THE SPEECH AND PRESS CLAUSES

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Are there important differences in the protection provided by the speech and press clauses of the first amendment? Two distinguished commentators have suggested recently that there are. In a law review article, Professor Melville Nimmer has argued that a speech-press "duality" is suggested by the text of the amendment itself and by recent Supreme Court opinions.¹ He is joined in this view by Mr. Justice Stewart who has suggested, in a speech delivered at the Yale Law School, that the difference is between the individual freedom of expression secured by the speech clause and the institutional freedom protected by the press clause.² The views of Professor Nimmer and the Justice do not entirely coincide,³ but there is enough common ground between them to justify essentially common analysis. As I shall explain, I am persuaded that the first amendment ought not be read the way Professor Nimmer and the Justice propose. However that may be, it is at least clear that they have succeeded in isolating issues of immense importance which deserve far more careful attention than they have had during the development of our first amendment tradition.⁴

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² Address by Mr. Justice Stewart, Yale Law School Sesquicentennial Convocation, November 2, 1974, reprinted in (with the exception of personal remarks occasioned by the convocation) Stewart, "Or of the Press," 26 HASTINGS L.J. 631 (1975) [hereinafter cited as Stewart].

³ In particular, Justice Stewart appears more certain than does Professor Nimmer that the Framers meant to recognize the "institutional press" in the press clause. Compare Stewart, supra note 2, at 633-34, with Nimmer, supra note 1, at 640-41.

⁴ The present Article is intended principally as an initial response to the provocative observations of Mr. Justice Stewart and Professor Nimmer, and does not purport to be a definitive treatment of the subject. Research has disclosed
I. TOWARD A SPEECH-PRESS "DUALITY": TWO VIEWS

The first amendment forbids abridgement of "the freedom of speech, or of the press."
Professor Nimmer and Justice Stewart both observe that unless the separate references to "speech" and "press" convey separate meanings, the Framers have left us with a "constitutional redundancy." Though neither is prepared


Professor Chafee also considered the question briefly:
We are concerned with freedom of the press rather than with freedom of speech generally. Does the separate recognition of these two privileges in the First Amendment have any importance for us? Is constitutional "freedom" somewhat different in scope for "the press" than for "speech"? Not for the most part. They appear virtually to coincide as legal concepts. I have not found the courts mentioning any significant difference between these two freedoms in that respect. There is, however, a difference in fact so far as governmental control is concerned, for newspapers are more vulnerable than speakers. The government (unless checked by the Constitution) can impose restraints on them which would not be applicable to orators, like heavy taxation as in Tory England and Louisiana, requirements of large bonds guaranteeing against violations of libel or sedition laws, injunctions against future issues, exclusion from the mails, etc.

It is also worth noting that hitherto "the press" has been interpreted rather narrowly by the courts. They have been inclined to limit it to the popular sense of newspapers (and probably books and pamphlets), without embracing other media . . . [which] lack the benefit of the tradition. This difference in attitude is important in connection with motion picture censorship and control of the radio, as will appear later.

1 Z. Chafee Jr., Government and Mass Communication 34-35 (1947). See also 2 T.M. Cooley, Constitutional Limitations 883-86, 937-44 (8th ed. 1927);
R. McCormick, The Freedom of the Press 1 (1936) (concluding that the rights of the press are the same as those of the individual). In addition to these sources, numerous historical and philosophical treatments of speech and press are generally relevant. I have attempted to cite representative examples of these works in this article.

8 Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
U.S. Const. amend. 1.

9 Stewart, supra note 2, at 633; Nimmer, supra note 1, at 639-40.
to rest his argument on this observation alone, their subsequent discussions are to some extent impelled by this initial truism.

For Mr. Justice Stewart, failure to recognize that the two clauses are distinct is "an elementary error of constitutional law." He acknowledges, in effect, that the error may have seemed a rather well-embedded one. For years, as he points out, cases involving the first amendment simply did not reach the Supreme Court, thanks mainly to the familiar early rulings which held that the Bill of Rights did not apply to the states. When the first trickle of cases began to flow in this century, they were most frequently criminal prosecutions of dissident individuals. These cases might well present questions arising from first amendment defenses but, as Justice Stewart notes, they did not often require an examination of the "rights and privileges, or the responsibilities, of the organized press." More recent cases have occasioned precisely this missing examination, in the Justice's view. A speech is not, of course, a format in which to set forth an expanded analytical treatment of developing case law. Yet it is clear that Justice Stewart sees in the Court's recent opinions the beginnings of a body of precedents which will one day define "freedom of the press." In particular, the precedents in five quite separate areas suggest to him that the Court is already well begun at the task of establishing the privileges and responsibilities of the press as the "fourth estate."

The libel cases, which began in 1964 with the Court's opinion in New York Times Co. v. Sullivan, established that representa-

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7 Stewart, supra note 2, at 633.
8 Id. at 632.
12 Stewart, supra note 2, at 632-36; see text accompanying note 76 infra.
atives of the press, like officials of the federal government, are substantially "immune" to charges of defamation arising from reports which further "the public's business." Though it has common law antecedents, this immunity seems to Justice Stewart to be rooted in the press clause as well. Thus, he asserts that individuals have been granted no corresponding immunity derived from their rights of free speech.

The "reporter's privilege" cases, in which press reporters claimed a first amendment privilege against disclosure of their sources, similarly are said to have turned on the press clause. While these claims ultimately were rejected by a closely divided Court, Justice Stewart argues that in the very act of deciding the cases the Court gave implicit recognition to a separate press-related issue. Individuals have never been granted immunity against testimony based on claims of free speech. Thus, in accepting the question of the reporter's status as somehow a "different" one, the Court must have viewed the reporter as a "representative of a protected institution."

The "access cases" required the Court to decide in effect whether the Government has an affirmative role, under the first amendment, in securing a balanced ideological marketplace. The proponents of an enforceable right of access to the press had sought to correct unfair or inadequate coverage of issues of public importance. In rejecting these demands, Justice Stewart be-


14 Stewart, supra note 2, at 635.
16 Id.
18 Id.
17 E.g., Branzburg v. Hayes, 408 U.S. 665 (1972). Separate claims of privilege, asserted by three reporters, were consolidated for decision in Branzburg.
19 Stewart, supra note 2, at 635.
20 Id.
21 Id. (Emphasis in original).
23 See Stewart, supra note 2, at 635. See also text accompanying note 153 infra.
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lies, the Court established that the Government cannot decide the limits of fairness in American journalism.25

With their publication of the "Pentagon Papers,"26 two major newspapers approached what Justice Stewart describes as "the line between secrecy and openness in the affairs of Government."27 In New York Times Co. v. United States28 the Court rejected Government arguments that the Constitution itself furnished support for injunctions against publication and held, Justice Stewart says, that "so far as the Constitution goes, the autonomous press may publish what it knows, and may seek to learn what it can."29 This does not mean that the press has carte blanche to rifle the files of Government. On the contrary, the "prison visitation" cases30 establish that the press may be formally barred from immediate access to certain sources of information, as in the case of prisoners. But the principle which ties together these two final lines of authority is one which, in Justice Stewart's view, underlies the larger institutional role of the press as well. The role of the "autonomous" press is institutional in the sense that the press enjoys a separate constitutional status in the American society, a status quite apart from individual rights of free expression. The press' separate right to inquire, to oppose and scrutinize the actions of government, is guaranteed in the interest of an informed, secure electorate.31 The right itself is guaranteed, but not necessarily its convenient or successful exercise, which may depend instead "on the tug and pull of political forces in American society."32 Thus, in Justice Stewart's words, "the Constitution . . . establishes

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25 Stewart, supra note 2, at 635.
27 Stewart, supra note 2, at 635.
29 Stewart, supra note 2, at 636. Justice Stewart probably would agree that this is his own gloss on the case. Technically, the Court's decision was limited to a holding that the Government had failed to establish grounds justifying prior restraint. New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam).
30 E.g., Pell v. Procunier, 417 U.S. 817 (1974); Saxbe v. Washington Post Co., 417 U.S. 843 (1974). Both cases involved claims under the first amendment. In Pell, individual prisoners claimed the right to unrestricted communication with the press. Three press reporters also claimed that prison regulations restricting access to the prisoners were invalid. Both claims were rejected by the Court. In Saxbe, a newspaper and one of its reporters challenged a federal prisons policy statement restricting interviews with prisoners. This challenge also was rejected.
31 See Stewart, supra note 2, at 634, 636.
32 Id. at 636.
the contest, not its resolution.33

It should be said that Justice Stewart's remarks at Yale were primarily in defense of a vigorous, partisan press.34 His views, though interesting, might have seemed unremarkable had he not explicitly championed the separate constitutional status of the press. Most students of the first amendment would agree that one of its chief theoretical justifications is the advancement of the electorate; and all would surely agree that there is a permissible gulf between "free expression" and "successful expression." Yet these observations alone would not justify particular reliance on the press clause, and, as will be seen, "freedom of the press" does not seem to have had quite the institutional connotations in the eighteenth century that Justice Stewart suggests. Moreover, the brevity of his remarks prevents him from explaining why the press clause might be of separate importance today.

Professor Nimmer, on the other hand, provides a somewhat fuller development of the thesis. He is less certain than Justice Stewart that the Framers meant to distinguish between freedom of speech and a free press. As he concedes, the terms "freedom of speech" and "freedom of the press" were used interchangeably at the time the first amendment was adopted.35 He also concedes that recent Supreme Court opinions emphasizing "the press" may have employed language which was simply inadvertent or ambivalent even when it seemed most clear.36 For example, Gertz v. Robert Welch, Inc.,37 the most recent of the libel cases, contains repeated references to "the press" or "the media," and the issue in the case is stated technically in terms of "a newspaper or broadcaster" without reference to individual speech interests.38

33 Id.
34 Justice Stewart's remarks apparently were prompted by concern for hostile public reaction to the role of the press during the Vietnam War and in the final debacle of the Nixon Administration. See, id. at 631.
35 Nimmer, supra note 1, at 640.
36 Id. at 647. See also Note, The Right of the Press to Gather Information, 71 COLUM. L. REV. 838 (1971).
37 [Even on first reading the constitutional concept of freedom of the press seems expansive. Despite the Constitution's express protection of that freedom, however, the opinions that have been handed down by the Supreme Court have not really dealt with the issue of possible distinctions between speech and press; the Court has generally viewed the freedom of the press as little more than a particularized form of freedom of speech . . . . More recently, the Court has begun to write of a general "freedom of expression" without citing either the freedom of speech or freedom of the press clauses.

Id. at 840-41 (footnote omitted; emphasis in original). See generally id. at 840-42.
39 As the Court stated it:

The principal issue in this case is whether a newspaper or broadcaster that publishes defamatory falsehoods about an individual who is neither a public official nor a public figure may claim a constitutional
In Mr. Justice Stewart's view, of course, the omitted reference is quite deliberate; as has been noted, the Justice is convinced that the Court has not extended its first amendment libel holdings to individuals. Yet the opinion in Gertz is not entirely free of reference to speech. Early in the opinion, its author, Mr. Justice Powell, acknowledges that what the Court must do is reconcile "the law of defamation and the freedoms of speech and press protected by the first amendment." In a later passage, Justice Powell refers to the Court's continuing efforts "to assure to the freedoms of speech and press that 'breathing space' essential to their fruitful exercise." Thus, as Professor Nimmer observes:

[O]ne is left with the uneasy feeling that the Court's application of the ... doctrine [in Gertz] to what may be regarded as the freedom of the press arena, and its unarticulated exclusion of other "speech," may have been inadvertent, and that, further, the inadvertence was due precisely to the failure of the Court to recognize that the freedoms of speech and press are not necessarily coextensive.

