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## The Stealth Press Clause

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# THE STEALTH PRESS CLAUSE

*Sonja R. West\**

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"To read between the lines was easier than to follow the text . . . ."

Henry James (1843–1916), in *The Portrait of a Lady*,  
Chapter 13 (1881).<sup>1</sup>

## I. INTRODUCTION

As we reflect on the 50th anniversary of *New York Times Co. v. Sullivan*,<sup>2</sup> there will likely be many tributes to *Sullivan* as one of the Supreme Court's most significant press cases. Yet *Sullivan* was not really a "press" case. The Supreme Court, in its opinion, granted all speakers greater protection against defamation liability regardless of whether they were a member of the press.<sup>3</sup>

*Sullivan* is not the only famous so-called "press" case that was not just about the press. Several more "not-just-the-press" victories followed in *Sullivan*'s wake. *New York Times Co. v. United States* (the "Pentagon Papers case"), for example, put a "heavy burden" on the government's ability to place a prior restraint on anyone's speech, not just that of the press.<sup>4</sup> *Richmond Newspapers, Inc. v. Virginia*, similarly, declared a right of access for everyone, not just the press, to attend criminal trials.<sup>5</sup>

The press, moreover, has shared not only its victories with the public but also its defeats. The Supreme Court ruled, for example, that neither the press nor the public could gain access to government jails.<sup>6</sup> Neither the press nor the public, the Court told us, can break promises of confidentiality without liability.<sup>7</sup>

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<sup>1</sup> HENRY JAMES, *THE PORTRAIT OF A LADY* 148 (Harold Bloom ed., Chelsea House 1987) (1881).

<sup>2</sup> 376 U.S. 254 (1964).

<sup>3</sup> See *id.* at 283 ("We hold today that the Constitution delimits a state's power to award damages for libel in actions brought by public officials against critics of their official conduct.").

<sup>4</sup> 403 U.S. 713, 714 (1971) (citing *Org. for a Better Austin v. Keefe*, 402 U.S. 418, 419 (1971)).

<sup>5</sup> 448 U.S. 555, 576 (1980) (plurality opinion).

<sup>6</sup> *Houchins v. KQED, Inc.*, 438 U.S. 1, 15–16 (1978).

<sup>7</sup> See *Cohen v. Cowles Media Co.*, 501 U.S. 663, 672 (1991) ("[T]he First Amendment does not confer on the press a constitutional right to disregard promises that would otherwise be enforced under state law . . . .").

When it comes to the cases that most affect the press, the Court seems to be taking a one-for-all-and-all-for-one stance. The reasons for this approach are varied. One suggestion is that the Court is adopting a reading of the Press Clause that protects the technology of mass communication and not particular speakers.<sup>8</sup> Another sees it as in keeping with a view of the Press Clause that simply protects an individual right for everyone—not just a select group—to publish his or her speech.<sup>9</sup> A third view is that it is a practical necessity to lump all speakers together in order to avoid a messy definitional problem of who does and who does not receive certain rights or protections.<sup>10</sup> I address all of these arguments in other places.<sup>11</sup>

In this piece, however, I pause to push back on the conventional wisdom that the Court actually has refused to view the press as constitutionally special. Contrary to what we have been told, I contend the Supreme Court has indeed recognized the press as constitutionally unique from nonpress speakers. The justices have done so implicitly and often in dicta,<sup>12</sup> but nonetheless they have continually and repeatedly treated the press differently. While rarely acknowledged explicitly, this “Stealth Press Clause” has been hard at work carving out special protections for the press,

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<sup>8</sup> See *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 800 n.5 (1978) (Burger, C.J., concurring) (arguing that “‘press,’ the word for what was then the sole means of broad dissemination of ideas and news, would be used to describe the freedom to communicate with a large, unseen audience,” even using new technologies that were not known to the Framers); Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 U. PA. L. REV. 459, 505 (2012) (“Under the mass-communications-more-protected view, the Free Press Clause provides special protection to all users of the press-as-technology.”).

<sup>9</sup> See, e.g., *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 390–91 n.6 (2010) (Scalia, J., concurring) (“It is passing strange to interpret the phrase ‘the freedom of speech, or of the press’ to mean, not everyone’s right to speak or publish, but rather everyone’s right to speak or the institutional press’s right to publish.”).

<sup>10</sup> *Bellotti*, 435 U.S. at 747–802 (Burger, C.J., concurring) (arguing that the Press Clause should not be read too narrowly when “freedom of speech” was used synonymously with freedom of the press pre-First Amendment).

<sup>11</sup> See generally Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. REV. 1025 (2011) [hereinafter West, *Awakening the Press Clause*] (arguing for narrow definition of the press in Press Clause jurisprudence); Sonja R. West, *Press Exceptionalism*, 127 HARV. L. REV. (forthcoming 2014 symposium) (arguing that the press is a subset of speakers separate from “occasional public commentating” that fulfill a distinct role).

<sup>12</sup> See generally RonNell Andersen Jones, *The Dangers of Press Clause Dicta*, 48 GA. L. REV. 705 (2014) (discussing the dangers of Supreme Court dicta praising the press and the unique function it serves).

guiding the Court's analysis and offering valuable insights into how we should view the contributions of the press.

To demonstrate this point, I start by discussing a few Court decisions that were specifically about the press. Next, I examine the underlying logic supporting decisions that apply broadly but focus on the press. I then turn to the distinctive rhetoric the Court has used when it discusses the press. Finally, I look at the important insights these Stealth Press Clause cases give us about the unique constitutional roles of the press. These unique press functions are perhaps the most valuable contribution of the Stealth Press Clause.

The oft-told story that the Court has treated press and nonpress speakers alike does not hold up to close examination. Despite its protestations to the contrary, the Court has made clear that there is a special constitutional space for the press.

## II. CONVENTIONAL WISDOM: THE PRESS AND THE PUBLIC ARE THE SAME

In *Citizens United*, the Court declared that it has "consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers."<sup>13</sup> This is, indeed, the conventional wisdom among most justices, judges, and scholars.<sup>14</sup> The Court has claimed repeatedly that "[t]he guarantees of the First Amendment broadly secure the rights of every citizen" and, therefore, the Court rejects any interpretation that "create[s] special privileges for particular groups or individuals."<sup>15</sup>

The Court has not always explained why it has adopted this approach to interpreting the Expression Clauses. Writing for himself, Chief Justice Burger has expressed multiple concerns

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<sup>13</sup> 558 U.S. at 352 (citations omitted) (internal quotation marks omitted); *accord* *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 691 (1990) (Scalia, J., dissenting) ("We have consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers.").

<sup>14</sup> See, e.g., C. Edwin Baker, *The Independent Significance of the Press Clause Under Existing Law*, 35 HOFSTRA L. REV. 955, 962 (2007) (stating that it is a "commonly suggested view that freedom of the press does not provide for special rights").

