from a press access case, *Press-Enterprise Co. v. Superior Court of California*.[41]

A version of the four-part *Waller* test has been applied not only to complete closures of trial proceedings but also to partial closures of court proceedings.[42] "A partial closure results in the exclusion of certain members of the public while other members of the public are permitted to remain in the courtroom."[43] It occurs "when some of the public is allowed into the courtroom."[44] Most lower courts have applied a variation of the *Waller* test to partial closures.[45] These courts provide that, in partial closure situations, an "overriding interest"[46] need not be shown; instead, they require only a "substantial reason."[47] "[T]he difference between the two standards is not perfectly clear, other than the fact that the reviewing court knows that the 'substantial reason' standard is a more lenient standard than the 'overriding interest' standard."[48] This modified *Waller* test used

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39. *See* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 800 (2006) (explaining strict scrutiny as a two-factor inquiry, requiring that "the governmental ends are compelling" and "the law is a narrowly tailored means of furthering those governmental interests").

40. *See, e.g.,* Press-Enter. v. Superior Ct. of Cal., 464 U.S. 501, 510 (1984).

41. *Id.*

42. *See, e.g.*, State v. Turrietta, 308 P.3d 964, 967 (N.M. 2013).

43. State v. Sams, 802 S.W.2d 635, 639 (Tenn. Crim. App. 1990).

44. Kristin Saetveit, *Close Calls: Defining Courtroom Closures Under the Sixth Amendment*, 68 STAN. L. REV. 897, 926 (2016).

45. *See, e.g.*, United States v. Simmons, 797 F.3d 409, 413-14 (6th Cir. 2015) (citations omitted) ("Nearly all federal courts of appeals . . . have distinguished between the total closure of proceedings and situations in which a courtroom is only partially closed to certain spectators."). Not all judges would follow suit, however. *See, e.g.*, State v. Mahkuk, 736 N.W.2d 675, 685 (Minn. 2007) (Meyer, J., concurring).

46. Simmons, 797 F.3d at 414.

47. *See, e.g.*, Woods v. Kuhlmann, 977 F.2d 74, 76 (2d Cir. 1992) (applying "substantial reason" test); Commonwealth v. Downey, 936 N.E.2d 442, 449 n.12 (Mass. App. Ct. 2010) ("When a closure is partial, a 'substantial reason' rather than an 'overriding interest' may suffice to justify the closure." (citing Commonwealth v. Cohen (No. 1), 921 N.E.2d 906, 921 (Mass. 2010))); *but see Turrietta*, 308 P.3d at 970 (holding *Waller*'s "overriding interest" factor applies in partial closures excluding only some courtroom spectators); People v. Jones, 750 N.E.2d 524, 529 (N.Y. 2001) (citations omitted) (holding, in the partial closure context, that "[w]hen the procedure requested impacts on a defendant's right to a public trial, nothing less than an overriding interest can satisfy constitutional scrutiny.").

48. *Turrieta*, 308 P.3d at 970.

in partial closure cases hews very closely to *Waller* in its original form.[49] The modified test simply minimizes the showing necessary under *Waller*'s first, government interest, factor.[50]

"Partial closure" terminology is used in the lower courts as a way of distinguishing between closures that require close attention, and those that may be subject to more cursory, less demanding analysis.[51] Intuitively, "partial closures do not implicate the same fairness and secrecy concerns as total closures."[52] The dilution of *Waller*'s "overriding interest" to require only a "substantial interest" for partial closures implies that lower courts understand *Waller* to apply strict scrutiny, generally.[53] Courts have, accordingly, fashioned a form of lesser, intermediate scrutiny at the government interest phase of the tiered scrutiny approach,[54] which they apply to closures posing less of a risk to the values of a public trial. [55]

### *B. Public Trial Violations as Structural Errors*

Determining the proper level of scrutiny to apply to potential courtroom closures is important because of the great effect that a finding of improper closure can have on the values of judicial economy and trial finality. Violations of the right to a public trial are "structural."[56] Because structural errors are not subject to harmlessness analysis,[57] the finding that a right subject to structural error analysis has been violated results in a virtually "per se rule of reversal."[58]

Most errors in the conduct of a criminal trial are subject to harmless error review.[59] In the ordinary course, if an error is unlikely to have affected the result of the trial, it is harmless, and the defendant is not entitled to relief.[60] Errors

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49. *See Simmons*, 797 F.3d at 414 ("All federal courts of appeals that have distinguished between partial closures and total closures modify the *Waller* test so that the 'overriding interest' requirement is replaced by requiring a showing of a 'substantial reason' for a partial closure, but the other three factors remain the same.").

50. *Id.*

51. *See* Judd v. Haley, 250 F.3d 1308, 1315 (11th Cir. 2001) (stating that partial closures are "not as deserving [as complete closures] of such a rigorous level of constitutional scrutiny.").

52. United States v. Osborne, 68 F.3d 94, 99 (5th Cir. 1995).

53. *See, e.g.*, Woods v. Kuhlmann, 977 F.2d 74, 76 (2d Cir. 1992) (applying "substantial reason" test). *But see*, *Turrietta*, 308 P.3d at 967 (holding *Waller*'s "overriding interest" factor applies in partial closures excluding only some courtroom spectators).

54. *See, e.g.*, Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2375 (2018) (describing intermediate scrutiny as requiring a "substantial" interest).

55. *See, e.g., Osborne*, 68 F.3d at 99.

56. Weaver v. Massachusetts, 582 U.S. 286, 290 (2017).

57. *Id.* at 295.

58. Peck v. United States, 106 F.3d 450, 454 (2d Cir. 1997).

59. Arizona v. Fulminante, 499 U.S. 279, 306 (1991).

60. *See* Chapman v. California, 386 U.S. 18 (1967).

prejudicing a select group of rights, however, are considered "structural."[61] Violations of the right to a public trial are among those treated as "structural" errors.[62] Structural error doctrine is applied to "certain basic, constitutional guarantees that should define the framework of any criminal trial."[63] They are typically errors that are difficult to subject to the harmless error analysis common to most trial errors.[64] After all, how can a court determine that, say, closing a voir dire session had an actual effect on the outcome of a proceeding?

The most important reason to protect defendants from structural errors is to ensure the regularity of the proceedings. There are some errors "whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function."[65] "Errors of this type are so intrinsically harmful as to require automatic reversal (*i.e.*, "affect substantial rights") without regard to their effect on the outcome."[66]

The Court has concluded, however, that while remedying structural errors may prevent fundamental unfairness,[67] "[a]n error can count as structural even if the error does not lead to fundamental unfairness in every case."[68] It has also indicated that violations of the right to a public trial fall into this not-necessarily-unfair category.[69]

The Court has stated that, instead, violations of the public trial right are structural for other reasons. One category of structural errors is those where "the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest."[70] The Court wrote "the public-trial right furthers interests other than protecting the defendant against unjust conviction," oddly invoking the public's *First* Amendment rights of access to trials.[71] Accordingly, the Court is suggesting that the violation of a defendant's rights is

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61. Tumey v. Ohio, 273 U.S. 510 (1927) (right to an impartial tribunal); McKaskle v. Wiggins, 465 U.S. 168 (1984) (the right to self-representation); Vasquez v. Hillery, 474 U.S. 254 (1986) (racial discrimination in the selection of grand jurors); Sullivan v. Louisiana, 508 U.S. 275 (1993) (failure to correctly instruct the jury on reasonable doubt); United States v. Gonzalez-Lopez, 548 U.S. 140 (2006) (the right to hire counsel of one's choice); McCoy v. Louisiana, 138 S. Ct. 1500, 1504 (2018) ("violation of the defendant's Sixth Amendment-secured autonomy" to, at least, decide whether to admit guilt); *see also* Zachary L. Henderson, *A Comprehensive Consideration of the Structural-Error Doctrine*, 85 MO. L. REV. 965, 989 (2020) (identifying "at least fifteen errors that the circuit courts have concluded are structural but that the Supreme Court has not yet considered").

62. Weaver v. Massachusetts, 582 U.S. 286, 294-95 (2017).

63. *Id.* at 295.

64. *Id.*

65. *Sullivan*, 508 U.S. at 281.

66. Neder v. United States, 527 U.S. 1, 7 (1999).

67. *Weaver*, 582 U.S. at 295.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 299.

a structural error because, in part, of the impact on the rights of others.[72] This is puzzling because a defendant may waive her Sixth Amendment rights,[73] but she has no say at all over the public's corresponding First Amendment rights. The rights' holders are entirely distinct, and independently enforceable.

Another category of structural errors—and a better explanation than the foregoing for including the right to a public trial in this category—are those errors that "are simply too hard to measure."[74] The Court relied primarily on this justification to determine that public trial violations are structural errors: "a public-trial violation is structural . . . because of the 'difficulty of assessing the effect of the error.'"[75]

The too-hard-to-measure justification for structural treatment of public trial violations should apply to all types of closures: complete, partial, and conditional entry. If it is hard to measure whether a complete closure prejudiced the rights of a criminal defendant, it is only harder to determine whether, for example, requiring identification of would-be spectators did so. Accordingly, if some difference is to be drawn between the different degrees/types of closure, it must be a difference in scrutiny, not in the type of error and resulting remedy.

