

Of the Press: Rights and Responsibilities

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While the First Amendment gives specific recognition and protection to the press,¹ it simultaneously recognizes and protects freedom of speech (which goes beyond the media) in the very same phrase: “Congress shall make no law . . . abridging the freedom of speech, or of the press”² The phrasing of the First Amendment leads to questions regarding whether the Framers intended to grant the press any special rights, vis-a-vis ordinary citizens, and whether they intended to impose any special obligations or responsibilities on the press? Or, by including “the press” and the general concept of freedom of speech in the same paragraph, did the Framers intend for both rights to be treated the same?

Unquestionably, the press has historically been very important role in democratic societies, and in the U.S. in particular, serving as a “watchdog” over government and governmental institutions. One commentator went so far as to claim that the Framers of the First Amendment were trying to create “a fourth branch of government -- the press” which they envisioned as having the “ability to question those in power.”³ He went on to argue that the press serves a “necessary adversarial function.”⁴ Unquestionably, the press has served that watchdog over the centuries, investigating, reporting on, and challenging government officials.⁵ Indeed, the “watchdog” journalistic tradition includes the “muckrakers” of the early twentieth century,⁶ and Woodward and Bernstein’s Watergate investigation that ultimately led to President Richard

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¹ See RUSSELL L. WEAVER, *THE FIRST AMENDMENT: CASES, MATERIALS & PROBLEMS*, ch. 9 (7th ed. 2023) (hereafter *THE FIRST AMENDMENT*).

² U.S. CONST., 1ST AMDT.

³ See Ken Auletta, *The press’ role as a watchdog on government*, Public Broadcasting Service, Frontline <https://www.pbs.org/wgbh/pages/frontline/newswar/tags/watchdog.html>

⁴ *Id.*

⁵ See IRVING FANG, *A HISTORY OF MASS COMMUNICATION: SIX INFORMATION REVOLUTIONS* 56 (1997) (referring to articles “awakening the nation to governmental corruption, the greed of industrialists, and the need for pure food laws and child labor laws.”).

⁶ See Robert H. Giles, *The Media and Government Regulation in the Great Tradition of Muckraking*, 11 KANSAS J. L. & PUB. POLICY 567 (2002).

Nixon's resignation from the presidency.⁷ Numerous other examples abound.⁸

But the broader question, of whether the First Amendment gives the press any special "rights" or "responsibilities," perhaps in pursuit of its watchdog function, remain an open question. This article examines those issues.

I. DOES THE PRESS HAVE SPECIAL RIGHTS UNDER THE FIRST AMENDMENT?⁹

For many decades, jurists have debated whether the press is given a privileged position under the First Amendment. Despite the fact that the Framers placed the press and speech clauses side by side. Nevertheless, Justice Powell, concurring in *Branzburg v. Hayes*,¹⁰ asserted that "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 which is crucial to the governing powers of the people. Knowledge is essential to informed decisions." Paralleling this sentiment, Mr. Justice Stewart maintained that: "The Free Press Clause extends protection to an institution. The publishing business is, in short, the only organized private business that is given explicit constitutional protection. If the Free Press guarantee meant no more than freedom of expression, it would be a constitutional redundancy."¹¹

Other justices have disagreed. Then Chief Justice Burger, who concurred in *First National Bank of Boston v. Bellotti*,¹² argued that:

The Court has not squarely resolved whether the Press Clause confers upon the "institutional press" any freedom from government restraint not enjoyed by all

⁷ See Alicia C. Shepard, *Deep Throat's Legacy to Journalism*, National Public Radio (Dec. 19, 2008), <http://www.npr.org/templates/story/story.php?storyId=98532461>

⁸ See David Folkenflik, *Imagining a City Without Its Daily Newspaper*, National Public Radio, Morning Edition (Feb. 5, 2009) <http://www.npr.org/templates/story/story.php?storyID=100256908>:
So let's let the [Hartford] *Courant* stand in for all papers facing tough times and take a moment to imagine Connecticut without it. For one thing, former Gov. John Rowland wouldn't have faced corruption charges a few years back. Richard Blumenthal, the state's longtime attorney general, says the *Courant's* tenacious coverage compelled authorities to investigate Rowland. He describes the *Courant's* reporting as 'old-fashioned muckraking, finding out that there was corruption. The bad guys go to prison; the system's changed, reformed — you know, the sort of basic American tableau of what a good newspaper does at its best.' Hartford's mayor has just been indicted on bribery charges, and the *Courant* was out ahead on that, too. The paper has exposed polluters and the deployment of mentally ill soldiers to Iraq. But it's not just pursuing hard news.

⁹ Portions of this section were derived from THE FIRST AMENDMENT, *supra* note 1.

¹⁰ 408 U.S. 665 (1972).

