AI AND THE PRESS CLAUSE

Jared Schroeder*

INTRODUCTION

The Press Clause of the First Amendment does not say anything about generative AI. To be fair, it is also silent about reporters, journalism, and news. Those who constructed the First Amendment deliberately included the Press Clause among five crucial freedoms that have become sacrosanct. They were less deliberate in explaining what the Press Clause should mean, who or what it applies to, or how it stands apart from the Speech Clause—if it does so at all.[1] More than 230 years later, as more people—and AI entities—gain access to publishing tools and audiences, we are not much closer to understanding the meaning and scope of the Press Clause

* Jared Schroeder is an Associate Professor at the Missouri School of Journalism who carries a courtesy appointment with the Missouri School of Law. He is the author of *The Structure of Ideas: Mapping a New Theory of Free Expression in the AI Era*.

[1] See Melville B. Nimmer, *Introduction—Is Freedom of the Press a Redundancy: What Does it Add to Freedom of Speech?*, 26 HASTINGS L.J. 639, 640 (1975); LEONARD W. LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY, at vii–xii (1960); David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 456–62 (1983), for examples of how the relationship between the Speech and Press Clauses has been interpreted.

than we were the day the First Amendment was ratified.[2] As a result, it's not clear the extent to which the Press Clause applies to generative AI because it's not clear who or what the Press Clause protects in general. The historical record provides hints, but no direct answers, regarding the Clause's intended meaning. Early pre-Revolution documents celebrated the crucial role of the press.[3] John Dickinson's "A Letter to the Inhabitants of the Province of Quebec," for example, listed press freedoms among four other rights.[4] The letter, written in the fall of 1774 to encourage Canadian colonists to join a potential revolt against England, associated the press with "the advancement of truth, science, morality, and [the] arts," before reasoning that the press strengthened the people's ability to communicate with each other and to hold government officials accountable.[5] Crucially, the letter itself relied on a publisher who made thousands of copies that were distributed in the colonies and Canada.

Months before the *Declaration of Independence* was signed in 1776, Virginia lawmakers passed the Commonwealth's Declaration of Rights, which reasoned, "[F]reedom of the press is one of the greatest bulwarks of liberty, and can never be restrained but by despotic governments."[6] The passage tracks closely with a section of *Cato's Letters*, an influential collection of essays written in England in the 1720s.[7] The most crucial difference: The letters' authors wrote, "Freedom of *Speech* is the great bulwark of liberty."[8] Virginia lawmakers' decision to shift the phrasing from *Cato's Letters*' use of speech to emphasizing press hints at an intentional focus on press rights, an emphasis that was reinforced throughout the colonies as nearly every state constitution mentioned press protections.[9] Only one emphasized free speech.[10]

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[2] *See* Nimmer, *supra* note 1, at 640. See also Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. REV. 1025, 1026–33 (2011); RonNell Andersen Jones, *The Dangers of Press Clause Dicta*, 48 GA. L. REV. 705, 706–08 (2014), for examples of the widespread disagreement and lack of clarity surrounding the meaning of the Clause.

[3] See Letter from William Cushing to John Adams (Feb. 18, 1789), *in* NAT'L ARCHIVES [hereinafter Letter from Cushing], https://www.founders.archives.gov/documents/Adams/06-19-02-0272 [https://perma.cc/K7PL-Y46S]; LUCAS A. POWE, JR., THE FOURTH ESTATE AND THE CONSTITUTION: FREEDOM OF THE PRESS IN AMERICA 23–35 (1991); LEVY, *supra* note 1, at 64–76, for examples and insights into the prominence free-press discourse during this period.

[4] A LETTER TO THE INHABITANTS OF THE PROVINCE OF QUEBEC 41 (Phila., William Bradford & Thomas Bradford 1774).

[5] *Id.*

[6] *The Virginia Declaration of Rights*, *in* NAT'L ARCHIVES (Sept. 29, 2016), https://www.archives.gov/founding-docs/virginia-declaration-of-rights [https://perma.cc/JG5Y-J4PM] (Section 12).

[7] John Trenchard & Thomas Gordon, *Cato's Letters (1720–23)*, *in* CONST. CTR., https://www.constitutioncenter.org/the-constitution/historic-document-library/detail/john-trenchard-and-thomas-gordoncatos-letters-1720-23 [https://perma.cc/SYE5-BKZQ] (last visited Feb. 19, 2025) (Letter 15).

[8] *Id.* (emphasis added).

[9] POWE, *supra* note 3, at 23.

[10] VT. CONST. art. XIII.

Massachusetts's declaration of rights, passed a few years after Virginia's, noted, "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."[11] These examples indicate press rights were valued and on the minds of lawmakers and leaders, but only hint at the scope or meaning of those rights. What did they mean by press?

The Supreme Court has been less than helpful. The Justices have never, in more than a century of free-expression-related legal decisions, explicitly defined if or how the Press Clause is distinctive from the Speech Clause.[12] They have often used the Clauses as a pair or referred to them more generally as freedom of expression.[13] The Justices, however, provided one clear element of the Press Clause's meaning in the *Near v. Minnesota* prior restraint case in 1931, when the Court reasoned, "[I]t has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication."[14] The precedent contributes to how we understand the Clause's meaning but does little to clarify its scope. To whom or what does the Clause apply? Four decades later, the Justices answered some questions regarding the Clause's scope but created a host of new ones in their conflicting, enigmatic opinions in the *Branzburg v. Hayes* reporters' rights case.[15] In the case, the Justices concluded freedom of the press is a "fundamental *personal* right" that does not necessarily apply solely to the news-media industry.[16] They reasoned nearly any communicator can claim Press-Clause protections, essentially decoupling the press from the Press Clause and undermining efforts by lawmakers to create laws and protections based on *who* published the information.[17] Legal scholars are still trying to decode the Rorschach test the Justices created in *Branzburg* in 1972.[18] Networked communication tools, and now AI, have not made that task easier.

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[11] MASS. CONST. art. XVI.

[12] Anderson, *supra* note 1, at 456; Nimmer, *supra* note 1, at 640–41.

[13] See *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 499 (1952); *New York Times Co. v. Sullivan*, 376 U.S. 254, 256, 264, 266, 268–69 (1964); *Branzburg v. Hayes*, 408 U.S. 665, 667 (1972); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 778 (1976) (Stewart, J., concurring), for examples of the Court using Speech and Press Clauses as a pair or referring to communication as "expression."

[14] 283 U.S. 697, 713 (1931).

[15] See 408 U.S. at 681–92; *id.* at 709–10 (Powell, J., concurring), for discussion regarding the Court's unclear 5–4 ruling about the boundaries of the Press Clause. See also Anthony L. Fargo, *What They Meant to Say: The Courts Try to Explain* Branzburg v. Hayes, 12 JOURNALISM & COMMC'N MONOGRAPHS 65, 116–18 (2010), for an in-depth examination of the judicial system's struggling to apply the *Branzburg* precedent.

[16] *Branzburg*, 408 U.S. at 704 (emphasis added).

[17] *Id.* at 704–05.

[18] See Sonja R. West, *Concurring in Part & Concurring the Confusion*, 104 MICH. L. REV. 1951, 1958–60 (2006); Fargo, *supra* note 15, at 116–18, for scholarship regarding the confusing precedent *Branzburg* created.

Legal scholars have not fared much better in defining the scope and meaning of the Press Clause. They have vociferously debated the Clause's meaning for decades, with scholars contending that its protections were intended to be limited and narrow,[19] that the Clause's scope was far broader and included expansive safeguards for the press,[20] and that the Clause is an industry-specific protection that was created to protect journalism.[21] ChatGPT picked up on the ambiguity in how the Press Clause is understood when it was asked to define who or what the Clause protects. The large language module's explanation of the Press Clause, which was drawn from the billions of texts available to the AI tool, reflected the inconsistency in the Press Clause–related literature. ChatGPT, accordingly, noted, "The Press Clause . . . does not explicitly define who or what is protected . . . ."[22] Its definition continued by offering both broad Press Clause protections for all publishers and narrower, industry-specific safeguards. ChatGPT, in other words, does not know what the Press Clause means either.

As a result, just as when the early internet eliminated most barriers to publishing and, later, social media further expanded the number of publishers and messages communicated online, the emergence of powerful AI tools that can construct comprehensive and, often, correct information for publication again raises questions regarding who or what the Press Clause protects. In the late 1990s and early 2000s, when dozens of bloggers, message-board posters, and website creators faced the types of legal difficulties journalists have faced for decades, they claimed Press-Clause protections.[23] Their claims for press protections led jurists in a variety of jurisdictions to struggle with the matter of who or what is protected by the Press Clause.[24] The results have not been clear.[25] Generative AI has rebooted these unresolved questions, adding a crucial difference, however, because it is neither a

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[19] Leonard W. Levy, *On the Origins of the Free Press Clause*, 32 UCLA L. REV. 177, 217–18 (1984).

[20] Anderson, *supra* note 1, at 533–37.

[21] *See* Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 633 (1975). Justice Stewart's conclusion is particularly interesting, since he had recently taken part in several crucial press-related Supreme Court decisions.

[22] CHATGPT, https://www.chatgpt.com/share/671a591e-85e4-8005-86e9-cc8829d010b9 [https://perma.cc/MA46-FQTK] (last visited Feb. 19, 2025) (responding to query: "Is the press clause of the First Amendment clear about who or what is protected? 20 words").

[23] See generally *Obsidian Finance Group v. Cox*, 740 F.3d 1284 (9th Cir. 2014); *Too Much Media, LLC v. Hale*, 206 N.J. 209 (2011); *Bailey v. State*, 900 F. Supp. 2d 75 (D. Me. 2012), for examples of publishers who claimed protections that have historically been associated with traditional journalism. See also JARED SCHROEDER, THE PRESS CLAUSE AND DIGITAL TECHNOLOGY'S FOURTH WAVE 137–58 (2018), for a broader look at these earlier-networked-era questions.

[24] *See generally Obsidian Finance*, 740 F.3d 1284; *Too Much Media*, 206 N.J. 209; *Bailey*, 900 F. Supp. 2d 75; SCHROEDER, *supra* note 23.

[25] *See* Jared Schroeder, *Focusing on How Rather Than on Whom: Constructing a Process-Based Framework for Interpreting the Press Clause in the Network-Society Era*, 19 COMMC'N L. & POL'Y 509, 526–34 (2014), for an examination of cases in which courts struggled to consistently define who is and is not a journalist.

journalist *nor* human. The historical lack of clarity regarding the Clauses' protections, from the Amendment's authors, Supreme Court, lower courts, and legal scholars has led to confusion about the role and place of the Press Clause, particularly when new, disruptive communicative technologies emerge. Generative AI tools, like ChatGPT and Google's Bard, are just such technologies.

Generative AI took a massive leap forward in late 2022 and early 2023 with the introduction of public access to ChatGPT and Bard. OpenAI, whose ChatGPT tool garnered more than 100 million users in fewer than two months, upgraded to GPT-4 in March 2023.[26] These AI tools, and those who create and use them, almost certainly represent the vanguard of a new generation of publishers, which will join the long queue of communicators who have challenged courts to define the role and place of the Press Clause. AI publishers raise substantial legal questions in fields including defamation, intellectual property, and privacy law, particularly regarding the liability human actors incur when employing AI tools. This Article, however, focuses solely on whether the Press Clause protects AI publishers, not as extensions of human publishers, but purely as non-human entities that gather and communicate information that is available to audiences.

To address this question, this Article first outlines the background and nature of generative AI tools, particularly in their roles as publishers. Next, this Article examines the history of the Press Clause, focusing on how late eighteenth-century authors in the colonies defined and discussed press freedoms and the role of news in democratic society and how legal scholars have conceptualized the Clause and its meaning. From there, this Article examines crucial Supreme Court decisions regarding the press and Press Clause, particularly concerning how the Justices defined and communicated understandings regarding the press as being both instrumentally and institutionally crucial to the flow of ideas in a democratic society. The conclusions draw the conceptual building blocks from these areas together to identify whether AI communicators should receive Press-Clause protections.

I. HOAXES, IMITATORS, AND CREATORS

Hungarian inventor Wolfgang von Kempelen could be viewed as one of the pioneers of artificial intelligence—if he had not been a con man. He invented a chess-playing machine in the late 1700s that baffled and astonished everyone from Empress Maria Theresa to Benjamin Franklin, one of the early proponents for press freedoms in the United States.[27] When a human player made a move, von Kempelen's

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[26] Krystal Hu, *ChatGPT Sets Record for Fastest-Growing User Base—Analyst Note*, REUTERS (Feb. 2, 2023, 10:33 AM), https://www.reuters.com/technology/chatgpt-sets-record-fastest-growing-user-base-analyst-note-2023-02-01/ [https://perma.cc/L7M4-NNDL].

[27] *The Mechanical Turk: AI Marvel or Parlor Trick?*, ENCYC. BRITANNICA (May 21, 2021), https://www.britannica.com/story/the-mechanical-turk-ai-marvel-or-parlor-trick [https://perma.cc/JN82-YNTE]; *see also* Letter from Wolfgang von Kempelen to Benjamin Franklin

machine responded by moving one of its wooden chess pieces. The machine's ability to seemingly come to life and automatically move pieces in response to a human's actions shocked and confused observers throughout Europe. Franklin lost his chess match to von Kempelen's Mechanical Turk during his time in Paris during the Revolutionary War.[28] Napoleon Bonaparte, who had conquered most of Europe by 1809, could not defeat von Kempelen's machine. He lost to the automaton in the "Napoleon Torn Apart" match that year.[29] The problem with the astonishing, almost unbelievable automated chess machine, however, was that it was a hoax. Hidden behind the machine's elaborate clockwork-like gears and levers was an expert chess player. The Mechanical Turk was a puppet show where a hidden human manipulated tiny figures, making them appear to think and act in response to a human player's actions in a chess match.