Other recent opinions leave Professor Nimmer equally uneasy. In one of the "prison visitation" cases authored, as it happened, by Justice Stewart, the Court had held that "[t]he Constitution does not ... require government to accord the press special access to information not shared by members of the public generally." Here, Professor Nimmer suggests, is "as clear a statement as has thus far emerged ... that those words in the Constitution which speak of 'freedom of the press' do not carry any meaning beyond that contained in the reference to 'freedom of speech.'" With the benefit of hindsight, however, it is equally clear that Justice Stewart himself cannot have meant all that his words portended. What those Justices who concurred in his opinion may have thought is another matter, but one can safely suppose only that the passage conveyed what was necessary in the context. The Constitution simply does not require that the press be given access to prisoners when individual members of the public are not.

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privilege against liability for the injury inflicted by those statements.

Id. at 332. Professor Nimmer observes that "[s]ince for constitutional purposes a broadcaster is no less a part of 'the press' than is a newspaper, the above statement ... seems to relate exclusively to freedom of the press." Nimmer, supra note 1, at 648.

30 See text accompanying note 16 supra.

40 418 U.S. at 325.

41 Id. at 342.

42 Nimmer, supra note 1, at 649.


44 Id. at 834.

45 Nimmer, supra note 1, at 642.
If the "prison visitation" cases do not satisfactorily distinguish between the freedoms of speech and press, at least they pose no necessary conflict between the two. Other cases may, Professor Nimmer argues. In the right of access cases, for example, it is possible to see a conflict between the speech interests of individuals claiming access to the established press and the dissimilar interests of the press in opposing those claims.\footnote{Id. at 644-47.} Whether a conflict is seen is largely, if not entirely, a conceptual matter.\footnote{It is clear, in a conventional sense, that speech and press interests were opposed in Democratic National Committee and Tornillo. But it does not follow that they involved the protection of competing clauses under the first amendment. On the contrary, it is entirely possible to reconcile the two interests within the larger protection afforded by the amendment. See text accompanying note infra.} Justice Stewart apparently does not recognize one—or perhaps it is merely that he approves of the Court's disposition of the cases.\footnote{Justice Stewart concurred in the result in Democratic National Committee (412 U.S. at 132-46) and was with the majority in Tornillo.} For Professor Nimmer, however, the decisions were flawed, not so much by their outcome as by the process which produced them.

In Miami Herald Publishing Co. v. Tornillo,\footnote{418 U.S. 241 (1974).} the specific question was the constitutional validity of a Florida statute which required newspapers to grant free space for replies by candidates who had been attacked in the newspaper's columns.\footnote{The statute provided: If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candidate immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to. Fla. Stat. Ann. § 104.38 (1973).} The Court held that the statute impermissibly abridged "the freedom of the press."\footnote{418 U.S. at 258.} By implication, at least, it also rejected the earlier holding of the Florida Supreme Court that the statute properly advanced the interests of speech.\footnote{The Florida supreme court had said: The statute here under consideration is designed to add to the flow of information and ideas and does not constitute an incursion upon First Amendment rights or a prior restraint, since no specified newspaper content is excluded. There is nothing prohibited but rather it requires, in the interest of full and fair discussion, additional information. Tornillo v. Miami Herald Pub. Co., 287 So. 2d 76, 82 (Fla. 1973) (emphasis in original).} In Columbia Broadcasting System, Inc. v. Democratic National Committee,\footnote{412 U.S. 94 (1973).} two groups of individuals had attempted to reach television audiences through
paid editorial advertisements. Their efforts had been rebuffed by a Washington, D.C. television station and by one of the major networks. In a suit to enforce their claims to access, the groups had asserted an affirmative first amendment right which, with some qualifications, the Court of Appeals for the District of Columbia had accepted. The Supreme Court reversed, however, in a remarkably complex plurality opinion written by Chief Justice Burger. While Professor Nimmer notes correctly that a majority of the Court assumed that state action was involved in the broadcasters' denial of air time, the decision itself rested on a finding that the regulatory policies authorized by Congress under the Communications Act of 1934 did not require access of the sort claimed by the groups, and, of more immediate constitutional importance, that these policies did not contravene the first amendment. Necessarily, the Court was required to assess competing first amendment interests in order to reach the latter conclusion. Professor Nimmer argues that what was in fact being weighed were the competing interests of speech and press; I disagree for reasons which I have presented elsewhere. It is at least clear, however, that if speech was being balanced against press, the balancing process itself was far too murky to be of value to anyone who might look to the opinions for guidance on that question. In a sense then, Professor Nimmer is undoubtedly right in his principal criticism of both Tornillo and Democratic National Committee. If, as he supposes, there are distinctions between freedom of speech and freedom of the press which ought to be observed—distinctions which, in fact, are being observed by the Court sub silentio—then he is clearly correct when he suggests that the Court's recent opinions do not reflect these distinctions adequately.

The question remains whether a speech-press “duality” ought to be recognized, and it is to this question that Professor Nimmer addresses himself in the most persuasive and yet most troublesome portions of his article. Since his conclusions are almost inseparable from his analysis, it is necessary to restate the latter rather fully in order to explain the former. To begin with, one must understand what it is that distinguishes “the press” from “speech.” Surely, he argues, “speech” cannot encompass all forms of expression if “the press” is to have separate meaning; nor can “speech”

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86 Nimmer, supra note 1, at 646-47, 637.
87 See Lange, supra note 55; text accompanying note 153 infra.
mean simply everything which is spoken (or symbolically expressed). The former construction would be too sweeping; the latter would be at odds with conventional understanding. On the one hand, radio broadcasters must be viewed as a part of the press; on the other, not every written expression is an act of the press. Perhaps, therefore, an external standard must be employed, one which is somewhat apart from conventional understanding yet compatible with it. Professor Nimmer suggests that "at the very least" an act of "publication," or dissemination to the general public, must accompany whatever other activities may characterize "the press." His concept is explicitly borrowed from the law of copyright so that, far from an undefined general proposition, it has the advantage of fairly specific definitional boundaries. One would expect, for example, that publication would be characterized by actions, rather than intent, and that the actions necessary might include any which were voluntary and which could reasonably be expected to divest one's control over the general dissemination of ideas and expression reflected in particular materials. Thus, to pursue an example which Professor Nimmer offers, Daniel Ellsberg might have claimed only a speech interest in private, confidential discussions of the Pentagon Papers, but his release of the papers to the Times and the Post could have qualified for whatever differing protection, if any, the press might claim.

The Ellsberg example is an instructive one. It suggests, on the one hand, how the standard of publication could lend greater analytical clarity to attempts to distinguish "speech" from "the press" without departing substantially from conventional understanding. Most persons probably would find it possible to recognize a difference in character, if not necessarily in consequence, between essentially private conversations and actions calculated to result in general dissemination. And, probably, most would not find it strange to characterize the one as "speech" and the other as "press." At the same time, the Ellsberg example suggests how greater analytical clarity might lead in turn to differing results. Again, to pursue Professor Nimmer's example (this

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58 Nimmer, supra note 1, at 650-51.
59 Id. at 651-52.
60 Id. at 652.
61 Id.
62 See 1 M. Nimmer, Nimmer on Copyright §§ 49, 58.3 (1972).
time, well beyond his own conclusions), Ellsberg's liability for private disclosures of the Pentagon Papers might be different from his liability for dissemination to the public at large. In the one case he might be condemned as spy, and in the other be hailed as public savior.  

Whether different results ought to follow depends, in this context, on whether there are important differences between the values reflected in speech and in the press. Professor Nimmer's own conclusions are frankly tentative, and, in fact, he arrives at none in the case of Ellsberg.  

But he does suggest generally that the "functions" of speech and the press are sufficiently different to permit, if not require, different conclusions in a rather wide range of cases decided under his proposed "duality."  

Drawing upon Mr. Justice Brandeis' celebrated concurring opinion in Whitney v. California, Professor Nimmer observes that there are three conventional justifications for free speech: self-fulfillment; its close corollary, the "safety valve" provided by self-expression; and finally, the pursuit of the democratic dialogue. Of these three, he argues, only the last is generally applicable to the press.  

In modern American society, however, the press may be even more important to the democratic dialogue than is individual speech. If one accepts these distinctions, then of course he or she may also accept Professor Nimmer's reassessment of the several cases which have already been discussed. In the prison visitation cases, one might join him in arguing that the combined weight of both speech and press interests should have been balanced against the interests in prison regulation.  

In the libel cases, speech and press interests would not necessarily merit co-extensive protection. "Media expression" presumably would serve the democratic dialogue most fully and would occasionally reflect the other, more personal justifications for free speech as well; "non media" expression, on the other hand, might be insuf-

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64 These extremes are not meant as practical examples of what one would in fact expect, but rather as a reflection of the tendency toward diverging consequences which might result from distinctions drawn between private and public acts. Cf. Nimmer, supra note 1, at 656 n.81.

65 As Professor Nimmer stated:
This introduction is intended only as the beginning of [the] inquiry. No more will be attempted here than to suggest certain guidelines and directions that may be helpful in delineating the constitutional relationship between press and speech.

Nimmer, supra note 1, at 653.

66 Id. at 653-58.

67 274 U.S. 357 (1927).


69 Nimmer, supra note 1, at 653-54.

70 See, id. at 654-55.
ficient alone to outweigh the countervailing interests in private reputation. Finally, of course, the access cases might have been decided differently had the Court acknowledged that the competing interests there were speech and press.

Professor Nimmer himself is not particularly inclined toward one as against another result in any of these cases. In his article, at least, his conclusions are reflected in his analysis. A strong proponent of definitional balancing in first amendment theory, he is as strongly (and necessarily) committed to analytical clarity. Thus the strength of his proposal for explicit recognition of a free speech-free press duality ("an idea," he concludes, "whose time is past due") is also its potential weakness. One must accept the distinctions between speech and press which he proposes (or fashion others) if the proposal itself is to have meaning. It is not enough merely to suggest that the press be accorded separate constitutional status as a protected institution. That is essentially Justice Stewart’s proposal and it will not do alone. An institution defined how, and to what ends? These are the obvious questions and the answers are at best uneasy.

II. THE ORIGINS OF SPEECH AND PRESS

It is true, of course, that the Framers have left us language in the first amendment which justifies the present debate—language which, under almost any view one takes, is less than clear. Either it has occasioned some two hundred years of potential misunderstanding or it simply seems redundant. Of the two, the latter is more probable, for the fact is (as Professor Nimmer himself notes) that the terms “freedom of speech” and “freedom of the press” were used quite interchangeably in the eighteenth century, particularly so among persons who were interested in the terms at a conceptual level.

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71 Id. at 655-56.
72 Id. at 656-57.
74 Nimmer, supra note 1, at 658.
Justice Stewart appears to believe that the Framers meant explicitly to recognize a "fourth institution outside the Govern-

the same restraints of subsequent punishment, were rarely distinguished. Most writers, including Addison, Cato, and Alexander, who employed the term 'freedom of speech' with great frequency, used it synonymously with freedom of the press." *Ibid.* at 174. His conclusion can be illustrated by comparing two essays published in the colonies in 1734. The first is Cato's famous essay, "Of Freedom of Speech: That the same is inseparable from Public Liberty," which appeared in John Peter Zenger's *New-York Weekly Journal* on February 18:

Without Freedom of Thought, there can be no such Thing as Wisdom, and no such Thing as public Liberty, without Freedom of Speech, which is the Right of every Man, as far as by it he does not hurt or controul the Right of another: And this is the only Check it ought to suffer, and the only Bounds it ought to know.

This sacred Privilidge is so essential to free Governments, that the Security of Property, and the Freedom of Speech always go together; and in those wretched Countries where a Man cannot call his Tongue his own, he can scarce call any Thing else his own. Whoever would overthrow the Liberty of a Nation must begin by subduing the Freeness of Speech; a Thing terrible to publick Traytors.

