WHAT THE SUPREME COURT THINKS OF THE PRESS AND WHY IT MATTERS

RonNell Andersen Jones*

ABSTRACT

Over the last fifty years, in cases involving the institutional press, the United States Supreme Court has offered characterizations of the purpose, duty, role, and value of the press in a democracy. An examination of the tone and quality of these characterizations over time suggests a downward trend, with largely favorable and praising characterizations of the press devolving into characterizations that are more distrusting and disparaging. This Essay explores this trend, setting forth evidence of the Court’s changing view of the media—from the effusively complimentary depictions of the media during the Glory Days of the 1960s and 1970s to the more skeptical, tepid, or derogatory portrayals in recent years. It considers possible causes of this change in rhetoric and then explores the potential First Amendment consequences of the change. The Essay argues that there

* Associate Professor of Law, J. Reuben Clark Law School, Brigham Young University. The author thanks the participants of the University of Alabama Law Review Symposium for their thoughtful feedback and student researchers Sarah Jenkins, Travis Hunt, and Samantha Rogers for their assistance.
is a very real risk that these trends could lead to the impoverishment of a wider array of First Amendment rights. Because the jurisprudential pattern has long suggested that general speakers and press speakers rise and fall together, wider First Amendment values that have been enhanced in U.S. Supreme Court cases brought by the positively characterized media could be diminished as the Court’s view of the media diminishes. The downward trend in press characterizations may therefore be cause for broader concern about the vitality and stability of First Amendment rights.

I. INTRODUCTION

*New York Times v. Sullivan* marked a crucial moment for the United States Supreme Court for many reasons. It signaled a breaking point against a tool of intimidation in the civil rights movement in the gridlocked South. It constitutionalized U.S. libel law and ushered in a uniquely American approach to defamation actions. It opened the door to an era of vibrant, free-flowing dialogue about government and those who govern. But *Sullivan* was also a defining moment from the Supreme Court in another way: It was a watershed opinion for the Court’s use of rhetoric expressing appreciation for and admiration of the media and its role in our society. Subsequent *Sullivan*-era cases are likewise rife with this same brand of press-praising language—positive characterizations of the media as a democracy-enhancing, power-checking, community-building institution with a critical role to play in informing, educating, and empowering a voting public. In sometimes extensive commentary in these cases, the Court offered the American public a deeply optimistic portrayal of the institutional media and conveyed a sense of gratitude for its social

5. See infra text accompanying notes 9–38.
and constitutional functions. It boldly and repeatedly told America that the press mattered, and it told America why.

In the fifty years since *Sullivan*, though, the Supreme Court’s depictions of the media have changed. The Court now appears both less likely to take cases involving the press and less likely to offer a positive characterization of the press in the cases that it does take. This Essay examines this trend in the tone and content of the language the Court uses when it portrays the media in its opinions. Part II outlines the apparent trajectory of these characterizations, charting a movement from largely favorable and praising depictions of the press to largely distrusting and dismissive ones. It explores earlier portrayals of the press as an educator, a dialogue builder, and a watchdog, and then contrasts those characterizations with more recent depictions of the press that take a decidedly less positive tone. Part III offers some possibilities of what might be driving this change in characterization, exploring changes in Court composition, changes in media quality and delivery mechanisms, and changes in public opinion that could be influencing the changes in judicial characterization. Part IV concludes with an analysis of why this pattern of characterizations matters. It highlights some more evident concerns related to the direct effect that the Court’s changing depictions of the media might have on the operation of the journalistic enterprise and on the many Americans who consume that journalistic work product. Beyond this, it also describes some potentially less obvious concerns about the broader effect that this development might have on a larger body of constitutional jurisprudence. The Essay argues that the downward trend in press characterizations may be cause for much deeper concern about the vitality of wider First Amendment rights held by speakers other than the media.

II. A DIMINISHING VIEW OF THE PRESS

An examination of the tone and quality of the descriptive language that the Court uses when it speaks of the institutional press suggests a diminishing trend over time. In a smattering of pre-*Sullivan* cases and then very consistently throughout a period that we might call the press “Glory

---

7. Elsewhere I have recently addressed the unique form that characterizations of the press often take: they are delivered by the Court in nonbinding but heavily suggestive dicta in cases that do not actually set forth any special rights for the press but instead offer more sweeping holdings about the First Amendment free speech rights of all citizens. See id. I have suggested that the excessive use of this tool is troubling and have argued that statements about the press in dicta, unnecessary to the outcome of the case, give rise to serious risk of confusion and evasion of stare decisis in lower courts. *Id.* at 722. This dicta-based lack of clarity is objectionable, not merely because it falls outside the justiciability bounds of the Court’s legitimate purview but also because in the area of expressive freedoms it has long been recognized that clarity is especially crucial. *Id.* at 723.
Days of the 1960s, 1970s, and early 1980s, the Court went out of its way to speak of the press and then offered effusively complimentary depictions of the media in its opinions. In the years since, the Court appears to have devolved into a period in which it actively avoids taking press-focused cases or speaking of the press, and then embraces none of the complimentary characterizations when it does speak of it.

