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## *ARTICLES*

# FIRST AMENDMENT DISEQUILIBRIUM

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*The Supreme Court has constructed key parts of First Amendment law around two underlying assumptions. The first is that the press is a powerful actor capable of obtaining government information and checking government power. The second is that the executive branch is bound by various internal and external constraints that limit its ability to keep information secret. Judges and legislators have long assumed that these twin forces—an emboldened press and a constrained executive—maintain a rough balance between the press's desire to uncover secrets and the executive's desire to keep information hidden. Landmark First Amendment cases such as the* Pentagon Papers *decision embody this view. Professor Cass Sunstein has described these cases as establishing a "First Amendment equilibrium," one that arises out of the structural competition between the press and the executive. Today, judges and legislators continue to treat the press and the government as equal combatants in these disputes.*

*Yet whatever equilibrium might once have existed between the press and executive branch has been destabilized. The institutional press has*

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*been eviscerated in recent years—hemorrhaging talent, expertise, resources, and legitimacy. Wide swaths of the country now qualify as "news deserts," lacking any local press presence at all. Public trust in the mainstream media has also plummeted. At the same time, many internal checks no longer constrain the ability of the executive branch to guard its secrets. This combination of a hollowed-out press and an insufficiently checked executive has given rise to a First Amendment disequilibrium, unsettling the foundations of this critical segment of constitutional law. This Article describes the causes and consequences of this disequilibrium and argues that recalibration is essential to fostering effective democratic self-governance.*

## INTRODUCTION

In the fall of 1968, a pair of FBI agents visited *New York Times* reporter Earl Caldwell.[1] At the time, Caldwell was among the most prominent journalists in the country. He was the first Black reporter the *Times* assigned to cover Martin Luther King, Jr., and the only journalist on the scene when the civil rights leader was shot.[2] The newspaper had recently assigned him to cover the Black Panther movement, and the FBI agents wanted to know if Caldwell would pass along information about the group. He refused.[3] A year and a half later, a federal prosecutor subpoenaed him to testify before a grand jury about the movement. Again, he refused, arguing that the First Amendment protected the identity of his confidential sources and his eyewitness observations of the group's activities.[4]

The ensuing legal dispute reached the Supreme Court in 1972.[5] In a set of four consolidated cases, Caldwell and two other reporters argued that a qualified constitutional privilege protected them from being compelled to divulge confidential information.[6] Without such protection, the reporters argued, their informational sources would dry up, impairing their ability to keep the electorate informed. The journalists argued that

[1] Josiah Bates, How a Journalist's Refusal to Testify Against the Black Panthers Changed First Amendment Rights, Time (Feb. 28, 2022, 2:41 PM), https://time.com/6149443/earl-caldwell-black-panthers-fbi/ [https://perma.cc/KP5X-L97H].

[2] Id.

[3] Id.

[4] Branzburg v. Hayes, 408 U.S. 665, 675–77 (1972).

[5] Id. at 665. *Branzburg* was a consolidation of four separate cases. In addition to the case involving Caldwell, see id. at 675, there were two cases involving a Kentucky newspaper reporter who reported on individuals making hashish and using illegal drugs. Id. at 667–69. A third involved a television reporter in Massachusetts who obtained information while inside the headquarters of the Black Panthers. Id. at 672–73. The reason the reporters advanced this constitutional claim was that there were no federal or state shield laws available to offer protection. One of the consolidated cases involved a federal grand jury, and there was (and is) no federal shield statute. Id. at 689. One involved a state grand jury in Massachusetts, which had no shield statute at the time. Id. The other two involved a grand jury in Kentucky, whose shield statute was held to be inapplicable. Id. at 668–70.

[6] Id. at 681 ("The heart of the claim is that the burden on news gathering resulting from compelling reporters to disclose confidential information outweighs any public interest in obtaining the information.").

implicit in the constitutional rights of speech and press is a right to gather news and information.[7]

The Supreme Court rejected their privilege claims.[8] In a 5-4 decision, the Court held there is no First Amendment privilege allowing reporters to shield confidential sources in response to a grand jury subpoena.[9] A central assertion the Court made to justify this conclusion was that such a privilege was unnecessary. Justice Bryon White, writing for the majority, noted that the press had flourished for 200 years without a privilege and had proven capable of engaging in its own self-defense. "[T]he press has at its disposal powerful mechanisms of communication and is far from helpless to protect itself from harassment or substantial harm," he wrote.[10] The Court assumed that the press possessed the economic, political, cultural, and social clout needed to protect itself and penetrate government secrecy without judicial assistance.

This is no longer true today. The institutional press has been in free fall for more than two decades.[11] Cycles of layoffs have stripped talent and expertise from newsrooms, and wide swaths of the country now qualify as "news deserts," without any local newspapers and often no local press presence at all to keep communities informed and hold government actors accountable.[12] Meanwhile, public trust in the media has declined

[7] Id. at 680–81, 691–92.

[8] Id. The holding in this case is debated. Much of the confusion stems from a concurrence written by Justice Powell—who served as the majority's fifth vote—which seemed to advocate for a First Amendment balancing test that the majority had expressly rejected. Id. at 709–10 (Powell, J., concurring); see Michele Bush Kimball, The Intent Behind the Cryptic Concurrence That Provided a Reporter's Privilege, 13 Commc'n L. & Pol'y 379, 381–82 (2008) (contending, based on historical research, that Justice Powell intended to support recognition of a qualified reporter's privilege). For years, the lower courts have puzzled over how to interpret the case. See Christina Koningisor, The De Facto Reporter's Privilege, 127 Yale L.J. 1176, 1196–98 (2018) (describing the split among the circuits). More recently, however, the trend among lower courts has been to read the case more narrowly. See, e.g., McKevitt v. Pallasch, 339 F.3d 530, 532 (7th Cir. 2003) (Posner, J.) ("A large number of cases conclude, rather surprisingly in light of *Branzburg*, that there is a reporter's privilege . . . ."); see also RonNell Andersen Jones, Media Subpoenas: Impact, Perception, and Legal Protection in the Changing World of American Journalism, 84 Wash. L. Rev. 317, 346 & n.111 (2009) (suggesting that "media-generous reading[s] [of] *Branzburg*" were in decline).

[9] *Branzburg*, 408 U.S. at 667–68.

[10] Id. at 706.

[11] See infra Section II.A.

[12] Penelope Muse Abernathy, Ctr. for Innovation & Sustainability in Loc. Media, News Deserts and Ghost Newspapers: Will Local News Survive? 8 (June 24, 2020), https://www.usnewsdeserts.com/wp-content/uploads/2020/06/2020_News_Deserts_and_Ghost_Newspapers.pdf [https://perma.cc/87KA-BHCP]; see also Steven Waldman, The Local-

dramatically.[13] Even so, *Branzburg v. Hayes*'s assumptions about press power remain part of the foundational legal backdrop framing the relationship between the executive branch and the press—and, by extension, the public.

This Article reexamines the premises of *Branzburg*, along with those of other landmark cases and critical legislation addressing government control of information. This body of law includes foundational Supreme Court decisions defining the press's right to gather news and access government information. It also includes landmark government transparency and accountability legislation, such as federal and state freedom of information laws.[14]

Revisiting these sources uncovers two key assumptions upon which the government-press legal regime has been built. The first is that the institutional press is a powerful actor capable of asserting its professional interests and checking executive branch overreach at all levels of government—through the courts, via legislation, and by appealing directly to the public in the pages of its own publications.[15] The second is that executive branch officials are bound by various internal and external constraints on their ability to keep information secret.

Judges and legislators have long assumed that the combination of a robust press and a constrained executive would establish a rough balance between the press's desire to uncover secrets and the executive's desire to keep information hidden. Key First Amendment cases from this era, including *Branzburg*, *New York Times Co. v. United States* (*The Pentagon Papers Case*), and *Houchins v. KQED, Inc.*, embody this view.[16] Alexander Bickel famously described this as the "disorderly situation."[17]

News Crisis Is Weirdly Easy to Solve, Atlantic (Aug. 8, 2023), https://www.theatlantic.com/ideas/archive/2023/08/local-news-investment-economic-value/674942/ [https://perma.cc/K33J-RNFA] ("On average, two newspapers close each week. Some 1,800 communities that used to have local news now don't.").

[13] Megan Brenan, Americans' Trust in Media Dips to Second Lowest on Record, Gallup (Oct. 7, 2021), https://news.gallup.com/poll/355526/americans-trust-media-dips-second-lowest-record.aspx [https://perma.cc/R7B8-R9B4].

[14] See infra Section I.B.

[15] This Article uses the term "the executive" to refer to executive officials and agencies at federal, state, and local levels of government. This includes the president and federal agencies; state governors and state agencies; and local elected officials and local agencies, including local law enforcement agencies.

[16] See infra Section I.C.

[17] Alexander Bickel, The Morality of Consent 80 (1975).

Cass Sunstein, in turn, has referred to it as an "equilibrium model of the first amendment."[18]

Both pillars of this constitutional equilibrium have been destabilized in recent years. The power and influence of the institutional press, particularly at state and local levels, has dramatically declined.[19] At the same time, many intra- and intergovernmental checks on the executive branch no longer operate as effective constraints against government secrecy.[20] This combination of a hollowed-out press and an unchecked executive has given rise to a First Amendment disequilibrium—a development that has been largely overlooked by the courts. The collapse of the institutional press at state and local levels and its further consolidation at the national level, together with the unleashing of many intergovernmental constraints on executive branch secrecy, has undermined a cornerstone of First Amendment law. These developments have jeopardized the press's ability to check the executive branch and disseminate truthful information to the public.[21]

[18] Cass R. Sunstein, Government Control of Information, 74 Calif. L. Rev. 889, 890 (1986). The First Amendment equilibrium is not intended to capture all of First Amendment law. It focuses more narrowly on a subset of cases and statutes that establish the legal foundation that governs press-government relations. See id.

[19] See Brenan, supra note 13. Of course, there are exceptions. A handful of institutional media actors and some non-institutional ones continue to uncover secrets that the executive branch would prefer to withhold at the national level. See discussion infra notes 215–21 and accompanying text; see also Azmat Khan, Hidden Pentagon Records Reveal Patterns of Failure in Deadly Airstrikes, N.Y. Times (Dec. 18, 2021), https://www.nytimes.com/interactive/2021/12/18/us/airstrikes-pentagon-records-civilian-deaths.html [https://perma.cc/WZ34-VXQQ] ("Except for the rare instances of revelation and subsequent outcry, the Pentagon's brief published reports on the minority of cases it finds credible are the only public acknowledgment of the air war's civilian toll. The Times's reporting in Iraq, Syria and Afghanistan points to the broader truth."). However, some of these actors have faced serious consequences, including prosecution, for doing so. See, e.g., Press Release, U.S. Dep't of Just., WikiLeaks Founder Julian Assange Charged in 18-Count Superseding Indictment (May 23, 2019), https://www.justice.gov/opa/pr/wikileaks-founder-julian-assange-charged-18-count-superseding-indictment [https://perma.cc/S52X-5SG8]. Further, the ability of media actors to perform a watchdog role at the national level is not matched at the local level. See discussion infra Section II.A.

[20] See infra Section II.B; see also Neal Kumar Katyal, Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within, 115 Yale L.J. 2314, 2316 (2006) ("The first-best concept of 'legislature v. executive' checks and balances must be updated to contemplate second-best 'executive v. executive' divisions.").

[21] In this sense, this Article is in keeping with Tim Wu's influential essay. See Tim Wu, Is the First Amendment Obsolete?, 117 Mich. L. Rev. 547 (2018). In that essay, Wu observes that a core set of First Amendment cases were decided at a time when there was information scarcity and government suppression of dissent was the primary threat to free speech. Id. at 548. He argues that these previous First Amendment holdings do not necessarily hold up under

Existing scholarship fails to fully describe the forces destabilizing this equilibrium or the threat they pose to democratic self-governance. A prominent strand of recent First Amendment scholarship highlights how the Roberts Court's deregulatory turn has contributed to a disordered information ecosystem.[22] Based on this diagnosis, scholars and policymakers have sought cures for these disorders in various sources of law, including antitrust law,[23] consumer protection law,[24] and the laws governing intermediary liability.[25] Yet this body of work has not fully captured the extent to which the nation's information ecosystem is dependent on the body of law—both statutory and constitutional—that defines the rights of the press in the contest for control of information.

Media law scholars have focused more squarely on this legal regime. They have identified the crucial role of legislation in enabling the press to inform the public,[26] recognized the inadequacy of constitutional

the conditions of the digital public sphere today, in which an abundance of cheap and easily manipulated speech threatens the nation's information ecosystem. Id. at 548–49. This Article identifies a similar mismatch between the economic and political conditions under which the major First Amendment press cases were decided and those decided today.

[22] See, e.g., Richard L. Hasen, Cheap Speech and What It Has Done (To American Democracy), 16 First Amend. L. Rev. 200, 216–18 (2018) (describing how First Amendment restrictions on campaign finance laws can facilitate misinformation campaigns); Amanda Shanor, The New *Lochner*, 2016 Wis. L. Rev. 133, 202 (arguing that this deregulatory approach to the First Amendment concentrates power in the hands of a few and "displaces the policy preferences and the mechanisms for intelligent policy-preference development of a broader public with those of a smaller elite"); Ari Ezra Waldman, The Marketplace of Fake News, 20 U. Pa. J. Const. L. 845, 863–65 (2018) (describing how First Amendment protections for false speech limit the effect of consumer protection laws in addressing misinformation); Morgan N. Weiland, Expanding the Periphery and Threatening the Core: The Ascendant Libertarian Speech Tradition, 69 Stan. L. Rev. 1389, 1393–94 (2017) (arguing that "the outward creep of the First Amendment . . . risks undermining the theoretical traditions of the First Amendment itself, especially with respect to listeners' rights and individual autonomy").

[23] See, e.g., Staff of H. Subcomm. on Antitrust, Com., & Admin. L. of the Comm. on the Judiciary, 117th Cong., Investigation of Competition in Digital Markets 13 (Comm. Print 2022).

[24] See, e.g., Callum Borchers, How the Federal Trade Commission Could (Maybe) Crack Down on Fake News, Wash. Post (Jan. 30, 2017, 12:22 PM), https://www.washingtonpost.com/news/the-fix/wp/2017/01/30/how-the-federal-trade-commission-could-maybe-crack-down-on-fake-news/ [https://perma.cc/CDV3-MBNR] (describing how consumer protection laws could be harnessed to attack misinformation campaigns).

[25] See, e.g., Noah Feldman, Free Speech, Libel and the Truth After Pizzagate, Bloomberg (Dec. 16, 2016, 12:24 PM), https://www.bloomberg.com/opinion/articles/2016-12-16/free-speech-libel-and-the-truth-after-pizzagate#xj4y7vzkg [https://perma.cc/WSJ7-8EEF].

[26] David A. Anderson, Freedom of the Press, 80 Tex. L. Rev. 429, 432 (2002) (discussing the importance of nonconstitutional protections for the press).

protections for news-gathering,[27] and emphasized how the fragility of the press compromises its ability to play its watchdog role.[28] Although these scholars have paid close attention to the inadequacy of legal protections for the press, they have not fully examined how the shifting power dynamics in the press-government relationship have contributed to the decay of those legal protections.[29]

This Article turns attention to these dynamics. It addresses the causes and consequences of First Amendment disequilibrium.[30] It also offers

[27] See generally Sonja West, Awakening the Press Clause, 58 UCLA L. Rev. 1025 (2011) (explaining that the Supreme Court does not recognize any independent right or protection arising solely from the Press Clause).

[28] RonNell Andersen Jones, Litigation, Legislation, and Democracy in a Post-Newspaper America, 68 Wash. & Lee L. Rev. 557, 570–71 (2011) (showing how the decline of news-gathering resources is undermining democracy); Luke Morgan, The Broken Branch: Capitalism, the Constitution, and the Press, 125 Pa. St. L. Rev. 1, 6 (2020) (arguing "that the institutional press is critically important in the constitutional structure, and that it is dying for reasons that have nothing to do with intentional censorship by the government and everything to do with market capitalism").

[29] There are important exceptions. See, e.g., Jones, supra note 28, at 559 (arguing that "discussions about the risks that might accompany the death of newspapers have almost entirely ignored the ramifications for development and enforcement of the law"); David McCraw & Stephen Gikow, The End to an Unspoken Bargain? National Security and Leaks in a Post-*Pentagon Papers* World, 48 Harv. C.R.-C.L. L. Rev. 473, 473–74 (2013) (describing the relationship between the press and the federal executive branch in the context of national security disclosures).

[30] In examining the press side of the balance, we build on the work of researchers who have documented the causes of the economic decline of the institutional press. Researchers, for example, have chronicled the dire financial consequences of the rise of online advertising and the decoupling of ad revenue from newspaper publishing. See, e.g., James T. Hamilton, Democracy's Detectives: The Economics of Investigative Reporting 17 (2016); Martha Minow, Saving the News 19–20, 34–35 (2021); Jones, supra note 28, at 562–63, 568; RonNell Andersen Jones & Sonja R. West, The Fragility of the Free American Press, 112 Nw. U. L. Rev. 567, 576–78 (2017). We also look to the impact the economic decline of the institutional press has had on the democratic process. See, e.g., Joshua P. Darr, Matthew P. Hitt & Johanna L. Dunaway, Newspaper Closures Polarize Voting Behavior, 68 J. Commc'n 1007, 1008 (2018) (showing that when a local newspaper closes, voting becomes more polarized); Sam Schulhofer-Wolf & Miguel Garrido, Do Newspapers Matter? Short-Run and Long-Run Evidence from the Closure of *The Cincinnati Post*, 26 J. Media Econ. 60, 61 (2011) (finding that in the wake of a newspaper closure, voter turnout and campaign spending fell); Pengjie Gao, Chang Lee & Dermot Murphy, Financing Dies in Darkness? The Impact of Newspaper Closures on Public Finance 4–5, 21 (Hutchins Ctr. on Fiscal & Monetary Pol'y at Brookings, Working Paper No. 44, 2018), https://www.brookings.edu/wp-content/uploads/2018/09/WP44.pdf [https://perma.cc/XKA5-3EUK] (finding that, in the wake of a newspaper closure, the salaries of top government officials rose). Finally, we incorporate insights from those researchers who have examined various pathologies of democratic discourse in the social media era, including the rise of misinformation and political polarization, and demonstrated how this rise corresponds with a loss of public confidence in the press as an arbiter of truth.

remedies designed to aid the press in combatting government secrecy, informing the electorate, and checking governmental abuses of power. Revisiting this legal regime reveals how much of the nation's information infrastructure has been constructed around a set of factual assumptions about the press and the government that no longer hold true. This insight, in turn, opens up new paths for reforming key parts of the public sphere.

The Article proceeds in four parts. Part I describes how the Supreme Court and legislatures of the 1960s and '70s enshrined into law a "First Amendment equilibrium" that continues to set the terms of the struggle between the press and the executive branch over control of information. It examines the growing power of the press and the adoption of various constraints on the executive's control of information in the wake of the Vietnam War and Watergate.[31] It then maps the ways that assumptions about both the strength of the press and the constraints on government have been baked into the current legal regime. It traces these two assumptions throughout the major press cases of this era, as well as through the construction of the major transparency statutes and intergovernmental checks enacted at both the federal and state levels in this period.

Part II examines the current state of disequilibrium between the government and the press. It describes the collapse of press power and the erosion of many Watergate-era intergovernmental constraints. It then traces the impact of this disequilibrium on various parts of the law, including the law governing access to national security secrets, the protection of confidential sources, and the development of constitutional and statutory rights of information access. In doing so, it also explores the

See, e.g., Hunt Allcott & Matthew Gentzkow, Social Media and Fake News in the 2016 Election, 31 J. Econ. Persps. 211, 212–13 (2017) (evaluating the consumption of fake news on social media platforms prior to the 2016 presidential election); Jane R. Bambauer, Snake Oil Speech, 93 Wash. L. Rev. 73, 83 (2018) (arguing in favor of greater government intervention to regulate fake speech); Caroline Mala Corbin, The Unconstitutionality of Government Propaganda, 81 Ohio St. L.J. 815, 820 (2020) (proposing that the government violates the speech clause of the First Amendment by spreading false information to citizens); Hasen, supra note 22, at 204–05 (describing the role that the decline of newspapers and the rise of social media has played in the spread of misinformation during election campaigns); Helen Norton, The Government's Lies and the Constitution, 91 Ind. L.J. 73, 74–75 (2015) (exploring constitutional limits on the government's authority to lie).

[31] See Jonathan M. Ladd, Why Americans Hate the Media and How It Matters 6 (2012) ("The existence of an independent, powerful, widely respected news media establishment is an historical anomaly. Prior to the twentieth century, such an institution had never existed in American history.").

extent to which obsolete assumptions about power dynamics and dependencies within the government-press relationship permeate First Amendment theory in a manner that thwarts today's press from playing its constitutionally assigned role as government watchdog and enabler of democratic self-governance.

Part III surveys potential critiques of the First Amendment equilibrium model, including the views that this equilibrium is undesirable or unimportant, or that it was a fiction from the start. Part IV then concludes with potential remedies to the current disequilibrium. It asks how we might recalibrate the equilibrium destabilized by the collapse of key segments of the press. It argues that there are two central paths forward: fixing the press, so that there is sufficient public oversight of government; and fixing the law, so that the distortions caused by the press's decline are minimized.