<sup>15</sup> *Saxbe v. Wash. Post Co.*, 417 U.S. 843, 857 (1974) (Powell, J., dissenting).

with extending “special” constitutional protections to the press.<sup>16</sup> He argued that it was not the Framers’ intention to accord unique protections to the press.<sup>17</sup> He further feared the challenge of defining the press, suggesting the mere act of identifying the press would parallel “the abhorred licensing system of Tudor and Stuart England—a system the First Amendment was intended to ban from this country.”<sup>18</sup> Recognizing press protections, according to Chief Justice Burger, would necessarily entail a process where government officials “would be required to distinguish the protected from the unprotected on the basis of such variables as: content of expression, frequency or fervor of expression, or ownership of the technological means of dissemination.”<sup>19</sup> He further foresaw a slippery-slope that would allow “lecturers, political pollsters, novelists, academic researchers, [ ] dramatists,” and limitless others to assert a claim for press rights.<sup>20</sup>

The D.C. Circuit, on the other hand, credits a strict reading of the text of the First Amendment for supporting the view that the press is not different. The First Amendment, the court said, “speaks equally of freedom of speech and of the press.”<sup>21</sup> The D.C. Circuit also cites “common sense,” claiming it dictates that if the press were given greater protection, individuals “would be encouraged to rush allegations into wide publication rather than to carefully present them to informed parties for verification or refutation in a more private setting.”<sup>22</sup>

For whatever reason, the parity view of the Expression Clauses appears in a variety of cases involving access rights, tort violations, intellectual property, and criminal law. The Supreme Court, for example, has declared that the press has no “special access to information not shared by members of the public generally.”<sup>23</sup> Despite pleas from members of the press that they

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<sup>16</sup> *Bellotti*, 435 U.S. at 797–802 (Burger, C.J., concurring).

<sup>17</sup> *See id.* at 799 (“Indeed most pre-First Amendment commentators who employed the term ‘freedom of speech’ with great frequency, used it synonymously with freedom of the press.” (internal quotation marks omitted)).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Branzburg v. Hayes*, 408 U.S. 665, 705 (1972).

<sup>21</sup> *Davis v. Schuchat*, 510 F.2d 731, 734 n.3 (D.C. Cir. 1975).

<sup>22</sup> *Id.*

<sup>23</sup> *Pell v. Procunier*, 417 U.S. 817, 834 (1974).

need access to government-controlled information, places, or meetings, the Court has been unmoved. In a series of cases focusing on jails and prisons, for example, the Court upheld regulations that prevented the media from accessing property or inmates in order to pursue potentially newsworthy issues.<sup>24</sup> A majority of the Court in these cases declared that journalists have no right of access beyond that afforded the general public.

The lower courts have gotten the message. In *California First Amendment Coalition v. Calderon*, the press sought access to witness the execution of inmates, but the Ninth Circuit concluded that while the execution was a matter of public importance, in this particular instance the First Amendment does not guarantee the press a right of access since the public was also excluded.<sup>25</sup> Thus, the question of whether the press had access to witness an execution turned upon whether the public had such a right.<sup>26</sup> The Fifth Circuit reached a similar view that the key question of constitutional right of access by the press is not the degree of public interest in the story, but on whether the public at large has a constitutional right of access to the information.<sup>27</sup>

Sometimes the "everybody gets in or nobody gets in" approach, however, works in favor of both the public and press. This mostly has arisen in cases arguing for a right of access to judicial proceedings. In *Richmond Newspapers, Inc. v. Virginia*, a newspaper challenged the closure of criminal trial.<sup>28</sup> The Court concluded that the public—and therefore also the press—had a constitutional right to attend criminal trials.<sup>29</sup> Yet despite acknowledging that the public is more likely today to "receive

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<sup>24</sup> See, e.g., *Houchins v. KQED, Inc.*, 438 U.S. 1, 16 (1978) (holding the First Amendment guarantees the media "no special right of access to the Alameda County Jail different from or greater than that accorded the public generally"); *Saxbe v. Wash. Post Co.*, 417 U.S. 843, 850 (1974) ("[N]ewsmen have no constitutional right of access to prisoners or their inmates beyond that afforded the general public."); accord *Pell*, 417 U.S. at 884; see also *Daily Herald Co. v. Munro*, 758 F.2d 350, 358 (9th Cir. 1984) ("These cases merely hold, however, that the First Amendment does not guarantee the media a special right of access to areas from which the public generally is excluded.").

<sup>25</sup> 150 F.3d 976, 981–82 (9th Cir. 1998) (concerning limitations in the procedure for viewing executions as applied to the press).

<sup>26</sup> *Id.*

<sup>27</sup> *Garrett v. Estelle*, 556 F.2d 1274, 1279 (5th Cir. 1977).

<sup>28</sup> 448 U.S. 555, 558 (1980).

<sup>29</sup> *Id.* at 578, 580.

information concerning trials through the media,” the Court again declared that media representatives “are entitled to the same rights [to attend trials] as the general public.”<sup>30</sup> Similarly, in *Globe Newspaper Co. v. Superior Court*, the Court held that states could not require judges to close courtrooms during the testimony of minor victims of sexual assault.<sup>31</sup> The Court reiterated that “the circumstances under which the press and public can be barred from a criminal trial are limited.”<sup>32</sup>

In other scenarios, the courts have refused to treat members of the press differently based on the general concept that the press receives “no special immunity from the application of general laws.”<sup>33</sup> In defamation cases, for example, the general rule is that a plaintiff must meet the same burden regardless of whether the speaker of the alleged defamatory statement is a member of the press or an individual speaker.<sup>34</sup> Following the Supreme Court’s lead, state courts have applied *Sullivan* and its progeny under the rationale that the cases focused on protecting public debate of important issues, such as the freedom to criticize the government, not on the identity of the speaker.<sup>35</sup>

Media defendants likewise have not won First Amendment protection for trespass. Rather, the courts have held that a newsperson in pursuit of a story is not exempt from trespass laws, because “[t]he First Amendment is not a license to trespass,” and the media are afforded no greater protection or immunity from torts committed during the newsgathering process.<sup>36</sup> The

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<sup>30</sup> See *id.* at 577 n.12 (quoting *Estes v. Texas*, 381 U.S. 532, 540 (1965) (concerning a Massachusetts procedure barring the press and general public from the courtroom during the testimony of minor victims of sexual assault)).

<sup>31</sup> 457 U.S. 596, 610–11 (1982).

<sup>32</sup> *Id.* at 606.

<sup>33</sup> *Associated Press v. NLRB*, 301 U.S. 103, 132 (1937).

<sup>34</sup> See generally *New York Times Co. v. Sullivan*, 376 U.S. 245 (1964) (holding that a state cannot award damages to a public official for defamation relating to his official conduct unless actual malice is shown).

<sup>35</sup> See, e.g., *Wheeler v. Green*, 593 P.2d 777, 783 (Or. 1979) (“The *New York Times* rule, as we have said, applies to all defendants, not only to those connected with the media. The rationale in *New York Times* focuses on the importance of the protection of freedom for debate on public issues and individual freedom of expression, particularly the freedom to criticize government. There is nothing in *Curtis Publishing Co.* to indicate that the Court, when it expanded the constitutional protection to defamation affecting a broader class of plaintiffs, intended to limit that protection to a narrower class of defendants.”).

<sup>36</sup> *Le Mistral, Inc. v. Columbia Broad. Sys.*, 401 N.Y.S.2d 815, 817 (N.Y. App. Div. 1978).