Several strands of the Glory Days depictions are worthy of note.9

A. Characterizations of the Press as Educator

In the Glory Days characterizations of the media, the Supreme Court sent a very public signal that it viewed the press as a valuable educator. It painted a picture of the press as a helpful teacher with a gift for both determining what the people need to know and conveying it to them in a useful fashion. The cases from this era praise the media for “informing the citizenry of public events and occurrences,”10 and emphasize repeatedly that this role matters greatly because “[a]n untrammeled press [is] a vital source of public information[,] . . . and an informed public is the essence of working democracy.”11 In Richmond Newspapers, Inc. v. Virginia,12 for example, the Court characterizes the press as crucially important to “public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system.”13 It calls the press the “chief” source of citizens’ information.14 Notably, the Glory Days cases consistently create a link between this educator role and the media’s role as a

---


9. Discussions of a number of these cases and their effusive pro-media rhetoric can be found in RonNell Andersen Jones, U.S. Supreme Court Justices and Press Access, 2012 BYU L. REV. 1791 (2012) [hereinafter Jones, Press Access].


13. Id. at 573 (quoting Neb. Press Ass’n v. Stuart, 427 U.S. 539, 587 (1976) (Brennan, J., concurring in judgment)).

14. Id. For a more extensive discussion of the characterizations in this case, see Jones, Press Clause Dicta, supra note 6, at 706.
“surrogate” or proxy for members of the wider public at events of import,\textsuperscript{15} when constraints on time, space, knowledge, or ability keep the individual citizen from participating directly. The portrayals are of an entity that will do the hard work of finding out what is happening in the democracy, and then pass along the information to those who could not or would not glean it for themselves.

Language from \textit{Cox Broadcasting Corp. v. Cohn}\textsuperscript{16} provides another powerful example of the way that the Court depicts the press as an indispensable entity for educating the voting public: “[I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations.”\textsuperscript{17} The opinion calls this teaching role the “great responsibility” that is met by the press, and conveys the Court’s view that if the nation did not have these key community educators who report “fully and accurately the proceedings of government,” the society of informed, participatory citizens that is envisioned by the Constitution could not be a reality.\textsuperscript{18} Indeed, the Court notes, “[w]ithout the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally.”\textsuperscript{19}

\textbf{B. Characterizations of the Press as Dialogue Builder}

The Glory Days characterizations also positively portray the press as a dialogue builder—a critically important distiller of societal information and shaper of community conversations through the application of editorial insight and journalistic acumen. In striking down a Florida “right to reply” statute in \textit{Miami Herald Publishing Co. v. Tornillo},\textsuperscript{20} the Court wrote:

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 and content of the paper, and treatment of public issues and public

\textsuperscript{15.} \textit{Richmond Newspapers}, 448 U.S. at 573.
\textsuperscript{16.} 420 U.S. 469 (1975).
\textsuperscript{17.} \textit{Id.} at 491.
\textsuperscript{18.} \textit{Id.} at 492.
\textsuperscript{19.} \textit{Id.}
\textsuperscript{20.} 418 U.S. 241 (1974).
officials—whether fair or unfair—constitute the exercise of editorial control and judgment.\footnote{21}

The Court noted that this role of the press as a builder and structurer of community dialogue was constitutionally ordained and constitutionally protected, indicating that “[i]t 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.”\footnote{22} Other cases echoed this sentiment, with the Court highlighting the success the media has in creating these public conversations, calling the press “a mighty catalyst in awakening public interest in governmental affairs”\footnote{23} and characterizing it as an entity “specifically selected” by the Constitution “to play an important role in the discussion of public affairs.”\footnote{24}

\section*{C. Characterizations of the Press as Watchdog}

Finally, and overwhelmingly, the Glory Days Supreme Court characterizations of the media depict the press as a watchdog—a critical check on government that performs an essential “Fourth Estate” function.\footnote{25} The media is portrayed as an entity that has both the skill and the mandate to “expos[e] corruption among public officers and employees.”\footnote{26} The Supreme Court told us that in this role the media forms a “foundation” of democracy, because “the basic assumption of our political system [is] that the press will often serve as an important restraint on government.”\footnote{27} In \textit{Mills v. Alabama},\footnote{28} the Court indicated that “the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve.”\footnote{29} Later, in \textit{Nebraska Press Association v. Stuart},\footnote{30} it reiterated these sentiments, characterizing the checking function of the

