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The Majoritarian Press Clause

Sonja R. West[†]

INTRODUCTION

In early 2018, stories began circulating that something troubling was happening at the United States—Mexico border. The reports claimed that the United States government was separating migrant families and then holding children (as well as adults) by the thousands in crowded, possibly inhumane environments. There were alarming accounts of children who were sick, dirty, hungry, neglected, and sleeping on concrete floors.¹

Americans, of course, demanded answers: What was happening at these migrant detention centers? Why was it happening? What were the official policies involved? Were the government's actions appropriate? Were they legal? In other words, this was a textbook example of an issue crying out for an “uninhibited, robust, and wide-open”² public debate.

But before that could happen, the public needed to know what, exactly, was going on. The limited and sporadic information made it difficult for concerned citizens to understand the issues, and the often-unfamiliar sources behind these reports led to confusion about who or what to believe. What the public needed at this moment, it seemed, was a group of trusted, nongovernmental actors who could shed light on the situation—skilled professionals with the necessary resources to gather the pertinent information and disseminate it broadly. Ideally, these third-party actors would also supplement this information with expert analysis and place it in historical, social, and political context.

In the United States, we are fortunate enough to have such third-party entities—the press. According to Justice Potter Stewart, the press

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¹ See generally Simon Romero, et al., *Hungry, Scared and Sick: Inside the Migrant Detention Center in Clint, Tex.*, N.Y. TIMES (July 9, 2019), <https://www.nytimes.com/interactive/2019/07/06/us/migrants-border-patrol-clint.html> [<https://perma.cc/2HMM-FXSG>]; Caitlin Dickerson, *‘There Is a Stench’: Soiled Clothes and No Baths for Migrant Children at a Texas Center*, N.Y. TIMES (June 21, 2019), <https://www.nytimes.com/2019/06/21/us/migrant-children-border-soap.html> [<https://perma.cc/NB44-K5CX>].

² N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

is “the only organized private business that is given explicit constitutional protection.”³ The First Amendment singles out the press, the United States Supreme Court has explained, because its members serve as the public’s “agent[s],”⁴ “surrogates,”⁵ and “eyes and ears.”⁶ Yet despite this explicit constitutional shout-out, there was little that journalists could do when the government refused to grant them to access to the migrant detention centers. Indeed, very few members of the press were ever allowed inside the centers,⁷ and those who did gain access received only brief, heavily restricted tours that were limited to a small part of the facilities.⁸ They also were prohibited from talking to any children or taking photographs or videos.⁹

Thanks to these policies, the public was left without any images of the insides of these centers that were taken by photojournalists.¹⁰ The only available photos, rather, came from an entirely different source—the government. And the government’s officially curated images, it turned out, were not of the “horrific”¹¹ or “tragic”¹² living conditions that some reports had suggested. They instead showed bright-colored bedrooms decked out with stuffed animals,¹³ game rooms complete with Ping-Pong and air-hockey tables,¹⁴ and meals of pizza and cookies.¹⁵ The

³ Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 633 (1975) (providing an excerpt from an address on November 2, 1974, at the Yale Law School Sesquicentennial Convocation in New Haven, Connecticut).

⁴ *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 609 (1978).

⁵ *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (plurality opinion).

⁶ *Houchins v. KQED, Inc.*, 438 U.S. 1, 8 (1978).

⁷ David Bauder, *Media Fight Access Restrictions on Child Detention Centers*, PBS NEWSHOUR (June 26, 2018), <https://www.pbs.org/newshour/nation/media-fight-access-restrictions-on-child-detention-centers> [perma.cc/3VRQ-EGJB].

⁸ Paul Farhi, *Migrant Children Are Suffering at the Border. But Reporters Are Kept Away From the Story*, WASH. POST (June 25, 2019), https://www.washingtonpost.com/lifestyle/style/migrant-children-are-suffering-at-the-border-but-reporters-are-kept-away-from-the-story/2019/06/24/500313a2-9693-11e9-8d0a-5edd7e2025b1_story.html [https://perma.cc/Q4Q5-Y29Q].

⁹ *Id.*

¹⁰ It does not appear that any independent photojournalists have ever been allowed to document the conditions inside one of these facilities. See Julia Waldow & Emily Kohlman, *This is Why There Are So Few Pictures of Migrant Children*, CNN (June 20, 2018), <https://money.cnn.com/2018/06/20/media/media-press-photos-migrant-children/index.html> [perma.cc/H9GG-RBJP].

¹¹ Isaac Chotiner, *Inside a Texas Building Where the Government is Holding Immigrant Children*, NEW YORKER (June 22, 2019), <https://www.newyorker.com/news/q-and-a/inside-a-texas-building-where-the-government-is-holding-immigrant-children> [https://perma.cc/GU3M-KN5S].

¹² Cedar Attanasio, Garance Burke, & Martha Mendoza, *Attorneys: Texas Border Facility Is Neglecting Migrant Kids*, AP NEWS (June 21, 2019), <https://www.apnews.com/46da2dbe04f54adbb875cfbc06bbc615> [https://perma.cc/KM4Q-V39Q].

¹³ U.S. Dept. of Health & Human Services, *Bristow VA: IMG_8498*, FLICKR (June 20, 2018), <https://www.flickr.com/photos/hhsgov/albums/72157698695934349> [https://perma.cc/BR3F-8GZQ].

¹⁴ *Id.*

¹⁵ U.S. Dept. of Health & Human Services, *San Diego: 033A5759*, FLICKR (June 20, 2018), <https://www.flickr.com/photos/hhsgov/albums/72157698632559615> [perma.cc/LB76-Q9KZ].

government's photos showed children playing soccer, going to classes, and doing crafts.¹⁶

The news media (and, by extension, the public) can thank the United States Supreme Court for putting them at the mercy of government officials for entry to these centers. In a series of decisions, the Supreme Court has refused to recognize a constitutional right for the press to access to many government-controlled places, including places of detention like jails and prisons.¹⁷ The Court has instead insisted that the press has no unique constitutional rights or protections beyond those awarded to the general public.¹⁸ Of course, journalists do enjoy the same powerful First Amendment protections to speak that we all have,¹⁹ including key safeguards from prior restraints²⁰ and content-based regulations by the government.²¹ But the Supreme Court has repeatedly refused to recognize virtually any unique constitutional protection for the distinct roles of reporters as newsgatherers, government watchdogs, and public informants.

The Court's stance might come as a surprise to some, especially when considered in light of the First Amendment's explicit guarantee of press freedom—a guarantee that mirrors the Constitution's much-celebrated protection for freedom of speech. It might become even more surprising when viewed in light of the historical evidence of the origins of the First Amendment's protections for the freedoms of speech and

¹⁶ U.S. Dept. of Health & Human Services, *Homestead Florida: 6e9Cb9TgQ5243YlhpeVhtA*, FLICKR (June 20, 2018), <https://www.flickr.com/photos/hhsgov/albums/72157668713957787> [<https://perma.cc/4UMZ-JG6Z>].

¹⁷ See *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978); *Saxbe v. Wash. Post Co.*, 417 U.S. 843 (1974); *Pell v. Procunier*, 417 U.S. 817 (1974).

¹⁸ See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 352 (2010) (stating that the Court has “consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers”) (internal quotation marks omitted); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 784 (1985) (Brennan, J., dissenting) (“[I]n the context of defamation law, the rights of the institutional media are no greater and no less than those enjoyed by other individuals or organizations engaged in the same activities.”); *Zurcher v. Stanford Daily*, 436 U.S. 547, 567 (1978) (rejecting the argument that newspapers have special immunity from search warrants); *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972) (“[T]he First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally.”).

¹⁹ See *Stewart*, *supra* note 3, at 633 (noting that the press is “guaranteed that freedom, to be sure, but so are we all, because of the Free Speech Clause”).

²⁰ See, e.g., *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 570 (1976) (striking prior restraint on media coverage of a criminal trial); *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (*per curiam*) (striking prior restraint on publication of the Pentagon Papers); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 723 (1931) (striking prior restraint against anti-Semitic newspaper).

²¹ See, e.g., *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 827 (2000) (striking a law requiring cable operators to “scramble” sexually explicit programming); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 123 (1991) (striking a law imposing financial burden on works describing author's crimes); *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 234 (1987) (striking a content-based magazine tax).

press. This historical evidence suggests that rather than prioritizing the freedom of speech, as we do today, members of the framing generation were primarily focused on the protection of press freedom. Also, in contrast to how we now tend to think of our First Amendment rights, the historical evidence reveals that early Americans saw press freedom less as a highly individualized right and more as a necessary structural safeguard that protects the community at large. Indeed, the framing generation valued the press because it fulfilled structural roles of public informant and government watchdog—the very same roles that modern journalists fulfill today when they undertake these public-serving activities.²² Yet despite these historical understandings, the Supreme Court has nonetheless spent much of the last century focusing its attention on the Speech Clause (not the Press Clause) and most often as an individual expressive right (not as a collective structural protection). In other words, when it comes to allowing the Press Clause to fulfill its intended constitutional role as a structural defender of the public’s collective interests, it appears that we somehow got off track.