## II. VARIETIES OF ENTRY CONDITION

Courts regularly impose conditions on admission to the courthouse and courtroom. Typically, they are conditions related to courtroom safety or decorum. For example, as illustrated in the introduction to this article, many courts require courthouse entrants to pass through metal detectors.[76] It is also common for courts to require identification of courthouse visitors.[77] As demonstrated below, this specific condition has been challenged from time to time by criminal defendants as violative of their rights to a public trial.[78]

Dress codes are sometimes imposed by court rules.[79] For instance, the United

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72. *Id.*

73. *E.g.*, United States v. Moon, 33 F.4th 1284, 1298 (11th Cir. 2022).

74. *Weaver*, 582 U.S. at 295.

75. *Id.* at 298 (quoting United States v. Gonzalez-Lopez, 548 U.S. 140, 149 n.4 (2006)).

76. *See* St. Clair v. Commonwealth, 140 S.W.3d 510, 556 (Ky. 2004), *as modified* (Feb. 23, 2004) (metal detector condition did not violate right to a public trial); *see also Requirements for Entry*, U.S. DIST. CT., D.C., https://www.dcd.uscourts.gov/requirements-entry [https://perma.cc/5PX9-DECT] (last visited Sept. 4, 2023) ("All visitors are required to walk through a magnetometer and all bags, briefcases, and backpacks will be screened by an x-ray machine.").

77. Diane P. Wood, *Joint Courthouse Security Order*, U.S. DIST. CT. N.D. ILL., at *1, https://www.ilnd.uscourts.gov/_assets/_documents/_forms/_clerksoffice/rules/admin/pdf-orders/Joint%20Courthouse%20Security%20Order.pdf [https://perma.cc/X3JN-3QRE] (last visited Sept. 4, 2023) ("The United States Marshal, in consultation with the Building Security Committees of the Northern District of Illinois, has determined the requirement for visitors to present identification to Court Security Officers upon entry into the Courthouses.").

78. *See infra* Section III.

79. While this article does not delve into the specific requirements of particular conditions, one

States District Court for the Southern District of California prohibits entrants from wearing "[h]ats, shorts, tank top, flip flops or beach attire" in the courtroom.[80] Some are quite specific: Judge Vidmar of the United States District Court for the District of New Mexico prohibits, among other things, "[a]nything that reveals the midriff or underclothing."[81]

Other, less routine, conditions may also be implemented. In *United States v. Roberts*, the defendant challenged a condition implemented during the COVID-19 pandemic.[82] There, the court required, per a standing order, that "anyone other than 'excepted persons' [] provide proof of vaccination for COVID-19 or a negative PCR test result obtained within 72 hours of entering the courthouse."[83]

In each instance, from requiring entrants to pass through a metal detector, to forbidding flip-flops, to mandating vaccination or testing, courts have imposed generally applicable rules with which courthouse and courtroom entrants must comply. Presumably, most people do—there are no reports of general rebellions against courtroom dress codes.

There may be instances, however, where people resist a courtroom entry condition. This may be most easily envisioned in the vaccination context.[84] There are unvaccinated persons who wish to stay that way.[85] Some may also oppose the alternative of providing proof of a negative test.[86] But even less controversial conditions may find pockets of idiosyncratic resistance. From providing identification to forgoing a choice of footwear, some would-be entrants may prefer to say no and remain outside the courtroom. The existence of the condition is, for them, a barrier to entry.

That said, an entry condition may (and likely should[87]) have exceptions. If a

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commentator has cautioned against the danger of discretion given to court officers enforcing dress codes. *Sixth Amendment Challenge to Courthouse Dress Codes*, 131 HARV. L. REV. 850, 851 (2018).

80. *Juror Dress Code and Security*, U.S. DIST. CT. S. DIST. CAL., https://www.casd.uscourts.gov/Jurors/Dress-Code.aspx# (last visited Sept. 4, 2023) (The Southern District also requires that entrants pass through a magnetometer, and present picture identification).

81. *Dress Code Notice*, U.S. DIST. CT. DIST. OF N.M., https://www.nmd.uscourts.gov/sites/nmd/files/Judge%20Vidmar%20Dress%20Code.pdf [https://perma.cc/F3FN-Y94E] (last visited Sept. 4, 2023).

82. Crim. 19-134 (FLW) (D.N.J. Sept. 21, 2021) https://casetext.com/case/united-states-v-roberts-501 [https://perma.cc/4FFU-43DK].

83. *Id.* (citing Standing Order 2021-08: COVID-19 Vaccination and Testing Requirements of Visitors to Court Facilities and of Federal Detainees in the District of New Jersey (Sept. 13, 2021)).

84. *See id.*

85. Lindsay M. Monte, *Household Pulse Survey Shows Many Don't Trust COVID Vaccine, Worry About Side Effects*, U.S. CENSUS BUREAU (Apr. 12, 2022), https://www.census.gov/library/stories/2021/12/who-are-the-adults-not-vaccinated-against-covid.html [https://perma.cc/UP7F-SQ2P].

86. Rita Rubin, *First It Was Masks; Now Some Refuse Testing for SARS-CoV-2*, JAMA NETWORK (Nov. 6, 2020), https://jamanetwork.com/journals/jama/fullarticle/2772860 [https://perma.cc/R8UG-4EC5].

87. *See infra* Section IV.C.

condition cannot be complied with, there may be workarounds to enable courtroom access. The Northern District of Illinois, for instance, recognizes in its identification policy that some people will not have acceptable identification, and makes appropriate accommodations.[88] Taking advantage of an accommodation requires some effort by the would-be entrant, but this seems like a de minimis imposition.

## III. CONDITIONAL ENTRY IS A TYPE OF "CLOSURE" FOR SIXTH AMENDMENT PURPOSES

Conditional entry comes within the ambit of the right to a public trial. The courts that have so concluded have recognized that the purposes and values incorporated within the Sixth Amendment may be impacted by the imposition of entry conditions.[89] The courts that have concluded that Sixth Amendment scrutiny need *not* be applied to review of entry conditions have often still explicitly recognized that those conditions should be reviewed, in some manner, to determine whether they are unduly burdensome.[90] Why would such analysis be necessary were the right to a public trial not implicated? These courts insist on some form of review because constitutional values are at stake. These courts are right that the review employed may be deferential, but they are wrong in asserting that the review is not constitutional in nature.[91] Ultimately, the question should not be *whether* the Sixth Amendment is implicated—it is—but what sort of constitutional scrutiny should follow.[92]

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88. Wood, *supra* note 77, at 2. "Any visitor who does not have an accepted form of identification listed in this Order may be escorted by a licensed attorney (providing his or her bar registration number), or an employee of a tenant agency of the Courthouses. Following security screening, the United States Marshal shall require that individual to record his or her name in a log maintained by Court Security Officers.

The United States Marshal, or his or her designee, may for good cause shown approve access to any visitor to the Courthouses who does not have an acceptable form of identification listed in this Order, should the United States Marshal determine that access is appropriate and necessary." *Id.*

89. *See infra* Section III.A.

90. *See infra* Section III.C. Some courts have simply ignored the public trial implications of entry conditions, describing court security measures as subject to abuse of discretion review. *E.g.*, United States v. Shryock, 342 F.3d 948, 974 (9th Cir. 2003).

91. *See* Commonwealth v. Maldonado, 2 N.E.3d 145 (Mass. 2014) (applying abuse of discretion review).

92. The doctrine of "unconstitutional conditions" does not seem applicable. That doctrine typically forbids the government from granting "a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether." Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989). Conditional entry seems unrelated, as it asks nothing of the criminal defendant. Moreover, to the extent it implicates an entrant's First Amendment right of public access to courts, it requires only surrender of a non-constitutional preference, such as not passing through a metal detector, not providing identification, and so on.

### *A. Courts Treating Conditions as Closures*

Some courts have treated the imposition of entry conditions, which could potentially lead would-be audience members to decline to enter, as a closure for purposes of the Sixth Amendment. For example, in *People v. Jones*, the Court of Appeals of New York concluded that "the posting of a court officer outside the courtroom as a screening device . . . implicated defendant's Sixth Amendment right to a public trial."[93] The screening was perhaps a more invasive condition than some of the others presented above. By its terms, the condition required the court officer "to interview all other people seeking entry to the courtroom and . . . ask attendees their identity and their interest in coming to court."[94] Nonetheless, the trial court did not impose an instruction to exclude, either generally or individually, but created a condition—to enter, you must engage briefly with the court officer and respond to questions.[95] Moreover, no one was actually excluded.[96]

The court acknowledged that the procedure implemented by the trial court "bars only those who do not submit to the identification or those who are 'chilled' by the procedure itself."[97] Nonetheless, the court asserted, without elaboration, that "the device implemented here raises the same secrecy and fairness concerns that a total closure does."[98] Accordingly, it applied strict *Waller* review, though it nonetheless concluded that the entry conditions were constitutional.[99]

Other courts concluding that entry conditions require Sixth Amendment scrutiny have similarly done so based on the belief that public trial "concerns" or purposes could be affected by the condition. *United States v. Smith* is one example.[100] In *Smith*, "the Marshals Service, in conjunction with the Department of Homeland Security (DHS), began requiring all unknown building visitors to show photo identification before passing through magnetometers."[101] The trial court "concluded that Smith's Sixth Amendment rights were not implicated because the district court itself had not denied anyone courtroom access,"[102] but the Second Circuit disagreed, concluding that "measures that limit the public's access to federal buildings with courtrooms where public trials may be occurring

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93. People v. Jones, 750 N.E.2d 524, 524-25 (2001).