Wolfgang von Kempelen's hoax is not without value when we ask questions about the role and meaning of the Press Clause and its potential application to AI. One of the crucial themes in the development of AI is the extent to which human actors control its behavior. Another crucial theme, when it comes to the meaning and purpose of the Press Clause, is whether protections should be influenced by *who* is communicating or *how* information is gathered and presented.[30]

A. Problem-Solvers and Therapy Bots

Allen Newell and Herbert Simon were not con men. In the mid-1950s, the scientists sought to create a problem-solving computer program. Newell had already used game theory to help the Air Force improve its early-warning radar systems, and Simon had published one of the seminal works on administrative decision-making.[31] Their initial programming effort was the Logic Theorist, which is considered the first AI program.[32] The Logic Theorist, according to its creators, was "capable of discovering proofs for theorems in . . . symbolic logic."[33] The authors emphasized that the Logic Theorist "relie[d] heavily on heuristic methods similar to those that have been observed in human problem solving activity."[34] The Logic Theorist, and

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(May 28, 1783), *in* NAT'L ARCHIVES, https://www.founders.archives.gov/documents/Franklin/01-40-02-0041 [https://perma.cc/Y9UV-MGAV].

[28] *See The Mechanical Turk*: *AI Marvel or Parlor Trick?*, *supra* note 27.

[29] *Id.*; *Napoleon Bonaparte vs. The Turk (Automaton)*, CHESSGAMES, https://www.chessgames.com/perl/chessgame?gid=1250610 [https://perma.cc/C7MH-UJS3] (last visited Feb. 19, 2025). The site notes the player in the machine was Johann Allgaier. *Id.*

[30] *See infra* Part III.

[31] Michael Aaron Dennis, *Allen Newell*, ENCYC. BRITANNICA (Apr. 25, 2024), https://www.britannica.com/biography/Allen-Newell [https://perma.cc/54WU-M6ZQ].

[32] *Id.* See also Allen Newell & Herbert A. Simon, *The Logic Theory Machine: A Complex Information Processing System*, 2 IRE TRANSACTIONS INFO. THEORY 61 (1956), for the creators' paper about their program.

[33] Newell & Simon, *supra* note 32, at 61.

[34] *Id.*

the improved version that followed, the General Problem Solver, came to conclusions based on their programming. In this sense, the information they communicated was predictable because the range of potential answers was limited by the extent of the solutions and information programmed into the tool. In this regard, Newell and Simon's creation shared similarities with the hidden chess player in the Mechanical Turk. They, by necessity, influenced the program's outcomes because it could not operate beyond what they programmed it to know and do. The scientists did not seek to deceive audiences, like von Kempelen's invention. Newell and Simon acknowledged their program's limitations and the difficult challenge of programming for all the possible variables needed for decision-making. The programmers, despite their best efforts, remained more like puppeteers than creators because of these limitations.

A few years before Newell and Simon started thinking about these initial AI tools, British thinker Alan Turing, who during World War II created a machine that could break encrypted Axis communications, asked the question, "Can machines think?"[35] While we could contend Newell's and Simon's Logic Theorist *could* think, in the sense that it could communicate solutions to problems, Turing's seminal paper, and its famous question, got at whether a machine could replicate human thought and expression—not as a tool, but as an artificial entity. Turing concluded traditional questions about machine-based thought were "too meaningless to deserve discussion."[36] He instead focused on a different way to frame questions about machine-based thought, confidently predicting machines would soon be able to *think*. He also addressed, head-on, criticisms his conclusions might face.[37]

One of the criticisms Turing addressed was whether a machine could ever "do anything really new."[38] He attributed the question to Ada Lovelace, who worked with Charles Babbage on his Analytical Engine computer in the 1840s.[39] The criticism's premise, which Turing rejected, got at the question of agency for AI tools.[40] Can they go beyond being puppet-like in producing only what they were programmed to produce? Turing countered that he is often surprised by machines and that human thought is generally no more abstract or open-minded than a machine's.[41] He reasoned that there is an "assumption that as soon as a fact is presented to a mind all consequences of that fact spring into the mind simultaneously with it. It is a very

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[35] Alan M. Turing, *Computing Machinery and Intelligence*, 59 MIND Q. REV. 433, 433 (1950). Turing's feats during World War II were dramatized in THE IMITATION GAME (Black Bear Pictures 2014). The film's title matches wording Turing used to describe his ideas in the article.

[36] Turing, *supra* note 35, at 442.

[37] See *id.* at 443–54, for Turing's itemized section of potential criticisms of his ideas and his responses to them.

[38] *Id.* at 450–51 (quoting Ada Lovelace).

[39] *Id.*

[40] *Id.*

[41] *Id.*

useful assumption under many circumstances, but one too easily forgets it is false."[42] People, he reasoned, work out questions using limited information and general principles, just as machines do.[43] To Turing, the criticism that machines cannot think or create because they can only produce what their programming determines made unfair assumptions about human thought.[44] The criticism, in short, thought too much of people and too little of machines.

Turing ultimately reasoned that machines would do far more than the Mechanical Turk. To advance that line of thought, he titled Section 1 of his groundbreaking paper "The Imitation Game," which was his way of reframing the discussion from asking whether machines can solve problems to whether they can replicate human behavior.[45] The system he outlined and named "The Imitation Game" later became the Turing Test, which is still used to gauge the complexity and nuance in an AI entity.[46] A program that passes the Turing Test has succeeded in convincing a human that they communicated with another human, rather than a machine. The test asks whether a human can distinguish between a computer and a human communicator.[47] The human in the test asks questions and receives answers, via texting. The test is intended to measure whether the AI can think in a way that is sufficiently creative and abstract as to fool a human interrogator into thinking it is human.

Joseph Weizenbaum's mid-1960s invention, ELIZA, failed the Turing Test. Still, the first chatbot simulated human interaction, allowing people and AI to interact in a text-based conversation. ELIZA was created as a Rogerian therapist, which asks reflective questions of those who interact with it.[48] While ELIZA does not provide spontaneous answers, it identifies patterns in the text people provide and responds with questions, such as "tell me more" or "what does that suggest to you?"[49] ELIZA's non-specific, probing questions encourage those who interact with it to

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[42] *Id.* at 451.

[43] *Id.* at 449–50.

[44] *Id.*

[45] *Id.* at 433.

[46] See Darren Orf, *The Turing Test for AI Is Far Beyond Obsolete*, POPULAR MECHS. (Mar. 16, 2023, 10:10 AM), https://www.popularmechanics.com/technology/robots/a43328241/turing-test-for-artificial-intelligence-is-obsolete/ [https://perma.cc/VL2U-XGQJ]; Graham Oppy & David Dowe, *The Turing Test*, STAN. ENCYC. PHIL. (Oct. 4, 2021), https://plato.stanford.edu/entries/turing-test/ [https://perma.cc/8VUL-WMBT], for discussions of the test and its enduring relevance.

[47] Oppy & Dowe, *supra* note 46.

[48] ELIZA, https://web.njit.edu/~ronkowit/eliza.html [https://perma.cc/P5HE-GFDZ] (last visited Feb. 19, 2025). Years after inventing the first chatbot, Weizenbaum communicated fears about AI. *See* Ben Tarnoff, *Weizenbaum's Nightmares: How the Inventor of the First Chatbot Turned Against AI*, THE GUARDIAN (July 25, 2023, 12:00 AM), https://www.theguardian.com/technology/2023/jul/25/joseph-weizenbaum-inventor-eliza-chatbot-turned-against-artificial-intelligence-ai [https://perma.cc/KUA5-YZLT].

[49] ELIZA, *supra* note 48.

reflect on their thoughts—even if the AI has no knowledge or understanding of human problems. Sociologist Sherry Turkle, who was a student who worked with Weizenbaum when he created the program, observed, "Weizenbaum's students knew that the program did not know or understand; nevertheless, they wanted to chat with it. More than this, they wanted to be alone with it."[50] Turkle found ELIZA had an allure and offered benefits to users, even if it lacked empathy or any knowledge of the human condition.[51] Turkle's observation makes a crucial point: AI need not be human-like or sentient to influence human thought or behavior.

Simon, whose work with Newell was crucial to early AI problem-solving tools, continued to construct crucial theoretical building blocks for AI as programmers experimented with new ideas. He won the Nobel Prize in Economics in 1978 for his theory of bounded rationality, a conceptualization of human understanding and decision-making that has become crucial to AI entities.[52] Bounded rationality recognizes that people, when making decisions, limit the spectrum of choices they consider by using mental shortcuts and biases.[53] The concept aligns closely with Turing's response to the assumption that machines cannot create anything new or creative because they are limited by their programming.[54] Turing reasoned it is a fallacy to assume people are any more open to all ideas than computers when they encounter a question.[55] Similarly, Simon posited the opposite of bounded rationality, which he rejected, was that people are globally rational, which assumes they fairly and evenly consider all possible solutions before making a decision.[56] The bounded rationality concept reframes how AI designers construct their systems. Rather than trying to create entities that are perfectly rational, which would make them less human, designers can allow their tools to incorporate biases, decision-making short-cuts, and other tricks and tools that humans employ. Such an approach makes AI systems more human and less rigidly computerized.

B. AI Learns to Learn

When world chess champion Garry Kasparov defeated IBM's Deep Blue, a computer programmed to play chess, in 1989, his only advice to programmers was

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[50] SHERRY TURKLE, ALONE TOGETHER: WHY WE EXPECT MORE FROM TECHNOLOGY AND LESS FROM EACH OTHER 23 (2011).

[51] *Id.* at 23–24.

[52] Gregory Wheeler, *Bounded Rationality*, STAN. ENCYC. PHIL. (Nov. 30, 2018), https://plato.stanford.edu/entries/bounded-rationality/ [https://perma.cc/4C64-79GC]. *See generally* Herbert A. Simon, *Theories of Bounded Rationality*, 22 DECISION & ORG. 161 (1972); Press Release, Royal Swedish Academy of Sciences, Studies of Decision-Making Lead to Prize in Economics (Oct. 16, 1978).

[53] Simon, *supra* note 52, at 175–76.

[54] Turing, *supra* note 35, at 450–51.

[55] *Id.*

[56] Simon, *supra* note 52, at 170.

to "teach it to resign earlier."[57] Seven years later, the computer embarrassed the champion, beating him twice in six games.[58] The next year, in 1997, it beat him 2 times and forced 3 draws, winning a 6-game match.[59] The world's best chess player could not beat a computer program in six tries. In a game with clear rules that is known for requiring forethought and creativity, a computer outfoxed the human champion. The victory, in many ways, was a crescendo for Turing and others, who had all worked with chess as a tool for developing artificial intelligence.[60] Crucially, Deep Blue was not getting better with each match. It was not learning. The program used a massive amount of data and employed it with machine-like precision.[61] The computer, in other words, could process potential moves and countermoves more quickly and comprehensively than Kasparov. That precision was enough to outdo the game's best human player. What beats the computer that beats the best human player? AI that learns.

Google's AlphaZero taught itself to play chess, along with two other games, in 2017 and then defeated the most advanced chess computer programs in the world.[62] In other words, a chess program that had been carefully and specifically developed and updated by human programmers for two decades after Deep Blue beat Kasparov could not defeat a general AI program that taught itself to play chess. AI that can learn and improve with each interaction is more powerful than a specialized program that does not learn. AlphaZero started by making seemingly random moves on the chess board. Within two hours, it was better at chess than most humans. After four hours, it could beat any player in the world—computer or human.[63] David Silver, the head of Google's DeepMind project, along with a group of other scholars, emphasized the differences between the older types of AI, which have their roots in Newell's and Simon's Logic Theorist, and machine-learning technology, in an article in *Science*.[64] They explained, "AlphaZero replaces the handcrafted knowledge and

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[57] Mark Tran, *Deep Blue Computer Beats World Chess Champion*, THE GUARDIAN (Feb. 12, 2021, 12:30 AM), https://www.theguardian.com/sport/2021/feb/12/deep-blue-computer-beats-kasparov-chess-1996 [https://perma.cc/X25T-MXZ9].

[58] Garry Kasparov, *Worry About Human (Not Machine) Intelligence*, ENCYC. BRITANNICA (June 8, 2023), https://www.britannica.com/topic/Worry-About-Human-Not-Machine-Intelligence-2119055 [https://perma.cc/K58N-R2SR].

[59] *Id.*

[60] David Silver et al., *A General Reinforcement Learning Algorithm That Masters Chess, Shogi, and Go Through Self-Play*, 362 SCIENCE 1140, 1140 (2018); Turing, *supra* note 35, at 460.

[61] *See Deep Blue*, IBM, https://www.ibm.com/history/deep-blue [https://perma.cc/DFL8-YHXC] (last visited Feb. 19, 2025).

[62] Silver et al., *supra* note 60, at 1140, 1143.

[63] James Somers, *How the Artificial-Intelligence Program AlphaZero Mastered Its Games*, NEW YORKER (Dec. 28, 2018), https://www.newyorker.com/science/elements/how-the-artificial-intelligence-program-alphazero-mastered-its-games [https://perma.cc/P5CW-554K].

[64] Silver et al., *supra* note 60, at 1140, 1144.

domain-specific augmentations used in traditional game-playing programs with deep neural networks, a general-purpose reinforcement learning algorithm . . . ."[65] AI that can learn and evolve is more powerful than AI that is programmed to specialize in a certain task. The puppeteering that was central to the Mechanical Turk, and even Newell and Simon's Logic Theorist, is further removed from the information-creation process when AI uses programming to learn. This learning stage raises new questions about Press Clause rights for AI, as the tools exert greater agency and more capability to exercise nuanced thinking.

This next logical step helps resolve Newell and Simon's early challenge that they could not program all the possible scenarios and solutions into their early AI tool. Any tool they created could only provide answers based on content they had fed it, which was constrained by a variety of factors. AI that can teach itself chess can learn about other matters as well. After AlphaZero, AI learned to learn, which allowed OpenAI to introduce ChatGPT-3 in 2020.[66] ChatGPT-3 was the predecessor to the ChatGPT-4 model that garnered 100 million users in only a few months in late 2022 and early 2023.[67] OpenAI's tool connected the deep learning technologies that evolved from AI, like AlphaZero, with language models that increasingly replicate humans' written communication patterns. Thus, having learned billions of pieces of data, generative AI takes the next step, introducing the ability of non-human entities, AI, to quickly sift through and draw from billions of pieces of information to create reports and to publish information in easily accessible formats.[68] While this tool does not replace the work of journalists, who gather information that is not available to AI, it enters the journalistic space because, like news organizations, generative AI can gather and report many pieces of information to audiences.