Not only has the Press Clause been overshadowed by the Speech Clause, but it has also been absorbed into the same individual rights paradigm through which we primarily view speech rights. Classifying press freedom as an individually held liberty as opposed to understanding its role as a communally shared protection is problematic. For one, it makes the Press Clause a mere redundancy when it comes to the protection of individual expressive rights, because these rights are now viewed as fully protected by the Speech Clause. But, more importantly, it leaves us with a Press Clause that is powerless to address significant gaps in the constitutional protection of key structural press functions.

This essay thus proposes a new way of thinking about the Press Clause in which we reframe the Clause’s primary constitutional role. Rather than continuing to view the Press Clause as merely the Speech Clause’s toothless counterpart in the protection of individual expressive rights, I suggest that, for purposes of constitutional analysis, we cede this job entirely to the Speech Clause.²³ Mentally jettisoning off the Press Clause’s duties to protect personal expressive rights frees us to focus on its *other* constitutionally assigned task—safeguarding our collective, majoritarian right to a republican form of government. The “Majoritarian Press Clause,” as I call this newly energized understanding of the First Amendment’s guarantees, advances this shared structural interest by concentrating our attention on the importance of two primary goals: protecting the expansive flow of information to the public

²² See *infra* notes 34–41 and accompanying text.

²³ See *infra* Part III.

on matters of communal concern and facilitating effective government scrutiny.

I explore these ideas in three parts. First, in Part I, I discuss the historical underpinnings of the First Amendment's Press Clause and the evidence revealing that members of the founding generation valued press freedom as a primary and significant structural protection. In Part II I describe how, contrary to this historical background, the U.S. Supreme Court has instead focused almost exclusively on the Speech Clause as an individual right, effectively leaving the Press Clause with no constitutional role. Finally, in Part III, I explain how the Majoritarian Press Clause can provide a new framework for thinking about press freedom that respects its historic significance, while also working with (rather than against) our modern speech-centered First Amendment jurisprudence.

I. THE HISTORICAL EVIDENCE OF A STRUCTURAL PRESS CLAUSE

To understand the Press Clause's proper role, we start with the historical evidence. When it comes to the question of the Press Clause's original meaning, scholars and historians are sure of one thing—the framing generation cared deeply about protecting press freedom.²⁴ James Madison referred to liberty of the press as one of the “choicest privileges of the people” and proposed language to make press freedom “inviolable.”²⁵ Thomas Jefferson described it as one of the “fences which experience has proved peculiarly efficacious against wrong.”²⁶ John Adams praised the ways “[a] free press maintains the majesty of the people.”²⁷ The Virginia Declaration of Rights, written by George Mason,

²⁴ See LEONARD W. LEVY, *LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY* 214–15 (1960) (“Freedom of the press was everywhere a grand topic for declamation.”); David A. Anderson, *The Origins of the Press Clause*, 30 *UCLA L. REV.* 455, 487 (1983) (“[F]reedom of the press, whatever it meant, was a matter of widespread concern.”); Steven J. Heyman, *Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression*, 78 *B.U. L. REV.* 1275, 1288 (1998) (“Among the most important of these rights [needing specific protection], Antifederalists contended, were freedom of speech and press, which they characterized as inalienable rights of human nature and invaluable bulwarks against tyranny.”).

²⁵ JEFFERY A. SMITH, *PRINTERS AND PRESS FREEDOM: THE IDEOLOGY OF EARLY AMERICAN JOURNALISM* 166 (1988) (quoting a letter from James Madison to Edmund Randolph (May 31, 1789) in 5 *THE WRITINGS OF JAMES MADISON 1787–1790*, at 372, 377, 380 (Gaillard Hunt ed., 1904)).

²⁶ Letter from Thomas Jefferson to Noah Webster (Dec. 4, 1790) in *FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON* 342 (Leonard W. Levy ed., 1966).

²⁷ WENDELL BIRD, *PRESS AND SPEECH UNDER ASSAULT: THE EARLY SUPREME COURT JUSTICES, THE SEDITION ACT OF 1798, AND THE CAMPAIGN AGAINST DISSENT* 153 (2016) (quoting John Adams in CLYDE A. DUNIWAY, *THE DEVELOPMENTS OF FREEDOM OF THE PRESS IN MASSACHUSETTS* 143–44 (1906)).

declared that “the freedom of the Press is one of the great bulwarks of liberty, and can never be restrained but by despotic Governments.”²⁸

Beyond this basic understanding of press freedom’s historical meaning, however, the picture grows far murkier. Unfortunately, we only have a “sketchy history” of the Press Clause’s framing.²⁹ There is little evidence that the first Congress engaged in any real debate over its meaning or reach,³⁰ and other potential sources of historical evidence are likewise sparse.³¹ Many scholars have concluded that the historical meaning is hazy because, in the words of judicial philosopher Zechariah Chafee, the framers themselves “had no very clear idea as to what they meant by ‘the freedom of speech or of the press.’”³² Benjamin Franklin all but confessed to as much when he described the liberty of the press in 1789 as a freedom “which every Pennsylvanian would fight and die for; tho’ few of us, I believe, have distinct Ideas of its Nature and Extent.”³³

History, therefore, gets us only so far in our mission to uncover the proper role of the Press Clause, and this brief essay is not intended to provide a comprehensive overview of the original understanding of press freedoms. Nevertheless, there are two key takeaways from the

²⁸ VA. DECLARATION OF RIGHTS of 1776, § 12.

²⁹ Anderson, *supra* note 24, at 487; *see also* LEVY, *supra* note 24, at 4 (“The meaning of no other clause of the Bill of Rights at the time of its framing and ratification has been so obscure to us [as the Free Speech and Press Clause].”); Melville B. Nimmer, *Introduction—Is Freedom of the Press a Redundancy: What Does it Add to Freedom of Speech?*, 26 HASTINGS L.J. 639, 640–41 (1975) (“History casts little light on the question here posed.”).

³⁰ S. DOC. NO. 112–9, at 1128 n.362 (2013); Anderson, *supra* note 24, at 485–86.

³¹ Lawrence Rosenthal, *First Amendment Investigations and the Inescapable Pragmatism of the Common Law of Free Speech*, 86 IND. L.J. 1, 18 (2011) (noting the “paucity of surviving evidence”).

³² Zechariah Chafee, Jr., Book Review, 62 HARV. L. REV. 891, 898 (1949) (reviewing ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948)); *see also* GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME: FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* 42 (2004) (“In fact, the framers of the First Amendment had no common understanding of its ‘true’ meaning. They embraced a broad and largely undefined constitutional principle, not a concrete, well-settled legal doctrine.”); LUCAS A. POWE, JR., *THE FOURTH ESTATE AND THE CONSTITUTION: FREEDOM OF THE PRESS IN AMERICA* 23 (1991) (“[I]t is simply impossible to turn to discussions by the framers . . . for definitive answers on the scope of freedom of the press.”); DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 52 (2010) (“[T]he actual views of the drafters and ratifiers of the First Amendment are in many ways unclear.”); Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 307 (1978) (“History tells us little . . . about the precise meaning contemplated by those who drafted the Bill of Rights.”).

³³ Benjamin Franklin, *An Account of the Supremest Court of Judicature in Pennsylvania, viz., The Court of the Press, 12 Sept. 1789, Writings 10:36–40*, reprinted in 5 THE FOUNDERS’ CONSTITUTION 130, 130 (Philip B. Kurland & Ralph Lerner eds., 1987), http://press-pubs.uchicago.edu/founders/documents/amendL_speechs16.html [<https://perma.cc/LRS2-CVQ8>]; *see also* Stephen Botein, “*Meer Mechanics*” and an Open Press: *The Business and Political Strategies of Colonial American Printers*, in IX PERSPECTIVES IN AMERICAN HISTORY 127, 206 (Donald Fleming & Bernard Bailyn eds., 1975) (“There is no reason to believe that many or even any printers in colonial America thought deeply or systemically about [press liberties].”).

historical evidence that we do know with a fair amount of certainty and that are vital to our understanding of its purpose.