94. *Id.* at 526.

95. *Id.*

96. *Id.* at 527 ("The prosecution also noted that the court officer stationed outside the courtroom had reported that 'at no time did anyone else seek to enter the courtroom and everyone who sought entrance was permitted in.'").

97. *Id.* at 528.

98. *Id.* at 529.

99. *Id.* at 530

100. 426 F.3d 567 (2d Cir. 2005).

101. *Id.* at 570 ("[A]ny person who could produce a form of photo identification was permitted to enter the federal building containing courtrooms.").

102. *Id.* at 571.

implicate Sixth Amendment concerns."[103] The question, according to the court, was "whether [entry conditions] implicate the values that the Sixth Amendment's public trial guarantee aims to protect."[104] The court did not, however, assess to what degree those asserted values were affected by the entry conditions, asserting only that it "decline[d] to assume that a requirement of showing photo ID at the door of a federal building containing courtrooms would not implicate [those] values."[105] The court then applied intermediate, modified-*Waller*, scrutiny, and concluded that the entry conditions were constitutional.[106]

Some other courts have applied Sixth Amendment scrutiny to the imposition of entry conditions, without analysis of whether a closure was even at issue. For instance, in *United States v. Deluca*, the court instituted an identification procedure, "whereby each would-be spectator was required to present written identification before being allowed to enter the courtroom."[107] The court acknowledged that the imposition of entry conditions might not be a closure at all.[108] Nonetheless, the court concluded that it need not resolve that question, "since the security screening procedure utilized below amounted at most to a permissible 'partial' closure."[109] Because it concluded that the relevant constitutional test was satisfied in any event, the threshold issue of whether the test need be applied at all was not addressed.[110]

### *B. Courts Treating Conditions as Non-closures*

Two state supreme court decisions serve as exemplars of a contrary approach, both concluding that an order imposing entry conditions need not go through the crucible of Sixth Amendment scrutiny.

In *Williams v. State*, "members of the public who sought access to the courtroom were required to pass through a metal detector and 'wand.'"[111] Additionally, "spectators who were unknown to the court were required to present identification to the officer at the door and sign in."[112] Because the defendant objected at trial only to the identification procedures, the court concluded that any

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103. *Id.*

104. *Id.* at 572 (quoting Peterson v. Williams, 85 F.3d 39, 43 (2d Cir. 1996)) (listing those values as: "'1) to ensure a fair trial; 2) to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions; 3) to encourage witnesses to come forward; and 4) to discourage perjury.'").

105. *Id.*

106. *Id.* at 574.

107. United States v. DeLuca, 137 F.3d 24, 32 (1st Cir. 1998).

108. *Id.* at 33 ("[N]o authority squarely holds that such 'universal' preconditions to courtroom access constitute a Sixth Amendment 'closure.'").

109. *Id.*; *see also* United States v. Brazel, 102 F.3d 1120, 1155 (11th Cir. 1997) (assuming a permissible closure upon applying modified *Waller* scrutiny).

110. *DeLuca*, 137 F.3d at 33.

111. Williams v. State, 690 N.E.2d 162, 166 (Ind. 1997).

112. *Id.*

argument about the metal detector was waived.[113]

The court concluded that no courtroom closure was effected by the entry condition.[114] It wrote that "[b]oth a common sense reading of 'exclusion,' and, more importantly, the cases interpreting the public trial right, conceive of an exclusion as an affirmative act specifically barring some or all members of the public from attending a proceeding," and noted that no such thing had occurred.[115] Rather than a proscribable courtroom closure, the court defined the entry condition as "a minor procedural hurdle to gaining admittance to the trial by demanding the production of some form of identification, which is an item readily available to the general public."[116] A closure, according to the court, "requires some showing that the court, by order or otherwise, physically prevented the public from attending."[117]

The Massachusetts Supreme Court came to a similar conclusion almost 20 years later in *Commonwealth v. Maldonado*.[118] There, the defendant argued that his Sixth Amendment right to a public trial was violated by a "closure of the court room arising from the judge's order to require all spectators attending the trial to sign in and show identification."[119] "The judge in this case essentially made identification a condition of entry into the court room."[120]

The court emphasized that the identification condition it imposed was not intended to keep anyone from the courtroom, though it:

> recognize[d] that requiring spectators to sign in and provide some form of identification could potentially have resulted in some persons being unable to enter the court room because they did not have any identification on their person. We also recognize that others may have chosen not to enter the court room to avoid the need to identify themselves, perhaps because they feared that identifying themselves might bring them to the attention of the police or immigration authorities,

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113. *Id.*

114. *Id.* at 168.

115. *Id.*

116. *Id.*

117. *Id.* at 168. The defendant argued that the public was "constructively excluded": "[B]ecause many of his supporters were 'Ghetto Boy' members and, as conceded by Marbley's counsel, may have had prior encounters with law enforcement, they were not eager to leave their names at the door for possible scrutiny by law enforcement officials. At the extreme, perhaps some were wanted fugitives. At a minimum they may have been persons who feared the consequences that a potential background check would entail. The security precautions, so the argument goes, constructively established a bar to Williams' supporters and thereby deprived Williams of his right to a public trial. Indeed, at trial co-defendant Gregory used the word 'intimidation' to describe the effect the procedures had on the relevant members of the public. But the defendant's right does not protect against constructive exclusion." *Id.*

118. 2 N.E.3d 145 (Mass. 2014).

119. *Id.* at 148.

120. *Id.* at 151.

or because they wished simply to preserve their anonymity.[121]

The court noted that any such condition might inhibit attendance but concluded that inhibition was not enough: "In all the cases where we have found a full or partial closure of the court room, spectators have been intentionally barred from the court room[.]"[122]

In the absence of any such intent, the court found that "the conditions imposed on entry into the court room in this case did not rise to the level of a constitutional closure and, therefore, even if imposed in error, would not require reversal of the conviction for structural error."[123] It then opined that "[t]o characterize so modest a condition as a closure would demean the significance of a closure in the context of a defendant's right to a public trial, and risk dilution of the standard justifying a closure."[124]

The language of *Williams* is different from that of *Maldonado*. *Williams* describes the need for an exclusionary act,[125] while *Maldonado* relies on an intent to exclude.[126] But really, they are two sides of the same coin. The exclusionary act of *Williams* can be performed only intentionally. Both courts rely on the same core reasoning—by their own terms, conditions potentially admit all comers.[127] Any exclusion requires actions and intentions extrinsic to the court: an entry condition supplies a necessary condition to a closure, but not a sufficient one. That is provided by the individual who chooses not to comply with the condition.

### *C. The Non-Closure Caveat*

While the *Williams* and *Maldonado* courts both concluded that Sixth Amendment scrutiny, either *Waller* or modified-*Waller*, need not be applied to evaluate courtroom entry conditions, they did not stop there: Both found it necessary to opine that this conclusion did not mean that "anything goes" in terms of conditioning entry to courtrooms.[128] In fact, they emphasized the importance

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121. *Id.*

122. *Id.* at 152.

123. *Id.* at 153.

124. *Id.* at 153-54. Not all courts have analyzed the constitutional implications of entry conditions in detail. For instance, in *People v. England*, the court simply asserted that "there was no general exclusion of the public from the trial, and the security measures imposed . . . were minimal and unintrusive." 83 Cal. App. 4th 772, 779 (2000).

125. Williams v. State, 690 N.E.2d 162, 168 (Ind. 1997); *see, e.g.*, United States v. Al-Smadi, 15 F.3d 153, 154 (10th Cir. 1994) (requiring "affirmative act").

126. *Maldonado*, 2 N.E.3d at 152.

127. *See Williams*, 690 N.E.2d at 168; *see also Maldonado*, 2 N.E.3d at 153.

128. *Williams*, 690 N.E.2d at 168-69; *Maldonado*, 2 N.E.3d at 151. Not all courts that have declined to find the Sixth Amendment applicable have included the *Williams*/*Maldonado* caveat. *See* Banks v. Foss, No. 1:20-cv-00008-AWI-SKO (HC), 2020 WL 2512093, at *6 (E.D. Cal. May 15, 2020), *report and recommendation adopted sub nom*. Banks v. Foss, No. 1:20-cv-00008-AWI-SKO (HC), 2020 WL 3489643 (E.D. Cal. June 26, 2020) ("To the extent that the security procedures employed here deterred members of the public who simply did not want to present identification, we

of openness as a value and demanded that some sort of findings be made to justify a proposed entry condition.[129]

The *Williams* court warned that "when access to public proceedings is impeded, even slightly, the right to be free to walk into court and assess our justice system in operation comes under threat."[130] Accordingly, it held that trial courts must enter findings to justify "any measures taken beyond what is customarily permitted that are likely to affect unfettered access by the press and public to the courtroom."[131] It went on to provide more detail about the required findings, instructing that "when considering this sort of procedure, a court must weigh the prospective benefits to the order and security of the courtroom with the burdens to the defendant, the press, and the public."[132]

*Maldonado* included similar language. First, it wrote that even though "the conditions imposed by the judge of signing in and showing identification fell short of a constitutional closure, that does not mean that they may be imposed without justification or that they are exempt from judicial review."[133] Writing specifically of identification provisions, it said they should generally be presumed invalid, unless "a judge sets forth on the record the reasons that justify imposing this condition on entry based on the special circumstances of the case and only where the conditions are no broader than needed to accomplish their purpose."[134] The court wrote that such conditions would be reviewed for abuse of discretion.[135]

And so, even though these courts assert that the Constitution is not at issue, they still require *some* sort of review to take place. And by requiring trial court findings and considering the weight of justifications and breadth of the condition, they are recapitulating the very requirements of *Waller*'s constitutional test.[136]

### *D. Sixth Amendment Scrutiny Should Apply to Conditional Entry*

All of the aforementioned courts are right, at least partly. All acknowledge that there is a public trial tint to any potentially exclusionary conditions. The courts that have applied Sixth Amendment scrutiny, in some form, have been explicit. *Jones* states that the imposition of conditions implicates Sixth

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think they cannot be viewed as effecting any sort of exclusion or closure.").