... Guilt only dreads Liberty of Speech, which drags it out of its Lurking Holes and exposes its Deformity and horror to Day light ...

... All Ministers therefore who were Oppressors ... have been loud in their Complaints against Freedom of Speech and the Lycence of the Press; and always restrained or endeavour to restrain both ...

Freedom of Speech therefore being of such infinite importance to the Preservation of Liberty; every one [sic] who loves Liberty ought to encourage Freedom of Speech.


Many of the ideas, and a significant amount of the expression, in Cato's Letter are echoed in Andrew Bradford's "Sentiments on the Liberty of the Press," which was published in Philadelphia, on April 25, in *The American Weekly Mercury*. Bradford's essay is somewhat less daring than Cato's, in that Bradford begins by cataloguing the abuses which he is unwilling to defend. In Bradford's case, his careful introduction is understandable, since he had already been both censured and jailed for incautious publications. Nonetheless, having paid his respects to authority, he explains what he means by "freedom of the press":

"But, by the Freedom of the Press, I mean a Liberty, within the Bounds of Law, for any Man to communicate to the Public, his sentiments on the Important Points of Religion and Government; of proposing any Laws, which he apprehends may be for the Good of his Country, and of applying for the Repeal of such, as he Judges pernicious. I mean a Liberty of detecting the wicked and destructive Measures of certain Politicians; of dragging Villany out of it's obscure lurking Holes, and exposing it in it's full Deformity to open Day; of attacking Wickedness in high Places, of disentangling the intricate Folds of a wicked and corrupt Administration, and pleading freely for a redress of Grievances: I mean a Liberty of examining the great Articles of our Faith, by the lights of Scripture and Reason, a Privilege derived to us in its fullest Latitude, from our most excellent Charter.

This is the Liberty of the Press, the great Palladium of all our other Liberties, which I hope the good People of this Province, will forever enjoy ... For, it may be demonstrated from numerous Instances in History, that whenever this inestimable Jewel was lost, Slavery, Desolation and Ruine ensued."


These two essays, published here barely more than a month apart, demonstrate how closely intertwined were the freedoms of speech and press in the thinking of the Colonists. But the inspiration was almost entirely Cato's. Dean Levy
ment as an additional check on the three official branches.” He may be correct, but in fairness one must insist that the evidence in favor of his view is not entirely persuasive. The partisan press did provide a source of restraint upon government, but it does not seem to have been organized in quite the way Justice Stewart appears to suppose. Instead, the press was partisan because much of it was directly in the service of opposing power factions. This did lead to criticism of authority, sometimes in daring and amusing fashion. Thomas Jefferson, for example, employed a journalist to attack the policies of Washington’s party while Jefferson was himself Washington’s Secretary of State. But this was scarcely institutional partisanship on the part of the press itself. Burke’s “fourth estate” still lay ahead in England as well as in this country. The partisan press bore little relationship to the later “penny press,” and still less to the press of Hearst and Pulitzer.

The instructor us that:

“Cato’s Letters was quoted in every colonial newspaper from Boston to Savannah,” and “the most famous” of his letters was . . . (the essay on speech). . . .

Cato’s Letters was the high-water mark of libertarian theory until the close of the eighteenth century. In the American colonies, Cato was adored, quoted, and plagiarized. In fact, American libertarian theory . . . was at its best little more than an imitation of Cato . . . .

If freedom of the press was the palladium of public liberty, as the colonists were so fond of reiterating, Cato’s Letters was its intellectual source and provided virtually the entire content of its philosophy as well.


Stewart, supra note 2, at 634.

“Following the termination of the Revolutionary War, individual newspapers began to serve as semi-official vehicles through which a political party either presented its views or castigated opponents.” Note, Media and the First Amendment in a Free Society, 60 Geo. L.J. 867, 879 (1972). “For each party the press was the conduit between its leaders and philosophers, and the masses.” E. Emery, The Press and America 140 (2d ed. 1962).

The journalist was Phillip Freneau, whose principal target was Hamilton, but who did not hesitate to attack “the first magistrate” himself. E. Emery, The Press and America 143-48 (2d ed. 1962). See also W. Chenery, Freedom of the Press 33-38 (1955).


The prevailing view of the colonial and post-Revolutionary press appears to be that it was neither well-circulated nor widely-read. Fewer than 50 journals survived the Revolutionary War, and their individual circulation “was generally less than 1000 copies.” See W. Chenery, Freedom of the Press 120-21, 142-44 (1955). “The standard newspapers were usually edited for people of means
or the "free and responsible press" of today. In short, the institutional press apparently envisioned by Justice Stewart had scarcely been born. Of course, no one will ever know exactly what the Framers intended. Zechariah Chafee's observation some years ago probably still comes as close to the mark as any, where close debate about original first amendment nuances is engaged: "The truth is, I think, that the framers had no very clear idea what they meant." But his observation is less an invitation to disregard intent than it is a call for pragmatism in the search. In fact, a realistic appraisal of origins does appear to provide some

. . . . E. Emery, THE PRESS AND AMERICA 214 (1962). Thus, the significance of the "penny press" was that it meant, for the first time, "a press for the masses." See, id. at 213-18. Benjamin Day, who founded the New York Sun in 1833, is generally credited as the progenitor of the penny press. But he was not alone. In New York, Day's contemporary, James Gordon Bennett, founded the Herald in 1835; Horace Greeley followed with the Tribune in 1841; and Henry J. Raymond established the Times in 1851. Of Bennett, Paul Peebles would later write: Before his day newspapers did not exist. He determined that they should be brought forth. Before his day the world as represented in our public journals was lethargic, pretentious, pedantic. He resolved that it should become wide-awake, sensible, representative of the popular sentiment, and progressive.


Against these views, one should compare A. Schlesinger, Prelude to Independence—The Newspaper War on Britain 41-47, 281-301 (1958). Professor Schlesinger's view was that the press contributed significantly to the development of American Revolutionary sentiment. He concluded that even before the Revolution, "[t]he press held an essential place in the community . . . . The puling infant had come of age . . . [and] in the process it had wrought changes in newspaper methods that would have profound effects on all later American journalism." Id. at 281. He also found some evidence of circulation in excess of that reported by Cherney. See, id. at 303-04.

Allowing for this divergence of opinion, one can still fairly conclude that if an "institutional" press existed in 1791, it bore only a rudimentary resemblance to the sort of press conventionally associated with the concept of the "fourth estate."

Although Hearst and Pulitzer tend to be remembered for their contributions to "yellow journalism," their real legacy seems more significant than that. They epitomize an era of transition during which the mass newspaper was becoming fully institutionalized in American life. See generally E. Emery, THE PRESS AND AMERICA 337-68 (1962). Professor Emery reports, for example, that in the thirty years between 1870 and 1900, daily newspapers increased in number from 489 to 1,967, while circulation increased from 2.6 million copies to some 15 million daily. The newspapers had become, in his words, "the chronicler of the national scene, the interpreter of the new environment." Id. at 345, 346.

The significance of the phrase is that it reflects a movement from laissez-faire libertarianism to a view of the press which expects a sense of responsibility in exchange for freedom. See generally THE COMMISSION ON FREEDOM OF THE PRESS, A FREE AND RESPONSIBLE PRESS (1947) (with foreword by Robert M. Hutchins); W. Hocking, FREEDOM OF THE PRESS: A FRAMEWORK OF PRINCIPLE (1947); F. Siebert, T. Peterson & W. Schramm, FOUR THEORIES OF THE PRESS 73-104 (1956).

perspective on the question of the Framers' concern for the institutional press.

If it is true that colonial writers tended not to draw careful distinctions between speech and press, one can reasonably ask why they did not. The answers to that question almost certainly lie in still earlier periods of history. Concern for the underlying tensions in freedom of expression is obviously much older than the American experience.\textsuperscript{84} Laws directed against disruptive speech appeared in the earliest codes: the law of Moses enjoined slander, particularly when directed against authority;\textsuperscript{85} the earliest Roman Codes punished disruptive speech by clubbing and worse;\textsuperscript{86} the Athenians imprisoned the sculptor Phidias for a work which impugned Athenian tradition.\textsuperscript{87} These are no more than examples, to be sure, and yet they suggest something of the ancient lineage of what might be termed the authoritarian response to dangerous expression.\textsuperscript{88} Individual interests in free expression are equally ancient. The Roman historian Tacitus, writing of the Emperors Nerva and Trajan, described the qualities

\textsuperscript{84} See note 91 infra. Dean Levy has said of "freedom of speech": That freedom had almost no history as a concept or a practice prior to the First Amendment or even later. It developed as an offshoot of freedom of the press, on the one hand, and on the other, freedom of religion—the freedom to speak openly on religious matters. But as an independent concept referring to a citizen's personal right to speak his mind, freedom of speech was a very late development, virtually a new concept without basis in everyday experience and nearly unknown to legal and constitutional history or to libertarian thought on either side of the Atlantic prior to the First Amendment.

L. LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY 5 (1960). This statement can be misleading unless it is confined within its original context, which had to do with the Framers' attitude toward the question of seditious utterances. See id. at 1-7. I would agree that the Framers were, at best, ambivalent toward this question. I would also agree, at least in part, with Dean Levy's principal thesis, that the first amendment's press clause probably was rooted conceptually in the common law prior restraint doctrine, which happened also to be the legal definition of freedom or liberty of the press. See text accompanying notes 107-08 infra. But the larger implications in his statement must be qualified. First, as he himself has pointed out, the preeminent influence on American libertarian thought was Cato's essay on freedom of speech. In this respect, conceptual essays on freedom of the press (like Andrew Bradford's) were themselves derivative, not the other way around. See note 75 supra. Second, although agreement about the permissible scope of dissent was lacking, general comprehension of the transcendent values in free speech was not. Cato was well acquainted with Tacitus. See text accompanying note 89 infra.

\textsuperscript{85} M. NEWELL, THE LAW OF LIBEL AND SLANDER 2 (2d ed. 1898).
\textsuperscript{86} See id. at 6-7.
\textsuperscript{87} See id. at 5-6.
\textsuperscript{88} Cf. F. SIEBERT, T. PETERSON & W. SCHRAMM, FOUR THEORIES OF THE PRESS (1956). The authors observe that "[s]ince the beginnings of mass communication, in the Renaissance, there have been only two or four basic theories of the press—two or four, that is, according to how one counts them." They identify the "Authoritarian" and "Libertarian" theories as basic, and of these two, they observe, "the oldest is the Authoritarian." Id. at 2.
which had characterized their reigns in terms of free expression: “Such being the happiness of the times, that you may think as you wish, and speak as you think.” Here is perhaps as eloquent a summary of the enduring appeal of free expression as has ever been recorded. And the thought which it expresses has not been lost in the development of the American libertarian tradition. Mr. Justice Brandeis echoed the words of Tacitus when he described the Framers’ ultimate intent in his concurring opinion in *Whitney v. California*:

Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. . . . They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth . . . .

The earliest concerns, however, were for speech and expression and the concepts of freedom were necessarily individualistic and personal. True, free expression might be justified on grounds which went somewhat beyond personal happiness. But even under more elaborate theories, the exercise of free expression obviously was confined by one’s capacity to disseminate one’s thoughts. There was the voice—and in the occasional skilled orator or effective plotter the voice could prove a powerful instrument. And there was writing—again, an occasional instrument of power. But these were at best the reliable tools only of the rich and powerful. They were not the common lot of common men. Lacking access either to power or wealth, commoners lacked the means as well to carry their thoughts beyond themselves. Deprived of the capacity to amplify their own speech, they had little reason to be concerned with the free political use of

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89 Tacitus, *History* § 1. Tacitus also understood something of the essential futility in efforts at repression. Of Nero’s edict banning one author’s work, the historian observed: “So long as the possession of these writings was attended by danger, they were eagerly sought and read; when there was no longer any difficulty in securing them they fell into oblivion.” G. Patterson, *Free Speech and a Free Press* 18 (1939).