The first is that between freedom of speech and freedom of the press, the members of the framing generation were focused on the latter. In an influential 1983 article, David Anderson detailed the evolution of the constitutional right of press freedom from the pre-Revolutionary era through the first Congress.³⁴ While acknowledging that the framers lacked a “comprehensive theory of freedom of the press,”³⁵ Anderson concluded that their principal concern was press freedom—not speech rights.³⁶ By the time of the framing, press freedom had attained a widely embraced significance, yet freedom of speech was a far more nebulous concept.³⁷ Speech rights, according to Leonard Levy, evolved only later “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.”³⁸

The early state founding charters are perhaps one of the best illustrations of this separate and favored status of press freedom over speech rights. Of the eleven revolutionary state constitutions, nine specifically protected the freedom of the press,³⁹ which made it one of the most commonly recognized state rights.⁴⁰ Yet only one of the original states, Pennsylvania, also protected the freedom of speech.⁴¹

It is likewise notable that the primary original drafter of the Bill of Rights, James Madison, included among his proposed amendments a provision that would have limited the power of the states to infringe on only three rights, which he referred to as “the great rights.”⁴² In his original wording, Madison declared the freedom of the press as one of these great rights, but not freedom of speech.⁴³ While it was not

³⁴ Anderson, *supra* note 24, at 455.

³⁵ *Id.* at 536.

³⁶ *Id.* at 508 (“The textual antecedents of the first amendment reflect a greater concern with press than with speech.”).

³⁷ *See id.* at 487 (“As Levy showed, freedom of speech, unlike freedom of the press, had little history as an independent concept when the first amendment was framed.”).

³⁸ LEVY, *supra* note 24, at 5; *see also* Anderson, *supra* note 24, at 487 (“The hypothesis that the Press Clause was merely ‘complementary to and a natural extension of Speech Clause liberty,’ advanced by Chief Justice Burger, is not supported by the historical evidence. Epistemologically, at least, the press clause was primary and the speech clause secondary.”) (footnote omitted).

³⁹ Anderson, *supra* note 24, at 487.

⁴⁰ *See* BIRD, *supra* note 27, at 27 (noting that only freedom of religion and the right to a jury trial were more prevalent).

⁴¹ PA. DECLARATION OF RIGHTS, 1776, *reprinted in* 1 BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 262, 263, 266 (1971).

⁴² 4 ANNALS OF CONG. 934 (1794), http://press-pubs.uchicago.edu/founders/documents/amend_I_speechs14.html [<https://perma.cc/5KER-VDYQ>]; *see also* Akhil Reed Amar, *The Bill of Rights As A Constitution*, 100 YALE L.J. 1131, 1148 (1991).

⁴³ 4 ANNALS OF CONG. 934, *supra* note 42. The other two “great rights” were the equal rights

ultimately adopted, Madison later referred to this state-restricting provision as “the most valuable amendment in the whole list.”⁴⁴

The second key lesson from the history of the Press Clause starts with the understanding that the framing generation saw press freedom as having two distinct functions—an individual, self-expressive function and a structural, government-monitoring function.⁴⁵ To see this important distinction, we can return to Pennsylvania’s first state Constitution, which contained not one but *two* provisions protecting press freedom.⁴⁶ The first appeared in the document’s statement of rights and declared, “the people have a right to freedom of speech, and of writing, and publishing their sentiments: therefore the freedom of the press ought not to be restrained.”⁴⁷ Both freedoms of speech and of the press appear in this provision as protections for individual rights. Listed alongside other individual freedoms, such as the “right to worship,” “the right to bear arms for the defence [sic] of themselves and the state,” and the “right to assemble together,”⁴⁸ this version of press freedom protected the ability of the people simply to express “their sentiments” regardless of the context.

Pennsylvania’s second provision referencing press freedom, however, suggested an entirely different purpose. In this provision, press freedom was included among the more-structural provisions in the document, such as the vesting of the legislative and executive powers, the creation of courts, and the detailing of election procedures. In this section, titled “Plan or Frame of Government for Commonwealth or State of Pennsylvania,” this second provision declared that “[t]he printing presses shall be free to every person who undertakes to examine the proceedings of the legislature, or any part of government.”⁴⁹ Thus, in contrast to reference to press freedom as an individual expressive right, here press freedom is assigned a specific task—protecting those who scrutinize the government.⁵⁰ Also in contrast to the first reference, the

of conscience and the right to a trial by jury in criminal cases. *Id.*

⁴⁴ *Id.*

⁴⁵ See ZECHARIAH CHAFEE, *FREE SPEECH IN THE UNITED STATES* 33 (1954) (“There is an individual interest, the need of many men to express their opinions on matters vital to them if life is to be worth living, and a social interest in the attainment of truth, so that the country may not only adopt the wisest course of action, but carry it out in the wisest way.”).

⁴⁶ PA. DECLARATION OF RIGHTS, 1776, *reprinted in* 1 BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 266, 273 (1971).

⁴⁷ *Id.* at 266.

⁴⁸ *Id.* at 264, 266.

⁴⁹ *Id.* at 273; *see also* Stephen A. Smith, *The Origins of the Free Speech Clause*, 29 *FREE SPEECH Y.B.* 48, 62 (1991) (noting the committee draft of this provision continued to state “and the House of Representative shall not pass any Act to restrain it: Nor shall any Printer be restrained from printing any Remarks, Strictures, or Observations on the Proceedings of the General Assembly, or any Branch of Government, or any public proceeding whatever”) (citation omitted).

⁵⁰ Timothy E. Cook, *Freeing the Presses: An Introductory Essay*, in *FREEING THE PRESSES: THE*

second provision does not include a generalized protection for speech rights, which serves to emphasize the unique importance of press freedom as a structural safeguard.

We can also again return to Madison's initial proposal for the Bill of Rights, in this case to the provision that ultimately became the First Amendment. Madison's language in his proposal likewise suggests separate meanings for the protections of speech and press, as well as a distinction between the press functions of individual liberty and a structural safeguard. His proposed text stated: "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable."⁵¹ Like the Pennsylvania Constitution, Madison's language indicates two separate rights. There is recognition of both an individual right of the people "to speak, to write, or to publish their sentiments" and a second right of "the freedom of the press." This second right, moreover, is notably distinct from the first; it is separated by a semicolon and is itself the subject of the independent clause. It is this guarantee that is alone identified for its structural role as "one of the great bulwarks of liberty" and declared to be "inviolable."⁵²

The historical evidence thus tells us that members of the founding generation viewed press freedom as furthering both an individual expressive function and a structural function. It further suggests that between the two, they appeared to be more focused on the structural role.⁵³ Indeed, the early rhetoric on the significance of press freedom abounds with descriptions of its vital role in protecting the security of the republic and the collective endeavor of self-government.⁵⁴ Whether it was by "discussing the propriety of public measures and political

FIRST AMENDMENT IN ACTION 1, 7 (Timothy E. Cook ed., 2005) (noting that the first section "values the press as a public forum open to all" and the second "highlights the watchdog function"); see also Anderson, *supra* note 24, at 489–90 (stating that Pennsylvania's second Press Clause is "unmistakable" evidence of "the right to examine government").

⁵¹ 1 ANNALS OF CONGRESS 451 (1789).

⁵² *Id.*; accord Amar, *supra* note 42, at 1149.

⁵³ See Anderson, *supra* note 24, at 490–91 ("Throughout the formative period, the focus of discussion was on the role of the press in relation to the government. The Quebec Address shows some awareness that the press also had a role in advancing 'truth, science, morality, and arts in general,' but the primary thrust of that document, and the exclusive thrust of all other official declarations, was that freedom of the press was a necessary concomitant of self-government."); Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 538 (1977) ("There can be no doubt, however, that one of the most important values attributed to a free press by eighteenth-century political thinkers was that of checking the inherent tendency of government officials to abuse the power entrusted to them.").

⁵⁴ Yet press freedom was rarely discussed as a matter of individual expressive value. See Thomas I. Emerson, *Colonial Intentions and Current Realities of the First Amendment*, 125 U. PA. L. REV. 737, 744 (1977) ("The colonists were not thinking as intently as we do now in terms of protecting the individual against the manifold pressures of the collective.").

opinions”⁵⁵ or “scanning the conduct of administration, and shewing the tendency of it,”⁵⁶ the framing generation saw the free press as having an essential job to do in the safeguarding of democracy. As William Cushing wrote to John Adams in 1789, press freedom required constitutional protection because of its power to “save a state and prevent the necessity of a revolution, as well as bring one about, when it is necessary.”⁵⁷

II. THE MODERN FATE OF THE PRESS CLAUSE

A. The Supreme Court and the Press Clause

In light of the early understanding of the Press Clause as a provision of primary importance, it is striking that today it is viewed as a seemingly secondary right with no meaningful role independent from the Speech Clause. Yet that is precisely how our First Amendment jurisprudence has evolved.