Supreme Court similarly has held that newspapers cannot use the First Amendment as a shield to promissory estoppel arising from a breach of a confidentiality agreement<sup>37</sup> or as a defense to infringement of intellectual property rights.<sup>38</sup> In the same vein, the Fourth Circuit, among others, has held that widespread dissemination of a message to a wide audience should not and does not insulate a speaker from the civil consequences of his actions to assist in the commission of a crime.<sup>39</sup>

### III. THE STEALTH PRESS CLAUSE

According to the courts, therefore, justice is press-badge blind. The Constitution neither sees nor cares whether a speaker is a member of the press or engaged in the act of newsgathering or communicating the news. That, anyway, is the official story. But a closer look at the Supreme Court cases that most affect the press reveals a different picture. While the Court has been claiming to treat the public and press alike, there has been a constitutional principle at work in the background. This Stealth Press Clause rarely makes a center-stage appearance, but it has consistently shown that the press is constitutionally unique.

#### A. PRESS-SPECIFIC CASES

In a few cases, the Court's discussion of the press is explicit. These are cases where a party to the case is a member of the media, a law or regulation at issue directly targets the media, or the issue simply only applies to the media. For whatever reason, these are cases where the holding truly only applies to the "press" and not to other speakers. The Court's approach to these press-specific cases is as telling as its holdings. While analyzing the legal issues, the Court reveals for us ways in which the press is

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<sup>37</sup> *Cohen v. Cowles Media Co.*, 501 U.S. 663, 672 (1991).

<sup>38</sup> *See Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 575-79 (1977) (holding that the First Amendment does not "immunize the media when they broadcast a performer's entire act without this consent").

<sup>39</sup> *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 248 (4th Cir. 1997) ("Like our sister circuits, at the very least where a speaker—individual or media—acts with the purpose of assisting in the commission of crime, we do not believe that the First Amendment insulates that speaker from responsibility for his actions simply because he may have disseminated his message to a wide audience.").

historically and functionally unique and how the Constitution seeks to protect those differences.

1. *Taxation of the Press Cases.* The most explicit example comes in the tax context. In a series of cases, the Court held that taxation of the press receives unique First Amendment protection. In discussing taxation of the press, the Court is straightforward in declaring the constitutional importance of the issue. Taxing the press, the Court tells us, is “a question of the utmost gravity and importance,” because “it goes to the heart of the natural right of the members of an organized society, united for their common good, to impart and acquire information about their common interests.”<sup>40</sup> Therefore, the question of whether a tax applies to a speaker who is a member of the press is a threshold question in the Court’s analysis.<sup>41</sup>

According to the Court, the concern of taxation of the press—either as a whole or by targeting individual members—raises “a particular danger of abuse by the State.”<sup>42</sup> This danger is evident in the “long history” of British taxation of newspapers and advertisements, which the Court in *Grosjean v. Am. Press Co.* recounted.<sup>43</sup> Importantly, the Court noted that the passionate revolt was not a general dislike of taxes but of a deeper value.<sup>44</sup> “It is idle to suppose that so many of the best men of England would for a century of time have waged, as they did, stubborn and often precarious warfare against these taxes if a mere matter of taxation had been involved.”<sup>45</sup> Similarly, the Court recounted a late eighteenth-century effort by Massachusetts to impose a stamp tax on newspapers, magazines, and advertisements, which also met with a “violent opposition” leading to the law’s repeal.<sup>46</sup>

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<sup>40</sup> *Grosjean v. Am. Press Co.*, 297 U.S. 233, 243 (1936).

<sup>41</sup> *Leathers v. Medlock*, 499 U.S. 439, 444 (1991) (beginning its analysis of a tax structure that burdens cable television providers by determining that cable television “is engaged in ‘speech’ under the First Amendment, and is, in much of its operation, part of the ‘press’”).

<sup>42</sup> *Arkansas Writer’s Project, Inc. v. Ragland*, 481 U.S. 221, 228 (1987). The Framers viewed selective taxation as a distinctively potent “means of abridging the freedom of the press.” *Minneapolis Star & Tribune Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575, 585 n.7 (1983).

<sup>43</sup> 297 U.S. at 250.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 247.

<sup>46</sup> *Id.* at 248.

The Court addressed directly that taxation of the press or "owners of newspapers" is "not an ordinary form of tax, but one single in kind, with a long history of hostile misuse against the freedom of the press."<sup>47</sup> The risk is so serious that such a tax is presumptively unconstitutional and there need not be a showing of any impermissible motive on the part of the legislature.<sup>48</sup> The concern about taxation of the press is more than a general prohibition on speaker or viewpoint discrimination, because the constitutional concern is present whether the tax applies to the press as a whole or to individual members of the press.<sup>49</sup>

The logic and language of the taxation of the press cases reveals that the Court was recognizing that press speakers function differently from individual speakers. In *Minneapolis Star and Tribune*, for example, the Court contrasts taxation of the press against other types of discriminatory tax schemes and notes that protecting the press from invidious taxation will, in turn, protect the public. It explained that when the government singles out the press for taxation,

the political constraints that prevent a legislature from passing crippling taxes of general applicability are weakened, and the threat of burdensome taxes becomes acute. That threat can operate as effectively as a censor to check critical comment by the press, undercutting the basic assumption of our political system that the press will often serve as an important restraint on government.<sup>50</sup>

2. *Daily Mail Principle Cases.* In another series of cases, the Court explicitly dealt with the question of punishment of the press for publishing lawfully obtained, truthful information. These cases resulted in what is known as the *Daily Mail* principle that "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally

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<sup>47</sup> *Id.* at 250.

<sup>48</sup> *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 585 (1983).

<sup>49</sup> *See id.* at 591 ("Minnesota's ink and paper tax violates the First Amendment not only because it singles out the press, but also because it targets a small group of newspapers.").

<sup>50</sup> *Id.* at 585.

punish publication of the information, absent a need . . . of the highest order.”<sup>51</sup>

The *Daily Mail* principle is written in expressly press-specific terms. No doubt this is in part because it and all of the cases leading up to it involved media defendants. In some of the cases, moreover, the state law at issue was specifically about the press, authorizing punishment for the publication of certain information in “any newspaper”<sup>52</sup> or “any instrument of mass communication,”<sup>53</sup> but others simply prohibited disclosure by any means.<sup>54</sup>

The Court consistently and repeatedly kept its holding press-specific, stating that the issue was about suits against the press or “newspapers.”<sup>55</sup> The Court’s logic supporting these decisions, moreover, is press-specific. The Court focuses on the role of the “news media” to report on government activities and to inform the public.<sup>56</sup> By pointing to “the interests of the public to know and of the press to publish,” the Court acknowledges that the public and the press fill two distinct and different roles in society.<sup>57</sup>

The Court even at times discussed the role of the press in contrast to the public. In *Cox Broadcasting Corp. v. Cohn*, for example, the Court weighed the privacy interest of individuals against the interests of the free press by explaining how, “in a society in which each individual has but limited time and resources with which to observe at first hand the operations of his

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<sup>51</sup> *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 103 (1979); *see also Florida Star v. B. J. F.*, 491 U.S. 524, 541 (1989) (holding that “where a newspaper publishes truthful information . . . punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order”); *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 841 (1978) (stating that the state’s interest in maintaining the institutional integrity of its courts is insufficient to justify punishing the speech at issue); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491–92 (1975) (reasoning that the state may not punish the press for publishing information regarding events that are of legitimate concern to the public).

<sup>52</sup> *Daily Mail*, 443 U.S. at 98.

<sup>53</sup> *Florida Star*, 491 U.S. at 526.