## I. FIRST AMENDMENT EQUILIBRIUM

### *A. The Rise of the Press*

The drafters of the Constitution believed that a free press was essential to the formation of an informed citizenry that could engage in democratic self-governance.[32] Prior to the Revolution, the jury's acquittal of John

[32] See, e.g., Anuj C. Desai, The Transformation of Statutes into Constitutional Law: How Early Post Office Policy Shaped Modern First Amendment Doctrine, 58 Hastings L.J. 671, 674 (2007) (explaining that postal subsidies for newspapers illustrated the understanding of the importance of the press in forming national identity); Matthew L. Schafer, An American Freedom: The Intelligentsia and Freedom of the Press after Blackstone, 127 Pa. St. L. Rev. 455, 501–03 (2023) (discussing evolving notions of press freedom in the Founding and Reconstruction eras and refuting the notion, expressed by William Blackstone, that freedom of the press consisted merely of freedom from prior restraint); Sonja R. West, Favoring the Press, 106 Calif. L. Rev. 91, 109–10 (2018) (providing evidence of the Founding generation's "early reverence for the unique structural role of the press," which was often manifested in "favoritism of the press"). But see Leonard W. Levy, Legacy of Suppression: Freedom of Speech and Press in Early American History 13–14 (1960) (contending that the Framers intended the First Amendment merely to forbid prior restraints on the press). If the purpose of this Article were to argue for more expansive press protections rooted in the First Amendment, a more expansive "originalist" account might be thought necessary. Such an account would need to focus not only on the Framers' understanding of the role of the press and pamphleteers in both the Revolutionary and Reconstruction eras, but also on their understanding of the constraints on executive branch malfeasance. See, e.g., Katherine Shaw, Beyond the Bully Pulpit: Presidential Speech in the Courts, 96 Tex. L. Rev. 71, 80–83 (2017) (outlining the Framers' concerns about demagoguery by the executive branch). However, this Article is largely focused on providing the necessary background to understand the emergence of a

Peter Zenger for seditious libel in 1735 signaled that the colonists considered themselves free to criticize those who governed them.[33] And printed pamphlets published in the run-up to the Revolutionary War played a pivotal role in galvanizing support for American freedom.[34] The role of these newspapers and pamphlets in securing American independence doubtless influenced the Framers of the Constitution in their decision to enshrine press freedom[35]—"the great Bulwark of Liberty"[36]—into the Bill of Rights.[37]

Despite this history, the Supreme Court did not recognize meaningful legal protections for the press until the twentieth century,[38] and "media law" only emerged as a recognized field in the past fifty years.[39] The Supreme Court did not decide its first major press case until 1931,[40] and the bulk of cases defining the constitutional contours of press freedom

distinctive body of constitutional law protecting press freedom, to elucidate the assumptions underlying that law, and to suggest mostly nonconstitutional reforms to support the role formerly played by institutional press actors in checking government overreach, particularly within the executive branch. Our focus is on the assumptions embedded within the existing legal doctrine.

[33] Indeed, one of the Founders responsible for drafting much of the Constitution described the verdict as "the germ of American freedom, the morning star of that liberty which subsequently revolutionized America." William Lowell Putnam, John Peter Zenger and the Fundamental Freedom 4 (1997).

[34] See Minneapolis Star & Trib. Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 583–84 (1983) ("The role of the press in mobilizing sentiment in favor of independence was critical to the Revolution."); see also Joanne B. Freeman, Affairs of Honor: National Politics in the New Republic, at xxi–xxii (2001) (discussing the prevalence and political significance of broadsides, newspapers, and pamphlets in early American society).

[35] See *Minneapolis Star*, 460 U.S. at 583–84.

[36] Both James Madison and the 1776 Virginia Declaration of Rights employed this phrase. Virginia Declaration of Rights (George Mason's Draft) § 11, Document Bank of Va., https://edu.lva.virginia.gov/dbva/items/show/184 [https://perma.cc/EDM6-3AYB] (last visited Oct. 19, 2023); 1 Annals of Cong. 451 (1789) (Joseph Gales ed., 1790). But its origin may lie in *Cato's Letters*, an influential set of essays published in the colonies between 1720 and 1723. See Thomas Gordon, Of Freedom of Speech: That the Same Is Inseparable from Publick Liberty (1720), *reprinted in* 1 Cato's Letters; or, Essays on Liberty, Civil and Religious, and Other Important Subjects 96, 100 (W. Witkins, T. Woodward, J. Walthoe & J. Peele eds., 1737).

[37] David A. Anderson, The Origins of the Press Clause, 30 UCLA L. Rev. 455, 533–34 (1983).

[38] See Near v. Minnesota ex rel. Olson, 283 U.S. 697, 722–23 (1931) (striking down a prior restraint as a violation of press freedom).

[39] Marc A. Franklin, David A. Anderson, Lyrissa C. Barnett Lidsky & Amy Gajda, Media Law: Cases and Materials 19 (2016).

[40] *Near*, 283 U.S. at 697.

were decided in the 1960s, '70s, and '80s.[41] The slow development of the law of press freedom stems partly from the fact that the First Amendment applied only to the federal government until 1925.[42] Yet the changing nature of the press throughout the nineteenth and early twentieth centuries also helps explain why a distinctive body of constitutional press law took so long to emerge.

Although the Founders had articulated a powerful conception of the role of a free press in the new nation, newspaper printing remained a small, local operation for decades after the nation's Founding. The publication of inexpensive "penny papers" in the 1830s marked the start of investigative reporting.[43] But it wasn't until the rise of yellow journalism in the late 1800s, when figures like Joseph Pulitzer and William Randolph Hearst began selling cheap and accessible newspapers filled with salacious gossip and jingoistic rhetoric, that the first media empires were established.[44]

This era also marked the start of journalism as a modern profession. Newspapers began to employ a more reliable stable of writers to fill their pages.[45] By the early 1900s, the first journalism schools emerged within

[41] See generally Franklin et al., supra note 39 (discussing the development of media law and press freedom). We are defining this canon of "press cases" to include those that (i) involve a member of the institutional or legacy media as either a plaintiff or defendant, and/or (ii) involve an issue or right central to the press's journalistic operations or purposes. The Press Clause itself is not limited to these institutional media actors; its protections apply to everyone. See, e.g., Associated Press v. NLRB, 301 U.S. 103, 132–33 (1937) ("The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others."). Yet in practice, it is usually professional journalists who work to vindicate these rights. See Jones, supra note 28, at 559–60. And a key set of First Amendment cases reflects this reality. The Court frequently acknowledges that it is the institutional press who will be most affected by its decisions. See, e.g., Branzburg v. Hayes, 408 U.S. 665, 699 (1972) (defending the denial of a First Amendment privilege for confidential press sources on the grounds that "[t]he existing constitutional rules have not been a serious obstacle to either the development or retention of confidential news sources by the press"); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 573 (1980) (acknowledging that the press functions as "surrogates for the public" and that "[w]hile media representatives enjoy the same right of access as the public [to attend a trial], they often are provided special seating and priority of entry so that they may report what people in attendance have seen and heard").

[42] See Gitlow v. New York, 268 U.S. 652, 666 (1925).

[43] Michael Schudson, Question Authority: A History of the News Interview in American Journalism, 1860s–1930s, 16 Media, Culture & Soc'y 565, 565 (1994).

[44] Ken Gormley, 100 Years of Privacy, 1992 Wis. L. Rev. 1335, 1350–51.

[45] Anderson, supra note 26, at 447.

universities and began to train reporters.[46] Roughly contemporaneously, public service journalism also surged for a time in the early twentieth century before waning again after World War I.[47] And in the first half of the twentieth century, new technologies—first radio, and later television—emerged as powerful new mediums, even though they were dependent on government regulation for their operation.[48]

As a result of these developments, the media became a more cohesive and recognizable industry with a growing set of shared professional norms.[49] It also grew more profitable. Total revenue of U.S. newspapers grew steadily in the decades that followed, from around five billion dollars in 1960 to over twenty billion dollars by 1980.[50] Network news began to expand as well.[51] And as televisions became affordable to the middle class, new stations sprang up to service these new markets.[52] Walter Cronkite began broadcasting the CBS *Nightly News* in 1962, and his show soon reached an average of nearly thirty million viewers per night.[53]

[46] Id. Perhaps not coincidentally, "[t]he decade between 1902 and 1912 is generally regarded as the heyday of muckraking, the 'golden age of public service journalism.'" Mark Feldstein, A Muckraking Model: Investigative Reporting Cycles in American History, 11 Harv. Int'l J. Press/Pol. 105, 109 (2006).

[47] See Christopher B. Daly, How Woodrow Wilson's Propaganda Machine Changed American Journalism, Smithsonian Mag. (Apr. 28, 2017), https://www.smithsonianmag.com/history/how-woodrow-wilsons-propaganda-machine-changed-american-journalism-180963082/ [https://perma.cc/7CML-7DQB].

[48] See Tim Wu, Telecommunications Regulation, *in* 5 Oxford Int'l Encyclopedia of Legal Hist. 95, 96–97 (2009) (describing the enactment of the Radio Act of 1927 and the Communications Act of 1934, which together granted the FCC authority to regulate radio, telegraph, telephone, and eventually broadcast and cable television); Anderson, supra note 26, at 436–38; R.H. Coase, The Federal Communications Commission, 2 J.L. & Econ. 1, 2–4 (1959) (describing the need for government regulation to prevent interference with ship-to-shore and ship-to-ship commercial radio communication and broadcasting station signal interference).

[49] Anderson, supra note 26, at 448.

[50] Newspaper Fact Sheet, Pew Rsch. Ctr. (June 29, 2021), https://www.pewresearch.org/journalism/fact-sheet/newspapers/ [https://perma.cc/RX2Q-SD2P].

[51] See Marc Gunther, The Transformation of Network News, Nieman Reps., Summer 1999 Special Issue, at 21–22, https://niemanreports.org/articles/the-transformation-of-network-news/ [https://perma.cc/QF48-S2GD].

[52] See Charles L. Ponce de Leon, That's the Way It Is: A History of Television News in America 5–15 (2015) (contending that in the era of broadcast journalists such as Walter Cronkite and Edward R. Murrow, citizens treated the evening news broadcast as an authoritative source of information).

[53] Karlyn Bowman, The Decline of the Major Networks, Forbes (July 27, 2009, 12:01 AM), https://www.forbes.com/2009/07/25/media-network-news-audience-opinions-columnists-walter-cronkite.html?sh=17c4cf2547a5 [https://perma.cc/C54X-NM9L].

With the media's growing financial power came increased political clout, as well as a more complex and adversarial relationship with the government. Throughout the 1960s and '70s, government officials continued to rely on the press to convey their views and priorities to the public.[54] At the same time, as the Vietnam War unfolded, the press grew increasingly skeptical of government messaging and more willing to push back against government narratives.[55] Government-press relations devolved further under President Nixon, who viewed the media as especially hostile to him and his policy goals.[56]

The late 1960s and '70s also saw unprecedented investigative efforts. This included Bob Woodward and Carl Bernstein's landmark investigation into the Watergate scandal.[57] It also included deep and sustained reporting on the failures and horrors of the Vietnam War.[58] The 1970s were a high-water mark of investigative reporting,[59] marking a culmination of the "new muckraking age" of the 1960s during which "crusading journalists challenged segregation, the Vietnam War, political corruption, and corporate malfeasance."[60] This correlated with a rise in public confidence and faith in the press: a Gallup poll from the mid-1970s found that sixty-eight to seventy-two percent of Americans expressed trust in the mass media.[61]

This is not to suggest that this was a true "golden age" for the press. The institutional media was plagued by deep flaws, controlled by a small

[54] See Jones & West, supra note 30, at 582–83.

[55] For a first-hand account of journalists' changing perception of their own roles and responsibilities throughout the course of the Vietnam War, see Neil Sheehan, A Bright Shining Lie: John Paul Vann and America in Vietnam 314–21 (1988).

[56] Michael Schudson, The Fall, Rise, and Fall of Media Trust, Colum. Journalism Rev. (Mar. 6, 2019), https://www.cjr.org/special_report/the-fall-rise-and-fall-of-media-trust.php [https://perma.cc/P52D-5HAW].

[57] *Time* magazine declared 1974 "The Year of the Muckrake." James L. Aucoin, The Evolution of American Investigative Journalism 117–19 (2005).

[58] See, e.g., Sheehan, supra note 55, at 314–21 (discussing how the press exposed deception by high-level military officials regarding the true status of the war); Jared Malsin, Seymour Hersh on My Lai and the State of Investigative Journalism, Colum. Journalism Rev. (Apr. 1, 2015), https://www.cjr.org/q_and_a/seymour_hersh_mai_lai.php [https://perma.cc/4U5H-5EDT] (looking back on Hersh's uncovering of the My Lai massacre).

[59] Leonard Downie, Jr., Forty Years After Watergate, Investigative Journalism Is at Risk, Wash. Post (June 7, 2012, 4:03 PM), https://www.washingtonpost.com/opinions/forty-years-after-watergate-investigative-journalism-is-at-risk/2012/06/07/gJQArTzlLV_story.html [https://perma.cc/SXP6-9CW4].

[60] Feldstein, supra note 46, at 111.

[61] Brenan, supra note 13.

cadre of mostly white men who produced content that reflected the concerns and interests of a narrow segment of the nation's population.[62] The small numbers of Black and female reporters at this time were "programmatically excluded" from professional and social life.[63] Racism and sexism were rampant in newsrooms at the time.[64]

Even so, the press's power continued to expand through the 1960s and '70s.[65] Print and broadcast news grew increasingly profitable, and public faith in the institutional media persisted. This trend continued into the early 2000s, when the rise of the internet and a variety of related economic, political, and cultural forces combined to create a cascading set of challenges.

### *B. A Constrained Executive*

Even as the institutional press grew larger, wealthier, and more powerful throughout the post-Vietnam era, the federal government became more politically and legally constrained in its ability to conceal its policy decisions and actions from the public. A series of scandals and policy failures throughout the 1950s, '60s, and '70s—including the failures of Vietnam, the Watergate investigation, and the civil rights abuses committed by the FBI under J. Edgar Hoover—culminated in increased pressure to curtail executive secrecy and impose new constraints against government overreach and abuse.[66] While this is part of a larger story, one that involves the changing role of the president and

[62] See, e.g., U.S. Nat'l Advisory Comm'n on Civ. Disorders, Report of the National Advisory Commission on Civil Disorders 211 (1968) (noting that the media has been "shockingly backward" in hiring and promoting Black journalists).

[63] Louis Menand, When Americans Lost Faith in the News, New Yorker (Jan. 30, 2023), https://www.newyorker.com/magazine/2023/02/06/when-americans-lost-faith-in-the-news [https://perma.cc/R523-BUCS]. The Gridiron Club, an important social club for journalists in Washington, D.C., had members perform in blackface in the 1950s and didn't allow women to enter until 1972. Id.

[64] See, e.g., id. See generally Lynn Povich, The Good Girls Revolt: How the Women of *Newsweek* Sued Their Bosses and Changed the Workplace (2012) (describing the first class-action lawsuit brought by female reporters alleging workplace discrimination).

[65] See, e.g., Keven Lerner, *(MORE)* Guided Journalists During the 1970s Media Crisis of Confidence, Colum. Journalism Rev. (May 10, 2018), https://www.cjr.org/the_profile/more-journalism-review.php [https://perma.cc/A2J7-2XRT] (describing how, in some ways, journalism was at its zenith in the 1970s).

[66] See William C. Banks & M.E. Bowman, Executive Authority for National Security Surveillance, 50 Am. U. L. Rev. 1, 31–35 (2000); Matthew C. Waxman, National Security Federalism in the Age of Terror, 64 Stan. L. Rev. 289, 298–301 (2012).

the growth of the administrative state,[67] two major strands of reforms affected government-press relations during this time.

First, the 1960s and '70s saw various legislative efforts to peel back excessive government secrecy and allow the public increased access to government information. This included the Freedom of Information Act ("FOIA"), enacted in 1966 to provide the public with a private right of access to federal agency records.[68] It also included amendments to laws enacted in the wake of Watergate to allow for more robust judicial oversight of the agencies' classification authority.[69] And it included a variety of other federal transparency laws, such as the 1972 Federal Advisory Committee Act, which mandated open meetings and other reporting requirements on certain federal committees, and the 1976 Government in the Sunshine Act, which required federal agencies to open certain meetings more broadly.[70]

Similar reforms were enacted at the state and local government level as well. By the end of the 1970s, dozens of states had passed transparency statutes that granted public access to state and local government records.[71] And by 1976, every state had enacted an open meetings law as well.[72] This collection of statutory transparency mechanisms aimed to constrain federal, state, and local executive secrecy power.

A second set of statutory reforms during this period involved intergovernmental checks on executive branch secrecy. Against the backdrop of broader reform efforts, Congress focused in particular on law enforcement and national security.[73] Disclosure of the intelligence abuses of the early and mid-Cold War period culminated in the Church Committee investigations, along with an array of new oversight

[67] See generally Elena Kagan, Presidential Administration, 114 Harv. L. Rev. 2245 (2001) (discussing the transformation of the relationship between the president and the administrative state).

[68] Freedom of Information Act, 5 U.S.C. § 552.

[69] EPA v. Mink, 410 U.S. 73, 81–84 (1973), *superseded by statute*, Act of Nov. 21, 1974, Pub. L. No. 93-502, 88 Stat. 1561 (1974). For a discussion of this history, see Margaret B. Kwoka, Deferring to Secrecy, 54 B.C. L. Rev. 185, 198–99 (2013).

[70] Federal Advisory Committee Act, Pub. L. No. 92-463, 86 Stat. 770 (1972); Government in the Sunshine Act, Pub. L. No. 94-409, 90 Stat. 1241 (1976) (codified as amended, in relevant part, at 5 U.S.C. § 552b).

[71] Years That State FOIA Laws Were Enacted, Ballotpedia, https://ballotpedia.org/Years_that_state_FOIA_laws_were_enacted [https://perma.cc/BKR6-YDXL] (last visited Oct. 16, 2023).

[72] Jones, supra note 28, at 582 & n.123 (citing Sharon Hartin Iorio, How State Open Meeting Laws Now Compare with Those of 1974, 62 Journalism Q. 741, 741 (1985)).

[73] See Waxman, supra note 66, at 298–301.

mechanisms.[74] For example, Congress established permanent intelligence oversight committees during this era.[75] It also enacted the Foreign Intelligence Surveillance Act ("FISA"), which imposed new procedural constraints on the intelligence agencies' ability to conduct domestic surveillance.[76]

Further, the executive branch adopted voluntary intra-branch reforms, such as internal inspectors general for national security agencies.[77] It also issued executive orders limiting the scope of intelligence-gathering activities.[78] Some of these reforms were specifically intended to constrain government power in relation to the press. Among the most significant was a set of nonbinding guidelines issued by the Department of Justice in 1970 limiting federal prosecutors' power to subpoena journalists.[79]

Again, state and local governments were swept up by these same reformist currents. But they responded differently. For example, many state and local police departments were implicated in the intelligence abuses of the 1950s and '60s.[80] Yet instead of ramping up oversight like the federal government did, many local governments exited the space by shutting down their federal-local intelligence cooperatives altogether.[81] Other state and local actors did adopt intergovernmental checks, but they often assumed a different form. State legislatures imposed new restrictions on data collection by local agencies, for example, while judges relied on judicial consent decrees to tighten intergovernmental oversight over police.[82]

Such reforms had the dual effect of constraining federal, state, and local executive agencies and pushing additional information into the public

[74] See Select Comm. to Study Governmental Operations, Alleged Assassination Plots Involving Foreign Leaders, S. Rep. No. 94-465, at 1 (1975) (describing the findings and conclusions of the Church Committee).

[75] See generally Cong. Rsch. Serv., R45421, Congressional Oversight of Intelligence: Background and Selected Options for Further Reform (2018), https://www.everycrsreport.com/files/20181204_R45421_c39a642c18031691d7a0766d221f5bd5463e1daa.pdf [https://perma.cc/PKZ6-J9TV] (reviewing the history of congressional oversight beginning in the 1970s).

[76] See Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, §§ 102–103, 92 Stat. 1783, 1786–88.

[77] Shirin Sinnar, Protecting Rights from Within? Inspectors General and National Security Oversight, 65 Stan. L. Rev. 1027, 1032–36 (2013).

[78] Waxman, supra note 66, at 300.

[79] Branzburg v. Hayes, 408 U.S. 665, 706–07, 707 n.41 (1972) (describing the adoption of media guidelines). The guidelines were then codified in 1973. 28 C.F.R. § 50.10 (2016).

[80] Waxman, supra note 66, at 298.

[81] Id. at 300–01.

[82] Id. at 300.

sphere. Intergovernmental checks like agency inspectors general, congressional oversight committees, and judicial consent decrees had the intended effect of hamstringing executive secrecy powers and forcing information into the light.[83] And public records statutes stripped agencies of their power to keep information hidden and offered a mechanism for journalists to investigate government conduct. In this way, these reforms altered the balance of power between the government and the press—and, by extension, the public.

### *C. Government-Press Equilibrium*

This conception of government-press relations found expression in the law in various ways. Most visibly, many of the Court's press-related First Amendment decisions in this era are based in part on the notion that the press is a powerful institution capable of protecting itself against government incursions, especially incursions by the executive branch.[84] The statutory transparency mechanisms enacted at this time also reflect these dual assumptions, with journalist requesters envisioned as the primary users of these statutes.[85] This Section tracks the influence of this equilibrium across various segments of the law, including the construction of national security secrecy, the protection of confidential sources, and the development of constitutional and statutory rights of access.