¹¹ Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631 (1975).

¹² 435 U.S. 765 (1978).

others. Although certainty on this point is not possible, the history of the Clause does not suggest that the authors contemplated a “special” or “institutional” privilege. The common 18th century understanding of freedom of the press is suggested by Andrew Bradford, a colonial American newspaperman. In defining the nature of the liberty, he did not limit it to a particular group: “By Freedom of the Press, I mean a Liberty, within the Bounds of Law, for any Man to communicate to the Public, his Sentiments on the Important Points of Religion and Government; of proposing any Laws, which he apprehends may be for the Good of his Country, and of applying for the Repeal of such, as he Judges pernicious. ‘This is the Liberty of the Press, the great Palladium of all our other Liberties.’ ”¹³

Indeed, most pre-First Amendment commentators “who employed the term ‘freedom of speech’ with great frequency, used it synonymously with freedom of the press.”¹⁴

The U.S. Supreme Court’s decisions do not provide clarification regarding whether “the press” has special rights and privileges. In *Miami Herald Publishing Co. v. Tornillo*,¹⁵ the Court did rely on the press clause to strike down a Florida statute requiring newspapers which assail the character of political candidate to give those attacked a right of reply:

The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.¹⁶

In rendering its decision, the Court specifically invoked the press clause,¹⁷ emphasizing that a newspaper is more than “a passive receptacle or conduit for news, comment, and advertising.”¹⁸

¹³ *Id.*, at 798-799 (Burger, C.J., concurring) (quoting A. Bradford, *Sentiments on the Liberty of the Press*, in L. LEVY, *FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON* 41-42 (1966) (first published in Bradford’s *The American Weekly Mercury*, a Philadelphia newspaper, Apr. 25, 1734)).

¹⁴ L. LEVY, *LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY* 174 (1960).

¹⁵ 418 U.S. 241 (1974).

¹⁶ *Id.*

¹⁷ *Id.*, at 258.

¹⁸ *Id.*

Even though *Tornillo* relied on the press clause, and declared that newspapers have the right to exercise editorial discretion, that decision doesn't tell us much about whether the Press Clause grants the press special rights not available to others. In applying the speech clause, the Court rejected the idea that the government can require people to articulate ideas or principles to which they object. In *West Virginia Board of Education v. Barnette*,¹⁹ the Court held that a public school student could not be required to recite the pledge of allegiance. In rejecting the Pledge requirement, the Court recognized that "Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men,"²⁰ and the Court held that "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us."²¹ The Court rendered a similar decision in *Wooley v. Maynard*,²² in holding that an automobile owner could not be required to display a license plate with a motto ("Live Free or Die") to which he objected: "We are . . . faced with the question of whether the State may constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public. We hold that the State may not do so."²³

Aside from *Tornillo*, the U.S. Supreme Court has generally been unwilling to assume that the First Amendment gives the press "special rights." One context in which the Court refused to recognize a privileged status was in connection with a so-called reporter's privilege – whether the press has the right to shield its sources from disclosure. While covering issues of public importance, the press acquires information that may have value beyond its newsworthiness. For example, prosecutors may seek to uncover and use the information in the criminal justice process. In other words, a prosecutor may subpoena a reporter to appear and give testimony before a grand jury regarding a pending criminal matter. The difficulty is that, if the reporter obtained the information under a promise of confidentiality, the journalist may assert that disclosure of the information might impair his ability to obtain comparable information in the future. Moreover, the journalist may assert that secrecy is beneficial to the public in that the public derives the benefits of information it otherwise might not be able to know or access.

¹⁹ 542 U.S. 1 (2004).

²⁰ *Id.*, at 640.

²¹ *Id.*, at 642.

²² 430 U.S. 705 (1977).

²³ *Id.*, at 713.; see also *National Institute of Family & Life Advocates v. Becerra*, 585 U.S. 755 (2018).

In *Branzburg v. Hayes*,²⁴ the Court rejected the idea that a reporter could refuse to testify before a grand jury, expressing doubt that reporters would lose their sources and the flow of information to the public would diminish, if reporters could not guarantee confidentiality to their sources. In doing so, *Branzburg* held that the press has the same obligation as everyone else to provide testimony before a grand jury. The Court was unimpressed by the argument that confidentiality of sources is necessary for a well-informed public, noting that reporters need only be concerned with grand jury subpoenas to the extent that a source is implicated in a crime or possesses information relevant to the grand jury process. The Court was unconvinced that a significant percentage of confidential sources are in this situation or would be chilled by the absence of a privilege. Because the press had flourished in the past without such a privilege, the Court doubted that the protection was needed, especially given the costs that would be imposed on society. Concluding that the criminal justice system's interest in "every man's evidence" outweighed the uncertain utility of a First Amendment privilege, the Court held that a First Amendment privilege could not be "seriously entertained."

