

BUT FOR A FREE PRESS: A RESPONSE TO PRESS FREEDOM SKEPTICS

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INTRODUCTION

In 1943, Philip Kinsley, a correspondent with the *Chicago Tribune*, wrote the “freedom of the press, for all practical purposes, is whatever the higher courts, under the guidance of the basic law, say it is.”¹ Three decades later, during an American Enterprise Institute (AEI) roundtable, then U.S. Assistant Attorney General Antonin

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¹ PHILIP KINSLEY, *LIBERTY AND THE PRESS: A HISTORY OF THE CHICAGO TRIBUNE'S FIGHT TO PRESERVE A FREE PRESS FOR THE AMERICAN PEOPLE*, at v (1944).

Scalia made a similar comment. Therein, Scalia noted how the “freedom of the press is a particularly important freedom” that “has some special constitutional protection” such as the “newsman’s privilege” to protect confidential sources in many, but not all cases.² Scalia, however, expressed concern in defining who would constitute a “newsman for this purpose.”³ “I wouldn’t want to be on the other side in court, having to demonstrate that distinction,” stated Scalia.⁴ At the same time, Scalia noted that answering this distinction, as well as any other constitutional questions afforded by the First Amendment’s Press Clause, ultimately rested with the courts.⁵

Scalia’s support for some type of “newsman’s privilege,” albeit lukewarm, came at a time when the freedom of the press was experiencing a Supreme Court renaissance of sorts.⁶ From 1970 to 1974, the Supreme Court referenced the freedom of the press an astounding 179 times.⁷ Yet, during this period, the Court refused to recognize any distinct constitutional press freedoms. In a 1974 address before Yale Law School, Associate Justice Potter Stewart rebuked the Court for this dereliction.⁸ Stewart also rebuked the prevailing notion that the “purpose of the constitutional guarantee of a free press is [merely] to insure that a newspaper will serve as a neutral forum for debate, a ‘market place for ideas,’ a kind of Hyde Park corner for the community.”⁹ To Justice Stewart, the Press Clause embodied much more. It was expressly included by the Framers to “create a fourth institution outside the Government as an additional check on the three official branches,” and therefore, from Justice Stewart’s perspective, it was high time that the Supreme Court acknowledged the existence of distinct constitutional press freedoms.¹⁰

It has been more than fifty years since Justice Stewart made the convincing case for recognizing distinct constitutional press freedoms. Yet, as it stands today, the Supreme Court is no closer to achieving it.¹¹ If anything, based on the available empirical data, it is fair to say that the possibility of the Court recognizing the Press

² FREEDOM OF THE PRESS: AN AEI ROUND TABLE HELD ON JULY 29 AND 30, 1975 AT THE NATIONAL PRESS CLUB, WASHINGTON, D.C., at 7, 11 (1975).

³ *Id.* at 24.

⁴ *Id.* at 25.

⁵ *Id.* at 27.

⁶ See RonNell Andersen Jones & Sonja R. West, *The Disappearing Freedom of the Press*, 79 WASH. & LEE L. REV. 1377, 1409–10 (2022).

⁷ *Id.* at 1409.

⁸ Potter Stewart, “*Or of the Press*,” 26 HASTINGS L.J. 631, 633 (1975).

⁹ *Id.* at 634.

¹⁰ *Id.*

¹¹ See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 390–91 n.6 (2010) (noting how it would be “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”); *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 800 (1978) (Burger, C.J., concurring) (describing the Press Clause as merely “complementary to and a natural extension of Speech Clause liberty”); see also Sonja R. West, *Press Exceptionalism*, 127 HARV. L. REV. 2434, 2436 (2014); David A. Anderson, *Freedom of the Press in Wartime*, 77 U. COLO. L. REV. 49, 66 (2006).

Clause as embodying distinct constitutional press freedoms in the foreseeable future has notably decreased.¹² To borrow from First Amendment scholars Sonja R. West and RonNell Andersen Jones, both of whom have studied the subject in great detail, in recent years there has been a “sweeping shift” in how the Court has framed the Press Clause, thus resulting in the “disappearance of the freedom of the press” from our public discourse.¹³

The reasons given as to why the Press Clause continues to languish in obscurity, at least according to those who oppose recognizing distinct constitutional press freedoms, which hereinafter this Article refers to as press freedom skeptics, are essentially threefold. The first reason is that if the courts were ever to recognize any distinct constitutional press freedoms, such recognition would ultimately create greater and unequal First Amendment protections for the press and news media versus the public at large.¹⁴ The second reason is that it is impossible for anyone to objectively determine who exactly should qualify as a member of the press or news media, and therefore should receive distinct constitutional press freedoms.¹⁵ But undoubtedly, the most intellectually influential reason given as to why the Press Clause continues to languish in constitutional obscurity is the third and final one: there is allegedly no evidence that historically shows the First Amendment was drafted, enacted, and ratified to embody constitutionally distinct press freedoms for persons engaged in the printing and newspaper business.¹⁶

It is worth noting that all three of these reasons for denying distinct constitutional press freedoms are quite dated.¹⁷ All three have existed in our discourse going back to the 1930s—the very period when the Supreme Court began incorporating the First Amendment’s Press Clause through the Fourteenth Amendment’s Due

¹² Jones & West, *supra* note 6, at 1408–29.

¹³ *Id.* at 1430.

¹⁴ See, e.g., Michael W. McConnell, *Reconsidering Citizens United as a Press Clause Case*, 123 YALE L.J. 412, 440 (2013) (“[I]t would be odd to interpret the Press Clause, whose core meaning is that the government may not select the authors who inform the public, as a vehicle for reducing this diversity and imposing professional standards as a condition of publishing to the public.”).

¹⁵ *Id.* at 438 (“There is no coherent way to distinguish the institutional press from others who disseminate information and opinion to the public through communications media.”).

¹⁶ *Id.* at 431 (criticizing Justice John Paul Stevens for suggesting that the institutional press maintains special First Amendment status because “he provides no support in precedent or history for that proposition”); see also Anthony Lewis, *A Preferred Position for Journalism?*, 7 HOFSTRA L. REV. 595, 599 (1979) (claiming that “[n]o historian . . . has produced any evidence” that supports constitutionally recognizing distinct press freedoms).

¹⁷ See, e.g., Floyd Abrams, *The Press Is Different: Reflections on Justice Stewart and the Autonomous Press*, 7 HOFSTRA L. REV. 563, 570–87 (1979); William W. Van Alstyne, *The Hazards to the Press of Claiming a “Preferred Position,”* 28 HASTINGS L.J. 761 (1977). For the first historical controversy concerning the Press Clause, compare ZECHARIAH CHAFEE, JR., *FREE SPEECH IN THE UNITED STATES* (1954), with LEONARD W. LEVY, *LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY* (1960).

Process Clause.¹⁸ However, as this Article will demonstrate, all three of these reasons are principally built upon two mistaken beliefs. The first mistaken belief is that the recognition of any distinct constitutional press freedoms by the courts will ultimately negate or dilute the right of every citizen to write and publish freely on any and all subjects already protected under the umbrella of the First Amendment. This is demonstrably untrue. It is a fabricated Sophie's choice. This brings us to the second mistaken belief regarding the recognition of press freedom, which is intimately tied to the first: the belief that the Constitution somehow requires that we *must choose* between one of two historical interpretations of the Press Clause. There is purportedly no room for multiple historical interpretations. But this belief ignores the indisputable fact that history is rarely monolithic. Rather, history is both fluid and stagnant. What we mean by this is that although what happened in the past cannot change, the questions that historians ask of the past do, as does our general understanding of the past when new historical questions are asked and answered and when new evidence is uncovered and laid bare.

More than a decade ago, in a *Utah Law Review* article, we addressed this history-oriented press freedom skepticism head-on.¹⁹ In doing so, we laid to rest the ill-conceived historicist notion that the Press Clause was never intended to provide distinct constitutional protections to members of the press or the institutional press.²⁰ In particular, we showed how press freedom skeptics had principally built their historical claims through the 'law office history' practice of selectively parsing historical texts.²¹ According to the press-freedom-skeptic line of thinking, because many late eighteenth- and early nineteenth-century legal minds viewed a "free press" as a "vehicle" for "freedom of speech"²² or as a means through which the people voiced their dissatisfaction with government,²³ one must conclude that the founding generation universally accepted the notion that a "free press" was synonymous with the 'press-as-a-technology' model.²⁴ Put differently, many press freedom skeptics

¹⁸ *Near v. Minnesota*, 283 U.S. 697, 707 (1931). The Supreme Court began incorporating the First Amendment's Speech Clause six years earlier. *See Gitlow v. New York*, 268 U.S. 652, 666 (1925).

¹⁹ Patrick J. Charles & Kevin Francis O'Neill, *Saving the Press Clause from Ruin: The Customary Origins of a "Free Press" as Interface to the Present and Future*, 2012 UTAH L. REV. 1691, 1691–772.

²⁰ *Id.* at 1727–54.

²¹ *Id.* at 1698–701, 1751.

²² WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 123 (Phila., H.C. Carey & I. Lea 1825).

²³ *See, e.g.,* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 705 (1833).

²⁴ *See, e.g.,* McConnell, *supra* note 14, at 435–38; 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, 538 (2012); Edward Lee, *Freedom of the Press 2.0*, 42 GA. L. REV. 309, 380 (2008).

believe that the Press Clause was generally understood by the founding generation merely as a technological extension of free speech.²⁵

Yet, despite us and others²⁶ having shown the intellectual fallacy of this line of argument, it nonetheless persists in the public discourse.²⁷ Few, if any, modern legal minds will disagree that the Press Clause protects the right to write and publish personal sentiments—and this right must naturally extend beyond the medium of the late eighteenth-century printing press technology—recognizing or acknowledging this constitutional understanding does not mean that the Press Clause *must only* be interpreted as protecting such a right. Again, it is important to note that history is rarely monolithic. There can be multiple historical interpretations of a constitutional provision if the right questions are asked. Herein lies the problem with the historical line of argument advanced by press freedom skeptics.²⁸ It overlooks the proverbial forest for the trees—that is, press freedom skeptics are so focused on historically proving that their ‘press-as-a-technology’ model argument is right that they overlook the totality of the historical record. Even worse is the fact that press freedom skeptics have repeatedly failed to engage with the well-established historiography of free press and press freedom. Rather, in historiography’s stead, press freedom skeptics continue to embrace the ill-fated ‘law office history’ practice of *explaining away history*—that is, the all-too-common legal practice of oversimplifying complex historical issues, parsing historical texts outside the bounds of their intended context, placing said non-contextual history on a constitutional pedestal, and then ignoring, dismissing, or explaining away any historical evidence that contradicts it.²⁹

²⁵ Volokh, *supra* note 24, at 538.

²⁶ See, e.g., Sonja R. West, *The “Press,” Then & Now*, 77 OHIO ST. L.J. 49 (2016); Randall P. Bezanson, *Whither Freedom of the Press?*, 97 IOWA L. REV. 1259 (2012).

²⁷ See, e.g., Eugene Volokh, *Freedom of Speech and of the Press*, HERITAGE FOUND., <https://www.heritage.org/constitution/#!/amendments/1/essays/140/freedom-of-speech-and-of-the-press> [<https://perma.cc/TAY2-8T99>] (last visited Apr. 17, 2025); Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, REASON: VOLOKH CONSPIRACY (Apr. 24, 2018, 8:01 AM) [hereinafter Volokh, *Freedom for the Press*], <https://reason.com/volokh/2018/04/24/freedom-for-the-press-as-an-industry-or/> [<https://perma.cc/9T9M-PLJ4>]; Ashutosh Bhagwat, *Posner, Blackstone, and Prior Restraints on Speech*, 2015 BYU L. REV. 1151, 1157; Ashutosh Bhagwat, *Producing Speech*, 56 WM. & MARY L. REV. 1029, 1053 (2015); Arielle Giordano, *Protecting the Free Flow of Information: Federal Shield Laws in the Digital Age*, 23 COMMLAW CONSPICUOUS 191, 199 (2014); Harry G. Hutchison, Ampersand, Tornillo, and Citizens United: *The First Amendment, Corporate Speech, and the NLRB*, 8 N.Y.U. J.L. & LIB. 630, 685–86 (2014).

²⁸ West, *supra* note 26, at 53 (“Rather than asking the specific question of ‘what,’ the focus should be on the broader question of ‘why.’ Why did members of the founding generation consider press liberty so significant and deserving of constitutional protection? Did they seek to secure only an individual liberty of self-expression? Or was their purpose to safeguard and further an informational structural defense against the failings of government?”).

²⁹ For more on what constitutes explaining away history, see Patrick J. Charles, *The Second Amendment in Historiographical Crisis: Why the Supreme Court Must Reevaluate*

This Article is divided into three Parts. Part I will outline the history-in-law case for why the historical record sufficiently supports recognizing distinct constitutional press freedoms. Part II then provides a history-in-law response to some of the most common arguments made by press freedom skeptics as to why distinct constitutional press freedoms should not be recognized by the courts. Lastly, Part III makes the case for why the recognition of distinct constitutional press freedoms should become a jurisprudential reality and provides a roadmap to accomplish this.

I. THE HISTORY-IN-LAW CASE FOR PRESS FREEDOMS

The meaning and scope of constitutional rights are constantly open for debate.³⁰ How legal professionals characterize, describe, and label constitutional rights—what is otherwise commonly known as framing—affects everything from how the public perceives them to how the courts interpret them.³¹ Framing is relevant in every facet of the law.³² For instance, the manner in which a lawyer frames or a jurist perceives the statement of facts in a particular case or controversy can have a significant impact on the jurisprudential outcome.³³ The same bodes true for how any legal question is presented to a court of law. The breadth or narrowness of the question can have a decisive impact on the outcome.³⁴

The use and practice of history-in-law to answer constitutional questions and controversies—that is the study of how the law has evolved in a particular constitutional area; what events and factors caused the law to evolve; and how, if at all, this history is important when adjudicating constitutional questions³⁵—is no different. The manner in which legal professionals frame the history of a particular constitutional question or controversy, and subsequently marshal, select, and analyze the

the Embarrassing “Standard Model” Moving Forward, 39 FORDHAM URB. L.J. 1727, 1768–76 (2012).

³⁰ See Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 4 (2004).

³¹ Timothy Zick, *Framing the Second Amendment: Gun Rights, Civil Rights and Civil Liberties*, 106 IOWA L. REV. 229, 231 (2020).

³² See *id.* at 239–41.

³³ A fitting example of this is *Kennedy v. Bremerton School District*, 597 U.S. 507 (2022), wherein the majority and minority opinion delivered two very separate statements of fact, thus producing two very different constitutional analyses.

³⁴ A fitting example of this is *New York State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1 (2022), wherein the Supreme Court granted certiorari on the narrow issue of concealed carry, not all public carry. See *N.Y. State Rifle & Pistol Ass’n v. Corlett*, 141 S. Ct. 2566 (2021) (“Whether the State’s denial of petitioners’ applications for concealed-carry licenses for self-defense violated the Second Amendment.”). However, after briefing and oral argument, the Supreme Court decided the case on the broader question of whether there was a history and tradition of discretionary armed carriage licensing laws. *Bruen*, 597 U.S. at 11.

³⁵ Patrick J. Charles, *History in Law, Mythmaking, and Constitutional Legitimacy*, 63 CLEV. ST. L. REV. 23, 42 (2014).

evidentiary record in support or opposition to it, can effectively sway the outcome.³⁶ The point to be made is that the use of history to adjudicate constitutional questions and controversies is no less malleable than other forms of constitutional adjudication.³⁷ To borrow from late historian Edward Potts Cheney, an early proponent of science-based history: “[T]he treasure-house of history is so rich that all kinds of precedents can be drawn from it. . . . An ingenious and industrious advocate can always find in history the arguments he [or she] wants.”³⁸

The historical framing of the Press Clause by press freedom skeptics over the past half-century bears this out. These skeptics have generally framed the history of the Press Clause in one of two ways. The first is to flatly deny that there exists any historical evidence showing that the Press Clause was drafted, enacted, and ratified to embody distinct constitutional press freedoms.³⁹ The second is to present the history of the Press Clause as something akin to the storyline of the science fiction *Highlander* franchise, i.e., ‘there can be only one,’ but in a history-in-law framework.⁴⁰ Both of these attempts at historical framing by press freedom skeptics,

³⁶ Buckner F. Melton, Jr., *Clio at the Bar: A Guide to Historical Method for Legists and Jurists*, 83 MINN. L. REV. 377, 471–72 (1998) (“[H]aphazard or insufficiently thorough historical research, like haphazard or insufficiently thorough legal research, is at best useless, and is at worst dangerous.”); see also Martin S. Flaherty, *History “Lite” in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 526 (1995); William M. Wiecek, *Clio as Hostage: The United States Supreme Court and the Uses of History*, 24 CAL. W. L. REV. 227, 267–68 (1988); H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 699 (1987).

³⁷ See Jack M. Balkin, *Constitutional Memories*, 31 WM. & MARY BILL RTS. J. 307, 340 (2022) (noting how easy it is for jurists to “pick and choose the sources they most trust” and “construct a version of historical memory that buttresses their ideological and philosophical priors”); Charles, *supra* note 35, at 54 (“One cannot take those portions of a legal past he or she agrees with, discard the others, and proclaim constitutional objectivity and, therefore, constitutional legitimacy.”).

³⁸ EDWARD P. CHENEY, *LAW IN HISTORY AND OTHER ESSAYS* 27 (1927).

³⁹ See Charles, *supra* note 29, at 1768–76; see also McConnell, *supra* note 14, at 437 (“When the Founders spoke of the importance of ‘the press,’ they were not talking about professional news media, but about the printing press, meaning the ability of people to disseminate ideas easily and inexpensively to a broad public.”); Volokh, *Freedom for the Press*, *supra* note 27, at 538 (“The historical evidence points powerfully in one direction—throughout American history, the dominant understanding of the ‘freedom of the press’ has followed the press-as-technology model.”).

⁴⁰ See, e.g., McConnell, *supra* note 14, at 429 (“[I]f the Press Clause confines its protection to organs of professional journalism . . . then it might be constitutional to prohibit non-journalists from publishing their views on candidates during the election cycle.”); Volokh, *Freedom for the Press*, *supra* note 27, at 463 (“Under [any constitutional interpretation that affords distinct press freedoms], the First Amendment rights of the institutional press and of other speakers rise and fall together.”); *id.* at 469 (“It seems unlikely that the Framers would have secured a special right limited to this small industry, an industry that included only part of the major contributors to public debate.”); Lee, *supra* note 24, at 309, 339–50; see also David Lange, *The Speech and Press Clauses*, 23 UCLA L. REV. 77, 107

however, are deeply flawed. For one, the ‘no convincing historical evidence’ framing is contradicted by the bulk of the evidentiary record—that is if one actually takes the time to explore and examine it.⁴¹ Additionally, the ‘no convincing historical evidence’ framing is undercut by the rich social, intellectual, political, and constitutional history of a free press, particularly the role of printers and newspapermen in both securing American independence and ratifying the Constitution and Bill of Rights.⁴² Even late historian Leonard Levy, who was highly critical of any broad libertarian interpretation of the First Amendment,⁴³ acknowledged that the Press Clause embodied much more than an individual’s right to publish without prior restraint.⁴⁴ “Freedom of the press had accrued still another function that intimately associated it with a free state [by the late eighteenth century], meriting its constitutional protection,” wrote Levy.⁴⁵ This function being “the vigilance of the press in exposing unfairness, inequality, and injustice.”⁴⁶

Yet unfortunately, like many historical and scientific misconceptions that linger in our public discourse, the flawed ‘no convincing historical evidence’ framing lives on. This is largely because press freedom skeptics refuse to dig deep into the historiography of the Press Clause. The ‘there can be only one’ interpretation of the Press Clause framing is equally, if not more flawed. As far as we are aware, there is no jurisprudential doctrine which stipulates that constitutional text *can only* be understood to protect one historical interpretation. Rather, our understanding is that the Constitution was meant to be an enduring document, and “its principles were designed to, and do, apply to modern conditions and developments.”⁴⁷ However, if

(1975) (asserting that any attempt to jurisprudentially “[d]ivorce[] speech from the press means ripping away the essential underpinnings of the press as well”).