C. The Rise of Robot News Reports

The *Associated Press* (*AP*) did not wait for AlphaZero to defeat Deep Blue in chess. The global news non-profit started working with Automated Insights in 2014 to create templates for routine business stories.[69] When provided with the data, the AI quickly produced the types of basic, formulaic reports that interns and junior reporters had created daily for decades. The AI tool allowed the *AP* to go from 300

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[65] *Id.* at 1140.

[66] Bernard Marr, *A Short History of ChatGPT: How We Got to Where We Are Today*, FORBES (May 19, 2023, 1:14 AM), https://www.forbes.com/sites/bernardmarr/2023/05/19/a-short-history-of-chatgpt-how-we-got-to-where-we-are-today/ [https://perma.cc/V4R7-8NT9].

[67] Hu, *supra* note 26.

[68] ALBERT MEIGE ET AL., ARTIFICIAL INTELLIGENCE: TOWARD A NEW CIVILIZATION? 6 (2023).

[69] *Artificial Intelligence*, ASSOCIATED PRESS, https://www.ap.org/discover/artificial-intelligence [https://perma.cc/AG3K-BQT9] (last visited Feb. 19, 2025); Ross Miller, AP*'s 'Robot Journalists' Are Writing Their Own Stories Now*, THE VERGE (Jan. 29, 2015, 11:55 AM), https://www.theverge.com/2015/1/29/7939067/ap-journalism-automation-robots-financial-reporting [https://perma.cc/P3Q6-WAQ6].

earnings-report stories per year to 3,700.[70] Sports reports soon followed. *The Washington Post* took notice. The *Post* used an AI tool, Heliograf, to cover the 2016 Olympics and general election in the United States later that year.[71] *Bloomberg News* was not far behind. By the end of 2018, about one-third of *Bloomberg*'s content was influenced by AI.[72] Crucially, these pre-generative AI tools closely mirrored Newell and Simon's Logic Theorist or IBM's Deep Blue in the sense that they were created for and limited to a specific task. They were not using neural or adversarial networks to identify, interpret, and refine data into clear reports. They executed a program that filled in blanks with data provided. In this sense, early AI in journalism closely mirrored a printing press or word processor. It was a tool that was closely watched by humans and extended the reach of human journalistic efforts.

Generative AI, such as ChatGPT and OpenAI's image-producing tool, DALL-E 2, expanded the scope of content that can be created and published by non-human communicators.[73] The *AP*'s early earnings report tool, for example, was capable of turning a specific set of data, in a certain format, into a news report about that information. Thus, these tools, like an auto plant's assembly line, took the parts provided and assembled them into a specific item. The AI did not learn; it simply automated a task. The tool was limited by the data it was provided and what it could do with that data. Alternatively, generative AI can draw from billions of pieces of data to produce reports in a variety of styles and lengths. It also learns and improves with each interaction, using what the industry calls "reinforcement learning from human feedback."[74] Thus, the advancement into generative AI portends to substantially remove humans from many publishing processes, making AI far more independent. Beyond creating reports that could automatically appear on websites—news organizations' or otherwise—generative AI can also be specialized for a specific organization. *Bloomberg News* created BloombergGPT in spring 2023.[75] The AI tool knows

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[70] Jaclyn Peiser, *The Rise of the Robot Reporter*, N.Y. TIMES (Feb. 5, 2019), https://www.nytimes.com/2019/02/05/business/media/artificial-intelligence-journalism-robots.html [https://perma.cc/ZHD4-LCJE].

[71] Lucia Maffei, *Robots Will Cover the Olympics for* The Washington Post, TECHCRUNCH (Aug. 5, 2016, 4:33 PM), https://www.techcrunch.com/2016/08/05/robots-will-cover-the-olympics-for-the-washington-post/ [https://perma.cc/QCG5-RLSH].

[72] Peiser, *supra* note 70.

[73] *See DALL-E 2*, OPENAI, https://openai.com/dall-e-2 [https://perma.cc/PGL5-R26U] (last visited Feb. 19, 2025); *see also* Kyle Wiggers, *Now Anyone Can Build Apps That Use DALL-E 2 to Generate Images*, TECHCRUNCH (Nov. 3, 2022, 10:00 AM), https://www.techcrunch.com/2022/11/03/now-anyone-can-build-apps-that-use-dall-e-2-to-generate-images/ [https://perma.cc/KD4Z-N69A] (explaining DALL-E 2's ability to immediately produce images in both realistic and artistic styles).

[74] *Aligning Language Models to Follow Instructions*, OPENAI, https://openai.com/research/instruction-following [https://perma.cc/6S4H-Y9AM] (last visited Feb. 19, 2025).

[75] Joshua Benton, *What If ChatGPT Was Trained on Decades of Financial News and Data? BloombergGPT Aims to be a Domain-Specific AI for Business News*, NIEMANLAB

everything available in the *Bloomberg* archives, as well as additional data that is publicly available in other spaces.[76] The experimental tool includes 700-billion-word fragments and represents a new kind of information service for *Bloomberg* subscribers. This step toward organization-specific generative tools could mean audience members will soon be able to go to websites and apps, whether the sites are controlled by traditional news organizations or not, and request and receive specific reports that are immediately published. Such a development returns us to the original question: Does the Press Clause protect AI communicators and the reports they publish?

II. THE FOUNDERS' PRESS CLAUSE

Eleazer Oswald caused a lot of trouble. As one historian noted, "Oswald could not always be controlled."[77] When he was not shooting rival publishers in duels, threatening to shoot people, or arguing with George Washington, he instigated early tests of press rights that provided substantial background regarding the role of the press and its freedoms during the period when the First Amendment was written.[78] Oswald immigrated to New York in 1770, where he trained as a printer.[79] He joined the Continental Army during the Revolution and helped capture Fort Ticonderoga in 1775.[80] Oswald was injured and captured during Benedict Arnold's attack on Quebec in 1776 and freed in a prisoner exchange the following January.[81] By fall 1778, Oswald lost faith in Washington's leadership. He was particularly upset that he was passed up for promotion.[82] After leaving the army, he wrote to Washington to air his grievances. Oswald called Washington "Your Excellency" ten times in the fiery letter about the ill-treatment he perceived receiving in the Continental Army.[83]

(Apr. 3, 2023, 2:30 PM), https://www.niemanlab.org/2023/04/what-if-chatgpt-was-trained-on-decades-of-financial-news-and-data-bloomberggpt-aims-to-be-a-domain-specific-ai-for-business-news/ [https://perma.cc/VD3C-TNTH].

[76] *Id.*

[77] POWE, *supra* note 3, at 30.

[78] *See id.* at 30–31.

[79] Theodore Crackel, *Oswald, Eleazer*, FIN. PAPERS, http://financial.gwpapers.org/?q=content/oswald-eleazer [https://perma.cc/WE9W-A72S] (last visited Feb. 19, 2025).

[80] C.E. Pippenger, *The War Years (1775–1783)*, J. AM. REVOLUTION (May 18, 2020), https://www.allthingsliberty.com/2020/05/orders-issued-by-benedict-arnold-commander-in-chief-to-the-captain-of-the-liberty/ [https://perma.cc/X9RM-X9EF].

[81] *Eleazer Oswald Accidentally Starts the Retreat at Monmouth*, FOUNDER OF THE DAY (Nov. 29, 2021), https://www.founderoftheday.com/founder-of-the-day/eleazar-oswald [https://perma.cc/KZZ2-QB2F].

[82] Letter from Lieutenant Colonel Eleazer Oswald to George Washington (Oct. 28, 1778), *in* NAT'L ARCHIVES, https://www.founders.archives.gov/documents/Washington/03-17-02-0640 [https://perma.cc/W7BQ-T3JH].

[83] *Id.*

Oswald went back to printing, first in Baltimore, where he became one of the rare publishers who questioned Washington's leadership.[84] After one edition, his criticism of Washington inspired a mob to gather outside the print shop he shared with his business partner.[85] Unconcerned, Oswald grabbed his pistols and challenged the mob leader to a duel.[86] The outcome of the duel is not known, but Oswald clearly lived to fight again. He moved to Philadelphia, working for the *Independent Gazetteer* / *Chronicle of Freedom*, where he shot a rival publisher in the leg during a duel in 1786.[87] Two years after the duel, Oswald took on someone only slightly less powerful than Washington: He attacked Pennsylvania Chief Justice Thomas McKean.[88] McKean signed the *Declaration of Independence*.[89] He was president of the Continental Congress in 1781—while simultaneously Chief Justice of Pennsylvania and a representative from Delaware.[90] He later became the second governor of Pennsylvania.[91] This was not Oswald's first encounter with McKean. In 1782, Oswald attacked McKean for levying fines against military officers.[92] Oswald was saved from McKean's penalties when a grand jury refused to indict him.[93]

Oswald was not as lucky in 1788. He attacked a local schoolmaster's conduct in the *Gazetteer*, which led to his arrest for libel.[94] After being freed on bail, Oswald published an argument for freedom of the press that attacked the court. He claimed his "situation as a printer, and the rights of the press and of freemen, are fundamentally struck at."[95] Written under the pen name "Junius Wilkes," Oswald argued for a "perfectly free and unrestrained" press, which included protection from liability

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[84] Joseph Towne Wheeler, *Eleazer Oswald, Printer and Soldier*, 438 ARCHIVES MD. ONLINE 19, 23–25 (2002).

[85] POWE, *supra* note 3, at 30.

[86] *Id.*

[87] *Eleazer Oswald Challenged Carey to a Duel*, MATHEW CAREY, https://www.mathewcarey.info/life-legacy/becoming-american-1784-1789/eleazer-oswald-challenged-carey-to-a-duel/ [https://perma.cc/82HD-B9ZW] (last visited Feb. 19, 2025).

[88] POWE, *supra* note 3, at 34.

[89] *Signers of the Declaration of Independence*, NAT'L ARCHIVES, https://www.archives.gov/founding-docs/signers-factsheet [https://perma.cc/48ZC-NASS] (last visited Feb. 19, 2025).

[90] See Scott Bomboy, *Thomas McKean: A Founding Father with a Double Life*, NAT'L CONST. CTR. (Mar. 19, 2023), https://www.constitutioncenter.org/blog/thomas-mckean-looking-at-a-most-interesting-founding-father [https://perma.cc/B68H-9V5Z], for more about McKean's often underrecognized influence on early U.S. law.

[91] *Id.*

[92] POWE, *supra* note 3, at 34.

[93] *Id.* at 34–35.

[94] Respublica v. Oswald, 1 U.S. 319, 319 (Pa. 1788). It is noteworthy that Justice McKean's decision in *Respublica* is cited in *Near v. Minnesota*, 283 U.S. 697, 714 (1931), the first case in which the Supreme Court struck down a law because it conflicted with the First Amendment.

[95] *Respublica*, 1 U.S. at 319.

for defamation.[96] He contended the press protects the people from tyranny and holds government officials accountable and, therefore, must be safeguarded.[97] Oswald's arguments aligned with his understanding of article 12 of the Pennsylvania Bill of Rights, which was published prominently at the top of the front page of each issue of the *Gazetteer*.[98] Article 12 reads, "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."[99]

Justice McKean disagreed with parts of Oswald's construction of press rights, holding Oswald in contempt of court for seeking to undermine judicial authority during an active case. The case that resulted, *Respublica v. Oswald*, led Justice McKean to explain how he understood press rights.[100] After quoting the Pennsylvania Bill of Rights in his decision, Justice McKean emphasized four points that remain at the heart of questions about the Press Clause: false and defamatory content should not be protected; press protections are for all citizens; the press should benefit democratic society; and press protections do not allow government censorship.[101] McKean explained,

> The true liberty of the press is amply secured by permitting every man to publish his opinions; but it is due to the peace and dignity of society, to inquire into the motives of such publications, and to distinguish between those which are meant for use and reformation, and with an eye solely to the public good, and those which are intended merely to delude and defame.[102]

Justice McKean, in other words, understood press protections as coming with certain limitations and expectations. He reasoned press protections should be balanced with other concerns, such as individual reputation and benefit for public good, as well as, of course, the credibility of the judicial process. Justice McKean ultimately fined Oswald ten pounds and sentenced him to a month in jail.[103]

Elizabeth Oswald, Eleazer's wife, appealed to Pennsylvania President Benjamin Franklin, requesting that he look into her husband's case.[104] Franklin responded in a

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[96] POWE, *supra* note 3, at 39.

[97] *Id.*

[98] *See* INDEP. GAZETTEER, Aug. 3, 1789, at A1.

[99] *See* PA. CONST. art. XII (1776) (regarding the state's original constitution's safeguards for press rights). See INDEP. GAZETTEER, *supra* note 98, for the placement of the state's promise of press rights atop the newspaper's front page.

[100] 1 U.S. at 325–26.

[101] *Id.*

[102] *Id.* at 325.

[103] *Id.* at 329.

[104] Letter from Elizabeth Oswald to Benjamin Franklin (Aug. 3, 1788), *in The Papers of*

personal tone on the same day, indicating the two knew each other before this letter exchange. He explained it would be improper for him to overturn Justice McKean's decision.[105] He concluded by advising her that her husband should "change the Conduct of his Paper by which he has made and provok'd so many Enemies."[106] As a former newspaper publisher, Franklin was surprisingly unsympathetic to Oswald's cause. Franklin was not a stranger to questions regarding press rights, though he seemed more sympathetic decades earlier in his "Apology for Printers," which was published in his newspaper, *The Pennsylvania Gazette*, in 1731.[107] He explained, more than half a century before Elizabeth Oswald sought his help, "Printers are educated in the Belief, that when Men differ in Opinion, both Sides ought equally to have the Advantage of being heard by the Publick; and that when Truth and Error have fair Play the former is always an overmatch for the latter . . . ."[108] The Oswald saga, which ultimately drew in the ideas of two signers of the *Declaration of Independence* and one volatile former artillery officer, encapsulates some of the fundamental themes that surrounded press freedoms prior to the First Amendment's existence. Oswald understood press protections as broad and expansive, while Justice McKean included concerns regarding truth, social good, and respect for the judiciary in his conceptualization of press rights. The disagreement about the scope of press protections continued to echo in debates regarding the scope and meaning of the Press Clause.