91 There may have been no fully developed political theories, but it is clear that some early philosophers drew explicit equations between free speech and ideal government. See, e.g., G. Patterson, *Free Speech and a Free Press* 17-18 (1939) (quoting Demosthenes and Socrates). But cf. F. Siebert, T. Peterson & W. Schramm, *Four Theories of the Press* 12 (1956) (observing that Plato opposed unrestricted expression, and noting also that Socrates himself accepted the authority of the state to punish disobedience). See also L. Levy, *Legacy of Suppression: Freedom of Speech and Press in Early American History* 88-89 (1960).
speech for, without amplification, the occasions for the exercise of that freedom were necessarily few.  

Against these realities, the introduction of the printing press brought new and sweeping changes. In fifteenth century England, as on the Continent, the press provided an essential element in the chemistry of what were to be revolutionary new theories of political self-determination. Here was an undeniably effective means of carrying speech far beyond the accustomed ambit of the speaker. It was, moreover, a means within the

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92 Professors Jensen and Peterson have described the impact of the printing press in terms which also emphasize the life of personal expression before the introduction of the printing press:

The entire intellectual climate changed under the force of the printing press, which spread ideas to heads that once had small chance to receive them. An elite few could monopolize knowledge so long as books were scarce, expensive and inaccessible. Printing changed all that. Even the early books were published in editions of 200 to 1,000 copies, a fantastic increase in output over the days when a copist could hand letter no more than one or two copies a year . . . . Book production moved from the isolation of the university town and patrician manor into the busy, urban marketplace. . . .

In ways obvious and subtle, printing liberated the mind. Freed from the task of puzzling over the cramped handwriting of manuscripts, the reader could let his eyes race along, his mind with them, free to think as he read. What he read was being read by others, for now broadsides, pamphlets and books could spread over wide geographic areas with a speed previously unknown. . . .

. . . . Printing facilitated the governing of areas far beyond the seat of power by making possible the cohesion of large populations around a central doctrine. It helped to build political allegiances by enabling far-flung citizens to share common beliefs, common values, common goals. By codifying and standardizing vernaculars, it contributed to the emergence of national languages, national cultures and national consciousness.

J. Jensen & T. Peterson, Historical Development of the Media in American Life II-2 to II-5 (1968) (unpublished manuscript on file at UCLA Law Review). This valuable manuscript was prepared by its authors at my request as part of the investigation of the mass media conducted by the Media Task Force of the National Commission on the Causes and Prevention of Violence. Portions of the manuscript were printed as part of the introduction to the Report of the Media Task Force to the Commission. D. Lange, R. Baker & S. Ball, Mass Media and Violence 3-11 (1969).


94 Most historians agree that the printing press was brought to England in 1476 by William Caxton, who established his press at “the Sign of the Red Pale” at Westminster. E. Emery, The Press and America 9 (2d ed. 1962). Caxton, a scholar and author, may have been instructed to do so by King Edward IV, but the greater likelihood is that he acted on his own behalf. Id. See also F. Siebert, Freedom of the Press in England 1476-1776, at 22-24 (1952). The point is of some importance, since the question of the de jure authority of the Crown to regulate the press was later thought to turn, in part, upon whether it had been the King who first installed it. See, id. at 21-22. Meanwhile, the continental press had become relatively well-established. The Gutenberg Bible was printed at Mainz, sometime after 1450. E. Emery, The Press and America 5 (2d ed. 1962). Caxton himself learned to operate the press on the continent. Id. at 8.
capacity of the common man to grasp. Though ignored at first by the King, the press in the hands of his subjects was an instrument too threatening to escape his attention for long. Regulations began to appear. At first modest, they grew more sweeping as the threat to established thought and order became more insistent. Letters patent evolved into a wide-scale system of printing monopolies, licenses, and privileges controlled by the Crown. By 1586, Elizabeth had expanded the scope of the Star Chamber Decree, so that none but licensed stationers were permitted to print. Meanwhile, prosecutions for seditious libels flourished in an atmosphere which left the Star Chamber itself a synonym for repression. And yet illicit presses continued, sheet by sheet, to reinforce the English commoner's growing awareness of himself and his nascent political power. Though another two centuries would pass before the restrictions would begin to wither, the struggle itself was enough to assure the continued legitimacy of the concepts of free speech and press for the common man.

It was this heritage of struggle, in which the very concept of free speech was given new vitality by the introduction of the press, that the colonials brought with them to the New World.

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95 Professor Siebert states that John Milton's friend, Samuel Hartlib, "predicted as early as 1641 that '... the art of Printing will so spread knowledge that the common people, knowing their own rights and liberties will not be governed by way of oppression ...'" F. Siebert, Freedom of the Press in England 1476-1776, at 192 (1952).

96 The first serious move by the Crown against the press came in 1529 when Henry VIII issued an index of prohibited books. Licensing began the following year. See id. at 2.


98 See id. at 61-62.


100 Licensing and similar direct controls declined after the Tudors. Professor Siebert states that by the mid-eighteenth century prosecutions for seditious libel had become "too difficult" to enforce, thanks to the unwillingness of juries to convict. He adds, however, that "not until the 1860's was the press of England entirely free from objectionable controls by the government." F. Siebert, Freedom of the Press in England 1476-1776, at 5 (1952).

101 But see generally L. Levy, Legacy of Suppression: Freedom of Speech and Press in Early American History (1960). Dean Levy has argued that the colonials tended to take a sanguine view of seditious libel, and that the Framers' purpose was much more narrowly circumscribed than is commonly supposed. Cf. text accompanying note 107 infra. His evidence is persuasive. It seems to me, however, that his overall interpretation of the period is less generous than his own research would permit. Phrase-making is trivial, and I do not mean to pursue the point at any length; but I do think that
Among the important lessons in this heritage, it would seem, were these: There were, of course, differences between free speech and a free press. The former was by far the older and, of the two, more basic. Yet it was the latter which had amplified the former and given it meaning for the common man. It was entirely appropriate that the two concepts be used interchangeably for, in as nearly literal a sense as propositions of this sort can ever acquire, the two were functionally inseparable. Free speech could not exist in the fullest sense without freedom of the press; a free press, on the other hand, had no occasion to exist without freedom of speech. Thus viewed, the two could scarcely be set apart for neither had ever quite existed without the other.¹⁰²

¹⁰² The conclusions suggested in the text are supported by older, as well as more modern authorities. In his treatise on the English law of libel, reprinted in this country in 1818, Francis Ludlow Holt considered the meaning of the “liberty of the press” in the context of the informal English constitution:

As the liberty is opposed to the power of the licensor, the term is correct. It is loose only, when distinctively used as a new peculiar right of the press. The liberty of the press is only the liberty of those who use it. It is only one of the personal rights of the printer. . . .

. . . Printing is but the mechanical art of extending . . . [free] discussion into a wider sphere. It was a new power, but no new right. It left, therefore, everything as it found it, with the exception, that the acquisition of such power, and the greater facility of mischief, demanded an increased vigilance on the part of the law. . . .

With respect to the correct acceptance of the popular notion of the liberty of the press, it is what is necessarily included in its equivalent and progressive terms, thinking, speaking, and writing. . . .

The liberty of the press, therefore, properly understood, is the personal liberty of the writer to express his thoughts in the more improved way invented by human ingenuity in the form of the press. This definition, or rather description, will lead us not only to an accurate conception of the thing, but to the origin of those notions, and which some writers have deemed prejudices, entertained in favour of it in a popular constitution. . . .

. . . Our constitution, in fact, as it at present exists . . . is almost entirely, under Providence, the fruit of a free press. It was this which awakened the minds of men from that apathy, in which ignorance of their rights, and of the duties of their rulers, had left them. It was by these means, that moral and religious knowledge, the foundations of all liberty, was refracted, multiplied and circulated . . . . It was from the press that originated what is, in fact, the main distinction of the ancient and modern world, public opinion. A single question will be sufficient to put the importance of this subject in the strongest point of view. In the present state of knowledge and manners, is it possible that a Nero or Tiberius would be suffered to reign or live?

Holt, Of the Liberty of the Press, in Freedom of the Press from Hamilton to the Warren Court 17-20 (H.L. Nelson ed. 1967). For a corresponding recent view of the conceptual history of speech and press, see W. Hocking, Freedom of the Press: A Framework of Principle 79-80, 209 (1947). The philosophy of the press expressed by Hocking, however, recognizes contemporary differences between speech and press which, in his view (and that of the Hutchins Commission of which his work is an outgrowth), might justify separate treatment. This view is offered as part of a philosophical “framework of principle,” rather than in legal context. See generally id. at 80-84, 209-32; cf. Note, The Rights of the
Is it likely that the Framers had these lessons specifically in mind as they adopted the amendment? Perhaps not. Dean Leonard Levy has argued forcefully that a closer view of history supports a more focused view of the language. In eighteenth century legal thought, "freedom of the press" meant freedom from prior restraint. Blackstone expressed the theory in a much-quoted passage from his *Commentaries*:

The liberty of the press is indeed essential to the nature of a free state: but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity.103

This doctrine evolved during the struggle between the British press and Crown and reflected the liberation of the press from licensing and similar controls.104 It was obviously not an adequate formula for free expression; among its other deficiencies, it did nothing to prohibit prosecutions for seditious utterances.105 Nonetheless, it did enjoy great currency in the colonies;106 and it suggests that the Anglo-American law had become at least somewhat concerned for the basic right to disseminate one's thoughts. It seems most probable that the press clause itself was intended simply to refer to this right as it had already come to be recognized in law.107 The speech clause, on the other hand,

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104 With the expiration of the Printing Act in 1694, the English press was freed from the licensing provisions which had reached their zenith during the reign of the Tudors. Lord Mansfield and Blackstone, among other jurists, thereafter developed the theory which reconciled the freedom from prior restraint with the continuing subject to possible punishment for seditious libels. See F. Siebert, *Freedom of the Press in England 1476-1776*, at 5-7, 260-63 (1952).
106 See F. Siebert, T. Peterson & W. Schramm, *Four Theories of the Press* 43 (1956).
107 This is Dean Levy's basic interpretation of the press clause at the time of its adoption. His evidence is impressive and deserves to be summarized in his own words:

What did the amendment mean at the time of its adoption? First of all (if the amendment is analyzed by focusing on the phrase, "the freedom of the press"), it was merely an assurance that Congress was powerless to authorize restraints in advance of publication. On this point the evidence for the period from 1787 to 1791 is uniform and non-partisan. For example, Hugh Williamson of North Carolina, a Federalist signatory of the Constitution, used freedom of the press in Blacksonian or common-law terms, as did Melancthon Smith of New York, an anti-Federalist. Demanding a free-press guarantee in the new
may have been meant to suggest that the scope of the first amendment was not confined to the prior restraint doctrine—or it may have been the “redundant” clause itself. 108 Under either view of federal Constitution, despite the fact that New York’s constitution lacked that guarantee, Smith argued that freedom of the press was “fully defined and secured” in New York by “the common and statute law of England,” making a state constitutional provision unnecessary. No other definition of freedom of the press by anyone anywhere in America before 1798 has been discovered. There was no dissent from the proposition that the punishment of a seditious libeler did not abridge the power or lawful freedom of the press.