<sup>54</sup> *See, e.g., Landmark Commc'ns*, 435 U.S. at 830 (stating that Virginia’s statute subjects any person or entity to criminal sanctions); *Cox Broad. Co.*, 420 U.S. at 471–72 (noting that the Georgia legislature had prohibited publishing or broadcasting the name of rape victim).

<sup>55</sup> *See Cox Broad. Corp.*, 420 U.S. at 485 (confining opinion to review of state judgment to the context of suits against the press).

<sup>56</sup> *See id.* at 491–92 (noting that great responsibilities are placed upon the news media to report on the government).

<sup>57</sup> *Id.* at 496.

government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations."<sup>58</sup> The press, the Court informs us, must be free to provide information that will aid "most of us and many of our representatives" in participating in our democracy.<sup>59</sup> The Court goes on to discuss the problems of interfering with the ability of "the media" to do its job of "inform[ing] citizens about public business,"<sup>60</sup> again making clear that the press and the public are not the same.

3. *Editorial Discretion Cases.* Another series of cases deals with the inherently press-specific issue of editorial discretion. Again, these cases involve media defendants and regulations explicitly aimed at the media, but the Court's logic goes beyond these facts in discussing press-specific concerns about government control of the editorial process in publishing. The best example is *Miami Herald Publishing v. Tornillo* in which the Court held unconstitutional a Florida statute that required newspapers to publish the reply of a political candidate if the paper had "assailed . . . his personal character or official record."<sup>61</sup>

The Court found several problems with the law, but primarily declared it to be a violation of the Press Clause "because of its intrusion into the function of editors."<sup>62</sup> The Court tells us that it has long "expressed sensitivity as to whether a restriction or requirement constituted the compulsion exerted by government on a newspaper to print that which it would not otherwise print."<sup>63</sup>

Similarly in *CBS, Inc. v. Democratic National Committee*, the Court held that a regulation in the Fairness Doctrine requiring broadcasters to air paid editorial advertising was unconstitutional.<sup>64</sup> While admitting that "[a] broadcast licensee

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<sup>58</sup> *Id.* at 491.

<sup>59</sup> *Id.* at 492.

<sup>60</sup> *Id.* at 496.

<sup>61</sup> 418 U.S. 241, 244 (1974). For other examples of press-specific cases, see *Milkovich v. Lorain J. Co.*, 497 U.S. 1, 16, 19-20 & n.6 (1990) (referring consistently to the involvement of "media defendants" and "nonmedia defendants"); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 779 n.4 (1986) (reserving the question of "what standards would apply if the plaintiff sues a nonmedia defendant"); and *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972) (recognizing that "without some protection for seeking out the news, freedom of the press could be eviscerated").

<sup>62</sup> *Tornillo*, 418 U.S. at 258.

<sup>63</sup> *Id.* at 256.

<sup>64</sup> 412 U.S. 94, 97 (1973).

has a large measure of journalistic freedom but not as large as that exercised by a newspaper," the Court held that this regulation was "intimately related to the journalistic role."<sup>65</sup> The First Amendment protects the licensee's "journalistic judgment of priorities and newsworthiness."<sup>66</sup>

Lastly, *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations* involved an ordinance preventing a newspaper from aiding in workplace discrimination through sex-specific "help wanted" ads.<sup>67</sup> Although differing on whether the speech at hand was commercial in nature, an issue ultimately determining the outcome of the case,<sup>68</sup> the justices recognized a newspaper's constitutional right to "editorial judgment" and "free expression of views."<sup>69</sup> The Court unequivocally reaffirmed the First Amendment protection afforded to newspapers.<sup>70</sup> Even in dissent on different grounds, Justice Stewart affirmed that "it is a clear command that government must never be allowed to lay its heavy editorial hand on any newspaper in this country."<sup>71</sup>

#### B. PRESS-FOCUSED CASES

While there are few cases that specifically deal with the press, there are many more that focus on matters that primarily affect the press. In theory, these cases apply to all speakers and do not hinge on press-specific issues, but the Court's analysis makes clear that these cases were decided predominantly with the press in mind. In these instances, the Stealth Press Clause is influential in guiding the justices' analysis. As Lee Bollinger has noted, "[e]ven if other citizens can claim the same rights as the press (or, to put it the other way, even if the press has no special or unique rights), that does not mean that those rights were not developed by the

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<sup>65</sup> *Id.* at 117–18.

<sup>66</sup> *Id.* at 118.

<sup>67</sup> 413 U.S. 376, 379–80 (1973).

<sup>68</sup> Justice Douglas, in his dissent, argued that "there can be no valid law censoring the press or punishing it for publishing its views or the views of subscribers or customers who express their ideas in letters to the editor or in want ads or other commercial space." *Id.* at 398 (Douglas, J., dissenting).

<sup>69</sup> *Id.* at 391.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 403–04 (Stewart, J., dissenting).

Court in order to accommodate the interests of the press.”<sup>72</sup> The outcome might apply to all, but the reasoning is purely focused on the press.

1. *Prior Restraint Cases.* Much like with taxation, the Court has also expressed a special concern for prior restraints on the press. And while the main prior restraint cases—all involving newspapers—could arguably stand for a broader proposition that all speakers are protected from prior restraints or that all speakers have a right not to have their publications censored,<sup>73</sup> the language and logic of the cases are clearly press-focused.

It is often said that the chief purpose of “the liberty of the press” is “to prevent previous restraints up on publication.”<sup>74</sup> Clearly this principle applies to all speech and is an individual protection that all speakers enjoy. But the driving force of the Court’s prior restraint jurisprudence has been the interests of the press. Starting with *Near v. Minnesota*<sup>75</sup> and continuing through *New York Times Co. v. United States*<sup>76</sup> and *Nebraska Press Association v. Stuart*,<sup>77</sup> the Court has addressed prior restraints as an issue about the government trying to censor the press. In the same breath as it discussed “editors and publishers” and “those who exercise First Amendment rights in newspapers or broadcasting enterprises,” the Court declared that the damage of a prior restraint “can be particularly great when [it] falls upon the communication of news and commentary on current events.”<sup>78</sup>

In *Near v. Minnesota*, the Court reversed an injunction prohibiting the publication of a newspaper.<sup>79</sup> The injunction was granted under a state law authorizing abatement, as a public nuisance, of a defamatory newspaper.<sup>80</sup> The Court recognized that the First Amendment provides almost universal protection from prior restraints, and in reaching this conclusion, the Court noted

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<sup>72</sup> LEE C. BOLLINGER, UNINHIBITED, ROBUST, AND WIDE-OPEN: A FREE PRESS FOR A NEW CENTURY 10 (Geoffrey R. Stone ed., 2010).

<sup>73</sup> See *infra* Part III.C (discussing whether “press” meant only publishing technology).

<sup>74</sup> *Near v. Minnesota*, 283 U.S. 697, 713 (1931).

<sup>75</sup> *Id.*

<sup>76</sup> *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971).

<sup>77</sup> 427 U.S. 539 (1976).

<sup>78</sup> *Id.* at 559–60.

<sup>79</sup> 283 U.S. at 722–23.