A. Heavy Ideas, Light Explanations

The Oswald affair was not the only noteworthy discourse regarding press rights during the pre–Bill of Rights period. Just months before James Madison read his first draft of the Bill of Rights to Congress in Summer 1789, William Cushing, who within the year would become one of the original five members of the Supreme Court, wrote a letter to John Adams, the incoming vice president, asking for his thoughts regarding "liberty of the press."[109] Both were crucial innovators from Massachusetts. Adams wrote the Massachusetts Constitution in 1780 while Cushing became Chief Justice of the Commonwealth's highest court and a charter member

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Benjamin Franklin, PACKARD HUM. INST., https://franklinpapers.org/framedVolumes.jsp?vol=46&page=035 [https://perma.cc/U2SW-Z28K].

[105] Letter from Benjamin Franklin to Elizabeth Oswald (Aug. 3, 1788), *in The Papers of Benjamin Franklin*, *supra* note 104.

[106] *Id.*

[107] Benjamin Franklin, *Apology for Printers* (June 10, 1731), *in* FOUNDERS ONLINE, https://www.founders.archives.gov/documents/Franklin/01-01-02-0061 [https://perma.cc/N9V4-B2XD].

[108] *Id.*

[109] Letter from Cushing, *supra* note 3.

of the American Academy of Arts and Sciences.[110] In 1783, Cushing and his fellow Justices ended slavery in Massachusetts, making it the first state to outlaw the practice.[111] Cushing sought advice from the author of the state's press-protection provision regarding how to interpret such rights, noting, "I have had a difficulty about the construction of it; which no Gentleman better than yourself can, in a word, clear up."[112] The jurist was most concerned about the scope of press protections, particularly in regard to truthful information that upset or embarrassed those in power. He lauded, in the letter, the value of truth and flow of ideas, emphasizing "publishing truth can never effectually injure a good government or honest administrators."[113] Justice Cushing admitted the Commonwealth's press protections were broadly worded, leaving little room for limitations on the press. He asked, referring to the Massachusetts Bill of Rights, "[D]oes it not comprehend a liberty to treat all Subjects & characters freely within the bounds of truth?"[114]

Adams's response offered a more tepid version of press freedoms. He counselled the jurist that more than truth should be required to protect a publisher from legal liability.[115] Adams explained, "[I]t lay in my mind that Some just Cause for publishing it, must be added."[116] Adams, in other words, contended press freedoms required a public-good aspect. To Adams, a publisher must communicate ideas that are both true *and* beneficial to society to receive protection. Adams explained, "You may easily conceive a Case, when a Scandalous Truth may be told of a Man, without any honest motive, and merely from malice. In Such a Case, Morality and religion would forbid a Man from doing Mischief merely from Malevolence, and I thought that Law would give damages."[117]

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[110] For information about Adams's biography, see *John Adams, Architect of American Government*, MASS.GOV (2024), https://www.mass.gov/guides/john-adams-architect-of-american-government#-introduction- [https://perma.cc/B4FD-F3D4]. For information about Cushing's membership in the American Academy of Arts and Sciences, see *Charter of Incorporation of the American Academy*, AM. ACAD. ARTS & SCIS., https://www.amacad.org/archives/charter [https://perma.cc/MNG6-35UF] (last visited Feb. 19, 2025) (granted May 4, 1780).

[111] See Emily Blanck, *Seventeen Eighty-Three: The Turning Point in the Law of Slavery and Freedom in Massachusetts*, 75 NEW ENG. Q. 24, 24–25 (2002); Matthew Ahern, Jennison v. Caldwell*: Abolition and the Role of Courts in Eighteenth Century Massachusetts*, MASS. HIST. SOC'Y (Jan. 21, 2022), https://www.masshist.org/beehiveblog/2021/07/jennison-v-caldwell-abolition-and-the-role-of-courts-in-eighteenth-century-massachusetts/ [https://perma.cc/Q4E9-68FG], for more about Justice Cushing's role in ending slavery in Massachusetts.

[112] Letter from Cushing, *supra* note 3.

[113] *Id.*

[114] *Id.*

[115] Letter from John Adams to William Cushing (Mar. 7, 1789), *in* FOUNDERS ONLINE, https://www.founders.archives.gov/documents/Adams/06-19-02-0280 [https://perma.cc/ADK9-QHQH].

[116] *Id.*

[117] *Id.*

Truth alone was not sufficient, according to Adams, the author of one of the primordial documents regarding press protections in the United States. The exchange and differences between the two officials included parallels with the Oswald-McKean debate from the year before. Oswald and Justice Cushing interpreted press safeguards as being broad regarding who and what they protected. Oswald contended press freedoms were so crucial that no limitations should be placed on them, while Justice Cushing contended truth, by itself, was sufficient to trigger all protections for the press. Justice McKean and Adams understood press safeguards as being more limited, including expectations that what is published is true, and is communicated with good motives or represents some type of public good. Justice McKean's approach could also be interpreted as including an expectation that what is published supports, rather than threatens, public order. Crucially, when it comes to whether AI entities should receive press-related protections, these differences represent early fault lines that arise again when it comes to the meanings of safeguards for publishers.

As the ink dried on the exchange between Cushing and Adams, and the irascible Oswald finished his time in jail, Madison readied to continue a similar discussion about press rights, this time in a speech before the fledgling Congress. Little is known regarding the substance of the debates in Congress regarding what became the Press Clause of the First Amendment. Evidence from Madison's initial presentation to Congress, in June 1789, indicates themes from the Oswald-McKean and Cushing-Adams discourses persisted.[118] Madison's draft outlined two amendments that would safeguard the press, and their placement and phrasing provide crucial building blocks regarding how he understood such protections. The first mention came in a lengthy amendment that protected "civil rights," including rights to religion, assembly, and petition, and freedom of the people "to speak, to write, or to publish their sentiments."[119] The amendment continued, "[f]reedom of the press, as one of the great bulwarks of liberty, shall be inviolable."[120] That part of the amendment's wording was taken nearly word-for-word from the Virginia Declaration of Rights, from Madison's home state, which was signed in 1776, as well as *Cato's Letters*, which were initially published in England in the 1720s.[121] It is noteworthy that Madison included the passage with "to speak, to write, or to publish" and then a separate passage for freedom of the press, which could indicate he understood

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[118] 1 ANNALS OF CONG. 451–52 (1789) (Joseph Gales ed., 1834).

[119] *Id.* at 451.

[120] James Madison, *Amendments to the Constitution [8 June] 1789* (June 8, 1789), *in* FOUNDERS ONLINE, https://www.founders.archives.gov/documents/Madison/01-12-02-0126 [https://perma.cc/2Q8M-EVWL]. See also James Madison's Notes for Speech on Constitutional Amendments (June 8, 1789), *in* LIB. OF CONG., https://www.loc.gov/resource/mjm.04_0319_0320/?sp=1&st=image [https://perma.cc/47G5-KSX5], for Madison's handwritten notes for what he wanted to say during his speech.

[121] *The Virginia Declaration of Rights*, *supra* note 6; Trenchard & Gordon, *supra* note 7.

publishing as a protection for everyone and press safeguards as specific to news-related efforts.[122]

Later in his draft, Madison returned to the press, emphasizing, "No state shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases."[123] His inclusions regarding press freedoms reinforce that these matters were on the minds of lawmakers at the time. The second mention of press protections, as part of a fifth proposed amendment, is prefaced by a concern for equal rights across the states, indicating a concern that some states might provide more or fewer protections than others. The amendment, which was not adopted, comes closest to what later became the Fourteenth Amendment's Equal Protection Clause.[124] Madison's extensive presentation to Congress, which spans nearly twenty pages in the congressional record, received immediate opposition in the House.[125] Representative James Jackson, a former state militia general and pro-slavery lawyer from Georgia, was the first to speak when Madison completed his presentation.[126] Jackson was adamantly against a Bill of Rights and singled out press protections to make his argument. Jackson reasoned, "The gentleman endeavors to secure the liberty of the press; pray how is this in danger? There is no power given to Congress to regulate this subject."[127] Jackson continued, "Has any transaction taken place to make us suppose such an amendment necessary? . . . I am not afraid, nor are other members I believe, our conduct should meet the severest scrutiny."[128]

Jackson must not have read about Oswald's fine and imprisonment. The Congressman's arguments against any kind of Bill of Rights were the most incisive during the House's initial discussion about the draft amendments, but others sought to ignore the amendments in favor of other business.[129] Ultimately, the House agreed that day, after brief debate, to create a committee of the whole to discuss Madison's amendments. We have almost no record of that committee's work, or the Senate's discussions that followed.[130] The revisions, however, substantially changed the wording Madison proposed. The House Committee shifted Madison's initial press-related amendment to "[t]he freedom of speech and of the press, and the right of the people peaceably to assemble and consult for their common good, and to apply to the

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[122] 1 ANNALS OF CONG., *supra* note 118, at 451.

[123] Madison, *supra* note 120.

[124] U.S. CONST. amend. XIV, § 1.

[125] 1 ANNALS OF CONG., *supra* note 118, at 459–60.

[126] *Id.* at 459. For biographical information on Rep. James Jackson, see Alexander A. Lawrence, *James Jackson: Passionate Patriot*, 34 GA. HIST. Q. 75, 76–77 (1950). For an example of Jackson's statements in support of slavery, see Jeffery Robert Young, *Slavery in Antebellum Georgia*, NEW GA. ENCYC. (Sept. 30, 2020), https://www.georgiaencyclopedia.org/articles/history-archaeology/slavery-in-antebellum-georgia/ [https://perma.cc/PK2J-XLV7].

[127] 1 ANNALS OF CONG., *supra* note 118, at 460.

[128] *Id.*

[129] *Id.* at 460–62.

[130] POWE, *supra* note 3, at 45–47.

Government for the redress of grievances, shall not be infringed."[131] The revision removed the distinctive mention of "publish," which was placed alongside speaking and writing, and "press," which stood alone, that were in Madison's draft, placing the press in the same place as speech.[132] The revision also removed the "bulwark of liberty" passage, which associated press protections with safeguarding democratic discourse, but added a "common good" expectation, that press rights, along with other forms of discourse, include a concern that they are beneficial to society—an approach that would have aligned with Justice McKean's and Adams's understandings.[133]

The "common good" revision was not included in the final amendment but helps communicate concerns within Congress regarding the Press Clause and its intended meaning. The final version of the amendment left the Press Clause without context and the other amendment that specifically mentioned the press failed. As a result, speech was elevated and the word "press" was left to do the work of representing both "publishers" and "press," which were separate in Madison's original draft. Had both references survived, a distinction could have been made between the scope and meaning of protections that relate to publishers, which would safeguard anyone who communicated ideas via the printed word, and the Press Clause, which safeguarded the democratic and public-good mission of the press—a concern that was present in early state constitutions and thinkers' discussions of press safeguards. The presence of both references could have helped with questions about the meaning of the Press Clause in the twenty-first century, since nearly everyone, and increasingly many things, can now publish. Their work, like the work of many eighteenth-century printers, is not necessarily journalistic.

B. The Eighteenth-Century Press

Madison's draft of what became the First Amendment included separate publisher and press safeguards.[134] The inclusion of both, rather than being a redundancy, makes more sense in the context of what the press looked like in the eighteenth century. Eighteenth-century publishers did not claim to be journalists. They generally did not conduct interviews, fact-check reports, seek objectivity in their reporting processes, or claim independence from political or other influences.[135] The first journalism school, the University of Missouri School of Journalism, did not open until 1908.[136] Journalistic norms, in the sense that they emerged in the twentieth

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[131] *Id.* at 46.

[132] *Id.* at 45–46.

[133] *Id.* at 46.

[134] *Id.* at 45.

[135] *See* PAUL STARR, THE CREATION OF THE MEDIA 58–61 (2004); POWE, *supra* note 3, at 28.

[136] *The J-School Legacy*, MO. SCH. JOURNALISM, https://www.journalism.missouri.edu/the-j-school/the-j-school-legacy/ [https://perma.cc/2ST8-BHSE] (last visited Feb. 19, 2025).

century, did not exist. Colonial-era printers were small-business owners who profited from printing a variety of items. Legal historian Lucas Powe emphasized, "The eighteenth-century press—and the petty merchant-printers that ran it—did not bother with late-nineteenth- or twentieth-century notions such as independence from government."[137] The economic model for early printers centered on government contracts. Subscriptions and advertising revenues represented only a small part of their incomes.[138] Those who printed politics-oriented newspapers could earn tens of thousands of dollars in government contracts—if they kept their benefactors happy and in power.[139] The synergy between government contracts, book publishing, and newspapers was streamlined because one printer, along with employees, organized the business. Printers served as editors, typesetters, and salespeople.[140]

The first two consistently published newspapers in the colonies were printed by postmasters general.[141] *The Boston News-Letter*, for example, was the first regularly printed newspaper in the colonies.[142] It was published by Boston postmaster general John Campbell, who viewed printing a newspaper as part of the duties of his post.[143] Importantly, Campbell understood the postmaster's newspaper as a "Publick Good," providing one of the potential origins of the public-good expectations that were later outlined by Justices McKean and Adams.[144] Campbell never sold more than 300 copies of an issue of his newspaper.[145] One historian noted, "He conceived of his role as that of a functionary, not a journalist, treating the newspaper as an extension of his work as postmaster."[146] Benjamin Franklin took over *The Pennsylvania Gazette* in 1728 after its publisher sought to print an encyclopedia one letter at a time.[147] Before the publisher made it to "B," he sold *The Pennsylvania Gazette* to Franklin due to lack of readership.[148] Franklin turned the *Gazette* around by drawing it closer to the dominant funding streams of the time—government contracts and book publishing. His newspaper never reached more than 2,000 in circulation nor opened the door to crucial revenue streams.[149] The *Gazette* became the official printer of the Pennsylvania Assembly by 1730 and Franklin started publishing *Poor Richard: An*

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[137] POWE, *supra* note 3, at 28.