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id. at 258} (footnotes omitted).
\item \textit{Id}.
\item Estes v. Texas, 381 U.S. 532, 539 (1965).
\item See, e.g., Potter Stewart, \textit{"Or of the Press,"} 26 HASTINGS L.J. 631, 634 (1975). For a discussion of some cases highlighting this feature of the press and an argument that it is a “constitutional function” unique to press speakers, see Sonja R. West, \textit{The Stealth Press Clause}, 48 GA. L. REV. 729, 753 (2014).
\item Estes, 381 U.S. at 539.
\item Minneapolis Star & Tribune Co. v. Minn. Comm’r of Revenue, 460 U.S. 575, 585 (1983).
\item 384 U.S. 214.
\item \textit{Id. at 219}.
\item 427 U.S. 539 (1976).
\end{enumerate}
\end{footnotesize}
press as “impressive,” and praising the media’s “record of service over several centuries” on this front.\textsuperscript{31} According to the majority in that case, in the criminal trial setting, the press “does not simply publish information about trials but guards against the miscarriage of justice” by watching over the behaviors of judges, prosecutors, and other court officials and ensuring that they act appropriately.\textsuperscript{32} The media again is characterized as imminently worthy of trust in its own editorial decisions about how and when to engage in newsgathering and publication and is depicted as a vitally important social entity—“the handmaiden of effective judicial administration.”\textsuperscript{33}

In many respects, the holding in \textit{New York Times v. Sullivan} was driven by this same Fourth Estate characterization, with the Court constitutionalizing libel law by way of lofty language about giving citizens who were speaking through the media the “breathing space” to contribute to this valuable checking function.\textsuperscript{34} The \textit{Sullivan} opinion is a deeply romanticized ode to the power and promise of a watchdog media. Indeed, as I have noted elsewhere,\textsuperscript{35} the Court delivered this media characterization by echoing words of the Founders. Its \textit{Sullivan} opinion borrowed from Madison in its depiction of the press, asserting that across the nation, “the press has exerted a freedom in canvassing the merits and measures of public men, of every description.”\textsuperscript{36} It underscored the time-honored view of the media as the keeper of this crucial role, noting that “[o]n this footing the freedom of the press has stood; on this foundation it yet stands.”\textsuperscript{37} Jefferson is quoted for the reminder that, given the positive societal contributions of the press, Congress may not “contro\textit{l} [sic] the freedom of the press.”\textsuperscript{38}

\textbf{D. Characterizations That Remained Positive Despite Press Failings}

These Glory Days characterizations are forceful, consistent, and largely unyielding. Indeed, even when presented with strong counter-narratives—with press-freedom values pitted against “other values society ordinarily

\textsuperscript{31.} \textit{Id.} at 560 (quoting Sheppard v. Maxwell, 384 U.S. 333, 350 (1966)); \textit{see also} Jones, \textit{Press Clause Dicta, supra} note 6, at 711.

\textsuperscript{32.} \textit{Stuart}, 427 U.S. at 587.

\textsuperscript{33.} \textit{Id.} at 560 (quoting Sheppard, 384 U.S. at 350).


\textsuperscript{35.} \textit{See} Jones, \textit{Press Access, supra} note 9, at 1791; Jones, \textit{Press Clause Dicta, supra} note 6, at 712.

\textsuperscript{36.} \textit{Sullivan}, 376 U.S. at 275 (quoting 4 ELLIOT’S DEBATES ON THE FEDERAL CONSTITUTION 570 (1876) [hereinafter ELLIOT’S DEBATES]).

\textsuperscript{37.} \textit{Id.} (quoting ELLIOT’S DEBATES, supra note 36, at 570).

\textsuperscript{38.} \textit{Id.} at 277.
wishes to see protected quite vigorously, like the rights of criminal defendants, reputational rights, and rights of privacy—or when confronted with evidence of press behavior gone awry or concerns about inaccuracy, sensationalism, or unfairness, the Supreme Court’s characterizations during the Glory Days remained overwhelmingly positive.

In *Time, Inc. v. Hill*, the Court characterized the press as so “essential . . . to healthy government” that our open society “places a primary value on freedom” for even a less-than-responsible press. “Depicting the media as an earnest, hardworking institution that performs an ‘indispensable service . . . in a free society’ and that needs latitude to make some errors in the course of its important work, the Court expressed a deep fear of unnecessarily ‘saddl[ing] the press’ with impossible burdens of verifying facts with certainty.” In the Glory Days cases, these errors by the media are characterized as merely the cost of doing business in a democracy. “Some degree of abuse,” the Court said, “is inseparable from the proper use of every thing [sic], and in no instance is this more true than in that of the press.”