L. Levy, Freedom of the Press from Zenger to Jefferson lv-iv (1966). See generally L. Levy, Legacy of Suppression: Freedom of Speech and Press in Early American History (1960). It should be observed, however, that in Dean Levy’s view, the substantive emphasis in the first amendment is to be found not in the press clause but in the introductory clause: “Congress shall make no law . . . .” This is because, again in his view, the Framers were primarily concerned with the power of Congress vis-à-vis the states. They intended generally to limit the federal government to enumerated powers; the first amendment was meant merely to reinforce this already existing position:

In other words, no matter what was meant or understood by freedom of speech and press, the national government, even in the absence of the First Amendment, could not make speech or press a legitimate subject of restrictive legislation. The amendment itself was superfluous. To quiet public apprehension it offered an added security that Congress would be limited to the exercise of its delegated powers. The phrasing was intended to prohibit the possibility that those powers might be used to abridge speech and press. From this view of the matter, the Sedition Act of 1798 was unconstitutional.

L. Levy, Freedom of the Press from Zenger to Jefferson lv-ivii (1966) (emphasis in original). This did not mean that seditious libels could no longer be prosecuted under the common law, but merely that Congress could not, in effect, preempt state legislation in that area. Thus, in Dean Levy’s overall conclusion:

It now appears that the prohibition on Congress was motivated far less by a desire to give immunity to political expression than by a solicitude for states’ rights and the federal principle. The primary purpose of the First Amendment was to reserve to the states an exclusive authority, as far as legislation was concerned, in the field of speech and press.

Id. at lx. See generally id. at lv-lxii.

There is respectable authority contrary to Dean Levy’s larger interpretations—notably, for example, in the work of Zedekiah Chafee. See Z. Chafee, Jr., Freedom of Speech in the United States 3-35 (1941). In any event, Professor Chafee himself concluded that the two clauses appear “virtually to coincide as legal concepts.” See note 4 supra.

108 Dean Levy’s emphasis on the Framers’ concern for congressional power, rather than the substance of the two clauses, may mean that he himself tends to slight the meaning of the speech clause. If the clause reflected “freedom of speech” as employed by Cato, for example, then it might have suggested a concept going substantially beyond the prior restraint doctrine. See note 75 supra. Dean Levy suggests a two-part argument against this construction. One is that “freedom of Speech” was sometimes used to express the prior restraint doctrine, even though oral speech was never licensed. Thus, he states:

Speech, of course, unlike publications, had never and could not have been subject to the licensing system, there being no requirements of permits for speakers, so that the “no prior restraints” definition was, technically, not relevant to oral utterances. What is important, however, is that freedom of speech was always limited by the barricade against criminal utterances. . . . Even in the seventeenth century when the licensing
the speech clause, however, it seems unlikely that the press clause can have been meant to protect the institutional press alone. The emphasis in “freedom of the press” was upon unrestrained dissemination of thought and the right belonged not merely to “the press” but to “every free man.”

But constitutional debate at this level quickly becomes arid unless one succeeds in translating intent into contemporary relevance. Professor Nimmer has a point when he suggests that unanticipated tensions may justify a departure from “original understanding.” The question which remains is whether contemporary tensions justify the departure which he and Justice Stewart have proposed.

III. DISTINGUISHING SPEECH FROM THE PRESS IN CONTEMPORARY AMERICAN LIFE

One must concede that the conceptual unity of speech and press evident in colonial times is less easily defended today. The “publishing business” referred to by Mr. Justice Stewart has come into its own, and undoubtedly it has achieved institutional status. Whether today’s press plays quite the pivotal role in American life with which it is frequently credited is still an open question. But it is perceived as among the dominant contemporary social forces and perceptions must be reckoned with. Against the press, private speech and thought look pale. Competition within the press is perilous and severe. Today, it is the marketplace more than the law which appears to restrain speech. As a result, many of the nobler values reflected in the original concept of speech

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system was still operative, Walwyn, Robinson, and Milton used “freedom of speech,” “liberty of speaking,” or some such reference to oral statement when they were inveighing against prior restraints and therefore must have meant freedom of the press.


109 The specific references are to Blackstone (see text accompanying note 103 supra), but the implications are broader. As has been suggested, the freedoms of speech and press were so intertwined in this period, and the scope of what we would think of today as “the press” so unstructured, that one must doubt seriously that the Framers meant the press clause as a “structural provision” for a “fourth estate.” I do not argue that the Framers did not know the difference between oral, written, and printed speech, but rather that they are apt to have thought of them all as the subject of “fundamental personal right[s].” See Branzburg v. Hayes, 408 U.S. 665, 704 (1972). See also authorities cited note 102 supra.

110 Nimmer, supra note 1, at 641.

111 See text accompanying note 126 infra.
and press can seem, as one observer has described them, essentially "romantic."\textsuperscript{110}

If this were all, one could agree that speech and the press might better be recognized as distinct. But the matter is not quite that simple. Separate treatment for the two cannot be justified unless the enduring distinctions between them can be identified. If new balances are to be recognized, they must be based on attributes which are not only clear but more or less permanent as well. Otherwise, definitional balancing can be misleading. Sensitivities developed through the years in dealing with complex issues may be sacrificed to a new, but spurious, understanding. Professor Nimmer suggests that the distinction between speech and press can be expressed in terms of publication or acts leading toward general dissemination.\textsuperscript{113} That seems at least partially satisfactory. Historically, the first function of the press has been to amplify speech. Dissemination, then, not only reflects the difference between the two terms but expresses their relationship as well. The difficulty, however, is that Justice Stewart and Professor Nimmer are not prepared to rely on a distinction as highly conceptual as this. Instead they appear to fall back upon two other means of distinguishing "speech" from "press." The first employs a "structural" definition; "freedom of the press" is seen as protecting the social institution which has come to be known as the "mass media." An alternative, "functional" definition emphasizes the supposed differences between the social functions served by free speech and a free press.

At first reading, Justice Stewart seems explicit. He thinks of the organized press, of the business, the institution. He refers in his speech to "the publishing business," but it seems clear that he would include broadcasters and perhaps other representatives of the mass media as well.\textsuperscript{114} Thus, for example, in his dissenting opinion in \textit{Branzburg v. Hayes} he acknowledges "the first amendment rights of mass circulation newspapers and electronic media to disseminate ideas and information . . . ."\textsuperscript{115} It is not clear, however, who might be excluded from the press as he views it. Is "the lonely pamphleteer" protected by the press clause? What of the novelist and the film maker? The "underground press?"


\textsuperscript{112} Nimmer, supra note 1, at 652. He suggests, however, that this may be a minimum standard and that others could be employed. \textit{Id.} at 652 n.71.

\textsuperscript{113} See Stewart, supra note 2, at 633, 636.

\textsuperscript{114} 408 U.S. at 742.
The traditional, if perhaps unthinking, answer of the Court would appear to be that they are included.116 And Justice Stewart's own opinions have not suggested clear disagreement with that response.117 Yet none of these is necessarily a part of the mass media and some, by definition, have virtually no institutional identification. Is it a misreading, after all, to suppose that Justice Stewart means to define the institutional press in terms of structure? Would he define it in terms of role or function instead? Again in his opinion in Branzburg, he seems to suggest something of the sort when he describes the nature of the reporter's claim to privilege:

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. It is this basic concern that underlies the constitution's protection of a free press... because the guarantee is "not for the benefit of the press so much as for the benefit of all of us."118

If it is function, rather than structure, which defines the press, the definition again is at least approximately compatible with the conceptual relationship between speech and press. But a definition expressed in terms of function seems equally at odds with Justice Stewart's emphatic references to the organized mass media and with his insistence that the first amendment libel privileges do not apply to individuals. With misgivings, then, one is forced to conclude either that the Justice does not know himself what he means by "the press" or, more probably, that he has not yet had the occasion to express himself fully.

Perhaps the contemporary press must be defined by both structure and function. That seems to be Professor Nimmer's view. He describes the chief function of the press as the pursuit of the democratic dialogue.119 And he expresses, if he does not quite define, his view of structure in his repeated use of the term "media" as a synonym for "the press."120 Just how far these views

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117 But cf. Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684 (1959) (Stewart, J.). "Nor need we here determine whether, despite problems peculiar to motion pictures, the controls which a State may impose upon this medium of expression are precisely coextensive with those allowable for newspapers, books, or individual speech." Id. at 689-90.

118 408 U.S. at 725-26.

119 See Nimmer, supra note 1, at 653-54.

120 See, id. at 653-58.
carry him from his initial suggestion that the "physical scope" of the press may be defined in terms of publication, can be seen in his own analysis of the access cases. In Tornillo and Democratic National Committee, he argues, private interests in speech were at odds with the interests of the press. That may well be so, if one accepts his later assessment of function and structure. But it is by no means the case if the distinction between speech and press is the earlier one of public dissemination. The access proponents wanted nothing less than public dissemination. If activities leading toward publication are "within the sphere of 'press activities,'" as Professor Nimmer argues earlier, then the competing interests in the access cases were not speech against press, but press against press. This is not the way he later characterizes them, of course, and the reasons for not doing so are revealing. Dissemination may represent an essential relationship between speech and press, but it is also sweeping and essentially value free, and thus of only limited utility in deciding which interest is to prevail among likely competitors. One must assign closer definitions and clearer values to these interests if they are to be weighed in balance, and for that purpose it is far more convenient to refer to function and structure.

But this is uncertain ground. One can applaud the choice of Mr. Justice Brandeis' opinion in Whitney v. California as a source; it is among the most thoughtful opinions ever written on the first amendment. But Justice Brandeis himself surely would not have regarded it as more than seminal. It suggests nothing concerning the respective functions of speech and the press; it is concerned, both immediately and conceptually, with the larger value of individual liberty. To be sure, Justice Brandeis did refer, in effect, to the values of self-fulfillment and the pursuit of the democratic dialogue, and he acknowledged the dangers which may arise when individual liberty is abridged. Together, these observations probably reflect all of the more particular values in free expression. But they are still general observations and they offer no instruction about how the values are to be parcelled out between individuals and the press. Professor Nimmer suggests that individual interests in speech may reflect all of them, and in this general proposition he is surely correct. But one must debate his subsequent comparative analysis of speech and press interests on at least three grounds.

First, his analysis reflects an implicit and significant bias in favor of "the media." In his discussion of the democratic dia-

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121 See id. at 652.
122 274 U.S. 357, 372 (1927) (Brandeis, J., concurring).
123 See id. at 375-77.
logue, Professor Nimmer acknowledges that private or "non-
media" speech may occasionally reflect this value in particularly
significant form. But this, he suggests, is the exceptional case:
"Most would agree that generally speech via the press is much
more significant as a contribution to the democratic dialogue than
is speech through nonmedia channels." As an observation of
common perception this is probably a correct statement. But
one should not respond to perception by supposing that it is reality.
It simply is not clear that media speech contributes more significa-
cantly to the democratic dialogue than does nonmedia speech.
This is scarcely the place to attempt a fully-considered treatment
of the effects of the mass media upon contemporary American
society. If it were, the effort would prove frustrating for the only
certainty about mass media effects is that no one has yet
succeeded in demonstrating what they are or how they work.
Opinions reflected in the mass media interact with opinions dis-
seminated through other channels in ways which are so vastly com-
plex as virtually to defy examination, much less an assured
characterization. If the common perception is to be served, it
will be better served through a frank and explicit recognition of
its inadequacy than through unquestioning acceptance.