[138] *Id.*

[139] MICHAEL SCHUDSON, DISCOVERING THE NEWS: A SOCIAL HISTORY OF AMERICAN NEWSPAPERS 15 (1978).

[140] *Id.* at 16.

[141] Charles E. Clark, *Boston and the Nurturing of Newspapers: Dimensions of the Cradle*, 64 NEW ENG. Q. 243, 252–53 (1991).

[142] *Id.* at 243.

[143] *Id.* at 253–54.

[144] *Id.* at 256.

[145] *Id.* at 247.

[146] STARR, *supra* note 135, at 55.

[147] *Id.* at 58.

[148] *Id.*

[149] Clark, *supra* note 141, at 247.

Almanack annually in 1731.[150] He became Postmaster General of Philadelphia in 1737, linking his newspaper to the postal system and benefitting from not having to pay postage costs to send his publication to subscribers.[151] In 1775, just as the push for independence was reaching a crescendo, the total circulation of Boston's 2 largest newspapers, combined, was about 5,500.[152] The average newspaper in New England at the time had 600 subscribers.[153] Around 1826, newspapers were generally weekly and included four pages, two of which were filled with advertising.[154]

Publishers printed more than encyclopedia entries. The Massachusetts Assembly published its debates and votes, starting in 1715.[155] Printers also published 150,000 copies of Thomas Paine's *Common Sense* between 1775 and 1776.[156] Proposed state and federal constitutions also primarily circulated via printers' offices. Sociologist Paul Starr emphasized that "widespread publication was central to their legitimacy."[157] Certainly, these printers also published newspapers, which included information about current events, particularly after 1765, but news was only a portion of what was printed in their shops. Overall, newspapers were small in size and circulation and were not professionalized during the era in which press protections developed in state constitutions and, eventually, the Bill of Rights.

The newspapers were also closely linked to government and politicians, rather than independent. These characteristics could have led Madison to propose separate publishing and press protections in his initial draft of the amendments. The first protection, listed alongside speech and writing, could be understood as being intended to safeguard the types of pamphlets, such as Paine's *Common Sense* and *The Federalist Papers*, that were a central part of the flow of ideas during the period. *The Federalist Papers* were published between 1787 and 1788, about a year before Madison outlined his draft Bill of Rights before Congress.[158] The press protections, which appeared in two amendments in the initial draft of the Bill of Rights, could have focused on the news side of publishers' work, therefore being intended to safeguard the flow of news.[159] While revisions eliminated the separate "publish" and "press"

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[150] ESMOND WRIGHT, FRANKLIN OF PHILADELPHIA, at xv (1986).

[151] See *id.* at xv–xvii, for a chronology of Franklin's life, including how he allied his printing business with political powers. *See also* Nancy A. Pope, *Benjamin Franklin: Philadelphia's Postmaster*, SMITHSONIAN NAT'L POSTAL MUSEUM (June 6, 2017), https://www.postalmuseum.si.edu/benjamin-franklin-philadelphia%E2%80%99s-postmaster [https://perma.cc/J82H-D6LT] (describing how serving as postmaster allowed Franklin to mail *The Pennsylvania Gazette* to subscribers for free).

[152] STARR, *supra* note 135, at 68.

[153] *Id.*

[154] SCHUDSON, *supra* note 139, at 14.

[155] STARR, *supra* note 135, at 56.

[156] *Id.* at 67.

[157] *Id.* at 71.

[158] *See generally* THE FEDERALIST NOS. 1–85 (Alexander Hamilton, James Madison & John Jay).

[159] POWE, *supra* note 3, at 45.

mentions, as well as the later amendment Madison proposed regarding press protections, the earliest draft, as well as context regarding what the press looked like during the time in which these safeguards were crafted, contributes crucial contextual building blocks to the question of how we should construct the Press Clause of the First Amendment as it applies to AI publishers.[160]

C. Legal Scholars Wrestle with the Press Clause

Justice Potter Stewart had one subject he wanted to focus on when he stood before the Yale Law School Sesquicentennial Convocation in November 1974. He wanted to outline a definitive meaning of the Press Clause.[161] Stewart was a senior member of the Supreme Court, having served for more than fifteen years.[162] He was also a Yale Law School graduate.[163] The Press Clause, according to his address, had clearly been on his mind.[164] The Court's docket, by the end of the 1974 term, had just included the most concentrated period of press-related cases in its history.[165] The results were, for the most part, unclear. The Court heard cases involving journalists' claims to have a constitutional privilege to not disclose their sources to a grand jury. For example, *Branzburg v. Hayes*, according to Justice Stewart, was tied, "four and a half to four and a half" in 1972 regarding whether the Press Clause protected a reporter's right to refuse to testify and provide names of sources of information to a grand jury.[166] Four Justices signed the Court's opinion, which reasoned a journalist does not have any rights not available to other citizens.[167] Justice Lewis Powell, the half-and-half vote, concurred, and four Justices, including Justice Stewart, dissented.[168] Two terms later, in 1974, the Justices drew similar battle lines regarding press rights in *Saxbe v. Washington Post Co.*[169] and *Pell v. Procunier*,[170] both cases

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[160] *Id.* at 46–47.

[161] *See generally* Stewart, *supra* note 21.

[162] *Potter Stewart, 1958–1981*, SUP. CT. HIST. SOC'Y, https://www.supremecourthistory.org/associate-justices/potter-stewart-1958-1981/ [https://perma.cc/5GHV-H9GH] (last visited Feb. 19, 2025).

[163] *Id.*

[164] *See* Stewart, *supra* note 21, at 631–33.

[165] The Court considered press-related cases such as *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Branzburg v. Hayes*, 408 U.S. 665 (1972); *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974); *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974); *Pell v. Procunier*, 417 U.S. 817 (1974), in the years leading up to Justice Stewart's address to Yale Law School.

[166] Stewart, *supra* note 21, at 635. *See generally Branzburg*, 408 U.S. at 665 (regarding how the Justices' opinions were organized).

[167] *Branzburg*, 408 U.S. at 704–05. See *infra* Part III for a more detailed analysis of this decision.

[168] *Branzburg*, 408 U.S. at 709–10 (Powell, J., concurring).

[169] 417 U.S. 843 (1974).

[170] 417 U.S. 817 (1974).

in which journalists contended the Press Clause granted a right of access to sources to reporters. The Justices declined the news organizations' Press Clause arguments in both cases, again fracturing five-to-four in *Saxbe* and six-to-three in *Pell*.[171] The Justices had been far more aligned in the *New York Times Co. v. United States*,[172] a prior restraint case, and *Miami Herald Publishing Co. v. Tornillo*,[173] a compelled publication case, during this period. The cases, according to Justice Stewart's 1974 speech, had given him a clear idea of the meaning of the Press Clause.[174] While these and other press-related cases are examined in the next Section, Justice Stewart, here, outside of his black robes and his powers as a Justice hearing a case for the highest court, constructed a clear, but problematic and largely unsupported, theory of the Press Clause.[175]

Just months after the *Pell* and *Saxbe* decisions were announced, Stewart took to the podium at Yale Law School to contend the Press Clause is an industry-specific right.[176] The Clause, in other words, was intended to protect the institutional, journalistic press and nothing else. He explained, "[T]he Free Press Clause extends protection to an institution. The publishing business is, in short, the only organized . . . business that is given explicit constitutional protection."[177] He reasoned the Speech Clause is for everyone, but the Press Clause was intended, by the Framers, to protect a quasi-fourth branch of government—the institutional press. He reasoned the Press Clause was included to "create a fourth institution outside the Government as an additional check on the three official branches."[178] Justice Stewart emphasized that most state constitutions had press protections, but did not mention freedom of speech, before the Bill of Rights was created.[179] As a result, he was certain the Speech and Press Clauses were intended to do different things. To support his reasoning, Justice Stewart stepped into the minefield of recent Court decisions regarding press rights. Regarding *Branzburg*, he emphasized reporters do not have a right to refuse to testify before a grand jury under the Speech Clause, but they do, under the Press Clause, "if a reporter is a representative of a protected *institution*."[180] It is noteworthy that the Court concluded otherwise—its reasoning is examined more carefully

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[171] *See Saxbe*, 417 U.S. at 843; *Pell*, 417 U.S. at 817–18.

[172] 403 U.S. 713, 714 (1971). The Court published a per curiam opinion, with six Justices writing concurring opinions that generally celebrated the role of the press and First Amendment freedoms. *See generally id.*

[173] 418 U.S. 241 (1974). The Court was unanimous in its conclusion the government cannot compel a publisher to communicate that which it would otherwise not publish. *See generally id.*

[174] Stewart, *supra* note 21, at 633.

[175] See *infra* Part III for an analysis of press-rights-related cases.

[176] *See* Stewart, *supra* note 21, at 633.

[177] *Id.* at 633.

[178] *Id.* at 634.

[179] *Id.* at 633–34.

[180] *Id.* at 635.

in the next Section.[181] However unclear and fractured the Justices were, they concluded freedom of the press is a personal right enjoyed by all publishers and that journalists do not have a right to refuse to testify before a grand jury.[182]

Justice Stewart's industry-focused interpretation of the Press Clause finds little support in legal scholarship. No one else's interpretation does either. Problematically, no clear consensus regarding the Clause's meaning has emerged in legal scholarship. Instead, scholars have advanced several nuanced arguments about the Press Clause's meaning, particularly regarding its relationship to the Speech Clause. None are dominant, though some have found more salience than others. Historian Leonard Levy's skeptical histories of the First Amendment, published in 1960 and 1966, are cited in most Press Clause–related scholarship.[183] The citations do not equate to support for Justice Stewart's conclusions, however. Scholars have questioned his conclusions.[184] Levy contended the Framers did not envision an expansive interpretation of free expression, particularly when it came to press protections.[185] He concluded, "The common law's definition of freedom of the press meant merely the absence of censorship in advance of publication."[186] He also reasoned the Framers intended Congress to have no role in regulating publishing, instead leaving such powers to the states.[187] The Press Clause, in his reasoning, was fairly limited in scope. This reasoning finds extra weight in that his conclusions have been cited nine times by the Supreme Court, particularly in crucial First Amendment decisions, such as *New York Times Co. v. Sullivan*, *Gertz v. Welch*, and *Citizens United v. FEC*.[188] Chief Justice Warren Burger, in his concurring opinion in the *First National Bank v. Bellotti* corporate speech case, cited Levy when he concluded, "the history of the Clause does not suggest that the authors contemplated a 'special' or 'institutional' privilege."[189] Legal scholar David A. Anderson responded specifically to Levy's conclusions in "The Origins of the Press Clause," emphasizing Levy's conclusions were flawed and shortsighted.[190]

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[181] *See infra* Part III (regarding how the Court has communicated it understands the Press Clause).

[182] Branzburg v. Hayes, 408 U.S. 665, 702 (1972).

[183] *See generally* LEVY, *supra* note 1; LEONARD LEVY, FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON (1966).

[184] See David Lange, *The Speech and Press Clauses*, 23 UCLA L. REV. 77, 78–79 (1975); Anderson, *supra* note 1, at 461–62; West, *supra* note 2, at 1047, for examples of legal scholarship that have questioned Justice Stewart's conclusions.

[185] LEVY, *supra* note 1, at 13–15.

[186] *Id.* at 14–15.

[187] LEVY, *supra* note 183, at lvi–lix (1966).

[188] New York Times Co. v. Sullivan, 376 U.S. 254, 273 (1964); Gertz v. Welch, 418 U.S. 323, 382 (1974) (White, J., dissenting); Citizens United v. FEC, 558 U.S. 310, 432 n.58 (2010) (Stevens, J., concurring).

[189] 435 U.S. 765, 798 (1978) (Burger, C.J., concurring).

[190] *See generally* Anderson, *supra* note 1.

Anderson emphasized the Press Clause has a unique legislative history from the Speech Clause, which reinforces the idea that the First Amendment's authors intended the two to be distinctive, rather than redundant. He concluded the Framers intended the Press Clause to play a crucial role in protecting democratic society.[191] When they envisioned the press in this role, they pictured printers and publishers communicating information that enriched democratic discourse and the exchange of ideas, Anderson concluded.[192] Ultimately, Anderson constructed a more expansive Press Clause, though he was not specific regarding *who* or *what*, specifically, it protected. He instead examined the historical record, finding the Framers understood press protections as "inextricably related to the new republican form of government and would have to be protected if their vision of government by the people was to succeed."[193] Levy rejected Anderson's conclusions in an article the next year.[194] Ultimately, both scholars looked carefully at the history of the Clause and found substantially different meanings.