Despite the textually similar standing of the Press and Speech Clauses, the Supreme Court hardly could have treated these First Amendment neighbors more differently. On the one hand, the Speech Clause has grown over time into a constitutional powerhouse. Its reach has continually expanded and adapted to ever-changing circumstances. The justices brag about protecting it.⁵⁸ The public reveres it.⁵⁹ Litigants search for ways to cloak their legal claims within it.⁶⁰

The Press Clause, on the other hand, has been routinely sidelined.⁶¹ At best, the Court has relegated the Press Clause to a narrow role as

⁵⁵ Smith, *supra* note 25, at 11 (quoting Benjamin Franklin).

⁵⁶ WENDELL BIRD, *PRESS AND SPEECH UNDER ASSAULT* 155 (2016) (quoting a letter from William Cushing to John Adams (Feb. 18, 1789)).

⁵⁷ *Id.* (alteration in original) (quoting a letter from William Cushing to John Adams (Feb. 18, 1789)).

⁵⁸ See Tony Mauro, *Roberts Declares Himself First Amendment’s ‘Most Aggressive Defender’ at SCOTUS*, NAT’L L. J. (Feb. 13, 2019), <https://www.law.com/nationallawjournal/2019/02/13/roberts-declares-himself-first-amendments-most-aggressive-defender-at-scotus/> [<https://perma.cc/9VBN-2LG9>] (quoting Chief Justice John Roberts as referring to himself as “probably the most aggressive defender of the First Amendment on the court now”).

⁵⁹ See *Americans Say Freedom of Speech is the Most Important Constitutional Right, According to FindLaw.com Survey for Law Day, May 1*, PR NEWSWIRE (Apr. 30, 2015), <https://www.prnewswire.com/news-releases/americans-say-freedom-of-speech-is-the-most-important-constitutional-right-according-to-findlawcom-survey-for-law-day-may-1-300074847.html> [<https://perma.cc/7ND9-CLQV>].

⁶⁰ See Marcia Coyle & Tony Mauro, *It’s Not Free Speech as Usual at SCOTUS*, NAT’L L. J. (Feb. 28, 2018) <https://middlebororeviewetal.blogspot.com/2018/02/the-1st-amendment-playbook-its-not-just.html> [<https://perma.cc/2EH3-3UDU>] (discussing the broader range of cases raising free speech claims at the Supreme Court).

⁶¹ See Sonja R. West, *Press Exceptionalism*, 127 HARV. L. REV. 2434, 2436 (2014) (describing the Supreme Court’s different treatment of the Speech and Press Clauses); see also Anderson, *supra* note 24, at 457 (“[N]o Supreme Court decision has rested squarely on the press clause,

the Speech Clause's trusty sidekick, a subsidiary right tasked merely with ensuring the ability of speakers to publish and disseminate their speech.⁶² This reading, however, appears to make the Press Clause redundant in light of the Court's opinions empowering the Speech Clause to protect the entire communicative act, including the freedom of speakers to choose their messages⁶³ and to broadly distribute their speech,⁶⁴ as well as the audiences' rights to receive it.⁶⁵ As a result, the modern Press Clause cannot claim any explicitly recognized constitutional right or protection as its own.⁶⁶

The differing treatment of the two clauses raises crucial questions of First Amendment jurisprudence. Chief Justice John Marshall admonished us that "[i]t cannot be presumed that any clause in the constitution is intended to be without effect."⁶⁷ Yet the Press Clause seems to have become just that—if not “mere surplusage,”⁶⁸ then little more

independent of the speech clause.”). *But see id.* at 459 (“If the Court has never given the press clause independent significance, neither has it foreclosed the possibility.” (footnote omitted)).

⁶² *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 799–800 (1978) (Burger, C.J., concurring) (“The Speech Clause standing alone may be viewed as a protection of the liberty to express ideas and beliefs, while the Press Clause focuses specifically on the liberty to disseminate expression broadly. . . .”). *But see Associated Press v. NLRB*, 301 U.S. 103, 137 (1937) (Sutherland, J., dissenting) (“When applied to the press, the term freedom is not to be narrowly confined; and it obviously means more than publication and circulation.”).

⁶³ *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995) ([T]he fundamental rule of protection under the First Amendment[] [is] that a speaker has the autonomy to choose the content of his own message”).

⁶⁴ *See Bellotti*, 435 U.S. at 800 (Burger, C.J., concurring) (“[T]here is no fundamental distinction between expression and dissemination.”); *see, e.g., Citizens United v. FEC*, 558 U.S. 310 (2010) (deciding a case about the right to broadly disseminate a documentary film solely under the Speech Clause); *Reno v. ACLU*, 521 U.S. 844 (1997) (finding that a law that restricts the dissemination of certain content on the internet violates the freedom of speech but not mentioning the freedom of the press); *Ashcroft v. ACLU*, 542 U.S. 656 (2004) (same).

⁶⁵ *See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976) (holding that the Speech Clause's protections extend “to the communication, to its source and to its recipients both”).

⁶⁶ *See* David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 430 (2002) (“[A]s a matter of positive law, the Press Clause actually plays a rather minor role in protecting the freedom of the press.”); C. Edwin Baker, *The Independent Significance of the Press Clause Under Existing Law*, 35 HOFSTRA L. REV. 955, 956 (2007) (“The Court has never explicitly recognized that the Press Clause involves any significant content different from that provided to all individuals by the prohibition on abridging freedom of speech.”); *see also* David A. Anderson, *Freedom of the Press in Wartime*, 77 U. COLO. L. REV. 49, 69–70 (2006) (explaining that while early press cases did rely explicitly on the Press Clause, over time the Court's cases reveal an “abandonment of the Press Clause as a specific source of constitutional authority” as “the Court gave the press whatever rights it recognized under the Speech Clause”).

⁶⁷ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803); *accord* *District of Columbia v. Heller*, 554 U.S. 570, 643 (2008) (Stevens, J., dissenting); *see also* Nimmer, *supra* note 29, at 640 (“As nature abhors a vacuum, the law cannot abide a redundancy. The presumption is strong that language used in a legal instrument, be it a constitution, a statute, or a contract, has meaning, else it would not have been employed.”).

⁶⁸ *Marbury*, 5 U.S. (1 Cranch) at 174.

than an extension of the Speech Clause, an afterthought, a side dish to the main constitutional entree.⁶⁹

B. What's the Harm?

The topic of this volume asks the question, “What’s the harm?” And it is a question worth asking—what is the harm of allowing our Press Clause to lie dormant? What is the harm of adopting a speech-only focus to the protection of our expressive liberties? Members of the press, after all, enjoy the same robust speech rights that we all do, which happen to be some of the world’s strongest. But there is harm, and it comes from our failure to recognize the unique constitutional interest we all share in the protection of the press’s public-serving functions. In particular, this interest arises in a small, but significant, category of cases where it might not make sense to recognize a particular First Amendment right for all speakers, yet where our failure to recognize the right for the press harms our collective interest in a well-informed populace and a monitored government.

More practically, we see this harm in the everyday experiences of American journalists. Journalists, for example, have no First Amendment rights of access to many government-controlled places,⁷⁰ meetings,⁷¹ or documents.⁷² In addition to the limited access to migrant detention centers discussed earlier, there have also been recent

⁶⁹ See, e.g., *Bellotti*, 435 U.S. at 800 (Burger, J., concurring) (describing the press freedom as “complementary to and a natural extension of Speech Clause liberty”).

⁷⁰ See, e.g., *Branzburg v. Hayes*, 408 U.S. 665, 684–685 (1972) (“Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded . . .”).

⁷¹ But see *Soc’y of Prof’l Journalists v. Sec’y of Labor*, 832 F.2d 1180 (10th Cir. 1987) (vacating and dismissing as moot a lower court decision holding the public and the press have a First Amendment right of access to Mine Safety and Health Administration hearings); *The Government in the Sunshine Act*, REPORTERS COMM. FOR FREEDOM OF THE PRESS, <http://www.rcfp.org/federal-open-government-guide/federal-open-meetings-laws/government-sunshine-act> [<http://perma.cc/L28S-RXZS>] (“The Sunshine Act includes 10 exemptions or reasons that the government can refuse to open an agency meeting.”); accord 5 U.S.C. § 552b(c)(1)–(10) (2012) (listing exemptions).