Similarly, in *Sheppard v. Maxwell*, the Court speaks of the “unqualified prohibitions laid down by the framers [that] were intended to give to liberty of the press . . . the broadest scope that could be countenanced in an orderly society.” It characterizes the media’s role as so important that it “require[s] that the press have a free hand” regardless of its occasional poor judgment or “sensationalism.” In *Rosenbloom v. Metromedia, Inc.*, the Court noted that there had in fact been abuses by the free press of its constitutional freedoms, but it nevertheless characterized the free press as a foundation of a free society:

> We are aware that the press has, on occasion, grossly abused the freedom it is given by the Constitution. All must deplore such excesses. In an ideal world, the responsibility of the press would match the freedom and public trust given it. But from the earliest

39. *Jones, Press Access*, *supra* note 9, at 1795 (footnote omitted) (citing cases in which the Court favored press-freedom values in spite of the presence of competing values).
40. 385 U.S. 374 (1967).
41. *Id.* at 388.
42. *Jones, Press Clause Dicta*, *supra* note 6, at 712 (alteration in original) (footnote omitted) (quoting *Time, Inc.*, 385 U.S. at 388–89) (discussing the extensive praising dicta in *Time, Inc.*).
45. *Id.* at 350 (alteration in original) (quoting *Bridges v. California*, 314 U.S. 252, 265 (1941)).
46. *Id.*
days of our history, this free society, dependent as it is for its survival upon a vigorous free press, has tolerated some abuse.48

All told, the picture that develops in these Glory Days cases is an overwhelmingly generous, sweepingly sentimentalized, almost uniformly affirmative characterization of the press as a critically important, positively contributing social entity that is worthy of protection and uniquely valuable to the polity.

E. Declining Characterizations of the Press

If we fast-forward only a few decades, however, the reversal in course is stark. While the earlier era features a Court that appears to be going out of its way to hear cases implicating the press and then going out of its way to engage in lengthy positive characterizations of the press, the present era shows the opposite on both fronts. As Professor Lyrissa Barnett Lidsky noted in a recent assessment of the First Amendment jurisprudence of the Roberts Court,49 although the Court has recently addressed a number of important free speech cases, the only decisions even possibly characterized as free press cases are the two FCC v. Fox opinions,50 both of which “avoided the looming First Amendment issue they contained.”51 The table of cases in a standard media law textbook lists dozens of cases from the 1960s and 1970s and then has almost a complete famine of cases from the 2000s and 2010s. The paucity is not explainable by facts on the ground. It is not the case that critical legal episodes involving the press are not happening—quite the opposite. The early 2000s, for example, saw an explosion of very high-profile confidential source and reporter’s privilege episodes arguably unparalleled even by the media law events of the Glory Days.52 But the Court denied certiorari each time the issue came before it.53

Beyond this, when the Court does reach out to speak of the press and to offer a characterization of it, the tone and quality are in diametric opposition to what was seen in the earlier era. The most notable example is found in Citizens United v. Federal Election Commission,54 a case that did

48. Id. at 51.
not directly involve the press but followed the pattern of some Glory Days cases, with the Court opting to reach out to describe the media in dicta.\textsuperscript{55} This time, however, the Court offered a characterization of the press that partook of none of the shining “otherness” that once was seen in the Court’s rhetoric.\textsuperscript{56} The press was not depicted as an educator, a builder of community dialogue, or a watchdog providing a constitutionally crucial check on government. Indeed, the \textit{Citizens United} majority outright “rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers.”\textsuperscript{57} In the opinion, the media are alternatively characterized as purveyors of a “24-hour news cycle” that is “dominate[d]” by “sound bites, talking points, and scripted messages,”\textsuperscript{58} and as players in an institution on the “decline”—amorphous and hard to peg because given “the advent of the Internet and the decline of print and broadcast media . . . the line between the media and others who wish to comment on political and social issues becomes far more blurred.”\textsuperscript{59} Just like all of the other corporations that the \textit{Citizens United} majority announced were free to engage in electioneering,\textsuperscript{60} media corporations were depicted as “accumulat[ors of] wealth with the help of the corporate form,”\textsuperscript{61} whose “views . . . often ‘have little or no correlation to the public’s support’ for those views”\textsuperscript{62} and who carry the potential to “distort[]” the political process.\textsuperscript{63} Gone are the optimism and confidence that undergirded the former characterizations, replaced by cynicism, doubt, and, at its extremes, distrust and animosity.\textsuperscript{64}

\textbf{III. POSSIBLE EXPLANATIONS FOR THE TREND}

What might have changed to bring about this stark difference in the press characterizations? The full explanation is almost certainly multifaceted, with interrelated causal factors that are worthy of more investigation than can occur here and that would benefit from careful empirical evaluation. On the whole, however, there are at least three major categories of explanations that might need to be explored: the

\textsuperscript{55} See Jones, Press Clause Dicta, supra note 6, at 714.
\textsuperscript{56} See Lidsky, supra note 49, at 1831–32.
\textsuperscript{58} \textit{Id}. at 364.
\textsuperscript{59} \textit{Id}. at 352.
\textsuperscript{60} \textit{Id}.
\textsuperscript{61} See \textit{id}. at 381–82.
\textsuperscript{62} \textit{Id}. at 351.
\textsuperscript{63} \textit{Id}. (quoting Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 660 (1990)).
\textsuperscript{64} \textit{Id}. at 326.
\textsuperscript{65} Lidsky, supra note 49, at 1834.
characterizations of the press have changed because the Court has changed; the characterizations of the press have changed because the press has changed; and the characterizations of the press have changed because the public opinion or perception of the press has changed.