Anderson's conclusions were influenced by legal scholar Melville Nimmer, who concluded the Press Clause was intended to safeguard the flow of information, particularly when it pertains to self-governance, while the Speech Clause "serves a self-fulfillment function, affirming the individual's dignity and integrity."[195] Within his thinking, journalistic work could benefit from the Speech or Press Clauses, or both, depending on the nature of what was being communicated. While AI was not on his mind in 1975, when he wrote the article, his reasoning would seem to reject Speech Clause–based protections for AI, since they cannot experience self-fulfillment, dignity, or integrity. The Press Clause, however, with a more outwardly focused purpose of benefitting society with information, could receive protections. Legal scholar David Lange noted Justice Stewart's and Nimmer's conclusions, but disagreed with them, concluding the Framers did not seem to realize the differences between the Speech and Press Clauses and that any potential differences have not appeared in legal precedents.[196] Lange, in other words, found the Press Clause to be redundant to the Speech Clause. Journalism historian Margaret Blanchard reasoned none of these conclusions were persuasive because, ultimately, the press will receive as much protection as society will tolerate, regardless of the Speech and Press Clauses.[197] She concluded, "The only difference between media critics off the bench and those on it is that the critics on the bench may find that the interests of the

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[191] *Id.* at 536–37.
[192] *Id.* at 460, 488–94.
[193] *Id.* at 537.
[194] Levy, *supra* note 19, at 211–18.
[195] Anderson, *supra* note 1, at 460.
[196] Lange, *supra* note 184, at 117–19.
[197] Margaret A. Blanchard, *The Institutional Press and Its First Amendment Privileges*, 1978 SUP. CT. REV. 225, 293–96.

public have been so offended by a certain action of the press that it cannot be allowed to continue."[198]

Legal scholarship, along with the historical record surrounding the Press Clause, does not provide a clear definition of the Press Clause's meaning. The scholarship, however, identifies crucial concerns that can contribute to the extent to which the Clause can be applied to questions surrounding generative AI. Legal scholars generally shared concerns regarding whether the Press Clause carried a separate meaning from the Speech Clause, a concern that arises in the Supreme Court cases in the next Section and could influence the lens through which AI-generated, press-related content should be understood. Scholars also communicated a concern about whether the Clause merely protected publishers from prior restraint, as Levy contended, or if its safeguards went beyond these concerns. Finally, legal scholarship in this area includes undercurrents about the extent to which the initial intent of the Press Clause remains relevant. As Levy contended, "what the first amendment said is far more important than what its Framers meant."[199]

III. KNOWNS AND UNKNOWNS: THE SUPREME COURT, THE PRESS CLAUSE, AND AI

The Supreme Court has not addressed AI in its opinions. The Court has emphatically supported freedom-of-expression safeguards for corporations, another form of non-human entity.[200] The Justices in the *First National Bank v. Bellotti* corporate speech case, for example, emphasized, "The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual."[201] The *Bellotti* decision was not an isolated occurrence. The Court narrowly struck down a campaign finance law that limited corporations', political organizations', and unions' participation in elections for similar reasons in *Citizens United v. FEC* in 2010.[202] The Justices again emphasized the nature of the speaker cannot be the controlling concern. Justice Anthony Kennedy, writing for the Court, explained, "We must decline to draw, and then redraw, constitutional lines based on the particular media or technology used to disseminate political speech from a particular speaker."[203] The Justices, in other words, emphasized in both cases the identity of the speaker cannot be used to justify limiting expression.[204]

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[198] *Id.* at 296.

[199] Levy, *supra* note 19, at 180.

[200] See *First National Bank v. Bellotti*, 435 U.S. 765, 777 (1978); *Citizens United v. FEC*, 558 U.S. 310, 342–43 (2010), for examples of cases in which Justices concluded corporations are protected by the First Amendment.

[201] *First Nat'l Bank*, 435 U.S. at 777.

[202] 558 U.S. at 370–72.

[203] *Id.* at 326.

[204] *Id.*; *First Nat'l Bank*, 435 U.S. at 777.

A year later, in the *Brown v. Entertainment Merchants Ass'n* video-game speech decision, the Court was similarly adamant about the importance of the flow of ideas, rather than concern regarding the nature of a speaker.[205] The Court reasoned, "Under-inclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint."[206] Thus, the Justices have not specifically considered the Press Clause and AI, especially in reference to the generative AI entities such as those that became available to the public in late 2022 and early 2023.[207] The Court has, however, made emphatic statements that the flow of ideas is paramount in cases involving non-human expression.

State and federal courts have so far paid little attention to questions surrounding freedom of expression and AI as well.[208] Cases that considered AI generally focused on technical or specific legal questions, eschewing bigger questions about freedom of expression and the nature of AI. Perhaps a federal district court came closest to questions about the nature of AI, as a communicator, in the summer of 2023 when it ruled an AI-created work of art could not receive copyright protection because "the work lacked human authorship."[209] Stephen Thaler, who owned the computer system that created the work, did not seek a copyright for the AI that created the work, but for himself as the system's creator.[210] The judge, however, focused on the autonomous creator, emphasizing copyright law "protects only works of human creation."[211] Other cases dealt with potential biometric data collection in a McDonald's

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[205] 564 U.S. 786, 802 (2011).

[206] *Id.*

[207] See, for example, Bernard Marr, *The Difference Between Generative AI and Traditional AI: An Easy Explanation for Anyone*, FORBES (July 24, 2023, 1:41 AM), https://www.forbes.com/sites/bernardmarr/2023/07/24/the-difference-between-generative-ai-and-traditional-ai-an-easy-explanation-for-anyone/?sh=5e083d70508a [https://perma.cc/6R7G-5P34]; George Lawton, *What Is Gen AI? Generative AI Explained*, TECHTARGET (Oct. 2024), https://www.techtarget.com/searchenterpriseai/definition/generative-AI [https://perma.cc/JMJ4-Y83U]; Megan Crouse, *Generative AI Defined: How It Works, Benefits and Dangers*, TECHREPUBLIC (Oct. 24, 2024), https://www.techrepublic.com/article/what-is-generative-ai/ [https://perma.cc/3CBN-ND2G], for discussions of how generative AI is different than previous versions of AI.

[208] Searches in September 2023 in the Westlaw and Bloomberg Law legal databases failed to yield cases that included substantive discussions of press rights and AI in state and federal courts. WESTLAW, https://1.next.westlaw.com/Search/Home.html?transitionType=Default&contextData=(sc.Default) [https://perma.cc/F5JH-EHC9] (last visited Feb. 19, 2025) (select "All States" and "All Federal" for jurisdiction; then search "AI" "artificial intelligence" "ChatGPT" "press rights" "Freedom of the press"; then limit date range to cases before September 2023; then search); BLOOMBERG, https://www.bloomberglaw.com/product/blaw/search/results/b93d26ce01765adc74d2fc1bec3921d9 [https://perma.cc/2XU2-8DL9] (last visited Feb. 19, 2025) (limit date range to cases before September 2023; then search "AI" "artificial intelligence" "ChatGPT" "press rights" "Freedom of the press"; then search).

[209] Thaler v. Perlmutter, 687 F. Supp. 3d 140, 142 (D.D.C. 2023).

[210] *Id.*

[211] *Id.* at 146.

drive-through[212] and robocalls.[213] Searches in Westlaw and Bloomberg Law did not yield any lower-court cases that included jurists' concerns regarding AI and the Press Clause—or the First Amendment overall.[214]

The Supreme Court, however, has written extensively, if not consistently, about the role and meaning of the Press Clause. This Part identifies crucial themes that emerged from analyzing eight Supreme Court cases in which the Justices communicated substantive ideas regarding the scope and meaning of the Press Clause. The analysis was particularly concerned with how the Justices' understandings of the Clause could influence the extent to which AI would receive Press Clause protections. The cases were selected using qualitative document analysis methodology, which outlines "an integrated and conceptually informed method, procedure, and technique for locating, identifying, retrieving, and analyzing documents."[215] The method prescribes repeated interactions between the research focus and the texts. Texts were identified and themes emerged via an intensive, ongoing exchange of meaning through reading and re-reading the documents. Initial cases were identified using a variety of keyword searches of Supreme Court decisions in Westlaw's legal database. Searches included terms such as "First Amendment," "press," "Press Clause," and "technology." The searches yielded dozens of cases. Cases that did not include substantive discourse regarding the role, purpose, and scope of the Press Clause were removed from consideration regarding the analysis.

Once thirteen cases remained, decisions were selected with an effort to identify a diverse set of facts, legal questions, and dates with the goal of garnering a broader scope of the Justices' conceptual understanding of the Press Clause. The Court's most concentrated period of focus regarding the Press Clause and its meaning was in the 1970s, leading to an unavoidable concentration of cases from that period in the analysis. The eight cases analyzed were: *Grosjean v. American Press Co.*,[216] *Pennekamp v. Florida*,[217] *Mills v. Alabama*,[218] *New York Times Co. v. United States*,[219] *Branzburg v. Hayes*,[220] *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*,[221] *Saxbe v. Washington Post Co.*,[222] and *Miami Herald Publishing Co. v. Tornillo*.[223] The Justices communicated three crucial understandings regarding the

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[212] Carpenter v. McDonald's Corp., 580 F. Supp. 3d 512, 515–16 (N.D. Ill. 2022).

[213] Weister v. Vantage Point AI, LLC, No. 8:21-CV-1250-SDM-AEP, 2022 WL 3139373, at *1 (M.D. Fla. Aug. 3, 2022).

[214] *See supra* note 208.

[215] DAVID L. ALTHEIDE & CHRISTOPHER J. SCHNEIDER, QUALITATIVE MEDIA ANALYSIS 5 (2d ed. 2013).

[216] 297 U.S. 233 (1936).

[217] 328 U.S. 331 (1946).

[218] 384 U.S. 214 (1966).

[219] 403 U.S. 713 (1971).

[220] 408 U.S. 665 (1972).

[221] 413 U.S. 376 (1973).

[222] 417 U.S. 843 (1974).

[223] 418 U.S. 241 (1974).

role and purpose of the Press Clause, particularly with regard to whether the Press Clause applies to AI: (1) concern for an instrumental Press Clause; (2) concern for a Press Clause; and (3) a Press Clause for all. This Part briefly summarizes the cases before examining these themes.

A. Summaries: From Grosjean *to* Tornillo

The Justices unanimously struck down a Louisiana tax on larger-circulation newspapers in *Grosjean*.[224] Crucially, the Court concluded the state's tax was intended to limit access to information, rather than raise funds.[225] Justice George Sutherland, writing for the Court, concluded the tax was "a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guarant[e]es."[226] Identifying the tax as a limit on the flow of ideas, rather than a general tool for government revenue meant, according to the Court, the law violated the First Amendment.[227] A decade later, in *Pennekamp v. Florida*,[228] the Justices faced a substantially different question. An editor at the *Miami Herald* was found guilty of contempt after running two editorials critical of recent decisions made by the Circuit Court of Dade County.[229] The judges contended that the newspaper's comments undermined the administration of justice and faith in the court's decisions.[230] The Supreme Court rejected these arguments, emphasizing, "We conclude that the danger under this record to fair judicial administration has not the clearness and immediacy necessary to close the door of permissible public comment."[231] The Justices did not ignore the judges' concern for the judicial system's viability, but found the perceived threat was insufficient to warrant limiting freedom of expression.[232] Justice Felix Frankfurter penned a lengthy concurring opinion in the decision, highlighting the crucial role of the judiciary and its equal footing with the press' First Amendment protections.[233]

Justice Frankfurter was not on the Court anymore in 1966, but his old antagonist, Justice Hugo Black, remained to write the unanimous opinion in *Mills v. Alabama*.[234] Justice Black, a former Alabama senator, chastised his home state for using a state law meant to protect the election process to charge and convict a

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[224] 297 U.S. 233, 251 (1936).
[225] *Id.* at 250.
[226] *Id.*
[227] *Id.* at 250–51.
[228] 328 U.S. 331 (1946).
[229] *Id.* at 333.
[230] *Id.* at 333–34.
[231] *Id.* at 349–50.
[232] *Id.* at 347–50.
[233] *Id.* at 350–69 (Frankfurter, J., concurring).
[234] 384 U.S. 214 (1966).

newspaper editor for publishing election information on the day citizens voted.[235] Justice Black reasoned the law "silences the press at a time when it can be most effective."[236] He was even more forceful five years later, in his concurring opinion in the landmark *New York Times Co. v. United States* prior restraint case.[237] The Court published a terse per curiam opinion vacating the lower-court-imposed injunctions keeping *The New York Times* and *The Washington Post* from publishing more reports using the stolen government information about the United States' history in Vietnam.[238] Justice Black's concurring opinion follows the per curiam opinion, in which he articulated one of the most explicit understandings of the role of the press in democratic society. He reasoned, "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."[239] Crucially, Justice Black rationalized protecting the publication of stolen government secrets by emphasizing the indispensable role the press plays in informing the public.[240] He reasoned the newspapers were executing the exact role the First Amendment's authors had in mind when they included the Press Clause.[241]

Justice Black died three months after the *New York Times Co.* decision.[242] Justices William Douglas and William Brennan, who were closest to Justice Black's interpretation of the First Amendment, dissented in *Branzburg v. Hayes*, which was decided in 1972, a year after the Pentagon Papers case.[243] A deeply fractured Court narrowly concluded the Press Clause does not provide a reporter the right to keep confidential sources from a grand jury when subpoenaed to testify.[244] Justice Byron White, joined by three other Justices, rejected Paul Branzburg's claim that the Press Clause granted reporters rights not available to other citizens.[245] He explained, "[W]e decline now to afford . . . First Amendment protection by denigrating the duty of a citizen, whether reporter or informer, to respond to grand jury subpoena and answer relevant questions."[246] Justice Lewis Powell penned a short concurring opinion.[247] His crucial, tentative vote provided the five-vote plurality in the case. In his concurring opinion, Justice Powell softened the Court's reasoning, leaving open

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[235] *Id.* at 218.
[236] *Id.* at 219.
[237] 403 U.S. 713 (1971).
[238] *Id.* at 714.
[239] *Id.* at 717 (Black, J., concurring).
[240] *See id.*
[241] *Id.*
[242] *Hugo L. Black*, OYEZ, https://www.oyez.org/justices/hugo_l_black [https://perma.cc/2XD3-Q74B] (last visited Feb. 19, 2025).
[243] 408 U.S. 665, 711 (1972).
[244] *See id.* at 702.
[245] *Id.*
[246] *Id.* at 697.
[247] *Id.* at 709–10 (Powell, J., concurring).

possibilities that journalists do, at times, have the power to protect themselves from compelled testimonies.[248] Justice Stewart, joined by Justices Thurgood Marshall and Brennan, dissented, communicating concern that interpreting the Press Clause as not extending protections to journalists from compelled testimony would harm the flow of information and ideas in society.[249]

A year later in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, the Court fractured, 5–4 again, this time concluding a city commission ordinance that halted employment advertisements being labeled and organized based on gender was constitutional.[250] *Pittsburgh Press* argued the requirement, which changed how the newspaper's classified advertising could be organized, violated the Press Clause of the First Amendment.[251] The Court hesitated, distinguishing the Commission's rule from the tax the Justices overturned in *Grosjean*.[252] Justice Powell, writing for the Court, emphasized, "This is not a case in which the challenged law arguably disables the press by undermining its institutional viability."[253] Chief Justice Warren Burger, as well as Justices Douglas and Stewart, wrote separate dissents.[254] The Justices reasoned that as long as a publisher's content decisions were being influenced by government requirements, the Press Clause was being violated.[255]

The Court considered *Saxbe v. Washington Post Co.*[256] and *Miami Herald Publishing Co. v. Tornillo*[257] in 1974. The cases diverged substantially in the Press Clause–related questions they asked. In *Saxbe*, the Justices, once again divided 5–4, ruled a reporter does not have a First Amendment right of access to prisoners in a federal prison facility.[258] Justice Stewart, who had voted to support more expansive Press Clause understandings in previous cases, wrote for the Court, emphasizing journalists should have no more access to federal prisons than any other citizen.[259] Justice Powell, joined by Justices Brennan and Marshall, dissented, lamenting the government's power to harm the flow of ideas by limiting the press' access to vital sources of information.[260] A day after announcing their decision in *Saxbe*, the *Tornillo* case united the Court, with the Justices unanimously voting to strike down a Florida law that required newspapers to publish the replies of political actors who

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[248] *Id.*

[249] *See id.* at 725–52 (Stewart, J., dissenting).