[83] Whether such reforms have been effective in these goals is open to debate. For critiques of transparency law efforts, see, e.g., Mark Fenster, The Opacity of Transparency, 91 Iowa L. Rev. 885, 914–36 (2006) (describing various errors in the assumptions that undergird transparency statutes); Margaret B. Kwoka, FOIA, Inc., 65 Duke L.J. 1361, 1414–27 (2016) (describing how FOIA has been coopted by corporate users and interests); David E. Pozen, Transparency's Ideological Drift, 128 Yale L.J. 100, 156–59 (2018) (describing how transparency laws are subject to corporate capture and anti-public sector bias). For critiques of intergovernmental accountability checks, see, e.g., Samuel J. Rascoff, Domesticating Intelligence, 83 S. Cal. L. Rev. 575, 588–603 (2010) (describing the "governance vacuum" in domestic intelligence operations); Sinnar, supra note 77, at 1055–58 (describing flaws in the agency inspector general regime).

[84] See Jonathan Peters, Survey: Editors See Media Losing Ground as Legal Advocate for 1st Amendment, Colum. Journalism Rev. (Apr. 21, 2016), http://www.cjr.org/united_states_project/knight_survey_editors_first_amendment.php [https://perma.cc/XG2Q-SKP7] (describing the role that newspapers have historically played in enforcing constitutional and statutory access rights).

[85] See, e.g., Kwoka, supra note 83, at 1364 (describing how the drafters of FOIA envisioned journalists to be the primary users of the law).

*1. National Security Secrecy*

Arguably the clearest illustration of the First Amendment equilibrium is the legal regime that governs access to national security secrets. In 1969, U.S. military analyst Daniel Ellsberg copied thousands of classified pages from a secret government study about the Vietnam War.[86] He then handed over these documents—the "Pentagon Papers"—to the *New York Times*.[87] The *Times* ran its first set of articles based on the leaked reports on June 13, 1971.[88] Two days later, the government obtained a temporary restraining order enjoining the newspaper from publishing any further stories based on the classified material.[89] The *Washington Post* then started publishing information from the reports, and the government sought a second injunction.[90] The consolidated cases then made their way up to the Supreme Court.

The Court issued its decision in *New York Times Co. v. United States* (*The Pentagon Papers Case*) on June 30, less than three weeks after the first story based on the papers was printed.[91] In a four-sentence-long per curiam opinion, the Court held that the government had not met its "heavy burden of showing justification for the imposition of such a restraint."[92] It then allowed the publication of the Pentagon Papers articles to proceed. The opinion affirmed that prior restraints are presumptively unconstitutional, even when national security is at stake.[93] Underscoring the exceptional importance of the case, each member of the Court wrote separately.[94]

The *Pentagon Papers* case profoundly influenced subsequent struggles between the press and the executive branch. Instead of deciding as a

[86] Daniel Ellsberg, Secrets: A Memoir of Vietnam and the Pentagon Papers 299 (2002).

[87] Id. at 374–75.

[88] Id. at 382–83, 386.

[89] United States v. N.Y. Times Co., 328 F. Supp. 324, 325 (S.D.N.Y.), *remanded*, 444 F.2d 544 (2d Cir.) (en banc), *rev'd*, 403 U.S. 713 (1971).

[90] The district court denied the second injunction and an appeals court affirmed. United States v. Wash. Post Co., 446 F.2d 1327, 1328 (D.C. Cir. 1971), *aff'd sub nom.* N.Y. Times Co. v. United States (*The Pentagon Papers Case*), 403 U.S. 713 (1971).

[91] *The Pentagon Papers Case*, 403 U.S. at 713–14 (per curiam).

[92] Id. at 714 (quoting Org. for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971)).

[93] Id.

[94] Id. (Black, J., concurring); id. at 720 (Douglas, J., concurring); id. at 724 (Brennan, J., concurring); id. at 727 (Stewart, J., concurring); id. at 730 (White, J., concurring); id. at 740 (Marshall, J., concurring). The decision was not unanimous. Justices Burger, Harlan, and Blackmun dissented. Id. at 748 (Burger, C.J., dissenting); id. at 752 (Harlan, J., dissenting); id. at 759 (Blackmun, J., dissenting).

normative matter what national security information should or should not be protected, the Court set up a content-neutral battle of the wills.[95] Under this regime, the executive has sweeping authority to keep national security information secret—including an extensive information classification system and heavy criminal sanctions for those who violate it.[96] Yet once the press does obtain national security information, the government can do little to prevent its publication.[97] The assumption underlying this regime is that when the press and the government do compete over information, the two adversaries will be evenly matched.

Scholar Alexander Bickel referred to this resolution as the "disorderly situation,"[98] one in which the Court had defined the "rules of contest" rather than "the result."[99] He found this approach had much to recommend it, reasoning that this "adversary game between press and government" prevented either one from assuming too much informational control.[100] In the "pulling and hauling" between government and press, he argued, "lies the optimal assurance of both privacy and freedom of information."[101]

Cass Sunstein, in turn, described this as the "equilibrium theory of the first amendment."[102] In its ideal form, he explained, the approach ensures that "the government seeks to maintain secrecy" while "the press seeks

[95] The Court left open the possibility that the government's interest in the most serious cases might be sufficient to justify a prior restraint. Id. at 714 (per curiam). The disclosure of the Pentagon Papers also had enormous political ramifications. It spurred "huge controversy about whether the government—and the Johnson administration in particular—had intentionally misled the American public about the war." David Rudenstine, The Day the Presses Stopped 5 (1996).

[96] See McCraw & Gikow, supra note 29, at 476–77 (describing the breadth of the federal government's secrecy powers). The decision left open the question of whether the First Amendment protects members of the press from criminal prosecution for disclosing unauthorized government information. See *The Pentagon Papers Case*, 403 U.S. at 730 (Stewart, J., concurring) (noting that the government "has the power to enact specific and appropriate criminal laws to protect government property and preserve government secrets" and that Congress had already passed several such laws "of very colorable relevance to the apparent circumstances of these cases").

[97] Subsequent case law from this era made clear that the press has expansive authority to publish any government information that it acquires, even outside of the national security context. See Landmark Commc'ns, Inc. v. Virginia, 435 U.S. 829, 844–46 (1978) (holding that the First Amendment prohibits criminal sanctions against a newspaper for publishing truthful information regarding confidential government proceedings).

[98] Bickel, supra note 17, at 80.

[99] Id. at 80–81.

[100] Id.

[101] Id. at 86.

[102] Sunstein, supra note 18, at 899.

disclosure," and "the resulting system will work, as if by an invisible hand, to benefit the public as a whole."[103] He compared it to the system of checks and balances created by the tripartite separation of powers among the branches.[104]

Unlike Bickel, however, Sunstein was more skeptical about the effectiveness of this approach. He questioned whether the press and the government did in fact operate as adversaries, and he challenged the practical administrability of the equilibrium model.[105] Yet both scholars agreed that under this regime, the Court had abdicated its role in mediating these secrecy disputes, instead allowing the government and the press to battle it out among themselves.[106]

What is often overlooked in this debate, however, is the second part of this equilibrium—the role of government restraints.[107] The Court's approach to national security secrecy assumes that the press operates as an equal adversary—that it has the resources and will to ferret out national security secrets and then withstand the government's wrath once it publishes them.[108] But it also assumes that the government will be forced to proceed with a certain amount of restraint—that it will abide by the rules of the "disorderly situation" and stand by as leaked national security secrets are splashed across the newspaper's front page.[109] Both assumptions now rest upon shaky grounds,[110] and their instability threatens the broader regime of executive branch oversight—especially at the state and local levels.

[103] Id.

[104] Id.; see also Bickel, supra note 17, at 87 ("Madison's conception of the separation and diffusion of powers was intragovernmental, but the First Amendment, as the *Pentagon Papers* case demonstrated, extends it beyond government, so that it prevails not only among the institutions of government but also between them and the private sector.").

[105] Sunstein, supra note 18, at 904–20.

[106] As *New York Times* lawyers David McCraw and Stephen Gikow have explained, for many years the press and the government successfully resolved these disputes themselves through an informal system of negotiations. McCraw & Gikow, supra note 29, at 473–74.

[107] Bickel notes generally that the system relies on "government's self-restraint and self-discipline to keep the drive for secrecy within bounds." Bickel, supra note 17, at 81. But he doesn't explain the specifics of how that self-restraint takes shape.

[108] See discussion infra Subsection II.C.1.

[109] See discussion infra Subsection II.C.1.

[110] See discussion infra Section II.C.

*2. Confidential Sources*

The *Pentagon Papers* decision confirmed that the government cannot stop the press from publishing classified information obtained without official authorization. The following year, in *Branzburg v. Hayes*, the Court addressed a related issue: whether the government could compel journalists to reveal their confidential sources.[111] The press was less successful this time around. The Court declined to recognize a First Amendment privilege that would allow reporters subpoenaed by the government to withhold their source's identity.[112] In doing so, the Justices again constructed their case around baseline assumptions about both the government and the press.

First, the Court assumed that journalists didn't need the judicial branch to step in because it had "powerful mechanisms of communication" to "protect itself" without further help from the courts.[113] The implication was that reporters could always make their case directly to the public in the pages of their own publications—and that when they did so, the public would be inclined to listen and push back against government overreach.

This assumption that the press could engage in self-help surfaced elsewhere in the opinion as well. The Court also wrote that the proposed constitutional privilege, if recognized, would establish "a virtually impenetrable constitutional shield" for a "private system of informers operated by the press" without any public accountability—depicting the press's power in almost mythical terms.[114] Similarly, Justice Powell's concurrence took the dissent to task for failing to recognize that the media is "properly free and untrammeled in the fullest sense of these terms," and therefore "able to protect themselves."[115]

Second, the *Branzburg* Court advanced the deeply problematic claim that underrepresented groups' lack of political power would minimize the fallout from its decision. The Court argued that confidential informants are often members of "a minority political or cultural group that relies heavily on the media to propagate its views, publicize its aims, and

[111] *Branzburg* was a consolidation of four separate cases. See supra note 5.

[112] Branzburg v. Hayes, 408 U.S. 665, 708–09 (1972). The decision also declined to permit reporters to withhold unpublished information. Id. at 678, 708. That said, Justice Powell's concurrence has led some courts to read the decision more favorably. For a discussion of this split among the lower courts, see supra note 8.

[113] *Branzburg*, 408 U.S. at 706.

[114] Id. at 697.

[115] Id. at 709 (Powell, J., concurring).

magnify its exposure to the public."[116] As a result, "the relationship of many informants to the press is a symbiotic one which is unlikely to be greatly inhibited by the threat of subpoena."[117] In other words, groups like the Black Panthers would continue to provide information to journalists because they were so politically disenfranchised that they had nowhere else to turn. This claim is profoundly troubling. The Court minimized the consequences for members of marginalized groups who were forced to risk criminal exposure while others worked through normalized legal and political channels. It also rested on a series of underlying factual assumptions about the press's monopoly on information dissemination that no longer holds true.[118]

Third, the opinion assumed that the government would be bound by a robust set of internal constraints. For example, the Court invoked the Department of Justice's guidelines requiring that federal prosecutors take steps before issuing a subpoena to a member of the press.[119] Adopted in 1970 in response to the pending dispute in *Branzburg*, the guidelines required that prosecutors first exhaust all other sources and then obtain permission from the attorney general before they could issue a subpoena.[120] In other words, the guidelines operated as a form of voluntary self-binding by the federal executive, one that mitigated the need for constitutional protections.[121] "These rules are a major step in the direction the reporters herein desire to move," the Court reasoned, and "may prove wholly sufficient to resolve the bulk of disagreements and controversies between press and federal officials."[122]

Finally, the Court assumed that the practical costs of pursuing sources would operate as a powerful incentive against government overreach. "[I]f what the newsmen urged in these cases is true—that law enforcement cannot hope to gain and may suffer from subpoenaing newsmen before grand juries," the Court reasoned, then "prosecutors will be loath to risk

[116] Id. at 694–95 (majority opinion).
[117] Id. at 694.
[118] See discussion infra Subsection II.C.2.
[119] *Branzburg*, 408 U.S. at 706–07.
[120] Id. at 707 n.41.
[121] See Eric A. Posner & Adrian Vermeule, The Executive Unbound: After the Madisonian Republic 137 (2010) (describing how the executive voluntarily relinquishes power to curry favor and trust with the electorate).
[122] *Branzburg*, 408 U.S. at 707.

so much for so little."[123] In other words, confidential informants provide information not only to journalists, but to the government as well, via the press. The government's knowledge of criminal activity would be reduced by an overzealous hunt for sources. As a result, the Court reasoned, prosecutors would be judicious in which confidential sources they pursued.[124] We don't need to restrain the government, the Court seemed to be saying, because we can trust it to restrain itself.

These twin assumptions surface in other press opinions from this era as well. Perhaps the clearest example is the 1978 case *Zurcher v. Stanford Daily*.[125] There, the Court addressed a constitutional challenge brought by a campus newspaper following a police department's search of its newsroom for unpublished photographs and notes.[126] Citing *Branzburg*, the Court again rejected the newspaper's claim to a First Amendment shield against such government intrusion. In doing so, it reiterated its view that the combination of a powerful press and a constrained government offered protection enough.[127] It noted that a historical survey had turned up only a handful of newsroom searches, suggesting a longstanding norm of government self-restraint when it came to newsroom searches.[128] It also reasoned that the press "is not easily intimidated—nor should it be."[129] Under this conception of the press, even a student newspaper had the capacity to resist government overreach without further protection from the courts.[130]

[123] Id. at 706. The decision doesn't specify what argument the Court was responding to here. But it was likely replying to the following claim made by a lawyer for the plaintiffs during oral argument:

> [N]o reporters will be available to aid the prosecution by giving testimony before grand juries or any place else, because they're not going to have the information. Elements in the community that might have provided information, including government officials at all levels, will no longer provide such information to reporters.

Transcript of Oral Argument at 29, *Branzburg*, 408 U.S. 665 (No. 70-85).

[124] *Branzburg*, 408 U.S. at 706.

[125] 436 U.S. 547 (1978).

[126] Id. at 550–52. The newspaper argued that such searches will chill sources and harm the press's ability to gather news. Id. at 563–64.

[127] Id. at 566.

[128] Id.

[129] Id.

[130] The passage of the Privacy Protection Act of 1980, which protected journalists from searches and seizures of certain types of information, seemed to fulfill the Supreme Court's prediction that the press could protect itself. The press was able to lobby successfully to blunt the effect of *Zurcher*'s holding. Privacy Protection Act of 1980, Pub. L. No. 96-440, 94 Stat. 1879 (codified as amended at 42 U.S.C. §§ 2000aa to 2000aa-12 (2006)). See § 2000aa(a) ("[I]t shall be unlawful . . . to search for or seize any work product materials possessed by a

*3. Constitutional Right of Access*

These twin assumptions surfaced in a third set of landmark press cases from this era as well: those asserting claims to a First Amendment right of access to information. In a trio of cases from the 1970s—*Pell v. Procunier* (1974), *Saxbe v. Washington Post* (1974), and *Houchins v. KQED, Inc.* (1978)—the Court considered whether certain government restrictions on reporters' access to prisons violated the First Amendment.[131] In all three, the Court sided with the government, emphasizing that the press enjoys no constitutional right of access beyond what is afforded to the public at large. And again in all three, it reiterated these twin assumptions about the constraints on government and the power of the press.

The leading example is *Houchins v. KQED, Inc.*, the final of the three cases. Following a raft of illnesses and a prisoner's suicide at the Santa Rita County Jail in northern California, the sheriff of Alameda County limited reporters' access to the prison.[132] The press argued that these restrictions violated the First Amendment.[133] The Court rejected this claim.[134] In doing so, it restated the First Amendment equilibrium view of government-press relations. The Court emphasized that when it comes to disputes over access to government information, the Constitution "establishes the contest, not its resolution."[135] Rather, it is "the tug and pull of the political forces in American society" that brings government information into the light.[136] And in the course of these disputes, the press acts as "the eyes and ears of the public," scaling informational barriers to access to hold government actors to account[137]—a role that it has played since "the beginning of the Republic."[138]

person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication, in or affecting interstate or foreign commerce . . . .").

[131] Pell v. Procunier, 417 U.S. 817, 819 (1974); Saxbe v. Wash. Post Co., 417 U.S. 843, 844 (1974); Houchins v. KQED, Inc., 438 U.S. 1, 7–8 (1978).

[132] *Houchins*, 438 U.S. at 3–6.

[133] Id. at 7–8.

[134] Id. at 9.

[135] Id. at 14–15. The Court was quoting here from Justice Potter Stewart's famous law review article. Potter Stewart, Or of the Press, 26 Hastings L.J. 631, 636 (1975).

[136] *Houchins*, 438 U.S. at 15 (quoting Stewart, supra note 135, at 636).

[137] Id. at 8, 10.

[138] Id. at 8.

The Court's conception of the press as powerful and well-resourced animates other parts of *Houchins* as well. Despite restrictions on the press's physical access to the prison, the Court noted journalists had other channels of information at their disposal. They could interview inmates awaiting trial, so long as they secured the permission of both the district attorney and the court. They could also track down prison staff or former inmates or solicit letters or phone calls from those presently incarcerated.[139] Again, this view assumes a baseline level of money, time, and resources to engage in these often protracted, costly, and uncertain investigative processes.

The Court's decision in *Houchins* implicated the second prong of the government-press equilibrium as well. The Court reasoned that the importance of press access was diminished in light of the other intergovernmental checks then in place.[140] The California Board of Corrections was statutorily required to provide public reports about the jails at regular intervals, and state health and fire officials were required to monitor and inspect the prison.[141] Further, the County Board of Supervisors held public hearings on the safety of the prison.[142] By emphasizing these other actors, the Court was expressing the view that the physical exclusion of the press was made more tolerable by the other government entities that could step in and take its place. Again, this perspective assumes both the existence and health of these intergovernmental checks.

The Court eventually did recognize a First Amendment right of access to criminal trials in the 1980 case *Richmond Newspapers, Inc. v. Virginia*.[143] And in doing so, the Court made clear that it assumed journalists would be the ones to vindicate this right. The media act as "surrogates" for the public, the Court explained, attending trials in person "so that they may report what people in attendance have seen and heard" to an otherwise distracted public.[144] In this way, the press "contribute[s]

[139] Id. at 6, 15.

[140] Id. at 14–15. This point about alternative mechanisms of information is made even more explicit in *Pell v. Procunier*: "In order properly to evaluate the constitutionality of [the restriction], we think that the regulation cannot be considered in isolation but must be viewed in the light of the alternative means of communication permitted under the regulations with persons outside the prison." 417 U.S. 817, 823 (1974).

[141] *Houchins*, 438 U.S. at 15.

[142] Id.

[143] 448 U.S. 555, 580 (1980).

[144] Id. at 573.

to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system."[145] Any meaningful First Amendment right of access, in other words, depends on a vibrant and well-resourced press. In this way, *Richmond Newspapers* embodies certain judicial assumptions about the continued strength and vitality of the press as well.

*4. Statutory Rights of Access*

The fourth and final category—the establishment of statutory access mechanisms—strays somewhat from the Article's central thesis by looking beyond the four corners of the First Amendment. Yet these statutes still implicate important constitutional values. They play a central role in advancing a Meiklejohnian vision of the First Amendment—one in which the electorate engages in public deliberation and facilitates democratic self-governance.[146] The Court has emphasized that FOIA operates as a "structural necessity in a real democracy,"[147] and scholars have observed that FOIA has taken on a "quasi-constitutional valence."[148] Further, these transparency statutes embody these same assumptions about both press power and government constraints.

FOIA was passed in 1966. The legislative history of the law reveals that its drafters contemplated the press as the primary users of the statute.[149] Members of the press played a key consultative role in drafting the law.[150] And journalists were envisioned to serve as its primary enforcers. While the law created a broad right of access available to "any person,"[151] it was members of the press who would have both the motivation and resources to force the government to comply. "It will take vigorous action by the . . . Nation's press to make our objectives [in

[145] Id. (alteration in original) (quoting Neb. Press Ass'n v. Stuart, 427 U.S. 539, 587 (1976) (Brennan, J., concurring)).

[146] See Alexander Meiklejohn, The First Amendment Is an Absolute, 1961 Sup. Ct. Rev. 245, 255–57; see also Sunstein, supra note 18, at 889–90 ("Under [Meiklejohn's] view, the citizenry must have a significant role in government decisions, and the guarantee of freedom of expression is intended above all to promote that role.").

[147] Nat'l Archives & Recs. Admin. v. Favish, 541 U.S. 157, 172 (2004).

[148] David E. Pozen, Deep Secrecy, 62 Stan. L. Rev. 257, 314 n.204 (2010).

[149] See Jones, supra note 28, at 581–86 (describing the role of the press in developing state public records and open meetings laws); Kwoka, supra note 83, at 1371 (describing the FOIA drafters' belief that the press would be the primary users of the law).

[150] See Mark Fenster, The Transparency Fix: Advocating Legal Rights and Their Alternatives in the Pursuit of a Visible State, 73 U. Pitt. L. Rev. 443, 461–66 (2012).

[151] 5 U.S.C. § 552(a)(3).

passing FOIA] a reality," one member of Congress explained in the wake of the law's enactment.[152] Embedded within the very structure of the law were key assumptions about the press's capacity to carry out the statute's promise—to submit requests, negotiate access with agency officials, and litigate improper denials.