129. *Williams*, 690 N.E.2d at 168; *Maldonado*, 2 N.E.3d at 151.

130. *Williams*, 690 N.E.2d at 169.

131. *Id.*

132. *Id.* at 170.

133. *Maldonado*, 2 N.E.3d at 154.

134. *Id.*

135. *Id.* Abuse of discretion review is commonly applied to trial management decisions made by the trial court. *E.g.*, E. Mishan & Sons, Inc. v. Homeland Housewares LLC, 580 F. App'x 26, 27 (2d Cir. 2014) (order limiting durations of trial summations reviewed for abuse of discretion); Microsoft Corp. v. Motorola, Inc., 696 F.3d 872, 881 (9th Cir. 2012) ("Abuse-of-discretion review is highly deferential to the district court.").

136. *See Williams*, 690 N.E.2d at 170: *see also Maldonado*, 2 N.E.3d at 751-52.

Amendment "secrecy and fairness concerns."[137] *Smith* tips its hat to Sixth Amendment "values."[138] Both spot the potential that openness will be reduced by the imposition of conditions and apply some form of Sixth Amendment scrutiny.

The courts that say that the Sixth Amendment is *not* implicated in a conditional entry scenario yet go on to note that openness must be considered and that conditions will be reviewed for an abuse of discretion are mistaken. They miss the very reason for the assessment they insist upon. *Williams* states that entry conditions "affect[] the openness of the proceedings in general[.]"[139] *Maldonado* describes an ongoing judicial responsibility to "preserve the presumption of openness of our court rooms[.]"[140] They both do so even though they conclude there is no Sixth Amendment closure at issue; they invoke Sixth Amendment openness values while asserting they are not at stake.[141] In this respect, *Williams* and *Maldonado* are self-refuting. The Sixth Amendment's right to a public trial is always in place. As all these courts agree, it informs any restriction on an open courtroom. The proper conclusion, therefore, is not that potential exclusions do not implicate the Sixth Amendment, but that the Sixth Amendment makes different demands of openness depending on the nature of the court's decision to restrict access.

## IV. APPLYING RATIONAL BASIS SCRUTINY TO CONDITIONAL ENTRY

### *A. The Tiers of Scrutiny in the Public Trial Context*

Although the Sixth Amendment is inevitably implicated when conditions are placed on courtroom entry, the many mitigating, minimizing factors that make conditional entry different from other "closures" suggests that a lesser degree of scrutiny is appropriate when a court reviews entry conditions. For the sake of conceptual consistency, the application of a version of rational basis scrutiny makes sense. The courts have already imported traditional tiered scrutiny into the public trial context,[142] with strict scrutiny applied to complete closures, and intermediate scrutiny to partial ones.[143] Applying rational basis scrutiny to entry conditions both fits and completes the established doctrinal model.

Tiered scrutiny is "one of the techniques by which the modern Court gives differential protection to constitutional norms."[144] The strict scrutiny the Court set

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137. People v. Jones, 750 N.E.2d 524, 529 (2001).

138. United States v. Smith, 426 F.3d 567, 572 (2d Cir. 2005).

139. *Williams*, 690 N.E.2d at 169.

140. *Maldonado*, 2 N.E.3d at 154.

141. *See Williams*, 690 N.E.2d at 167; *see also Maldonado*, 2 N.E.3d at 151.

142. *See* Joseph Blocher & Luke Morgan, *Doctrinal Dynamism, Borrowing, and the Relationship Between Rules and Rights,* 28 WM. & MARY BILL RTS. J. 319, 321 (2019) (remarking on the doctrinally "migratory" nature of the tiers of scrutiny).

143. *See supra* Section I.A.

144. Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355, 358 (2006).

forth in *Waller* for complete closures is the "most exacting scrutiny" provided by the tiered approach.[145] It is the "most demanding" form of review and is extended to few rights.[146] It requires that the law must serve a compelling government interest and be necessary to accomplish that purpose.[147] Strict scrutiny is employed in an Equal Protection context to "flush[] out" unconstitutional motivations underlying government actions.[148] Laws are subject to heightened scrutiny when the Court suspects that the classification they are based on does not reflect "sensible grounds"[149] or "meaningful considerations."[150] This heightened scrutiny applies only after the Court presumes an illicit motive—when, for instance, race is the instant classification in an Equal Protection case.[151]

Similarly, in the First Amendment context, courts apply strict scrutiny to content-based laws because there are few legitimate reasons for a government entity to restrict expression based on its content.[152] Because government has, generally, no power to regulate content, when it does, it is regarded with the suspicion that strict scrutiny imposes.[153] "The vice of content-based legislation—what renders it *deserving* of the high standard of strict scrutiny—is

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145. Boos v. Barry, 485 U.S. 312, 321 (1988).

146. City of Boerne v. Flores, 521 U.S. 507, 509 (1997). Strict scrutiny has been criticized as a blunt instrument. *See also* Angelo Guisado, *Reversal of Fortune: The Inapposite Standards Applied to Remedial Race-, Gender-, and Orientation-Based Classifications*, 92 NEB. L. REV. 1, 41 (2013) ("the Court's decision to use strict scrutiny effectively forecloses any meaningful examination"); Rebecca L. Brown, *Judicial Supremacy and Taking Conflicting Rights Seriously*, 58 WM. & MARY L. REV. 1433, 1454 (2017) (criticizing strict scrutiny as a "formulaic solution[]").

147. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 567 (5th Ed. 2015) (There are various phrasings of the test).

148. JOHN HART ELY, DEMOCRACY AND DISTRUST 146 (1980); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion) ("[T]he purpose of strict scrutiny is to 'smoke out' illegitimate uses of race [and to determine] . . . that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype."). "Smoking out" aside, strict scrutiny has also been described as manifesting a "cost-benefit conception." Jed Rubenfeld, *The New Unwritten Constitution*, 51 DUKE L.J. 289, 303 (2001).

149. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985).

150. *Id.* at 441; *see also* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 228 (1995) ("By requiring strict scrutiny of racial classifications, we require courts to make sure that a governmental classification based on race, which 'so seldom provide[s] a relevant basis for disparate treatment,' is legitimate, before permitting unequal treatment based on race to proceed.") (alterations in original) (internal citations omitted).

151. ELY, *supra* note 148, at 154 ("[L]abeling a classification 'suspect' means functionally [] that a prima facie case has been made out and that the inquiry into its suspiciousness should continue."); Paul E. McGreal, *The Role of Suspicion in Federal Equal Protection*, 8 WM. & MARY BILL RTS. J. 183, 186 (1999) ("Depending on the classification involved, the Court will be more or less suspicious of the government's action" and choose a particular tier of scrutiny as a result).

152. Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015) ("Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional.").

153. Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95 (1972).

not that it is *always* used for invidious, thought-control purposes, but that it *lends itself* to use for those purposes."[154] For example, in *Arkansas Writers' Project, Inc. v. Ragland*, the Court invalidated a tax on certain magazines, holding that it violated the First Amendment.[155] The Court subjected the tax to strict scrutiny, relying on its suspicion that the type of tax Arkansas imposed "poses a particular danger of abuse by the State."[156]

Strict scrutiny is applied when the nature of the government action under review leads to a probability of invalidity.[157] When strict scrutiny is applied, it is because it is easy for the court to imagine an improper purpose at play: the presumption of invalidity indicates that the court expects the law to stem from an improper motivation.[158]

The application of strict scrutiny makes some sense in the context of a complete courtroom closure. While an expectation of wrongdoing in imposing the closure may be misplaced, it is nonetheless true that a complete closure can create conditions that might lead to the denial of fairness that the right to a public trial is designed to prevent.[159]

In turn, the common application of a reduced, intermediate form of scrutiny makes sense in the context of a partial courtroom closure. In the Equal Protection context, courts apply a more lenient form of scrutiny to gender classifications than to race classifications, requiring that a law be substantially related (rather than necessary) to an important (rather than compelling) government interest.[160] They do so because they are *less* suspicious of the motives behind them.[161] It is more likely that there is a legitimate purpose behind a gender classification than a racial one.[162] We know that there may be acceptable bases for those

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154. Madsen v. Women's Health Ctr., 512 U.S. 753, 794 (1994) (Scalia, J., concurring in part). In contrast, lesser scrutiny applies to laws that "do not pose such inherent dangers to free expression, or present such potential for censorship or manipulation, as to justify application of the most exacting level of First Amendment scrutiny." Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622, 661 (1994).

155. Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 234 (1987).