[250] 413 U.S. 376, 390 (1973).

[251] *See id.* at 383–84.

[252] *See id.* at 383–85.

[253] *Id.* at 382 (citing Grosjean v. Am. Press Co., 297 U.S. 233, 250 (1936)).

[254] *See id.* at 393–97 (Burger, C.J., dissenting); *see also id.* at 397–99 (Douglas, J., dissenting); *id.* at 400–04 (Stewart, J., dissenting).

[255] *See id.* at 396 (Burger, C.J., dissenting).

[256] 417 U.S. 843 (1974).

[257] 418 U.S. 241 (1974).

[258] 417 U.S. at 850.

[259] *See id.* at 848–50.

[260] *See id.* at 863 (Powell, J., dissenting).

were criticized in their pages.[261] The Court emphasized that the government's compelling a newspaper to publish content it would otherwise not publish was comparable to censorship.[262] Chief Justice Burger explained, "This law runs afoul of the elementary First Amendment proposition that government may not force a newspaper to print copy which, in its journalistic discretion, it chooses to leave on the newsroom floor."[263]

B. An Instrumental Press

The Court consistently communicated concern for the flow of ideas in democracy and, crucially, associated the press as being the vehicle through which information flowed. In this regard, the Justices conveyed they understood the press as an *instrument* for achieving the goals of the Press Clause, which were to protect the dissemination of ideas and information to the public. Journalism, in this construction of the Press Clause, operated as a means to an end, rather than an *institution* with distinctive processes, practices, and a democratic mission. Journalism, in this regard, was constructed as a vehicle or conduit. In *Grosjean*, for example, the Court reasoned the taxes levied against the newspapers are "commonly characterized as 'taxes on knowledge,' a phrase used for the purpose of describing the effect of the exactions and at the same time condemning them."[264] Similarly, decades later in *New York Times Co. v. United States*, Justice Black emphasized the newspaper's role in informing the public, rather than journalists' rights.[265] He explained,

> Now, for the first time in the 182 years since the founding of the Republic, the federal courts are asked to hold that the First Amendment does not mean what it says, but rather means that the Government can halt the production of current news of vital importance to the people of this country.[266]

A year later, in *Branzburg*, Justice White communicated concern for the flow of ideas, not the institutional press, when he rationalized the Court's decision to limit the scope of the Press Clause.[267] He contended, "The argument that the flow of news will be diminished by compelling reporters to aid the grand jury in a criminal investigation is not irrational . . . ."[268] In each of these instances, the Justices conveyed concern for the press as a vehicle, rather than an institution.

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[261] *See Tornillo*, 418 U.S. at 256.
[262] *Id.* at 261.
[263] *Id.*
[264] Grosjean v. Am. Press Co., 297 U.S. 233, 246 (1936).
[265] 403 U.S. 713, 717 (1971) (Black, J., concurring).
[266] *Id.* at 715.
[267] *See* Branzburg v. Hayes, 408 U.S. 665, 693–95 (1972).
[268] *Id.* at 693.

When the Justices conveyed these understandings, they emphasized the benefits of the flow of ideas, rather than the processes and practices that journalists employ in gathering and reporting generally accurate information to audiences. Justice Stewart, in his dissent in *Branzburg*, for example, reasoned, "Enlightened choice by an informed citizenry is the basic ideal upon which an open society is premised, and a free press is thus indispensable to a free society."[269] Similarly, in striking down Florida's right-of-reply law in *Tornillo*, the Court emphasized, "Therefore, under the operation of the Florida statute, political and electoral coverage would be blunted or reduced. Government-enforced right of access inescapably 'dampens the vigor and limits the variety of public debate."[270] Also, in *Pittsburgh Press Co.*, Justice Stewart highlighted, "[T]he First Amendment presupposes free-wheeling, independent people whose vagaries include ideas spread across the entire spectrum of thoughts and beliefs. I would let any expression in that broad spectrum flourish, unrestrained by Government, unless it was an integral part of action . . . ."[271] Finally, Justice Black, in *Mills*, emphasized, "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs."[272]

In each of these instances, the Justices did not communicate concern for the press as an institution but instead emphasized the importance of the flow of ideas. This care for the flow of ideas, within the context of the Press Clause, identified information as a public good and placed journalistic work in a protected position because it was, at the time, the primary vehicle through which the affordance of information flowed.

The *instrumental* approach draws the Press Clause's meaning closer to the Speech Clause because it emphasizes the affordance of information to the public rather than the rights of the institutional press. Justice Sutherland, in emphasizing the importance of the flow of ideas within the context of newspapers in *Grosjean*, for example, reasoned, "[F]reedom of speech and of the press are rights of the same fundamental character."[273] Similarly, in his dissent in *Saxbe*, Justice Powell emphasized, "[T]he Government imposes neither a penalty on speech nor any sanction against publication, these individualistic values of the First Amendment are not directly implicated."[274] The Court communicated similar reasoning in *Branzburg*, highlighting a journalist's requirement to testify before a grand jury did not limit speech or press.[275]

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[269] *Id.* at 726 (Stewart, J., dissenting).

[270] Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 257 (1974).

[271] Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rels., 413 U.S. 376, 399 (1973) (Stewart, J., dissenting).

[272] Mills v. Alabama, 384 U.S. 214, 218 (1966).

[273] Grosjean v. Am. Press Co., 297 U.S. 233, 244 (1936).

[274] Saxbe v. Wash. Post Co., 417 U.S. 843, 862 (1974) (Powell, J., dissenting).

[275] Branzburg v. Hayes, 408 U.S. 665, 697 (1972).

Crucially, the instrumental approach emphasizes the ability of people to receive information. The public-good affordance, in other words, focused on an informed society and access to information and ideas.

The *instrumental*, public-good conceptualization of the Press Clause was not universal, as the Justices in certain circumstances communicated concern for the press as an institution, a theme examined in the next Section. The two themes need not be mutually exclusive. The thin, nuanced line between concern for an *instrumental* press and one that is *institutional* is crucial to identifying the extent to which AI expression could be protected by the Press Clause.

C. The Institutional Press

The Justices, at times, communicated a concern for the institutional press, which in these instances was understood as being protected by the Press Clause *because* of a public service role journalists execute when they gather and provide information. Justice Black, for example, concluded, "In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy."[276] Similarly, in *Branzburg*, Justice Stewart emphasized, "The reporter's constitutional right to a confidential relationship with his source stems from the broad societal interest in a full and free flow of information to the public."[277] In both instances, the information news organizations provide, as examined in the previous Section, was understood as a public good to democratic society. Within the *institutional*-press theme, however, the Justices conveyed understandings that journalistic processes and practices lead to the creation of quality, democracy-nourishing information. In this regard, as was the case in the *instrumental*-press theme, the Justices conveyed that they understood information as a public good. What is added in this theme, however, is a concern for a public service role that is executed by the *institutional* press in informing the public. The Justices communicated the Press Clause, because of the public service role, protects the *institutional* press.

Crucially, the Justices conceptualized the creation of democracy-nourishing information as being the result of certain journalistic processes and practices. In *Saxbe*, for example, Justice Powell contended the press "acts as an agent of the public."[278] In the same passage, he reasoned, "An informed public depends on accurate and effective reporting by the news media. No individual can obtain for himself the information needed for the intelligent discharge of his political responsibilities."[279] Justice Black, in *Mills*, emphasized the Alabama law that was used to halt election-related information on Election Day "muzzles one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve

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[276] N.Y. Times Co. v. United States, 403 U.S. 713, 717 (1971) (Black, J., concurring).
[277] *Branzburg*, 408 U.S. at 725 (Stewart, J., dissenting).
[278] 417 U.S. at 863 (Powell, J., dissenting).
[279] *Id.*

our society and keep it free."[280] The Court was even more explicit in *Pittsburgh Press Co.*, framing the question before it as whether the law "disables the press by undermining its institutional viability."[281] In each of these examples, the Justices communicated they understood the Press Clause as protecting an institution that employs certain skills that aid democracy via the affordance of information.

The Justices specifically conveyed concerns regarding the editorial process, particularly regarding journalistic skills that go into deciding which information should be gathered and communicated to audiences. Justice Stewart, in *Branzburg*, reasoned, "If it is to perform its constitutional mission, the press must do far more than merely print public statements or publish prepared handouts."[282] Similarly, two years later in *Tornillo*, Chief Justice Burger emphasized, "Compelling editors and publishers to publish that which '"reason" tells them should not be published' is what is at issue in this case."[283] Later, he concluded, "A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper . . . constitute[s] the exercise of editorial control and judgment."[284] The Justices also sparred about editorial judgment in *Pittsburgh Press Co.* Justice Powell, writing for the Court, emphasized the ruling against the newspaper did not undermine Press Clause protections.[285] He explained, "We reaffirm unequivocally the protection afforded to editorial judgment and to the free expression of views on these and other issues, however controversial."[286] Justice Stewart, in his dissent, disagreed, "So far as I know, this is the first case in this or any other American court that permits a government agency to enter a composing room of a newspaper and dictate to the publisher the layout and makeup of the newspaper's pages."[287] In these examples, the Justices communicated that they understand the Press Clause as protecting discernable, skilled, and intentional decisions journalists make about what and how to present information to audiences. Crucially, the Justices associated these distinctive processes and practices with the public service role of the press.

Editorial decision-making was not the online distinctive activity the Justices communicated they understood as part of a Press Clause protected institutional role for journalism. Justice Stewart, in the *Saxbe* prison-access case, contended, "Without a personal interview a reporter is often at a loss to determine the honesty of his informant, or the accuracy of the information received."[288] Two years earlier, Justice

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[280] Mills v. Alabama, 384 U.S. 214, 219 (1966).

[281] Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rels., 413 U.S. 376, 382 (1973) (Stewart, J., dissenting).

[282] *Branzburg*, 408 U.S. at 729 (Stewart, J., dissenting).

[283] Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 256 (1974).

[284] *Id.* at 258 (Brennan, J., concurring).

[285] *Pittsburgh Press Co.*, 413 U.S. at 391.

[286] *Id.*

[287] *Id.* at 402 (Stewart, J., dissenting).

[288] Saxbe v. Wash. Post Co., 417 U.S. 843, 854 (1974).

White emphasized in *Branzburg* the importance of the reporting process, explaining, "Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated."[289] In *Tornillo*, Justice White noted expectations and absences of journalistic processes and practices, highlighting, "Of course, the press is not always accurate, or even responsible, and may not present full or fair debate on important public issues."[290] Concerns about interviews, accuracy, responsibility, and other traditional journalistic processes and practices indicate the Justices conceptualized Press Clause protections as being associated with certain actions. The actions, cumulatively lead to the provision of quality information, which the Justices conceptualized as a public good, which is a result of journalism's public service mission.

Ultimately, the Justices communicated conceptualizations of the Press Clause that are at times *instrumental*, emphasizing the public-good affordance of the flow of information, and *institutional*, which adds concern for the types of processes and practices traditionally associated with journalism. The Justices conveyed one final theme, which helps resolve the seeming contradiction between the *instrumental* and *institutional* understandings of the Press Clause.

D. A Press Clause for All

The Justices consistently constructed understandings of the Press Clause as protecting personal, rather than professional, rights. Certainly, as examined in the preceding Section, the Court often associated the Clause with journalism's public service role. That theme, however, is not antithetical to the Justices' consistent emphasis that the Press Clause was intended to be for all citizens, not a specific profession. Thus, while the Court conveyed it values the processes and practices traditionally associated with journalism, it did not indicate that only journalists can fulfill this role. Justice White, perhaps most explicitly, communicated this understanding in *Branzburg*, emphasizing, "Freedom of the press is a 'fundamental personal right' which 'is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.'"[291] Crucially, he continued, listing other communicators who can contribute to the flow of ideas in society.[292] He explained, "The informative function asserted by representatives of the organized press in the present cases is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists. Almost any author may quite accurately assert that he is contributing to the flow of information to the

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[289] Branzburg v. Hayes, 408 U.S. 665, 681 (1972).
[290] Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 260 (1974) (White, J., concurring).
[291] *Branzburg*, 408 U.S. at 704.
[292] *Id.* at 705.

public . . . ."[293] Similarly, decades earlier, Justice Black outlined a less expansive, but still relatively inclusive list of what the Press Clause protects in *Grosjean*. He reasoned, "The newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity . . . ."[294] Importantly, the passage that preceded this one emphasized the vitality of public information.[295] In both examples, as well as other instances, the Justices constructed the Press Clause as a personal, rather than professional, protection.