These assumptions formed the basis of not just federal transparency statutes but state-level laws as well. These same conceptions about press power and wealth also influenced the construction of public records statutes across the fifty states. Newspapers played a crucial role in enacting these laws, too—prodding government officials to act and influencing the structure and shape of the text.[153] They also served as the statutes' enforcers, "monitoring those laws for necessary expansions over time" and "vigilantly staving off inevitable retrenchment efforts."[154] In these ways, too, assumptions about the health and vibrancy of the local press affected the construction of another critical piece of the nation's information infrastructure.

## II. FIRST AMENDMENT DISEQUILIBRIUM

The previous Part chronicled the emergence of a "First Amendment equilibrium" across different legal realms. Mapping out these underlying beliefs that the press is sufficiently powerful and the government is sufficiently constrained illuminates how deeply these assumptions have become embedded in the legal regime that governs the public sphere. This Part examines what happens when this edifice crumbles—when the press starts to falter and the intergovernmental checks that once bound the executive begin to unravel. It examines the causes and consequences of a

[152] See Kwoka, supra note 83, at 1371 (alteration in original) (quoting 112 Cong. Rec. 13655 (1966) (statement of Rep. Durward Gorham Hall)).

[153] See, e.g., D. John McKay, Alaska Open Government Guide, Reps. Comm. for Freedom of the Press, https://www.rcfp.org/open-government-guide/alaska/ [https://perma.cc/B97V-FJVF] (last visited Oct. 17, 2023) (describing the role of the press in enacting Alaska's public records statute); Robert A. Bertsche & Daniel Jeon, Massachusetts Open Government Guide, Reps. Comm. for Freedom of the Press, https://www.rcfp.org/open-government-guide/massachusetts/ [https://perma.cc/CS2D-ES99] (last visited Oct. 17, 2023) (describing the role of the press in enacting Massachusetts's open meetings law); Thomas J. Cafferty, Nomi I. Lowy, Lauren James-Weir & Charlotte Howells, New Jersey Open Government Guide, Reps. Comm. for Freedom of the Press, https://www.rcfp.org/open-government-guide/new-jersey/ [https://perma.cc/ZSA3-YHQP] (last visited Oct. 17, 2023) (describing the role of the press in enacting New Jersey's open meetings law).

[154] Jones, supra note 28, at 590.

growing disequilibrium between the powers of the government and those of the press.[155]

### *A. The Decline of the Press*

The institutional press is in a state of crisis. The basic outlines of this story are likely familiar. The rise of the internet in the late 1990s and early 2000s disrupted media outlets' longtime financial model. Revenue from classified advertisements migrated to websites like Craigslist, while ad sales from large and wealthy corporations moved to platforms like Google and Facebook.[156] News outlets compounded this loss by offering online access to their content for free, shifting consumers' expectations about what they should pay for.[157] Subscription revenue began to crater.[158] And platforms profited off news content without sharing the advertising revenue they generated.[159]

Perhaps less familiar, however, are the specific patterns of this decline, as well as the new media ecosystem that has arisen in its wake. A handful of national newspapers have not only weathered this storm but emerged more powerful on the other side. By the end of 2021, for example, the *New York Times* had reached nearly nine million subscribers and earned more than two billion dollars in revenue.[160] One media analyst has

[155] In doing so, this Part focuses on the decline of the so-called institutional press, which has been the focus of the Supreme Court's press freedom cases and has traditionally been the actor most responsible for checking executive branch overreach. However, this Part also looks at the role of new actors in the journalistic sphere and their effect on the press's balance of power with the executive branch.

[156] Minow, supra note 30, at 13, 25.

[157] Lee Smith, Wayne Barrett, Donald Trump, and the Death of the American Press, Tablet (Feb. 22, 2017), https://www.tabletmag.com/sections/news/articles/trump-american-press [https://perma.cc/MC2F-YKPN] (observing that, as a result of the responses of the traditional press to the economic challenge of the internet, including giving away free content, "[e]ntire papers went under, and even at places that survived, the costliest enterprises, like foreign bureaus and investigative teams, were cut," and that "[a]n entire generation's worth of expertise, experience, and journalistic ethics evaporated into thin air").

[158] Id.

[159] See Joanne Lipman, Tech Overlords Google and Facebook Have Used Monopoly to Rob Journalism of Its Revenue, USA Today (June 11, 2019, 4:18 PM), https://www.usatoday.com/story/opinion/2019/06/11/google-facebook-antitrust-monopoly-advertising-journalism-revenue-streams-column/1414562001/ [https://perma.cc/N6L5-7XVR].

[160] Marc Tracy, The Times Hits Its Goal of 10 Million Subscriptions with the Addition of The Athletic, N.Y. Times (Feb. 2, 2022), https://www.nytimes.com/2022/02/02/business/media/nyt-earnings-q4-2021.html [https://perma.cc/X5JF-EQ6E].

estimated that one out of every ten newspaper journalists in the country is now employed in the *Times* newsroom.[161]

A handful of other print outlets have flourished as well. The *Washington Post* is probably the best-known example of an alternative model emerging for print news: the benevolent owner. Amazon founder Jeffrey Bezos purchased the *Post* from the storied Graham family in 2013.[162] He then infused the ailing newspaper with cash and other resources.[163] Since then, the newspaper's staff has nearly doubled, and its digital subscriptions have continued to climb.[164] The *Wall Street Journal*, too, has seen circulation and subscription revenues increase over the past decade.[165]

But these successes have come at a price. Local news outlets have shuttered at alarming rates. Between 2005 and 2020, roughly a quarter of all print newspapers in the country closed.[166] Millions of citizens now live in what researchers have termed "news deserts," or communities with "very limited access to the sort of credible and comprehensive news and information that feed democracy at the grassroots level."[167] There are also hundreds of "ghost newspapers" scattered across the country, or formerly vibrant print publications that now operate with an extremely limited staff

[161] Joshua Benton, The Wall Street Journal Joins The New York Times in the 2 Million Digital Subscriber Club, NiemanLab (Feb. 10, 2020, 2:44 PM), https://www.niemanlab.org/2020/02/the-wall-street-journal-joins-the-new-york-times-in-the-2-million-digital-subscriber-club/ [https://perma.cc/WUM5-SYT4].

[162] Paul Farhi, Washington Post to Be Sold to Jeff Bezos, the Founder of Amazon, Wash. Post (Aug. 5, 2013, 8:12 PM), https://www.washingtonpost.com/national/washington-post-to-be-sold-to-jeff-bezos/2013/08/05/ca537c9e-fe0c-11e2-9711-3708310f6f4d_story.html [https://perma.cc/XBB9-BEX5].

[163] Marc Tracy, How Marty Baron and Jeff Bezos Remade the Washington Post, N.Y. Times (May 11, 2021), https://www.nytimes.com/2021/02/27/business/marty-baron-jeff-bezos-washington-post.html [https://perma.cc/3WKK-6BQB].

[164] Id.

[165] Sara Guaglione, Inside the Wall Street Journal's Latest Push for New Subscribers, Digiday (Apr. 30, 2021), https://digiday.com/marketing/inside-the-wall-street-journals-latest-push-for-new-subscribers/ [https://perma.cc/5R3G-ZFTW].

[166] Whitney Joiner & Alexa McMahon, Since 2005, About 2,200 Local Newspapers Across America Have Closed. Here Are Some of the Stories in Danger of Being Lost—As Told by Local Journalists, Wash. Post (Nov. 30, 2021), https://www.washingtonpost.com/magazine/interactive/2021/local-news-deserts-expanding/ [https://perma.cc/HJ2G-VQB5].

[167] Abernathy, supra note 12, at 18.

and a rapidly declining circulation.[168] Between 2008 and 2019, the nation lost more than half of its print newsroom jobs.[169]

This dramatic reduction in funding has also reduced the news-gathering capabilities of the media institutions that remain. Roughly half of the reporters covering statehouse politics today do so less than full time, for example.[170] And newspapers have reduced the number of copy editors they employ to check stories before they go to print.[171]

There are multiple causes of this crisis. The loss in subscription and advertising revenue has forced local and regional newspapers to slash the ranks of their newsrooms.[172] Many smaller and medium-sized outlets have been acquired by private equity funds that have slashed spending and gutted newsrooms to increase profits.[173] And the pull of national newspapers has cut into the readerships of smaller and medium-sized outlets. Roughly half of all digital domestic subscriptions today are to either the *New York Times* or the *Washington Post*.[174] As of 2020, the *Times* alone had more digital subscribers than the *Washington Post*, the *Wall Street Journal*, and all 250 local Gannett-owned newspapers combined.[175] The current digital subscription model has emerged as a

[168] Id. at 9.

[169] Elizabeth Grieco, 10 Charts About America's Newsrooms, Pew Rsch. Ctr. (Apr. 28, 2020), https://www.pewresearch.org/fact-tank/2020/04/28/10-charts-about-americas-newsrooms/ [https://perma.cc/9RQJ-MUKH].

[170] Elisa Shearer et al., Total Number of U.S. Statehouse Reporters Rises, but Fewer Are on the Beat Full Time, Pew Rsch. Ctr. (Apr. 5, 2022), https://www.pewresearch.org/journalism/2022/04/05/total-number-of-u-s-statehouse-reporters-rises-but-fewer-are-on-the-beat-full-time/ [https://perma.cc/AB5W-T9G3].

[171] Project for Excellence in Journalism, Pew Rsch. Ctr., The Changing Newsroom: What Is Being Gained and What Is Being Lost in America's Daily Newspapers? 13 (2008), https://www.pewresearch.org/wp-content/uploads/sites/8/legacy/PEJ-The-Changing-Newspaper-Newsroom-FINAL-DRAFT-NOEMBARGO-PDF.pdf [https://perma.cc/2JX3-885L].

[172] Id. at 4; Penelope Muse Abernathy & Tim Franklin, The State of Local News 2022, at 6, 26 (2022), https://localnewsinitiative.northwestern.edu/assets/the_state_of_local_news_2022.pdf [https://perma.cc/WEL4-NQ37].

[173] McKay Coppins, The Men Who Are Killing America's Newspapers, Atlantic, Nov. 2021, at 33, 35 (describing how Alden Global Capital has become the leader in this practice).

[174] Nic Newman with Richard Fletcher, Anne Schulz, Simge Andi & Rasmus Kleis Nielsen, Reuters Institute Digital News Report 2020, at 22 (2020), https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2020-06/DNR_2020_FINAL.pdf [https://perma.cc/5GSY-UQ9R].

[175] Ben Smith, Why the Success of The New York Times May Be Bad News for Journalism, N.Y. Times (Mar. 1, 2020), https://www.nytimes.com/2020/03/01/business/media/ben-smith-journalism-news-publishers-local.html [https://perma.cc/G6L6-Y63G].

winner-take-all market, and a handful of powerful newspapers have emerged on top.[176]

This is not to say the picture is all bleak.[177] There has been some innovation in the local news space. The rise of successful nonprofit models like *ProPublica*'s local news initiatives, for example, have served as a rare bright spot.[178] And there are growing calls for increased public spending to support struggling outlets.[179] Further, wealthy owners have not just propped up well-known national newspapers like the *Washington Post*,[180] but they have purchased ailing local and regional outlets as well.[181] Yet a more sustainable and scalable local news model has yet to emerge.[182]

[176] Tony Haile, It Is Possible to Compete with the New York Times. Here's How., Colum. Journalism Rev. (July 31, 2020), https://www.cjr.org/analysis/nytimes-subscriptions-local-publishers-compete.php [https://perma.cc/5GJJ-N2G2] (noting that most people have only one digital subscription). A few other national outlets, like the *Washington Post* and *Wall Street Journal*, have also seen subscription and revenue growth in recent years. Benton, supra note 161.

[177] For an account of some of the successes of new media actors in uncovering executive branch secrets, mostly at the federal level, see text accompanying notes 280–84.

[178] See Richard J. Tofel, Non-Profit Journalism: Issues Around Impact, https://s3.amazonaws.com/propublica/assets/about/LFA_ProPublica-white-paper_2.1.pdf?_ga=2.1259891.335349375.1659310892-902779288.1658083615 [https://perma.cc/PG77-7GT5] (last visited Oct. 17, 2023); ProPublica's Local Initiatives, ProPublica, https://www.propublica.org/local-initiatives/ [https://perma.cc/8RSZ-W8JK] (last visited Oct. 17, 2023); see also Christopher Gavin, Yes, Hyperlocal Newspapers Are Dying. But Here's What's Rising Up to Fill the Void., Boston.com (Nov. 30, 2022), https://www.boston.com/news/media/2022/11/28/were-trying-to-seize-the-future-how-local-news-is-changing-in-massachusetts/ [https://perma.cc/FB27-GA84] (describing the proliferation of nonprofit local news sites in Massachusetts).

[179] For a summary of these efforts, see Timothy Karr, The Future of Local News Innovation Is Noncommercial, Colum. Journalism Rev. (Mar. 18, 2022), https://www.cjr.org/business_of_news/the-future-of-local-news-noncommercial.php [https://perma.cc/4RBF-G9D6].

[180] Amazon founder Jeff Bezos bought the *Washington Post* in 2013. Farhi, supra note 162.

[181] See, e.g., Spencer Buell, John Henry Says He Doesn't Want to Sell the Globe, Bos. Mag. (July 25, 2018, 10:59 AM), https://www.bostonmagazine.com/news/2018/07/25/john-henry-boston-globe-sell/ [https://perma.cc/Y83D-WUKG] (describing billionaire owner John Henry's commitment to the *Boston Globe*); Keach Hagey, Lukas I. Alpert & Yaryna Serkez, In News Industry, a Stark Divide Between Haves and Have-Nots, Wall St. J. (May 4, 2019, 12:00 AM), https://www.wsj.com/graphics/local-newspapers-stark-divide/ [https://perma.cc/CWM3-HT35] (describing the growth of the *Minneapolis Tribune* under billionaire owner Glen Taylor).

[182] Broadcast news has fared better. But here, too, viewership has steadily declined. See Bowman, supra note 53. Some critics place the blame for the crisis in journalism on the for-profit model itself. See, e.g., Nathan J. Robinson, The Collapse of BuzzFeed News Shows Why For-Profit Journalism Is a Disaster, Current Affs. (Apr. 20, 2023), https://www.currentaffairs.org/2023/04/the-collapse-of-buzzfeed-news-shows-why-for-profit-journalism-is-a-disaster [https://perma.cc/8KJX-BPFU] ("Journalism is in a sorry state, precisely because so

The media has become weaker along a second critical measure as well: public faith in the press as an institution. Citizens have lost confidence in the institutional press.[183] A 1973 poll found that Walter Cronkite was the most trusted man in America.[184] Public trust in the media peaked in the mid-1970s at seventy-two percent.[185] But by 2016, that number had fallen to thirty-two percent.[186] And with this loss of public faith comes increased political vulnerability. Declining public support for the institutional media makes it easier and less politically costly for government actors to denigrate both individual journalists and the press as a whole.[187] The Trump Administration's repeated attacks on journalists can be seen as both cause and consequence of this broader loss of public faith in the media as an institution.[188]

In sum, the institutional press is not a monolith. While many media outlets have suffered both financially and politically, this decline has not affected all industry actors in the same way. Many have shuttered; some hobble on; and a select few have flourished. These distinctions are important because they mean that different legal regimes are affected in different ways. Such variations are explored in greater detail below. But the basic point still stands: the institutional press, and especially local media, is no longer the well-resourced, geographically diverse, and politically popular institution that it was at the time *New York Times Co. v. United States* (*The Pentagon Papers Case*), *Branzburg v. Hayes*, and *Houchins v. KQED, Inc.* were handed down. If it was once "far from helpless to protect itself from harassment or substantial harm," that is no longer true today.[189]

much of it has been entrusted to for-profit entities that realize it's much easier to make money pumping garbage into people's heads than telling them things they ought to know.").

[183] See Louis Menand, Making the News, New Yorker, Feb. 6, 2023, at 59–60 (pointing out that trust in news media is at a historical low).

[184] Bowman, supra note 53.

[185] Brenan, supra note 13.

[186] Id.

[187] See Jones & West, supra note 30, at 580–81.

[188] Id. at 584–95. Of course, such attacks predate the Trump era. See, e.g., Richard Harris, The Presidency and the Press, New Yorker, Oct. 1, 1973, at 122–25 (describing President Nixon's attacks on the press); James Risen, Trump Can Target Journalists, Thanks to Obama, N.Y. Times, Jan. 1, 2017, at SR3 (describing the increase in leaks prosecutions under President Obama).

[189] Branzburg v. Hayes, 408 U.S. 665, 706 (1972).

### *B. An Unconstrained Executive*

Examining the second prong of the equilibrium—the assumption that intra- and intergovernmental checks will constrain executive secrecy powers—reveals that much of this legal infrastructure, too, has crumbled over time. Many intergovernmental restraints have broken down or even disappeared altogether.

At the federal level, congressional oversight of the national security agencies has proven flawed.[190] Presidential power in general has expanded in recent years.[191] And the extraordinary secrecy surrounding executive agencies, especially in the national security context, can make these agencies difficult for even members of Congress to penetrate. It can be challenging for congressional staffers to gain the necessary clearance to access top-secret material.[192] Further, the problem of "deep secrecy"—or the idea that some executive actions are so hidden that congressional representatives don't even know of their existence—looms large as well. Members of oversight committees are often in the dark about the very activities they're tasked with monitoring.[193] Congress frequently ends up depending on the press to raise the alarm about possible national security failures, rather than vice versa.[194]

The federal courts, too, have failed to meaningfully check executive branch secrecy. The Federal Intelligence Surveillance Court ("FISC")

[190] This is part of a larger process of the "continued growth in executive power—with virtually no check by the legislative branch." Glenn Sulmasy, Executive Power: The Last Thirty Years, 30 U. Pa. J. Int'l L. 1355, 1355 (2008); see also William P. Marshall, Eleven Reasons Why Presidential Power Inevitably Expands and Why It Matters, 88 B.U. L. Rev. 505, 506 (2008) ("Th[e] expansion in presidential power has created a constitutional imbalance between the executive and legislative branches, calling into doubt the continued efficacy of the structure of separation of powers set forth by the Framers.").

[191] See Katyal, supra note 20, at 2319–21 (describing the expansion of presidential power after 9/11).

[192] See Oona A. Hathaway, Secrecy's End, 106 Minn. L. Rev. 691, 720–21 (2021) (describing how members of Congress do not need to secure security clearances, but members of their staff do—and because they're not eligible for interim clearance, the process is often lengthy); Marshall, supra note 190, at 515 (describing how Congress does not have its own information-gathering apparatus and instead "must continually negotiate with the executive from a position of weakness and dependence" in order to access information).

[193] See Pozen, supra note 148, at 260–63 (defining deep secrecy and describing its harms).

[194] See, e.g., Heidi Kitrosser, Congressional Oversight of National Security Activities: Improving Information Funnels, 29 Cardozo L. Rev. 1049, 1049–53 (2008) (describing how the *New York Times* revealed the existence of warrantless electronic surveillance programs to most members of Congress, including most members of congressional intelligence oversight committees).

operates behind closed doors, approving nearly all the warrant applications it receives.[195] And the lower federal courts have crafted a series of FOIA-specific doctrines that undermine requesters' capacity to unearth national security and law enforcement secrets. These include affording extreme deference to claims of national security harm, for example, as well as declining to review national security materials *in camera*.[196] Congress intended the courts to operate as a check to the executive branch's expansive classification authority.[197] In reality, they end up all but rubber-stamping agencies' classification decisions. Overall, FOIA is expensive, cumbersome, and complex,[198] and the requesting process rarely reveals meaningful information about critical government spheres like the national security state.[199]

Many intra-branch checks on executive power have proven flawed as well. Agency inspectors general have had only limited effect when it comes to restraining executive secrecy powers, especially when it comes to the national security state.[200] And while self-binding mechanisms like the Department of Justice press subpoena guidelines have sometimes proven effective, at other times—such as during the Trump Administration—the executive branch has virtually ignored these constraints altogether.[201]

These problems are often exacerbated at the state and local level, where there are fewer internal checks on executive power. Governors have

[195] ACLU v. United States, 142 S. Ct. 22, 23 (2021) (declining to review the FISC and Foreign Intelligence Surveillance Court of Review ("FISCR") determinations that the FISC and the FISCR didn't have authority to determine whether there was a First Amendment right of access to FISC proceedings); id. (Gorsuch, J., dissenting from denial of certiorari) ("Unlike most other courts, . . . FISC holds its proceedings in secret and does not customarily publish its decisions."); see also Charlie Savage, A Disturbing Peek at How the U.S. Carries Out Domestic Surveillance, N.Y. Times, Dec. 12, 2019, at A1, A22 (noting that the FISC fully rejected only one out of the government's 1,080 requests in 2018).

[196] See Kwoka, supra note 69, at 212–16, 224–28.

[197] See supra note 69 and accompanying text.

[198] David E. Pozen, Freedom of Information Beyond the Freedom of Information Act, 165 U. Pa. L. Rev. 1097, 1099 (2017).

[199] See, e.g., Staff of H. Comm. on Oversight & Gov't Reform, 114th Cong., FOIA Is Broken: A Report 8–19 (2016) (describing the problem of inappropriate or excessive redactions and providing examples).

[200] See Sinnar, supra note 77, at 1031.