⁷² See 5 U.S.C. § 552b(c)(1)–(10) (2012) (outlining exemptions to government’s obligation to release information under the Freedom of Information Act (FOIA), 5 U.S.C. § 552); *Response Times*, REPORTERS COMM. FOR FREEDOM OF THE PRESS, <http://www.rcfp.org/federal-open-government-guide/federal-freedom-information-act/response-times> [<http://perma.cc/444J-LJB3>] (“For journalists, the nearly routine failure of agencies to provide timely access to records has triggered the need to go outside the [Freedom of Information] Act . . .”). For examples of cases rejecting journalists’ FOIA requests under the statutory exemptions, see *U.S. Dep’t of Justice v. Reporters Comm. For Freedom of Press*, 489 U.S. 749, 757, 780 (1989) (rejecting journalist’s FOIA request for FBI record of crime figure suspected of bribing congressman); *FBI v. Abramson*, 456 U.S. 615, 631–32, 634 n.1 (1982) (rejecting journalist’s FOIA request for FBI records requested by President Nixon); *U.S. Dep’t of State v. Wash. Post Co.*, 456 U.S. 595, 596, 602–03 (1982) (rejecting newspaper’s FOIA request for Iranian nationals’ passport application information); *Ctr. for Nat’l Sec. Studies v. U.S. Dep’t of Justice*, 331 F.3d 918, 936 (D.C. Cir. 2003) (rejecting public interest groups’ FOIA request for information on thousands of foreign nationals detained during September 11 investigation).

controversies involving the White House stripping reporters of their press passes⁷³ and selectively banning them from the president’s meetings with foreign leaders,⁷⁴ White House press briefings, and other events.⁷⁵ Journalists also have no, or only uncertain, constitutional protections from being subjected to government subpoenas,⁷⁶ searches,⁷⁷ or surveillance.⁷⁸ We saw striking examples of this when it was revealed in 2018 that federal prosecutors had seized years’ worth of a *New York Times* reporter’s telephone and email records,⁷⁹ and when we learned in 2020 that the Department of Homeland Security had compiled “intelligence reports”—the type typically reserved for suspected terrorists and violent actors—on two American journalists covering highly contentious protests in Portland, Oregon.⁸⁰ Finally, there is likewise no official constitutional role in legal actions, such as civil lawsuits⁸¹ or even

⁷³ Paul Farhi, *Reporter Sues White House Over 30-day Suspension of Press Pass Following Confrontation*, WASH. POST (Aug. 20, 2019), https://www.washingtonpost.com/lifestyle/style/reporter-sues-white-house-over-30-day-suspension-of-press-pass-following-confrontation/2019/08/20/e0d0b768-c384-11e9-b5e4-54aa56d5b7ce_story.html [https://perma.cc/D5E3-FN9B]; Amy B. Wang & Paul Farhi, *White House Suspends Press Pass of CNN’s Jim Acosta After His Testy Exchange with Trump*, WASH. POST (Nov. 8, 2018), <https://www.washingtonpost.com/politics/2018/11/08/white-house-suspends-press-pass-cnns-jim-acosta-after-testy-exchange-with-trump/> [https://perma.cc/7U4K-F2VA]; David R. Lurie, *Trump’s Cold War with the White House Press Corps*, SLATE (Aug. 8, 2019), <https://slate.com/news-and-politics/2019/08/trump-cold-war-white-house-press-gorka.html> [https://perma.cc/TG4P-S2FV]; Mathew Ingram, *White House Revokes Press Passes for Dozens of Journalists*, COLUM. JOURNALISM REV. (May 9, 2019), https://www.cjr.org/the_media_today/white-house-press-passes.php [https://perma.cc/DS93-WJLG].

⁷⁴ Julie Hirschfeld Davis, *Trump Bars U.S. Press, but Not Russia’s, at Meeting with Russian Officials*, N.Y. TIMES (May 10, 2017), <https://www.nytimes.com/2017/05/10/us/politics/trump-russia-meeting-american-reporters-blocked.html> [https://perma.cc/ABP5-3YKL].

⁷⁵ Joe Concha, *White House Excludes CNN from Annual SOTU Media Lunch*, HILL (Feb. 4, 2020), <https://thehill.com/homenews/media/481378-white-house-excludes-cnn-from-annual-sotu-media-lunch> [perma.cc/RT3V-QRC6]; *NPR Reporter Removed from Pompeo Trip in ‘Retaliation’, Says Press Group*, GUARDIAN (Jan. 27, 2020), <https://www.theguardian.com/us-news/2020/jan/27/npr-reporter-removed-from-pompeo-trip-in-retaliation-says-press-group> [perma.cc/8S5P-VGLB].

⁷⁶ See, e.g., *In re Grand Jury Subpoena*, Judith Miller, 438 F.3d 1141, 1145–50 (D.C. Cir. 2006) (upholding contempt orders against journalists for refusing to comply with subpoena).

⁷⁷ See, e.g., 42 U.S.C. § 2000aa(b) (2012) (setting forth situations where police may seize media’s “documentary materials”); *Zurcher v. Stanford Daily*, 436 U.S. 547, 552–53 (1978) (rejecting a Fourth Amendment challenge to police search of student newspaper office for photographs), *superseded by statute*, 42 U.S.C. § 2000aa, *as recognized in* *Sennett v. United States*, 667 F.3d 531 (4th Cir. 2012).

⁷⁸ Cora Currier, *Government Can Spy on Journalists in the U.S. Using Invasive Foreign Intelligence Process*, INTERCEPT (Sept. 18, 2018), <https://theintercept.com/2018/09/17/journalists-fisacourt-spying/> [https://perma.cc/X9RB-ESVW].

⁷⁹ Adam Goldman, Nicholas Fandos, & Katie Benner, *Ex-Senate Aide Charged in Leak Case Where Times Reporter’s Records Were Seized*, N.Y. TIMES (June 7, 2018), <https://www.nytimes.com/2018/06/07/us/politics/times-reporter-phone-records-seized.html> [https://perma.cc/S6YZ-ZXD7].

⁸⁰ Shane Harris, *DHS Compiled ‘Intelligence Reports’ on Journalists who Published Leaked Documents*, WASH. POST (July 30, 2020), https://www.washingtonpost.com/national-security/dhs-compiled-intelligence-reports-on-journalists-who-published-leaked-documents/2020/07/30/5be5ec9e-d25b-11ea-9038-af089b63ac21_story.html [https://perma.cc/JY5X-6UM7].

⁸¹ See, e.g., *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999) (holding that journalists who lie on employment applications to gain access to private facilities or use

criminal prosecutions, for evidence that a defendant is a journalist who was engaged in an act of newsgathering or reporting. In 2010, for example, the Department of Justice took the unprecedented step of naming a reporter as a co-conspirator under the Espionage Act for his newsgathering efforts—a charge that carries a sentence of up to 10 years in prison.⁸² More recently, the U.S. Press Freedom Tracker identified more than 600 reports of law enforcement officers arresting, detaining, or engaging in acts of physical aggression against journalists who were attempting to report on the nationwide demonstrations against racially discriminatory police violence.⁸³

This is all happening, moreover, at the same time that most American news organizations are facing significant new struggles. The Court's refusal to recognize any constitutional differences between members of the press and other speakers might have appeared for decades to be at most harmless error. Because, as it just so happened, the Court determined much of the law in this area during the era that turned out to be the high-water mark of the American press's strength. The press, during this period, was financially strong, enjoyed the public's goodwill, and benefited from a mutually dependent relationship with government officials.⁸⁴ It was further bolstered by established norms dictating that government officials will show the press at least a minimum amount of respect.⁸⁵ The press of that era, therefore, was an institution that had the resources to aggressively defend itself as well as the political capital to demand certain basic levels of accommodation.

Today, however, the American press stands on far shakier ground. The newspaper industry is in a free fall thanks to declining advertising revenues, challenges brought by the Internet age, and a public that has become accustomed to getting its news for free.⁸⁶ At the same time, the

secret cameras for newsgathering activities are not protected by the First Amendment and may be liable for trespass or other offenses).

⁸² Ryan Lizza, *The Justice Department and Fox News's Phone Records*, NEW YORKER (May 21, 2013), <https://www.newyorker.com/news/news-desk/the-justice-department-and-fox-newss-phone-records> [<https://perma.cc/KLS7-HB6G>].