⁴¹ See West, *supra* note 26, at 71–88; Charles & O’Neill, *supra* note 19, at 1702–54; David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 462–85 (1983).

⁴² See, e.g., ROBERT W. T. MARTIN, *THE FREE AND OPEN PRESS: THE FOUNDING OF AMERICAN DEMOCRATIC PRESS LIBERTY, 1640–1800* (2001); JEFFERY A. SMITH, *PRINTERS AND PRESS FREEDOM: THE IDEOLOGY OF EARLY AMERICAN JOURNALISM* (1988); CARL BERGER, *BROADSIDES AND BAYONETS: THE PROPAGANDA WAR OF THE AMERICAN REVOLUTION* (1961); ARTHUR M. SCHLESINGER, *PRELUDE TO INDEPENDENCE: THE NEWSPAPER WAR ON BRITAIN 1764–1776* (1958); PHILIP DAVIDSON, *PROPAGANDA AND THE AMERICAN REVOLUTION 1763–1783* (1941).

⁴³ See generally LEONARD W. LEVY, *EMERGENCE OF A FREE PRESS* (1985).

⁴⁴ LEONARD W. LEVY, *ORIGINAL INTENT AND THE FRAMERS’ CONSTITUTION* 209–13 (1988).

⁴⁵ *Id.* at 213.

⁴⁶ *Id.*

⁴⁷ *Heller v. District of Columbia*, 670 F.3d 1244, 1275 (D.C. Cir. 2011) (Kavanaugh, J., dissenting); see also *Cohens v. Virginia*, 19 U.S. 264, 387 (1821); LEONARD W. LEVY, *JUDGMENTS: ESSAYS ON AMERICAN CONSTITUTIONAL HISTORY* 71 (1972) (“Questions of constitutional law involve matters of public policy which should not be decided merely because of the original meanings of words in the Constitution. They must be read as revelations of the general purposes which were to be achieved, or as expressions of imperishable

the ‘there can be only one’ approach to constitutional interpretation is indeed somehow the law of the land, then many of the protections afforded by the Constitution and Bill of Rights will have to be re-examined in the future.

Placing aside these deeply flawed attempts at historical framing, there is one line of history-in-law argument that we believe somewhat buttresses the position of press freedom skeptics: the historical evidence supporting the right of every individual to write and publish their thoughts without prior restraint is far more straightforward than identifying and pinpointing any freedoms to be afforded to members of the press.⁴⁸ Meaning, when it comes to historically identifying *what* conduct the Press Clause constitutionally protects, press freedom skeptics have laid out a convincing case—a case that no legal academic, as far as we are aware, disputes, and nor do we. What press freedom skeptics fail to expound upon sufficiently, however, is the historical reasoning behind *why* the Press Clause is there to begin with.⁴⁹ And often it is the historical *why*, not the historical *what*, that is most relevant in deriving constitutional meaning and purpose.⁵⁰ The historical *why* pertaining to the Press Clause should be treated no differently.

principles that are expansive and comprehensive in character. Those principles and purposes, rather than their framers’ original understanding of them, are what was intended to endure. The Constitution serves as well today as in earlier centuries because an antiquarian historicism that would freeze its original meaning, even when discernible, has not generally guided its interpretation—nor was it intended to.”)

⁴⁸ See, e.g., Paul Horwitz, “*Or of the [Blog]*,” 11 NEXUS 45, 50 (2006) (noting how much of the historical evidence surrounding the Press Clause supports an “open press model” of constitutional interpretation, but that one “must be careful not to overstate this conclusion” given other historical evidence).

⁴⁹ Within First Amendment law, one example of the historical *why* is the Public Forum Doctrine. The doctrine was developed in response to municipal bans on the use of public spaces for public discussion. These bans flouted a key purpose of the First Amendment—to promote freedom of discussion and assembly by the citizenry in a democracy. That historical *why* gave birth to the doctrine that citizens should enjoy expressive access to certain public spaces. In *Hague v. CIO*, 307 U.S. 496 (1939), the Supreme Court struck down ordinances that imposed a flat ban on the public distribution of printed materials and required a permit—issued at the unfettered discretion of the public safety director—for all public meetings and demonstrations. In an enormously influential plurality opinion, Justice Owen Roberts found a constitutional right to use “streets and parks for communication of views,” *id.* at 516, basing that right on the fact that “streets and parks . . . have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions,” *id.* at 515.

⁵⁰ See, e.g., Vicki C. Jackson, *Multi-Valenced Constitutional Interpretation and Constitutional Comparisons: An Essay in Honor of Mark Tushnet*, 26 QUINNIPIAC L. REV. 599, 613 (2008) (“Constitutional interpretation without purposiveness is impossible, since the act of interpreting a legal document (whether by recovering past understandings or present meaning), with a view toward making a coercive decision in the world, requires some understanding, or assumption, of purpose(s).”); see also Mark E. Brandon, *Originalism and Purpose: A Précis*, 16 U. PA. J. CONST. L. 413, 413–15 (2013).

As noted earlier, but for the mid- to late-eighteenth-century genesis of a free press—which includes the ever-evolving standards, customs, and practices of the printers and newspapermen that operated, ran, and owned the printing presses—American independence would never have been achieved when it was.⁵¹ The opposition to the Stamp Act, the subsequent Declaratory Act, the rousing of the colonists to join in arms against Britain, and eventually the adoption of the Declaration of Independence were all principally due to a free press and press freedom.⁵² Americans living at that time often celebrated a free press for these political achievements.⁵³ “It was by means of News papers,” printer John Holt boasted to Samuel Adams on January 29, 1776, “that we receiv’d & spread the Notice of the tyrannical Designs formed against America, and kindled a Spirit that has been sufficient to repel [the British].”⁵⁴ Later that year, British Under Secretary of State for the American Colonies, Ambrose Serle, offered similar sentiments in a letter to Lord Dartmouth. “Among other Engines, which have raised the present Commotion next to the indecent Harangues of the Preachers, none has had a more extensive or stronger Influence than the Newspapers of the respective Colonies,” wrote Serle.⁵⁵ Fast forward to 1789, when historian and Revolutionary War contemporary David Ramsay published a two-volume work titled *The History of the American Revolution*. Within this work, Ramsay wrote that “[i]n establishing American independence, the pen and the press had merit equal to that of the sword.”⁵⁶ What Ramsay meant by “the press” was not the printing press as a technology. A technology in and by itself could not have “rouse[d] and unite[d] the inhabitants, and . . . persuade[d] them to patience for several years” to “effect the revolution.”⁵⁷ No, what Ramsay meant by “the press” was its many parts, including the many “distinguished writers” who wrote “in favour of the rights of America,” as well as the “printers of news-papers, . . . [p]articularly Eedes and Gill, of Boston; Holt, of New-York; Bradford, of Philadelphia; and Timothy, of South-Carolina.”⁵⁸

⁵¹ See generally CAROL SUE HUMPHREY, *THE AMERICAN REVOLUTION AND THE PRESS: THE PROMISE OF INDEPENDENCE* (2013).

⁵² SCHLESINGER, *supra* note 42, at 80, 214–16, 264.

⁵³ Charles & O’Neill, *supra* note 19, at 1726; Arthur M. Schlesinger, *The Colonial Newspapers and the Stamp Act*, 8 NEW ENG. Q. 63, 81 (1935); see also Alex McDougall, *To the Freeholders, Freeman, and Inhabitants of the Colony of New-York; and to the Friends of Liberty in North America*, N.Y. J.; OR THE GEN. ADVERTISER, Feb. 15, 1770, at 2 (“Five years are now elapsed since the American Press has been boldly employed [sic] in asserting the Right of this Country, to an Exemption from British Taxations.”).

⁵⁴ SCHLESINGER, *supra* note 42, at 284.

⁵⁵ *Id.* at 284–85.

⁵⁶ 2 DAVID RAMSAY, *THE HISTORY OF THE AMERICAN REVOLUTION* 633 (Lester H. Cohen ed., Liberty Fund 1990) (1789) (emphasis added).

⁵⁷ *Id.* at 634.

⁵⁸ *Id.*

Additionally, but for the mid- to late-eighteenth-century genesis of a free press—which again includes the ever-evolving standards, customs, and practices of the printers and newspapermen that operated, ran, and owned the printing presses—the ratification of the Constitution would not have happened as it did.⁵⁹ As James Madison wrote in his famous protest to the 1798 Sedition Act, but for the free press, “might not the United States have been languishing at this day under the infirmities of a sickly Confederation? Might they not, possibly, be miserable colonies, groaning under a foreign yoke?”⁶⁰ Madison, of course, was not alone (and definitely not the first) to credit the free press for the ratification of the Constitution. In an editorial in the April 15, 1789 edition of the *Gazette of the United States*, an anonymous writer noted that the “adoption of the Federal Constitution by this great and various people, may be ascribed to the Freedom of the Press.”⁶¹ And by “freedom of the press,” the writer did not mean the printing press as a technology or simply the privilege to “write and publish their sentiments with decency,” but rather a “free press” in its entirety, or the “*independency and free state* of the press” in every community.⁶² This, according to the writer, is what made a free press “the palladium of liberty—the scourge of tyrants—the terror of Sycophants—and the detector and dread of mock patriots and demagogues.”⁶³

What was meant by the phrase “palladium of liberty” circa the late eighteenth century, or what other writers described as the “bulwark” or “barrier” of liberty, was that a free press provided an important governmental check that balanced the people’s rights, particularly that of self-governance, in their favor.⁶⁴ “The establishment of a FREE PRESS in any government, more especially in democracies . . . is the best mode of ensuring its privileges. The *liberty of the press* may be considered as an invisible bulwark to the rights of a free state, and the palladium of the liberties of mankind,” wrote one writer in 1786, adding, “[therefore, a] *free and impartial press* will be deemed by every informed American as the centinel to [their] rights, [their] liberties and [their] honor, that will give the watch word at the approach of danger and challenge every alarming evil, while yet at a distance.”⁶⁵

The number of times in which the “freedom of the press,” “liberty of the press,” and “free press” were referred to as the “palladium,” “bulwark,” or “barrier” of all liberty is voluminous.⁶⁶ Such descriptions existed decades before the “freedom of

⁵⁹ See PAULINE MAIER, *RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788*, at 70–95 (2010).

⁶⁰ James Madison, *Report on the Resolutions*, in 6 *THE WRITINGS OF JAMES MADISON* 341, 389 (Gaillard Hunt ed., 1906).

⁶¹ *Observations*, *GAZETTE OF THE U.S. (Phila.)*, Apr. 15, 1789, at 4.

⁶² *Id.* (emphasis added).

⁶³ *Id.*

⁶⁴ Charles & O’Neill, *supra* note 19, at 1718.

⁶⁵ *New-Jersey*, VT. *GAZETTE* (Bennington), Sept. 4, 1786, at 2 (emphasis added).

⁶⁶ For examples, see Charles & O’Neill, *supra* note 19, at 1694, 1711, 1717–20, 1725, 1729, 1731, 1735, 1740. See also *Philadelphensis*, *For the Freeman’s Journal*, FREEMAN’S

the press,” “liberty of the press,” and “free press” ever received constitutional protection on either side of the Atlantic.⁶⁷ Thus, it should not be surprising to learn that not long after America declared independence—and each of the newly minted states (previously colonies) established their own governments separate and distinct from Great Britain—several state constitutions included language acknowledging that a free press was indeed what protected and secured all of the rights and liberties of the people.⁶⁸ For instance, the North Carolina Constitution of 1776 declared: “That the freedom of the press is one of the great *bulwarks of liberty*, and therefore ought

J. (Phila.), Jan. 23, 1788, at 2 (“The liberty of the press is . . . the scourge of tyrants, oppressors, villains, and blood-suckers; the bulwark of freedom, that causes the haughtiest lordling to tremble; an inestimable jewel, that places the poorest citizen on a level with the richest demagogue.”); Lucius, *The Miscellany*, MASS. CENTINEL (Bos.), May 18, 1785, at 2 (“By the publick print—By that sacred palladium of freedom, a *free press*, we are informed of the situation of our commerce, and when our great men behave unworthy, and *sometimes* we are awakened from the *very brink of destruction*.”); 5 GEORGE BANCROFT, HISTORY OF THE UNITED STATES, FROM THE DISCOVERY OF THE AMERICAN CONTINENT 353 (Bos., Little, Brown & Co., 20th ed. 1875) (quoting Benjamin Mecom, owner and printer of the *Connecticut Gazette* in 1765, as declaring “the press is the test of truth, the bulwark of public safety, the guardian of freedom, and the people ought not to sacrifice it”).

⁶⁷ See, e.g., Meeting of Freeholders and Other Inhabitants of New-Windsor, in Ulster County, New-York (Mar. 14, 1775), in N. ILL. UNIV. DIGIT. LIBR., <https://digital.lib.niu.edu/islandora/object/niu-amarch%3A84257> [<https://perma.cc/TN7Y-TZGW>] (“[W]e consider the Freedom of the Press as the great palladium of *English* liberty.”); THE LIBERTY OF THE PRESS 8 (London 1770) (describing the liberty of the press as the “Palladium of British Liberty”); *To the Public*, PROVIDENCE GAZETTE; & COUNTRY J. (R.I.), Jan. 12, 1765, at 1 (“[T]he Liberty of the Press is [styled] the very Basis and Bulwark of [the British] Constitution, and its truest Safeguard, amidst the rude Attacks of Arbitrary Power.”); *Political Observations*, SUPPLEMENT TO THE N.Y. GAZETTE (N.Y.C.), Oct. 2, 1752, at 1 (“The LIBERTY of the PRESS is the great Barrier of all our LIBERTIES.”); *The Great Importance of the Liberty of the Press*, BOS. EVENING-POST, Apr. 20, 1747, at 1 (“The Liberty of the Press is so essential to the Support of that Constitution, under which we have hitherto enjoy’d the Blessing of Freedom, that it becomes every Man to consider in the most reverential Light, this *Palladium* of our Rights, and to shudder at the Thought of any Violation offer’d to it.”); *Of the Principles of the British Government*, BOS. EVENING-POST, Mar. 15, 1736, at 1 (“[T]he *Liberty of the Press* . . . may be consider’d, and indeed ought to be consider’d as the Barrier of all the rest; it is in the highest Sense the *Palladium* of all other Liberty.”).

⁶⁸ Charles & O’Neill, *supra* note 19, at 1736 (“In the midst of the American Revolution, nine states included variations of the liberty of the press in their respective constitutions. It was the first time in the pantheon of Anglo-American history that the liberty of the press, free press, or the freedom of the press was codified as a constitutional right.” (footnotes omitted)); see also Mr. OSWALD, INDEP. GAZETTEER (Phila.), Sept. 12, 1789, at 3 (noting that “the blessings of civil and religious liberty, is principally owing to the freedom of the press” and it “is an incontrovertible position that all our dearest rights and privileges are derived from” it); Wilkes, *For the Chronicle of Freedom: Wilkes, on the Liberty of the Press*, INDEP. GAZETTEER (Phila.), Dec. 28, 1782, at 2 (“Almost every *Constitution* in the *confederated* States of America, hath provided for; and confirmed the Privilege of the Press to their citizens—and the most distinguished writers and characters have added their weight and influence.”).

never to be restrained.”⁶⁹ Similarly, the Virginia Constitution of 1776 declared: “That the freedom of the press is one of the great *bulwarks of liberty*, and can never be restrained but by despotic governments.”⁷⁰ Then there was the Massachusetts Constitution of 1780, which used the phrase “essential to the security of freedom in a State” in lieu of “bulwark” or “palladium” of liberty: “The liberty of the press is *essential to the security of freedom in a state*; it ought not, therefore, to be restrained in this commonwealth.”⁷¹ This change in language by Massachusetts in no way modified the late eighteenth-century understanding that a constitutional free press embodied far more than simply an individual’s right to write and publish without restraint.⁷² A constitutional free press, at least according to Massachusetts Chief Justice William Cushing, ensured that the “free scanning of the conduct of administration and shewing the tendency of it” by members of the press will be continuous, especially “where truth will warrant” showing the conduct of the administration is “subversive of all law, liberty, and the Constitution.”⁷³

Simply put, by the close of the eighteenth century, the principal role of a constitutional free press and its many parts was to keep the administration of government as transparent and honest as possible.⁷⁴ This, in turn, ensured that American lawmakers remained ever accountable to the very people that they governed.⁷⁵

⁶⁹ N.C. CONST. of 1776, Declaration of Rights, § XV (emphasis added).

⁷⁰ VA. CONST. of 1776, Declaration of Rights, § XII (emphasis added).

⁷¹ MASS. CONST. of 1780, Declaration of Rights, art. XVI (emphasis added). Four years later, New Hampshire adopted almost similar language in its constitution. N.H. CONST. of 1784, p. 1, art. XXII (“Free speech and Liberty of the press are *essential to the security of Freedom in a State*: They ought, therefore, to be inviolably preserved.” (emphasis added)).

⁷² See, e.g., LEVY, *supra* note 43.

⁷³ Letter from William Cushing to John Adams (Feb. 18, 1789), *reprinted in* 27 MASS. L.Q. 12, 14 (1942).

⁷⁴ See, e.g., David Ramsay, *An Oration*, GAZETTE OF THE U.S. (Phila.), July 29, 1794, at 2 (“The liberty of the press is enjoyed, in these states, in a manner that is unknown in other countries. . . . The doors of our legislative assemblies are open, and the conduct of our state officers may be safely questioned before the bar of the public, by any private citizen. So great is the responsibility of men in high stations among us, that it is the fashion to rule well. . . . Our rulers, taken from the people, and at stated periods returning to them, have the strongest incitement to make the public will their guide, and the public good their end.”).

⁷⁵ According to one late eighteenth-century Presbyterian minister, Elihu Palmer, America’s representative form of government and a free press went hand-in-hand. See Elihu Palmer, *The Political Happiness of Nations; an Oration* (July 4, 1800) (“It is impossible from the nature of [representative government], that either [the rights of the press or free representation] should ever be destroyed, they reciprocally guarantee each others existence. A free representation will guard the rights of the press, and the press will diffuse that information among the people, which is necessary to preserve the right of representation.”); see also A Republican, *To the Editor of the National Gazette*, NAT’L GAZETTE (Phila.), Aug. 22, 1792, at 3 (“There are three modes of communication, upon the subject of the approaching election, contemplated by the citizens. . . . [T]he third is through the medium of the press, offering the sense of individuals, in the shape of a ticket, to the consideration of the public.”); Republicus,

Several eighteenth-century sources corroborate this.⁷⁶ Take, for instance, the contents of an anonymous address written immediately after the adoption of the 1776

OBSERVATIONS on the LIBERTY of the PRESS, AM. MONITOR: OR, THE REPUBLICAN MAG., Oct. 1785, at 1 (“It is sufficiently known, that arbitrary power would steal in upon us, were we not extremely watchful to prevent its progress, and were there not an easy method of conveying the alarm from one end of these Free, Sovereign, Independent and United States of America to the other. . . . Nothing is so effectual to this purpose as the LIBERTY of the PRESS, by which all the learning, wit and genius of the Nation may be employed on the side of LIBERTY.”); *American News*, VT. GAZETTE (Bennington), July 18, 1785, at 1 (“Another effect and a very considerable one of the liberty of the press, is, that it enables the people effectually to exert those means, which the constitution has bestowed on them, of influencing the motions of government.”); *OBSERVATIONS on the LIBERTY of the PRESS*, BOS. EVENING-POST, Oct. 14, 1765, at 1 (“The spirit of the people must be frequently roused in order to curb the ambition of the court; and the dread of rousing this spirit must be employed to prevent that ambition. Nothing is so effectual to this purpose as the Liberty of the Press, by which all the learning, wit, and genius of the nation, may be employed on the side of the liberty, and every one be animated to its defence.”).