The Justices communicated this understanding in other cases as well. In *Saxbe*, the Court emphasized, "This policy is applied with an even hand to all prospective visitors, including newsmen, who, like other members of the public, may enter the prisons . . . ."[296] Justice Powell disagreed. In his dissenting opinion in *Saxbe*, he averred, "[N]either any news organization nor reporters as individuals have constitutional rights superior to those enjoyed by ordinary citizens. The guarantees of the First Amendment broadly secure the rights of every citizen; they do not create special privileges for particular groups or individuals."[297] Similarly, Justice Wiley Rutledge, emphasized in his concurring opinion in *Pennekamp*, "[I]f the press and others are to function as critical agencies in our democracy concerning courts as for all other instruments of government."[298] In each of these instances, the Justices conveyed understandings that the press have no more rights than others. The combination of ideas—a Press Clause for all and that press have no more rights than other citizens—communicates that the Justices conceptualize Press Clause protections as being intended to safeguard the flow of ideas and anyone who contributes to this exchange of ideas. The Justices conveyed these understandings because they understood the Press Clause was intended to be for all citizens, not a specific industry, as well as for practical reasons, as Justice White emphasized in *Branzburg*,

> The administration of a constitutional newsman's privilege would present practical and conceptual difficulties of a high order. Sooner or later, it would be necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as the large metropolitan publisher who uses the latest photocomposition methods.[299]

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[293] *Id.*
[294] Grosjean v. Am. Press Co., 297 U.S. 233, 250 (1936).
[295] *Id.*
[296] Saxbe v. Wash. Post Co., 417 U.S. 843, 846 (1974).
[297] *Id.* at 857 (Powell, J., dissenting).
[298] Pennekamp v. Florida, 328 U.S. 331, 372 (1946) (Rutledge, J., concurring).
[299] Branzburg v. Hayes, 408 U.S. 665, 703–04 (1972).

Conceptualizing the Press Clause as a personal right intended to safeguard the flow of ideas devalues the process-and-practice-based nature of journalistic work. The concern, in other words, shifts to the outcome rather than the quality and source of the information. Constructing the Press Clause as a personal right aligns with the *instrumental* understandings examined earlier. A Press Clause that is intended for all communicators shares a common emphasis with an understanding that is most concerned with safeguarding the vehicles through which information flows. The *institutional* understanding of the Clause, however, acknowledges that the Justices at times have shown substantial concern for the unique contributions made by journalistic work to the flow of ideas. When taken together, the Justices communicated they understood the Press Clause as applying to everyone, but recognized the *institutional* press, have established processes and practices that can lead to uniquely valuable contributions to the flow of ideas. While these contributions, according to the Press-Clause-for-everyone theme, do not warrant rights beyond those enjoyed by other citizens, they can at times elevate the Justices' concerns when the government seeks to limit the flow of ideas. The *institutional* and *instrumental* understandings, in other words, persist in the same environment, with the Justices communicating substantial care for the flow of ideas, of which the press is historically a crucial vehicle, but also valuing the unique nature of journalistic information. All three of these themes contribute to resolving the question of whether the Press Clause protects AI communication.

CONCLUSION

The First Amendment, as well as its authors and the courts, might be silent about AI, but the Press Clause's history, legal scholarship about the Clause, and the Supreme Court's Press Clause–related precedents, all point toward a form of general Press Clause–based protections for AI publishers. The lone limiting factor in such protections, based on this Article's findings, would be if the government could implement limitations on AI expression that harms the flow of information. This conclusion is not the result of a finding that AI are sentient or have sufficiently original thoughts and ideas to garner Press Clause protections. Coming to such a conclusion is not necessary. This finding is instead dictated by the Press Clause's history, legal scholarship surrounding the Clause's meaning, and the Supreme Court's Press Clause–related decisions, which generally communicate the flow of ideas and information is of greater priority than concerns regarding the nature of the communicator. Aspects of this finding were most explicit in the *Bellotti*, *Citizens United*, and *Brown* decisions but, crucially, the Press Clause's history, and the legal decisions and scholarship that surround it, communicate this conclusion has an even deeper presence than is found in the explicit conclusions about the flow of ideas found in these decisions.[300]

[300] *See* First Nat'l Bank v. Bellotti, 435 U.S. 765, 777 (1978); Citizens United v. FEC, 558 U.S. 310, 341 (2010); Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 790 (2011).

Ultimately, the defining contours of the relationship between the Press Clause and AI publishers were formed long before generative AI became widely accessible to the public in 2023. They were formed, for example, in debates between Oswald and Justice McKean[301] and Justices Cushing and Adams.[302] They were also formed in legal scholars' debates regarding the meaning and intent of the Press Clause. Legal scholars have not agreed on a single meaning of the Clause, but they consistently communicated understandings that its role was forever linked to protecting the flow of ideas.[303] Disagreements about the Clause's meaning generally revolve around *who* it was intended to protect, not its role in fostering the flow of ideas. Similarly, the Supreme Court's Press Clause–related decisions do not provide a single narrative regarding how the Justices understand the Clause, but they generally conveyed interpretations that centered around safeguarding the affordance of information to society—whether these understandings included concerns for journalistic work or not. Drawing from the fundamental building blocks identified in the historical and legal discourses regarding the meaning of the Press Clause, as well as the Supreme Court's understandings, this Article identifies two crucial, interconnected rationales, regarding how the relationship between the Press Clause and AI should be navigated.

A. A Focus on What, Not Whom

When the Court narrowly rejected Branzburg's claim that the Press Clause provides journalists rights not available to other citizens, it framed the Clause as a "fundamental personal right" and emphasized many other communicators provide "information and opinion."[304] The Court followed these conclusions by listing several types of non-journalistic communicators who contribute "to the flow of information to the public."[305] They included lecturers, novelists, and academic researchers. In both passages, the Court communicated it associated the Clause with safeguarding the flow of ideas, rather than with journalists or journalistic work. Certainly, the Court, particularly Justice Stewart, has at times communicated understandings that the Press Clause protects the institutional press, but behind each of these conclusions was an overarching concern for the flow of ideas.[306] In this regard,

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[301] *See generally* Respublica v. Oswald, 1 U.S. 319 (1788).

[302] *See generally* Letter from Cushing, *supra* note 3.

[303] *See supra* Section III.C.

[304] *Branzburg*, 408 U.S. at 704.

[305] *Id.* at 705.

[306] *See* Stewart, *supra* note 21, at 634. See also *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 394–95 (Burger, C.J., dissenting) (1973); *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring); *Saxbe v. Washington Post Co.*, 417 U.S. 843, 863 (1974) (Powell, J., dissenting), for examples in which the Justices supported institutional press rights but, in doing so, sought to protect the flow of ideas.

the *who* is always secondary to the *what*. The information, in other words, has been the paramount concern. Who communicates the idea, their credentials, processes, or intentions, the Justices conveyed, are of lesser importance. Justice Stewart, who was perhaps the most adamant regarding safeguarding the press as an institution, emphasized the output of the press' democracy-sustaining information when articulating his arguments for a journalism-based Press Clause. In his article, *Or of the Press*, he reasoned, "The free press meant organized, expert scrutiny of government."[307] How is such scrutiny exercised? Through the flow of information into society.

In the *Saxbe* reporter's access case, for example, Justice Powell reasoned in his dissent, "In seeking out the news the press therefore acts as an agent of the public at large. It is the means by which the people receive that free flow of information and ideas essential to intelligent self-government."[308] Similarly, in his concurring opinion in *Tornillo*, Justice White emphasized the press is protected because it is a vehicle for the flow of ideas.[309] He explained, "Regardless of how beneficent-sounding the purposes of controlling the press might be, we prefer 'the power of reason as applied through public discussion' and remain intensely skeptical about those measures that would allow government to insinuate itself into the editorial rooms . . . ."[310] In both instances, the Justices conveyed understandings that journalistic processes and practices generally lead to the creation of quality, democracy-nourishing information, but the flow of ideas was the dominant rationale for Press Clause safeguards, not institution-specific rights. If AI is producing and communicating information, whether it follows in journalistic formats or not, it would seem to be meeting the minimum requirement that the Justices communicated—that it contributes to the flow of ideas.

The pre–First Amendment debates between Justice McKean and Oswald and Justice Cushing and Adams about the scope of press protections reinforce these conclusions regarding the dominant association between the Press Clause and the flow of ideas. Their discourse, in other words, was not about *who* had rights, but rather the affordance of information to the public. In his opinion in *Respublica*, Justice McKean emphasized,

> [T]he liberty of the press has stood on a firm and rational basis. On the one hand, it is not subject to the tyranny of previous restraints, and, on the other, it affords no sanction to ribaldry and slander; so true it is, that to censure the licentiousness, is to maintain the liberty of the press.[311]

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[307] Stewart, *supra* note 21, at 634.

[308] 417 U.S. at 863 (Powell, J., dissenting).

[309] *See* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 259 (1974) (White, J., concurring).

[310] *Id.*

[311] Respublica v. Oswald, 1 U.S. 319, 329 (1788) (emphasis omitted).

While Justice McKean supported qualifying press protections, highlighting an expectation that published information acts as a public good, his concern was still focused on the flow of ideas and not the nature of the publisher. The next year, Justice Cushing, in Massachusetts, reasoned in a letter to Adams, "This liberty of publishing truth can never effectually injure a good government or honest administrators; but it may save a state . . . ."[312] While Adams was skeptical of such a wide-open understanding of press rights, his central concern was not regarding *who* could publish, but whether *what* was published contributed to the public good.[313] In his response to Justice Cushing, Adams explained, "If the Press is to be Stopped, and the People kept in Ignorance, We had much better have the first Magistrate and senators hereditary."[314] Thus, the concern for the flow of information generally transcended arguments about any additional conceptualizations of the scope and contours of the Press Clause. If the provision of information is paramount, and the source is generally secondary, then AI would seem to receive protections under the Press Clause.

B. The Public Good Standard

While the affordance of information acts as a common thread that generally weaves together often disparate interpretations and rationales for Press Clause protections, concerns about whether safeguards should include limitations based on whether what is being communicated is a public good provides another crucial line of thought regarding AI communicators and their relationship with the Press Clause. Essentially, the question is not whether AI receive Press Clause protections—examined in the previous Section—but whether historical, scholarly, and legal concerns surrounding the Press Clause indicate such safeguards are dependent on the value of the information to democratic society. As AI innovations such as ELIZA, Deep Blue, and AlphaZero illustrated, these tools are capable of leveraging fundamentally non-human characteristics to influence human behavior or activities.[315] The non-human natures of these entities raise new questions about the information they communicate.

The public good theme, a concern that was communicated in Adams's and Justice McKean's eighteenth-century discourses regarding press rights, as well as in the Supreme Court's discourse, offers a potential caveat to expansive Press Clause protection for AI entities. It also, however, introduces subjectivity. What

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[312] Letter from Cushing, *supra* note 3.

[313] *See* Letter from John Adams to William Cushing, *supra* note 115.

[314] *Id.*

[315] *See* TURKLE, *supra* note 50, at 23 (explaining ELIZA's allure to students); Tran, *supra* note 57 (describing the power Deep Blue had to leverage its non-human nature to defeat the world's best chess player); *see also* Silver et al., *supra* note 60, at 1140–44 (explaining the power of AI to learn and excel at human-created games).

makes information a public good? Despite the subjectivity, the Public Good caveat cannot be ignored as a consistent rationale for Press Clause safeguards. Adams qualified Justice Cushing's expansive understanding of press protections, suggesting whether ideas included an "honest motive" could be considered as well.[316] Similarly, Justice McKean rebuffed Oswald's more absolute approach to press rights, emphasizing protections should "distinguish between those which are meant for use and reformation, and with an eye solely to the public good, and those which are intended merely to delude and defame."[317]

Similarly, the Justices' rationales for expansive Press Clause safeguards often associated the flow of information with a public good. Justice Frankfurter, for example, conveyed a Public Good concern in his concurring opinion in *Pennekamp*, "The public function which belongs to the press makes it an obligation of honor to exercise this function only with the fullest sense of responsibility. Without such a lively sense of responsibility a free press may readily become a powerful instrument of injustice."[318] Alternatively, Justice Powell emphasized the crucial role of quality information to the public in his dissent in *Saxbe*. He reasoned, "An informed public depends on accurate and effective reporting by the news media. No individual can obtain for himself the information needed for the intelligent discharge of his political responsibilities."[319] The public good concerns were not always controlling, meaning they were not always dominant reasoning in the decisions, but their presence should not be ignored.

Crucially, the public good concern was often used as a rationale for *why* expansive expression rights were protected by the Court. Justice Black, for example, associated press rights with protecting free discussion and self-governance in *Mills*.[320] He reasoned, "The Constitution specifically selected the press, which includes not only newspapers, books, and magazines, but also humble leaflets and circulars, to play an important role in the discussion of public affairs."[321] Thus, he was both expansive in his understanding of press rights and associated the affordance of information with a public good. Similarly, in *Grosjean*, the rights were framed as a public good. The Court explained, "A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves."[322] The Justices, in these and other instances, were not explicit regarding whether the absence of a public good could lead to limitations Press Clause protections. The consistent presence of the public good expectation in Press Clause–related cases, however, could provide an avenue for limitation when the Justices cannot identify

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316 Letter from John Adams to William Cushing, *supra* note 115.
317 Respublica v. Oswald, 1 U.S. 319, 325 (1788).
318 Pennekamp v. Florida, 328 U.S. 331, 365 (1946) (Frankfurter, J., concurring).
319 Saxbe v. Wash. Post Co., 417 U.S. 843, 863 (1974) (Powell, J., dissenting).
320 Mills v. Alabama, 384 U.S. 214, 218–19 (1966).
321 *Id.* at 219 (internal citation omitted).
322 Grosjean v. Am. Press Co., 297 U.S. 233, 250 (1936).

a public good, or associate the expression with harming the flow of ideas. These concerns find unique, but untested, footing when interwoven with the fundamentally non-human nature of AI. The courts, drawing the Supreme Court's Press Clause–related decisions, as well as from the history of the Clause's creation, could limit certain AI expression because it harms, rather than contributes to, the flow of ideas.

AI communicators should, based on the Press Clause's history, the legal scholarship surrounding it, and the Supreme Court's press-related decisions, generally receive protections under the Clause. The public good concern, however, provides a potential avenue through which some AI, that which harms the flow of ideas, could be limited.