Despite the result in *Branzburg*, the decision sent confusing signals. In his concurring opinion, Justice Powell suggested that a reporter could challenge a subpoena that was brought in bad faith or in the absence of "a legitimate law enforcement need."²⁵ Under his approach, the privilege would apply when there were alternative means of obtaining the information, the information was not relevant to the investigation, or it was not intrinsic to a successful prosecution. Powell's concurring opinion, combined with the opinion of four dissenting justices who favored a First Amendment privilege, cast doubt upon *Branzburg*'s actual meaning. Some lower courts cited *Branzburg* in support of a limited First Amendment privilege. The meaning of *Branzburg* was clarified eventually in *University of Pennsylvania v. E.E.O.C.*²⁶ In that case, which concerned a university's claim of confidentiality for a tenure file, the Court referenced *Branzburg* as a decision that rejected the claim of a First Amendment privilege.

Despite the holding in *Branzburg*, the decision left the states free to establish immunities for reporters that were absolute or qualified. Many states responded to this invitation by adopting shield laws. The nature and scope of these legislated privileges varied, as did the standards of review. In some instances, courts subordinated even seemingly absolute privileges to a defendant's right to a fair trial. Although not constitutionally based, these statutes provided the press with special rights.

The notion that the press has a special status under the First Amendment was further undermined by the holding in *Cohen v. Cowles Media Co.*²⁷ Following *Branzburg*, reporters who promised confidentiality to sources faced the risk that they might be ordered by a court to

²⁴ 408 U.S. 665 (1972).

²⁵ *Id.*, at 742-743 (Powell, J, concurring).

²⁶ 493 U.S. 182 (1990).

²⁷ 501 U.S. 663 (1991).

disclose the identity of their sources. When that happened to one reporter, *Cohen* presented the question of whether the reporter could be held civilly liable for failure to honor his promise. The plaintiff in that case was a political campaign aide who, based upon a promise of confidentiality, leaked embarrassing information about a rival candidate. Although noting that the First Amendment protects the right to publish lawfully acquired information, the Court held that the promise of confidentiality established an enforceable contractual obligation. As a result, the Court rejected a newsworthiness defense that was grounded in the notion that the breach of confidence provided voters with information that was particularly relevant to the decision they had to make.

The idea that the press has special privileges under the First Amendment was further undercut by the holding in *Zurcher v. Stanford Daily*.²⁸ *Zurcher* arose when police searched the editorial offices of a student newspaper pursuant to a warrant issued based on probable cause. The police were seeking photographs of demonstrators who had assaulted police during a campus protest. Lawyers for the newspaper argued that the First Amendment barred searches of a newsroom because searches would chill the editorial process since they could disrupt and invade the editorial process and compromise the confidentiality of sources. Unmoved by these arguments, the Court held that newsrooms are not off-limits to search warrants and that the state is under no obligation to use the less invasive methodology of a subpoena. Although the Court refused to treat newsrooms differently than other venues for search and seizure purposes, it did hold that Fourth Amendment requirements must be satisfied with “scrupulous exactitude” when First Amendment interests are implicated. Justice Stewart, in a dissenting opinion, voiced concern that the decision would enable police to ransack newsrooms, chill sources, and impair the flow of information to the public.

Zurcher did prompt Congress to give the press some special legislative protection. In the Privacy Protection Act of 1980, 42 U.S.C. §§ 2000aa-1 to 2000aa-12 (1980), Congress established a preference for subpoenas as a means of obtaining evidence from news organizations. The Act did create exceptions for situations when the information holder is suspected of a crime or the exigencies of life, serious injury, or loss of evidence exist. Although this protection from searches and seizures is unique to the press, it is legislatively rather than constitutionally driven.

In most other contexts, the Court treats the press like it treats ordinary citizens. For example, in *Richmond Newspapers, Inc. v. Virginia*, the Court recognized that the press has a right of access to criminal trials.²⁹ Subsequently, there were lots of decisions, brought by media outlets, seeking (and obtaining) trial access.³⁰ But the Court has made it clear that the right of

²⁸ 436 U.S. 547 (1978)

²⁹ 448 U.S. 555 (1980).

³⁰ See *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982).

access is not limited to the press. In *Globe Newspaper Co. v. Superior Court*,³¹ the Court recognized the importance of public scrutiny of criminal trials:

. . . The right of access to criminal trials plays a particularly significant role in the functioning of the judicial process and the government as a whole. Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the fact-finding process, with benefits to both the defendant and society as a whole. Moreover, public access to the criminal trial fosters an appearance of fairness, thereby heightening public respect for the judicial process. In the broadest terms, public access to criminal trials permits the public to participate in and serve as a check upon the judicial process – an essential component in our structure of self-government. In sum, the institutional value of the open criminal trial is recognized in both logic and experience.³²

Since the privilege of access is not limited to the press, but instead applies to the public generally, this is not a special right accorded to the press.