[201] See, e.g., Matt Kristoffersen, RCFP Attorneys Sue Justice Department for Records on Trump Administration's Handling of News Media Guidelines, Reps. Comm. for Freedom of the Press (May 11, 2021), https://www.rcfp.org/doj-media-guidelines-foia-lawsuit/ [https://perma.cc/8RQ8-PAQH].

consolidated their executive power in recent years.[202] Agency inspectors general are less common.[203] State agencies are often poorly funded.[204] And state legislative checks on the executive branch are also reduced. State legislatures meet much less frequently than Congress,[205] and for many legislators, this is only a part-time role.[206]

This increases the importance of statutory transparency mechanisms like state public records laws. Yet these statutes, too, are often deeply flawed. Many state legislatures have placed fewer restrictions on fees and higher barriers to appeal than Congress has with FOIA.[207] And other statutory transparency mechanisms, such as open meetings laws, have been largely co-opted by corporate interests as well.[208]

The failure of state and local intergovernmental checks is especially evident when it comes to policing. Many of the judicial consent decrees that emerged in the 1970s and '80s have since been lifted.[209] And many of the police departments that shuttered their intelligence operations in the 1970s revived such efforts in the wake of the September 11 attacks.

[202] See Miriam Seifter, Gubernatorial Administration, 131 Harv. L. Rev. 483, 485–89 (2017).

[203] For example, compare State Inspectors Gen., OLR Research Report (Aug. 16, 2013), https://www.cga.ct.gov/2013/rpt/2013-R-0315.htm [https://perma.cc/YNX6-T6HW] (listing roughly one to two agency inspectors general in only half of the states), with Ben Willhelm, Cong. Rsch. Serv., R45450, Statutory Inspectors General in the Federal Government: A Primer 5 (2023), https://sgp.fas.org/crs/misc/R45450.pdf [https://perma.cc/SJ76-ACQR] (noting that there are seventy-four inspectors general across the federal government).

[204] See Seifter, supra note 202, at 521.

[205] See Annual vs. Biennial Legislative Sessions, Nat'l Conf. of State Legislatures (July 1, 2021), https://web.archive.org/web/20220520044113/https://www.ncsl.org/research/about-state-legislatures/annual-vs-biennial-legislative-sessions.aspx/ [https://perma.cc/Q64K-R36C].

[206] See, e.g., Alice Fordham, Only New Mexico Lawmakers Don't Get Paid for Their Time. That Might Change This Year, NPR (Mar. 15, 2023, 1:57 PM), https://www.npr.org/2023/03/15/1163680005/new-mexico-lawmakers-salary-dont-get-paid-money-legislation [https://perma.cc/4WMS-W7J3].

[207] See Christina Koningisor, Transparency Deserts, 114 Nw. U. L. Rev. 1461, 1508–10, 1519–22 (2020).

[208] See Steven J. Mulroy, Sunlight's Glare: How Overbroad Open Government Laws Chill Free Speech and Hamper Effective Democracy, 78 Tenn. L. Rev. 309, 363–64 (2010). And internal executive constraints have fallen short too. Bureaucratic overlap, internal inspectors general, and reporting requirements play some role in forcing information into the public sphere. See Katyal, supra note 20, at 2346. But such internal restraints have proven less effective over time. See, e.g., Kagan, supra note 67, at 2290 (describing how President Clinton was able to more effectively control the administrative state); Marshall, supra note 190, at 507 (describing the steady accumulation of executive power over time).

[209] See Waxman, supra note 66, at 314 (describing how, after 9/11, many judicial consent decrees governing police surveillance were lifted).

Crucially, they did so without the web of oversight mechanisms that govern the federal intelligence agencies.[210] This has led to abuses of government surveillance power, such as the NYPD's massive and nearly unchecked monitoring of Muslim communities in the New York City region.[211]

In sum, when judges and policymakers constructed key parts of our information infrastructure, they envisioned a stable set of checks that would bind the government. Yet many of these restraints have eroded over time. The press has been sapped of much of its power, and the government has broken free of many of its internal constraints. The information equilibrium has become unbalanced on both sides.[212]

### *C. Government-Press Disequilibrium*

This dual decline of both the institutional press and these interlocking sets of government restraints has destabilized the legal regime that governs the public sphere. The government and the press no longer operate as equal adversaries. The constitutional and statutory law regime governing the press embodies outdated assumptions about the constraints on government and the press's ability to engage in constitutional "self-help."[213] This Section tracks the effect of the equilibrium's demise across various segments of the law.

#### *1. National Security Secrecy*

The press's ability to check national security secrecy has declined in certain ways since the Supreme Court issued the *Pentagon Papers* decision, even as the national security state has continued to expand. News outlets today are less able to engage in costly overseas monitoring of national security activities, for example. Between 1998 and 2011,

[210] Id. at 336.

[211] See Matt Apuzzo & Adam Goldman, Enemies Within 179 (2013) (describing how the secret NYPD surveillance operation was not "burdened" by the level of oversight experienced by the FBI).

[212] Sunstein, writing in 1986, noted that the equilibrium model would fail if the government's secrecy powers grew too great. See Sunstein, supra note 18, at 903 ("In any particular period, government power to control disclosure may . . . overwhelm the citizenry's interest in public discourse. If so, the model will fail to serve the goal of ensuring against self-interested representation.").

[213] Cf. David Pozen, Self-Help and the Separation of Powers, 124 Yale L.J. 2, 2 (2014) (describing how "unwritten, quasi-legal norms shape[] and constrain[] retaliation as well as cooperation across the U.S. government").

nearly two dozen media organizations shuttered their foreign bureaus.[214] And domestically, once-storied regional newspapers like the *Dallas Morning News*, *Chicago Sun-Times*, and *Chicago Tribune* no longer maintain dedicated seats in the White House Press Briefing Room.[215]

This might be less concerning if other news organizations had risen to take their place. And for a time, it looked like buzzy digital start-ups like BuzzFeed News or Vice might be positioned to do so. But many of the most promising media start-ups are now struggling.[216] Overall, there are fewer reporters from fewer outlets today working to uncover national security secrets. This has blunted the press's ability to chip away at the government's extraordinary secrecy powers.

In other respects, information about the national security state is arguably easier for the public to obtain today. Technological innovations have allowed for the disclosure of unprecedented amounts of information directly to the public—think of the vast WikiLeaks dumps, or the enormous national security disclosures from former National Security Agency ("NSA") contractor Edward Snowden.[217] But the costs of such

[214] Anup Kaphle, The Foreign Desk in Transition, Colum. Journalism Rev. (Mar. 2, 2015), https://www.cjr.org/analysis/the_foreign_desk_in_transition.php [https://perma.cc/8FVU-K6GL].

[215] Chris Cizilla, How the Seating Chart of the White House Press Room Has Changed, in 1 Cool Graphic, Wash. Post (Mar. 25, 2015, 3:04 PM), https://www.washingtonpost.com/news/the-fix/wp/2015/03/25/how-the-seating-chart-of-the-white-house-press-room-has-changed-in-1-cool-graphic/ [https://perma.cc/Y9SP-3PBP]. Other former mainstays, like then-newspaper conglomerate Knight Ridder, no longer exist at all. Alex Sherman, BuzzFeed Investors Have Pushed CEO Jonah Peretti to Shut Down Entire Newsroom, Sources Say, CNBC (Mar. 22, 2022, 4:59 PM), https://www.cnbc.com/2022/03/22/buzzfeed-investors-have-pushed-ceo-jonah-peretti-to-shut-down-newsroom.html [https://perma.cc/5ZEZ-AE5D]; Katharine Q. Seelye & Andrew Ross Sorkin, Knight Ridder Newspaper Chain Agrees to Sale, N.Y. Times (Mar. 12, 2006), https://www.nytimes.com/2006/03/12/archives/knight-ridder-newspaper-chain-agrees-to-sale.html [https://perma.cc/4MZ8-VXUG].

[216] See Jeremy Barr, The Rise and (Maybe) Fall of BuzzFeed News—and Larger Dreams for Digital Journalism, Wash. Post (Mar. 23, 2022, 7:26 PM), https://www.washingtonpost.com/media/2022/03/23/buzzfeed-staff-cuts-digital/ [https://perma.cc/9QXQ-6Z7P]; Alex Sherman, Vice Media Has Hired Financial Advisors to Seek a Buyer, May Sell Itself in Pieces, Sources Say, CNBC (May 2, 2022, 5:33 PM), https://www.cnbc.com/2022/05/02/vice-media-hires-financial-advisors-to-seek-buyer-may-sell-itself-in-pieces.html [https://perma.cc/5EDY-EDGB].

[217] See, e.g., David Welna, 12 Years of Disruption: A WikiLeaks Timeline, NPR (Apr. 11, 2019, 2:11 PM), https://www.npr.org/2019/04/11/712306713/12-years-of-disruption-a-wikileaks-timeline [https://perma.cc/2HDZ-3YTA] (describing millions of pages posted to WikiLeaks site); Jill Lepore, Know It All: Edward Snowden and the Culture of Whistle-Blowing, New Yorker, Sept. 23, 2019, at 60 (noting that Snowden leaked 1.7 million documents).

disclosures have arguably increased as well. Consider the example of Reality Winner, who provided a single classified document to *The Intercept*, and then in 2017 received among the longest prison sentences ever imposed for the unauthorized disclosure of information to the press.[218] The burdens assumed by leakers seem to have increased in recent decades, as the government has grown more aggressive in pursuing unauthorized disclosures of classified information.[219] This imperils an important source of national security information as well.[220]

At the same time, the web of government constraints on national security secrecy established in the wake of Watergate and the Vietnam War has also begun to fray. Intra-branch constraints like agency inspectors general have had a mixed record of success when it comes to operating as a meaningful check on national security activity.[221] And the president's classification powers have continued to expand.[222] The sheer

[218] See Tessa Stuart, 'Bitter,' 'Angry,' 'Enraged': Reality Winner Blasts the Intercept After 4 Years in Jail, Rolling Stone (Nov. 24, 2021), https://www.rollingstone.com/politics/politics-features/reality-winner-interview-prison-nsa-1261844/ [https://perma.cc/3PNK-FC32].

[219] Heidi Kitrosser, Media Leak Prosecutions and the Biden-Harris Administration: What Lies Ahead?, 2021 U. Ill. L. Rev. Online 121, 123–24 (observing that the government has increasingly prosecuted those who leak to the media under the Espionage Act). Consider the example of the Twitter Files revelations of government censorship attempts on social media as well. This information came to light when Elon Musk bought Twitter and decided to release information within his control to a number of Substack journalists, most of whom formerly worked for traditional media. Rebecca Klar & Emily Brooks, 'Twitter Files' Fuel House GOP Probes, Censorship Claims, Hill (Dec. 16, 2022, 6:00 AM), https://thehill.com/policy/technology/3777023-twitter-files-fuel-house-gop-probes-censorship-claims/ [https://perma.cc/48W6-R9LZ]; Cat Zakrzewski & Faiz Siddiqui, Elon Musk's 'Twitter Files' Ignite Divisions, but Haven't Changed Minds, Wash. Post (Dec. 3, 2022, 6:39 PM), https://www.washingtonpost.com/technology/2022/12/03/elon-musk-twitter-files/ [https://perma.cc/M3HE-Y8DC]. Even though media actors with experience, training, and the financial capacity to systematically devote their time to news-gathering and analysis were the ones who made the information available to the public in an accessible form, publication of the revelations in non-traditional formats may have blunted their impact. See, e.g., Gerard Baker, Opinion, Elon Musk's Twitter Files Revelations Are Instructive but Not Surprising, Wall St. J. (Dec. 12, 2022, 3:10 PM), https://www.wsj.com/articles/twitter-files-revelations-are-instructive-but-not-surprising-media-cultural-elites-misinformation-disagreement-musk-11670856198 [https://perma.cc/DS53-NSHX] (describing the rollout of the Twitter Files disclosures). Thus, these important examples of recent national security leaks do not negate the essential point: the decline of journalistic expertise and institutional resources devoted to uncovering executive abuses of power in the national security sphere disserves the public interest.

[220] See Greg Sargent, Leak Investigations Are Indeed Having a Chilling Effect, Wash. Post (May 20, 2013, 1:15 PM), https://www.washingtonpost.com/blogs/plum-line/wp/2013/05/20/leak-investigations-are-indeed-having-a-chilling-effect/ [https://perma.cc/KF7V-ADGK].

[221] Sinnar, supra note 77, at 1031.

[222] Hathaway, supra note 192, at 714–15.

volume of classified material today, combined with legislative and judicial failure to check presidential classification authority, has meant the executive branch enjoys extraordinary secrecy powers.[223]

That said, the legal regime governing national security information still functions. Major national news outlets continue to devote time and resources to covering diplomatic and foreign affairs. And yet the press's investigative powers in this realm are more circumscribed today. Many smaller and medium-sized newspapers have abandoned this beat, which means that those that remain must cover more ground. In sum, the government and the press still clash over national security information. But the opponents are no longer as equally situated.

### *2. Confidential Sources*

Just as the *Pentagon Papers* opinion assumed that the press leverages its power to penetrate government secrecy, the Court in *Branzburg* assumed that the press could use these same powers to fend off government interference with confidential source relationships.[224] But this assumption, too, no longer stands. The press outlets that have survived can still use their pages to drum up support for journalists under threat. But whether the public will respond to that call is less certain today.[225] Popular support for the press has fallen, reducing the political costs of attacking journalists.[226] And the media's financial decline makes it more difficult for news organizations to afford the legal fees associated with trying to keep a reporter out of jail.[227] There is some evidence that the fines imposed by judges for journalists' noncompliance have increased as well.[228]

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[223] Further, even when Congress does carry out its monitoring responsibilities, the national security agencies can and do prevent the ensuing reports from being made public. See, e.g., Jane Mayer, Top CIA Lawyer Sides with Senate Torture Report, New Yorker (Sept. 26, 2013), https://www.newyorker.com/news/news-desk/top-c-i-a-lawyer-sides-with-senate-torture-report [https://perma.cc/96Z2-QWWX] (describing how the CIA used its classification authority to prevent the publication of the Senate's report on CIA black sites and use of torture in the wake of 9/11).

[224] Branzburg v. Hayes, 408 U.S. 665, 706 (1972).

[225] For a persuasive argument that declining public trust dramatically affects the press's ability to perform its democracy-supporting roles, see generally Ladd, supra note 31.

[226] See discussion supra notes 183–87 and accompanying text.

[227] There is some evidence that the costs imposed by courts on journalists are rising. See Koningisor, supra note 8, at 1250.

[228] It's difficult to find comprehensive data. But anecdotal evidence suggests contempt fines are rising. For example, a judge imposed a fine of one dollar per day on CBS in 1980 for

As for the deeply flawed claim in *Branzburg* that members of marginalized communities will continue to surrender secrets to the press because they have no other choice—this assumption is likewise no longer valid. Potential sources now have the capacity to speak directly to the public. Social media has granted everyone a platform. This comes with downsides.[229] But one significant upside is that politically vulnerable groups are no longer beholden to the traditional gatekeepers of the institutional press to advance their views.[230] This is a welcome development. But it is also one that underscores the extent to which judicial assumptions about press power embedded in the *Branzburg* decision no longer hold up.

At the same time, various internal constraints on government have also declined. Perhaps most significantly, longstanding norms around national security leaks have weakened. As media lawyers David McCraw and Stephen Gikow have explained, in the wake of the *Pentagon Papers* case and *Branzburg*, the federal government and the press arrived at an "unspoken bargain."[231] The press would be judicious in its disclosure of national security secrets and, in exchange, the government would mostly refrain from pursuing leakers.[232] This agreement held up well in the decades that followed. But more recent changes in the information ecosystem—including the expansion of the government's classification authority and the rise of nontraditional publishers like WikiLeaks—have caused much of this longstanding agreement to crumble.[233]

Perhaps the clearest evidence is the government's increasingly aggressive pursuit of leakers. The Obama Administration pursued three

declining to surrender unpublished audio and video footage. United States v. Cuthbertson, 630 F.2d 139, 143 (3d Cir. 1980). In 2008, in contrast, a judge fined a reporter $5,000 a week for refusing to surrender a source. See Ken Paulson, The Real Cost of Fining a Reporter, USA Today, Mar. 12, 2008, at 11A, https://usatoday30.usatoday.com/printedition/news/20080312/opcomwednesday.art.htm [https://perma.cc/9DB5-VLJW]. The judge also took the additional step of barring his employer from covering his fees. Id.

[229] There is voluminous literature on the social and democratic harms of social media. For an example, see generally Andrew Marantz, Antisocial: Online Extremists, Techno-Utopians, and the Hijacking of the American Conversation (2019) (describing the spread of extremist and alt-right beliefs through social media).

[230] See Lyrissa Barnett Lidsky, Silencing John Doe: Defamation & Discourse in Cyberspace, 49 Duke L.J. 855, 893–95 (2000) (describing the relationship between disintermediation of public discourse and the marketplace of ideas metaphor underlying First Amendment jurisprudence).

[231] McCraw & Gikow, supra note 29, at 473–74.

[232] Id.

[233] Id. at 485–92.

times as many leaks prosecutions as all previous administrations combined.[234] And if President Obama began to chip away at this norm of non-prosecution, President Trump exploded it. Although the Department of Justice guidelines remained in force during the Trump presidency, the Administration repeatedly violated them, often in alarming ways.[235] To give one example, the Justice Department under President Trump secretly obtained the phone records of *Washington Post* reporters investigating Russia's role in the 2016 elections—a clear example of the president using the executive branch's prosecutorial discretion to serve his own political ends.[236]

Technological developments have also played a role. Intensive surveillance of journalists or suspected leakers once required significant time and resources. But today, the government has myriad options at its disposal to unmask a leaker. It can subpoena phone call records, as it could in the time of *Branzburg*. But it can also obtain cell-site location data, badge swipe information, email records, text messages, video surveillance footage, social media communications, and more.[237] The Court assumed in *Branzburg* that the high costs of pursuing confidential informants—political and otherwise—would serve as a natural check against government abuse.[238] But this assumption, too, no longer holds up. Continuous government surveillance is both cheap and easy today, making leakers more vulnerable now than they were when the case was first issued.

Perhaps the most important form of executive self-restraint when it comes to the press has been the Department of Justice's longstanding practice not to pursue journalists who publish national security information. The *Pentagon Papers* case left open the question of whether

[234] Risen, supra note 188, at SR3 ("[T]he [Obama] administration has prosecuted nine cases involving whistle-blowers and leakers, compared with only three by all previous administrations combined.").

[235] See Kristoffersen, supra note 201 (describing these various violations of the Guidelines).

[236] Devlin Barrett, Trump Justice Department Secretly Obtained Post Reporters' Phone Records, Wash. Post (May 7, 2021, 10:00 PM), https://www.washingtonpost.com/national-security/trump-justice-dept-seized-post-reporters-phone-records/2021/05/07/933cdfc6-af5b-11eb-b476-c3b287e52a01_story.html [https://perma.cc/7CPR-7GP5].

[237] See, e.g., Ann E. Marimow, A Rare Peek into a Justice Department Leak Probe, Wash. Post (May 19, 2013, 8:43 PM), https://www.washingtonpost.com/local/a-rare-peek-into-a-justice-department-leak-probe/2013/05/19/0bc473de-be5e-11e2-97d4-a479289a31f9_story.html [https://perma.cc/QB7L-WTFT] (noting that FBI investigators used "security-badge data, phone records and e-mail exchanges" between a reporter and a suspected confidential source).

[238] See Branzburg v. Hayes, 408 U.S. 665, 706 (1972).

reporters or publishers could be criminally prosecuted for disclosing classified information in violation of the Espionage Act or related statutes. Justice Stewart's concurrence suggested that they could.[239]

Yet the question remains unresolved because the government has never pressed the issue. It has never tried to prosecute a member of the press for revealing classified information.[240] At least, that was the case until three years ago, when it indicted Julian Assange.[241] There are obvious questions around whether Assange can or should be considered a publisher. Yet the institutional press was nonetheless rattled, concerned that the indictment represents only the first step in the decline of this critical norm.[242] Whether or not this presages the collapse of this powerful and long-standing tradition of non-prosecution remains to be seen.

### *3. Constitutional Right of Access*

The Court's assertion in the right of access case *Houchins* that reporters could circumvent restrictions to report on government institutions assumes a baseline set of press resources—a full newsroom, the capacity to expend resources running down investigative leads, and an experienced

[239] N.Y. Times Co. v. United States (*The Pentagon Papers Case*), 403 U.S. 713, 730 (1971) (Stewart, J., concurring) ("Undoubtedly Congress has the power to enact specific and appropriate criminal laws to protect government property and preserve government secrets. Congress has passed such laws, and several of them are of very colorable relevance to the apparent circumstances of these cases.").

[240] Jack Goldsmith, Extraordinary U.S. Press Freedom to Report Classified Information, Lawfare (Dec. 2, 2013, 8:05 AM), https://www.lawfaremedia.org/article/extraordinary-us-press-freedom-report-classified-information [https://perma.cc/YJ9L-YEUF] ("[T]he U.S. government has never prosecuted a newspaper or journalist for publishing classified information, and in recent years even the theoretical legal possibility of doing so has evaporated.").

[241] Press Release, U.S. Dep't of Just., WikiLeaks Founder Julian Assange Charged in 18-Count Superseding Indictment (May 23, 2019), https://www.justice.gov/opa/pr/wikileaks-founder-julian-assange-charged-18-count-superseding-indictment [https://perma.cc/DLX6-VJ4K].