⁸³ See U.S. PRESS FREEDOM TRACKER, <https://pressfreedomtracker.us> [<https://perma.cc/JRC4-PP8T>] (last visited Sept. 19, 2020) (tracking arrests and detentions of journalists); Paul Farhi & Elahe Izadi, *'The Norms Have Broken Down': Shock as Journalists are Arrested, Injured by Police While Trying to Cover the Story*, WASH. POST (May 31, 2020), https://www.washingtonpost.com/lifestyle/media/journalists-at-several-protests-were-injured-arrested-by-police-while-trying-to-cover-the-story/2020/05/31/bfbc322a-a342-11ea-b619-3f9133bbb482_story.html [<https://perma.cc/9R6V-GCPS>] (discussing "a number of incidents," in which "journalists were injured, harassed or arrested even after identifying themselves as reporters" during the protests).

⁸⁴ See RonNell Andersen Jones & Sonja R. West, *The Fragility of the Free American Press*, 112 NW. U. L. REV. 567, 575–576 (2017).

⁸⁵ *Id.*

⁸⁶ Pew Research Center, *Newspaper Fact Sheet*, JOURNALISM.ORG (July 9, 2019), <https://www.journalism.org/fact-sheet/newspapers/> [<https://perma.cc/ZR2C-J6ZU>].

public's trust in the press has hit all-time lows,⁸⁷ and government actors are now far less dependent on the press in order to convey their messages to the public. Notably, this was the state of affairs even before the election of a president who has declared a "running war" with the news media,⁸⁸ referred repeatedly to the press as "the enemy of the people,"⁸⁹ and has run roughshod over all the traditional norms of respect for the essential role of a free press in our democracy.

The modern American press, therefore, is far weaker than in the past and less able to rely on non-legal sources of strength. There might be one helpful aspect, however, of this shift in the press's relative powers, which is that it sharpens our understanding of the importance of constitutional and legal protections for the press. The Supreme Court's stance that the Constitution is, for basically any practical purpose, blind to the role of the press versus other types of speakers is simply far less tenable today.

III. THE MAJORITARIAN PRESS CLAUSE

Something funny happened on our way to securing the constitutional guarantee of press freedom—this "inviolable" right, our "great bulwark of liberty," one of the most significant rights in our Constitution. It happened gradually and often with the best of intentions, but at some point, we lost our way. Times changed, technology changed, and professional identities changed, as did our understandings of individual liberties, expressive freedoms, and equality.⁹⁰ The result is that this freedom of preeminent historical importance, which was designed as a key structural support for the republic and as a collectively shared security, is now being treated as though it were penned in disappearing ink.

It is necessary, therefore, that we adjust our framework for thinking about press freedom in a way that respects its prominent historical role while also reflecting the modern recognition of expansive individual speech rights. The first step is to openly acknowledge that the Speech Clause now dominates the job of protecting individual expressive rights.

⁸⁷ Art Swift, *Americans' Trust in Mass Media Sinks to New Low*, GALLUP (Sept. 14, 2016), <https://news.gallup.com/poll/195542/americans-trust-mass-media-sinks-new-low.aspx> [perma.cc/WN H9-2TDB].

⁸⁸ *Trump CIA Speech Transcript*, CBS (Jan. 23, 2017), <http://www.cbsnews.com/news/trump-cia-speech-transcript/> [https://perma.cc/G6L5-PPQP]

⁸⁹ *Remarks by President Trump at the Conservative Political Action Conference*, WHITE HOUSE (Feb. 24, 2017), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-conservative-political-action-conference/> [https://perma.cc/PB43-TBAH].

⁹⁰ See Sonja R. West, *The "Press," Then & Now*, 77 OHIO ST. L.J. 49, 89–104 (2016) (discussing the interwoven evolution in journalism, mass communication technology and First Amendment doctrine).

While there might have once been a vibrant role for the Press Clause to play in this task, that is simply no longer the case.

Yet the Press Clause's duties do not end there; it still has important work to do in its other role as protector of our shared structural rights. Modern First Amendment jurisprudence, however, has trained us reflexively to view press freedom through the same individual rights paradigm that we apply to speech. We thus need a new way of thinking about press freedom that emphasizes its collective function. I refer to this new framework as the "Majoritarian Press Clause."

A. The Majoritarian Press Clause Framework

Our discussion so far has been centered on the two primary functions of press freedom, which are protecting individual rights and providing structural safeguards. Closely related to this basic dichotomy is another important dividing line—the difference between the Press Clause's majoritarian and counter-majoritarian functions. In Federalist No. 51, James Madison warned us of these two separate constitutional concerns: the need to guard "one part of the society against the injustice of the other part" (a counter-majoritarian protection) as well as to shield "society against the oppression of its rulers" (the majoritarian protection).⁹¹

When we consider individual expressive rights, our focus tends to be on counter-majoritarian protections.⁹² These protections are counter-majoritarian in that they shield individuals, often minority or unpopular speakers, against the majority (a majority who might be using the levers of a representative democracy as a means to silence them).⁹³ To be clear, counter-majoritarian expressive protections are extremely important. They further essential values, such as personal self-realization⁹⁴ and a richly diverse public dialogue.⁹⁵ These counter-majoritarian

⁹¹ THE FEDERALIST NO. 51, at 351 (James Madison) (Jacob E. Cooke ed., 1961).

⁹² See *McCutcheon v. FEC*, 572 U.S. 185, 206 (2014) ("The whole point of the First Amendment is to afford individuals protection against such infringements [by the will of the majority]."); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995) ("[T]he purpose behind the Bill of Rights, and of the First Amendment in particular [is] to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society."); *Wooley v. Maynard*, 430 U.S. 705, 715 (1977) ("The First Amendment protects the right of individuals to hold a point of view different from the majority. . . .").

⁹³ See *United States v. Schwimmer*, 279 U.S. 644, 654–55 (1929) (Holmes, J., dissenting) ("[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate."); *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring) ("Recognizing the occasional tyrannies of governing majorities, [the framers] amended the Constitution so that free speech and assembly should be guaranteed.")

⁹⁴ See Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982) (arguing that the freedom of speech serves the sole value of individual self-realization).

⁹⁵ See *Cohen v. California*, 403 U.S. 15, 24 (1971) ("The constitutional right of free expression

protections also often have the incidental effect of benefiting the public as a whole. But it is the protection of the individual as against all others that typically lies at their core.

Under the Majoritarian Press Clause framework, we allow the Speech Clause to continue to do this counter-majoritarian work by robustly protecting individual speakers from potentially antagonistic coalitions of their fellow citizens. The Press Clause, meanwhile, can then focus on safeguarding our collective ability to challenge a potentially tyrannical government and secure our communal right to a republican form of government. By protecting separate, nongovernmental checks to government power,⁹⁶ the Majoritarian Press Clause's primary mission is to ensure that our representative government is, indeed, reflecting the popular will of its constituents⁹⁷— a mission it achieves through the journalistic mechanisms of a well-informed populace and vigorous government scrutiny. Once we shift our attention to the Press Clause's role of protecting the collective power of the public writ large as against the government, it becomes easier to see how press freedom can complement, not compete with, speech rights.

Not only is this approach more faithful to the original understanding of press freedom, but it also helps to clarify the constitutional work that the Press Clause can and should be doing today. Arguments against giving practical meaning to the Press Clause typically suggest that it would be too difficult to determine both what Press Clause protections should be recognized and which speakers should be allowed to claim them.⁹⁸ Underlying these assertions is usually a sense of inequality—the fear that recognizing any unique press rights would be akin to bestowing special privileges on a favored class at the expense of everyone else. This reaction, of course, makes sense. We have been trained to think about speech rights from a counter-majoritarian angle. Most of us

is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.”)

⁹⁶ See Blasi, *supra* note 53, at 538 (stating that “one of the most important values attributed to a free press by eighteenth-century political thinkers was that of checking the inherent tendency of government officials to abuse the power entrusted to them”).

⁹⁷ See Amar, *supra* note 42, at 1147 (noting that the First Amendment’s “historical and structural core was to safeguard the rights of popular majorities . . . against a possibly unrepresentative and self-interested Congress”).

⁹⁸ See, e.g., *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 801 (1978) (Burger, C.J., concurring) (“The second fundamental difficulty with interpreting the Press Clause as conferring special status on a limited group is one of definition.”); *Branzburg v. Hayes*, 408 U.S. 665, 703–704 (1972) (stating that “[t]he administration of a constitutional newsman’s privilege would present practical and conceptual difficulties of a high order” and that the Court was “unwilling to embark the judiciary on a long and difficult journey to such an uncertain destination”).

thus naturally bristle at the notion that some speakers might be able to claim a constitutional right while others could not. In the speech context, for example, we often demand that courts treat each idea, viewpoint, and speaker the same. We expect identical rights, because we view speech through the individual rights lens, which dictates that it is the right of each person to speak (or not to speak) and to weigh the value of others' messages.⁹⁹

Yet this concern of inequality, while crucial in the counter-majoritarian context, is misplaced when considering majoritarian safeguards. The Majoritarian Press Clause helps us see the difference by moving our focus to the public's collective interest in a truly representative government and how the free press advances this majoritarian endeavor through effective government scrutiny and broad dissemination of information. Depending on the circumstances, constitutional protection for these press functions may or may not necessitate treating all individual speakers the same. With this understanding in mind, determining which rights and speakers to recognize becomes, while maybe still not an easy task, certainly an easier and more palatable one. The ultimate job for the Court becomes recognizing the constitutional tools that are needed by those speakers who are best suited to work on the public's behalf in this effort to fortify our democracy.