Another important decision is *New York Times Co. v. Sullivan*, the outcome of which may have been influenced by the fact that the media was involved.³³ That case involved a large defamation judgment by an Alabama court against the *New York Times*. The judgment, which was premised upon common law rules, was overturned by the Court which articulated new and enhanced defamation standards applicable to suits by public officials.³⁴ In its decision, the Court emphasized the fact that the First Amendment protects both speech and the press,³⁵ as well as the potential impact of the judgment on the press.³⁶ But the Court also placed great emphasis on

³¹ 457 U.S. 596 (1982).

³² *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982).

³³ 376 U.S. 254 (1964).

³⁴ *Id.*, at 279-280 (“The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”).

³⁵ *Id.*, at 264 (“We hold that the rule of law applied by the Alabama courts is constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments in a libel action brought by a public official against critics of his official conduct.”).

³⁶ *Id.*, at 266 (“Any other conclusion would discourage newspapers from carrying ‘editorial advertisements’ of this type, and so might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities—who wish to exercise their freedom of speech even though they are not members of the press.”).

freedom of expression,³⁷ and the right of the people to freely express themselves.³⁸ So, although the focus was not solely on the press,³⁹ the Court expressed concern regarding the impact of defamation judgments on the press⁴⁰ but it likewise expressed concern about the chilling impact of defamation judgments on free speech generally and individuals.⁴¹ Ultimately, even though the Court focused at times on the press,⁴² the Court ultimately treated the press and individuals as the same in the sense that it applied the same defamation standards to actions brought by public officials against private individuals that it applied to actions brought against the press.⁴³

Interestingly, in Court's follow-up decision in *Gertz v. Welch*,⁴⁴ the Court did focus on the press, framing the issue as whether a "a newspaper or broadcaster that publishes defamatory falsehoods about an individual who is neither a public official nor a public figure may claim a constitutional privilege against liability for the injury inflicted by those statements."⁴⁵ In deciding the case, the Court continued to focus on the media: "Our decisions recognize that a rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship."⁴⁶ And the Court concluded that, "Allowing the media to avoid liability only by proving the truth of all injurious statements does

³⁷ *Id.* ("To avoid placing such a handicap upon the freedoms of expression, we hold that if the allegedly libelous statements would otherwise be constitutionally protected from the present judgment, they do not forfeit that protection because they were published in the form of a paid advertisement.").

³⁸ *Id.*, at 269 ("The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" (quoting *Roth v. United States*, 354 U.S. 476 (1957)).

³⁹ See also *id.* ("The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system." (quoting *Stolberg v. California*, 283 U.S. 359, 369 (1931)).

⁴⁰ *Id.*, at 278 ("Whether 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.").

⁴¹ *Id.*, at 280 ("The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.").

⁴² See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

⁴³ See THE FIRST AMENDMENT, *supra* note 1, at 83-126.

⁴⁴ 418 U.S. 323 (1974).

⁴⁵ *Id.*, at 333.

⁴⁶ *Id.*, at 340.

not accord adequate protection to First Amendment liberties.”⁴⁷ and the Court ultimately decided the case based on the fact that “tension necessarily exists between the need for a vigorous and uninhibited press and the legitimate interest in redressing wrongful injury.”⁴⁸ As a result, the Court imposed a lower standard when a private individual brings a defamation action: “so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.”⁴⁹

Even though *Gertz* focused on suits against the media, it did not hold that a different standard of liability would apply to suits against by private individuals against non-media defendants.⁵⁰ That omission was underscored by the Court’s subsequent decision in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,⁵¹ which held that the states could apply an even lower standard to private individuals involved in matters of purely private interest.⁵² In rendering that opinion, the Court placed little emphasis on the media, instead, focusing on the importance of free speech,⁵³ and its role in the democratic process.⁵⁴

So, from a First Amendment perspective, the press has few special rights or privileges not available to everyone else. That is even true of the press’ watchdog role. As with many other functions, the watchdog role is not unique to the press. The printing press was the dominant

⁴⁷ *Id.*.

⁴⁸ *Id.*, at 342.

⁴⁹ *Id.*, at 347.

⁵⁰ *Id.*, at 345-346 (“ For these reasons we conclude that the States should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual.”).

⁵¹ 472 U.S. 749 ((1984).

⁵² *Id.*, at 759-761.

⁵³ *Id.*, at 759 (“ It is speech on “ ‘matters of public concern’ ” that is “at the heart of the First Amendment’s protection.” *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978),”).