[242] See, e.g., Jon Allsop, Espionage Charges Against Assange Are a 'Terrifying' Threat to Press Freedom, Colum. Journalism Rev. (May 24, 2019), https://www.cjr.org/the_media_today/julian_assange_espionage_act.php [https://perma.cc/CFB4-7MRB]; Charlie Savage, Press Freedoms and the Case Against Julian Assange, Explained, N.Y. Times (Apr. 11, 2019), https://www.nytimes.com/2019/04/11/us/politics/assange-indictment.html [https://perma.cc/K4FD-CV57]; Michael M. Grynbaum & Marc Tracy, 'Frightening': Charges Against Julian Assange Alarm Press Advocates, N.Y. Times (May 23, 2019), https://www.nytimes.com/2019/05/23/business/media/assange-first-amendment-wikileaks.html [https://perma.cc/42CT-F7KL] (describing the media's alarm over Julian Assange's indictment).

stable of reporters.[243] But the reality today is that many of the local outlets that once monitored the operations of local prisons and jails—along with myriad other local government operations—no longer exist.[244] Hundreds of these local outlets have been shuttered. And the ones that remain are stretched thin.

The press's decline also means that there are fewer media institutions available to vindicate First Amendment rights in court. Many of the organizations behind the landmark press cases—the newspapers that brought *Richmond Newspapers, Inc. v. Virginia*,[245] for example, or the two *Press-Enterprise Co. v. Superior Court* cases[246]—are now either out of business or in financial trouble. These newspapers once played a crucial role in defining the scope of the First Amendment, "mobiliz[ing] the judiciary to interpret and apply the Constitution in ways that enhanced accountability and openness in government."[247] Yet while there were once dozens or even hundreds of outlets available to assume this role, far fewer outlets today are capable of funding litigation for lengthy and involved First Amendment access cases.[248] This, too, means impoverished First Amendment enforcement for the public at large.[249]

[243] Houchins v. KQED, Inc., 438 U.S. 1, 6, 15 (1978).

[244] See generally Abernathy, supra note 12 (describing the financial decline of the press and the spread of news deserts).

[245] 448 U.S. 555, 580 (1980). The plaintiffs were the *Richmond News Leader*, which closed in the 1990s, and the *Richmond Times-Dispatch*, which has experienced a significant financial decline in recent years. See Jones, supra note 28, at 5774–75.

[246] Press-Enter. Co. v. Superior Ct. (*Press-Enterprise I*), 464 U.S. 501, 510 (1984); Press-Enter. Co. v. Superior Ct. (*Press-Enterprise II*), 478 U.S. 1, 10–13 (1986). The plaintiff in those cases was the *Press-Enterprise*, a regional paper that served the Riverside and San Bernardino counties in California. It too has suffered significant financial difficulties. See Jones, supra note 28, at 578.

[247] See Jones, supra note 28, at 580.

[248] See In Defense of the First Amendment, Knight Found. (Apr. 21, 2016), https://knightfoundation.org/reports/defense-first-amendment/ [https://perma.cc/NRG8-C8FT]. News organizations are increasingly forming media coalitions to enforce right of access issues. But often these coalitions involve more circumscribed efforts to obtain access to a specific document or proceeding, and they tend to have less precedential value. See, e.g., Patricia Mazzei & Alan Feuer, Judge May Release Affidavit in Trump Search, but Only After Redaction, N.Y. Times (Aug. 26, 2022), https://www.nytimes.com/2022/08/18/us/politics/trump-fbi-affidavit-warrant.html [https://perma.cc/J845-G63P].

[249] For a discussion of the importance of public access to criminal proceedings, see Jocelyn Simonson, The Criminal Court Audience in a Post-Trial World, 127 Harv. L. Rev. 2173, 2177 (2014) ("To be a member of an audience is itself a form of public participation, for there is power in the act of observation: audiences affect the behavior of government actors inside the courtroom, helping to define the proceedings through their presence.").

At the same time, the capacity of other government actors to push critical information into the public sphere is also diminished, especially at the state and local level. Resource constraints often impede state or local government actors' ability to meaningfully fulfill their oversight responsibilities.[250] And the emergence of party strongholds across the states has reduced partisan competition, which ordinarily contributes to public disclosures.[251]Not only is the press less equipped to circumvent barriers to government access, but important intergovernmental checks are failing as well. This leaves wide swaths of government activity unmonitored by internal actors.[252]

A central thread running through the Court's right of access cases is the assumption that structural constitutional and sub-constitutional information-forcing mechanisms will be enough—that they will obviate the need for First Amendment-based pathways.[253] The collapse of these intergovernmental and external oversight mechanisms, then, further destabilizes the push-pull of government information access. Not only is the press less equipped to overcome the information barriers placed in its way, but the other actors that the *Houchins* Court imagined would step in if the press were to fail—such as elected city officials or competing state and local agencies—are less equipped to do so as well.[254]

### *4. Statutory Rights of Access*

The government-press equilibrium has become destabilized in the context of statutory access rights, too. This holds true across both sides of

[250] See Koningisor, supra note 207, at 1493–95.

[251] In 2019, only Minnesota had a divided legislature. Timothy Williams, With Most States Under One Party's Control, America Grows More Divided, N.Y. Times (June 11, 2019), https://www.nytimes.com/2019/06/11/us/state-legislatures-partisan-polarized.html [https://perma.cc/7RAS-CJPG].

[252] In recent years, there has been a rise in citizen filming of police. There has also been an increase in activist and grassroots efforts to monitor police. See, e.g., Christina Koningisor, Public Undersight, 106 Minn. L. Rev. 2221, 2248–57 (2022) (describing extralegal information-gathering efforts); Jocelyn Simonson, Copwatching, 104 Calif. L. Rev. 391, 407–26 (2016) (describing organized "copwatching" groups). But while powerful, these extra-governmental efforts are limited to government activity that takes place in public view. Internal oversight helps to fill in the remaining gaps.

[253] See, e.g., Houchins v. KQED, Inc., 438 U.S. 1, 13 (1978); see also Antonin Scalia, The Freedom of Information Act Has No Clothes, 6 Regulation 14, 19 (1982) (arguing against statutory rights of access because "the institutionalized checks and balances within our system of representative democracy" are sufficient to force government information into the public sphere).

[254] See 438 U.S. at 15.

the divide. On one side of the balance, the decline of the press has left these laws without a critical set of external actors to enforce them.[255] There are now fewer journalists available to submit requests and a shrinking pool of news outlets with both the resources and expertise required to enforce an improper denial in court.[256] Again, this effect is especially pronounced at the state and local levels, where wide swaths of the country have been left without any local news outlets at all.[257]

This has had various consequences. Most directly, critical information about government activity remains shielded from public view. Without journalists to submit records and ferret out stories, the public remains in the dark when it comes to important matters of government.[258] But there are also secondary effects for the information ecosystem as well. These laws were meant to be enforced by judges. Yet the cost of suing is so high that public records request denials are rarely litigated.[259] And without the

[255] See Jones, supra note 28, at 562–70.

[256] Abernathy, supra note 12, at 8.

[257] Id. (describing the spread of news deserts); Mason Walker, U.S. Newsroom Employment Has Fallen 26% Since 2008, Pew Rsch. Ctr. (July 13, 2021), https://www.pewresearch.org/fact-tank/2021/07/13/u-s-newsroom-employment-has-fallen-26-since-2008/ [https://perma.cc/5VPL-KVD9] (describing the loss of newsroom employees).

[258] A number of studies have demonstrated the negative impacts of a newspaper's closure. Gao et al., supra note 30, at 4–5 (finding that newspaper closures correlate with higher municipal borrowing costs); Sarah Holder, When Local Newsrooms Shrink, Fewer Candidates Run for Mayor, Bloomberg (Apr. 11, 2019, 12:50 PM), https://www.bloomberg.com/news/articles/2019-04-11/as-local-newspapers-shrink-so-do-voters-choices [https://perma.cc/V4GR-4RFE]; Jonas Heese, Gerardo Pérez-Cavazos & Caspar David Peter, When the Local Newspaper Leaves Town: The Effects of Local Newspaper Closures on Corporate Misconduct, 145 J. Fin. Econ. 445, 454 (2021) (finding an increase in corporate misconduct by local firms in the wake of a local newspaper closure).

[259] At the federal level, only around 0.1% of FOIA requests result in a lawsuit. Compare Off. of Info. Pol'y, U.S. Dep't of Just., Summary of Annual FOIA Reports for Fiscal Year 2020, at 2 (2021), https://www.justice.gov/media/1139891/dl?inline [https://perma.cc/7JNF-WYHL] (reporting 790,688 FOIA requests submitted in fiscal year 2020), with FOIA Project Staff, September 2020 FOIA Litigation with Five-Year Monthly Trends, The FOIA Project (Nov. 3, 2020), https://foiaproject.org/2020/11/03/september-2020-foia-litigation-with-five-year-monthly-trends/ [https://perma.cc/8FXN-BRCM] (reporting 807 FOIA lawsuits filed in fiscal year 2020). Data are more difficult to gather at the state level, but the number of lawsuits tends to be low as well—often only a handful per year. See, e.g., Off. of Info. Pracs., State of Haw., Annual Report 2021, at 58 (2021), https://oip.hawaii.gov/wp-content/uploads/2022/01/ANNUAL-REPORT-2021-12.23.21-accessible.pdf [https://perma.cc/27CC-EA6C] (reporting thirteen new public records lawsuits in 2021); E-mail from Laura C. Rowntree, Assistant Att'y Gen., Off. of the Vt. Att'y Gen., to author (Aug. 22, 2022) (on file with author) (reporting that two public records lawsuits were filed against state agencies in 2020 and five in 2021, and noting that this tally excludes "cities, towns, local departments and boards, the University of Vermont, and quasi-public entities").

threat of judicial enforcement to act as a deterrent, agencies have less incentive to comply with these laws in the first place.[260]

The absence of press involvement also leaves the law under-defined across much of the country. Countless exemptions across dozens of states have never been interpreted by a judge.[261] This allows government actors to stretch the bounds of the statutory language, and it makes it more difficult for requesters to challenge an improper denial.

On the other side of the balance, the web of intergovernmental checks constraining government secrecy powers in the face of their statutory transparency obligations has also begun to fray. The national security agencies, for example, have become unmoored from the set of internal checks meant to constrain their secrecy powers. Executive branch authority to classify materials has expanded. The sheer size and scope of the classification system now far exceeds what the drafters of FOIA likely could have imagined.[262] Trillions of pages are now classified, making it more difficult for information to come into public view.[263] And because fewer news organizations can afford to mount effective legal challenges, such information is being pushed out through extralegal channels, such as whistleblowers and leakers. Yet as the number of media institutions with dedicated national security coverage declines, the pathways for such unauthorized disclosures shrink as well.[264]

Again, similar forces are at work at the state and local level. Law enforcement agencies are granted exceptional secrecy powers under state

[260] See Koningisor, supra note 207, at 1515–17 (describing the problem of government hostility to public records obligations).

[261] See, e.g., id. at 1521 (noting that half of the exemptions in West Virginia's public records law have never been interpreted by a state judge).

[262] See, e.g., Examining the Costs of Overclassification on Transparency and Security: Hearing Before the H. Comm. on Oversight & Gov't Reform, 114th Cong. 1–2 (2016) (statement of Rep. Jason Chaffetz, Chairman, H. Comm. on Oversight & Gov't Reform) (reporting that an estimated fifty to ninety percent of government records are wrongly classified and that the government spends roughly sixteen billion dollars per year on classification activities).

[263] Pub. Int. Declassification Bd., Transforming the Security Classification System 5 & n.v (2012), https://www.archives.gov/files/declassification/pidb/recommendations/transforming-classification.pdf [https://perma.cc/R8VV-Z7QC].

[264] See generally David Pozen, The Leaky Leviathan: Why the Government Condemns and Condones Unlawful Disclosures of Information, 127 Harv. L. Rev. 512 (2013) (describing this ecosystem of unauthorized disclosures).

public records statutes,[265] and these state-level statutes are marred by weak administrative appeals procedures and insufficient restrictions on requester fees.[266] Such structural barriers make it more difficult for the press and the public to utilize these laws to exercise meaningful oversight of government activity. These transparency laws work to facilitate, rather than curtail, government secrecy powers at the sub-federal level as well. At the same time, courts at all levels have abdicated their role as the statutes' enforcers.[267]

These interrelated trends—the press's inability to serve as the laws' enforcers, the government's ever-expanding body of classified materials, and the judiciary's reluctance to hold agencies to the law's terms—have combined to upend the statutory transparency regime. FOIA is "a structural necessity in a real democracy."[268] Yet today, it rarely operates as intended. The press is often unable to fulfil the law's promise as an information-forcing mechanism. And the government is too often able to circumvent the law's effects and keep large swaths of government activity hidden from public view. Government secrecy powers continue to expand, while the countervailing checks on its authority slowly contract.

## III. CRITIQUING THE FIRST AMENDMENT DISEQUILIBRIUM

This Article's central thesis—that flawed assumptions about the government and the press have unbalanced key parts of the law, which requires urgent fixing—invites a set of related critiques. One is that the First Amendment equilibrium never existed, at least not in the form that courts and legislatures assumed. Another is that the First Amendment equilibrium was flawed from the outset and is not worth saving now. A third is that the nation's information ecosystem is so infirm that

[265] See generally Christina Koningisor, Police Secrecy Exceptionalism, 123 Colum. L. Rev. 615 (2023) (chronicling the unique secrecy protections extended to law enforcement agencies).

[266] It's worth noting that "[f]ewer than half of the states provide requesters with an option to file an administrative appeal." Koningisor, supra note 207, at 1478. In terms of fees, a number of states allow agencies substantial discretion in deciding how much to charge requesters for a search. See, e.g., Fla. Stat. Ann. § 119.07(4)(d) (West 2023) (allowing a "special service charge" when a request "require[s] extensive use of information technology resources or extensive clerical or supervisory assistance by personnel of the agency involved"); Mo. Ann. Stat. § 610.026 (West 2023) (permitting agencies to charge requesters for the research time involved).

[267] For a discussion of the FOIA-specific doctrines the courts have developed to provide additional secrecy powers to government, see Kwoka, supra note 69, at 211–20.

[268] Nat'l Archives & Recs. Admin. v. Favish, 541 U.S. 157, 172 (2004).

rebalancing government-press relations is futile, and instead something more radical is needed. This Part addresses each of these arguments in turn. It concludes that whether or not the Supreme Court's account of the equilibrium represented an idealized version of reality, today's disequilibrium is real, particularly at state and local levels.

### *A. The First Amendment Equilibrium Is Misrepresentative*

The critique that the First Amendment equilibrium described by the Supreme Court never existed takes different forms. The first is that the press was never that strong. Even in the 1970s, often thought of as the heyday of the institutional press, media organizations faced financial and pragmatic obstacles in extracting information from a recalcitrant executive.[269] The newspaper industry, in particular, faced consolidation and concentration brought on by financial difficulties. Congress enacted the Newspaper Preservation Act in 1970, for example, exempting the press from certain antitrust laws in an effort to maintain competitive papers in smaller urban markets.[270]

The Supreme Court sought to protect the newspaper industry as well. In *New York Times Co. v. Sullivan*, the landmark decision establishing that public officials must demonstrate actual malice in defamation suits, defamation lawsuits threatened the ability of the press to report on the Civil Rights Movement.[271] Justice Black, concurring in *Sullivan*, took note of the financial precarity of the press in the face of defamation lawsuits. He worried that costly verdicts "threaten the very existence of an American press virile enough to publish unpopular views on public affairs and bold enough to criticize the conduct of public officials."[272] A recent book by historian and press law scholar Samantha Barbas documents the accuracy of Justice Black's concerns for the continued

[269] Such concerns motivated, for example, the enactment of the Newspaper Preservation Act of 1970, which exempted newspapers from certain parts of antitrust laws. 15 U.S.C. §§ 1801–1804.

[270] Id.; To Exempt from the Antitrust Laws Certain Joint Newspaper Operating Arrangements: Hearing Before the Subcomm. on Antitrust, H. Comm. on the Judiciary, 91st Cong. 10–11 (1969) (statement of Rep. Spark Matsunaga).

[271] 376 U.S. 254, 277–78, 283 (1964).

[272] Id. at 294 (Black, J., concurring).

financial viability of major press actors in the face of these suits.[273] Constitutional protection helped stave off this financial threat.[274]

Despite these selected financial vulnerabilities, the evidence suggests that the press as a whole grew more financially and politically powerful between the late 1960s and the end of the 1970s.[275] And it is noteworthy that these limited counterexamples of press vulnerabilities also generated legislative and judicial solutions. These counterexamples throw into sharp relief the more common view in this era that media institutions were both financially secure and politically powerful.[276]

The inverse of this financial precarity argument is that the press remains strong today. This latter argument could take several forms. One is that the cadre of media actors at the national level remains powerful and profitable. After all, as of November 2022, the *New York Times* boasted nearly 10 million subscribers.[277] Fox News averaged about 1.5 million monthly viewers during the same year.[278] Yet as mentioned above, the success of these national institutions has often come at the price of regional and local press outlets.[279]

Another argument is that technological changes have enabled new media actors to penetrate government secrecy in new ways. While it may be easier to surveil reporters today, for example, it is also easier for the press to obtain leaked information—for instance, through anonymous secure drops.[280] For the wealthiest and most sophisticated segments of the

[273] See generally Samantha Barbas, Actual Malice: Civil Rights and Freedom of the Press in *New York Times v. Sullivan* (2023).

[274] This is also an example of the broader tendency of the Court to provide greater protection to the press in the realm of publishing than the realm of news-gathering. See discussion supra Subsection I.C.3. Similar concerns about the financial impacts of tort verdicts surface in other cases involving the press. See, e.g., Hustler Mag., Inc. v. Falwell, 485 U.S. 46, 53 (1988) (applying the actual malice standard to intentional infliction of emotional distress claims, in part over concerns about the impact of damages awards against the press).

[275] Total revenue of U.S. newspapers grew from $5.3 billion in 1960 to $8.3 billion by 1970 to $20 billion by 1980. Newspaper Fact Sheet, supra note 50.

[276] See discussion supra Section I.C.

[277] See Katie Robertson, The New York Times Company Adds 180,000 Digital Subscribers, N.Y. Times (Nov. 2, 2022), https://www.nytimes.com/2022/11/02/business/media/nyt-q3-2022-earnings.html [https://perma.cc/S5UC-U7PT].

[278] Stephen Battaglio, Fox News' 'The Five' Topples 'Tucker Carlson Tonight' to Become New Cable News Ratings Leader, L.A. Times (Dec. 19, 2022, 5:00 AM), https://www.latimes.com/entertainment-arts/business/story/2022-12-19/the-five-topples-tucker-carlson-tonight-to-become-the-new-cable-news-ratings-champ [https://perma.cc/H27E-69P7].

[279] See supra note 174 and accompanying text.

[280] See, e.g., Got a Confidential News Tip?, N.Y. Times, https://www.nytimes.com/tips [https://perma.cc/Y3SC-EGHQ] (last visited Oct. 19, 2023) (soliciting readers to supply the

media, it is difficult to predict which side the technology will ultimately favor in the cat-and-mouse game of leaks and investigations. But again, these gains are likely to be limited to a select few national media outlets.

A further argument is that new media actors are arising to effectively perform the watchdog role once played predominantly by the institutional press. Consider Edward Snowden's powerful revelations of NSA secrets,[281] for example, or the recent analysis of government censorship attempts on social media by Substack journalists.[282] Such disclosures seem to support this view. Even these revelations, however, still depend on the existence of media actors with experience, training, and the financial capacity to systematically devote their time to news-gathering and analysis.[283]

In sum, while each of the three arguments highlight pockets of media strength, when it comes to the impact of technological change on the local press, the numbers are clear. Local media, and especially local print media, has been devastated.[284] As a whole, they lack the resources needed to extract information from government actors and perform their traditional watchdog role.

newspaper with news tips via, inter alia, an open source, encrypted messaging app that "allows messages to self-destruct, removing them from the recipient's and sender's phones . . . after a set amount of time").

[281] See generally Glenn Greenwald, NSA Collecting Phone Records of Millions of Verizon Customers Daily, Guardian (June 6, 2013, 6:05 AM), https://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order [https://perma.cc/8L3W-A5N5] (describing the NSA's large-scale domestic metadata collection activities).

[282] Klar & Brooks, supra note 219.

[283] Snowden partnered with institutional media outlets. For an example of the fruits of one such partnership, see Greenwald, supra note 281. And the Substack journalists all formerly worked for prominent media institutions. See, e.g., Michael M. Grynbaum, Elon Musk, Matt Taibbi, and a Very Modern Media Maelstrom, N.Y. Times (Dec. 8, 2022), https://www.nytimes.com/2022/12/04/business/media/elon-musk-twitter-matt-taibbi.html [https://perma.cc/V46H-3KVM] (describing how journalist Matt Taibbi left *Rolling Stone* and journalist Bari Weiss left the *New York Times*); Harry Lambert, How Bari Weiss Broke the Media, New Statesman (Feb. 23, 2023), https://www.newstatesman.com/politics/media/2023/02/how-bari-weiss-broke-media [https://perma.cc/T8HH-ABRV] ("Since 2017, Weiss has gone from being an unknown books editor at the *Wall Street Journal* to the founder of one of the biggest political platforms on Substack, via the opinion pages of the *New York Times*.").

[284] See Grieco, supra note 169. The Pew Research Center's Project for Excellence in Journalism provides excellent statistics on the state of the news media. See, e.g., Katerina Eva Matsa & Kirsten Worden, Local Newspapers Fact Sheet, Pew Rsch. Ctr. (May 26, 2022), https://www.pewresearch.org/journalism/fact-sheet/local-newspapers/ [https://perma.cc/3E3T-2MUQ] (revealing that weekday circulation of locally focused U.S. daily newspapers has declined by forty percent since 2015, and revenue is down forty percent since 2019).