⁷⁶ See, e.g., JONATHAN MAXCY, AN ORATION, DELIVERED IN THE BAPTIST MEETING-HOUSE IN PROVIDENCE, JULY 4, A.D. 1795, at 14–15 (1795) (“The freedom of the press, so essential to the preservation of liberty, is here enjoyed in its greatest latitude. . . . The freedom of the press converts united America into an enlightened congress of politicians. How can our liberties be subverted, while the people are universally acquainted with the conduct of their representatives?”); *An Oration, Delivered in St. Michael’s Church, Before the Inhabitants of Charleston, South Carolina, on the Fourth of July 1794, by David Ramsay, M.D. President of the Senate of South-Carolina*, GAZETTE OF THE U.S. (Phila.), July 29, 1794, at 2 (celebrating the liberty of the press and that “our printing presses are free” because both keep the “doors of our legislative assemblies . . . open, and the conduct of our state officers may be safely questioned before the bar of the public”); *On the Liberty of the Press*, GAZETTE OF THE U.S. (Phila.), Mar. 13, 1790, at 4 (“Nothing can more conduce to keep rulers from swerving from their duty, and from assuming unconstitutional powers, than the fear of having their evil deeds exposed to their constituents, through the medium of a Free Press. By this, enlightened and ingenious individuals have ample opportunity afforded them of giving useful hints, upon which the Legislature may afterwards improve. The proceedings of the different departments of government may be fairly and impartially discussed; and any invasion of our civil and religious rights, may be pointed out, and the alarm sounded, to call forth the People in their defence.”); JEAN LOUIS DE LOLME, THE CONSTITUTION OF ENGLAND 216–17 (David Lieberman ed., 2006) (1789) (noting that the “advantage of a free press” is it facilitates the people’s “right of *resisting*” against government attempts to violate their liberties); *To the PRINTER*, N.Y. GAZETTE (N.Y.C.), July 10, 1769, at 1 (“[The liberty of the press] is a blessing not to be found under despotic government; when we feel the weight of oppression, to set forth our grievances, and make them publicly known, is an advantage which those that are free only enjoy.—When public affairs are badly administered, justice perverted, wrong measures pursued, or destructive schemes projected; to open the eyes of the public, to apprize them of, and point out their danger, as well as propose remedies in such emergencies, are privileges enjoyed only in a free country. The *Liberty of the Press* is therefore a jewel of inestimable value, and ought to be defended with our lives and fortunes, for neither will be worth enjoying, when freedom is destroyed by arbitrary measures.”).

Pennsylvania Constitution, which declared: “That the people have a right to freedom of speech, and of writing, and publishing their sentiments; therefore the freedom of the press ought not to be restrained.”⁷⁷ The writer of the address sought to correct the notion that “men in publick stations” are somehow “exempt from [the] impartial scrutiny” of the press, as well as to remind the people that the press’s “right of examination, and [the right] to remedy the defects [of government], [is what] constitute[s] the[ir] safety.”⁷⁸ Thus, whenever the “right [of a free press] is infringed, the Constitution falls a sacrifice to tyranny and usurpation.”⁷⁹

The anonymous writer was not articulating anything new regarding the importance of a free press in maintaining the people’s constitutional liberty. Two years earlier, on October 26, 1774, in an attempt to urge the inhabitants of Quebec to join the American Colonies in resisting English threats against their freedom, the First Continental Congress described the importance of a free press in similar terms:

The importance of [a free press] consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments, on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated into more honourable and just modes of conducting affairs.⁸⁰

What elevates the relevance of this passage is the fact that the First Continental Congress listed a free press as one of five “invaluable rights” deemed necessary to maintain a “mild system of [representative] Government”—that is one of only five “invaluable rights” which the people were “entitled to, and ought . . . to exercise”—and one of only five “invaluable rights” that made the people “free and happy.”⁸¹ To put it differently, the First Continental Congress described the importance of a free press in language akin to those that referred to it as the “palladium,” “bulwark,” or “barrier” of all liberty—that is, as an “invaluable” counterpoise to any government that failed to fulfill its constitutional or democratic obligations.⁸²

⁷⁷ PA. CONST. of 1776, Declaration of Rights, art. XII.

⁷⁸ Address to the Publick on Appointments to Offices (Sept. 7, 1776), in N. ILL. UNIV. DIGIT. LIBR., <https://digital.lib.niu.edu/islandora/object/niu-amarch%3A81947> [<https://perma.cc/99MV-43NW>].

⁷⁹ *Id.*

⁸⁰ Address to the Inhabitants of the Province of Quebeck (Oct. 26, 1774), in N. ILL. UNIV. DIGIT. LIBR., <https://digital.lib.niu.edu/islandora/object/niu-amarch%3A82117> [<https://perma.cc/M8MM-656S>]. John Dickinson is the primary author of the Quebec Address. For Dickinson’s initial draft, see John Dickinson’s Draft Letter to Quebec (Oct. 24, 1774), in 1 LETTERS OF DELEGATES TO CONGRESS 236–44 (Paul H. Smith ed., 1976).

⁸¹ Address to the Inhabitants of the Province of Quebeck, *supra* note 80.

⁸² This understanding or interpretation of the Quebec Address is confirmed by a contemporaneous resolution from the Committee of Inspection for Newport, Rhode Island,

Another writing which shows that a free press and its many parts was understood to ensure that the administration of government was as transparent and honest as possible is a 1797 oration by Revolutionary War veteran Samuel Sibley. In his oration, Sibley described the freedom of the press as “one of the *grand pillars of political freedom*.”⁸³ “United to the train of important privileges, which we enjoy, the unlimited freedom of the press claims a high and distinguished rank,” exalted Sibley, adding, “[i]t is so essential to the existence of a free government, that to abridge it, would be, wantonly, to hazard the liberties of the people.”⁸⁴ While certainly one may interpret Sibley’s oration as simply acknowledging the freedom to write and publish one’s sentiments through the medium of eighteenth-century printing press technology, Sibley’s follow-on statement informs a much broader constitutional role for the press:

[The press is] an *impartial tribunal*, by which men and measures must eventually stand or fall. ’Tis the *grand vehicle of national information*. Hence tyrants have, uniformly, considered *the press* as their enemy. They have waged an eternal war against it. They are fully sensible, that the firmness and durability of their usurped power depend on the ignorance of mankind, that to let the light of reason into the minds of their subjects would be giving the last and fatal blow to their greatness.⁸⁵

Undoubtedly, the “grand vehicle of national information”⁸⁶ referred to by Sibley included that of newspapers and the printers and owners that ran them.⁸⁷ As Benjamin Franklin Bache, printer and owner of the *General Advertiser*, asserted in

regarding press libels and licentiousness. The resolution not only restated the “importance” of a free press to “civil society” almost verbatim to that of the Quebec Address but also noted the importance of government protecting and preserving a free press; that “noble pillar, and great support of Public Liberty.” See Resolutions of the Committee of Inspection for Newport, Rhode-Island (Mar. 1, 1775), in N. ILL. UNIV. DIGIT. LIBR., <https://digital.lib.niu.edu/islandora/object/niu-amarch%3A79868> [<https://perma.cc/4N8U-42V3>].

⁸³ *Extract from an Oration, Delivered at Mendon, (Mass.) at the Celebration of the 19th Anniversary of American Independence by Mr. S. Sibley, A.B.*, FED. GALAXY (Brattleboro, Vt.), Oct. 30, 1797, at 4 (emphasis added).

⁸⁴ *Id.*

⁸⁵ *Id.* (emphasis added).

⁸⁶ *Id.*

⁸⁷ See, e.g., Samuel Latham Mitchill, *An Oration, Pronounced Before the Society of Black Friars, at their Anniversary Festival, in the City of New-York, on Monday, 11th of November, 1793*, at 25–26 (N.Y., Friar M’Lean 1793) (noting that “a large proportion” of newspapers contained “[s]trictures on the conduct of public men, and speculations on the tendency of public measures” related to “transactions of the legislature, decisions of courts of law and equity, proclamations by the executive, appointments to offices and removals from the same”).

1790: “*The Freedom of the Press is the Bulwark of Liberty. An impartial Newspaper is the useful offspring of that Freedom. Its object is to inform. . . . [Newspapers’] general circulation and cheapness render them also very proper vehicles for every species of information in the Arts, Sciences, &c.*”⁸⁸

Bache was not the only printer and owner of an eighteenth-century newspaper to espouse this view.⁸⁹ In 1785, both Robert Gerrish, printer and owner of the *New-Hampshire Mercury*, and Eleazer Oswald, printer and owner of the *Independent Gazetteer*, reprinted a London editorial that discussed the overall utility of newspapers.⁹⁰ The editorial noted:

When under the direction of a *prudent, experienced conductor*, [a newspaper] is a centinel placed upon the out-posts of the constitution: and should never be punished but for sleeping, or neglect of duty. The freedom of thinking, speaking, and writing, is one of the great principles of liberty; and a news-paper is by far the most eligible medium for men to convey their opinions to the public ear.⁹¹

Then there was Loring Andrews, printer and owner of the *Western Star*, who, in 1789, espoused the view that a “Newspaper,” its “impartial” editor, and a “free press” went hand-in-hand in “sound[ing the] alarm when danger is at hand, for the destruction of a FREE PRESS will be the first object with men determined to enslave their fellow citizens.”⁹² John Fenno, printer and owner of the *Gazette of the United States*, and Francis Bailey, printer and owner of the *Freeman’s Journal*, reprinted Loring’s editorial in its entirety.⁹³

That mid- to late-eighteenth-century newspaper printers and owners perceived themselves as impartial purveyors of news of the day⁹⁴ is not to suggest that said printers and owners were in fact politically objective when reporting the news. Often

⁸⁸ *To the PUBLIC, GEN. ADVERTISER & POL., COM., AGRIC. & LITERARY J.* (Phila.), Oct. 4, 1790, at 1 (emphasis added).

⁸⁹ See, e.g., SMITH, *supra* note 42, at 19 (quoting James Parker, the printer of *The Connecticut Gazette*, as observing that the utility of newspapers was “universally acknowledged”).

⁹⁰ See Robert Gerrish, *On News-Papers*, N.H. MERCURY (Portsmouth), Mar. 15, 1785, at 1; Eleazer Oswald, *From the Bahama Gazette: La Bagatelle. News-Papers*, INDEP. GAZETTEER (Phila.), April 2, 1785, at 3.

⁹¹ *Id.* (emphasis added).

⁹² *The Following Observations on the Great Importance, and Utility of Newspapers, Are Exacted from the First Member of THE WESTERN STAR—a Paper Published by Mr. Loving Andrews, at Stockbridge, Massachusetts*, GAZETTE OF THE U.S. (Phila.), Dec. 12, 1789, at 3.

⁹³ *Id.*; *From No. 1 of the WESTERN STAR*, FREEMAN’S J.; OR, THE N. AM. INTELLIGENCER (Phila.), Dec. 23, 1789, at 1.

⁹⁴ See, e.g., Eleazer Oswald, *NOTES TO CORRESPONDENTS*, INDEP. GAZETTEER (Phila.), May 1, 1790, at 3 (noting to his correspondents that “*impartiality* ought to be the guide and pole-star of every free and independent printer”).

they were not.⁹⁵ Just like the news media of today, newspaper printers and owners operating in the mid- to late eighteenth century generally leaned in favor of one political ideology or another⁹⁶—some much more so than others.⁹⁷ Moreover, newspaper printers and owners were often presented with difficult moral judgments (as well as financial considerations) regarding what to and what not to print.⁹⁸ Nevertheless, the fact remains that these imperfect news purveyors⁹⁹ and their subscribers viewed newspapers as an important constitutional guardian of the people's rights, liberties, and representative form of government.¹⁰⁰ These imperfect news purveyors

⁹⁵ Anderson, *supra* note 41, at 466 (“Even the most partisan papers invariably claimed impartiality.”).

⁹⁶ Daniel Davis, *An Oration Delivered at Portland, July 4th, 1796*, at 16–17 (Portland, Thomas Baker Wait 1796) (stating that there are “publick presses” which are “converting” a free press “into a vehicle of sedition”); Mitchill, *supra* note 87, at 26 (“The liberty of the press is not only free but *uncontrouled*, . . . If in any case, therefore, a Printer enlists on the side of a prevailing party, it arises from his particular political sentiment. In this respect our condition is greatly preferable to that of the *English*.”).

⁹⁷ See SMITH, *supra* note 42, at 20–25, 37; LEVY, *supra* note 43, at 144; JAMES E. POLLARD, *THE PRESIDENTS AND THE PRESS* 63 (1947); GEORGE HENRY PAYNE, *HISTORY OF JOURNALISM IN THE UNITED STATES* 76–99 (1920).

⁹⁸ See, e.g., Andrew Brown, *To the Public*, CITY GAZETTE, OR THE DAILY ADVERTISER (Charleston), Nov. 24, 1790, at 4 (“When I first ventured to solicit the patronage of my fellow citizens, I experienced all the anxiety, and anticipated all the difficulties, to which the editor of a daily publication is naturally exposed, who wishes to establish his reputation upon an impartial and original basis.”); 2 ISAIAH THOMAS, *THE HISTORY OF PRINTING IN AMERICA* 104–05 (N.Y.C., Burt Franklin 1874) (reprint of February 1748 letter from James Parker, owner and printer of the *New-York Gazette, or, Weekly Post-Boy*) (“Poor Printers are often under a very unhappy dilemma, of either displeasing one Part of their Benefactors, or giving Offence to others; and sometimes get the Ill-will of both sides . . . The Press is looked on as the grand Bulwark of *Liberty, Light, Truth and Religion*; and if at any Time the Innocent is attack’d unjustly, the Gospel pronounces such *Blessed*; and common Sense tells us *their Innocence will shine the more conspicuously thereby*. But on the other Hand, it often is noted that Persons are too apt to be touch’d at having any of their Faults exposed. However, if I have openly injur’d any, I am willing as openly to vindicate them.”).

⁹⁹ *Charleston, July 3*, ST. GAZETTE OF S.C. (Charleston), July 3, 1786, at 2 (“It will . . . be thought that I speak in too high terms, of the [positive] effects produced by the public newspapers. I indeed confess that every piece they contain are not patterns of good reasoning, or of the true attic wit. On the other hand, it never fails but that a subject in which the laws, or the welfare of the community, are really concerned; calls forth some able writer, who communicates to the public his observations and complaints.”); Wilkes, *supra* note 68, at 2 (noting that “[n]ewspapers no more than the individuals who peruse them, can be always right”).

¹⁰⁰ See, e.g., Benjamin Franklin Bache, *The Editor to the Public*, AURORA GEN. ADVERTISER (Phila.), Dec. 30, 1795, at 4 (“Upwards of five years have elapsed since the EDITOR first undertook the arduous duties of Conductor of a FREE PRESS. . . . In his Editorial capacity he has been less directed by motives of interest, than by a strict regard to what he deemed his duty as an INDEPENDENT Printer. Established in the commercial metropolis of the United States, he was sensible, from the first, that a perfect compliance with the views of the wealthy, would have promoted his pecuniary advancement, but such compliance he disclaimed as strongly repugnant to his ideas of a Free Press.”); *From a London Paper*, PROVIDENCE

were the tollers of the people's proverbial "alarm bell."¹⁰¹ Equally important is the fact that mid- to late-eighteenth-century newspaper owners and printers, as well as the American people, viewed the solicitation, collation, and publication of the relevant news of the day as being protected under the constitutional umbrella of the "freedom of the press," "liberty of the press," and "free press."¹⁰² The headers of many

GAZETTE; & COUNTRY J. (R.I.), Jan. 15, 1763, at 4 (noting that newspapers "not only convey [political] Instruction and Amusement, but when properly conducted, secure to us the Liberty of the Press"); 2 THOMAS, *supra* note 98, at 50 ("As our present political state affords Matter for a variety of Thoughts, of peculiar Importance to the good People of *New-England*, we purpose to insert every thing of that Nature that may be pertinently and decently wrote. . . . We are ourselves free, and our Paper shall be free—free as the Constitution we enjoy—free to Truth, good Manners, and good Sense" (quoting an *Independent Advertiser* address from the printer, circa 1748)).

¹⁰¹ In the eighteenth century, several writers referred to the "freedom of the press," "liberty of the press," and a "free press" as an "alarm bell." See, e.g., DAVID HUME, *ESSAYS, MORAL, POLITICAL, AND LITERARY* 12 (Eugene F. Miller ed., 1987) (noting how the press is the "easy method of conveying the alarm from one end of the kingdom to the other"); *From No. 1 of the WESTERN STAR*, *supra* note 93, at 1 (noting it is the duty of newspaper editors to "sound an alarm when danger is at hand"); *Philadelphensis*, *supra* note 66 ("None but the press. . . . is the herald that sounds the alarm, and rouses freemen to guard their liberty."); AN ESSAY ON THE LIBERTY OF THE PRESS &C. 1 (London 1755) ("Now the best Method . . . of ringing the Alarm-Bell, is to exercise the Liberty of the Press.").

¹⁰² See, e.g., Samuel S. Wilde, *An Oration, Delivered at Thomastown, July 4th, 1797*, at 13–14 (Hallowell, Me., Howard S. Robinson 1797) (noting that the "free and general circulation of newspapers" assists in removing the "mist of ignorance, which obscures the faculties and enslaves the mind"); Davis, *supra* note 96, at 17 ("A press truly impartial, and ably conducted, is indeed the very soul of a free government."); *From a Correspondent*, NAT'L GAZETTE (Phila.), July 27, 1793, at 3 ("The liberty of the press, the right of discussing public measures, and the conduct of public officers in their official capacities, is a right the people have expressly reserved to themselves in their Constitutions. There are, I am told, a set of gentlemen very busily engaged at this time in laying schemes to abridge this liberty, either by menacing the conductors of such newspapers as to not suit their palates; or by throwing to others a *sop*, so as to keep up a good understanding in case of necessity." (emphasis added)); Philo Mirabeau, *To the Editor of the NATIONAL GAZETTE*, NAT'L GAZETTE (Phila.), Aug. 22, 1792, at 3 ("A FREE Press is a bulwark, and an *independent printer* a centinel of liberty—without centinels to alarm, no fortress is secure, but is liable, every moment, to a surprize." (emphasis added)); *Wednesday, April 14, 1790. Newspapers*, in 2 ANNALS OF CONGRESS 1580–81 (1834) (statement of Elbridge Gerry) ("[A] free press is of the greatest importance to the people, and all proper encouragement ought to be given it; that the practice of Congress, in taking the newspapers upon a liberal plan, conduced to this object; that the most beneficial consequences had resulted to the Government from that information [I]t will not be denied that all parts of the Union have as good a right to political intelligence as the spot where Congress happens to be The information conveyed through this channel [of newspapers] has afforded the greatest satisfaction to our constituents."); Eleazer Oswald, *PROPOSALS, INDEP. GAZETTEER & AGRIC. REPOSITORY* (Phila.), Jan. 23, 1790, at 3 ("He who hath truth, reason and justice on his side, will always be an over-match for his adversaries; and a man, armed with those divine weapons, will be able to put a thousand of them to flight, on his being allowed *fair play*, through the channel of a *free* and *Impartial* press [F]or [through such a press] we shall always be able to defeat and overcome the efforts and attacks of intolerance

mid- to late-eighteenth-century newspapers bear this out.¹⁰³ While many owners and printers made this point by utilizing their newspaper headers to restate their respective state constitutional provisions regarding the press,¹⁰⁴ other owners and printers put forward more imaginative headers. For instance, the *Independent Gazetteer*'s header contained the Junius¹⁰⁵ quote, "Let it be impressed upon your Minds, let it be instilled into your Children, that the Liberty of the Press is the PALLADIUM of all the civil, political, and religious Rights of Freeman."¹⁰⁶ The *Freeman's Journal*'s header contained the motto "OPEN to ALL PARTIES, but INFLUENCED by NONE."¹⁰⁷ The *Virginia Gazette*'s, later *Virginia Argus*, header contained the motto "A Free Press Maintains the Sovereignty of the People."¹⁰⁸ Meanwhile, Bache's header for the *General Advertiser* contained the motto "Truth, Decency, Utility."¹⁰⁹

Given how the "freedom of the press," "liberty of the press," and a "free press" facilitated the success of the American Revolution, secured American independence, and, in the process, preserved the American people's rights, liberties, and representative form of government, it is no surprise that the Bill of Rights contained a Press Clause.¹¹⁰ Much like the right to trial by jury, the writ of habeas corpus, and the right

and tyranny, and to maintain inviolate our inherent rights and privileges."); Thomas Mifflin et al., *RECOMMENDATION, CITY GAZETTE, OR THE DAILY ADVERTISER* (Charleston), Nov. 24, 1790, at 4 ("Newspapers are in all countries, but especially in free ones, of importance. When conducted with decency and industry, they are the vehicles of much pleasing and useful intelligence to every order of society."); Isaiah Thomas, [*Copy of Hand-bill to the Customers of the Late Massachusetts Spy*], *THE AM. RECORDER & THE CHARLESTOWN ADVERTISER* (Mass.), Apr. 14, 1786, at 4 (arguing that whenever a "law is made, which takes away the means of printing and circulating News-Papers, it amounts to . . . an *unconstitutional restraint* on the Liberty of the Press").