156. *Id.* at 228. To the contrary, see City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 447 (2002), which applied intermediate rather than strict scrutiny to an ordinance because it was "not so suspect that we must employ the usual rigorous analysis that content-based laws demand in other instances."

157. *See* Shaw v. Reno, 509 U.S. 630, 643 (1993) (presuming invalidity of racial classification); R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) (presuming invalidity of content-based speech restriction).

158. Cass R. Sunstein, *The Supreme Court 1995 Term-Foreword: Leaving Things Undecided,* 110 HARV. L. REV. 4, 78 (1996) (strict scrutiny "ensure[s] that courts are most skeptical in cases in which it is highly predictable that illegitimate motives are at work.").

159. *See In re* Oliver, 333 U.S. 257, 270 (1948).

160. CHEMERINSKY, *supra* note 147, at 566.

161. *See* Bhagwat, *supra* note 15.

162. *Id.* at 359 ("With gender . . . biological differences between the sexes will remain in existence, and therefore true 'equality' might well require differing treatment."); United States v. Virginia, 518 U.S. 515, 533 (1996) (citations omitted) ("Supposed 'inherent differences' are no

classifications.[163] That level of suspicion dictates the level of scrutiny. Accordingly, in the context of a partial courtroom closure, because the risk that public trial values will be prejudiced is greatly reduced, a less demanding review is appropriate.[164] The primary purpose of the public trial right is to provide the sunlight that will prevent the judge and prosecutor from imposing unfair procedures on a defendant.[165] The presence of an audience should alleviate that concern, even if the audience is missing some excluded members. Partial closures pose less danger to public trial interest, and thus receive less demanding scrutiny.

Finally, when the degree of suspicion of wrongful, rights-denying behavior is at its lowest, an even more lenient type of scrutiny should apply.[166] Rational basis scrutiny requires only that a law be rationally related to a legitimate government purpose.[167] When a court imposes entry conditions, the "inherent dangers"[168] of other types of closure are lacking. By imposing a generally applicable rule there is no danger, for example, of the singling-out of third-parties associated with a defendant. Moreover, given the tendency of an entry condition to admit, rather than exclude—most people will probably comply with a condition—it is inconceivable that it is imposed in order to hide intended wrongdoing by a court or prosecutor. If courts should be "most skeptical [and apply strict scrutiny] in cases in which it is highly predictable that illegitimate motives are at work,"[169] they should be least skeptical when it is highly predictable that they are not.

In the First Amendment context, the Court has explicitly tied the application of a lenient form of review to the minimal dangers to the interests at issue. In *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, state law required attorneys to make certain disclosures in advertising.[170] The plaintiff objected to being required to "speak" by providing those disclosures.[171] The Court concluded that although the appellant did have a "constitutionally protected interest in not providing any particular factual information," that interest was "minimal."[172] As a result, the Court applied lenient review (if not rational basis scrutiny, something close)[173] to review the commercial speech regulation, and

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longer accepted as a ground for race or national origin classifications. . . . Physical differences between men and women, however, are enduring[.]").

163. *Id.*

164. *See* discussion *infra* Section IV.B.1.

165. *See id.*

166. *See* Brown, *supra* note 146, at 1447 ("That model [strict scrutiny] is less compelling, however, when either the rights in question are less clear or the objectives of the legislature are not as obviously invidious.").

167. CHEMERINSKY, *supra* note 147, at 565.

168. Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622, 661 (1994).

169. Sunstein, *supra* note 158, at 78.

170. Zauderer v. Office of Disciplinary Couns. of Sup. Ct. of Ohio, 471 U.S. 626, 633 (1985).

171. *Id.* at 650.

172. *Id.* at 651 (internal emphasis omitted).

173. It required only that the disclosure requirements be "reasonably related" to the state's

declined to apply any form of heightened scrutiny, "[b]ecause the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed."[174] The Court was accordingly unwilling to apply a more demanding means analysis that would interrogate possible alternatives to the legislative choice that was made: "we do not think it appropriate to strike down such requirements merely because other possible means by which the State might achieve its purposes can be hypothesized."[175] With less at stake, in terms of constitutional values, courts need not apply the strong medicine of heightened scrutiny.

### *B. The Mitigating Features of Conditional Entry*

Conditional entry has characteristics that militate in favor of treating it as non-suspicious, and therefore deserving of only minimal scrutiny. The cases that identify the operation of the Sixth Amendment in conditional entry situations do so correctly, so far as it goes.[176] But they fail to address the minor degree of incursion on Sixth Amendment principles made by the imposition of conditions.[177] They ignore the differences between conditional entry and other "closure" situations.[178] Once they identify Sixth Amendment implications, they attempt to shoehorn matters into ill-fitting doctrinal garb.[179] *Jones*, for instance, applies full *Waller* scrutiny.[180] *Smith* applies modified-*Waller*.[181] But conditional entry is different from other types of Sixth Amendment "closures." It does not pose the same dangers to public trial interests. It is imposed without a judicial intent to exclude individuals.[182] Intervening actors create the causal link required to exclude any would-be audience member, and such conditions impose generally applicable rules. These mitigating factors militate in favor of a more lenient standard of constitutional scrutiny.

*1. The Purposes of the Right to a Public Trial and Risk of Prejudice from Entry Conditions*.—A court that orders the imposition of entry conditions creates little risk of prejudicing the purposes of the right to a public trial. The bedrock purpose of the open courtroom is to prevent the machinery of the state from operating in secret, to the detriment of criminal defendants; its goal, ultimately, is to "ensure a fair trial."[183]

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interest. *Id.* This is standard rational basis language. *E.g.*, Astrue v. Capato *ex rel.* B.N.C., 566 U.S. 541, 557 (2012).

174. *Zauderer*, 471 U.S. at 651 n.14.

175. *Id.*

176. *See* discussion and notes *supra* Section III.

177. *See id.*

178. *See id.*

179. *See id.*

180. People v. Jones, 750 N.E.2d 524, 529 (2001).

181. United States v. Smith, 426 F.3d 567, 572 (2d Cir. 2005).

182. *See* discussion and notes *supra* Section IV.B.2.

183. Peterson v. Williams, 85 F.3d 39, 43 (2d Cir. 1996).

> [It] has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.[184]

The Supreme Court has explained that the Sixth Amendment's right to a public trial exists to: (1) "ensure[] that judge and prosecutor carry out their duties responsibly," (2) "encourage[] witnesses to come forward" and (3) "discourage[] perjury."[185]

The first purpose is abuse-deterrence, discouraging government trial actors from engaging in rights-denying behavior. This purpose seems furthered only by prohibiting complete closures. Partial closures, generally, and especially entry conditions, impinge on this interest minimally, if at all. If the right to a public trial is about shining sunlight on the proceedings,[186] the presence of any members of the public should achieve that. The exclusion of an individual or small group seems irrelevant to the Sixth Amendment's goal of fair procedure.

Because less-than-complete closures facially accommodate the key abuse-deterrence purpose of the right to a public trial, it makes sense to reduce the level of scrutiny applied to them from the strict scrutiny applied to complete closures to the intermediate applied to partial ones. Perforce, it is *more* true of entry conditions, which, by their terms, need exclude no one. The presence of *any* observer should be an adequate deterrent to keep the prosecutor or judge from engaging in overtly wrongful behavior. The absence of a random actor who declines to comply with an entry condition seems beside the point.

The any-sunlight-suffices argument may be less true of more subtle wrongs the judge or prosecutor might commit.[187] For instance, only particular observers may spot violations of evidence rules or improper communications between prosecutor and judge.[188] But to the extent that the possibility of some real-time response by an in-court lay observer is required to ensure fairness, there is no reason to believe that the presence of a particular audience member will matter. It is hard to picture the would-be audience member particularly situated to dissuade the judge or prosecutor from engaging in gross legal error. Few observers, if any, would have the knowledge necessary to discern the nature of

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184. *In re* Oliver, 333 U.S. 257, 270 (1948).

185. Waller v. Georgia, 467 U.S. 39, 46 (1984).

186. State v. Silvernail, 831 N.W.2d 594, 607 (Minn. 2013) (Anderson, J., dissenting) (citing LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (1914)).

187. *See, e.g.*, Blue v. State, 716 So. 2d 567, 572 (Miss. 1998) (describing as "malum prohibitum" wrongs that are not obvious but made illegal by positive law).

188. These actions should be objected to by defense counsel (who would certainly be present) and might be rectified on appeal in any event. A jury might also be present, but the right to a jury is provided textually in the Sixth Amendment, independently from the right to a public trial. U.S. CONST. amend. VI. This indicates that the presence of a jury alone does not satisfy the right to a public trial.

the legal wrong taking place before them, were they in the courtroom. Ultimately, no matter the type of possible rights-denying behavior, abuse-deterrence is not seriously implicated by partial closures or conditional entry.

The Supreme Court has been especially solicitous of accommodating the presence of friends and family in the courtroom.[189] It is possible that someone who does not comply with an entry condition may be a family member. Family members may be the best auditors of the proceedings,[190] but, again, to the extent the right to a public trial exists to remind the prosecutor and judge of their duties,[191] the presence of any eyes should almost always suffice. Moreover, entry conditions do not turn on the identity of the would-be admittee. They turn on behaviors. Thus, the courts' occasional admonitions about assuring attendance of friends and family do not seem pertinent. A mother, father, or sibling is not denied entrance; a person unwilling to conform to the court's rules is.