<sup>80</sup> *Id.* at 701–02.

that it was the “chief purpose of the guaranty to prevent previous restraints on publications.”<sup>81</sup> By focusing on restraints on publications rather than on speech and by holding that the law was “an infringement on the liberty of the press” rather than one of speech, the Court recognizes the press as unique.<sup>82</sup>

Forty years later, the Court’s focus on the distinctive qualities of the press continued in *New York Times v. United States*.<sup>83</sup> In that case, the Justices issued only a short per curiam opinion followed by a separate opinion by each Justice. In a variety of ways, a majority of the Justices expressed concern about prior restraints on the press. Justice Black, for example, was concerned with some of the Justices’ views that “publication of *news* may sometimes be enjoined” because such a holding would be wholly inconsistent with the First Amendment.<sup>84</sup> In his separate opinion, he points to the press’s irreplaceable role in our society to “serve the governed” and “expose deception in government”—tasks, he claims, are only possible if the press is “free and unrestrained.”<sup>85</sup> Justice Stewart also noted that “a press that is alert, aware, and free most vitally serves the basic purpose of the First Amendment. For without an informed and free press there cannot be an enlightened people.”<sup>86</sup> Justice White joined the majority of Justices because of “the concededly extraordinary protection against prior restraints enjoyed by the press under our constitutional system.”<sup>87</sup>

Even the dissenters in that case, like Justice Blackmun, acknowledged that the Court’s task was to develop standards weighing “the broad right of the press to print and of the very narrow right of the Government to prevent.”<sup>88</sup> Chief Justice Burger agreed that there is “little variation among the members of the Court in terms of resistance to prior restraints against

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<sup>81</sup> *Id.* at 713.

<sup>82</sup> *Id.* at 722–23.

<sup>83</sup> *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971).

<sup>84</sup> *Id.* at 715 (Black, J., concurring) (emphasis added).

<sup>85</sup> *Id.* at 717.

<sup>86</sup> *Id.* at 728 (Stewart, J., concurring).

<sup>87</sup> *Id.* at 730–31 (White, J., concurring).

<sup>88</sup> *Id.* at 761 (Blackmun, J., dissenting).



publication" as the Court has had little opportunity to assess prior restraints "against news reporting on matters of public interest."<sup>89</sup>

Finally, in *Nebraska Press Association*, the Court overturned a restraining order, issued out of concern for the defendant's right to fair trial, preventing the news media from publishing or broadcasting confessions or admissions made by the defendant.<sup>90</sup> The Court held that the defendant failed to meet the "heavy burden" needed to support a prior restraint, in part because it violated the "settled principle" that "'there is nothing that proscribes the press from reporting events that transpire in the newsroom.'"<sup>91</sup>

The Court again issued a press-focused opinion, acknowledging that precedent has interpreted the "guarantees [of a free press] to afford special protection against orders [such as these] that prohibit the publication or broadcast of particular information . . . that impose a . . . 'prior' restraint on speech."<sup>92</sup> Justice Brennan, adopting an even stronger pro-press slant, wrote that a "prior restraint on the media bears 'a heavy presumption against its constitutional validity.'"<sup>93</sup> His sole focus on the media and not on all forms of expression argues that the Court recognizes that the Press Clause carries stronger safeguards than the Speech Clause.

2. *Defamation Cases.* The Court's defamation cases are another area to examine the Stealth Press Clause at work. The famous *Sullivan* case,<sup>94</sup> of course, involved a political ad run in the *New York Times*. And while the case gives every speaker the protection of actual malice in defamation lawsuits for statements concerning the official conduct of public officials, twice in later cases the Court explicitly reserved the question of whether media

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<sup>89</sup> *Id.* at 748 (Burger, C.J., dissenting).

<sup>90</sup> *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 570 (1976).

<sup>91</sup> *Id.* at 568 (quoting *Shepard v. Maxwell*, 384 U.S. 333, 362-63 (1966)).

<sup>92</sup> *Id.* at 556.

<sup>93</sup> *Id.* at 582-83 (Brennan, J., concurring) (quoting *N.Y. Times Co. v. United States*, 403 U.S. 412, 414 (1971)).

<sup>94</sup> *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1969).

and non-media defamation defendants might be treated differently.<sup>95</sup>

The Court's embrace of the unique role of the press in our "uninhibited, robust, and wide-open" debate is evident in the *Sullivan* decision.<sup>96</sup> The Court rejects the charge that this was commercial speech by noting that the fact that "the [*New York Times*] was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold."<sup>97</sup> The Court notes a symbiotic relationship between those "who wish to exercise their freedom of speech" and "members of the press," and warns against any conclusion that "would discourage newspapers from carrying 'editorial advertisements' of this type."<sup>98</sup>

In *Sullivan*, moreover, the Court expresses concern about the impact of defamation judgments against the press, and notes a nexus with its constitutional analysis and the role of the press, stating, "[w]hether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive."<sup>99</sup>

*Sullivan*'s reliance on this distinction between press and other speakers becomes more evident as the defamation doctrine develops. Later, in *Gertz v. Robert Welch, Inc.*, the Court described the holding in *Sullivan* in press-specific terms. The Court said in *Sullivan* it "shield[ed] the press and broadcast media from the rigors of strict liability for defamation."<sup>100</sup>

*Sullivan* can be contrasted with *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, a case involving a credit report agency that erroneously reported that the plaintiff filed for bankruptcy. Here, a case not involving the press, the Court held that the

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<sup>95</sup> See *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 779 n.4 (1986) (specifically reserving the question about non-media defendants); *Milkovich v. Lorain J. Co.*, 497 U.S. 1, 19–20 (1990) (discussing how to approach a case when "a media defendant" is involved).

<sup>96</sup> *Sullivan*, 376 U.S. at 270.

<sup>97</sup> *Id.* at 266.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 278.

<sup>100</sup> 418 U.S. 323, 348 (1974); see also *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264, 292 (1974) (characterizing an earlier labor law case as "adopt[ing] as a rule of labor law pre-emption the constitutional standard of media liability for defamation originally enunciated for libel actions by public officials in *New York Times Co. v. Sullivan*").

*Sullivan* standard did not apply because it involved matters of private concern.<sup>101</sup> This speech, the Court held, was "solely in the individual interest of the speaker and its specific business audience"<sup>102</sup> and the speaker had no interest in disseminating the information. This focus on dissemination, a traditional press activity, shows the identity of the speaker as press or nonpress matters to the Court's analysis.

### C. THE LANGUAGE OF A UNIQUE "PRESS"

Also revealing about the Court's view of the press is the way it talks about the press. The Court frequently discusses the press in ways that do not comport with a "one-for-all-and-all-for-one" approach. Rather, it has embraced a vocabulary of press uniqueness. The pervasive use of the language of a unique press belies the claim that the Court sees no difference between press and nonpress speakers. These rhetorical cues also dispute a view of the "press" as merely a reference to publishing technology.

1. *It's the "Other."* The Court talks about the press in ways that do not align with an "everybody" approach by referring to the press as something that is different from other speakers. The press, according to the Court, is something some speakers might be a "member of" or "part of," implying there also are speakers who are not a member or part of the press. The Court has also acknowledged the press as an "institution"<sup>103</sup> that has "members,"<sup>104</sup> "representatives,"<sup>105</sup> and "leaders."<sup>106</sup> It is also, we are told, an "agency," which the "Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free."<sup>107</sup>

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<sup>101</sup> *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985).

<sup>102</sup> *Id.* at 762.

<sup>103</sup> *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 691 (1990) (Scalia, J., dissenting).