A. A Changing Court

One strong possibility is that the Supreme Court itself has changed in a way that has impacted the press characterizations. The Roberts Court may just be substantially less press-friendly than the Warren or Burger Courts were—and thus would offer less positive press characterizations even if all other factors remained constant and the factual world was on all fours with the press contours of the past.66 The Justices on the current Supreme Court who lean to the right ideologically might not find press freedoms to fit as neatly within the libertarian strain of First Amendment jurisprudence that is motivating many of the pro-free-expression decisions of the current Court.67 Those who lean to the left ideologically may be less likely than the civil rights era liberal Justices were to see the press as a part of a wider social justice agenda68—or might simply have less interest in that agenda as a whole. Modern Justices, who have experienced the firestorm of individually targeted press coverage that now accompanies almost every nationally televised confirmation proceeding, may be less favorably disposed overall toward the press than their predecessors were.69 It may be, then, that the rhetoric about the press has changed because the authors of that rhetoric have changed. Because most of the glowing language about the press from the Glory Days was contained in nonbinding dicta,70 this new generation of Justices is not obligated to adhere to the press portrayals of their predecessors, and the current Court may be opting to leave them behind for ideological, jurisprudential, or personal reasons.

68. Id. at 144–45 (arguing that liberals on the Court favor free speech for reasons of political equality and protection of marginal speech).
69. See Dahlia Lithwick, Their Own Private Hell, SLATE (Mar. 8, 2011, 6:09 PM), http://www.slate.com/articles/news_andPolitics/jurisprudence/2011/03/their_own_private_hell.html (arguing that “the justices’ own experiences with the media and their shrinking sense of personal privacy” affects their First Amendment decisions, and that some “tend to view the American public and the media largely through the prism of their own confirmation hearings—which they found to be painful and humiliating”).
70. See Jones, Press Clause Dicta, supra note 6, at 709.
B. A Changing Press

Second, perhaps the characterizations of the press have changed because the press itself has changed. A great deal of transformation has occurred in the American media landscape in the last fifty years, and at least some of it may be contributing to this massive change in Court characterization. Broadly speaking, there are two general strains of change that are often suggested to be at play here. The first focuses on the technology by which news is delivered, and the second focuses on the quality with which news is delivered.

Technologically, much of the “press” that the Court might encounter today is only a distant relative of the press that was the focus of the Glory Days cases. The deteriorating “legacy” media are rapidly being replaced by a wide variety of mechanisms of “citizen journalism,” which replicate some of the key functions but very little of the form of their press predecessors. An explosion of Internet and social media news sources, some of which fulfill only portions of the role that the traditional, Glory Days press fulfilled, have burst onto the information-conveyance scene in ways that severely complicate a body of law that came into being when the “press” meant three television news networks and a daily newspaper in every major city. In many ways, this issue brings to mind the classic Philosophy 101 thought experiment about the Ship of Theseus, which imagines a ship that is sent to sea and then plank by plank has all of its component parts replaced. When it returns, does it remain the same ship, or is it something fundamentally different? Likewise, the term “media” today is attached to a wide range of individually targeted information sources, and at least some significant aspects of today’s press would be wholly unrecognizable to the Glory Days Supreme Court. The so-called “disaggregation” of newspaper product means that news that was once delivered all in a single newspaper is now being delivered through a wider variety of media targeted to the particular consumer’s reading preferences. This technological shift eliminates some of the opportunity that the press of the Glory Days had to educate the public. It limits the capacity of the legacy media to stand as a true proxy for the citizens or a


73. RonNell Andersen Jones, Litigation, Legislation, and Democracy in a Post-Newspaper America, 68 WASH. & LEE L. REV. 557, 564–70 (2011) [hereinafter Jones, Post-Newspaper America] (describing the “disaggregation” of news product that all once appeared in a single newspaper format and the trend toward media that convey news but do not produce it).

74. Id.
meaningful watchdog on behalf of the people. It unquestionably hampers 
the media’s ability to structure the conversations of the community as it 
once did. While in the Glory Days, people “who went to [the newspaper] 
for classified ads, movie listings, recipes, or sports stumbled upon the local 
and national news along the way, and in so doing became a part of a wider 
informed citizenry,”75 news consumers no longer have this experience 
through the press. This feature of the Glory Days news consumption may 
well have motivated a great deal of the positive rhetoric that the Court 
attributed to the press in its characterizations from that time period. It is at 
least possible that the shift in characterization is rooted in part in this shift. 

A second possible way in which the press has changed since the 
Glory Days is less centered on technology and more centered on quality. If, 
as I have suggested, the Court’s characterizations of the press have taken a 
turn for the worse, one explanation that has to be entertained for that 
change is that the press itself has taken a turn for the worse—that is, that 
the Court in its rhetoric is simply accurately reflecting a real-world shift of 
the media from responsible, careful educators of and watchdogs for the 
populace to entertainment- and conflict-driven, partisan profit seekers who 
are less stalwart or less professional in their work than their predecessors. 