So long as there are observers, or even the possibility of observers, the Sixth Amendment's core concern of ensuring fair proceedings is satisfied. In the ordinary course, it is not compromised by possibly excluding a non-complying audience member, including a family member of the defendant, from the courtroom. Government trial participants still know that their actions are subject to review by anyone else who may enter the courtroom.

The second purpose of the right to a public trial is to encourage witnesses to come forward.[192] This purpose presumes that if the trial is known to the public, those members of the public with knowledge of the case will be able to approach the parties to offer their testimony.[193] Again, this becomes a question of degree. Will these potential witnesses be discouraged by having to comply with a condition? It depends on the condition and the would-be witness, but the risk seems low.[194] Moreover, application of the rational basis review advocated by this

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189. *In re* Oliver, 333 U.S. at 268.

190. Tinsley v. United States, 868 A.2d 867, 873 (D.C. 2005) (per curiam) ("Of all members of the public, a criminal defendant's family and friends are the people most likely to be interested in, and concerned about, the defendant's treatment and fate, so it is precisely their attendance at trial that may best serve the purposes of the Sixth Amendment public trial guarantee.").

191. Waller v. Georgia, 467 U.S. 39, 46 (1984).

192. *Id.*

193. *See* State v. Schmit, 139 N.W.2d 800, 807 (Minn. 1966) ("[T]he possibility that some spectator drawn to the trial may prove to be an undiscovered witness in possession of critical evidence cannot be ignored.").

194. I have discovered only one example of an audience member being called to testify, from over a century ago. *See* Buchanan v. State, 41 Tex. Crim. 127, 131, 52 S.W. 769, 770-71 (1899) ("While defendant's counsel was cross-examining the state's witness Luther Buchanan as to the venue of the alleged offense, and said witness had testified that he did not believe that the defendant's camp was on the Tom Ates place, in Baylor county, one R. H. Payne, seated in the audience, not subpoenaed or put under the rule, and one of the parties who got out the complaint and had defendant arrested, spoke out, in hearing of the witness, of the jurors, and of counsel, saying, 'It is in Baylor county, all the same.' Upon objection by defendant's counsel that it was tampering with the witness and calculated to influence the jury, the court reprimanded the said R. H. Payne, and had him sworn

article should obviate any concerns. A witness who provides a good reason for not complying should be excused from the condition.[195]

Finally, the purpose of discouraging perjury is not prejudiced.[196] This purpose is furthered by making the proceedings accessible to persons who may have knowledge of the people and events giving rise to the proceedings.[197] If a witness is lying, and someone in the audience perceives it, the observer with knowledge of the lie can approach the parties to let them know. Someone excluded by a condition may indeed know the facts in a way that leads them to be able to assess the truth or falsity of any testimony given. But if they have that knowledge and that commitment to the truth, the odds are extremely high that they will either comply with the condition or, if necessary, seek relief from it, which a rational condition regime will account for.

*2. Intent to Close or Exclude*.—The Supreme Court has imported into the public trial context the type of scrutiny applied to other kinds of constitutional challenges.[198] Accordingly, other related precepts should similarly come along. In the Equal Protection context, the Court has been clear: a government action violates the Equal Protection Clause only if it intentionally distributes benefits or burdens on the basis of membership in a protected class.[199]

Disparate *treatment* is constitutionally impermissible; but unintentional disparate *impact* visited upon a protected class is not. For instance, in *Washington v. Davis*, Black applicants to the Washington D.C. police department claimed that the Police Department's recruiting procedures, which included a written personnel test, were racially discriminatory and, therefore, violated the Due Process Clause of the Fifth Amendment because they "excluded a disproportionately high number of Negro applicants."[200] The applicants did not claim intentional or purposeful discrimination, but instead asserted that the personnel test "bore no relationship to job performance" and had "a highly discriminatory impact in screening out black candidates."[201]

The Court concluded that this was not enough. Instead, it held that "the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory *purpose*."[202] The Court used words like "intentional," "purposeful," and "contrivance" to describe what was required

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to testify[.]").

195. *See infra* Section IV.C.

196. *Waller,* 467 U.S. at 39, 46.

197. *See Schmit*, 139 N.W.2d at 806-07 ("The presence of an audience does have a wholesome effect on trustworthiness since witnesses are less likely to testify falsely before a public gathering.").

198. *See* discussion *supra* Section I.A.

199. *See* Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 452 (1997) ("[P]urpose of heightened scrutiny . . . is not to protect against inadvertent effects but to smoke out unacknowledged purposes.").

200. Washington v. Davis, 426 U.S. 229, 233 (1976).

201. *Id.* at 235.

202. *Id.* at 240 (emphasis added).

before an official action would be invalidated.[203] The Constitution, according to the Court, was not a barrier to "a statute or ordinance having neutral purposes but disproportionate racial consequences."[204] "[A] discriminatory 'ultimate effect' is without independent constitutional significance."[205]

When a court sets a condition to entry, it does so for reasons unrelated to an intent to exclude or otherwise reduce openness. The intent is compliance in furtherance of some other goal. A court does not want the parties, attorneys, and jury distracted, for instance, by a naked audience member. If the court requires attire, its goal is not to exclude those lacking attire; its goal is to reduce distraction. Similarly, if a court requires identification, it is not trying to exclude—nor is it particularly interested in whom the individual is—it is trying, for safety purposes, to make sure entrants are willing to be held accountable for any wrongs they might commit in the courtroom. A court is not an investigative office, and it does not pursue goals extrinsic to the proceedings it hosts. It is interested in maintaining its own safety and order. The command of the right to a public trial is not to the contrary. As in *Davis*, a trial court imposing a condition on entry is not acting with an intent contrary to constitutional values. Any resulting "closure" is a by-product, not a feature, of the condition.[206]

*3. Intervening Actors*.—Another mitigating factor which should reduce the degree of scrutiny placed on the imposition of entry conditions is that any actual reduction in trial openness comes at the hands not of the court but of the third parties who decide not to comply. Causation is lacking when "there has intervened an independent decision on the part of [another actor]."[207] Most prospective exclusions will arise not because of difficulty with compliance but because the would-be spectator chose not to comply.

> [T]he voluntary intervention of a second person very often constitutes the limit [of causation]. If a guest sits down at a table laid with knife and fork and plunges the knife into his hostess's breast, her death is not in any context other than a contrived one thought of as caused by, or the effect or result of the waiter's action in laying the table.[208]

While a requirement imposed by a court is a necessary condition to a potential decrease in openness—but for the requirement that would-be entrants pass through a metal detector, for example, those wishing not to would not have

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203. *Id.*

204. *Id.* at 243.

205. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 271 (1977); *see also* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 207 (2008) ("A voter complaining about such a law's effect on him has no valid equal-protection claim because, without proof of discriminatory intent, a generally applicable law with disparate impact is not unconstitutional.").

206. Some courts addressing inadvertent closures have addressed them under the rubric of "triviality." *See, e.g.*, Peterson v. Williams, 85 F.3d 39, 42 (2d Cir. 1996) (holding that a brief, unintentional closure was "too trivial" to violate the Sixth Amendment).

207. H.L.A. HART & TONY HONORE, CAUSATION IN THE LAW 203 (2nd ed. 1985).

208. *Id.* at 70.

to make the choice—the sufficient condition is the choice ultimately made by the third party. That choice is determinative.[209] The court does not direct would-be entrants not to enter. It welcomes them, subject to a minor burden.

In tort law, the intervention of third parties severs the causal link between an action and an outcome: "A superseding cause is an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about."[210] Of course, if the actions of the third party are foreseeable to the initial actor, both may be liable.[211] An actor is concurrently liable even if it "merely created a condition which is made harmful by the operation of the intervening force set in motion by [the third person]."[212] Accordingly, it is inadequate to assert that the reduction in openness is attributable entirely to the third party who declines to comply.

But the constitutional culpability of the court is significantly tempered by the third party's actions. The court imposing a condition has not ordered that no one enter the courtroom (a complete closure). It has not ordered that some people be excluded (a partial closure). It has ordered only that entrants must take certain steps. It has not acted to prohibit access, but to dissuade certain behavior. The subsequent decision to comply or not is out of the court's hands.[213]

*4. Generally Applicable Conditions and the Lesson of* Crawford v. Marion County Election Board.—The Supreme Court has treated the imposition of generally applicable conditions that precede the exercise of rights as a minor incursion on that exercise.[214] Generally applicable laws are those that apply regardless of the specific class to which a person belongs.[215] They apply "equally

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209. Tandeski v. Barnard, 121 N.W.2d 708, 713 (Minn. 1963) ('[A] an independent act is considered an intervening, superseding cause . . . if an actor who had the time and the ability to make a conscious choice makes a choice that leads to a result which would not have occurred except for that conscious choice.").

210. RESTATEMENT (SECOND) OF TORTS § 440 (1965).

211. *Id.* § 441.

212. *Id.*; *see also id.* § 442A ("Where the negligent conduct of the actor creates or increases the foreseeable risk of harm through the intervention of another force, and is a substantial factor in causing the harm, such intervention is not a superseding cause.").

213. This mitigating factor obviously intersects with the lack of intent to close. *See* discussion *supra* Section IV.B.2.

214. *See* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993) ("[A] law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice."); *see also* Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 649 (10th Cir. 2006) (holding, in a Free Exercise context, that "a law that is both neutral and generally applicable need only be rationally related to a legitimate governmental interest to survive a constitutional challenge.").