⁵⁴ *Id.*, at 759:

“The First Amendment ‘was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.’ *Roth v. United States*, 354 U.S. 476, 484 [77 S.Ct. 1304, 1308, 1 L.Ed.2d 1498] (1957); *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 [84 S.Ct. 710, 720, 11 L.Ed.2d 686] (1964). ‘[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.’ *Garrison v. Louisiana*, 379 U.S. 64, 74–75, [85 S.Ct. 209, 215–216, 13 L.Ed.2d 125] (1964). Accordingly, the Court has frequently reaffirmed that speech on public issues occupies the ‘ “highest rung of the hierarchy of First Amendment values,” ’ and is entitled to special protection. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913, [102 S.Ct. 3409, 3425, 73 L.Ed.2d 1215] (1982); *Carey v. Brown*, 447 U.S. 455, 467 [100 S.Ct. 2286, 2293, 65 L.Ed.2d 263] (1980).”

communications medium for hundred of years after its invention in 1450.⁵⁵ Indeed, Benjamin Franklin, who is known for many things, but especially as a printer, was using the Gutenberg press some 300 plus years after its invention.⁵⁶ As a result, if the founding generation were asked to identify “the press,” they would undoubtedly have referred to publications printed on the Gutenberg press. That was the only technology that they knew. However, by the nineteenth century, with the harnessing of electricity, mass communication was undergoing profound change.⁵⁷ A plethora of new communications technologies emerged, including broadcast (radio and television),⁵⁸ cable,⁵⁹ satellites,⁶⁰ and the internet.⁶¹ Moreover, the internet dramatically unsettled and transformed the environment. For one thing, the internet dramatically undercut the viability of the traditional press.⁶² Traditional newspapers began hemorrhaging both subscribers⁶³ and advertising revenue.⁶⁴ Some newspapers were forced to close.⁶⁵

Because of these trends, reporting and investigation began to change. Lots of traditional newspapers stopped producing printed newspapers, and moved their operations entirely online in

⁵⁵ See H.W. BRANDS, *THE FIRST AMERICAN: THE LIFE AND TIMES OF BENJAMIN FRANKLIN* 20 (2000) (hereafter *THE LIFE AND TIMES OF BENJAMIN FRANKLIN*).

⁵⁶ When Benjamin Franklin was printing in the eighteenth century, he used essentially the same process that Gutenberg had used:

In fact Ben served very well [as an apprentice printer]. Printing turned out to be ideally suited to his peculiar combination of manual and intellectual dexterity. The physical process of printing was straightforward, if somewhat involved. The printer set the handwritten type in text, placing the cast-metal letters (imported, during this period, from England) in rows that would yield the lines of printed text. These lines were held in place by rectangular frames corresponding to the printed pages; typically four pages were set and framed at once. The letters were inked, paper was laid over them and pressed against them, and the sheet of four pages was hung or laid aside to dry. As many sheets were pressed as copies the customer ordered. After the last impressions were made and had dried, the sheets were cut into their separate pages, which were collated and bound.

See *THE LIFE AND TIMES OF BENJAMIN FRANKLIN*, *supra* note 21, at 20.

⁵⁷ See RUSSELL L. WEAVER, *FROM GUTENBERG TO THE INTERNET: FREE SPEECH, ADVANCING TECHNOLOGY & THE IMPLICATIONS FOR DEMOCRACY* (CAROLINA ACADEMIC PRESS, 3RD ED., 1015) (hereafter *FROM GUTENBERG TO THE INTERNET*).

⁵⁸ *Id.*, at 66-71.

⁵⁹ *Id.*, at 71-72.

⁶⁰ *Id.*, at 73-74.

⁶¹ *Id.*, at 99-109.

⁶² *Id.*, at 429-445.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

an attempt to survive.⁶⁶ In addition, new online newspapers and news organizations sprouted up,⁶⁷ many being populated by former print journalists who had left or lost their print jobs.⁶⁸ One news outlet is iPad only.⁶⁹ In addition, there are now blogs and micro-blogs and even social media posts who report information,⁷⁰ leading to so-called “citizen journalists.”⁷¹ If the press is going to be accorded special “rights” under the First Amendment, decisions must be made about whether these new information sources should be regarded as “the press” or as outside of those special protections. For example, are bloggers, microblogger and other new forms of communication part of the press. And, if the First Amendment provides special rights to the press, do those rights extend to the methods of communication? The reality is that the First Amendment provides few special rights to the press.