A second variant of this critique is that the equilibrium thesis misrepresents the executive power side of the equation. There is a case to be made that the executive branch has only sporadically been subject to meaningful constraints. After all, the 1970s were historically anomalous, and the federal executive was especially weak in the wake of Watergate and Vietnam due to self-inflicted wounds. It is also possible to point to flaws in the secrecy-constraining methods and mechanisms put into place during this era. Criticism of these emerged soon after they were adopted. Ralph Nader, for example, argued only a few years after FOIA was enacted that "agencies have systematically and routinely violated both the purpose and specific provisions of the law."[285] Critiques of other intergovernmental checks introduced in this era surfaced soon after their adoption as well.[286]

Yet these new laws undoubtedly constrained federal and state executive actors in unprecedented ways, in spite of their flaws.[287] More importantly, even if the executive has only sporadically been subject to constraint, the response is to seek more ways to strengthen legal, practical, and normative constraints rather than to despair about the possibility of implementing them. This is especially true in an era when the executive has more power to gather and deploy information with which to manipulate public opinion than ever before in history.[288]

[285] Ralph Nader, Freedom from Information: The Act and the Agencies, 5 Harv. C.R.-C.L. L. Rev. 1, 2 (1970); see also David E. McCraw, The "Freedom from Information" Act: A Look Back at Nader, FOIA, and What Went Wrong, 126 Yale L.J.F. 232, 233–34, 236–39 (2016) (describing Nader's critiques).

[286] See, e.g., Helene E. Schwartz, Oversight of Minimization Compliance Under the Foreign Intelligence Surveillance Act: How the Watchdogs Are Doing Their Jobs, 12 Rutgers L.J. 405, 477–79 (1981) (criticizing congressional reluctance to convey information to the public about executive branch compliance with the Foreign Intelligence Surveillance Act).

[287] See discussion supra Section I.B. The voluntary guidelines adopted by the Department of Justice, for example, proved effective in reducing the volume of subpoenas issued to the press. See, e.g., Sam J. Ervin, Jr., In Pursuit of a Press Privilege, 11 Harv. J. on Legis. 233, 252–53 (1974) ("[T]he sudden reduction in the number of federal government subpoenas which followed the issuance of the guidelines indicated that they had achieved the desired effect."). It is only more recently that the government has violated these provisions in new and alarming ways. See Bruce D. Brown & Gabe Rottman, Everything We Know About the Trump-Era Records Demands from the Press, Lawfare (July 6, 2021, 10:00 AM), https://www.lawfareblog.com/everything-we-know-about-trump-era-records-demands-press [https://perma.cc/4WYC-VWD4] (discussing the Department of Justice's authorization of "broad, secret demands for the phone and email records" of particular journalists "to identify confidential sources").

[288] See Section II.B.

A third strand of the argument that the First Amendment equilibrium was illusory is that the government and the press never truly operated as adversaries.[289] Again, there are different versions of this critique. One is that the equilibrium model wrongly assumes that the government and the press are stable and unitary entities acting upon a fixed set of motives. Cass Sunstein has advanced this view, arguing that government actors are often motivated to disclose information and the press is often motivated to conceal it.[290] He argues that the two often form alliances that are both fluid and shifting.[291] Further, very partisan outlets like Fox News or Daily Kos are more or less likely to act as an adversary to the executive depending on whether their preferred political party is in power.[292]

A stronger version of this critique is that the press and the government act more like co-conspirators, each reliant on the other to advance their interests.[293] Under both articulations, the equilibrium theory fails to capture the complexity and nuance of the true relationship between the government and the Fourth Estate.[294]

As a descriptive matter, it is true that the press and the government are not perfect or consistent adversaries. Indeed, one can point to a number of historical examples illustrating press complicity and cooperation with government officials.[295] Yet while the adversarial model of press-

[289] See, e.g., Kathryn J. McGarr, City of Newsmen: Public Lies and Professional Secrets in Cold War Washington 2–4 (2022) (arguing that the Washington press corps withheld information from the American public during the Cold War because they ideologically supported certain government efforts like aligning the nation's interests with those of Western Europe).

[290] Sunstein, supra note 18, at 902 (arguing that commercial pressure in particular "makes it unlikely that the press will venture too far from what its consumers want to read or hear").

[291] See id.

[292] See, e.g., Matthew A. Baum & Tim Groeling, New Media and the Polarization of American Political Discourse, 25 Pol. Commc'n 345, 350–53 (2008) (measuring the degree of partisan coverage by Fox News and Daily Kos, among others).

[293] See id. (making the point that the press and the government are not engaged in a true adversarial relationship).

[294] Sunstein argues that the adversarial model is therefore both "odd and inaccurate." Sunstein, supra note 18, at 902. David Pozen's extensive investigation into the ecology of government leaks demonstrates the complexity of government-press relations when it comes to information disclosures, too, including how often such information is disclosed with either explicit or implicit permission of high-ranking government officials. Pozen, supra note 264, at 567–73.

[295] See, e.g., Carl Bernstein, The CIA and the Media, Rolling Stone, Oct. 20, 1977, at 55 (contending that more than 400 U.S. journalists "carried out assignments for the Central Intelligence Agency" and "provided a full range of clandestine services—from simple intelligence gathering to serving as go-betweens with spies in Communist countries").

government relations may oversimplify the complexity and fluidity of the relationship, the real question is whether the existence of non-adversarial interactions fundamentally destabilizes the essential tug-of-war over government information that the various branches of government established in the wake of Watergate and Vietnam.

They most likely do not. Even if there is some conceptual blurring of the categories and cooperative behavior by press and government actors, critical types of information—information that embarrasses the government; information that reveals government wrongdoing, corruption, or misconduct; and so on—require an adversarial actor who obtains information against the will of the government. Put another way, the equilibrium model does not need to capture every type of government-press interaction. But there does need to be some external push and pull over government information for the democratic political system to function properly.

A further strand of critique is that the equilibrium fails to acknowledge that the government has extended all sorts of special protections to the press throughout our nation's history but particularly in the last half-century.[296] Certainly, the government has provided some forms of financial support. Media institutions, like many other industries, receive tax breaks, as well as exemptions from certain labor laws, restrictions on interstate commerce, and more.[297] The press has long received legal protections as well. Professor Martha Minow has argued that the "constitutional plan did not only assume the existence and viability of private enterprises producing and distributing news; it also authorized governmental contributions to the news industry through decades of economic and technological change."[298]

[296] For a summary of this favorable treatment, see West, supra note 32, at 105–20; see also Anderson, supra note 26, 485–89 (observing that "[t]he press's ability to gather news is protected almost entirely by nonconstitutional means" and pointing to federal and state freedom of information acts; statutory fee waivers for records requests; the common law right of access to judicial records; policies of providing preferential press access to various government bodies and government-controlled spaces; shield statutes; statutes preventing newsroom searches and seizures; exemptions from various regulations and taxes; favorable postal rates; and other benefits).

[297] See Joshua P. Darr, Government Subsidies to Save Local News, NiemanLab, https://www.niemanlab.org/2021/12/government-subsidies-to-save-local-news/ [https://perma.cc/QG4N-S5H7] (last visited Oct. 19, 2023).

[298] Minow, supra note 30, at 56; see also Desai, supra note 32, at 676–95 (describing the history of government postal subsidies for newspapers in seventeenth and eighteenth-century America).

Federal and state legislative protections have been especially robust.[299] These include interventions like statutes permitting newspapers to maintain joint operating agreements without violating antitrust laws.[300] They also include state shield laws, which allow reporters to protect their confidential sources.[301] And they include federal and state statutes that make it more difficult for law enforcement agencies to conduct searches of newsrooms.[302]

Again, although this account is descriptively accurate, it is not in direct tension with this Article's thesis. Legislative interventions have helped to blunt the impact of judicial decisions denying constitutional protection to the press.[303] But they have not wholly eliminated their effect. Reporters still lack a shield law in federal court. Statutory transparency laws still do not permit reporters to access critical government facilities like jails and prisons. The impacts of the *Branzburg v. Hayes* and *Houchins v. KQED, Inc.* holdings are still felt today.

Further, it takes political power and resources to organize and advocate for rights extended through the legislature. The *Branzburg* Court reasoned that the impact of its denial of constitutional protections was mitigated by the press's ability to work through legislative channels.[304] Yet with diminished press financial resources, fewer press outlets available to take up these causes, and the growing unpopularity of the press among significant segments of the public, it becomes less likely that the press will be successful in advancing its interests through lobbying and other advocacy efforts.

[299] For a summary of these protections, see Anderson, supra note 26, at 485–89.

[300] See 15 U.S.C. §§ 1801–1804.

[301] For a discussion of these statutes, see Koningisor, supra note 8, at 1201–02.

[302] See, e.g., 42 U.S.C. § 2000aa (making it unlawful "to search for or seize any work product material possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication").

[303] See Mary-Rose Papandrea, Citizen Journalism and the Reporter's Privilege, 91 Minn. L. Rev. 515, 545–52 (2007) (describing the varying degrees of protection state shield laws offer journalists, despite the lack of constitutional protections).

[304] Branzburg v. Hayes, 408 U.S. 665, 706 (1972) ("There is also merit in leaving state legislatures free, within First Amendment limits, to fashion their own standards in light of the conditions and problems with respect to the relations between law enforcement officials and press in their own areas.").

### *B. The First Amendment Equilibrium Is Irrelevant*

The second set of critiques involves a loosely related set of claims that the First Amendment equilibrium no longer matters. One version of this claim is that the press is no longer relevant because the government can now convey information directly to the public.[305] The response to this critique is obvious: government information that flows unmediated and unexamined to the public will always be insufficient for democratic purposes because it tends to become unchecked government propaganda.[306] On its own, government-provided information will rarely operate as a valid constraint on government or as a source of information capable of sustaining the deliberative democratic process. For that, a critical and adversarial actor is needed to uncover information the public needs that the government would like to keep hidden. Expertise matters, too, if the public is to receive the information it needs to serve as a check on official action.

A second, related argument is that various affirmative disclosure obligations on the government could operate as an effective substitute for the information-gathering efforts of the press.[307] Again, while affirmative disclosure mechanisms are often valuable, they cannot replace the work of an investigative and adversarial press. Such ex ante requirements inevitably fall short when it comes to disclosing the most embarrassing, troubling, or revelatory government information.[308] Further, such

[305] A more extreme variant of this critique might be that the press has been too weakened and is not worth saving. Justice Gorsuch, in a recent dissent from denial of certiorari in a defamation case, seemed to advance a version of this claim. See Berisha v. Lawson, 141 S. Ct. 2424, 2427–30 (2021) (Gorsuch, J., dissenting from denial of certiorari). He argued that the decline in production quality among mainstream press institutions is a reason to revisit the constitutional protections for the press. Id. (arguing that when *New York Times Co. v. Sullivan* was handed down, "many major media outlets employed fact-checkers and editors, . . . and one could argue that most strived to report true stories," but "[l]ess clear is what sway these justifications hold in a new era where the old economic model that supported reporters, fact-checking, and editorial oversight is disappearing").

[306] See Andersen Jones & West, supra note 30, at 583–84 (noting that such direct access "cut[s] out a set of functions—fact-checking, educating, exercising editorial discretion, and offering context"); Sasha Dudding, Note, Spinning Secrets: The Dangers of Selective Declassification, 130 Yale L.J. 708, 712–13 (2021) (describing how selective declassification of secret information allows the government to advance self-serving narratives).

[307] Cf., e.g., Pozen, supra note 198, at 1149 (suggesting that affirmative disclosure obligations could serve as a replacement for FOIA).

[308] See Sunstein, supra note 18, at 903. There is also the risk that affirmative disclosures will be overinclusive and require more effort to release information for which there is little public demand. See Margaret B. Kwoka, Inside FOIA, Inc., 126 Yale L.J.F. 265, 272 (2016) (noting

disclosure efforts are often costly and time consuming, making it difficult for many local governments, especially, to engage in bulk and systematic disclosures.[309] In other words, such disclosures are often both over- and underinclusive. They risk flooding the public with low-value information while also failing to produce the information most relevant to the electorate.

A third variant of this argument is that the role played by the media is less central today. Other actors are now stepping in to fill the media's shoes, which in turn reduces the role and relevance of the institutional press. There has been an increase in unauthorized "document dumps" to websites like WikiLeaks, for example.[310] And the combination of Twitter, TikTok, and iPhone video cameras allows anyone to act as both journalist and commentator. Darnella Frazier's video of the murder of George Floyd illustrated just how powerful citizen journalists can be.[311] Social media has democratized the government accountability process.

Yet again, such efforts—even taken in combination—do not necessarily add up to the functions of an independent and well-resourced press. Citizen journalists generally do not cultivate sources, obtain government data, build sustained expertise, or follow a story over time. And the document dumps hosted by leaking websites are not engaged in the type of sustained and systematic review and analysis needed to convey information to the public.[312] The Fourth Estate is still needed to interpret, organize, and disseminate government information.[313]

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that for certain categories of records, it will be "substantially more work" to engage in affirmative disclosures than to respond to specific requests).

[309] Cf. Peter Conradie & Sunil Choenni, On the Barriers for Local Government Releasing Open Data, 31 Gov't Info. Q. at S10, S16 (2014) (describing high transaction costs as one of the barriers to local government open data initiatives).

[310] See WikiLeaks: Document Dumps That Shook the World, BBC (Apr. 12, 2019), https://www.bbc.com/news/technology-47907890 [https://perma.cc/M9TJ-6V3S] (chronicling major WikiLeaks document dumps between 2009 and 2016).

[311] See 2021 Pulitzer Prize Winner in Special Citations and Awards: Darnella Frazier, The Pulitzer Prizes, https://www.pulitzer.org/winners/darnella-frazier [https://perma.cc/6Y2H-JQ9X] (last visited Oct. 19, 2023).

[312] See Sandra Upson, What Happened to WikiLeaks?, Wired (Aug. 19, 2016, 12:00 AM), https://www.wired.com/2016/08/what-happened-to-wikileaks/ [https://perma.cc/899A-4P65].

[313] See Citizens United v. FEC, 558 U.S. 310, 353 (2010) ("[T]elevision networks and major newspapers owned by media corporations have become the most important means of mass communication in modern times."); see also David A. Anderson, The Press and Democratic Dialogue, 127 Harv. L. Rev. F. 331, 333 (2014) (arguing that the press operates as the "principal organizer" of the nation's "democratic dialogue").

Finally, there is the critique that the information ecosystem has become so distorted that even a well-functioning and well-resourced press is incapable of holding the government in check. Under this view, the public no longer reads, believes, or trusts the institutional press.[314] Even the most penetrating investigative efforts are futile if the public is no longer listening. This critique is perhaps the most difficult to counter because it undermines a fundamental presumption of First Amendment theory—namely, that citizens will rationally evaluate the information necessary to engage in democratic self-governance. It also plugs into a much larger debate about how best to address the contemporary challenges of political polarization and disinformation, one that requires a longer and more in-depth treatment.[315]

Yet, in brief, the problem of disinformation and the collapse of the press are intertwined, and it is possible that one might be a cure for the other. A stronger and more vibrant press—especially at the local level—might help to counter this cycle of fake news, especially when supplied by government actors, and to restore a common set of baseline facts to the public debate.[316] To cast aside the press as irrelevant in our age of disinformation would be to discard one of the most promising mechanisms at our disposal to counter the underlying problem.

### *C. The First Amendment Equilibrium Is Undesirable*

The final critique is that the First Amendment equilibrium was flawed from the start and should not be restored. Under this view, one or both sides of the balance are deeply skewed. The press has been given too much power to reveal sensitive national security information even though it lacks both the requisite knowledge and expertise to do so. And the government has been given too much power to shield information that the public requires to make informed electoral decisions and engage in deliberative debate.[317]

[314] See Brenan, supra note 13 (finding that, in 2021, only eleven percent of Republicans expressed confidence in the media).

[315] See supra note 30. One of us has previously responded to the most deeply pessimistic accounts of the breakdown of First Amendment theory. See generally Lidsky, supra note 230.

[316] See, e.g., Richard L. Hasen, How to Keep the Rising Tide of Fake News from Drowning Our Democracy, N.Y. Times (Mar. 7, 2022), https://www.nytimes.com/2022/03/07/opinion/cheap-speech-fake-news-democracy.html [https://perma.cc/9QMK-5GDQ] (describing the connections between the collapse of local news and the spread of mis- and disinformation).

[317] See Sunstein, supra note 18, at 902–03 (summarizing this claim).

A close variant of this critique is that the content-neutral approach embodied in the equilibrium—one in which the strongest side wins—should give way to a more substantive evaluation of the competing interests and justifications on both sides.[318] Judges or legislators should decide ex ante which information is valuable enough to the public that it should be disclosed. Academics and policymakers have mounted attacks on these grounds. As one scholar has put it, "As a normative or justificatory matter, few have celebrated this 'disorderly situation.' Many believe it to be regrettable if not outrageous."[319]

Yet such critiques of the government-press balance of power tend to be confined to the national security context,[320] while this power imbalance is arguably most severe at the state and local level. Across wide swaths of the country, state and local officials are unmonitored by the press.[321] And in places where local media does persist, these organizations are very often merely struggling to survive.[322] Local media outlets are rarely equally situated when it comes to government-press disputes.

Further, such critiques do not directly contradict this Article's central claims. Fixing the distortions in the law caused by the press's decline does not necessarily require restoring the vision of equilibrium articulated by the Court and by Congress in the 1970s. As is discussed further below, new and different approaches—ones better tailored to the present moment—might be adopted instead.

## IV. FIXING THE FIRST AMENDMENT DISEQUILIBRIUM

The First Amendment equilibrium model no longer functions as intended. The press is no longer capable of operating as an equal adversary to the government, and the government is no longer bound by a key set of internal and external constraints. This is especially true at the state and local level. The question then becomes how best to remedy this

[318] See id. at 904.

[319] Pozen, supra note 264, at 516–17.

[320] See, e.g., id.

[321] See, e.g., Miriam Seifter, Further from the People? The Puzzle of State Administration, 93 N.Y.U. L. Rev. 107, 110 (2018) ("[S]tate agencies are, on the whole, less transparent than their federal counterparts, less closely followed by watchdog groups, and less tracked by the shrinking state-level media."); Shearer et al., supra note 170 (describing the decline in full-time statehouse reporters).

[322] See Abernathy, supra note 12, at 8 (noting that many outlets "were hanging on by the slimmest of profit margins" even before the COVID-19 pandemic).

imbalance. This Part argues that there are two central paths forward: fixing these distortions in the law and rehabilitating an ailing press.

### *A. Fixing the Law*

#### *1. Judicial Fixes*

One way to remedy the government-press disequilibrium is to ramp up constitutional protections for the press. The Court could, in theory, revisit *Branzburg* and recognize a qualified First Amendment shield for journalists' sources.[323] It could also extend the First Amendment right of access to reach other types and forms of government activity, including executive branch records, information, and facilities.[324] Such an approach would have benefits. First Amendment protection for confidential sources would unify and expand what is now a patchwork set of protections extended by state legislatures, state courts, and some federal circuits.[325] It would also help mend the many holes in the current, statute-based information access regime. Such constitutional expansions would bolster the power of the press and help remedy some of the distortions in the law created by the government-press disequilibrium.

Yet there are also reasons to be skeptical. As a practical matter, the present Court has shown little enthusiasm for extending new or broader constitutional protections for the press.[326] The Court's current, neo-

[323] See Koningisor, supra note 8, at 1264–66 (describing the benefits and drawbacks of constitutionalizing the reporter's privilege).

[324] See Christopher Dunn, Column: Rediscovering the First Amendment Right of Access (New York Law Journal), N.Y. C.L. Union (Aug. 4, 2011), https://www.nyclu.org/en/publications/column-rediscovering-first-amendment-right-access-new-york-law-journal [https://perma.cc/9PSJ-NHMV] (describing limited appellate court decisions finding a constitutional right of access to certain administrative proceedings).

[325] See RonNell Andersen Jones, Rethinking Reporter's Privilege, 111 Mich. L. Rev. 1221, 1246 (2013) (describing this "patchwork" of rules).

[326] The Roberts Court has seemed particularly disinterested in press cases. Admittedly, it is not clear how many certiorari petitions involving the media the Roberts Court has denied. By our count, the only cases the Roberts Court has decided that directly involve the media are *FCC v. Fox Televisions Stations, Inc.* (*Fox I*), 556 U.S. 502, 516 (2009), and *FCC v. Fox Television Stations, Inc.* (*Fox II*), 567 U.S. 239, 258 (2012), which ended up being decided on administrative law and due process grounds, respectively, and *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 790 (2011). However, a number of Roberts Court decisions indirectly implicate media interests, including *United States v. Alvarez*, 567 U.S. 709, 719–20 (2012) (plurality opinion), *Snyder v. Phelps*, 562 U.S. 443, 451–53 (2011), *United States v. Stevens*, 559 U.S. 460, 470–71 (2010), and *Citizens United v. FEC*, 558 U.S. 310, 351–54 (2010).

Lochnerian expansion of the First Amendment largely ignores the barriers that prevent some speakers from meaningful participation in public discourse. The Court has emphasized negative rights—freedom from government regulation—rather than bolstering positive speech rights like access to government information.[327] Moreover, the Court is increasingly skeptical of the notion that the press plays a special role in democracy. As Professors RonNell Andersen Jones and Sonja R. West have shown, even the phrase "freedom of the press" is "disappearing from the Court's lexicon."[328] The Court has also rejected constitutional protections for the press on originalist grounds.[329]

There may also be practical reasons to eschew such protections. Permitting special constitutional protections for the press might reduce the government's willingness to extend preferential treatment in the first place.[330] If denying a press pass to a specific outlet invites constitutional challenges, for example, the government may decide not to offer press access at all.[331] Even for constitutional protections that are not press-specific—for example, broader First Amendment right of access protections for the public at large—expanding such protection might dampen policymakers' willingness to protect information access through statutory or other sub-constitutional means.