<sup>104</sup> *See, e.g., Vill. Publ'g Corp. v. N.C. Dep't of Revenue*, 472 U.S. 1001, 1003 (1985); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964); *Okla. Pub. Co. v. Dist. Court In & For Okla. Cnty.*, 430 U.S. 308, 311-12 (1977); *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 640 (1994).

<sup>105</sup> *See, e.g., The Albert Dumois*, 177 U.S. 240, 251 (1900); *Spreckels v. Brown*, 212 U.S. 208, 214 (1909).

<sup>106</sup> *See, e.g., Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 549 (1976).

<sup>107</sup> *Mills v. Alabama*, 384 U.S. 214, 219 (1966) (discussing "[s]uppression of the right of the press to praise or criticize governmental agents and to clamor and contend for or against change").

None of this language makes sense if there is no subgroup of speakers known as the “press.” If the “press,” for example, only refers to everybody’s right of access to publishing technology, then why does the Court refer to the press and members of the public separately? For example, while referring to the rights of a public trial, the Court noted that these rights are “satisfied by the opportunity of members of the public and the press to attend . . . and to report on what they have observed.”<sup>108</sup> Rather than suggest unity, the Court’s use of both terms implies a distinction between “representatives of the communications media” and “members of the public.”<sup>109</sup> The Court frequently compares and contrasts the rights of the press with those of the public.<sup>110</sup> By singling out the press for special mention and referring to it in terms that do not apply universally, the Court again is making clear that the press and a collection of all speakers are not one and the same.

2. *It’s Not Just Printing Technology.* In addition to suggesting distinctiveness between the press and the public, the Court’s language illustrates that the press is not merely printing technology. In many instances, rather, the Court has imposed upon the press human-like characteristics, which goes against the argument that the term “press” as used in the First Amendment refers to the technology of the printing press.<sup>111</sup> Common sense tells us that a printing press, for example, would not be given priority courtroom seating,<sup>112</sup> be able to receive telephone calls,<sup>113</sup>

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<sup>108</sup> *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 610 (1978); *see also* *Pell v. Procunier*, 417 U.S. 817, 825 (1974) (referring to “a member of the press”); *Gannett Co. v. DePasquale*, 443 U.S. 368, 401 (1979) (referring to “constitutional right of the press and public”); *Waller v. Georgia*, 467 U.S. 39, 46 (1984) (referring to the “First Amendment right of the press and public”); *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1037 (1991) (referring to restrictions “on the press or general public”).

<sup>109</sup> *Estes v. Texas*, 381 U.S. 532, 584 (1965).

<sup>110</sup> *See, e.g., Branzburg v. Hayes*, 408 U.S. 665, 684–85 (1972) (explaining that “[n]ewsmen have no constitutional right . . . when the general public” does not); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) (referring to “persons . . . who wish to exercise their freedom of speech even though they are not members of the press”).

<sup>111</sup> *See* Volokh, *supra* note 8, at 463 (“The text [of the First Amendment] was likely not understood as treating the press-as-industry differently from other people who wanted to rent or borrow the press-as-technology on an occasional basis.”).

<sup>112</sup> *United States ex rel. Darcy v. Handy*, 351 U.S. 454, 458 (1956).

<sup>113</sup> *See* *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980) (“They are often provided special seating and priority of entry . . .”); *Houchins v. KQED, Inc.*, 438 U.S. 1,

discuss a matter with another person,<sup>114</sup> or photograph defendants.<sup>115</sup> The press can also "praise or criticize governmental agents,"<sup>116</sup> show "concern for the constitutional guarantee of a fair trial" of an individual,<sup>117</sup> and "scrutinize" a judicial hearing<sup>118</sup>—tasks clearly beyond the scope of a machine.

The press that is described by the Supreme Court has the unique ability and responsibility to "expose deception in government"<sup>119</sup> and "report[] events that transpire in the courtroom."<sup>120</sup> It "cannot be sanctioned for publishing" any information divulged in public court papers.<sup>121</sup> It has the human ability to be "discourage[d]"<sup>122</sup> and "believ[e]"<sup>123</sup> things. Through the personification of the press, the Court is implicitly acknowledging that when it discusses the press, it is not referring solely to publishing technology.

3. *It's Interchangeable With News Media.* Finally, the Court has repeatedly used the term the "press" as interchangeable with the news media. This usage adds further evidence to suggest that the press does not refer merely to everyone's right to publish his or her speech. In *Sheppard v. Maxwell*, for example, the Court noted that the "press does not simply publish information about trials but guards against the miscarriage of justice" and it was for this reason the Court explained it is "unwilling to place any direct limitations on the freedom traditionally exercised by the news media."<sup>124</sup> The term "press," as used by the Court here, clearly means "the news media."

Often, in the same breath as it discusses the press, the Court will substitute words like "newspapers," "magazines,"

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26-27 n.14 (1978) (Stevens, J., dissenting) ("Even if a maximum-security inmate may make collect telephone calls, it is unlikely that a member of the general public or representative of the press would accept the charges . . .").

<sup>114</sup> *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157, 167 (1979) (citation omitted).

<sup>115</sup> *Okla. Pub. Co. v. Dist. Court In & For Okla. Cnty.*, 430 U.S. 308, 311-12 (1977).

<sup>116</sup> *Mills v. Alabama*, 384 U.S. 214, 219 (1966).

<sup>117</sup> *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 552 (1976).

<sup>118</sup> *Gannett Co. v. DePasquale*, 443 U.S. 368, 393 (1979).

<sup>119</sup> *N.Y. Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring).

<sup>120</sup> *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966).

<sup>121</sup> *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 496 (1975).

<sup>122</sup> *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964).

<sup>123</sup> *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 109 (1979).

<sup>124</sup> 384 U.S. 333, 350 (1966) (quoting *Craig v. Harney*, 331 U.S. 367, 374 (1947)).

"journalists,"<sup>125</sup> "newsmen,"<sup>126</sup> or "reporters." In *Minneapolis Star*, the Court referenced "paid circulation newspapers."<sup>127</sup> In *Cohen v. Cowles Media Co.*, the Court acknowledged the press's "ability to gather and report the news."<sup>128</sup> In his influential concurrence in *Branzburg v. Hayes*, Justice Powell spoke of the rights of "newsmen" to constitutional protection "with respect to the gathering of news or in safeguarding their sources."<sup>129</sup>

These rhetorical terms meld with a popular and legislative understanding of the term. As a practical matter, the term "press" in general usage refers to members of the news media.<sup>130</sup> Legislative efforts to define the press, moreover, have often referred to terms like "newspapers," "magazines," "journals," "periodicals," "wire services," "news agencies," "radio" and "television."<sup>131</sup> That the Supreme Court similarly has adopted this concept of the press is important. It shows an acceptance that press freedoms are primarily protections designed for the news media.

#### IV. THE UNIQUE CONSTITUTIONAL FUNCTIONS OF THE PRESS

Finally, and I suggest most importantly, the Stealth Press Clause is influential by revealing for us the unique constitutional roles the press fulfills that differ from those of other speakers.

Although the Court has never recognized separate constitutional rights or protections for the press, it has repeatedly reflected on the distinctive role the press plays in our constitutional structure.<sup>132</sup> The Court's many discussions of the

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<sup>125</sup> *Saxbe v. Wash. Post Co.*, 417 U.S. 843, 847–48 (1974).