The institutional press has faced significant criticism on these fronts in 
the last decade.76 Critics note that “press organizations must fight for their 
piece of an ever-shrinking pie of revenue from consumers who enjoy 
numerous low-cost or even free news alternatives”77 and that “[t]he need to 
compete for ratings results in an obsession with non-news, frivolity and 
entertainment.”78 Thus, it is possible that the Court has not actually 
reconsidered what it thinks about the primary, unique, constitutionally 
designated role of the press, but rather that it has simply determined that 
the modern press is not currently performing that role. It might have 
concluded as a factual matter that the press is not doing the job of being a 
trustworthy conveyor of information to the public and thus changed its 
judicial characterizations accordingly. 

Indeed, this explanation gets some additional support from the current 
Justices’ own more immediate experiences with the press. In recent years,

75. Id. at 565–66.
76. See Jones, Media Subpoenas, supra note 8, at 337–38 (detailing “[n]umerous well-publicized 
scandals involving highly respected news organizations” and “a series of well-known incidents in which 
journalists from the New York Times and USA Today fabricated stories, plagiarized the works of 
competitors, or failed sufficiently to verify their sources,” and citing commentary showing that these 
episodes “negatively affected the public’s perception of the ethics of journalists and reduced its 
confidence that the news media will provide accurate and fair accounts of stories”).
77. DAVID A. YALOF & KENNETH DAUTRICH, THE FIRST AMENDMENT AND THE MEDIA IN THE 
COURT OF PUBLIC OPINION 11 (Cambridge Univ. Press 2002).
78. David L. Geary, The Decline of Media Credibility and Its Impact on Public Relations, PUB. 
REL. Q., Fall 2005, at 8, 10.
there have been several high-profile gaffes by the institutional media in which the reporting of decisions from the Court has been sloopy or erroneous.\textsuperscript{79} Several Justices have publicly bemoaned what they see as the generally poor performance of the press in covering the Court’s work.\textsuperscript{80} These reactions make it very tempting to speculate that the Court is changing its characterization of the press because the Court believes that the modern-day press, in its day-to-day operations, is not doing a good job of being press-like in the constitutional sense.

But there is a fundamental problem with this explanation. It would be analytically inconsistent to suggest that the embarrassing or unsatisfactory performance of the press is the sole or even primary reason for the radical change in press characterization from the Court. This is because the Glory Days Supreme Court already anticipated this contingency: The Court repeatedly acknowledged that sometimes the press would be unwise, disappointing, and fall short of its constitutional ideals, but the Court concluded that it would stalwartly protect the press (and overwhelmingly glowingly characterize it) anyway.\textsuperscript{81} Separate and apart from whether that position was correct, the fact that the position was vigorously and consistently taken suggests that poor performance by the media is not what is driving the about-face in the characterizations of the press. In light of the Glory Days practice of positively characterizing the press despite its widespread failings, it would be deeply contradictory to now point to a pattern of disappointing press behavior as an explanation for the precipitous decline in those characterizations.

C. A Change in Public Opinion

Finally, and relatedly, perhaps the change in Supreme Court press characterization is linked to a change in public opinion of the press, and the Court is mapping its views onto more widely held societal views that the press is no longer valuable or laudable.


\textsuperscript{80} See Jones, \textit{Press Access}, supra note 9, at 1805 n.96 (summarizing comments from current Justices that accuse the media of oversimplifying, sensationalizing, misleading the public, and misinterpreting the actions of the Court).

\textsuperscript{81} See supra notes 39–48 and accompanying text.
There is abundant data pointing to this change in public opinion. Polling during the Glory Days suggested that the public recognized and appreciated the educator role of the institutional media, regularly expressing widespread respect for and belief in the institutional media. In May 1972, 68% of Americans reported that they trusted the mass media a “great deal” or a “fair amount.”82 In contrast, a recent Gallup poll reported the exact opposite: trust for the mass media in the United States was at an all-time low,83 with 60% saying that they trusted the media “[n]ot very much” or not “at all.”84 While Glory Days polling indicated that Walter Cronkite was the single most trusted man in the nation85 today less than a third of Americans report that they can believe all or most of what major news anchors say.86 The news outlets themselves have also lost credibility, with only “about two-in-ten say[ing] they believe all or most information from” ABC, CBS, or NBC News.87 Indeed, in the last decade, all national institutional press, both print and broadcast, experienced double-digit drops in believability ratings.88

Likewise, the public is experiencing sharp decreases in its faith in the institutional media’s ability to structure community conversations. From 1985 to 2011, the Pew Center for Research tracked an increasingly negative opinion of news organizations on issues relevant to this function. Compared to the Glory Days, many more people today believe that news stories are often inaccurate,89 that news reports tend to favor one side,90 and...
that the news is often influenced by powerful people and organizations. 91
The public now overwhelmingly criticizes the press for its perceived lack of fairness, 92 its unwillingness to admit mistakes, 93 its inaccurate reporting, 94 and its political bias. 95