¹⁰³ See, e.g., *COLUMBIAN HERALD, OR THE PATRIOTIC COURIER OF N. AM. (S.C.)*, May 9, 1785, at 1; *INDEP. GAZETTEER & AGRIC. REPOSITORY* (Phila.), Nov. 20, 1790, at 1; *FREEMAN'S J.; OR, THE N. AM. INTELLIGENCER* (Phila.), Dec. 23, 1789, at 1.

¹⁰⁴ See, e.g., [*Header*], *COLUMBIAN HERALD, OR THE PATRIOTIC COURIER OF N. AM. (S.C.)*, May 9, 1785, at 1 ("That the LIBERTY of the PRESS be inviolably preserved. Constitution of South-Carolina."); [*Header*], *N.H. MERCURY & THE GEN. ADVERTISER* (Portsmouth), Mar. 15, 1785, at 1 ("The Liberty of the Press is Essential to the Security of Freedom in a State—it ought therefore to be inviolably preserved. *Const. N.H.*").

¹⁰⁵ Junius was the pseudonym of an unidentified author of a series of letters published in Henry Sampson Woodfall's *Public Advertiser* newspaper from January 21, 1769, through January 21, 1772. See *Junius*, *BRITANNICA ONLINE*, <https://www.britannica.com/biography/Junius> [<https://perma.cc/6PAX-H8NL>] (last visited Apr. 17, 2025).

¹⁰⁶ [*Header*], *INDEP. GAZETTEER & AGRIC. REPOSITORY* (Phila.), Nov. 20, 1790, at 1.

¹⁰⁷ [*Header*], *FREEMAN'S J.; OR, THE N. AM. INTELLIGENCER* (Phila.), Dec. 23, 1789, at 1.

¹⁰⁸ [*Header*], *VA. GAZETTE & RICH. & MANCHESTER ADVERTISER* (Rich.), Apr. 17, 1794, at 1.

¹⁰⁹ [*Header*], *GEN. ADVERTISER & POL., COM., AGRIC. & LITERARY J.* (Rich.), Oct. 4, 1790, at 1.

¹¹⁰ Writing forty-one years ago, First Amendment scholar Floyd Abrams made this point succinctly when he wrote: "The press clause . . . was no afterthought, no mere appendage to the speech clause. . . . Whatever ambiguities there may be about its [full constitutional]

to keep and bear arms in a well-regulated militia, a free press was an important palladium of liberty.¹¹¹ A constitutional free press was essential in balancing the Constitution in the people's favor,¹¹² or, as Thomas Brand Hollis wrote to John Adams upon learning of its omission from the Constitution: a constitutional free press served as "an additional star . . . the Bulwark of Liberty which . . . Despots dread and permit not."¹¹³ Therefore, when Congress formally sent the Bill of Rights to the state governments for ratification, it should come as no surprise that the amendments contained within were described not only as necessary in ensuring that the federal government could not misconstrue or abuse "its Powers," but also as "extending the Ground of public Confidence."¹¹⁴

A free press, particularly the role played by newspapers, facilitated this "public confidence" given that newspapers served as *the* information and news conduit between the people and their representatives, and vice versa.¹¹⁵ As James Madison noted in a 1791 editorial titled "Public Opinion":

Public opinion sets bounds [for] every government, and is
the real sovereign in every free one.

meaning, the press clause was, at the very least, a deeply felt response to the deprivations of *press* liberty that the colonists had witnessed and to which they have been subjected." Abrams, *supra* note 17, at 579.

¹¹¹ Charles & O'Neill, *supra* note 19, at 1718.

¹¹² *Id.*; see also Letter from James White to Richard Caswell, November 17, 1787, in 24 LETTERS OF DELEGATES TO CONGRESS 554, 554 (Paul H. Smith & Ronald M. Gephart eds., 1996) ("I have regretted that the proposed constit[ution] was not more explicit with respect to several essentials: but the great clamor is, that no express provision is made for the **trial by jury**, and **liberty of the press**; things so interwoven with our political, or legal ideas, that I conceive the sacred immutability of these rights to be such, as never to have occurred as questionable objects to the convention." (emphasis added)); *Centinel*, No. II, MD. J., AND BALT. ADVERTISER, November 2, 1787, at 1 ("As long as the liberty of the press continues unviolated, and the people have the right of expressing and publishing their sentiments upon every public measure, it is next to impossible to enslave a free nation. . . . The abolition of that grand palladium of freedom, the liberty of the press, in the proposed plan of government . . . is a striking exemplification of these observations.").

¹¹³ Letter to John Adams from Thomas Brand Hollis (Nov. 4, 1787), in FOUNDERS ONLINE, NAT'L ARCHIVES: ADAMS PAPERS, <https://founders.archives.gov/documents/Adams/06-19-02-0149> [<https://perma.cc/MX3V-HWS4>].

¹¹⁴ 1 JOURNAL, OF THE FIRST SESSION OF THE SENATE OF THE UNITED STATES 163 (N.Y., Thomas Greenleaf 1789).

¹¹⁵ See SCHLESINGER, *supra* note 42, at 46 (noting how "newspapers dispensed a greater volume of political and constitutional argument than all the other [mid- to late-eighteenth-century] media combined"); Philadelphiensis, *supra* note 101, at 2 ("In America the freedom of the press is peculiarly interesting: to a people scattered over such a vast continent, what means of information or redress have they, when a conspiracy has been formed against their sacred rights and privileges? None but the press. This is the herald that sounds the alarm, and rouses freemen to guard their liberty And through the medium of the press, the *good and the patriotic* citizen receives the thanks of his grateful countrymen.").

As there are cases where the public opinion must be obeyed by the government; so there are cases, where not being fixed, it may be influenced by the government. . . .

In proportion as government is influenced by opinion, it must be so, by whatever influences opinion. This decides the question concerning a *Constitutional Declaration of Rights*, which requires an influence of government, by becoming a part of the public opinion.

The larger a country, the less easy for its real opinion to be ascertained, and the less difficult to be counterfeited; when ascertained or presumed, the more respectable it is in the eyes of individuals.—This is favourable to the authority of government. For the same reason, the more extensive a country, the more insignificant is each individual in his own eyes.—This may be unfavourable to liberty.

[Therefore, w]hatever facilitates a general intercourse of sentiments, as good roads, domestic commerce, a *free press*, and *particularly a circulation of news-papers* through the entire body of the people, and Representatives going from, and returning among every part of them is equivalent to a contraction of territorial limits¹¹⁶

James Madison was not the only founder to single out newspapers as being important in both discerning and informing public opinion and, therefore, essential to the sustainment of the nation and its representative form of government.¹¹⁷ In 1787, Thomas Jefferson famously wrote that the very “basis of [American] government[.]” was the “opinion of the people,” and therefore, the “very first object” of

¹¹⁶ *Public Opinion*, AURORA GEN. ADVERTISER (Phila.), Dec. 20, 1791, at 3 (emphasis added); see also *For the National Gazette* (ca. Dec. 19, 1791), in FOUNDERS ONLINE: NAT’L ARCHIVES: MADISON PAPERS, <https://founders.archives.gov/documents/Madison/01-14-02-0145> [<https://perma.cc/9P3P-SU9P>]; SMITH, *supra* note 42, at 71.

¹¹⁷ See, e.g., DOCUMENT 21. *Richard Henry Lee Insists on a Constitutional Guarantee*, (Additional . . . Letters From the Federal Farmer, 1778), reprinted in FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON 144 (Leonard W. Levy ed., 1966) (“A free press is the channel of communication as to mercantile and public affairs; by means of it the people in large countries ascertain each others sentiments; are enabled to unite, and become formidable to those rulers who adopt improper measures.”); Letter from John Adams to Edmé Jacques Genet (May 28, 1780), in FOUNDERS ONLINE, NAT’L ARCHIVES: ADAMS PAPERS, <https://founders.archives.gov/documents/Adams/06-09-02-0224> [<https://perma.cc/AZ2L-37GY>] (describing the “press” as one of “four Sources” where an “unerring demonstration of the true Sen[t]iments of the People of America, may be drawn”).

government “should be to keep that right; and were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter.”¹¹⁸

At this time, Jefferson was a chief proponent of the ‘market place of ideas’ concept of press freedom—that is, the belief that the truth will ultimately prevail over any falsehood when the two are allowed to compete freely in the public discourse.¹¹⁹ The ‘market place of ideas’ concept was quite popular among mid- to late-eighteenth-century newspaper printers and owners, as well as the American public.¹²⁰ However, it was only one of several conceptions of press freedom circulating at the time. As one anonymous writer in 1782 aptly put it: “The liberty of the press is like the subjects of mobs, money, and beggars. No two men think alike upon it[, yet a]ll men agree in the necessity and advantages of it.”¹²¹ Writing three decades earlier, printer William Livingston, who would later serve as a member of the 1787 Constitutional Convention and the First and Second Continental Congresses and as the first governor of New Jersey, expressed similar sentiments in an essay titled, “Of the Use, Abuse, and Liberty of the Press.”¹²² Therein, Livingston wrote how the

Liberty of the Press, like Civil Liberty, is talked of by many, and understood but by few; the latter is taken by Multitudes, for an irrefrainable License of acting at Pleasure; an equal Unrestraint in Writing, is often argued from the former, but both are false and equally dangerous to our Constitution.¹²³

Livingston went on to note that the true liberty of the press extended only to the publication of “what is not prejudicial to the general Good,” and therefore, it behooved printers “not to publish ever[y] Thing that is offered . . . but what is conducive of general Utility.”¹²⁴

As to what constituted the “general Good” or was “conducive of general Utility” somewhat varied among the great legal minds at the founding.¹²⁵ However, what

¹¹⁸ Letter from Thomas Jefferson to Edward Carrington (Jan. 16, 1787), in FOUNDERS ONLINE, NAT’L ARCHIVES: THOMAS JEFFERSON PAPERS, <https://founders.archives.gov/documents/Jefferson/01-11-02-0047> [<https://perma.cc/5NYM-4UDA>].

¹¹⁹ SMITH, *supra* note 42, at 31, 40; POLLARD, *supra* note 97, at 54–55.

¹²⁰ See SMITH, *supra* note 42, at 37–41.

¹²¹ *For the INDEPENDENT GAZETTEER: On the LIBERTY of the PRESS*, INDEP. GAZETTEER; OR, THE CHRON. OF FREEDOM (Phila.), Aug. 10, 1782, at 2.

¹²² William Livingston, *Of the Use, Abuse, and Liberty of the Press*, 1753 INDEP. REFLECTOR (N.Y.C.) 159, 159–62 (Aug. 30, 1753); see also Michael D. Hattem, *William Livingston*, GEORGE WASHINGTON’S MOUNT VERNON, <https://www.mountvernon.org/library/digital-history/digital-encyclopedia/article/william-livingston> [<https://perma.cc/PL89-FUEV>].

¹²³ Livingston, *supra* note 122, at 161 (emphasis omitted).

¹²⁴ *Id.* at 161–62.

¹²⁵ See Patrick J. Charles, *Restoring “Life, Liberty, and the Pursuit of Happiness” in Our Constitutional Jurisprudence: An Exercise in Legal History*, 20 WM. & MARY BILL RTS. J.

virtually all of them agreed upon is that the “freedom of the press,” “liberty of the press,” and a “free press” in no way nullified the legal doctrine of libel, or what was otherwise referred to as the licentiousness of the press.¹²⁶ To borrow from Massachusetts Judge Increase Sumner, writing in 1791, “[t]here is a material difference between the *liberty* and the *licentiousness* of the press; if a [person] publishes any thing to the injury of the publick or individuals, [they] must answer for it according to the [libel] laws of [their] country.”¹²⁷ It is worth noting that the legal doctrine of libel, at least as the founders understood it, was not meant to apply to writings and publications that were politically half-baked or contained information that was only partly true, nor to writings and publications that were politically abusive, a public nuisance, or intellectually misguided.¹²⁸ Rather, by the turn of the nineteenth century, particularly after the lapse of the much-maligned 1798 Sedition Act, a part-libertarian,¹²⁹

457, 479 n.120, 502–23 (2011) (discussing the concepts of the “public good,” “common good,” “good of the whole,” and its relationship to the Declaration of Independence’s promise of “life, liberty, and the pursuit of happiness”); *see also Extract from a Charge Delivered to the Grand Jury for the City and County of Philadelphia, on the 4th of April, by the Honorable Thomas McKean, Chief Justice of the Supreme Court [of Pennsylvania], with the Unanimous Approbation of the Other Judges*, COLUMBIAN HERALD, OR THE PATRIOTIC COURIER OF N. AM. (Charleston, S.C.), May 9, 1785, at 2 (“Men, therefore, have only to take care in their publications, that they are *decent, candid and true*, that they are for the purpose of reformation and not of defamation, and that they have an eye solely to the public good. Publications of this kind are not only lawful but laudable.”).

¹²⁶ *See, e.g., [Judge Shippen’s Charge to the Jury, at the Trial of William Cobbet on an Action for Slander]*, NORWICH PACKET (Conn.), Jan. 2, 1800, at 4; *Judge Chace’s Charge to the Jury, in the Case of the United States Against Thomas Cooper*, NEWBURYPORT HERALD & COUNTRY GAZETTE (Mass.), May 6, 1800, at 1–2; *Charge of the Chief Justice of Pennsylvania*, TIMES: ALEXANDRIA ADVERTISER (Va.), Dec. 11, 1797, at 2; *Extract from a Charge Delivered to the Grand Jury for the City and County of Philadelphia*, *supra* note 125, at 2; *Trial for a Libel.*, CONCORD HERALD (N.H.), Apr. 13, 1791, at 1.

¹²⁷ *Trial for a Libel.*, CONCORD HERALD (N.H.), Apr. 6, 1791, at 1.

¹²⁸ *See, e.g., From the Spy*, GAZETTE OF THE U.S. & DAILY EVENING ADVERTISER (Phila.), Jan. 14, 1795, at 2 (drawing a stark contrast between publications that fall under the “liberty of the press” and the “licentiousness of the Press”); *A Patriot Charge to a Grand Jury in a Free Government*, INDEP. GAZETTEER; OR THE CHRON. OF FREEDOM (Phila.), Apr. 23, 1785, at 2–3 (noting how the doctrine of libel in the United States and England are vastly different given that former allows “truth” as a defense).

¹²⁹ *See, e.g., The Liberty of the Press*, VERGENNES GAZETTE (Vt.), Nov. 8, 1798, at 4 (“[T]he liberty of the press consists in a right of publishing without restraint . . . [so long as it is] not injurious to himself or others.”); *For the INDEPENDENT GAZETTEER: On the LIBERTY of the PRESS*, *supra* note 121, at 2 (“What subjects and characters are proper for the public eye, through the medium of a news-paper? To this I answer, all subjects and characters connected with government and the happiness of a people.—Men who fill public stations of any kind, are proper game for a news-paper. Even their private vices . . . should be held up to public view.”); Livingston, *supra* note 122, at 160 (“But to shut up the Press because it has been abused, would be like burning our Bibles and proscribing Religion, because its Doctrines have been disobeyed and misrepresented.”).

part-utilitarian¹³⁰ conception of press freedom had taken hold in the United States. As a result, to quote Benjamin Franklin, the “freedom of the press,” “liberty of the press,” and a “free press” became widely understood as protecting virtually anything and everything pertaining to the “propriety of public measures and political opinions” without prior restraint, but did not protect press licentiousness—that is the act of maliciously “affronting, calumniating, and defaming one another.”¹³¹

Today, of course, how the founders decided whether or not a writing advanced the “general Good,” was “conducive of general Utility,” or fell under the heading of licentiousness is largely irrelevant as a matter of constitutional law. These questions are now decided by well-established First Amendment doctrines and tests.¹³² However, the same cannot be said for jurisprudentially recognizing any distinct constitutional press freedoms. This should no longer be the case. As history shows, the evidentiary record is replete with examples where mid- to late-eighteenth-century Americans described and viewed the “freedom of the press,” “liberty of the press,” and a “free press” as much more than simply an individual right to write and publish one’s sentiments without prior restraint.¹³³ The Press Clause also clearly protected the institutional press and its many parts as well,¹³⁴ especially the news-gathering functions provided by newspapers.¹³⁵

¹³⁰ See, e.g., *From the Anti-Democrat*, CHARLESTON COURIER (S.C.), Mar. 25, 1803, at 1 (“A free press is a good, which amply excells and fully compensates for all its evils.—It is, in a free government, like a tender shrub, the root of which you may kill by too free a use of the pruning knife.”); *DOCUMENT 21. Richard Henry Lee Insists on a Constitutional Guarantee, (Additional . . . Letters From the Federal Farmer, 1778)*, *supra* note 117, at 144 (“Newspapers may sometimes be the vehicles of abuse, and of many things not true; but these are but small inconveniences, in my mind, among many advantages.”).

¹³¹ 12 THE WORKS OF BENJAMIN FRANKLIN 131 (John Bigelow ed., 1904); see also *For the INDEPENDENT GAZETTEER: On the LIBERTY of the PRESS*, *supra* note 121, at 2 (“What should be the treatment of an author, who publishes falsehoods against men in office? A prosecution. This is absolutely necessary, or newspapers will soon lose their efficacy.”); Leonard Levy, *Introduction to FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON*, *supra* note 117, at xlix (“[T]he principle of a free press, like flag, home, and mother, had no enemies in America after the Revolution. Only seditious libels, licentious opinions, and malicious falsehoods were condemned.”).

¹³² The Supreme Court has identified certain categories of unprotected speech, developing tests that define their boundaries. These include incitement (*Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)); obscenity (*Miller v. California*, 413 U.S. 15, 24 (1973)); fighting words (*Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)); and true threats (*Counterman v. Colorado*, 600 U.S. 66, 74, 79–80 (2023)).