215. Cal. Trucking Ass'n v. Bonta, 996 F.3d 644, 657 (9th Cir. 2021) ("A generally applicable law is one that affects individuals 'solely in their capacity as members of the general public.'") (citation omitted), *cert. denied sub nom.* Cal. Trucking Ass'n, Inc. v. Bonta, 142 S. Ct. 2903 (2022).

to all similarly situated people without targeting any one group[.]"[216]

A close analogy can be drawn between placing conditions on courtroom entry and placing conditions on voting. Both the vote and public trial present fundamental constitutional rights.[217] Both have frequently been conditioned on presenting identification.[218] In the voting arena, the Supreme Court has been clear by permitting identification conditions.[219] Moreover, in coming to that conclusion, the Court has not subjected the identification condition to particularly rigorous scrutiny.[220]

This was made clear in *Crawford v. Marion County Elections Board*,[221] where the Court upheld the validity of an Indiana statute that required in-person voters to present "photo identification issued by the government" as a pre-condition to voting.[222] The Court was split into various blocs, but six Justices agreed that the condition was constitutional.[223]

Justice Stevens, writing for himself, Chief Justice Roberts, and Justice Kennedy, first asserted the "general rule that 'evenhanded restrictions that protect the integrity and reliability of the electoral process itself' are not invidious[.]"[224] These three Justices indicated that rationality was not the standard but nonetheless applied a lenient, almost-rational-basis form of scrutiny to the identification requirement, explaining that a "burden that a state law imposes on a political party, an individual voter, or a discrete class of voters . . . must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'"[225]

The three Justices concluded that an identification requirement satisfied that test.[226] First, they accepted that Indiana possessed "a neutral and nondiscriminatory reason supporting the State's decision to require photo identification."[227] One of the reasons accepted by the Justices was a broad, general interest "in protecting public confidence 'in the integrity and legitimacy of representative government.'"[228] The Justices also assessed the resulting burden on voting as a minimal one, determining that "the inconvenience of making a trip

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216. Wendy K. Olin, *Constitutional Survival Camp: What Are the Chances That the General Applicability Test Will Make It?*, 68 S. CAL. L. REV. 1029, 1030 (1995).

217. *E.g.*, Reynolds v. Sims, 377 U.S. 533, 562 (1964) (voting); Walton v. Briley, 361 F.3d 431, 434 (7th Cir. 2004) (public trial).

218. *E.g.*, Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008) (voting); United States v. Smith, 426 F.3d 567 (2d Cir. 2005) (public trial).

219. *Crawford*, 553 U.S. at 204.

220. *Id.* at 204, 209 (Scalia, J., concurring).

221. *Id.* (majority opinion).

222. *Id.* at 185.

223. *Id.* at 204, 209 (Scalia, J., concurring).

224. *Id.* at 189-90 (majority opinion).

225. *Id.* at 191.

226. *Id.*

227. *Id.* at 196-97.

228. *Id.* at 197.

to the BMV, gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting."[229]

In a separate opinion, Justice Scalia, joined by Justices Thomas and Alito, agreed that the identification requirement passed constitutional muster.[230] Justice Scalia described the applicable scrutiny as "a deferential 'important regulatory interests' standard for nonsevere, nondiscriminatory restrictions, reserving strict scrutiny for laws that severely restrict the right to vote."[231]

In assessing the burden at issue, Justice Scalia wrote that "[o]rdinary and widespread burdens, such as those requiring 'nominal effort' of everyone, are not severe. Burdens are severe if they go beyond the merely inconvenient."[232] Justice Scalia concluded that "[t]he universally applicable requirements of Indiana's voter-identification law are eminently reasonable. The burden of acquiring, possessing, and showing a free photo identification is simply not severe . . . . And the State's interests are sufficient to sustain that minimal burden."[233]

The opinions of Justices Stevens and Scalia agree on major points, in ways easily abstracted to a public trial context. They agree that it is permissible to impose a generally applicable condition that must be satisfied before the right to vote may be exercised.[234] They agree that the government interest served must be legitimate but need not satisfy a heightened standard, such as the compelling interest required by strict scrutiny.[235] Finally, Justices Stevens and Scalia agree that the burden of the specific condition of photo identification is not a great one.[236] The outcome of *Crawford* provides support to the conclusion that entry conditions need not be subject to heightened scrutiny.[237] If minimal scrutiny is applied to voting conditions similar to those conditions arising in a public trial setting, minimal scrutiny makes sense in the public trial setting as well.[238]

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229. *Id.* at 198.

230. *Id.* at 209 (Scalia, J., concurring).

231. *Id.* at 204.

232. *Id.* at 205 (internal citations omitted).

233. *Id.* at 209 (internal citations omitted); *see also* Burdick v. Takushi, 504 U.S. 428, 438 (1992) (permitting, under a lenient standard, "[r]easonable regulation of elections").

234. *Crawford*, 553 U.S. at 181; *id.* at 209 (Scalia, J., concurring); *see* Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 885 (1990) (holding that a free exercise objection does not overcome "[t]he government's ability to enforce generally applicable prohibitions of socially harmful conduct").

235. *Crawford*, 553 U.S. at 181; *id.* at 209 (Scalia, J., concurring).

236. *See* Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Sagardia De Jesus, 634 F.3d 3, 13 (1st Cir. 2011) ("we think that the Constitution permits a guard to ask a visitor for his or her name and identification—a question often asked at the entrance of public federal buildings like courthouses.").

237. *Crawford*, 553 U.S. at 181.

238. A complaint about this analogy may be that the identification condition placed on a voter impacts solely the *voter's* ability to participate in an election, while an identification condition placed on a courtroom entrant impacts not only the entrant's ability to attend trial, but also the defendant's right to openness. But in both instances, it is the court's decision-making that would be challenged,

### *C. Scrutinizing Entry Conditions*

Because the least suspicious government actions should be viewed through the least demanding lens, the many mitigating factors that distinguish conditional entry from other types of potential courtroom closures militate in favor of applying rational basis scrutiny, the "most lenient level of scrutiny."[239]

Most government actions survive rational basis scrutiny.[240] "[T]he standard is deferential; appellees need only show that the [government action] is 'rationally related to a legitimate state interest.'"[241] Rationality review has been described as resulting in "near-automatic approval,"[242] but it need not be a rubber stamp.[243] Justice Kennedy, in his time on the Court, drew attention to the idea of "meaningful rational basis review."[244] He saw rational basis review as requiring actual scrutiny: "[b]y requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law."[245]

Applying meaningful rational basis scrutiny makes sense in the public trial context, which already has its own flavor of tiered scrutiny. Although this article proposes using all three of the traditional tiers of scrutiny in the public trial context, those tiers apply differently in different contexts. For instance, strict scrutiny has been described as resulting in "near-automatic condemnation"[246] of laws reviewed under it, but I have explained elsewhere that this description does

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and, in any instance, the same factors would be considered in assessing that decision—the justification for the restriction and burden it imposes.

239. Webster v. Reprod. Health Servs., 492 U.S. 490, 555 (1989) (Blackmun, J., dissenting in part and concurring in part).

240. Sklar v. Byrne, 727 F.2d 633, 640 (7th Cir. 1984); *see also* McGreal, *supra* note 151, at 185 ("The Court generally upholds [laws subject to rational basis scrutiny] unless it determines that the government based its decision on a desire to harm a specific group.").

241. Pennell v. City of San Jose, 485 U.S. 1, 14 (1988).

242. United States v. Alvarez, 567 U.S. 709, 731 (2012).

243. Hadix v. Johnson, 230 F.3d 840, 843 (6th Cir. 2000) ("[R]ational basis review is not a rubber stamp of all legislative action.").

244. Kelo v. City of New London, 545 U.S. 469, 492 (2005) (Kennedy, J., concurring); *see also* Lawrence v. Texas, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring) ("When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.").

245. Romer v. Evans, 517 U.S. 620, 633 (1996). Commentators, too, have noted that rational basis scrutiny is not uniformly deferential. *See* Chemerinsky, *supra* note 147, at 708 ("Many argue . . . that there is not a singular rational basis test, but one that varies between complete deference and substantial rigor."). *See also* R. Randall Kelso, *Three Years Hence: An Update on Filling Gaps in the Supreme Court's Approach to Constitutional Review of Legislation*, 36 S. TEX. L. REV. 1, 3 (1995) (describing a spectrum of rational basis review including three sub-types: "minimum rationality, basic rational review, and rational review with bite").

246. *Alvarez*, 567 U.S. at 731.

not hold true in the public trial context.[247] In fact, many closure orders survive *Waller*'s strict review.[248] In an earlier article, I posited two reasons for this.[249] First, at the government interest stage of strict scrutiny, the sorts of interests at stake in a closure situation, like the security of witnesses, are more easily agreed upon as justifying the government action under review than, say, creating role models in a particular racial group is for purposes of affirmative action.[250] Second, in terms of tailoring—the "fit" between means and ends—courts reviewing courtroom closures simply do not place the same great demands on the trial court's choice of means that they do in, for instance, the case of content-based speech restrictions.[251]

Rational basis scrutiny may operate differently in the public trial context as well. The government interests pursued when imposing entry conditions will almost always be legitimate. From decorum, to safety, to accountability, it will be a rare interest that is not upheld as a valid one for the court to pursue.[252] But in terms of tailoring—the reasonable relationship between the interest served and the condition imposed—there will often be very simple, easily implemented alternatives to achieve the purposes of the entry condition. This is not to say that the condition cannot be generally required, only that the interest may easily be served by a spot alternative if a spectator cannot comply for some reason. For instance, if the defendant's mother does not possess valid identification, but his lawyer can vouch for her, the purposes of the identification requirement are served, without a significant burden being placed on the court.