II. DOES THE PRESS HAVE SPECIAL RESPONSIBILITIES?

One might hope that the press, however it is defined, is “responsible.” But that has not always been the case. Thomas Jefferson, the drafter of the Declaration of Independence, was particularly critical of the press:⁷² “Nothing can now be believed which is seen in a newspaper,” and “Truth itself becomes suspicious by being put into that polluted vehicle.”⁷³ During subsequent periods in history, the press did not always act responsibly. At one point in U.S. history, some newspapers practiced what was described as “yellow journalism” in the sense that those newspapers “sent out squads of reporters to hunt down leads and, if evidence failed to materialize, make up stories.”⁷⁴ For “yellow journalists,” the idea of presenting the news “objectively” was regarded as “only an occasional and tangential goal.”⁷⁵

⁶⁶ *Id.*, at 445-450 & 495-496.

⁶⁷ *Id.*

⁶⁸ *Id.*, at 475.

⁶⁹ *Id.*, at 495.

⁷⁰ *Id.*, at 472-476 & 492-493.

⁷¹ See Clay Calvert & Mireles Torres, *Putting the Shock Value in First Amendment Jurisprudence: When Freedom for the Citizen-Journalist Watchdog Trumps the Right of Informational Privacy on the Internet*, 13 VANDERBILT J. ENTERTAINMENT AND TECH. LAW 323 (2011).

⁷² See Edward Rothstein, *Life and Times of the U.S. Press*, *International Herald Tribune* 8 (Sept. 23, 2006) (quoting a letter from President Jefferson to John Norvell written in 1807).

⁷³ *Id.*

⁷⁴ See William Grimes, *The Devil’s Gentleman*, *International Herald Tribune* 13 (Oct. 26, 2007).

⁷⁵ See Rothstein, *supra* note 230, at 8

One would hope that the modern press is more professional and objective than it was during Jefferson's time or during the period of "yellow journalism." And, certainly, journalists sometimes say the right things. For example, National Public Radio (NPR) claims to aspire to lofty journalistic objectives:

The mission of NPR is to collaborate with Member Stations to cultivate an informed public, fostering a deeper understanding and appreciation of events, ideas, and cultures. To achieve this, we produce, acquire, and distribute programming that upholds the highest standards of public service in journalism and cultural expression. We also advocate for our members' shared interests and provide satellite interconnection for the entire public radio system.⁷⁶

However, the evidence regarding the modern press is not reassuring. A recent poll concluded that 75% of Americans believe that the media is responsible for increasing political polarization in this country, and nearly half the country has little or no trust in the media to report the news fairly and accurately.⁷⁷ Moreover, there is a widespread perception that the media spreads disinformation.⁷⁸ 40% of those interviewed believed that the press is doing more to hurt democracy than to promote it, and only 20% believed that the press is doing more to protect it.⁷⁹

Reflective of the poll, many modern press outlets do not function objectively or neutrally. Fox News was accused of defamation for its reporting on the 2020 presidential election and ultimately paid a \$787 million settlement.⁸⁰ Likewise, there is evidence that NPR does not live up to its lofty statement of objectives, and instead allows rank partisanship to infiltrate its reporting.⁸¹ Just as Fox News tilts to the right, NPR tilts decidedly to the left.⁸² On important matters of public interest, NPR will completely ignore critical facts that do not comport with its left-wing narrative,⁸³ or will cut speakers off or harass interviewees who are not in line with

⁷⁶ <https://www.npr.org/about/>

⁷⁷ See David Klepper, *Poll: Most fault media for division*, *Courier-Journal* 10A (May 2, 2023).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ See David Bader, Randall Chase & Geoff Mulvihill, *Fox Dominion reach \$787M over election claims*, Associated Press (Apr. 18, 2023), <https://apnews.com/article/fox-news-dominion-lawsuit-trump-2020-0ac71f75acfacc52ea80b3e747fb0afe>; see also FROM GUTENBERG TO THE INTERNET, *supra* note 57, at 84.

⁸¹ See FROM GUTENBERG TO THE INTERNET, *supra* note 57, at 84-94, 344-345.

⁸² *Id.*

⁸³ *Id.*, at 88-93.

NPR's narrative.⁸⁴ As a result, it is hardly surprising that President Trump and Congress decided to terminate NPR's federal funding.⁸⁵

While it is worthwhile to suggest that the press should have "responsibilities," it must be possible to define those responsibilities. Once defined, who will enforce the responsibilities? Will there be governmental enforcement? Private enforcement? Or only self-enforcement?

Of course, self-enforcement is a possibility. But is that realistic? A comedian might suggest that the concept of "journalistic ethics" (or, alternatively, self-imposed journalistic responsibilities) is an oxymoron. Looking at NPR, we see how a media outlet can espouse lofty ideals and how it can fall well short of those ideals. The same for Fox News.