B. The Majoritarian Press Clause in Practice

To better illustrate how the Majoritarian Press Clause would function, let us use as an example the case of *Houchins v. KQED*,¹⁰⁰ the last in a trio of cases from the 1970s in which the Supreme Court denied the requests of journalists to access jails and prisons for newsgathering purposes.¹⁰¹ In *Houchins*, a broadcasting station sought "reasonable access" to a local county jail¹⁰² as part of an investigation into an inmate suicide¹⁰³ as well as reports of rapes,¹⁰⁴ beatings,¹⁰⁵ and generally "shocking and debasing" conditions.¹⁰⁶

⁹⁹ *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 818 (2000) (noting that when it comes to judging the value of speech, "[w]hat the Constitution says is that these judgments are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority").

¹⁰⁰ 438 U.S. 1 (1978).

¹⁰¹ *See id.*; *Saxbe v. Wash. Post, Co.*, 417 U.S. 843 (1974); *Pell v. Procunier*, 417 U.S. 817 (1974).

¹⁰² *Houchins*, 438 U.S. at 3. Specifically, the journalists-plaintiffs sought access to the "Little Greystone" portion of the jail and to be able to "interview inmates and make sound recordings, films, and photographs for publication and broadcasting by newspapers, radio and television." *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 5.

¹⁰⁵ *Id.*

¹⁰⁶ *Brenneman v. Madigan*, 343 F. Supp. 128, 133 (N.D. Cal. 1972) (discussing the judge's

The Court held that the journalists did not have any special constitutional right to access the jail beyond the access granted to the general public.¹⁰⁷ When viewed through the individual rights paradigm, this holding is understandable. On the surface, providing special access to members of the press looks a lot like favoring certain powerful speakers over other speakers. Our counter-majoritarian instincts tell us that this must be unconstitutional. But if we put on our collective rights hat, the analysis changes. The Majoritarian Press Clause instructs us to ask different questions, such as: Does the claimed right further a structural press function? And if so, are these speakers likely to utilize the right on the public's behalf?

The answer to both questions in the *Houchins* case was clearly "yes." The reporters were seeking access to information about a matter of significant public concern for the purposes of disseminating it to the public and holding the government accountable.¹⁰⁸ These are classic structural press functions that aid the public in forming intelligent opinions and acting as a restraint on misgovernment. Conditions of prisons and jails, the *Houchins* Court acknowledged, "are clearly matters of great public importance."¹⁰⁹ As Justice Lewis Powell pointed out in his dissent in another of the prison-access cases, a prohibition on press access "precludes accurate and effective reporting on prison conditions and inmate grievances,"¹¹⁰ including "[t]he administration of these institutions, the effectiveness of their rehabilitative programs, the conditions of confinement that they maintain, and the experiences of the individuals incarcerated therein."¹¹¹

It is worth noting, moreover, that the Court simply recognizing that a constitutional right involves a structural press function does not mean that the government's interests in limiting press access would become immaterial or that the government would be forced to grant access to any speaker who sought information. As Chief Justice Earl Warren observed, "[t]here are few restrictions on action which could not be clothed

personal visit to the jail and his observations that the conditions there "constituted cruel and unusual punishment for man or beast," and led him to the "inescapable conclusion was that [the jail] should be razed to the ground").

¹⁰⁷ *Houchins*, 438 U.S. at 16.

¹⁰⁸ See Affidavit of Melvin S. Wax at ¶ 3, *Houchins*, 438 U.S. 1 (No. 76-1310) ("We believe that jails and prisons are public institutions managed by public officials who are accountable to the public, and therefore information concerning such institutions should be reported by the news media.").

¹⁰⁹ See *Houchins*, 438 U.S. at 8 (quotation marks omitted).

¹¹⁰ *Saxbe v. Wash. Post*, 417 U.S. 843, 854 (1974).

¹¹¹ See *id.* at 861; see also *Houchins*, 438 U.S. at 37 (Stevens, J., dissenting) (noting that the public's interest in the criminal justice system "survives the judgment of conviction and appropriately carries over to an interest in how the convicted person is treated during his period of punishment and hoped-for rehabilitation").

by ingenious argument in the garb of decreased data flow.”¹¹² Under the Majoritarian Press Clause, as with other First Amendment rights, courts would still weigh the collective public interest at stake against the government’s interests.¹¹³ The government, for example, might have a substantial interest¹¹⁴ in prohibiting press access to confidential or privileged information¹¹⁵ or when unique factors would make press access to the jail unusually dangerous.¹¹⁶

Thus, the Majoritarian Press Clause has helped us determine that press access to the jail in *Houchins* is the type of right that courts should recognize as guaranteed by the First Amendment. But what about the question of which speakers should be able to claim the right? The question of definition—who is or is not the press—is a difficult one. To some, in fact, this definitional problem is practically fatal to assertions of unique constitutional rights for the press.¹¹⁷ The Majoritarian Press Clause approach, however, brings clarity to this potentially thorny issue.

In circumstances where recognizing a press right for all speakers is feasible, both individual and structural First Amendment interests dictate that the courts should do just that.¹¹⁸ It is in situations where it

¹¹² *Zemel v. Rusk*, 381 U.S. 1, 16–17 (1965).

¹¹³ *See Richmond Newspapers v. Virginia*, 448 U.S. 555, 586 (Brennan, J., concurring) (“Read with care and in context, our decisions must therefore be understood as holding only that any privilege of access to governmental information is subject to a degree of restraint dictated by the nature of the information and countervailing interests in security or confidentiality.”).

¹¹⁴ Determining the level of heightened scrutiny that the Court should apply is beyond the scope of this essay, but in *Saxbe* the Court rejected the argument that the government must show “some substantial justification” for restricting access. *Saxbe*, 417 U.S. at 856 (Powell, J., dissenting); *see also id.* at 861 (“I believe that this sweeping prohibition of prisoner-press interviews substantially impairs a core value of the First Amendment.”).

¹¹⁵ *See id.* at 861.

¹¹⁶ Mem. and Order Granting Motion for Preliminary Injunction at 70, *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978) (No. 76-1310) (The district court noted in its order granting a preliminary injunction allowing press access to the jail that “[o]f course, should a situation arise in which jail tensions or other special circumstances make such implementation dangerous, defendant can restrict media access for the duration of such circumstances”).

¹¹⁷ *See First Nat’l Bank v. Bellotti*, 435 U.S. 765, 796–802 (1978) (Burger, C.J., concurring) (arguing that “the very task” of defining the press would be “reminiscent of the abhorred licensing system of Tudor and Stuart England—a system the First Amendment was intended to ban from this country”).

¹¹⁸ *See, e.g., Richmond Newspapers*, 448 U.S. 555 (concluding that there is a general First Amendment right of access to criminal trials for the public and the press). *But see id.* at 573 (acknowledging that “people now acquire [information about trials] chiefly through the print and electronic media”); *id.* (noting that providing the news media with “special seating and priority of entry so that they may report what people in attendance have seen and heard” aids the “public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system.” (quotation omitted)); *id.* at 581, n.18 (noting that because “courtrooms have limited capacity, there may be occasions when not every person who wishes to attend can be accommodated. In such situations, reasonable restrictions on general access are traditionally imposed, including preferential seating for media representatives.”); *id.* at 586, n.2 (Brennan, J., concurring) (observing that “[a]s a practical matter . . . the institutional press is the likely, and fitting, chief

is not workable to include everyone, however, that the Majoritarian Press Clause framework is useful in determining the proper claimants of a press right or protection. It is of little use to recognize a collective, structural press right, after all, if the party or parties claiming the right would not use it to further the public's interest in representative government.