As a further example, assume a requirement that courtroom entrants pass through a metal detector. Assume, further, that a would-be entrant could make a credible claim that the metal detector was a danger to their health. It would not pass rational basis scrutiny not to accommodate that entrant's needs. While the government has a legitimate need to prevent the importation of weapons into the courtroom, a blanket requirement of passing through the metal detector, when other means of ensuring the entrant is unarmed are so easily available, does not seem reasonably related to the government's goal. The rule is *generally* reasonable but may not be in particular applications.[253]

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247. *See* Smith, *supra* note 16, at 467; *see also* Winkler, *supra* note 39.

248. Smith, *supra* note 16, at 468.

249. *Id.* at 448.

250. *Id.* at 460 n.120.

251. *Id.* at 463-64.

252. *See* Chemerinsky, *supra* note 147, at 710 ("Virtually any goal that is not forbidden by the Constitution will be deemed sufficient.").

253. While uncommon, courts have entertained "as applied" challenges to laws reviewed using rational basis scrutiny. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 448 (1985) ("Because in our view the record does not reveal any rational basis for believing that the Featherston home would pose any special threat to the city's legitimate interests."). As a further example, in *Jones v. Governor of Florida,* the Eleventh Circuit wrote that "[t]he continued disenfranchisement of felons who are genuinely unable to pay LFOs and who have made a good faith effort to do so, does not further any legitimate state interest that we can discern." 950 F.3d 795, 810 (11th Cir. 2020).

If an alternative means is easily available, it seems unreasonable, even unfair,[254] not to permit it in lieu of satisfying the entry condition. In a standard situation applying rational basis review, the means chosen by the government is subject to very deferential review—the government may choose to pursue its interests in most ways it pleases.[255] But conditional entry, in some circumstances, presents such easy alternatives that it would be unreasonable not to permit them. To do otherwise would be "a display of arbitrary power [rather than] an exercise of judgment."[256]

Accordingly, some entry conditions may not survive rational basis review. Entry condition rationality should consider safety valves that can provide alternatives to strict compliance, where appropriate. This does not mean exceptions must be accommodated on demand. Under rational basis scrutiny, a government action, including a generally applicable condition, is presumed valid.[257] To show an "irrational" condition in this circumstance, a defendant would have to show that a particular would-be entrant was denied a particular, easily implemented, accommodation, and that the request for an exception was more than simply a matter of personal preference.[258]

## V. A SIMILAR ANALYSIS APPLIES TO FIRST AMENDMENT COURTROOM ACCESS CASES

While this Article is focused on the Sixth Amendment, the same approach should resolve any claim of public access to courts under the First Amendment. The Supreme Court's First Amendment jurisprudence of press access to courtrooms gave rise to the *Waller* test. As noted above, the *Waller* test was lifted verbatim from a press access case: *Press-Enterprise Co. v. Superior Court of California*.[259] *Press-Enterprise*, in turn, had rephrased yet another First Amendment court access test, provided by *Globe Newspaper Co. v. Superior*

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Although the case was ultimately decided on other grounds, the court reviewed the rationality of the law with respect to the particular individuals before it, rather than only the *category* of felons who were unable to pay, and concluded it was irrational. *Id.*

254. The Court has invoked "fairness" considerations in making rational basis determinations. *See* Allegheny Pittsburgh Coal Co. v. Cnty. Comm'n of Webster Cnty., 488 U.S. 336, 346 (1989) (applying rational basis scrutiny to invalidate tax assessment method).

255. Vance v. Bradley, 440 U.S. 93, 108 (1979) (permitting choice of means that is both underinclusive and overinclusive).

256. Mathews v. De Castro, 429 U.S. 181, 185 (1985).

257. Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 314 (1976).

258. In some matters, making exceptions may not be practical. *See* Kheriaty v. Regents of Univ. of Cal., No. SACV 21-1367 JVS (KESX), 2021 WL 6298332, at *8 (C.D. Cal. Dec. 8, 2021), *aff'd sub nom*. No. 22-55001, 2022 WL 17175070 (9th Cir. Nov. 23, 2022) (approving denial of university vaccination exception "because it would not be able to accurately determine who among the nearly half a million members of the campus community had infection-induced immunity and should be exempted from the vaccination requirement.").

259. 464 U.S. 501 (1984).

*Court of Norfolk County*.[260] Before setting forth its (and *Waller*'s) test, the *Press-Enterprise* Court quoted the following from *Globe Newspaper*: "[w]here . . . the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a *compelling governmental interest*, and is *narrowly tailored to serve that interest.*"[261] This is pure strict scrutiny language that directly imports tiered scrutiny into public trial doctrine.

Although *Waller*'s test for the propriety of a courtroom closure under the Sixth Amendment's right to a public trial was appropriated from this related area of First Amendment law, there remain important structural differences between the public's access rights under the First Amendment, and a defendant's right to an open courtroom under the Sixth Amendment.

One distinction between a First Amendment access case and a Sixth Amendment public trial case is that criminal defendants may waive their Sixth Amendment rights.[262] Defendants may not, however, waive the press's corresponding rights.[263] There is also a dramatic difference between the two rights in terms of the remedy available for a violation. In the First Amendment context, a member of the press may be able to obtain an order permitting access.[264] As well, the production of a transcript may be ordered and considered sufficient to remedy a retrospective public access violation.[265] In the Sixth Amendment context, the remedy is much stronger. A violation of the right to a public trial can result in a reversal of a conviction.[266] The finality of judicial proceedings is at stake in a way it is not when a First Amendment access case is brought—a newspaper, of course, cannot seek to void a conviction. This impact on finality is further exacerbated by public trial violations being denominated "structural errors."[267]

The common doctrinal provenance of the First Amendment right of access and the Sixth Amendment's public trial command dictates similar results. A would-be entrant's complaints about entry conditions should be subject to the same rational basis scrutiny as a criminal defendant's complaints. The arguments for reduced scrutiny are only more forceful. An audience member does not have the same compelling fair trial interests as a criminal defendant.[268] Moreover,

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260. 457 U.S. 596 (1982).

261. *Press-Enterprise*, 464 U.S. at 510 (quoting *Globe Newspaper Co.*, 457 U. S. at 606-07) (emphasis added).

262. *See* Levine v. United States, 362 U.S. 610, 619-20 (1960).

263. *Constitutional Waivers by States and Criminal Defendants*, 134 HARV. L. REV. 2552 (2021).

264. *See* Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1061 (3d Cir. 1984) (holding in a civil case that access should have been permitted).

265. *See* Gannett Co. v. DePasquale, 443 U.S. 368, 393 (1979).

266. *See, e.g.*, Presley v. Georgia, 558 U.S. 209, 216 (2010).

267. Weaver v. Massachusetts, 582 U.S. 286, 295 (2017); *see supra* Section I.B.

268. Press-Enterprise Co. v. Superior Ct. of Cal., 464 U.S. 501, 508 (1984) (stating "[n]o right ranks higher than the right of the accused to a fair trial.").

would-be entrants who will not comply with a generally applicable rule hold, in their own hands, the means of gaining entry to the courtroom.

There is one distinction to be drawn between the complete three-tiers of scrutiny applicable to possible closures under the Sixth Amendment and the tiers of scrutiny as applicable in the First Amendment context. While Sixth Amendment scrutiny includes a form of "intermediate" scrutiny applicable to partial closures,[269] no similar tier can exist under First Amendment public access doctrine. To a party claiming a right of access under the First Amendment, there is no such thing as a "partial" closure. The party making the claim is either excluded or not. A First Amendment claimant wants personal access to the court. A Sixth Amendment claimant wants openness, generally, and is focused on the access available to others, which comes in different degrees.

## CONCLUSION

In keeping with the doctrinal model already followed by the courts—applying "tiered scrutiny" to courtroom closures—conditional entry should be reviewed according to the most lenient of the tiers, rational basis scrutiny. Public trial scrutiny should exist on a sliding scale. The Sixth Amendment should require *Waller* scrutiny, the most demanding, when all are excluded; modified-*Waller* "substantial reason" scrutiny, less demanding, when some are excluded; and rational basis scrutiny, much less demanding, in cases of conditional entry, when no one need be excluded, but for their non-compliance with a generally applicable rule. A lesser standard should apply because entry conditions cause minimal prejudice to the purposes of the right, entry conditions are rules of general applicability, the decision not to enter rests with intervening actors, and courts imposing conditions lack an intent to exclude.

This sliding scale from full to partial closure, to conditional entry, is a matter of degree. Conditional entry may be different even in kind. It is less about whom or how many people a court excludes, but, in part, about causation. The court initiates a general rule that must be followed, but individual actors decide whether to follow that rule. Conditions placed on courtroom entry may dissuade, but they do not prohibit. Accordingly, they do not pose the same danger to Sixth Amendment openness values that other types of closure may.

269. *See* discussion *supra* Section I.A.