A second portion of Professor Nimmer's analysis reflects
what seems to be an oversimplification of the press itself. He
observes that the self-fulfillment and safety valve functions of
speech are to be found in the press occasionally in the case of
individual contributions, but not often, as he puts it, in the case of
"the press qua press . . . ." But what is "the press qua
press" apart from the individuals who compose it? Surely not the
machinery or physical assets; they obviously have no separate
investment in any of the functions of free expression. Is it the
institutional values which individual representatives of the mass
press share, or the constraints under which they work? If so, then

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124 Nimmer, supra note 1, at 653.
125 Statements to this effect are so widespread that they have virtually
become common ground. Professor Nimmer's observation is modest against the
hyperbole that one can find in even a casual review of almost any communica-
tions-related literature. In a recent article on broadcasting regulation, for ex-
ample, Judge David Bazelon said, "It is simply impossible to exaggerate the
impact of TV in particular on our lives and the lives of our children." Bazelon,
I think the short answer is that when an able jurist like Judge Bazelon can spon-
or a statement like this one, the "impact" of television has become exaggerated
by definition.
126 For a recent brief summary of the effects literature, see Lange, The
Role of the Access Doctrine in the Regulation of the Mass Media: A Critical Re-
view and Assessment, 52 N.C.L. Rev. 18-21 (1973).
127 Nimmer, supra note 1, at 654.
one cannot help observing that few institutions are as immediately intertwined with self-fulfillment as at least the journalism segment of the press. An evening in the company of journalists is likely to leave one with a hangover, some amusing anecdotes, and the enduring impression that the bedrock of American journalism is ego-gratification.\textsuperscript{128} To be sure, this is typically ego in the service of a cause. An increasing sense of professionalism, particularly in the past three decades, has blurred some of the sharper edges of individuality in journalism.\textsuperscript{129} The fact remains that a sense of self-fulfillment continues to provide a substantial portion of the raison d’être of the so-called “working press.”\textsuperscript{130} Surely it is not too much, then, to resist Professor Nimmer’s characterization of the press as something apart from self-fulfillment. And as definitions of the press are broadened to include the underground, alternative TV and, of course, “the lonely pamphleteer,” it seems impossible to deny the functions of self-fulfillment and even the safety valve.

In short, one simply cannot accept the distinctions between speech and the press which Professor Nimmer offers. It is not at all evident that speech contributes less to the democratic dialogue than does the press. It is no more evident that the functions of the press can be considered adequately apart from the personal interests of the individuals who compose it. And thus, the final objection to Professor Nimmer’s analysis is that it falls short of its own highest goal. The goal is definitional clarity upon which more sensitive balances may be poised in the analysis of first amendment issues. But the definitions offered do not provide that clarity. At best, they afford only a debatable rationale, and then one which is of only incidental value in an uncertain range of cases.

Consider for example, the larger interests posed by the “prison visitation” cases. It may be that the values in free expression would be better served if prisoners had greater access

\textsuperscript{128} As James Perry of the \textit{Christian Science Monitor} puts it: “Any good reporter lives on ego. Praise is what he seeks because, God knows, he isn’t going to get much else.” J. \textsc{Perry}, \textsc{Us} and \textsc{Them} 8 (1973).

\textsuperscript{129} Much of the present concern for press responsibility can be traced to the Hutchins Commission’s Report, \textit{A Free and Responsible Press}, published in 1947. \textsc{The Commission on Freedom of the Press}, \textsc{A Free and Responsible Press} (1947) (with foreword by Robert M. Hutchins). But individualism is far from dead; journalists still admire it and see it in themselves. As \textit{Washington Post} reporter Bill Greider put it upon emerging from a screening of \textit{The Front Page} earlier this year: “Well, not much has changed.”

\textsuperscript{130} \textit{See generally} T. \textsc{Crouse}, \textsc{The Boys on the Bus} (1973); J. \textsc{Perry}, \textsc{Us} and \textsc{Them} (1973). These two books provide chronicles of press coverage of the 1972 election campaign which not only support the proposition in the text but repay reading on more general grounds as well.
to the public. Recent works by Tom Wicker, Truman Capote and Alexander Solzhenitsyn all suggest as much.  

But do the distinctions between speech and press aid in deciding which, if any, of these writers should be given access to prisoners? If we adopt Professor Nimmer's "publication" standard, perhaps all three could claim that "freedom of the press" protected their efforts to gather information, since all might fairly claim an intent to publish. But then, anyone might claim an intent to publish—if only through a press conference or a letter to the editor or a speech at the next Kiwanis meeting. One need not disparage these claims in order to recognize that they scarcely provide an adequate basis for deciding the question of admission.  

Should a "structural" standard be employed? Now Wicker, as a fully-accredited representative of the established press, might be admitted, but Capote and Solzhenitsyn might as readily be excluded. Considered against Wicker's own account of the Attica Prison riots, the distinction would seem pointless, if not absurd. He has not actually written as a journalist; instead, he has adopted the voice of the omniscient narrator and cast himself as participant in the event. His choice of voice is significant for many reasons, but among them, obviously, is his own conviction that the ordinary perspective of a reporter is inadequate to convey the Attica story as he saw it.  

Are Professor Nimmer's functional distinctions between speech and press useful in this context? Perhaps, in some limited

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181 See T. Capote, In Cold Blood (1965); A. Solzhenitsyn, The Gulag Archipelago (1973); T. Wicker, A Time to Die (1975). I assume the readers' passing familiarity, at least, with these works, but it is useful to note their similarities in form. Capote's account of the mass murders of a Kansas farm family in 1959, and the subsequent execution of their killers, is termed by its author a "non-fiction novel." Solzhenitsyn's monumental record of Soviet political persecutions from 1918-1956 is subtitled "an experiment in literary investigation." Wicker's narrative of the uprising at New York's Attica Prison and its bloody suppression by New York State Troopers has been termed "history as a novel." Lehmann-Haupt, Books of the Times, N.Y. Times, March 6, 1975, at 35, col. 2.

132 See Note, The Right of the Press to Gather Information, 71 Colum. L. Rev. 838, 850 (1971); Note, The Rights of the Public and the Press to Gather Information, 87 Harv. L. Rev. 1505, 1508 (1974). It should be noted that both of these articles go on to attempt solutions to the problem of circumvention.

183 Wicker is an associate editor of the New York Times.

184 Wicker's device has received substantial critical acclaim. Christopher Lehmann-Haupt has said:  

[I]t is neither broadside nor polemic, neither monstrous nor shrill. Instead it is three dimensional and multilodal and textured. . . .  

. . . [W]hat gradually takes shape . . . is a character with which all readers can identify (or if not identify, then certainly orient ourselves) . . . .

It is interesting. It is history as a novel. It salutes Norman Mailer's innovation [in Armies of the Night]. It works. And thus we are permitted to feel the greatest possible outrage over Attica—which polemic or broadside might not have accomplished.

sense, but again their basic presuppositions do not seem to be borne out by what we know about the three authors. For the fact is that Wicker, the representative of "the press," will produce a work which is neither more powerful nor less personal than the work of the "individuals," Capote and Solzhenitsyn.

Problems in definition, then, are the first obstacle to providing separate constitutional status for speech and the press. In fairness, it should be said again that neither Justice Stewart nor Professor Nimmer can be faulted for not surmounting this obstacle. They have succeeded admirably in isolating the idea of separate rights and their observations are truly provocative. It may be that further debate will yield definitions which will lend somewhat greater clarity to the meaning of the press. It is not altogether impossible to define "the press." We do so every day for many general purposes and, less frequently, for the purpose of defining legal consequences as well. But it is still unlikely, in my opinion, that we will succeed in defining the press in ways which will prove satisfactory in recognizing separate rights under the press clause. The problem comes to this: If the press is defined broadly enough to include the pamphleteer and the underground, the definition also will have to approach speech so closely that the exclusion of speech will often seem arbitrary and unjustified. We will have, in Justice Stewart's words, "a structural provision," but with no distinct structure. If, on the other hand, the pamphleteer and the underground are excluded, the result is perverse; these are two elements in the contemporary press which the Framers themselves would have recognized. Alternatively, I suppose, each element in the speech-press spectrum might be examined individually, sometimes gaining the protection of the press clause and sometimes not. That may make sense as a

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The term "newspaper publication" means a publication produced on newsprint paper which is published in one or more issues weekly (including as one publication any daily newspaper and any Sunday newspaper published by the same owner in the same city, community, or metropolitan area), and in which a substantial portion of the content is devoted to the dissemination of news and editorial opinion. Many states have also attempted a definition of the press in their reporter's privilege statutes. For a summary of definitional problems these states have encountered, see Comment, Newsmen's Privilege Two Years After Branzburg v. Hayes: The First Amendment in Jeopardy, 49 Tul. L. Rev. 417, 429-36 (1975). The authors of this Comment note that the terms in the statutes vary greatly and are so ambiguous as to make it difficult for a reporter to determine whether he or she is entitled to the privilege. Id. at 431.
general approach to the first amendment, but it is not clear that distinctions between speech and the press should be advanced that way. In fact, to make a system like that work—that is, to recognize overriding differences between speech and the press without particular regard for structure—it would be necessary to emphasize functions and, more important, to assign them values or weight. And that is just where the real uncertainties began.

IV. RECONCILING SPEECH AND THE PRESS

Let us suppose, however, that adequate definitions are possible. Let us also suppose that the debate is still open—that is, that the Framers have given us no clear mandate concerning the question of separate press status under the first amendment. Finally, let us suppose, as we must, that separate status for the press will mean an array of privileges or responsibilities distinct from the rights accorded under the speech clause. That does not mean that individuals within the press will not also be protected by “freedom of expression,” as Justice Stewart notes, but merely that the “press qua press” will somehow be set apart. It would be helpful if we knew how much apart, but in the circumstances that is not possible and, in any event, it is not essential. What I wish to present here are two frankly speculative observations about what we can ultimately expect if we do elect to recognize separate constitutional status for the institutional press. If these observations are correct, they identify distinct threats to freedom of expression which can best be avoided by serious efforts to reconcile, rather than to distinguish, the freedoms of speech and press.

A. THE DANGER FOR A FREE PRESS

In the first place, I doubt that the institutional press will remain secure for very long if it is set apart from speech. Divorcing speech from the press means ripping away the essential underpinnings of the press as well. Justice Stewart himself has acknowledged that a free press is guaranteed “not for the benefit of the press so much as for the benefit of all of us.” One would expect as much. It is not an easy matter to demonstrate the value

137 Cf. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952). The Court there held that motion pictures were entitled to the first amendment “liberty of expression,” and added that: “Each method [of expression] tends to present its own peculiar problems. But the basic principles of freedom of speech and the press . . . do not vary.” Id. at 502-03.
138 Stewart, supra note 2, at 633.
of an independent press which is not essentially identified with the people it serves. Freedom of the press in the best of times is insecure. Its survival depends ultimately on the confidence and goodwill of the people who support it.\footnote{140} If they have serious reason to suppose that they are separated from it, or worse, at odds with it, the most powerful press cannot rest easy. Having lost its constituency, it will have lost its reason for being as well.

This is not to suggest that the press is likely to be put down by armed revolt or anything half so satisfyingly dramatic. Instead, my speculation is that it will simply be nibbled to death by gnats—that is, it will finally fall victim to an unending stream of complaints coupled with unceasing demands for greater responsibility.\footnote{141} Responsibility in this context is likely to mean balance, objectivity, or fairness. Justice Stewart seems quite correct when he implies that the first amendment demands none of these from the press.\footnote{142} But the plain fact is that an increasing number of people do. Their demands have been translated within the past several years into claims for legal recognition.\footnote{143} Of course, the

\footnote{140} Cf. Note, The Rights of the Public and the Press to Gather Information, supra note 4, at 1517. Alexander Hamilton, who resisted efforts to adopt the Bill of Rights on the grounds that the limited powers of the federal government made an enumeration of rights unnecessary, was more far-sighted in his observations on the nature of freedom of the press:

What is the liberty of the press? Who can give it any definition which would not leave the utmost latitude for evasion? I hold it to be impracticable; and from this I infer, that its security, whatever fine declarations may be inserted in any constitution respecting it, must altogether depend on public opinion, and on the general spirit of the people and of the government.