The public’s sense that the media is fulfilling its watchdog role has also radically decreased. While Glory Days polling suggested large-scale public confidence in this role, by 2009, 61% of Americans were “very concerned” that the news media would not “fulfill its duties of providing oversight to the public about what the administration is doing.” 96 While polls from the Glory Days showed that Americans overwhelmingly believed news organizations helped democracy, recent polls show an equal number saying that the media actually harms democracy. 97

The data in this area is so consistent and so compelling that at least some piece of the explanation for the change in Court characterization of the press over the past fifty years must be rooted in shifts in real-world societal views and in colloquial characterizations of the behaviors and roles of the American press over that same time period.

IV. WHY IT MATTERS

Whatever the cause—or, undoubtedly, causes—of this trend toward less positive characterizations of the press by the Supreme Court, there are likely to be ramifications.

First, and perhaps most obviously, if the Court no longer believes the press to be a celebrated social institution, a performer of important constitutional checking functions, a necessary shaper of community dialogue, or an educator of or proxy for the public, we might expect a continuation of the basic arc that we have recently seen: a hesitancy on the part of the Supreme Court to take cases involving the press and a hesitancy to view the press favorably when the Court does offer a characterization of it. If, as appeared to be the case in the Glory Days, positive characterizations motivated (or at least accompanied) positive legal

90.  Id. (noting an increase from 53% in 1985 to 77% today).
91.  Id. (noting an increase from 53% in 1985 to 80% today).
92.  Id. at 6 (finding that 77% of respondents shared this view).
93.  Id. (finding 72% of respondents shared this view).
94.  Id. (finding 66% of respondents shared this view).
95.  Id. (finding 63% of respondents shared this view).
96.  Media Use and Evaluation, supra note 86 (“Based on those who think the news media are not being tough enough on the Obama administration.”).
97.  Pew, Views of the News Media, supra note 89, at 10. (“For the first time in a Pew Research Center survey, as many say that news organizations hurt democracy (42%) as protect democracy (42%). In the mid-1980s, about twice as many said that news organizations protect democracy rather than hurt democracy.”).
outcomes for the press, negative characterizations may well be harbingers of the opposite.

To the extent that any of the Glory Days rhetoric resonates as either legitimate descriptively or desirable normatively, this loss of an inclination to support the newsgathering or public-informing work of the press is cause for concern. Abandonment of any Fourth Estate mindset at the Court threatens to hamstring a significant premise of our democracy and to disincentivize the investigative, watchdog, and public-proxy behaviors that have been foundational to the functioning of communities.98 As Justices of the Supreme Court have contended99 and as empirical data on the behaviors of working journalists100 confirms, when legal structures to protect newsgathering and news publication are absent, certain newsgathering and news publication simply will not occur.

At a time when those who once investigated the news, uncovered corruption, and informed the community conversation are struggling to find financial models that will allow the continuation of those pursuits,101 it seems very risky to also rob them of legal models that support those pursuits. A negative Supreme Court characterization of the press thus might be expected to have a correspondingly negative effect on the operation of the journalistic enterprise and, concomitantly, on the many Americans who consume that journalistic work product.

Less obviously, though, there is another risk at stake. Left unchecked, these trends in press characterization could threaten to impoverish a much wider body of First Amendment rights. The U.S. Supreme Court’s jurisprudential pattern has always been that general speakers and press speakers rise and fall together.102 On the rising side, “[a] sizable amount of vital constitutional doctrine in this country developed as a result of constitutional cases in which mainstream media companies, often newspapers, aggressively fought for fundamental democratic principles that had public benefits beyond the scope of the individual [press] litigants’ successes.”103

---

98. Jones, Media Subpoenas, supra note 8, at 393 (discussing survey data on journalist responses to lapses in legal protection and reporting that they fear “that the inevitable result is a very practical limitation on the watchdog function that most newsroom leaders still see as a vitally important aspect of their work”).
99. See, e.g., Branzburg v. Hayes, 408 U.S. 665, 728 (1972) (Stewart, J., dissenting) (discussing how the lack of legal protection can deter the gathering and publishing of information by the press).
100. See Jones, Media Subpoenas, supra note 8, at 354–74 (describing empirical data on news editors’ reports of the impact on newsgathering practices of a lack of legal protection).
101. See Jones, Post-Newspaper America, supra note 73, at 562–68 (describing the sharp financial decline of American newspapers).
102. West, supra note 25 at 730 (observing that the press “has shared not only its victories with the public but also its defeats”).
103. Jones, Post-Newspaper America, supra note 73, at 571.
In the Glory Days cases, media litigants were common “legal instigators” who brought many cases to the Court that ultimately enhanced the individual liberties of communicative individuals not affiliated with the media.\textsuperscript{104} Thus, for example, in \textit{Richmond Newspapers, Inc. v. Virginia},\textsuperscript{105} “[t]he holding was not a narrow press victory based on media-specific rights. Rather, it was a bold statement on the needs of ‘people in an open society’ and the value of public observation of government proceedings.”\textsuperscript{106} The holding, by its clear terms, was applicable to “everyone” who wishes to invoke the newly announced First Amendment right, and not merely to the positively-characterized members of the press who brought the case that produced the holding.\textsuperscript{107}