Alternatively, courts could expand common law protections for the press. When it comes to the reporter's privilege, for example, Rule 501 of the Federal Rules of Evidence permits courts to recognize new common law evidentiary privileges.[332] The courts could formalize protections via

[327] See Genevieve Lakier, The First Amendment's Real *Lochner* Problem, 87 U. Chi. L. Rev. 1241, 1324 (2020) (describing "the Court's increasing tendency to construe the First Amendment as a shield that private market actors can wield against government regulation, rather than (as it once did) as a mechanism for safeguarding free speech values against the threat posed to them by *both* private and government power").

[328] RonNell Andersen Jones & Sonja R. West, The Disappearing Freedom of the Press, 79 Wash. & Lee L. Rev. 1377, 1380 (2022).

[329] See, e.g., *Citizens United*, 558 U.S. at 390–91 & n.6 (Scalia, J., concurring) (rejecting the dissent's claim that the drafters intended the press clause to refer to the "institutional press").

[330] See Anderson, supra note 26, at 510–12 (describing the costs of constitutionalizing press privileges and protections).

[331] See id. at 510; see also David Pozen, Why a Media Shield Law May Be a Sieve, Just Sec. (Oct. 21, 2013), https://www.justsecurity.org/2232/media-shield-law-sieve-david-pozen/ [https://perma.cc/8MXF-UZ7H] ("Accusations of overreach would have less bite within a legal framework that had been blessed by all three branches of government plus the Fourth Estate.").

[332] Fed. R. Evid. 501.

this route as well.[333] They could also recognize broader common law rights of access to government records and proceedings.[334] Such approaches would mitigate certain concerns over constitutionalizing press protections. Yet again, such options can only reach so far. Common law evidentiary privileges would not, for example, help address the imbalances that exist in the realm of national security secrecy.[335] In sum, while there are judicial avenues available for remedying the First Amendment equilibrium, they are likely to be limited.

*2. Legislative Fixes*

Legislative interventions to reduce these imbalances between the government and the press hold more promise. This route offers increased flexibility and a greater opportunity to determine ex ante how best to balance the competing values at stake.[336] It also offers ample opportunities for interventions at the state and local level, where both press oversight and intergovernmental checks are reduced.[337] These interventions could take different forms. They could include statutory fixes to bolster protections for the press, statutory efforts to restore some of the constraints on executive branch power, or some combination of both.

In terms of press-focused interventions at the federal level, Congress could enact a statutory shield law. Dozens of such laws have been introduced over the decades since *Branzburg* was handed down, although none have passed.[338] The benefit of such an approach would be that Congress could resolve difficult definitional questions around who

[333] In fact, the drafters of the rule contemplated a reporter's privilege with the creation of this rule. See 23A Charles Alan Wright & Kenneth Graham Jr., Federal Practice and Procedure § 5426 & n.4 (2018) (explaining that the legislative history of the rule "read like an invitation to courts to create" a reporter's privilege).

[334] See Koningisor, supra note 207, at 1474.

[335] See discussion supra note 192 and accompanying text.

[336] Cf. Branzburg v. Hayes, 408 U.S. 665, 706 (1972) (noting that there is "merit in leaving state legislatures free, within First Amendment limits, to fashion their own standards in light of the conditions and problems with respect to the relations between law enforcement officials and press in their own areas").

[337] See discussion supra notes 202–06 and accompanying text.

[338] See RonNell Andersen Jones, Avalanche or Undue Alarm? An Empirical Study of Subpoenas Received by the News Media, 93 Minn. L. Rev. 585, 595 n.52 (2008) (noting that seventy-one shield laws were introduced in Congress in the year following *Branzburg* alone).

qualifies for protection.[339] It could also outline an approach for balancing competing interests when determining whether and how such protections should apply.[340] And it would allow the public, especially the press, to weigh in on the proper balance of equities involved. In response to a recently proposed shield law, for example, some journalists have argued that the carve-outs for national security sources rendered the bill ineffective.[341] Others have concluded that despite these "intolerably large" loopholes, "[e]ven an imperfect shield law would restore a little balance in the perpetual struggle between necessary secrets and democratic accountability."[342] The legislative route allows for debate and possibly even consensus on these types of questions.

Further, as the states have shown, such an approach is administrable. As of 2021, forty states and the District of Columbia have enacted statutory protections for journalists' confidential sources and unpublished notes and materials, and these state statutes have proven workable in practice.[343] A federal shield law would have to deal with the increased complexities involved with protecting national security-related information and sources. Yet there is ample precedent for crafting a legislative approach to the problem of confidential sources.[344]

Other federal legislative solutions could be used to remedy the imbalance of power in the national security context. For example, Congress could amend the Espionage Act to better protect reporters and

[339] See Sonja R. West, Awakening the Press Clause, 58 UCLA L. Rev. 1025, 1062–68 (2011) (describing the various approaches that state legislatures have taken when defining the press for the purpose of statute-based protections like state reporter's privilege laws).

[340] See id. at 1068–70.

[341] See Free Flow of Information Act of 2013, S. 987, 113th Cong. (2013), https://www.govinfo.gov/app/details/BILLS-113s987rs [https://perma.cc/MY6E-LQMZ] (proposed shield law); Eric Newton, Paying Attention to the Shield Law's Critics, Colum. Journalism Rev. (Sept. 24, 2013), https://archives.cjr.org/behind_the_news/paying_more_attention_to_the_s.php [https://perma.cc/7ADT-CFF8] (describing national security reporters' concerns over the proposed bill).

[342] Bill Keller, Opinion, Secrets and Leaks, N.Y. Times (June 2, 2013), https://www.nytimes.com/2013/06/03/opinion/keller-secrets-and-leaks.html [https://perma.cc/NG7F-R78J].

[343] Introduction to the Reporter's Privilege Compendium, Reps. Comm. for Freedom of the Press (Nov. 5, 2021), https://www.rcfp.org/introduction-to-the-reporters-privilege-compendium/ [https://perma.cc/Y5RF-GCFP].

[344] See Reporter's Privilege Compendium, Reps. Comm. for Freedom of the Press, https://www.rcfp.org/reporters-privilege/ [https://perma.cc/2QRD-LWZ3] (last visited Oct. 20, 2023).

publishers.[345] A bill was introduced in 2022 along these lines, one that proposed to narrow the scope of the Act to reach only those with authorized access to national security information and foreign agents.[346] It also proposed to strengthen intergovernmental restraints by protecting whistleblowers who furnish information to national security agency inspectors general, members of the Privacy and Civil Liberties Oversight Board, and FTC and FCC commissioners—in other words, the intergovernmental actors who are already empowered to check executive branch secrecy from within.[347]

Another powerful legislative remedy would be to codify the Department of Justice guidelines that protect members of the press against government subpoenas. The Trump Administration's disregard for these guidelines underscored their central weakness: that they are voluntary, with little enforcement mechanisms in place to safeguard their terms.[348] Attorney General Merrick Garland strengthened these guidelines in early 2021, expanding them to provide greater protection for the press.[349] Yet there is nothing to prevent future administrations from dismantling them again. Only Congress can make these protections permanent.[350]

A further point of entry for the legislature would be to amend FOIA to minimize the harms to the statutory regime caused by the decline of the press. Again, such fixes could take different forms. Public money could be used to fund lawsuits by requesters, for example. There are existing models to support this approach. The Canadian government, for instance, reserves public funds to support private citizens who commit to litigating

[345] For a discussion of critiques of the Espionage Act, see, e.g., Heidi Kitrosser & David Schulz, A House Built on Sand: The Constitutional Infirmity of Espionage Act Prosecutions for Leaking to the Press, 19 First Amend. L. Rev. 153, 160–61 (2021); Hathaway, supra note 192, at 793–98.

[346] See Espionage Act Reform Act of 2022, S. 4630, 117th Cong. (2022); Press Release, Knight First Amend. Inst. at Columbia Univ., Knight Institute Comments on Espionage Act Reform Legislation (July 27, 2022), https://knightcolumbia.org/content/knight-institute-comments-on-espionage-act-reform-legislation [https://perma.cc/ABF5-PALE].

[347] See supra note 346.

[348] See discussion supra notes 236–37 and accompanying text.

[349] See Charlie Savage & Katie Benner, Garland Tells Prosecutors Not to Seize Reporters' Records, N.Y. Times (July 19, 2021), https://www.nytimes.com/2021/07/19/us/politics/reporter-records-justice-department.html [https://perma.cc/5L77-TP32].

[350] Attorney General Garland recently endorsed such an effort. See Josh Gerstein, Garland Backs Legislation to End Subpoenas for Reporters' Records, Politico (June 25, 2021, 12:45 PM), https://www.politico.com/news/2021/06/25/garland-reporters-records-subpoenas-496291 [https://perma.cc/P57H-8UUD].

"cases of national significance."[351] A similar approach could be used to help reduce the pressure on the press to act as the law's enforcer. This is especially true at the state and local level, where there are fewer public interest requesters to fill the void.

At the state level, legislative fixes could improve journalists' ability to meaningfully utilize these public records laws in the course of their reporting. State legislatures could limit the amount that state and local governments are permitted to charge public interest requesters, for example. Many state statutes require only that such fees are "reasonable," which gives the agencies discretion to impose high requesting fees as a mechanism for evading public scrutiny.[352] Reining in such costs would improve journalists' ability to utilize these statutes in the normal course of their reporting.

Further legislative efforts could focus on ramping up existing constraints on executive branch power, especially when it comes to government secrecy powers. The oversight powers of agency inspectors general could be strengthened. Professor Shirin Sinnar has offered various proposals along these lines at the federal level, including expanding the jurisdiction and subpoena powers of inspectors general and requiring the publication of unclassified versions of these officials' annual reports.[353] But intergovernmental oversight at the state and local level could be improved as well. Governors have consolidated their executive power in recent years, and state agencies face reduced internal and external checks on their power.[354] Expanded intergovernmental checks like state-level agency inspectors general might help to compensate for reduced civil society oversight.[355]

[351] See Objectives and History of the Court Challenges Program, Gov't of Can., https://www.canada.ca/en/canadian-heritage/services/funding/court-challenges-program/backgrounder.html [https://perma.cc/XVB8-AVFR] (last visited Oct. 20, 2023).

[352] See Koningisor, supra note 207, at 1508 (summarizing these statutory provisions).

[353] See Sinnar, supra note 77, at 1083–84.

[354] See Seifter, supra note 202, at 487 (describing the consolidation of gubernatorial power); Seifter, supra note 321, at 109–10 (describing reduced civil society checks on state executive administration).

[355] See Terence Adams, State Inspectors Gen., Off. of Legis. Rsch., Conn. Gen. Assemb., 2013-R-0315 (2013), https://www.cga.ct.gov/2013/rpt/2013-R-0315.htm [https://perma.cc/6CAU-PWXJ] (describing states with inspectors general).

*3. Executive Fixes*

Finally, the executive branch could help to remedy government-press imbalances by adopting, strengthening, or codifying intragovernmental restraints that bind the executive vis-à-vis the press. The Department of Justice guidelines on press subpoenas offer an example.[356] Similar restraints could be adopted in the states as well. The Department of Justice could also formalize its longstanding policy of nonenforcement of the Espionage Act against the press, for instance, making explicit that it will not prosecute reporters or publishers who secure or disseminate classified materials. In states with weaker reporter shield laws in place, state attorneys general could adopt similar internal restraints as well.

The Department of Justice could also take affirmative steps to improve transparency in government. The attorney general could adopt a policy limiting the circumstances under which the Department will defend a FOIA denial or withholding, for instance, and instead require agencies to meet certain requirements before the Department will take up the case.[357] Again, executive branch actors at the state level could adopt similar reforms.

Reducing the executive's classification powers could also help. Professor Oona A. Hathaway has outlined possible ways to tackle the problem of overclassification, including simply doing away with the classification system altogether.[358] But there are other options as well. The president could take steps to accelerate the declassification process, for instance, or target specific problem areas. The prepublication system—the set of rules that require former intelligence agency employees to secure preapproval to speak or write about their employment—has been widely criticized for tamping down dissent from within and silencing criticisms of the government's national security approach.[359] The president could issue an executive order reducing the

[356] 28 C.F.R. § 50.10 (2022).

[357] Two advocacy organizations, the Knight First Amendment Institute at Columbia University and the Reporters Committee for Freedom of the Press, recently urged such an approach. See Letter from the Knight First Amend. Inst. at Columbia Univ. & the Reps. Comm. for Freedom of the Press to Merrick Garland, Att'y Gen. of the U.S. (Mar. 11, 2021), https://knightcolumbia.org/documents/948jgv8x7v [https://perma.cc/VE65-4E59].

[358] Hathaway, supra note 192, at 786–99.

[359] See, e.g., Jack Goldsmith & Oona A. Hathaway, The Government's Prepublication Review Process Is Broken, Wash. Post (Dec. 25, 2015, 6:40 PM), https://www.washingtonpost.com/opinions/the-governments-prepublication-review-process-is-broken/2015/12/25/edd943a8-a349-11e5-b53d-972e2751f433_story.html [https://perma.cc/N7UP-M4JQ]; Ramya

number of affected employees or ease various procedural barriers to publication, for example.[360] This type of targeted reform could help ensure that important dissenting voices are heard.

### *B. Fixing the Press*

An alternative way to restore government-press equilibrium is to improve the economic, political, and cultural position of the press—especially the local press. This plugs into a much broader debate about the ongoing role and viability of the institutional media and how best to address the broken financial model of the mainstream press, especially local media outlets.[361] But certain reforms and innovations show some promise.

Proposals along this line include a more robust nonprofit model, similar to what institutions like ProPublica or the Marshall Project have achieved.[362] For example, the *VTDigger*, based in Montpelier, has proven successful in plugging the holes opened up by the decline of legacy newspapers like the *Burlington Free Press*.[363] Similarly, the *Texas Tribune* has long served as a model of excellent, sustainable nonprofit journalism.[364]

Other creative funding models, such as local newspaper cooperatives or media institutions organized as public benefit corporations, could also

Krishnan, The Government's Own Documents Show that Prepublication Review Is Broken, Just Sec. (Apr. 4, 2019), https://www.justsecurity.org/63504/the-governments-own-documents-show-that-prepublication-review-is-broken/ [https://perma.cc/9UVH-HQLC].

[360] See Jameel Jaffer, Alex Abdo, Meenakshi Krishnan & Ramya Krishnan, How the Biden Administration and Congress Can Fix Prepublication Review: A Roadmap for Reform, Knight First Amend. Inst. at Colum. Univ. (Mar. 11, 2022), https://knightcolumbia.org/content/how-the-biden-administration-and-congress-can-fix-prepublication-review-a-roadmap-for-reform [https://perma.cc/9QAX-ML6Y].

[361] See discussion supra note 30 and accompanying text.

[362] ProPublica has recently expanded its local news operations. See Local Reporting Network, ProPublica, https://www.propublica.org/local-reporting-network/ [https://perma.cc/FG3T-R2UQ] (last visited Oct. 20, 2023); see also Clare Malone, Is There a Market for Saving Local News?, New Yorker (Feb. 3, 2022), https://www.newyorker.com/news/annals-of-communications/is-there-a-market-for-saving-local-news [https://perma.cc/G85P-TAWT] (describing a new philanthropic funding model for local news).

[363] See Bill McKibben, How Vermont's Media Helps Keep the State Together, New Yorker (Sept. 14, 2022), https://www.newyorker.com/news/daily-comment/how-vermonts-media-helps-keep-the-state-together [https://perma.cc/GB7V-A97A].

[364] See Margaret Sullivan, If Local Journalism Manages to Survive, Give Evan Smith Some Credit for It, Wash. Post (Jan. 23, 2022), https://www.washingtonpost.com/media/2022/01/23/media-sullivan-evan-smith-texas-tribune/ [https://perma.cc/QK4X-2P56].

help to stem the losses in local news.[365] The wealthy benefactor model, too—think Jeff Bezos's purchase of the *Washington Post*, or John Henry's purchase of the *Boston Globe*—could be replicated on a smaller scale.[366] Skeptics have questioned the extent to which these alternative models are scalable and replicable across the country.[367] Yet these models are already spreading, and some of these existing media upstarts have already played a critical role in preserving and bolstering local information ecosystems.[368]

A more controversial approach would be to increase public funding for local media. There is, of course, government support for U.S. media already.[369] But it is limited—the United States is an outlier in this respect.[370] Most other western democracies already employ some mixed model of public and private financing of the media.[371] England sets an annual licensing fee that members of the public pay annually, for example, generating around five billion dollars per year in journalism funding.[372] And Canada's Local Journalism Initiative allocates millions

[365] For a summary of some of these new funding models, see Mark Glaser, 5 Business Model Shifts for Local News in 2021 and Beyond, Knight Found. (Dec. 18, 2020), https://knightfoundation.org/articles/5-business-model-shifts-for-local-news-in-2021-and-beyond/ [https://perma.cc/ERD6-PHUT].

[366] See Mark Glaser, How Creative Ownership Structures Can Help Local News Publishers Stay Local, Knight Found. (Oct. 6, 2021), https://knightfoundation.org/articles/how-creative-ownership-structures-can-help-local-news-publishers-stay-local/ [https://perma.cc/8JQH-72KN] (describing successful models at the local level). However, there is also a concern that such models give wealthy individuals too much power over the media. See Dan Froomkin, The *Washington Post* Has a Bezos Problem, Colum. Journalism Rev. (Sept. 27, 2022), https://www.cjr.org/special_report/washington-post-jeff-bezos.php [https://perma.cc/H45S-4X8C] (arguing that the conflicts of interest between Jeff Bezos and the *Washington Post* are "self-evident").

[367] See, e.g., Rodney Benson, Can Foundations Solve the Journalism Crisis?, 19 Journalism 1059, 1060 (2018), http://rodneybenson.org/wp-content/uploads/Benson-2018-Can-Foundations-Solve-the-Journalism-Crisis.pdf [https://perma.cc/B98Q-F4PF] (arguing that nonprofit journalistic organizations "fall short of offering a strong critical alternative to the market failure and professional shortcomings of commercial journalism").

[368] See Glaser, supra note 366.

[369] See Geoffrey Cowan & David Westphal, Ctr. on Commc'n Leadership & Pol'y, Public Policy and Funding the News 7–11 (2010), https://fundingthenews.usc.edu/report/ [https://perma.cc/6DDF-PZP6].

[370] See Rodney Benson & Matthew Powers, Public Media and Political Independence: Lessons for the Future of Journalism from Around the World 8 (Free Press 2011), https://www.issuelab.org/resources/13259/13259.pdf [https://perma.cc/N65P-4KX8].

[371] Id.

[372] See Stephen Beard, BBC's Funding System Under Fire Amid Viewership Changes, Conservatives' Hostility, Marketplace (Feb. 1, 2022), https://www.marketplace.org/2022/02/

of dollars to local press outlets.[373] Some states have already pursued something similar. New Jersey, for instance, recently earmarked two million dollars in funding for local news.[374]

The federal government and other states could pursue a similar model. The benefit of such an approach is that it guarantees a steady and predictable source of income. The downside is that public funding might risk creating a press that is less independent and less willing to hold political actors to account. Yet if the choice is between government-supported local media or no local media at all, perhaps those downsides become more palatable, especially if protections to insulate the press from funding decisions are built into the process.

Ultimately, it is unlikely that any single approach will cure the press and restore the government-press equilibrium. But some mix of the remedies outlined above might reduce the current imbalance and mitigate the distortions in the law created by the collapse of the press.

## CONCLUSION

The information ecosystem that sustains a liberal democracy requires a group of motivated, adversarial, and independent actors working to unearth and publicize information about government—what Professor David Anderson has described as the "organizer[s]" of the "democratic dialogue."[375] In the United States, that role has long been filled by the institutional press. Journalists have long worked to unearth government information and hold government actors accountable.

Yet the legal infrastructure that defines this critical relationship between the government and the press was established in a different era, one in which the press was more politically and financially powerful and the executive more constrained. The collapse of the press and the unshackling of executive branch constraints have distorted this key segment of First Amendment law. This Article documents these

01/bbcs-funding-system-under-fire-amid-viewership-changes-conservatives-hostility/ [https://perma.cc/8UEU-72DC].

[373] See Sarah Scire, In Canada, a Government Program to Support Local News Tries to Determine Who's Most Deserving, NiemanLab (May 8, 2020), https://www.niemanlab.org/2020/05/in-canada-a-government-program-to-support-local-news-tries-to-determine-whos-most-deserving/ [https://perma.cc/KQC5-75T6].

[374] Mathew Ingram, Government Funding for Journalism: Necessary Evil or Just Evil?, Colum. Journalism Rev. (Jan. 24, 2020), https://www.cjr.org/the_media_today/government-funding-journalism.php [https://perma.cc/HQ2Y-7396].

[375] Anderson, supra note 313, at 334.

distortions, tracking the effects of these changes across various parts of the law.

In doing so, it sets up an agenda for future exploration, such as how increased government surveillance has affected the relationship between journalists and their sources and whether increased government support for local journalism risks co-opting and silencing the press. And by identifying the areas of the law most affected by the collapse of the government-press equilibrium, the Article illuminates new paths forward for reform. It reveals ways that we might fix these distortions in the law and reestablish balance in the nation's democratic information ecosystem.