\footnote{141} Lord Devlin once observed:

If freedom of the press . . . perishes, it will not be any sudden death.

. . . It will be a long time dying from a debilitating disease caused by a series of erosive measures, each of which, if examined singly, would have a good deal to be said for it.


\footnote{143} It is . . . a mistake to suppose that the only purpose of the constitutional guarantee of a free press is to insure that a newspaper will serve as a neutral forum for debate, a "market place for ideas," a kind of Hyde Park corner for the community.

Stewart, supra note 2, at 634. \textit{See, id.} at 636-37. As Chief Justice Burger observed in \textit{Tornillo}, "A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated." 418 U.S. at 256.

\footnote{143} Claims for an enforceable right of access to the press are perhaps the most striking example. \textit{See generally} J. Barron, \textit{Freedom of the Press for Whom?} (1973). Fairness doctrine claims have also been more vigorously pursued. \textit{See, e.g.,} NBC v. FCC, No. 73-2256 (D.C. Cir. 1974) (complaint brought by Accuracy in Media, Inc. to enforce fairness doctrine against NBC documentary on private pension plans). \textit{Cf.} W. Hocking, \textit{Freedom of the Press: A Framework of Principle} 209-32 (1947).
Court has rejected them in Tornillo and Democratic National Committee, their two clearest presentations to date. One might conclude, with Justice Stewart, that these cases represent a secure affirmation of the separate rights of the press.\footnote{See Stewart, supra note 2, at 633, 635.} On second thought, that does not seem quite so clear.

In Democratic National Committee, the Court decided no more than that one method of imposing fairness is not constitutionally preferred above another.\footnote{See notes and text accompanying notes 53-57 supra.} The access proponents happened to lose that round, but the press did not gain much either. If anything, the obligations of broadcasters as "editorial trustees" were more firmly established than they had been in Red Lion Broadcasting Co. v. FCC,\footnote{395 U.S. 367 (1969).} itself a case in which the partisan interests of broadcasters had been subordinated to the public's interest in "balanced coverage of important controversial issues."\footnote{The Court in Red Lion upheld the fairness doctrine against claims by a broadcaster and broadcast journalists that it violated their first amendment rights. Writing for the majority, Mr. Justice White said: "Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write or publish." Id. at 388. Democratic National Committee reinforces the holding in Red Lion by emphasizing that the broadcaster's discretion is tempered by accountability: It was reasonable for Congress to conclude that the public interest in being informed requires periodic accountability on the part of those who are entrusted with the use of broadcast frequencies, scarce as they are. In the delicate balancing historically followed in the regulation of broadcasting Congress and the [Federal Communications] Commission could appropriately conclude that the allocation of journalistic priorities should be concentrated in the licensee rather than diffused among many. This policy gives the public some assurance that the broadcaster will be answerable if he fails to meet its legitimate needs. No such accountability attaches to the private individual, whose only qualifications for using the broadcast facility may be abundant funds and a point of view. To agree that debate on public issues should be "robust and wide-open" does not mean that we should exchange "public trustee" broadcasting, with all its limitations, for a system of self-appointed editorial commentators.} Of course, we all know that broadcasting is a "special" case under the first amendment. In fact, broadcasting seems to be the only element of the institutional press ever to receive fully distinct first amendment treatment.\footnote{412 U.S. at 125 (Burger, C.J.). But cf., Comment, The Regulation of Competing First Amendment Rights: A New Fairness Doctrine Balance After CBS?, 122 U. Pa. L. REV. 1283, 1293 (1974).} Perhaps there is a lesson

\textit{Inc. v. Burstyn} they were never subject to the extensive regulation or first amendment separatism imposed on broadcasting. Cable television, which is subject to extensive regulation, can be considered a part of broadcasting for the purposes of the statement in the text, since it seems fair to say that cable itself is regulated primarily because of its intimate relationship to broadcasting. \textit{See generally} D. LeDuc, \textit{Cable Television and the FCC} (1973).
here after all. In a little less than fifty years, broadcasting has also become the only element in the institutional press to be licensed and regulated by the government under formal obligations of balance, objectivity and fairness.149

Still, Tornillo does suggest in strong terms that this cannot happen with newspapers. Indeed, the most sweeping assertion of a newspaper’s rights in Tornillo is actually borrowed from the plurality opinion in Democratic National Committee, where it had served to emphasize the separate status of broadcasting:

The power of a privately owned newspaper to advance its own political, social, and economic views is bounded by only two factors: first, the acceptance of a sufficient number of readers—and hence advertisers—to assure financial success; and, second, the journalistic integrity of its editors and publishers.150

There was no dissent in Tornillo itself; the two concurring opinions did not hedge concerning the main issues,151 and Chief Justice Burger’s opinion for the majority remained emphatic throughout in its recognition of the rights of the press against encroachment.152 The opinions, moreover, referred explicitly to “freedom

149 For a critical history of broadcast regulation, considered against the backdrop of the first amendment, see Robinson, The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation, 52 Minn. L. Rev. 67 (1967). Professor Robinson is now an FCC Commissioner. See also Bazelon, FCC Regulation of the Telecommunications Press, 1975 Duke L.J. 213.


151 See 418 U.S. at 258 (Brennan, J., concurring); id. at 259 (White, J., concurring). Justice Brennan noted his understanding that the Court’s opinion did not rule on the constitutionality of statutes requiring retractions in cases of libel. Justice White reiterated his dissent in Gertz (decided the same day as Tornillo), noting the disparity, as he viewed it, between the secure protection afforded the newspapers in Tornillo (of which he approved) and the inadequate protection provided for private victims of defamations in Gertz.

152 Chief Justice Burger’s final paragraph suggests the resolute quality reflected throughout his opinion:

Even if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forego publication of news or opinion by the inclusion of a reply, the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors. A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size of the paper, and content, and treatment of public issues and public officials—whether fair or unfair—constitutes the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.

418 U.S. at 258.
of the press"; only the most fleeting reference to freedom of speech appeared anywhere in the case. How, then, can there be any doubt that the Court knows how to reject efforts to abridge the freedom of at least the traditional elements of the press? Perhaps there should be none, but nagging doubts persist nonetheless.

One might have thought, upon reading Tornillo, that all those references to "the press" were to be explained simply by the fact that it was the press (in a very conventional sense) which was under attack. And the decision in the case might have been explained in terms of a fundamental, but straight-forward principle: "Liberty of the press is in peril as soon as the government tries to compel what is to go into a newspaper,"153 just as freedom of speech generally is imperiled when the Government acts coercively.154 The access proponents lost their immediate battle, one would conclude, but in a larger sense they also gained individually what the press gained institutionally—namely, continuing recognition that neither free speech nor a free press can be restrained in the interests of fairness if, in the long term, they are to survive. This conclusion is fairly debatable, of course, but it is at least a conceptually defensible reconciliation of the otherwise parochial interests of speech and the press in Tornillo. It also has the advantage of being consistent with everything that was said in the case.

If the decision in Tornillo rests solely on the distinct interests of the press under the press clause, however, the case becomes another matter altogether. What seemed to be a fraternal quarrel is now revealed as internecine war, in which one side has lost. Clearly it is not enough to say that the access proponents still have the press as their surrogate; their central point was that the press has proved itself inadequate in that role.155 Again, the point is debatable, but it deserved a hearing, particularly if the press was claiming rights which do not belong to speech. Yet, as Professor Nimmer has observed, this much of the case—if it was the

154 Cf. Lange, The Role of the Access Doctrine in the Regulation of the Mass Media: A Critical Review and Assessment, 52 N.C.L. REV. 1, 72-89 (1973). But cf. W. HOCKING, FREEDOM OF THE PRESS: A FRAMEWORK OF PRINCIPLE (1947). Hocking acknowledges that "any power capable of protecting freedom is also capable of infringing freedom." Id. at 216) but suggests passthru that "new legal remedies are not to be excluded as aids to checking the more patent abuses of the press, under the precautions we have emphasized." Id. at 227. Apparently, however, Hocking would not have favored a legal right of access to the press. See id. at 99, 153-54.
case—got short shrift in the Court's opinion. The access proponents were acknowledged, but not really heard. Instead, they were told, in effect, that they had to lose because the press must win. This is not a victory the institutional press can afford. The people too can play the institutional game.

One need not rely entirely on speculation to see what can happen when the press is opposed by another institution acting in the name of the people. In *New York Times Co. v. United States* (the "Pentagon Papers" case), two giants of the institutional press actually were enjoined from publication for a period, albeit a brief one. In a sense, the press had its victory in this case too; the injunction against the *New York Times* was lifted, and the decision of the Court of Appeals for the District of Columbia against enjoining the *Washington Post* was affirmed. But here there was no ringing affirmation of freedom of the press. The decision of the Court was announced in a curt per curiam opinion which held merely that the Government had not met its "heavy burden of showing justification for the imposition of such . . . [restraints]." What followed were nine separate opinions of the Justices, three of whom were in dissent. Read individually, but with an adjustment for cross-concurrences, the opinions appear to reflect six distinct views of the case. Together, they reveal how the unanimity of opinion suggested by *Tornillo* can be shattered against clearly defined institutional opposition. Even more to the point, they also reveal how, in a confrontation of this sort, the nature of the relationship between the press and the people can be critical. The newspapers, as Chief Justice Burger noted, found

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166 In my opinion, *Tornillo* was correctly decided, on substantially the grounds suggested in the preceding paragraph of the text.
158 The newspapers involved in the case before the Court were the *New York Times* and the *Washington Post*. In addition, restraining orders were obtained briefly against the *St. Louis Post-Dispatch* and the *Boston Globe*. See Witcover, *Two Weeks that Shook the Press*, in *COLUM. JOURN. REV.*, Sept.-Oct. 1971, at 7.
159 403 U.S. at 714.
159 *Id.*
159 *Id.*
159 *Id.*
160 Justices Black and Douglas would have held that the Government had no right to prior restraint directed against the press. *Id.* at 720. Justice Brennan shared this view, except in "an extremely narrow class of cases" involving unmistakable threats, such as the publication of sailing dates in time of war. *Id.* at 424-27. Justice Stewart viewed the problem of internal security as one which rested primarily in the hands of the Executive; in the absence of specific authority or "direct, immediate, and irreparable damage to [the] Nation or its people," courts had no power under the first amendment to enjoin publication. *Id.* at 730. Although Justices White and Stewart each concur in the other's opinion, Justice White emphasized the absence of congressional authority for the injunctions sought. *Id.* at 740. Justice Marshall concurred in the per curiam opinion on the ground that the Court had no affirmative authority to act; he did not reach the first amendment issue. *Id.* at 741. The Chief Justice and Justices
it prudent to make "a derivative claim under the First Amendment. . . [which they denominated] as the public 'right to know' . . . ." But "derivative claims" may also incur disquieting obligations. Mr. Justice Blackmun, who happened literally to have the last word in the case, may also have expressed the last word in a figurative sense as well. In a "final comment," in which he expressed his concern that publication of the Papers might seriously jeopardize both American and foreign interests, he said:

I strongly urge, and sincerely hope, that these two newspapers will be fully aware of their ultimate responsibilities to the United States of America. . . . I hope that damage has not already been done. If, however, damage has been done . . . then the Nation's people will know where the responsibility for these sad consequences rests.103

Justice Blackmun's final observation remains a realistic and significant warning well beyond its context. The problem for the institutional press is to maintain its independence while remaining at peace with its constituency. Perhaps that can be done through a separate recognition of rights under the press clause. But if those rights can lead to a direct confrontation with rights in speech, as may have been the case in Tornillo, it would seem preferable to reconcile the two and pit them both against the more enduring threats to freedom of expression. In Tornillo, that could have been accomplished through an explicit recognition that the reply statute in question there was inimical to all interests in free expression, and not just those of the press.