<sup>126</sup> *United States v. Caldwell*, 408 U.S. 665, 721 (1972) (Douglas, J., dissenting) ("The press has a preferred position in our constitutional scheme, not to enable it to make money, not to set newsmen apart as a favored class, but to bring fulfillment to the public's right to know.").

<sup>127</sup> *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 578 (1983).

<sup>128</sup> 501 U.S. 663, 669 (1991).

<sup>129</sup> 408 U.S. 665, 709 (1972) (Powell, J., concurring).

<sup>130</sup> See ROGET'S INTERNATIONAL THESAURUS § 552.1 (Robert L. Chapman ed., 5th ed. 1992) (listing "press" and "news media" as synonyms).

<sup>131</sup> West, *supra* note 11, at 1063 n.245.

<sup>132</sup> See RonNell Andersen Jones, *U.S. Supreme Court Justices and Press Access*, 2012 BYU L. REV. 1791, 1792 (observing that the Court has repeatedly praised the role of the press while, at the same time, adopted less media-friendly internal policies).

press confirm that the press has an "historic, dual responsibility in our society."<sup>133</sup>

Based on a review of Supreme Court precedent, discussed in more detail below, I have identified the two primary constitutional functions of the *press qua press*: (1) gathering and disseminating news to the public and (2) providing a check on the government and the powerful. These two press functions, of course, overlap. Informing the public also acts as a check on the government and the powerful. Likewise, scrutinizing the acts of public officials can help inform members of the public about "what their government is up to."<sup>134</sup>

#### A. GATHERING AND DISSEMINATING NEWS TO THE PUBLIC

Declaring "an untrammelled press [to be] a vital source of public information,"<sup>135</sup> the Court has recognized the role of the press in conveying important information to the public. This press function enhances democracy, according to the Court, because "[w]ithout the information provided by the press most of us . . . would be unable to vote intelligently or to register opinions on the administration of government generally."<sup>136</sup> In *Thornhill v. Alabama*, the Court observed that the press fulfills an important constitutional role by answering "the public need for information and education with respect to the significant issues of the times."<sup>137</sup>

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<sup>133</sup> *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 382 (1984) (describing the dual responsibilities as "reporting information and . . . bringing critical judgment to bear on public affairs").

<sup>134</sup> *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 783 (1989) (quoting *EPA v. Mink*, 410 U.S. 73, 105 (1973) (Douglas, J., dissenting)); see also *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 587 (1976) (Brennan, J., concurring) ("[F]ree and robust reporting, criticism, and debate can contribute to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system, as well as improve the quality of that system by subjecting it to the cleansing effects of exposure and public accountability.").

<sup>135</sup> *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936); see also *N.Y. Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring) ("The press was protected so that it could bare the secrets of government and inform the people.").

<sup>136</sup> *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 492 (1975); see also *N.Y. Times Co.*, 403 U.S. at 728 (Stewart, J., concurring) ("[W]ithout an informed and free press there cannot be an enlightened people.").

<sup>137</sup> 310 U.S. 88, 102 (1940); see also *Estes v. Texas*, 381 U.S. 532, 539 (1965) (praising the role of the free press in "generally informing the citizenry of public events and

But the role of the press as seen by the Court goes beyond simply regurgitating data for public consumption.<sup>138</sup> While many individual speakers might disseminate information, the press is focused on conveying information about matters of public interest or, in shorthand, “news.”<sup>139</sup> As the Court stated, “[a] free press stands as one of the great interpreters between the government and the people.”<sup>140</sup> It does so by filtering, analyzing and translating information for its audience. The news media, the Court has told us, “‘does not merely print observed facts the way a cow is photographed through a plateglass window.’”<sup>141</sup> Rather the press puts facts “in their context”<sup>142</sup> through “‘interpretation’”<sup>143</sup> and “editorial selection.”<sup>144</sup> For this reason, the press’s editorial control is a “crucial process” that cannot be regulated “consistent with First Amendment guarantees of a free press as they have evolved to this time.”<sup>145</sup> This makes the “editorial process” of the news media “a matter of particular First Amendment concern.”<sup>146</sup>

The role of the press in reporting the news to the public does not hinge only on the final stage of publishing or broadcasting. Also vital is the earlier act of newsgathering. The Court has observed that “news gathering is not without its First Amendment

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occurrences”); *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967) (“Those guarantees are not for the benefit of the press so much as for the benefit of all of us. A broadly defined freedom of the press assures the maintenance of our political system and an open society.”).

<sup>138</sup> See *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (“A newspaper is more than a passive receptacle or conduit for news, comment, and advertising.”).

<sup>139</sup> See *Snyder v. Phelps*, 131 S. Ct. 1207, 1216 (2011) (describing matters of public interest as “‘a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public’” (quoting *San Diego v. Roe*, 543 U.S. 77, 83–84 (2004))); *Leathers v. Medlock*, 499 U.S. 439, 444 (1991) (noting that cable television “provides to its subscribers news, information, and entertainment” and is “in much of its operation, part of the ‘press’”).

<sup>140</sup> *Grosjean*, 297 U.S. at 250.

<sup>141</sup> *Tornillo*, 418 U.S. at 258 n.24 (quoting 2 ZECHARIAH CHAFEE, JR., *GOVERNMENT AND MASS COMMUNICATIONS* 633 (1947)).

<sup>142</sup> *Id.* (internal quotation marks omitted).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 258; see also *Herbert v. Lando*, 441 U.S. 153, 192 (1979) (Brennan, J., dissenting in part) (noting “the independent First Amendment values served by the editorial process”).

<sup>146</sup> *Herbert*, 441 U.S. at 191 (Brennan, J., dissenting in part).



protections"<sup>147</sup> because "without some protection for seeking out the news, freedom of press could be eviscerated."<sup>148</sup>

An important component of newsgathering involves the press functioning as "surrogates for"<sup>149</sup> or as "the 'eyes and ears' of the public."<sup>150</sup> In *Cox Broadcasting Corp. v. Cohn*, the Court explained that even with free and open access, individual speakers have "limited time and resources with which to observe at first hand the operations of [their] government," and the public therefore "relies necessarily upon the press to bring to [them] in convenient form the facts of those operations."<sup>151</sup> In *Richmond Newspapers, Inc. v. Virginia*, a plurality of the Court also directed attention to the special role of the press in noting that "there may be occasions when not every person who wishes to attend can be accommodated"<sup>152</sup> at public events such as criminal trials. Similarly, in *Globe Newspaper Co. v. Super Ct. for the Cnty. of Norfolk*, the Court rejected the state of Massachusetts' attempt to close courtrooms during the testimony of minor victims of sexual abuse to the public and the press.<sup>153</sup> The Court said it denied "logic and common sense" to close the courtroom when the press would still have access to other sources such as transcripts and court personnel to report the story to the public.<sup>154</sup>

Most people, Chief Justice Burger acknowledged, "now acquire [the news] chiefly through the print and electronic media."<sup>155</sup> This fact, he added, could justify giving the press "special seating and priority of entry" to government functions "so that they may report what people in attendance have seen and heard."<sup>156</sup> But along

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<sup>147</sup> *Branzburg v. Hayes*, 408 U.S. 665, 707 (1972).

<sup>148</sup> *Id.* at 681.

<sup>149</sup> *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (plurality opinion).