Under the individual rights view, there is no constitutional difference between members of the press and any random person who might knock on the prison door.¹¹⁹ In the speech context, our counter-majoritarian instincts have primed us to balk at the prospect of the government deciding which speakers are allowed to speak. Speech rights should not—indeed often cannot—be doled out based on who the speaker is,¹²⁰ what they have said in the past,¹²¹ or what they are likely to say in the future.¹²² If we transfer this individual centered view to the Press Clause, then the logical conclusion is that we must similarly resist the idea of awarding press rights based on the identity of the claimant.¹²³ The individual rights approach, therefore, boxes the Court into a stark binary choice—we either all have the right or none of us do.

But in the context of jails and prisons, it is not practical to recognize access rights for everyone. Valid concerns about safety and prison administration are generally incompatible with a right of unfettered public access.¹²⁴ So when the Court is forced by the individual rights framework to choose between access for everyone or for no one, then it is left with little choice but to deny access to everyone, including to members of the press. When considered in light of the Press Clause's historical and textual mandates, however, this conclusion is illogical. It fails both at protecting the public's interest in receiving information about the jail

beneficiary of a right of access because it serves as the 'agent' of interested citizens, and funnels information about trials to a large number of individuals").

¹¹⁹ See *Saxbe*, 417 U.S. at 846–47 (upholding a blanket prohibition on press interviews with individual inmates based, in part, on the fact that the policy “is applied with an even hand to all prospective visitors, including newsmen, who, like other members of the public, may enter the prisons to visit friends or family members. But, again like members of the general public, they may not enter the prison and insist on visiting an inmate with whom they have no such relationship”).

¹²⁰ See *Citizens United v. FEC*, 558 U.S. 310, 350 (2010) (“[T]he First Amendment generally prohibits the suppression of political speech based on the speaker’s identity.”).

¹²¹ See *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 712, 723 (1931) (holding unconstitutional a statute that subjected newspaper to prior restraint if it previously published “malicious” material).

¹²² *Id.*

¹²³ See Sonja R. West, *Favoring the Press*, 106 CALIF. L. REV. 91 (2018) (arguing that the Press Clause supports speaker classifications favoring the press).

¹²⁴ See *Saxbe*, 417 U.S. at 864 (Powell, J., dissenting) (“For good reasons, unrestrained public access [to the prison] is not permitted.”).

and in ensuring that possible government malfeasance is effectively investigated.

The Majoritarian Press Clause framework, on the other hand, once again guides us toward a more fitting solution by reminding us that the objective is not necessarily to treat all speakers the same but to identify those speakers who are fulfilling the unique public-serving press functions.¹²⁵ The appropriate query, therefore, is not whether the speakers before the Court are receiving special treatment (the counter-majoritarian concern) but, rather, whether the speakers are effectively working to further the public's interests (a majoritarian role). The plaintiffs in *Houchins* easily met this standard—they were experienced journalists¹²⁶ with an established audience and a proven record reporting on issues related to jails and prisons in their area.¹²⁷ They were seeking access, moreover, in order to gather and broadly disseminate information about a matter of significant public concern.¹²⁸ If the choice is between recognizing a right of access for these plaintiffs or for no one, the majoritarian framework exposes how our collective First Amendment interests are best served by granting the journalists access.¹²⁹

The *Houchins* case further illustrates how a member of the press can be a proper trustee of the public's shared right to information. In that case, two local branches of the National Association for the Advancement of Colored People (NAACP) joined the lawsuit as co-plaintiffs with the news station, KQED. Filing the complaint “on their own behalf and on behalf of black people generally,”¹³⁰ the NAACP chapters did not seek access to the jail for any of their individual members. They claimed, instead, that by blocking the *news station's* access the prison

¹²⁵ See Sonja R. West, *The Stealth Press Clause*, 48 GA. L. REV. 729, 749–55 (2014) (drawing on Supreme Court precedent to identify the two main “unique constitutional functions” of the press as (1) news-gathering and dissemination, and (2) checking the government); see also Sonja R. West, *Press Exceptionalism*, *supra* note 61, at 2443 (“The quest, therefore, should not be to define the press but rather to train our courts to recognize them in action.”).

¹²⁶ Mem. and Order at 66–67, *Houchins v. KQED*, 438 U.S. 1 (1978) (No. 76-1310) (The District Court in the case described the plaintiffs as “a local non-profit, publicly-supported corporation engaged in educational television and radio broadcasting.”).

¹²⁷ Affidavit of Melvin S. Wax, *supra* note 108, at ¶ 10 (declaring that as “a television journalist with experience in reporting on jail and prison conditions, I believe that it is essential to public understanding of the conditions prevailing at the Greystone facility and the Santa Rita jail in general, that the news media report in detail on the exact nature of such conditions”).

¹²⁸ Affidavit of William Schechner ¶ 4, *Houchins*, 438 U.S. 1 (No. 76-1310) (describing his reporting on an earlier news story regarding prison conditions and stating that being able to record footage inside San Quentin prison “significantly enhanced my ability to convey to the public, on the news program, the actual conditions at San Quentin”).

¹²⁹ Questions, of course, will remain about the best methods for identifying speakers who are fulfilling press functions. See Sonja R. West, *Press Exceptionalism*, *supra* note 61, at 2453–2462 (discussing useful proxies and a beginning framework for identifying press speakers).

¹³⁰ Complaint at ¶ 3, *Houchins*, 438 U.S. 1 (No. 76-1310).

had violated *their* constitutional rights.¹³¹ In the complaint, the NAACP members explained that they “depend on the public media to keep them informed of such conditions so that they can meaningfully participate in the current public debate on jail conditions in Alameda County” and that they “rely regularly on KQED’s Newsroom program to keep them informed on these issues.”¹³²

This press function—serving as proxies for the public—is well recognized.¹³³ As Justice Stewart observed in his concurring opinion in *Houchins*, “[w]hen on assignment, a journalist does not tour a jail simply for his own edification. He is there to gather information to be passed on to others, and his mission is protected by the Constitution for very specific reasons.”¹³⁴ Unlike the individual rights framework, the Majoritarian Press Clause both allows, indeed requires, the Court to recognize those speakers who are doing this important constitutional work.

IV. CONCLUSION

The First Amendment’s guarantee of press freedom is one of our Constitution’s most significant accomplishments. The historical evidence shows that the framing generation valued press freedom, even beyond speech rights, as both an individual freedom and as a key structural protection—a shared security of the people vis a vis their government. A free press was a vital tool necessary to ensure the survival of a truly representative government.

Over the last hundred years, however, our focus has shifted from protecting press freedom to securing speech rights more generally. Indeed, when it comes to the job of protecting our individual expressive interests, today’s robust speech protections occupy the field. In the process, the Press Clause has been swept aside and treated, contrary to its historical importance, as a superfluous tagalong to the Speech Clause.

¹³¹ *Id.* at ¶ 12 (asserting that barring the news station’s coverage of the jail “deprives the NAACP plaintiffs’ members of their right to know and receive information on such conditions and thus to participate meaningfully in the public debate, presently being conducted in Alameda County, with regard to jail reform and the possible construction of new jail facilities”).

¹³² *Id.* at ¶ 3.

¹³³ *See* *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (plurality opinion) (noting that public reliance on the news media “[i]n a sense, . . . validates the media claim of functioning as surrogates for the public.”); *Houchins*, 438 U.S. at 8 (“Beyond question, the role of the media is important; acting as the ‘eyes and ears’ of the public, they can be a powerful and constructive force, contributing to remedial action in the conduct of public business. They have served that function since the beginning of the Republic, but, like all other components of our society, media representatives are subject to limits.”); *see also* *Nixon v. Warner Commc’ns*, 435 U.S. 589, 609 (1978) (noting that “the press serves as the information-gathering agent of the public”).

¹³⁴ *Houchins*, 438 U.S. at 17 (Stewart, J., concurring).

The United States' unparalleled leadership in the protection of individual expressive rights is rightly celebrated and often also has the secondary effect of furthering our shared, structural interests. But we must be careful not to confuse the two jobs and, in the process, to fail to understand the situations in which constitutional rights and protections are still needed. The Majoritarian Press Clause approach can help us do just that, by reframing our understanding of when and how unique press functions should be protected in order to benefit society as a whole.

The Supreme Court has recognized that “the Constitution specifically selected the press” for protection “as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve.”¹³⁵ As the Court has declared, the guarantees of press freedom “are not for the benefit of the press so much as for the benefit of all of us.”¹³⁶ The Majoritarian Press Clause embraces this understanding and, in the process, shows us how the freedoms of speech and press can work together to more fully realize all of the promises of the First Amendment.

¹³⁵ *Mills v. State of Alabama*, 384 U.S. 214, 219 (1966); *see also Nixon*, 435 U.S. at 609 (noting that “the press serves as the information-gathering agent of the public”).

¹³⁶ *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967).