So, what about governmentally imposed responsibilities? It is unlikely that the government can or should be given the right to impose responsibilities on the press, or to enforce compliance with those responsibilities. For example, during the Biden Administration, the Department of Homeland Security (DHS), proposed to create a Disinformation Board to respond to false information.⁸⁶ In theory, the Board was designed to create a set of standardized practices that could be used by federal agencies to respond to violent threats against the nation.⁸⁷ However, the public reacted with a firestorm of criticism that led to the demise of the proposal.⁸⁸ The American public was not prepared to accept that level of governmental control over speech.

Of course, there were periods in history when governmental regulation and control of the press was the norm.⁸⁹ Following Johannes Gutenberg invention of the printing press in the fifteenth century, monarchies feared that widespread use of the press might undermine their power, and therefore they sought to control and limit its use.⁹⁰ For example, many governments limited the number of printing presses that could exist, and required printers to obtain a

⁸⁴ *Id.*, at 85-87.

⁸⁵ See Ted Anthony & Kevin Freking, *Corporation for Public Broadcasting to shut down after being defunded by Congress, targeted by Trump*, Associated Press (Aug. 1, 2025), <https://apnews.com/article/public-broadcasting-defunding-pbs-npr-94708ffb8313d4811fa6ca199fe454ad>

⁸⁶ See Deepa Shivaram, *DHS Pauses a Board Created to Combat Disinformation Amid a Campaign to Discredit It*, National Public Radio, Politics (May 18, 2022), <https://www.npr.org/2022/05/18/1099848240/dhs-disinformation-group-pause>

⁸⁷ See Nicole Seganga, *What is DHS' Disinformation Governance Board and why is everyone so mad about it?*, CBS News (May 6, 2022), <https://www.cbsnews.com/news/what-is-dhs-disinformation-governance-board-and-why-is-everyone-so-mad-about-it/>

⁸⁸ See Shivaram, *supra* note 46.

⁸⁹ See THE FIRST AMENDMENT, *supra* note 1, ch. 1.

⁹⁰ See *id.*, at 5.

governmental license to operate a press.⁹¹ In addition, many governments imposed content licensing, requiring publishers to submit manuscripts that they wanted to publish to governmental censors who could control and censor what was published.⁹² The English government imposed even more severe restrictions in the decision in *de Libellis Famosis*,⁹³ which provided that those who criticized the Crown or religious officials of high station, could be criminally prosecuted for their criticism.⁹⁴ Moreover, under English law, a defendant could not rely on the defense of truth; indeed truth was treated as an aggravating factor. "Since maintaining a proper regard for government was the goal of this new offense, it followed that truth was just as reprehensible as falsehood and was eliminated as a defense."⁹⁵ Similar restrictions were imposed in the American colonies where the British prosecuted "criticism directed against the government or public officials" because it was considered to be "a threat against public order and a criminal offense," and again truth was not a defense.⁹⁶

This history of repression ultimately led to the adoption of the First Amendment, and the firm belief that the U.S. government should have limited authority to control either thought or speech.⁹⁷ As the Court stated in *Ashcroft v. American Civil Liberties Union*,⁹⁸ "First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought." Likewise, in *Virginia v. Black*,⁹⁹ the Court stated that the "hallmark of the protection of free speech is to allow free trade in ideas — even ideas that the overwhelming majority of people might find distasteful or discomforting." Professor Emerson argued that the "only justification for suppressing an opinion is that those who seek to suppress it are infallible in their judgment of the truth. But no individual or group can be infallible, particularly in a constantly changing world."¹⁰⁰ As a result, through "the acquisition of new knowledge, the toleration of new ideas, the testing of opinion in

⁹¹ *Id.*, at 6.

⁹² *Id.*

⁹³ 77 Eng. Rep. 250 (Star Chamber 1606).

⁹⁴ See William T. Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 COLUM. L. REV. 91 (1984).

⁹⁵ *Id.*

⁹⁶ See Lawrence W. Crispo, Jill M. Slansky & Geanene M. Yriarte, *Jury Nullification: Law Versus Anarchy*, 31 LOY. L.A. L. REV. 1, 7 (1997).

⁹⁷ See The First Amendment, *supra* note 1, at ch. 1.

⁹⁸ 535 U.S. 234, 253 (2002).

⁹⁹ 538 U.S. 343, 358 (2003).