¹³³ See *supra* notes 48–131 and accompanying text.

¹³⁴ See, e.g., *The Hugonot: Points of View for the People of England*, GA. GAZETTE (Savannah), Aug. 16, 1764, at 1 (“The liberty of the Press is not an indivisible quantity, but a quantity composed of a great number of parts.”).

¹³⁵ See FRANK LUTHER MOTT, *AMERICAN JOURNALISM: A HISTORY OF NEWSPAPERS IN THE UNITED STATES THROUGH 260 YEARS: 1690 TO 1950*, at 107 (3d ed. 1962) (noting that by the end of the American Revolution “journalism had made a distinct gain in prestige,” with the greatest gain going to newspapers); see also Thomas, *supra* note 102, at 4 (describing

Yet despite the clear and convincing historical evidence for recognizing distinct constitutional press freedoms, over the past half-century, press freedom skeptics have made—what is for many—some convincing arguments as to why these freedoms should remain closed-off and unrecognized. Part II unpacks and examines these arguments.

II. THE HISTORY-IN-LAW RESPONSE TO PRESS FREEDOM SKEPTICISM

It is often said that the Constitution is an enduring document whose “principles were designed to, and do, apply to modern conditions and developments.”¹³⁶ For more than half a century, press freedom skeptics have embraced the ‘enduring Constitution’ premise as it pertains to the individual writing and publishing aspect of the Press Clause by claiming that one’s freedom to write and publish their sentiments must naturally extend to modern technological mediums. Yet these same skeptics outright dismiss the premise when it comes to recognizing any distinct constitutional press freedoms by claiming that the founders’ frequent references to “the press” or a “free press” were tantamount to a physical printing press, not any journalistic-related functions, and therefore assert it would be jurisprudentially unwise for the courts to recognize any distinct constitutional press freedoms for modern professional journalists.¹³⁷ Placing aside the fact that press freedom skeptics have overlooked the proverbial ‘forest for the trees’ when it comes to analyzing the history of the Press Clause, it is difficult to square how anyone can advance such a constitutional double standard. One should not be able to speak of a living, enduring approach to constitutional interpretation when advancing the technological aspect of press freedom, yet flip this argument on its head when dismissing the institutional aspects of press freedom. Such thinking is not only hypocritical, but also non-holistic. It amounts to

newspapers as “necessary vehicles of publick information” and asserting that “if a law is made, which takes away the means of printing and circulating News-Papers, it amounts to [prohibition], and is of course an *unconstitutional restraint* on the Liberty of the Press”); Lucius, *supra* note 66, at 2 (“I conceive it to be the *unalienable right* of the citizens of [the state of Massachusetts], and every step taken by any man, or set of men, to retard the free circulation of political knowledge, is an infringement of that *right*. For it is their invaluable privilege, to know everything that is transacting, to examine for themselves, and publicly to express their sentiments respecting it. In such a country then, a *Stamp on news-papers*, can be considered in no other light, than as a *stab to the freedom of the people*.”); *To the Public*, *supra* note 67, at 1 (“A Public Paper, well conducted, is allowed by the most sensible People to be very serviceable to a Community; it certainly is the easiest and cheapest Path to the Knowledge of Mankind.”); *see also supra* notes 94–118 and accompanying text.

¹³⁶ *Heller v. District of Columbia*, 670 F.3d 1244, 1275 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

¹³⁷ *See, e.g., McConnell, supra* note 14, at 436–37.

a pick-and-choose approach to constitutional interpretation, i.e., we like this bundle of constitutional rights and privileges, but not those.

Indeed, some press freedom skeptics are emphatic that the “historical evidence points *powerfully in one direction*” in support of the ‘press-as-a-technology’ model.¹³⁸ However, as this Article clearly demonstrates, this historical assessment of the Press Clause is severely flawed. What press freedom skeptics conveniently leave out is the fact that the technological vehicle of printing books, pamphlets, and newspapers remained unchanged from the late seventeenth century through the nineteenth century.¹³⁹ This fact by itself historically derails the ‘press-as-a-technology’ model being advanced by press freedom skeptics.¹⁴⁰ Simply put, with only one publishing technology available circa 1791, the year the Bill of Rights and Press Clause were ratified, it is impossible to historically ascertain how the founders viewed the “freedom of the press,” “liberty of the press,” and a “free press” as an evolving technological right of the people to employ free speech. Obviously, the founders did not have the foresight to predict future publishing mediums such as radio, television, and the Internet.¹⁴¹

This contextual criticism of the ‘press-as-a-technology’ model is not to suggest that the model is without merit. Jurisprudentially speaking, the model aligns perfectly with the understanding that the Constitution is an enduring document, and therefore, its defining principles must apply to new eras, circumstances, and technologies.¹⁴² Furthermore, historically speaking, the model succinctly aligns with the Anglo-American intellectual history of how the “freedom of the press,” “liberty of the press,” and a “free press” gradually came to be. The founders may not have possessed the foresight to predict new press technologies, nor the growth and evolution of the press as a profession and industry. However, the founders undoubtedly understood that the rights afforded a free press were customary in nature and must evolve with society.¹⁴³

The ‘press-as-a-technology’ model argument is only one of several flawed arguments that have been advanced by press freedom skeptics over the past half-century. The remainder of Part II outlines, discusses, and rebuts some others.

¹³⁸ Volokh, *supra* note 24, at 538 (emphasis added); *see also* Lee, *supra* note 24, at 343 (“It is evident . . . that the technology of the printing press was chief among the concerns for protection” by the founders); *id.* at 345 (“At its core, the freedom of the press was designed to protect speech technology.”).

¹³⁹ Charles & O’Neill, *supra* note 19, at 1701.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² West, *supra* note 26, at 53 (“[A]ny modern account of press freedom must take account of the significant evolutions of both mass communication technology and journalism since 1791.”).

¹⁴³ Charles & O’Neill, *supra* note 19, at 1702–54. The function and content of newspapers also evolved and improved by the close of the eighteenth century. *See* MOTT, *supra* note 135, at 114–16, 153–57.

A. The Founders' Press Was Not Comprised of Professional Journalists in the Modern Sense

A common objection to recognizing any distinct constitutional press freedoms is that there was no such thing as a journalist, at least as we know the profession today, circa the mid- to late eighteenth century.¹⁴⁴ In the words of press freedom skeptic Andrew Lee, “At the time of the Framing, . . . no definition of [the] ‘press’ included journalists or news reporters as a collective group or institution.”¹⁴⁵ Although Lee concedes that the founders’ conception of a free press “may have been understood to refer to the small-time printers and agents involved in printing or, more generally, to the collective enterprise of printing or publishing,” Lee believes that to equate these free press forebearers with “our modern notion of journalists or news reporters” is both ahistorical and a jurisprudential bridge too far.¹⁴⁶

It is worth noting that press freedom skeptics are not the only ones to claim that the press of today is far removed from that of our forebearers. In 2002, David A. Anderson, a strong proponent of recognizing distinct constitutional press freedoms, made a similar observation, writing: “The concept of press as journalism cannot claim a historical pedigree. When the First Amendment was written, journalism as we know it did not exist.”¹⁴⁷ It is, of course, unquestioned that the journalistic standards and practices of today are much more rigorous and professional compared to those of the mid- to late eighteenth century.¹⁴⁸ However, it is a grave mistake to historically conclude that the basic news and information function performed by the journalists of today—a function that was at the very core of the Press Clause—is demonstrably different from that of our forebearers.¹⁴⁹ Both historical eras—despite their stark social, demographic, and technological differences—to borrow from newspaper owner and printer Benjamin Mecom circa 1765, view the institutional press as the principal overseer of the “test of truth, the bulwark of public safety, the guardian of freedom, [which] the people ought not to sacrifice”¹⁵⁰ Moreover,

¹⁴⁴ See, e.g., McConnell, *supra* note 14, at 436–37; Lange, *supra* note 40, at 99 (“[I]t seems [historically] unlikely that the press clause can have been meant to protect the institutional press alone.”).

¹⁴⁵ Lee, *supra* note 24, at 339–40.

¹⁴⁶ *Id.* at 340.

¹⁴⁷ David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 446 (2002).

¹⁴⁸ Frank Luther Mott, *The Newspaper Coverage of Lexington and Concord*, 17 NEW ENG. Q. 489, 489 (1944) (correctly noting that, of course, mid- to late-eighteenth-century newspapers were limited “by the primitive techniques of eighteenth-century news-gathering, by such facilities of communication as existed”).

¹⁴⁹ It is worth noting, however, that not long after the ratification of the Bill of Rights, Congress began admitting reporters to examine and publish their proceedings. See MOTT, *supra* note 135, at 143.

¹⁵⁰ BANCROFT, *supra* note 66, at 352–53.

both historical eras, despite the stark differences in journalistic standards and practices between them, to borrow from late eighteenth-century newspaper owner and printer Eleazer Oswald, support the premise that “*impartiality* ought to be the guide and pole star of every free and independent” press—the key word being “ought.”¹⁵¹ Lastly, both eras view the “freedom of the press,” “liberty of the press,” and a “free press” as embodying the right to discuss “public measures, and the conduct of public officers in their official capacities,”¹⁵² as well as “all subjects and characters connected with government and the happiness of the people.”¹⁵³

The point to be made is that it is quite easy to miss the proverbial forest for the trees when historically comparing the journalism standards and practices of today with those of our forebearers. Certainly, the manner in which journalists and the news media operate today is far removed from that of the mid- to late eighteenth century. However, the basic news and information function is not.¹⁵⁴ There were not professional journalists, in the modern sense, on the staff of mid- to late-eighteenth-century American newspapers, but there were news correspondents—essentially private contractors paid by newspaper owners and printers to provide the American people with the news of the day.¹⁵⁵ Additionally, newspaper owners and editors often solicited and paid subject matter experts—on topics covering everything from politics to agriculture to commerce—to write articles for them.¹⁵⁶ This combination of mid- to late-eighteenth-century news correspondents, subject matter experts, and newspaper owners and editors are what comprised the free press of that era, and what routinely provided the American people with the most up to date news, information, and intelligence of the day. And if one objectively weighs and considers these indisputable facts, it becomes abundantly clear that the concept of press freedom was indeed alive and well in mid- to late-eighteenth-century America—and it is this basic post-Revolutionary period conception of a free press that should serve as the constitutional basis for recognizing twenty-first-century press freedoms.

¹⁵¹ Oswald, *supra* note 94, at 3.

¹⁵² *From a Correspondent.*, *supra* note 102, at 3; see also Wilkes, *supra* note 68, at 2 (“[I]t must be remembered we live in a *free* Country, in which public officers are not esteemed *lords* or *despots*; but the *servants* and *guardians* of the people; and therefore every freeman hath an undoubted right to investigate public measures.”).

¹⁵³ *For the INDEPENDENT GAZETTEER: On the LIBERTY of the PRESS*, *supra* note 121, at 2; see also *Charleston, July 3*, *supra* note 99, at 2 (“Through the assistance of the Press every individual may, at his leisure and in retirement, inform himself of every thing worth knowing. Through its assistance, a whole nation, as it were, hold a council, and deliberate; through its assistance, all matters of fact are, at length, made clear; and, by means of the conflict, nothing at last remains, but the sound arguments made use of by each contending party.”).

¹⁵⁴ See MOTT, *supra* note 135, at 52–56, 101–03, 153–57 (describing the news and editorial functions of mid- to late-eighteenth-century American newspapers); *id.* at 87–91 (outlining the many factors that limited eighteenth-century news gathering).

¹⁵⁵ *Id.* at 49–50.

¹⁵⁶ *Id.* at 690–91.

That the founders' conception of free press and its many parts is remarkably different from that of today is jurisprudentially immaterial and irrelevant. The founders' conception of what constituted "arms"—that is single-fire, muzzle-loading firearms capable of firing no more than 2 to 3 rounds a minute at a distance of 50 to 100 yards—is remarkably different from that of today, yet our Second Amendment jurisprudence expressly recognizes that modern "common use" firearms that "facilitate armed self-defense"—firearms with much greater lethality, firing rates, and firing distances no less—are presumed to be constitutionally protected.¹⁵⁷ Similarly, the founders' conception of what qualified as "papers" and "effects" is remarkably different from that of today, yet our modern Fourth Amendment jurisprudence expressly protects documents on electronic devices¹⁵⁸ as well as the owners and occupants of automobiles.¹⁵⁹ Neither of these items or technologies existed in the eighteenth century. Simply put, the Constitution and Bill of Rights cannot be forever stuck in 1787 or 1791.¹⁶⁰ Much like the discipline of history, the text contained within the Constitution and Bill of Rights is forever fluid and stagnant. Certainly, over the past two centuries, the Constitution and Bill of Rights have remained largely unchanged. However, the constitutional questions, as well as the facts and events associated with those questions, do; hence, why we have long adhered to the concept of an enduring Constitution.¹⁶¹

B. The Modern Press Is Primarily a For-Profit Business

Another common argument against recognizing any distinct constitutional press freedoms is the 'corporate greed' argument. Press freedom skeptics assert that because members of the press and news media are employees of for-profit corporations, and said corporations generate large revenue streams from both the advertising and the disseminating of the news, it would be odd to recognize the Press Clause as

¹⁵⁷ See *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 28 (2022) ("Just as the First Amendment protects modern forms of communications, and the Fourth Amendment applies to modern forms of search, the Second Amendment extends, *prima facie*, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." (internal citations omitted) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008))).

¹⁵⁸ See *Riley v. California*, 573 U.S. 373, 403 (2014).

¹⁵⁹ See *Grady v. North Carolina*, 575 U.S. 306, 306 (2015); *Florida v. Jardines*, 569 U.S. 1, 10–11 (2013).

¹⁶⁰ See *United States v. Rahimi*, 602 U.S. 680, 691 (2024).

¹⁶¹ *Cohens v. Virginia*, 19 U.S. 264, 387 (1821) ("[A] constitution is framed for ages to come, and is designed to approach immortality as nearly as human institutions can approach it. Its course cannot always be tranquil. It is exposed to storms and tempests, and its framers must be unwise statesmen indeed, if they have not provided it, as far as its nature will permit, with the means of self-preservation from the perils it may be destined to encounter.").

affording members of the press any distinct constitutional freedoms.¹⁶² Concern over ‘corporate greed’ in the context of press freedom is an old one that harkens back at least to the early twentieth century. Take, for instance, the 1914 meeting of the American Sociological Society on “Freedom of Communication.” Therein, Northwestern University law professor Henry Schofield expressed concern over whether the “owners and editors of newspapers and periodicals, like everyone else, [had] fallen victim to the ‘dollar culture’ or ‘fierce game of money.’”¹⁶³ Schofield was not the only meeting attendee that day to communicate this concern. Columbia University sociology professor Alvan A. Tenney also questioned “whether or not economic and social influences are unduly fettering the press.”¹⁶⁴ Likewise, University of Wisconsin sociology professor Edward A. Ross felt that, going forward, the “real menace to the freedom of the periodical press” was “not from law-makers or courts, but from [newspapers’] progressive subjection to the profits motive.”¹⁶⁵ This “capitalistic” shift in the newspaper business, according to Ross, would lead to the gradual substitution of “business standards and ideals for professional [journalistic] standards and ideals.”¹⁶⁶

Of course, professors Schofield, Tenney, and Ross were not newspapermen and, therefore, had little to no understanding of the newspaper business, particularly its operational and financial intricacies. However, *Baltimore Sun* owner Charles H. Grasty did. And, as Grasty eloquently explained to his fellow meeting attendees that although most newspaper revenue was indeed generated from outside business interests, particularly through the selling of advertisements, those business interests did not control or decide the news and editorial content of the newspaper.¹⁶⁷ Rather, the outside business revenue merely provided consumers with a newspaper at a much lower cost.¹⁶⁸ And naturally, at a lower cost, a newspaper will attract more consumers, but only so long as the consumers are confident that the newspaper maintains the “strictest adherence to public standards.”¹⁶⁹ In other words, according

¹⁶² See, e.g., McConnell, *supra* note 14, at 439; Tom A. Collins, *The Press Clause Construed in Context: The Journalists’ Right of Access to Places*, 52 MO. L. REV. 751, 762–63 (1987); see also C. Edwin Baker, *Press Rights and Government Power to Structure the Press*, 34 U. MIA. L. REV. 819, 858 (1980) (outlining how private economic interests may serve as a threat to the freedom of the press).

¹⁶³ Henry Schofield, *Freedom of the Press in the United States*, 9 AM. SOCIO. SOC’Y PROC. 67, 115 (1914).

¹⁶⁴ Alvan A. Tenney, *Discussion of Reasonable Restrictions upon Freedom of the Press*, 9 AM. SOCIO. SOC’Y PROC. 125, 125–26 (1914).

¹⁶⁵ Edward A. Ross, *Discussion of Reasonable Restrictions upon Freedom of the Press*, 9 AM. SOCIO. SOC’Y PROC. 131, 131 (1914).

¹⁶⁶ *Id.*

¹⁶⁷ Charles H. Grasty, *Reasonable Restrictions Upon Freedom of the Press*, 9 AM. SOCIO. SOC’Y PROC. 117, 119 (1914).

¹⁶⁸ *Id.* at 120.

¹⁶⁹ *Id.*

to Grasty, a newspaper's "power to make money . . . rest[ed] mainly on its consecration to the public service."¹⁷⁰

The concern over 'corporate greed' and its impact on press freedom once more reared its head in the mid- to late 1930s, a time when President Franklin D. Roosevelt was quarreling with newspaper owners and editors over what he perceived to be a lack of professional journalistic standards and ethics.¹⁷¹ Roosevelt's biggest gripe was his belief that newspaper owners and editors were choosing and publishing their news stories based solely on profit motive—a concern Roosevelt outlined in a November 2, 1938, letter to Joseph Pulitzer.¹⁷² Therein, Roosevelt accused newspaper owners and editors of choosing and publishing their news stories not "in the interests of the general public, [but] from the counting room."¹⁷³ What Roosevelt meant by the "counting room" was a largely fictional room where newspaper owners and editors tallied the money they made from their news reporting and editorializing.¹⁷⁴ Roosevelt then asked Pulitzer if there could be a "national symposium" on the question of whether the alleged "counting room" practice is consistent with the "freedom of the press"—a phrase that was "greatly overworked" by newspaper editors.¹⁷⁵

Pulitzer obliged Roosevelt's request by hosting a symposium on the "counting room" question in the *St. Louis Post-Dispatch*.¹⁷⁶ Over a period of five days, a total of fifty-nine essays from newspaper editors, publishers, historians, scholars, and lawmakers appeared in the pages of the *St. Louis Post-Dispatch*.¹⁷⁷ While several symposium participants agreed with Roosevelt that newspaper owners and editors too frequently hid behind the phrase "freedom of the press,"¹⁷⁸ most disagreed with

¹⁷⁰ *Id.* at 121.

¹⁷¹ See POLLARD, *supra* note 97, at 781–811. For more on Roosevelt's relations with the news media, see Richard W. Steele, *The Great Debate: Roosevelt, the Media, and the Coming of the War, 1940–1941*, 71 J. AM. HIST. 69 (1984); B.H. Winfield, *Franklin D. Roosevelt's Efforts to Influence the News during His First Term Press Conferences*, 11 PRES. STUD. Q. 189 (1981).

¹⁷² Franklin D. Roosevelt, Letter of Congratulations to the *St. Louis Post-Dispatch*, Nov. 2, 1938, AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/letter-congratulations-the-st-louis-post-dispatch> [<https://perma.cc/57PL-GG9D>].

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* Roosevelt's assertion that the newspaper owners and editors of his era did not understand or abide by the true "freedom of the press" is as old as the freedom itself. See Livingston, *supra* note 122, at 162 ("The Press is for ever in the Mouths of Printers, and one would imagine that as they live by its Liberty, they would understand its true Limits . . .").