The newspapers, at the time, had what it took to get that holding—the financial resources to litigate the case,\textsuperscript{108} the institutional incentive to press for the rights,\textsuperscript{109} and, importantly for the current purposes, the goodwill engendered from decades of positive Court characterizations of the press as a valuable First Amendment entity. This goodwill motivated the Court to take these kinds of cases in the first instance and then gave the Court positive instrumental views of the First Amendment freedoms when it decided the cases. The team for whom the Court was eager to act as cheerleader was the positively-portrayed press. But the true winners in the game were all citizens, who gained the constitutional right to attend a criminal trial as a result of the press-focused decision.

I have written elsewhere about the many times in which this pattern repeats itself in First Amendment law.\textsuperscript{110} The positively-characterized Press Enterprise newspaper was responsible for the Supreme Court announcing that all citizens, not just the press, have a right of access to preliminary hearings and voir dire proceedings.\textsuperscript{111} The positively-characterized Nebraska Press Association\textsuperscript{112} brought the case that gave the Supreme Court the opportunity to make bold statements about the presumptive

\textsuperscript{104} I have written extensively about this elsewhere. For further examples, and for more details on the examples shared here, see Jones, \textit{Post-Newspaper America}, supra note 73, at 571–80 (“These legal instigators . . . were singularly responsible for moving the U.S. Supreme Court to recognize widespread categories of rights that are vital to the nation’s participatory democracy.”).

\textsuperscript{105} 448 U.S. 555 (1980).

\textsuperscript{106} Jones, \textit{Post-Newspaper America}, supra note 73, at 573 & n.65) (quoting \textit{Richmond Newspapers}, 448 U.S. at 572 (“People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.”)).

\textsuperscript{107} \textit{Richmond Newspapers}, 448 U.S. at 575.

\textsuperscript{108} See Jones, \textit{Post-Newspaper America}, supra note 73, at 617–18.

\textsuperscript{109} \textit{Id.} at 613–14.

\textsuperscript{110} See generally id.


\textsuperscript{112} Neb. Press Ass’n v. Stuart, 427 U.S. 539 (1976).
unconstitutionality of governmental prior restraints in all settings, not just settings involving the media.\textsuperscript{113} Indeed, \textit{New York Times v. Sullivan} itself went the distance in constitutionalizing the law of libel through the vehicle of a press entity that the Court characterized as laudable and historically worthy of protection.\textsuperscript{114} Each of these cases—like the others discussed above—is marked by the presence of a body of press-praising rhetoric that helps the Court on its way to a declaration of wider constitutional rights that can now be enjoyed by all speakers.

This pattern—of the Court setting forth a “bedrock of press-supportive dicta on the way to a press-prevailing but all-speaker-protecting conclusion”\textsuperscript{115}—is notable for reasons well beyond those substantive conclusions. It is a pattern that highlights how thoroughly connected the Court’s positive conception of the media has been to the development of wider First Amendment doctrine in this country. And while the positive characterizations of the press have mostly enhanced our broader free-speech rights in the past, the new, negative conception of the media may risk the impoverishment of those wider rights going forward. At a minimum, this downward trend in characterizations is worthy of a broader dialogue than the one that is focused on what the trend means for the media. A myopic focus on the impact that the apparent judicial change of heart might have on the working journalists who are no longer depicted positively is risky, because it disregards the symbiotic nature of press freedoms and speech freedoms. It ignores the power that the positively characterized press has managed to wield on behalf of speakers everywhere and the potentially stark consequences of a retraction of that power. The scholarly conversation therefore must include a recognition that, because the rights of general speakers and press speakers crescendo and de crescendo together, wider First Amendment values that have been enhanced in cases brought by the positively characterized media could be diminished as the Court’s view of the press diminishes.

\textsuperscript{113} Jones, \textit{Press Clause Dicta}, supra note 6, at 710 (noting that “the holding centers on the broad free-speech principle that the government bears a ‘heavy burden’ of justifying any decision to impose a prior restraint on speech); \textit{id.} at 710–11 (“\textit{Nebraska Press Association} is, without question, a precedent that guarantees this freedom from governmental prior restraint regardless of the character of the restrained speaker, rather than a media-focused holding about the contours and applicability of the Press Clause.”).

\textsuperscript{114} \textit{id.} at 711–14.

\textsuperscript{115} \textit{id.} at 713.