<sup>150</sup> *Houchins v. KQED, Inc.*, 438 U.S. 1, 8 (1978); *see also Nixon v. Warner Commc'ns*, 435 U.S. 589, 609 (1978) ("Since the press serves as the information-gathering agent of the public, it could not be prevented from reporting what it had learned and what the public was entitled to know.").

<sup>151</sup> 420 U.S. 469, 491 (1975).

<sup>152</sup> *Richmond Newspapers*, 448 U.S. at 581 n.18.

<sup>153</sup> 457 U.S. 596 (1982).

<sup>154</sup> *Id.* at 610.

<sup>155</sup> *Richmond Newspapers, Inc.*, 448 U.S. at 573; *see also id.* at 577 n.12 ("That the right to attend may be exercised by people less frequently today when information as to trials generally reaches them by way of print and electronic media in no way alters the basic right.").

<sup>156</sup> *Id.* at 573.

with this recognition, “[g]reat responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government.”<sup>157</sup>

#### B. CHECKING THE GOVERNMENT AND THE POWERFUL

In addition to conveying newsworthy information to the public, it has long been accepted as a “basic assumption of our political system”<sup>158</sup> that “[t]he press plays a unique role as a check on government abuse”<sup>159</sup> and “will often serve as an important restraint on government.”<sup>160</sup> According to the Supreme Court, the “free press has been a mighty catalyst”<sup>161</sup> in “exposing corruption among public officers and employees”<sup>162</sup> and “a powerful and constructive force, contributing to remedial action in the conduct of public business.”<sup>163</sup>

Protecting this function of the press, the Court explained, was no constitutional accident. Rather, “the Framers of our Constitution thoughtfully and deliberately” sought to protect “the right of the press to praise or criticize governmental agents,”<sup>164</sup> and they “have served that function since the beginning of the Republic.”<sup>165</sup> According to the Court, “the Constitution specifically selected the press” for this protection because it “serves[] as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve.”<sup>166</sup>

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<sup>157</sup> *Cox Broad. Corp.*, 420 U.S. at 491–92.

<sup>158</sup> *Minneapolis Star & Tribune Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575, 585 (1983).

<sup>159</sup> *Leathers v. Medlock*, 499 U.S. 439, 447 (1991).

<sup>160</sup> *Minneapolis Star & Tribune Co.*, 460 U.S. at 585 (1983); see also *N.Y. Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring) (“The Government’s power to censor the press was abolished so that the press would remain forever free to censure the Government.”).

<sup>161</sup> *Estes v. Texas*, 381 U.S. 532, 539 (1965).

<sup>162</sup> *Id.*

<sup>163</sup> *Houchins v. KQED, Inc.*, 438 U.S. 1, 8 (1978).

<sup>164</sup> *Mills v. Alabama*, 384 U.S. 214, 219 (1966); see also Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 538 (“[T]he generation of Americans which enacted the First Amendment built its whole philosophy of freedom of the press around the checking value.”).

<sup>165</sup> *Houchins*, 438 U.S. at 8–9.

<sup>166</sup> *Mills*, 384 U.S. at 219.

Much of the focus of the press's function of checking the government is on the criminal justice system, because "[c]ommentary and reporting on the criminal justice system is at the core of First Amendment values."<sup>167</sup> The Court explained in *Sheppard v. Maxwell* that a "responsible press has always been regarded as the handmaiden of effective judicial administration"<sup>168</sup> in a way that goes beyond merely conveying information to the public. The Court explained that this function is something unique because "[t]he press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism."<sup>169</sup> This role of the press in checking our criminal justice system, moreover, is one that is "documented by an impressive record of service over several centuries," leaving the Court "unwilling to place any direct limitations on the freedom traditionally exercised by the news media."<sup>170</sup>

While checking the misdeeds of public officials is considered one of—if not the—primary constitutional function of the press, the Supreme Court also has recognized the role the press plays in checking other powerful figures. In *Grosjean v. American Press Co.*, the Court explained that "[t]he newspapers, magazines, and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity."<sup>171</sup>

Broadening the function of the press to check not just government but other powerful individuals or entities is consistent with the Court's extension of special concerns of public officials to public figures in constitutional defamation law. The Court famously held in *New York Times Co. v. Sullivan* that in order to ensure that the "debate on public issues should be uninhibited,

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<sup>167</sup> *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 587 (1976).

<sup>168</sup> 384 U.S. 333, 350 (1966).

<sup>169</sup> *Id.*; see also *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 492 (1975) ("With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice.").

<sup>170</sup> *Sheppard*, 384 U.S. at 350.

<sup>171</sup> 297 U.S. 233, 250 (1936).

robust, and wide-open,”<sup>172</sup> the First Amendment requires increased protection of speech about public officials in their official conduct. Three years later, the Court expanded that rule to apply to non-government public figures concluding that “the public interest [as well as] the publisher’s interest” was the same as with government officials.<sup>173</sup> Thus, the same need to protect commentary about public officials applies, according to the Court, to non-government figures who “have assumed roles of especial prominence in the affairs of society,” who occupy positions of “persuasive power and influence,” or who “have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.”<sup>174</sup> The Court’s recognition that “[t]he First Amendment protects authors and journalists who write about public figures,” by requiring a defamation plaintiff to show a higher standard of fault,<sup>175</sup> suggests that the constitutional function of the press to check power includes not only a check on those who possess government power but a check on those who possess private power as well.

## V. CONCLUSION

Shining light on the Stealth Press Clause matters. It shows that the Court has accepted the distinct constitutional role of press speakers. We know this based on an examination of how the Justices view the value of the press, how they talk about the press, and how they decide and analyze cases that most affect the press. Much like the popular and legislative understanding of the press,

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<sup>172</sup> 376 U.S. 254, 270 (1964); *see also id.* at 275 (quoting James Madison’s protest against the Sedition Act, stating, “In every state, probably, in the Union, the press has exerted a freedom in canvassing the merits and measures of public men, of every description, which has not been confined to the strict limits of the common law. On this footing the freedom of the press has stood; on this foundation it yet stands.”).

<sup>173</sup> *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 154 (1967); *see also id.* at 164 (Warren, C.J., concurring) (“Our citizenry has a legitimate and substantial interest in the conduct of [public figures], and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of ‘public officials.’ The fact that they are not amenable to the restraints of the political process only underscores the legitimate and substantial nature of the interest, since it means that public opinion may be the only instrument by which society can attempt to influence their conduct.”).

<sup>174</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974).

<sup>175</sup> *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 499 (1991).

the Court also understands that there are certain speakers who are fulfilling special and important roles in our democracy. More importantly, the Court has been keeping those differences in mind.

Acknowledging that there exists a subset of speakers who function as the press is significant because it adds strength to the argument that these special speakers are identifiable and should be protected.<sup>176</sup> This implicit judicial embrace, therefore, provides valuable guidance regarding how to think and talk about the press going forward.

Shedding light on the Court's implicit embrace of press exceptionalism also exposes the potential costs of failing to make explicit this recognition of press uniqueness. Continuing the charade that the Court views the press as no different than other speakers increases the risk of incorrect decisions that do not properly protect the unique functions of the press. It also stifles our ability to move forward with a needed discussion about how best to support and protect those speakers who are doing this vital constitutional job.

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<sup>176</sup> See West, *Awakening the Press Clause*, *supra* note 11, at 1069.