¹⁷⁶ See Nikki Usher, *Resurrecting the 1938 St. Louis Post-Dispatch Symposium on the Freedom of the Press*, 11 JOURNALISM STUD. 311, 313 (2010).

¹⁷⁷ *Id.* at 313–14.

¹⁷⁸ See, e.g., Virginius Dabney, *Post-Dispatch Symposium on Freedom of the Press*, ST. LOUIS POST-DISPATCH, Dec. 17, 1938, at 5A ("I share the feeling of President Roosevelt that

the President's assertion regarding the "counting room."¹⁷⁹ From this latter group of symposium participants, several dismissed Roosevelt's assessment outright.¹⁸⁰ "Of course there are good newspapers and bad ones, just as there are fine public officials and shoddy ones," wrote *Baltimore Sun* political writer Frank R. Kent, "But to suggest that the news and editorial policies of the really representative newspapers . . . are dictated or controlled by the [revenue generated from] advertising departments is as unjust as it is absurd."¹⁸¹ Other symposium participants, however, were more restrained in their dismay, such as C.L. Blanton, Sr., the owner and editor of the Missouri-based *Sikeston Standard*, who felt that Roosevelt's "counting room" assessment did not accurately portray how most rural newspapers operated.¹⁸² "We believe in freedom of the press on this newspaper to the extent that we always say what we think when we think it," wrote Blanton, adding, "Long ago we found out that speaking the truth bluntly made more genuine friends for a newspaper than evading the issue ever did."¹⁸³

Several symposium participants echoed Blanton's view. Each noted how it was not in the newspapers' best financial interest to disseminate highly partisan, non-objective publications.¹⁸⁴ "I know few if any newspaper men, whether publishers or

in some quarters there has been excessive emphasis on the supposed danger to freedom of the press in America."); Oswald Garrison Villard, *Post-Dispatch Symposium on Freedom of the Press*, ST. LOUIS POST-DISPATCH, Dec. 16, 1938, at 1D ("Some of the newspapers that have been shrieking loudest about the alleged dangers to the freedom of the press from President Roosevelt personally and the New Deal as a whole are among the worst offenders in the matter of news that should be printed, or in toning it down or playing it up for partisan purposes.").

¹⁷⁹ See, e.g., Carl W. Jones, *Post-Dispatch Symposium on Freedom of the Press*, ST. LOUIS POST-DISPATCH, Dec. 15, 1938, at 4C ("The accusation that editorial opinions are controlled from the business office is often made, and as a rule unjustly."); Alfred H. Kirchhofer, *Post-Dispatch Symposium on Freedom of the Press*, ST. LOUIS POST-DISPATCH, Dec. 14, 1938, at 1C ("No intelligent newspaper man contends that newspapers can be edited in the interests of the general public, or even in the best interest of their owners, 'from the counting room.'"); James G. Stahlman, *Post-Dispatch Symposium on Freedom of the Press*, ST. LOUIS POST-DISPATCH, Dec. 13, 1938, at 1A ("I do not subscribe . . . to [the] implication that the newspapers of America are edited from the counting room.").

¹⁸⁰ See, e.g., W.F. Wiley, *Post-Dispatch Symposium on Freedom of the Press*, ST. LOUIS POST-DISPATCH, Dec. 16, 1938, at 6D; Arthur H. Vandenburg, *Post-Dispatch Symposium on Freedom of the Press*, ST. LOUIS POST-DISPATCH, Dec. 15, 1938, at 1C.

¹⁸¹ Frank R. Kent, *Post-Dispatch Symposium on Freedom of the Press*, ST. LOUIS POST-DISPATCH, Dec. 15, 1938, at 4C.

¹⁸² C.L. Blanton, Sr., *Post-Dispatch Symposium on Freedom of the Press*, ST. LOUIS POST-DISPATCH, Dec. 16, 1938, at 6D.

¹⁸³ *Id.*

¹⁸⁴ But see Wirt McClintic Mitchell, *Post-Dispatch Symposium on Freedom of the Press*, ST. LOUIS POST-DISPATCH, Dec. 15, 1938, at 4C (asserting that "country" or rural newspapers were highly susceptible to partisan political pressures).

editors, who have not shown courageous determination to maintain freedom of expression in the columns of their publications,” wrote *Pittsburgh Post-Gazette* publisher Paul Block, adding, “The day has passed when a newspaper editorially supporting a given party devotes most of its news space to that party.”¹⁸⁵ Similarly, *Wall Street Journal* managing editor William H. Grimes wrote, “Without [an honest and balanced representation of the news] no newspaper was ever a permanent success. The newspaper official . . . who does not know this need cause us no concern; he will not be long in his post.”¹⁸⁶ Meanwhile, both *Evening Star* political writer G. Gould Lincoln and *Washington Post* editor Felix Morley thought that Roosevelt’s “counting room” assessment was a gross oversimplification of the newspaper business as a whole.¹⁸⁷ In the case of Morley, although he conceded that the proverbial “counting room” was indeed a consideration whenever newspaper editors decided which news stories to publish, it was only “one among many important factors.”¹⁸⁸ Morley elaborated on this point, writing:

It must be frankly recognized that the free newspaper is inevitably a commercial enterprise. To endure, let alone be free, the newspaper must be commercially successful. Circulation, and the advertisements which follow circulation, may prove to be limitations on the freedom of a newspaper. *But they are also the indispensable prerequisites of its freedom.* For the only alternative to a profit-making press is a [government] subsidized press.¹⁸⁹

Morley’s point, like that of Grasty’s point two decades earlier, is an astute one for modern press freedom skeptics to keep in mind whenever they put forward the ‘corporate greed’ argument. Historically, a capitalistic press is a free press and vice versa. The alternative, a government-subsidized or licensed press, only undercuts a free press as a palladium of liberty—that is, as effective constitutional counterpoises to a corrupt and tyrannical government. The founding generation inherently understood this given their knowledge of English history.¹⁹⁰ And it is why virtually

¹⁸⁵ Paul Block, *Post-Dispatch Symposium on Freedom of the Press*, ST. LOUIS POST-DISPATCH, Dec. 16, 1938, at 6D.

¹⁸⁶ William H. Grimes, *Post-Dispatch Symposium on Freedom of the Press*, ST. LOUIS POST-DISPATCH, Dec. 16, 1938, at 6D.

¹⁸⁷ Felix Morley, *Post-Dispatch Symposium on Freedom of the Press*, ST. LOUIS POST-DISPATCH, Dec. 16, 1938, at 1D; G. Gould Lincoln, *Post-Dispatch Symposium on Freedom of the Press*, ST. LOUIS POST-DISPATCH, Dec. 13, 1938, at 1D.

¹⁸⁸ Morley, *supra* note 187, at 1D.

¹⁸⁹ *Id.* (emphasis added).

¹⁹⁰ See, e.g., ST. GEORGE TUCKER, VIEW OF THE CONSTITUTION OF THE UNITED STATES WITH SELECTED WRITINGS 377–78, 384–85 (1999) (discussing the American lessons learned from the English history).

all founding-era American newspapers were principally funded by advertisements.¹⁹¹ Not only did these advertisements provide newspaper owners and editors with publishing independence, but they also ensured that newspaper owners and printers could sell their product at a lower cost, which in turn afforded more people the opportunity to purchase newspaper subscriptions.¹⁹² And the more newspaper subscriptions there were, the greater the circulation, and therefore the more attractive a newspaper became for future advertisers.¹⁹³ Needless to say, the circular capitalism model of a free press has long been part of our American tradition, and therefore, the ‘corporate greed’ argument is unpersuasive as a matter of history-in-law.¹⁹⁴

C. The Press Is Politically Biased

Today, it is no secret that several media organizations are politically and ideologically biased.¹⁹⁵ There is little attempt to hide it. For instance, Fox News is quite vocal in its disdain for political liberalism and the Democratic Party.¹⁹⁶ Conversely, MSNBC is quite vocal in its disdain for political conservatism and the Republican Party.¹⁹⁷ This is not to say, of course, that Fox News only broadcasts politically conservative and Republican points of view, and that MSNBC only broadcasts politically liberal and Democratic points of view.¹⁹⁸ It just means that these media

¹⁹¹ See, e.g., Republicus, *supra* note 75, at 4 (noting how advertisements attribute to the “present cheapness of News-Papers”); Thomas, *supra* note 102, at 4 (“[A]dvertisements are the only support of News-Papers in this country, where News-Papers are at so low a price.”); see also CLARENCE S. BRIGHAM, JOURNALS AND JOURNEYMEN 27 (1950) (“Advertisements in early newspapers were the chief source of revenue, as it has always been from the beginning to the present day.”).

¹⁹² MOTT, *supra* note 135, at 56–60, 104–05.

¹⁹³ *Id.*

¹⁹⁴ This is not to say that “we the people” should ever lose sight of the potential or possibility for our news media organizations to be guided primarily by “corporate greed.” However, in the pantheon of our history, this has been a self-correcting mechanism, whether it be due a loss of subscribers or advertising revenue.

¹⁹⁵ See, e.g., Amy Mitchell et al., *Section 1: Media Sources: Distinct Favorites Emerge on the Left and Right*, PEW RSCH. CTR. (Oct. 21, 2014), <https://www.pewresearch.org/journalism/2014/10/21/section-1-media-sources-distinct-favorites-emerge-on-the-left-and-right/> [<https://perma.cc/GB5X-VR6G>].

¹⁹⁶ John Gramlich, *5 Facts About Fox News*, PEW RSCH. CTR. (Apr. 8, 2020), <https://www.pewresearch.org/short-reads/2020/04/08/five-facts-about-fox-news/> [<https://perma.cc/255B-2VDG>].

¹⁹⁷ Alessandra Stanley, *How MSNBC Became Fox’s Liberal Evil Twin*, N.Y. TIMES (Aug. 31, 2012), <https://www.nytimes.com/2012/08/31/us/politics/msnbc-as-foxs-liberal-evil-twin.html> [<https://perma.cc/GSF4-DCS3>].

¹⁹⁸ See, e.g., Alexis Sobel Fitts, *And from the Left . . . Fox News*, COLUM. JOURNALISM REV. (Mar. 3, 2014), https://archives.cjr.org/feature/and_from_the_leftfox_news.php [<https://perma.cc/4J6Q-EL9C>].

organizations purposefully program and disseminate the news in a way that is politically polarizing. Given this fact, as well as the American public's growing distrust of mainstream media outlets,¹⁹⁹ it is understandable why anyone would be skeptical or uneasy with jurisprudentially recognizing any distinct constitutional press freedoms. Why afford protection to those members of the press who are clearly not impartial purveyors of the news?

The short answer is that all viewpoints, including those that are politically biased or polarizing, are already protected under the First Amendment. The longer answer requires returning to the debate over what constituted the "freedom of the press," "liberty of the press," and a "free press" circa the mid- to late eighteenth century. While some Americans living at that time (usually government officials criticized by the press)²⁰⁰ viewed the protections afforded by the "freedom of the press," "liberty of the press," and a "free press" quite narrowly, most Americans embraced the broader, part libertarian and part utilitarian conception of press freedom.²⁰¹ And within this broader, libertarian-utilitarian conception of press freedom was a carve out for partisanship and bias.²⁰² As historian Charles A. Beard aptly wrote in 1938, the founders' conception of press freedom included the "right to be just or unjust, partisan or non-partisan, true or false, in news column and editorial column."²⁰³ Indeed, virtuous mid- to late-eighteenth-century newspaper owners and editors continually strived for news and information impartiality—that is they intently sought to relay the truth, whatever it may be, to their readers.²⁰⁴ However, as everyone knows, humans are fallible. And so, even virtuous newspaper owners and editors maintained some level of inherent bias, and therefore the political news and information they conveyed were oftentimes only partly true, or not true at all in some cases if it was merely a newspaper owner's or editor's flawed perception of the truth.

That these early American newspaper owners and editors were, at some level or another, politically biased, whether intentionally or not, has led some press

¹⁹⁹ See, e.g., Mark Jurkowitz et al., *1. Democrats Report Much Higher Levels of Trust in a Number of News Sources than Republicans*, PEW RSCH. CTR. (Jan. 24, 2020), <https://www.pewresearch.org/journalism/2020/01/24/democrats-report-much-higher-levels-of-trust-in-a-number-of-news-sources-than-republicans/> [<https://perma.cc/Z5J3-MBWX>]; Stefano DellaVigna & Ethan Kaplan, *The Political Impact of Media Bias*, in INFORMATION AND PUBLIC CHOICE 79, 79–106 (Roumeen Islam ed., 2008).

²⁰⁰ See MOTT, *supra* note 135, at 103–04.

²⁰¹ SMITH, *supra* note 42, at 32, 35–36.

²⁰² As early as the mid-eighteenth century, political partisanship and bias have been part of the newspaper business. *Id.* at 129–41.

²⁰³ Charles A. Beard, *Post-Dispatch Symposium on Freedom of the Press*, ST. LOUIS POST-DISPATCH, Dec. 17, 1938, at 5A; see also James Truslow Adams, *Post-Dispatch Symposium on Freedom of the Press*, ST. LOUIS POST-DISPATCH, Dec. 13, 1938, at 1A ("Freedom of the press should not be confused with the purity of the press. Both are important but they are wholly different, just as are freedom and purity in political life.").

²⁰⁴ Charles & O'Neill, *supra* note 19, at 1723–24, 1731.

freedom skeptics to conclude that the Press Clause was never understood by the founders to provide distinct constitutional press freedoms related to news reporting. As one press freedom skeptic has put it, “Given the partisan state of newspapers and pamphlets during the Framing, it seems evident that the Framers had a much broader notion of ‘the press’ than pure news reporting.”²⁰⁵ In other words, because the mid- to late-eighteenth-century newspapers “did more than simply report news stories,” press freedom skeptics believe that one must automatically conclude that the founders understood a “free press” to be synonymous with the ‘press-as-a-technology’ model argument.²⁰⁶

There are several glaring flaws with this press-freedom-skeptic line of historical argument. For one, it improperly assumes that because mid- to late-eighteenth-century newspapers published a variety of news content, such content was irrelevant to the founding generation. This is quite a large historical assumption that requires substantiated evidence to support it, yet there is no such evidence that we are aware of. Additionally, this press-freedom-skeptic line of historical argument flies directly in the face of the bulk of the evidentiary record—a record that shows that the principal function of a “free press” and its many parts was to keep the administration of government as transparent and honest as possible. Performing this function required newspaper owners and printers to solicit and report the news of the day as best they could.²⁰⁷ Were the journalistic standards and practices of the founding era as rigorous and professional as those of today? Of course not. Was information sharing as technologically advanced and government record keeping as tedious in the mid- to late eighteenth century as it is today? Again, of course not. Answering ‘no’ to these questions, however, does not negate the fact that a constitutional “free press,” at least as it was understood by the founding generation, regularly provided the people with the relevant news and information of the day and such news and information was deemed crucial to the sustainment of our constitutional republic.²⁰⁸

That the founders’ conception of a “free press” included the right of printers and newspapermen to espouse their political partisanship and bias is not to suggest that

²⁰⁵ Lee, *supra* note 24, at 342.

²⁰⁶ *Id.*

²⁰⁷ See, e.g., ROBERT W. JONES, JOURNALISM IN THE UNITED STATES 153 (1st ed. 1947). The *Massachusetts Centennial and Republican Journal* laid out its editorial policy in its first issue in 1784:

The publishers engage to use every effort to obtain, and the most scrupulous circumspection in collecting whatever may be thought of public utility, or private amusement: Variety shall be courted in all its shapes, in the importance of political information—in the sprightliness of mirth—in the playful levity of imagination—in the just severity of satire—in the vicacity of ridicule—in the luxuriance of poetry—and in the simplicity of truth.

Id.

²⁰⁸ Charles & O’Neill, *supra* note 19, at 1744–45, 1750–51.

the founders viewed all political writings as being protected under the umbrella of the First Amendment. The doctrine of libel provided an important legal check on any printer or newspaperman who published material that was knowingly false and breached the peace.²⁰⁹ However, outside the doctrine of libel, the founders' views on a "free press" were quite progressive.²¹⁰ To the founders, a truly "free press" was self-correcting—a pendulum of truth, if you will, between opposing political viewpoints and writers in which the truth would ultimately prevail over falsehood.²¹¹

D. Press Freedom Is Undesirable

Undoubtedly, the most common argument against recognizing distinct constitutional press freedoms is that they are undesirable. Over the past five decades, press freedom skeptics have proffered several so-called 'pragmatic' reasons for advancing this line of argument.²¹² One such reason is that the recognition of any special constitutional protections for the press will end up exacerbating journalistic arrogance.²¹³ Another such reason is that the recognition of any distinct press freedoms will eventually lead to more government regulation of the press.²¹⁴ Of course, so-called 'pragmatic' reasons such as these are not legally binding, nor are they all that persuasive in a court of law. Two so-called 'pragmatic' reasons proffered by press freedom skeptics over the years, however, have proved quite persuasive within the public discourse.²¹⁵ The first is that the recognition of any distinct press freedoms will result in the loss or dissolution of First Amendment freedoms for everyone

²⁰⁹ See *supra* notes 126–31 and accompanying text.

²¹⁰ See, e.g., Letter from Thomas Jefferson to Edward Carrington, *supra* note 118 ("The people are the only censors of their governors; and even their errors will tend to keep these to the true principles of their institution. To punish these errors too severely would be to suppress the only safeguard of the public liberty. The way to prevent these irregular interpositions of the people is to give them full information of their affairs thro' the channel of the public papers, and to contrive that those papers should penetrate the whole mass of the people.").

²¹¹ The founders' view that a "free press" was self-correcting was borrowed from late seventeenth-century and early to mid-eighteenth-century English writers. See Charles & O'Neill, *supra* note 19, at 1716–17.

²¹² But see C. Edwin Baker, *The Independent Significance of the Press Clause under Existing Law*, 35 HOFSTRA L. REV. 955, 1024–26 (2007) (proffering five pragmatic reasons why the Press Clause should provide distinct constitutional press freedoms).

²¹³ Lewis, *supra* note 16, at 626.

²¹⁴ See Van Alstyne, *supra* note 17, at 770.

²¹⁵ Both arguments are asserted by Chief Justice Warren Burger in *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 797–98, 801 (1978) (Burger, C.J., concurring) (opposing any interpretation of the Press Clause "as somehow conferring special and extraordinary privileges or status on the 'institutional press'—which are not extended to those who wish to express ideas other than by publishing a newspaper" and stressing the difficulty of defining the class of speakers whom the Press Clause should protect).

else.²¹⁶ The second is that it is far too difficult to jurisprudentially differentiate members of the institutional press from everyone else.²¹⁷

Starting with the first persuasive reason—that the recognition of any distinct press freedoms will result in the loss or dissolution of First Amendment freedoms for everyone else—it is nothing more than a false Sophie’s choice. Perhaps if there was a jurisprudential doctrine that required the courts to choose only one interpretational carve out for every constitutional provision, this so-called ‘pragmatic’ reason would be persuasive. However, as far as we know, there is no such doctrine that requires constitutional text be interpreted in a manner that only protects one constitutional right, not two or more.