¹⁰⁰ See Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 882 (1963).

open competition, the discipline of rethinking its assumptions, a society will be better able to reach common decisions that will meet the needs and aspirations of its members."¹⁰¹

So, we might hope that the press will be responsible in the sense of being objective and reporting the truth. But, in the enforcement of that “responsibility,” would we allow the government to determine what speech is false, and to prohibit it? As a general rule, the U.S. government does not have the power to ban speech simply because it is false. Moreover, any assertion of authority of this nature would run counter to the idea that even false speech is protected speech. *United States v. Alvarez*¹⁰² involved an individual’s false assertion that he won the Congressional Medal of Honor. The Court held that Alvarez could not be convicted for making a false statement to the effect that he had won the medal. While *Alvarez* recognized that individuals can be prosecuted for false speech in limited and defined circumstances (e.g., perjury in a judicial proceeding or making false statements to a governmental official or agency,¹⁰³ or using false speech to perpetuate fraud),¹⁰⁴ he could not be convicted for making a false statement to the effect that he had won the medal.

Alvarez is consistent with the Court’s general free speech jurisprudence. If the legitimacy of our governmental system depends on the consent of the governed, it is inconsistent with that system to give government the power to control, limit and suppress the range of ideas that the people can hear or consider. As the U.S. Supreme Court recognized in *Ashcroft v. American Civil Liberties Union*,¹⁰⁵ as “a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”¹⁰⁶ Likewise, in *Cohen v. California*,¹⁰⁷ the Court flatly recognized that the “constitutional right of free expression . . . is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.” *Cohen* went on to state that it would not “indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the

¹⁰¹ *Id.*

¹⁰² 567 U.S. 709 (2012).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ 535 U.S. 564, 573 (2002).

¹⁰⁶ See also *United States v. Alvarez*, 567 U.S. 709 (2012); *Brown v. Entertainment Merchants Ass’n*, 564 U.S. 756 (2011).

¹⁰⁷ 403 U.S. 15, 24 (1971).

process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views."¹⁰⁸

That does not mean that the judiciary is completely free of controls for irresponsible behavior. But those controls come mostly through common law or statutorily imposed causes of action. For example, if the press disseminates false and defamatory information about someone, it might be possible for that person to obtain a defamation judgment. However, it is extremely difficult for public officials to recover in defamation because they must bear the burden of proof and show that the defendant published with "actual malice," meaning that defendant either knew that the allegations were false or were published with reckless disregard for truth or falsity.¹⁰⁹ Public figures must also meet this heightened standard.¹¹⁰ Courts do impose a lower standard when the plaintiff is a private individual,¹¹¹ and they impose the lowest standard of proof when the plaintiff is a private individual involved in a matter of purely private interest.¹¹² The net effect is that defamation litigation is relatively uncommon in the United States.¹¹³ There are some exceptions, including the Fox News settlement with Dominion Voting Systems. Other bases for imposing liability on the press are similarly unlikely to be effective. For example, it may be difficult to recover against the press for invasion of privacy.¹¹⁴ In false light privacy cases, the Court also imposes the actual malice standard.

CONCLUSION

Some have argued that the press clause of the First Amendment gives the press special rights and responsibilities. As a general rule, that has turned out not to be the case, and there is little evidence for the proposition that the press has special rights. There are a few statutory protections (e.g., creating a reporter's shield or requiring a subpoena in place of a search warrant). But, under the First Amendment, the press' rights are generally similar to the rights held by ordinary citizens. Moreover, if there were special press rights, the Court would have some difficulty defining what constitutes the press, and therefore who is entitled to those special rights.

¹⁰⁸ *Id.* at 26.

¹⁰⁹ *See New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

¹¹⁰ *See Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *Associated Press v. Walker*, 388 U.S. 130 (1967).

¹¹¹ *See Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).

¹¹² *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985).

¹¹³ *See* RUSSELL L. WEAVER, ANDREW KENYON, DAVID F. PARTLETT & CLIVE WALKER, *THE RIGHT TO SPEAK ILL: DEFAMATION, REPUTATION & FREE SPEECH* 85 (Carolina Academic Press 2006).

¹¹⁴ *See* The First Amendment, *supra* note 1, at 276-289.

The same problems arise with the concept of press responsibilities. It is difficult to know where those responsibilities come from and how (or by whom) will they be enforced. As we have seen, the press has not been successful in terms of self-enforcement in terms of articulating the responsibilities to which it should adhere or enforcing them. In general, outside the broadcast context,¹¹⁵ U.S. society would not allow the government to dictate the “responsibilities to which the press must adhere. As a general rule, the First Amendment prohibits government from censoring speech simply because it regards that speech as untruthful (or, for that matter, “offensive” or “distasteful”).¹¹⁶ On balance, the U.S. Supreme Court is wary of governmental attempts to control the flow of information, and has generally regarded both content-based and viewpoint-based restrictions on speech as presumptively unconstitutional.¹¹⁷ It is not for government to dictate what people should believe, but rather for the people to decide for themselves. So, it is unlikely that “press responsibilities” will be enacted or enforced by government.

¹¹⁵ See *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

¹¹⁶ See *Cohen v. California*, 403 U.S. 15 (1971); *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

¹¹⁷ See *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).