B. The Danger for Free Speech

My second speculation is that individual interests in speech may be even more seriously threatened by separate constitutional status. With no distinct institutional identification—and now without claim to immediate theoretical alliance with the press—they may find it more difficult to stand up against the constraints which a mass society inevitably finds it convenient to impose. I do not wish to appear excessively pessimistic. We are, after all, remarkably tolerant as nations go. Most of us understand, at least sometimes, that "one man's vulgarity is another's lyric."104 But how much of this tolerance has resulted from our emphasis on freedom

Harlan and Blackmun all dissented, essentially on the common ground that the cases had not been adequately developed for review. Id. at 748 (Burger, C.J., dissenting); id. at 752 (Harlan, J., dissenting); id. at 759 (Blackmun, J., dissenting).

102 403 U.S. at 749.
103 Id. at 762-63.
of expression? What will we risk if the emphasis is shifted, for example, from "expression" to "media" and "nonmedia" speech?

Without pushing speculation too far, it is possible to draw some tentative answers to these questions from another look at the Court's libel cases. New York Times Co. v. Sullivan, a and the cases which have followed it are recent and numerous enough to permit a fairly coherent sense of their conceptual development. They offer a glimpse of the Court at work with innovative first amendment doctrine. And they are grounded in both law and facts which cut across the entire spectrum of speech and press. Defamation can be uttered or published by almost anyone, in approximately as many circumstances as there are potential victims. Thus, one can think of libel and slander quite as readily in the case of individual speech as in the press.

The recent cases in the Supreme Court are generally familiar, but it may still be useful to sketch their conceptual development quickly. They reflect essentially three theories of libel under the first amendment. One is suggested in the opinions of Mr. Justice Brennan, including, of course, his initial opinion in New York Times itself. The Brennan theory begins with "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," b but would balance this commitment, against interests in individual reputations, through a privilege for defamatory publications of "matters of public interest or general concern" which can be defeated upon a showing of "knowing falsehood" or "reckless disregard" for the truth. c The second theory is in the opinions of Justices Black and Douglas who accept the commitment to public debate, but would impose no balance against it in favor of reputation; in their view, the libel privilege ought to be absolute. d The most recent theory—and the one currently in force—is established in Gertz by Mr. Justice Powell. It also accepts the commitment to robust public debate,

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166 Specific rules vary among the states. The typical definition of an actionable defamatory statement is an unprivileged and false publication to a person other than the victim which tends to lower the reputation of the victim in the estimation of an identifiable segment of the community. Defamation in writing, printing, or other permanent form is typically termed libel; impermanent or transitory utterances, such as speech or gestures, are typically termed slander. See generally A. HANSON, LIBEL AND RELATED TORTS (1969).
188 Id. at 278-80; Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 42-44 (1971).
but balances this interest against reputation by imposing different rules in the case of libels directed against public officials or public figures and those which defame private or anonymous individuals. In short, all three theories recognize a first amendment claim in favor of vigorous public debate; they vary in their response to the competing claim of private reputation under the common law of libel.

Do the libel cases apply to individual speech as well as to the press? Mr. Justice Stewart has stated that "the Court has never suggested that the constitutional right of free speech gives an individual any immunity from liability for either libel or slander." This statement is at least partially incorrect. In *New York Times* itself, the Court held that libel judgments entered against "four individual petitioners" (as well as the newspaper) had to be reversed in order to protect "freedom of speech and of the press . . . ." This was the holding in *New York Times* and there is no direct statement in any of the cases which have followed it suggesting that the holding was inadvertent or mistaken in its application to the "individual petitioners." Indeed, there is no statement implying as much, unless one reads the increasing references to "the press" and "the media" that way. I think that Professor Nimmer is correct when he says that these references are unclear. But I also suspect that Justice Stewart's statement, if not literally correct, is still closer to the mark than a reading of the cases would suggest. What he might have said is that the Court has not extended the libel holdings to nonmedia speech.

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171 In summarizing these theories, I have ignored many of the subtler issues, and I have omitted reference to Mr. Justice Harlan's contribution to the development of the current theory. See Curtis Pub. Co. v. Butts, 388 U.S. 130 (1967). For a more detailed discussion of these cases, as well as cases in the lower courts, see Anderson, Libel and Press Self-Censorship, 53 Texas L. Rev. 422 (1975).
172 Stewart, supra note 2, at 635 (emphasis in original).
173 376 U.S. at 256, 264.
174 Cf. Note, First Amendment Protection Against Libel Actions: Distinguishing Media and Non-Media Defendants, 47 S. Cal. L. Rev. 902 (1974). But cf. Anderson, Libel and Press Self-Censorship, 53 Texas L. Rev. 422, 442 n.95 (1975). Professor Anderson notes that, despite its language, "Gertz does not compel any distinction between press and nonpress defendants," and adds: "The Times privilege also initially was envisioned as a privilege for the press and was justified by the threat of self-censorship, but there is little doubt now that it applies to nonmedia defendants as well." Id. In the two cases he cites, Pickering v. Board of Education, 391 U.S. 563 (1968) and Garrison v. Louisiana, 379 U.S. 64 (1964), the defendants were not part of the press, but the accused statements had been published through the press or media. With the exception of one case, which was not technically a part of the *New York Times* line (see note 175 infra) I believe the same can be said for all of the other cases in which a media defendant was not involved. Nonetheless, I agree strongly with Professor Anderson's observation that "any proposal to give less favorable treat-
The Court has never held that nonmedia speech is excluded, but it is true that in every case the accused statement has been published or offered for publication in the media. Whatever theoretical rights in personal speech may be implied by the language in the libel cases, the Court has not found the occasion to give them recognition through a holding unmistakably divorced from the media context.

If this were entirely a reflection of the Court’s priorities between speech and the press, it would be, I submit, both indefensible and regrettable. Public issues can be debated with as much force among individuals as in the press. Indeed, in my experience, journalists themselves are infinitely more “robust, uninhibited and wide open” in private conversation than they are in print or on the air. And understandably so. They must realize that the mass press does not originate ideas; it spreads them around, shaping, leveling, and smoothing them in the process, somewhat the way a road grader moves sand. The process has its uses, to be sure, but someone must still dig. And in the field of human ideas and their original expression, that function belongs first to individuals. Consider the facts in New York Times Co. v. Sullivan: an editorial advertisement; a suit against four individuals and the New York Times. Does anyone seriously suppose that the advertisement originated with those individuals and the Times? In a limited sense, it did; the advertisement’s recurring theme was borrowed from an editorial The Times itself had published ten days earlier. But where did the ideas in that editorial and the advertisement come from? They came from the streets of Orangeburg and Montgomery and “a host of other cities in the South;” from demonstrations and songs and speeches of protest; from impassioned sermons in the Ebenezer Baptist Church; in short, from these and hundreds of other acts of individual courage in the pursuit of the democratic dialogue until, having well begun and only then, these individuals could fairly expect others to “heed their rising voices.”

There are many lessons in this case, but among the most important is the example set by speech—speech in league with the other freedoms guaranteed by the Constitution, yes, but still, emphatically, speech. Should the protection of the libel cases be ex-

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176 See Appendix to the Court’s Opinion, 376 U.S. insert at 292.

177 See id.
tended to individual speech? I do not understand how it can be
denied in any categorical manner. Nonmedia speech is always
the antecedent of media speech. Of course, there are occasions
when nonmedia speech is trivial, as there is much which is trivial
in the press. It may be sensible, in the interest of private reputa-
tion, to ask, before imposing liability, just what the defendant
said—or even who the victim was, as Gertz proposes. But if pub-
lic issues are to be debated, it is not sensible to treat two speakers
differently merely on the ground that one proposes to speak pri-
valety while another intends to use the media. No presupposition
can justify that; we have no way of knowing how far the private
communication will carry or which of the two will prove to be the
more enduring. Today, the private letters of Madison, Jefferson
and Adams are among our public treasures. But who really cares
what it was that John Peter Zenger published?

Of course, it does not necessarily follow that separate first
amendment status for the press will affect the interests of private
speech adversely in these cases. It is even possible that a formal
separation would force the Court to take a new and beneficial look
at speech. Against this possibility, however, I think another is more
likely. In the context of the libel cases alone, there is already
evidence that the interests of nonmedia speech are apt to be degraded
when they are set at odds with media speech. Mr. Justice Stewart is
much too ready to point out that the “right of free speech” gives in-
dividuals no immunity. The statement would be significant if it were
no more than an observation of fact. But his purpose, clearly, was to
demonstrate the superior claim of the media to the immunity which
speech is not to have. And then there is Professor Nimmer, whose
views on the immediate question are tentative, but who does suggest
that media speech contributes more significantly to the democratic
dialogue than does nonmedia speech. These are not the only ex-
pressions in favor of limiting the libel cases. A recent law review
comment, written prior to Gertz, also argues that “[s]ince the non-
media speaker does not share the same functional role or bear
the same self-disciplining characteristics of the typical media


\footnote{See Stewart, supra note 2, at 635.}

\footnote{Nimmer, supra note 1, at 655. Professor Nimmer also suggests that
media defamation may be countered more expeditiously than nonmedia defamation. Id. at 655-56. That may be so, at least in cases in which the victim has
equal access to the press. On the other hand, nonmedia speech is apt to be less
widely circulated, and then among persons to whom the victim will have as
ready access as the defamer. It seems to me that on these considerations, it is
not easy to draw a general balance one way or another. But see Note, First
Amendment Protection Against Libel Actions: Distinguishing Media and Non-
Media Defendants, 47 S. Cal. L. Rev. 902, 930 (1974).}
speaker, he should be held to a higher standard of care than the Times standard."

These arguments and observations are scarcely conclusive, but they seem to me to be consistent with what one would expect from efforts to acknowledge separate rights in the press. Speech interests which are seen as distinct from the press may be ignored or undervalued, and thus begin to wither. In his own analysis, Professor Nimmer is careful to draw few conclusions about where appropriate balances are to be drawn. He does emphasize the public nature of the press, however, as against the more personal or private nature of individual, nonmedia speech, and, as we have seen, there is some reason to believe that others will share that view. Of course, the distinctions between the public and the private might be value free and harmless in many instances. But there is a tendency in contemporary social analysis to equate the "public" interest with that which is valuable, at least against interests which are personal. And there is the rub. If the principal distinction between the press and speech is the public quality of the former and the private nature of the latter, I suggest that some of the questions Professor Nimmer is careful to reserve may in fact be prejudged.

Again, then, I submit that the goal of first amendment theory should be to equate and reconcile the interests of speech and press, rather than to separate them. This is scarcely to suggest a new theory; there are as many examples of how this might be done as there have been cases referring to "freedom of expression" or turning on "freedom of speech and press." If anything "new" is needed, it is probably a clearer understanding of the risks which may be incurred when the reference point is something less than these concepts. Balancing interests within the framework provided by the speech and press clauses may be necessary if the larger interests of both are to be advanced. But balancing speech against the press itself is neither necessary nor desirable.

Conclusion

Most risks are worth taking in some circumstances. But it is not clear that the risks posed by separate constitutional status for the mass press are justified. The Framers themselves do not seem to have contemplated it. More than fifty years of litigation have not suggested it, at least until now. And even now its pur-

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pose does not seem evident. If it is to provide real analytical clarity, then it seems equally clear that it can do so only at the expense of individual interests which have long been protected. As Mr. Justice White wrote in *Branzburg v. Hayes*:

Sooner or later, it would be necessary to define those categories of newsmen who qualified ..., a questionable procedure in light of the 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 of the large metropolitan publisher who utilizes the latest photocomposition methods. ... 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."188

Professor Nimmer may prove to be correct when he says that this "is an idea whose time is past due." But until these objections can be answered, I think this is one idea we can afford to keep waiting.