This brings us to the second, so-called ‘pragmatic’ reason as to why the recognition of any distinct constitutional press freedoms is undesirable; it is far too difficult to jurisprudentially differentiate members of the institutional press from everyone else. Granted, differentiating who does and does not qualify as a member of the press is not an easy task, and certainly there are jurists, including the late Associate Justice Antonin Scalia, who would prefer not to make this differentiation.²¹⁸ However, just because the task is difficult does not mean it is impossible, as we will expound upon in Part III. More importantly, though, as a matter of constitutional law, ‘difficulty’ is not a very convincing justification for failing to interpret the Constitution and Bill of Rights. Would the courts be justified in saying it is too difficult to determine what exactly constitutes “arms” under the Second Amendment and, therefore, not answer the question?²¹⁹ And what about the long-standing common law prohibition on “dangerous and unusual weapons”?²²⁰ Would it be acceptable for the courts to say it is too difficult to determine which “arms” are too dangerous or unusual to fall outside the constitutional umbrella of the Second Amendment? The answers to both questions are obviously ‘no’. So, why does the ‘it is too difficult to differentiate who constitutes the press’ rationale continue to hold sway in our constitutional discourse? The courts answer difficult constitutional questions all the time.²²¹ Determining who qualifies as a member of the press under the Press Clause should be no different.

²¹⁶ See, e.g., Robert D. Sack, *Reflections on the Wrong Question: Special Constitutional Privilege for the Institutional Press*, 7 HOFSTRA L. REV. 629, 651–52 (1979).

²¹⁷ See, e.g., McConnell, *supra* note 14, at 438–45.

²¹⁸ FREEDOM OF THE PRESS, *supra* note 2, at 25 (quoting then Assistant Attorney General Scalia as stating: “I wouldn’t want to be on the other side in court, having to demonstrate that distinction”).

²¹⁹ See *supra* note 157 and accompanying text.

²²⁰ For a discussion on this difficulty, see Patrick J. Charles, *The Fugazi Second Amendment: Bruen’s Text, History, and Tradition Problem and How to Fix It*, 71 CLEV. ST. L. REV. 623, 677–78 (2023).

²²¹ The difficulty of defining due process has not deterred the courts from finding both procedural and substantive protections in that constitutional clause. See ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 557–58 (4th ed. 2011) (explaining the distinction between procedural and substantive due process).

Perhaps if the mid- to late-eighteenth-century evidentiary record on the “freedom of the press,” “liberty of the press,” and a “free press” was as barren as an empty cupboard, these so-called ‘pragmatic’ reasons for denying distinct constitutional press freedoms under the Press Clause would be convincing. To state this differently, if there were no historical evidence available, it would be increasingly difficult, if not impossible, for anyone to assert or for the courts to rule in favor of press freedom. This is not the case, however. The historical record is replete with examples where mid- to late-eighteenth-century Americans acknowledged the constitutional utility of the “freedom of the press,” “liberty of the press,” and a “free press.”²²² In light of this history, with all due respect to press freedom skeptics, whatever so-called ‘pragmatic’ reasons can be mustered for denying distinct constitutional press freedoms under the Press Clause, they are unavailing as a matter of history-in-law.

The point to be made is that the debate over the constitutional utility of press freedom was decided over 230 years ago. *News flash*—press freedom won. Since that time, debate over the utility of constitutional press freedom and its limits has raged periodically in our public discourse. The 1938 symposium hosted by the *St. Louis Post-Dispatch* is one case in point. Therein, several participants expounded upon the utility of a press freedom, but none so eloquently as Kansas Senator Arthur Capper.²²³ At the time, the German Nazi Party had virtually eliminated the country’s independent press, thereby facilitating the political rise of Adolph Hitler, as well as the rise of fascism across Europe. Keenly aware of this consequential development, Capper, who owned the *Topeka Daily Capital*, and was therefore intimately familiar with the roles and responsibilities of a free press, penned the following response to late-1930s press freedom critics:

We have heard a great deal in recent years about the traditional American rights of freedom of the press. It is a subject which should be discussed thoroughly, particularly in these turbulent times when a large portion of the civilized world has lost all freedom. It is significant that in the process of seizing dictatorial power, the first step has been suppression of the press. Tyranny cannot tolerate a free press. . . .

Every successful publisher knows he owes his success to the fact that he prints fairly the news pertaining to the political, economic and social life of his community, and of the world. A

²²² See *supra* notes 89–93, 124–26 and accompanying text.

²²³ Arthur Capper, *Post-Dispatch Symposium on Freedom of the Press*, ST. LOUIS POST-DISPATCH, Dec. 15, 1938, at 1C.

considerable portion of the criticism aimed at newspapers these days is based on the premise that free and unlimited discussion on governmental projects, or certain proposals by Government officials, resulted in their defeat by an aroused public opinion. To my mind, this is the greatest argument imaginable for the perpetuation of a free press, without censorship which might forestall the presentation of all the news originating at Government sources. . . .

In my long years of experience as a public official and as a newspaper publisher, I have found that often the majority party in power tends to become despotic unless the minority has the means of expression. A free press supplies that medium, and often nips in the bud a move toward dictatorship. This is a responsibility every publisher owes his readers, and his community.

So long as the American press remains free from the censorship of government, or pressure groups—and yes, [even] from its advertisers—our democratic form of government is safe. Freedom of press and democracy go hand in hand. Neither can exist without the other. This is graphically demonstrated in the present trend in Europe, where the people first lost their freedom of the press, thus were easy victims of governmentally-inspired propaganda, and eventual slavery. Corrupt or tyrannical officials cannot maintain power if the public is informed of their speculations.²²⁴

Two years later, in a collection of essays put together by news correspondent Harold L. Ickes, titled *Freedom of the Press Today*, Capper penned another eloquent response to press freedom critics. Therein, Capper wrote how press freedom extended to both “the people” in their individual and collective capacity, the latter of which came via the institutional press “so that the people may have an agency separate from government able to reach farther than the voice of the individual.”²²⁵ In expressing his understanding of press freedom, Capper conceded that the American press was not without its problems and faults. “[It is an] undisputed fact that some publishers at some times abuse that freedom and do not place first the public interest,” wrote Capper.²²⁶ However, to Capper, the utility of press freedom far outweighed any burdens.

²²⁴ *Id.* at 1C, 4C.

²²⁵ Arthur Capper, *Licensed Freedom Is Not Freedom*, in *FREEDOM OF THE PRESS TODAY* 65, 65–66 (1941).

²²⁶ *Id.* at 69.

If the subject of this discussion [on press freedom] was Faults of the Press, instead of Freedom of the Press, one could point to many.

Many publishers have abused the freedom of the press guaranteed by the Constitution; many have stretched the construction of freedom to do things contrary to public policy. On the other hand, many have not.

But the remedy for admitted abuse of freedom of the press committed by some is not to destroy freedom of the press. . . .

Because freedom of the press is guaranteed against encroachment by the federal government in order to maintain one avenue for free expression by the people, the press is in the position of trustee and guardian for that right of expression.²²⁷

Capper's eloquent defense of press freedom, whether Capper knew it or not, aligned perfectly with that of the founding generation. The founders understood that a constitutional "free press" was easily susceptible to manipulation and abuse by unscrupulous actors. At the same time, however, the founders wholeheartedly believed that through a constitutional "free press" the truth would ultimately prevail—so long as printers, newspapermen, correspondents, and the other parts that made up a constitutional "free press" were allowed to exercise their palladium of press freedom. It is high time that our courts acknowledge this. Part III provides the jurisprudential roadmap.

III. A JURISPRUDENTIAL ROADMAP FOR RECOGNIZING PRESS FREEDOMS

Under the Supreme Court's modern First Amendment jurisprudence, the press enjoys extraordinary protections against censorship and prior restraint, but those protections were developed under the Speech Clause, not the Press Clause.²²⁸ The

²²⁷ *Id.* at 68.

²²⁸ *See, e.g.,* *Florida Star v. B.J.F.*, 491 U.S. 524, 541 (1989) (relying not upon the Press Clause but upon First Amendment precedent protecting public access to government information). There, in violation of a state statute and its own internal policy, a newspaper published the name of a rape victim, having obtained this information from a publicly released police report; the rape victim brought suit against the newspaper, winning both compensatory and punitive damages; the Supreme Court ruled that, under these circumstances, imposing money damages against the newspaper was a violation of the First Amendment. *Id.* at 526–29. The Court held that "where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order." *Id.* at 526, 541; *see also* *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 542, 559, 570, 588 (1976) (relying on prior restraint precedent developed under the

Court has consistently refused to breathe independent life into the Press Clause,²²⁹ holding that the press enjoys no special power or privilege to gather information,²³⁰ the press enjoys no greater right of access to government information or proceedings than that enjoyed by the general public,²³¹ and the press enjoys no special immunity from governmental demands for information in its possession.²³²

A Supreme Court majority has not undertaken a serious inquiry into the historical underpinnings of the Press Clause since 1931 in *Near v. Minnesota*.²³³ Potter

Speech Clause to strike down a gag order on press coverage of a murder trial that barred newspapers and broadcasters from reporting any confession by, or inculpatory information about, the accused and reaffirming that “[a]ny prior restraint on expression comes to this Court with a ‘heavy presumption’ against its constitutional validity”); *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam) (relying on prior restraint precedent developed under the Speech Clause and striking down injunctions that barred the *New York Times* and *Washington Post* from publishing excerpts from the “Pentagon Papers,” a top secret Defense Department study of the Vietnam War).

²²⁹ See, e.g., *Zurcher v. Stanford Daily*, 436 U.S. 547, 565 (1978) (rejecting the notion that the Press Clause affords the news media any greater protection from search and seizure than it does for other citizens); *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 797–801 (1978) (Burger, C.J., concurring) (rejecting the notion that the Press Clause affords any special protection to the institutional press); *Pell v. Procunier*, 417 U.S. 817, 833–34 (1974) (rejecting the notion that the Press Clause affords journalists any greater right of access to prisons than that enjoyed by the public generally); *Branzburg v. Hayes*, 408 U.S. 665, 690–91 (1972) (rejecting the notion that the Press Clause affords reporters any greater protection from grand jury subpoenas than it does for other citizens).

²³⁰ *Branzburg*, 408 U.S. at 707, 727–28 (acknowledging that “news gathering is not without its First Amendment protections,” but rejecting a broad right to gather news proposed by Justice Stewart in dissent); *Pell*, 417 U.S. at 833–34 (rejecting a Press Clause challenge to a California penal provision that barred face-to-face interviews between a reporter and any individual inmate whom the reporter specifically named and requested and reaffirming that “the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally”).

²³¹ *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575–76 (1980) (invoking the Speech, Press, Assembly, and Petition clauses of the First Amendment, in combination, to support a broad public “right to know” about governmental proceedings, the Court recognized a general right of public and press access to criminal trials—but the press enjoys only that degree of access possessed by the public generally).

²³² *Zurcher*, 436 U.S. at 550–51, 567–68 (upholding unannounced police raid and search of student newspaper’s offices, where police had a warrant to search for photographs of student protesters who assaulted police while seizing control of a university hospital’s administrative offices—holding that so long as a police search satisfies the Fourth Amendment, the First Amendment affords the news media no special protection from search and seizure); *Branzburg*, 408 U.S. at 708–09 (holding that reporters can be compelled to disclose their investigative findings and the identities of their confidential sources when subpoenaed to testify before grand juries, with no offense to the First Amendment).

²³³ 283 U.S. 697 (1931) (striking down an injunction that perpetually enjoined the *Saturday Press* from publishing any malicious, scandalous, or defamatory material). The paper had been sharply critical of the Minneapolis police chief, accusing him of “gross neglect of duty, illicit relations with gangsters, and . . . participation in graft” in allowing “a Jewish gangster”

Stewart's lonely crusade to establish an independent meaning for the Press Clause, grounded upon the historical vision of the press as a structural check on government power,²³⁴ was shot down in 1978 by Chief Justice Warren Burger.²³⁵ Taking a stance that the Court has held ever since, Burger asserted that the Press Clause is essentially synonymous with the Speech Clause.²³⁶ He rejected any interpretation of the Press Clause as "creating a special role for the 'institutional press.'"²³⁷ He insisted that the Press Clause confers no special status or privilege upon the news media and that the press enjoys no greater freedom from governmental restraint than any other speaker.²³⁸

The historical findings set forth in this Article show that the Press Clause was never intended to be an empty reiteration of the Speech Clause. They show that the historical record *supports* Justice Potter Stewart's vision of the Press Clause as a "structural provision" whose "primary purpose" was to create a "Fourth Estate"—a government watchdog that would offer "organized, expert scrutiny" of public officials.²³⁹

Since that is the central function of the Press Clause, it must govern our jurisprudential roadmap, shaping our answers to the following four questions:

1. What sort of activities does the Press Clause protect?
2. Whom does it protect?
3. Under what circumstances do heightened Press Clause protections kick in?
4. What do those heightened protections look like?

We will address these four questions in turn.

to control all "gambling, bootlegging, and racketeering" in the city. *Id.* at 704. At this early date, the Supreme Court was not yet speaking interchangeably of Speech and Press and was not yet treating the Press Clause as merely synonymous with the Speech Clause. The majority opinion by Chief Justice Charles Evans Hughes has two significant features. First, the Court consulted a wide number of eighteenth-century sources—ranging from Blackstone and De Lolme on English law to James Madison on the early state constitutions to the journal of the Continental Congress—all in an effort to grasp the early historical conception of press freedom. *Id.* at 713–18. Second, in marshaling these authorities, the Court singled out the principal value of press freedom: the role of the press as government watchdog, exposing official misconduct to public view. *Id.* at 716–17.

²³⁴ See Stewart, *supra* note 8, at 633–34.

²³⁵ First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 798–802 (1978) (Burger, C.J., concurring).

²³⁶ *Id.* at 800–02.

²³⁷ *Id.* at 799.

²³⁸ *Id.* at 802.

²³⁹ Stewart, *supra* note 8, at 633–34 (emphasis omitted); accord West, *supra* note 26, at 89 ("The historical rhetoric of press freedom . . . showed that the framers primarily valued the structural role of the press—the need for a nongovernmental institution that will check the government through informed opinion and knowledgeable scrutiny. The lived experiences of the early press, moreover, support this view." (footnote omitted)).

A. What Sort of Activities Does the Press Clause Protect?

If grounded upon the historical record, the core activities of the press are monitoring government behavior, investigating government corruption, and exposing government lies. By performing these activities, the press fulfills its constitutional role as a structural check on government power.

The First Amendment serves the *democracy* that our Constitution created.²⁴⁰ A healthy democracy requires an informed citizenry—and this is where the press derives its *constitutional* role: to keep the people apprised of the government’s conduct so that they can make knowledgeable use of their voting power.²⁴¹

At the very center of this constitutional role are press revelations of government lies and corruption. By uncovering the Watergate affair, the press exposed the widespread corruption of the Nixon administration.²⁴² By publishing the Pentagon Papers, the press revealed that five consecutive Presidents lied to the American people about the conduct of the Vietnam War.²⁴³

Government lies are nothing new. But the emergence of Donald Trump as a major force in American politics has highlighted the constitutional role of the press as a lie detector. During his first term as President, Trump lied more than 30,000 times.²⁴⁴

²⁴⁰ *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (the protections of the First Amendment are “essential to effective democracy”), *overruled on other grounds by* *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969); *First Nat’l Bank of Bos.*, 435 U.S. at 777 (discussing governmental affairs, as protected by the First Amendment, as “indispensable to decisionmaking in a democracy”).

²⁴¹ *Minneapolis Star & Trib. Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575, 585 (1983) (“[A]n untrammelled press [is] a vital source of public information’ . . . and an informed public is the essence of working democracy.” (citation omitted)); see LEE C. BOLLINGER, UNINHIBITED, ROBUST, AND WIDE-OPEN: A FREE PRESS FOR A NEW CENTURY 109 (2010) (“[A]s long as there is democracy or government based on some even minimal level of consent of the people, the press is a necessity. Someone must provide us with factual information and analysis of what is happening in the world while upholding values of—in the language of the Pulitzer Prize—‘honesty, accuracy, and fairness.’”).

²⁴² See generally CARL BERNSTEIN & BOB WOODWARD, *ALL THE PRESIDENT’S MEN* (1974) (recounting the investigative reporting that uncovered the Watergate affair).

²⁴³ Robert D. McFadden, *Daniel Ellsberg, Who Leaked the Pentagon Papers, Is Dead at 92*, N.Y. TIMES (June 16, 2023), <https://www.nytimes.com/2023/06/16/us/daniel-ellsberg-dead.html> [<https://perma.cc/4RHE-CSVZ>] (noting that the Pentagon Papers—comprising “7,000 government pages of damning revelations about deceptions by successive presidents who exceeded their authority, bypassed Congress and misled the American people”—were leaked by military analyst Daniel Ellsberg to the *New York Times* and published in installments commencing on June 13, 1971).

²⁴⁴ Glenn Kessler et al., *Trump’s False or Misleading Claims Total 30,573 Over 4 Years*, WASH. POST (Jan. 24, 2021), <https://www.washingtonpost.com/politics/2021/01/24/trumps-false-or-misleading-claims-total-30573-over-four-years/> [<https://perma.cc/5Y38-DC2E>] (“On Nov. 2 alone, the day before the 2020 vote, Trump made 503 false or misleading claims as he barnstormed across the country in a desperate effort to win reelection. . . . By the end of his term, Trump had accumulated 30,573 untruths during his presidency.”).

In the final year of his Presidency, Trump averaged thirty-nine lies a day.²⁴⁵ During the 2024 campaign, Trump lied repeatedly—asserting, for example, that Kamala Harris “spent all her FEMA money, billions of dollars, on housing for illegal migrants”; “that illegal Haitian migrants in the town of Springfield, Ohio, are ‘eating the dogs’ and ‘eating the cats’”; “that Democratic abortion rights supporters favor killing babies after birth”; and “that the 2020 election had been stolen.”²⁴⁶ Denying the legitimacy of the 2020 election “has [now] become a litmus test for the modern GOP under Donald Trump.”²⁴⁷

Merely fact-checking Trump is a full-time job for a squadron of reporters. This shows that performing the constitutional role of the press requires enormous resources. It cannot be fulfilled by a solitary blogger or opinion writer. And this brings us to the next key question: Whom does the Press Clause protect?

B. Whom Does the Press Clause Protect?

Identifying whom the Press Clause protects is not the insuperable puzzle that some²⁴⁸ have suggested. Exaggerating the challenge in *Branzburg*, Justice White lumped reporters together with “lecturers, political pollsters, novelists, academic researchers, and dramatists”—professing to find them indistinguishable under the Press Clause because they all “contribut[e] to the flow of information to the public.”²⁴⁹

²⁴⁵ *Id.*

²⁴⁶ Peter Baker, *Trump’s Wild Claims, Conspiracies and Falsehoods Redefine Presidential Bounds*, N.Y. TIMES (Nov. 3, 2024), <https://www.nytimes.com/2024/11/03/us/politics/trump-falsehoods-claims-election.html> [<https://perma.cc/EK7G-KTX9>]. The difficulty of fact-checking Trump in real time was made plain at a CNN town hall in May 2023, where he overwhelmed the presiding reporter with the quantity and rapidity of his lies. Prem Thakker, *CNN’s Trump Town Hall Was a Total Disaster*, NEW REPUBLIC (May 10, 2023, 10:00 PM), <https://newrepublic.com/post/172650/cnns-trump-town-hall-lies-total-disaster> [<https://perma.cc/E8HM-28RN>] (furnishing a long list of lies uttered by Trump during the telecast—including: his sexual assault of E. Jean Carroll never took place and he has no idea who she is; he “finished” the wall separating the United States and Mexico; he never asked Georgia’s secretary of state to find him any votes; and Mike Pence had the authority to overturn the 2020 election results).

²⁴⁷ Laura Barrón-López, *How 2020 Election Denialism Became a Litmus Test for the GOP*, PBS NEWS HOUR (Feb. 19, 2024, 6:40 PM), <https://www.pbs.org/newshour/show/how-2020-election-denialism-became-a-litmus-test-for-the-gop> [<https://perma.cc/9G4X-X6DA>] (quoting Denver Riggleman, a former Republican congressman who investigated election subversion while serving on the House January 6 Committee).

²⁴⁸ See *supra* notes 3–4 and accompanying text (quoting remarks by Antonin Scalia on the difficulty of defining the press for Press Clause purposes); *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 801–02 (1978) (Burger, C.J., concurring) (stressing the insuperable challenge of defining the press for Press Clause purposes); *Branzburg v. Hayes*, 408 U.S. 665, 704 (1972) (refusing to recognize a reporter/news source privilege emanating from the Press Clause, Justice White recoiled at the difficulty of defining “those categories of newsmen who qualif[y] for the privilege”).

²⁴⁹ *Branzburg*, 408 U.S. at 705.

We need not twist ourselves into knots trying to concoct a perfect definition. The key question is this: Who is doing the *work* that the Press Clause contemplates? Who is *functioning* as a government watchdog, providing “organized, expert scrutiny”²⁵⁰ of public officials?

Sonja R. West has advocated this type of functional approach to identifying whom the Press Clause protects.²⁵¹ Who constitutes the press? Those who “devote time, resources, and expertise to the vital constitutional tasks of informing the public on newsworthy matters and providing a check on the government and the powerful.”²⁵²

The constitutional work of the press necessarily requires the sort of resources possessed by well-financed news organizations. To perform its government-watchdog role, says Lee C. Bollinger, the press must include “organizations large and powerful enough to be able effectively to monitor and check the authority of the state” with “sufficient scale to have serious newsgathering ability and . . . multiple centers of expertise, knowledge, and capacity.”²⁵³ As Professor West has observed:

Truly acting as a government watchdog and effectively informing the public requires more than a passing interest in the “news” or a mere desire to express one’s opinion. The government is increasingly complicated, thus requiring expertise to understand it fully. It is also vast, thus requiring time and resources to investigate it effectively. The “size and complexity of modern government,” Professor Blasi argued, intensifies “the need for well-organized, well-financed, professional critics to serve as a counterforce to government.”²⁵⁴

²⁵⁰ See Stewart, *supra* note 8, at 634.

²⁵¹ West, *supra* note 11, at 2455 (focusing on the “unique *functions* of the press” so that Press Clause protections are bestowed upon “those who are most effectively fulfilling these roles in our society” (emphasis added)).

²⁵² *Id.* at 2437; see also West, *supra* note 26, at 105 (arguing that the historical record supports construing the Press Clause as protecting the government-watchdog function of “journalists,” i.e., the institutional press).

²⁵³ BOLLINGER, *supra* note 241, at 109–10. And Bollinger adds:

[T]here is at times a too casual and erroneous assumption that it would be just fine if the press as we have known it were to disappear and be replaced by thousands or even millions of individual Web sites from which we could each tailor our own specific “press.” It is a serious mistake to assume that a multitude of individual or small-scale Web sites would serve the same purpose as the traditional press Myriad Web sites can enhance public debate, but they cannot replace the role of the institutional press.

Id. at 110.

²⁵⁴ West, *supra* note 26, at 102 (footnotes omitted) (quoting Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. BAR FOUND. RSCH. J. 521, 538).

This does not mean that bloggers and opinion writers are bereft of First Amendment protection. Their work bears the stamp of *individual* expression that is more readily associated with the Speech Clause, not the Press Clause. And the Speech Clause already affords extraordinary protection against viewpoint-based restrictions.²⁵⁵

Ultimately, the Press Clause protects *the institutional press*—the news organizations that perform the constitutional *functions* of the press: monitoring government behavior, investigating government corruption, and exposing government lies.

C. Under What Circumstances Do Heightened Press Clause Protections Kick In?

At the very least, heightened Press Clause protections should kick in whenever the government attempts to hinder or punish the press for performing its watchdog function.

Such hindrance or retaliation can take any of the following forms (the government has tried all of them before): injunctive gag orders on press coverage,²⁵⁶ subpoenas compelling reporters to testify,²⁵⁷ newsroom search warrants,²⁵⁸ special

²⁵⁵ *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829–30 (1995) (“When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.” (citation omitted)).

²⁵⁶ *See N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam) (striking down injunctions that barred the *New York Times* and *Washington Post* from publishing excerpts from the “Pentagon Papers,” a top-secret Defense Department study of the Vietnam War).

²⁵⁷ *See In re Grand Jury Subpoena*, Judith Miller, 438 F.3d 1141, 1143 (D.C. Cir. 2005) (upholding civil contempt citations against two reporters and *Time* magazine for refusing to identify confidential news sources and refusing to turn over notes from interview with those sources). In an alleged act of political revenge by Vice President Dick Cheney, designed to punish *New York Times* op-ed writer Joe Wilson for exposing lies uttered by President George W. Bush during his 2003 State of the Union speech, Cheney allegedly revealed that Wilson’s wife, Valerie Plame, was a secret agent for the CIA. Michael Janofsky, *Time Reporter Again Held in Contempt in Leak Case*, N.Y. TIMES, Oct. 14, 2004, at A16. This revelation—purportedly engineered by Cheney’s Chief-of-Staff, Scooter Libby—ended Plame’s career. *Id.* A *New York Times* reporter, Judith Miller, spent twelve weeks in prison for refusing to reveal that Scooter Libby was her confidential source. *Id.* The contempt citations against the 2 reporters imposed an 18-month jail term for each of them; the contempt citation against *Time* magazine imposed a fine of \$1,000 per day until the subpoenaed interview notes were turned over to federal prosecutors. *Id.*

²⁵⁸ *Zurcher v. Stanford Daily*, 436 U.S. 547, 551 (1978) (upholding unannounced police raid and search of student newspaper’s offices, where police had a warrant to search for photographs of student protesters who assaulted police while seizing control of a university hospital’s administrative offices—holding that so long as a police search satisfies the Fourth Amendment, the First Amendment affords the news media no special protection from search

taxes leveled at the press,²⁵⁹ seditious libel prosecutions,²⁶⁰ U.S. Postal Service bans on mailing specified publications,²⁶¹ and defamation suits by public officials in response to unflattering press coverage.²⁶²

and seizure). Just last year, local police raided the office of *The Marion County Record*, a family-owned newspaper with a circulation of about 4,000, seizing reporters and editors' computers, servers, and cellphones; prior to the raid, the newspaper had been investigating the employment history of the local police chief, who led the raid. Steven Lee Myers & Benjamin Mullin, *Raid of Small Kansas Newspaper Raises Free Press Concerns*, N.Y. TIMES (Aug. 13, 2023), <https://www.nytimes.com/2023/08/13/business/media/kansas-marion-news-paper-police-raid.html> [<https://perma.cc/K2MX-6SC2>]. Only days before the raid, the newspaper had questioned the police chief about the circumstances surrounding his departure from the Kansas City Police Department. Orlando Mayorquin, *Police Chief Who Ordered Raid on Kansas Newspaper Is Suspended*, N.Y. TIMES (Sept. 30, 2023), <https://www.nytimes.com/2023/09/30/us/marion-kansas-police-chief-suspended.html> [<https://perma.cc/H4SM-CUMS>].

²⁵⁹ See *Minneapolis Star & Trib. Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 576–77, 579, 583, 585, 593 (1983) (striking down a special tax on paper and ink employed in the publishing of periodicals after observing that differential taxation of the press would have troubled the Framers and concluding that when the government “singles out the press” for special taxation, “[t]hat 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”); *Grosjean v. Am. Press Co.*, 297 U.S. 233 (1936) (striking down a Louisiana license tax that singled out newspapers with a weekly circulation of more than 20,000). The tax levied in *Grosjean* was designed to punish the state’s largest newspapers for criticizing Senator Huey Long. See *Minneapolis Star & Trib. Co.*, 460 at 579–80.

²⁶⁰ The Sedition Act of 1798 criminalized any criticism of Congress or the President. GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* 12 (2004). Under the leadership of President John Adams, the Federalist Party “designed” the Sedition Act “to attack and eliminate the political opposition”—namely, the Republican Party of Thomas Jefferson and James Madison. WENDELL BIRD, *CRIMINAL DISSENT: PROSECUTIONS UNDER THE ALIEN AND SEDITION ACTS OF 1798*, at 360 (2020). Spearheaded by Secretary of State Timothy Pickering, the Adams administration launched 51 prosecutions under the Sedition Act, most of them aimed at silencing and punishing Republican newspaper editors who had criticized President Adams and his administration. *Id.* at 361. Though some Federalists and most Republicans regarded the Sedition Act as outrageously unconstitutional, *id.* at 5–6, 8, the Act survived constitutional challenges in federal court. *United States v. Callender*, 25 F. Cas. 239, 257 (C.C.D. Va. 1800) (No. 14,709); *Lyon’s Case*, 15 F. Cas. 1183, 1185 (C.C.D. Vt. 1798) (No. 8,646).

²⁶¹ Under the Espionage Act of 1917, U.S. Postmaster General Albert S. Burleson targeted all publications that might “embarrass or hamper the government in conducting [World War I].” SAMUEL WALKER, *IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU* 14 (1990). He blocked mailing privileges for “virtually the entire antiwar and Socialist press.” *Id.* One of those publications, *The Masses*, obtained an injunction against the mailing ban—but that injunction was reversed on appeal. *Masses Publ’g Co. v. Patten*, 244 F. 535, 25, 39 (D.N.Y. 1917), *rev’d*, 246 F. 24 (2d Cir. 1917).

²⁶² *N.Y. Times v. Sullivan*, 376 U.S. 254, 256, 264, 279–80, 292 (1964) (reversing a \$500,000 libel award to a Southern official (L.B. Sullivan) who, following a clash with civil rights demonstrators, identified certain factual inaccuracies in an advertisement they

Government retaliation against the press is not merely a thing of the past. Donald Trump has pledged to do it in his second term as President.²⁶³ During the 2024 campaign, Trump and his allies vowed to seek retribution against reporters, particularly those who fact-checked and refuted his claim that he won the 2020 election.²⁶⁴ Kash Patel, Trump's pick for FBI director, pledged that a second Trump administration will retaliate against the press "criminally or civilly."²⁶⁵

published in the *New York Times* recounting the event; establishing qualified protection for defamatory falsehoods uttered by critics of official conduct; and holding that public officials are precluded from recovering damages for such statements unless they can prove that the statement was uttered "with knowledge that it was false or with reckless disregard of [its truth]"). Commissioner Sullivan's lawsuit against the *New York Times* was not an isolated incident; Southern officials brought a number of libel suits that were designed to intimidate and punish the national news media. Mary-Rose Papandrea, *The Story of New York Times Co. v. Sullivan*, in *FIRST AMENDMENT STORIES* 229, 229 (Richard W. Garnett & Andrew Koppelman eds., 2012). These suits targeted the *New York Times*, CBS News, and the Associated Press for their coverage of governmental efforts to suppress the civil rights movement. SAMANTHA BARBAS, *ACTUAL MALICE: CIVIL RIGHTS AND FREEDOM OF THE PRESS IN NEW YORK TIMES V. SULLIVAN 2* (2023). In filing these lawsuits, Southern segregationists were trying to inflict financial ruin upon the Northern press. *Id.* at 86. "By the end of 1961, the [*New York*] *Times* confronted over \$6 million in potential libel judgments and the possibility of bankruptcy By 1964, CBS News and the Associated Press, among other media companies, faced over \$288 million in damages in libel cases brought by segregationist officials." *Id.* at 2. In light of these multimillion-dollar libel suits, the Supreme Court created the "Times Malice" standard because "state libel laws threaten the very existence of an American press virile enough to publish unpopular views on public affairs and bold enough to criticize the conduct of public officials." *Sullivan*, 376 U.S. at 294 (Black, J., concurring).

²⁶³ Oliver Darcy, *Trump and His Allies Are Threatening Retribution Against the Press. Their Menacing Words Should Not Be Ignored*, CNN (Dec. 7, 2023, 7:11 AM), <https://www.cnn.com/2023/12/07/media/trump-threatens-retribution-against-press/index.html> [<https://perma.cc/G5WK-G9VC>] ("Donald Trump . . . is overtly vowing to weaponize government and seek retribution against the news media, showing no regard for the First Amendment protections afforded to the Fourth Estate.").

²⁶⁴ Ruxandra Iordache, *New Trump Administration Will Come After the Media, Ally Warns*, CNBC (Dec. 6, 2023, 8:13 AM), <https://www.cnbc.com/2023/12/06/new-trump-administration-will-come-after-the-media-ally-warns.html> [<https://perma.cc/DZ7S-TU6P>].

²⁶⁵ Elizabeth Williamson & Charlie Savage, *Kash Patel Has Plan to Remake the F.B.I. Into a Tool of Trump*, N.Y. TIMES (Dec. 2, 2024), <https://www.nytimes.com/2024/12/02/us/politics/kash-patel-fbi.html> [<https://perma.cc/E6JL-CLDL>] ("Mr. Patel has specifically threatened to unleash law enforcement powers on the mainstream news media."). Mr. Patel declared: "Yes, we're going to come after the people in the media who lied about American citizens, who helped Joe Biden rig presidential elections—we're going to come after you." *Id.* Oliver Darcy also commented on Patel's statements, writing:

In a particularly disturbing conversation this week, Trump's former top political strategist, Steve Bannon, and former National Security Council adviser, Kash Patel, openly discussed plans to target the press. Bannon, who underscored that such promises are "not just rhetoric" and that they are "absolutely dead serious" about seeking revenge against

When the government hinders or punishes the press for performing its watchdog function, heightened Press Clause protections should certainly kick in. But what if a public official refuses to grant an interview, refuses to afford press access to a crime scene, or refuses to share newsworthy information in the government's possession? Should *those* situations trigger heightened Press Clause protections?

Shielding the press from governmental interference or attack is one thing; it's quite another to endow the press with affirmative powers of investigative access.

To deal with this distinction, let's recall that our jurisprudential roadmap must be governed by the historical purpose of the Press Clause—to create a Fourth Estate that would serve as a government watchdog, providing organized, expert scrutiny of public officials. Governmental interference or retaliation against the press *directly threatens* the government-watchdog function; enhanced investigative access merely *assists* the government-watchdog function. Accordingly, the former requires greater Press Clause protections than the latter.

We turn now to what those protections should look like.

D. What Do Those Heightened Protections Look Like?

Any measures that hinder or punish the press for performing its watchdog function—including newsroom search warrants and subpoenas compelling reporters to testify—should be treated as presumptively unconstitutional, to be analyzed in the same way that we gauge prior restraints on publication.²⁶⁶ The historical underpinnings

journalists, asked Patel, who would likely serve in a second Trump administration, whether he could “deliver the goods.” Patel responded affirmatively, vowing that a re-empowered Trump would indeed “come after” the press.

Darcy, *supra* note 263. “Whether it’s criminally or civilly, we’ll figure that out, but yeah, we’re putting you all on notice,” said Patel. Iordache, *supra* note 264.

²⁶⁶ See *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam) (“Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity. The Government thus carries a heavy burden of showing justification for the imposition of such a restraint.” (citations and internal quotation marks omitted)). In a separate concurring opinion joined by Justice Douglas, an indignant Justice Black wrote:

Both the history and language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints.

In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government.

Id. at 716–17 (Black, J., concurring).

of the Press Clause require this heightened level of judicial review so that the watchdog role envisioned for the press cannot be negated by the government.

Likewise, the Press Clause requires heightened protections—above and beyond the “Times Malice” standard—when public officials bring defamation suits against the press. In order to perform its watchdog function free from governmental intimidation, the press should be absolutely immune from these suits. This was the stance taken by Justices Black, Douglas, and Goldberg in *New York Times Co. v. Sullivan*.²⁶⁷ As Justice Black observed: “In my opinion the Federal Constitution has dealt with this deadly danger to the press in the only way possible without leaving the free press open to destruction—by granting the press an absolute immunity for criticism of the way public officials do their public duty.”²⁶⁸

What about press access to government proceedings and to information in the government’s possession? The Supreme Court has limited press access to the same low level as public access.²⁶⁹ In *Pell v. Procunier*,²⁷⁰ for example, the Court rejected a Press Clause challenge to a California penal provision that barred face-to-face interviews between a reporter and any individual inmate whom the reporter specifically named and requested. The Court rebuffed the notion that the Press Clause affords journalists any greater right of access to prisons than that enjoyed by the public generally.²⁷¹ It is constitutionally incongruous to equate press access with public access. The historical purpose of the Press Clause was to create a Fourth Estate separate and distinct from the public—a Fourth Estate that would *serve* the public by acting as a government watchdog, investigating the prison system so that individual citizens won’t have to conduct their *own* investigations.

Accordingly, heightened Press Clause scrutiny should apply to restrictions that keep the press and the public equally at bay in affording access to government information and proceedings. Such restrictions should be treated as presumptively unreasonable, with the government bearing the burden of demonstrating a compelling need.

²⁶⁷ 376 U.S. at 293 (Black, J., concurring) (“I base my vote to reverse on the belief that the First and Fourteenth Amendments not merely ‘delimit’ a State’s power to award damages to ‘public officials against critics of their official conduct’ but completely prohibit a State from exercising such a power.”); *id.* at 298 (Goldberg, J., concurring in result) (“In my view, the First and Fourteenth Amendments to the Constitution afford to the citizen and to the press an absolute, unconditional privilege to criticize official conduct despite the harm which may flow from excesses and abuses.”).

²⁶⁸ *Id.* at 295 (Black, J., concurring).

²⁶⁹ *See, e.g., Richmond Newspapers v. Virginia*, 448 U.S. 555, 575–76 (1980) (invoking the Speech, Press, Assembly, and Petition clauses of the First Amendment, in combination, to support a broad public “right to know” about governmental proceedings, the Court recognized a general right of public and press access to criminal trials—but the press enjoys only that degree of access possessed by the public generally).

²⁷⁰ 417 U.S. 817 (1974).

²⁷¹ *Id.* at 833–34.

CONCLUSION

The time has come to reinvent the Press Clause in accordance with the historical findings set forth in this Article. In recent years, the Supreme Court has increasingly relied upon history as a guide to its jurisprudence.²⁷² (Whether the Court has achieved a coherent approach to employing history is a separate question.²⁷³) This Article provides a sound historical basis for constitutional interpretation, carefully documenting the historical *purpose* of the Press Clause and suggesting a jurisprudential approach attuned to that purpose. For too long, the Justices have refused to breathe independent life into the Press Clause, treating it as an afterthought to the Speech Clause. But the historical findings set forth in this Article demonstrate that the Press Clause was not an empty rhetorical flourish; it was included in the First Amendment to perform a special function of its own. That function—to create a Fourth Estate providing organized, expert scrutiny of government—is not synonymous with the Speech Clause and requires its own body of constitutional law. It is high time for the Supreme Court to recognize that the Press Clause is separate and distinct from the Speech Clause, with its own unique role to play in protecting the watchdog function of the press. Armed with the historical record unearthed in this Article, the road is open to a reimagined Press Clause.

²⁷² See, e.g., *United States v. Rahimi*, 602 U.S. 680, 691–701 (2024) (purporting to rely upon history in construing Second Amendment rights); *Trump v. United States*, 603 U.S. 593, 594, 622–23, 632–35, 638–40 (2024) (purporting to rely upon history in construing Presidential immunity); *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 234, 240–53 (2022) (purporting to rely upon history in construing abortion rights); *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 32–71 (2022) (purporting to rely upon history in construing Second Amendment rights); *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 535–36 (2022) (purporting to rely upon history in construing the Establishment Clause).

²⁷³ See, e.g., Reva B. Siegel, *The History of History and Tradition: The Roots of Dobbs’s Method (and Originalism) in the Defense of Segregation*, 133 YALE L.J. F. 99 (2023) (critiquing the Supreme Court’s recent use of history); Charles, *supra* note 29, at 1743–46 (critiquing the historical research on which the Supreme Court relied in construing the Second Amendment).