PANEL 1: THE SUPREME COURT AND THE PRESS CLAUSE: A COMPLICATED RELATIONSHIP

THE DANGERS OF PRESS CLAUSE DICTA

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I. INTRODUCTION

If an attorney, scholar, or citizen opened the 448th volume of the U.S. Reports to page 573, she would find herself midway through a case captioned *Richmond Newspapers, Inc. v. Virginia*.[1] Context would make clear that the case was brought by a newspaper that wished to report on a criminal trial but was precluded from doing so when the trial judge closed the proceedings.[2] The tenor of the analysis would foreshadow that the newspaper was on its way to a 7–1 victory and a holding that gave it the access it sought to the judicial proceeding.[3] And the tone of the Court's treatment of the newspaper litigant—coupled with more sweeping statements about the democracy-enhancing public service rendered by all similar entities—would suggest strongly that the newspaper's larger societal role in reporting on these matters of public concern was an important driving force for the Court's conclusion. The reader of page 573 would see the Justices of the Supreme Court "praise[ ] the media's critical role as surrogate, cite[ ] its importance to public understanding of the law and criminal justice, and speculate[ ] that this justified priority entry and special seating for the valuable institution of the press."[4] The press, the *Richmond Newspaper* Court explains, is the "chief[ ]" source of information to the people[5] and contributes significantly to "public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system."[6] Reading the page's passages in isolation, the reader might well come away with an understanding that the fact that a newspaper was a party to the case was both constitutionally relevant and outcome determinative.

But the reader would be wrong. The holding of *Richmond Newspapers* is that, for a variety of reasons rooted in the historical tradition and positive social function of openness,[7] *all* citizens—including but not limited to the media—have a presumptive First

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[1] 448 U.S. 555, 573 (1980).

[2] *Id.*

[3] *Id.*

[4] RonNell Andersen Jones, *U.S. Supreme Court Justices and Press Access*, 2012 BYU L. REV. 1791, 1796.

[5] *Richmond Newspapers*, 448 U.S. at 573.

[6] *Id.*

[7] *Id.* at 563–77.

Amendment right to attend a criminal trial.[8] The language on page 573, praising the press and speaking to its role in enhancing democracy and educating the populace, is mere dicta.

This particular brand of dicta—commentary about the unique role of the press in society and the democratic function that it serves—is not rare. Indeed, a close examination of cases involving the press reveals that it is one of the most consistent, defining characteristics of the U.S. Supreme Court's media law jurisprudence in the last half century. The Court's opinions in cases involving the media, while almost uniformly reaching conclusions based on other grounds, regularly include language about the constitutional or democratic character, duty, value, or role of the press—language that could be, but ultimately is not, significant to the constitutional conclusion reached.

This unusual pattern of excessive dicta arises in part from the existence of a specific constitutional provision, the Press Clause of the First Amendment,[9] that on its face *could* house significant protection for the media, but that has in fact proven to be a largely empty vessel—seen, at best, as a constitutional redundancy with the Speech Clause.[10] For decades, First Amendment scholars have debated ways in which the Court could or should be convinced to adopt a substantive position giving the Press Clause some constitutional teeth. In recent years, particularly in the wake of the Court's *Citizens United* opinion,[11] there has been a resurgence of media law scholarship on the question and renewed advocacy for meaningful protection for the media as a unique social institution.[12] Several scholars have thoughtfully argued that it

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[8] *Id.* at 580 ("We hold that the right to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and 'of the press could be eviscerated.' " (quoting Branzburg v. Hayes, 408 U.S. 665, 681 (1972))).

[9] U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, *or of the press*" (emphasis added)).

[10] *See* David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 456 (1983) ("[T]he first amendment is often interpreted as if it read 'freedom of speech, including freedom of the press' . . . the Supreme Court has declined to give independent significance to the phrase 'freedom of the press.' It has refused to give the press any more protection than an individual enjoys under the speech clause.").

[11] Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

[12] *See, e.g.*, Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. REV. 1025, 1027 (2011) ("[I]n *Citizens United* . . . [t]he justices were blowing the dust off of a constitutional question that the Court had not addressed in thirty years: Does the Press Clause have

would be both more constitutionally sound and objectively better as a policy matter for the Court to recognize special press protection.[13] Others have argued that this approach is historically unfounded and constitutionally unwarranted.[14] The focus of this conversation, though, has been on a preferred outcome to the substantive debates over whether the media should be viewed as having special rights and whether the Press Clause should be viewed as having any independent force and meaning.

This Essay steps back from the substantive debates to discuss the more primary question of the ramifications of a dicta-driven Press Clause dialogue. It investigates the ways in which the Court's loose language in this area has detracted from careful doctrinal development in media law and has created organizational and operational confusion of constitutional consequence. It argues that, separate and apart from the substantive drawbacks that might accompany the Court's failure to commit to a media-protecting Press Clause position, there are other large-scale, structural consequences that accompany the mere practice of such dicta-heavy constitutional imprecision and that these consequences ought to be seen as disconcerting.

The discussion proceeds in three parts. Part II describes the longstanding pattern of the U.S. Supreme Court discussing the press in dicta that ultimately proves unconnected to the constitutional holding of the case at hand. Part III explores potential motivations and justifications for this approach and investigates why the doctrine has emerged in this uniquely dicta-based form. Part IV discusses the overarching jurisprudential and constitutional risks produced when the use of dicta predominates the Court's analysis of any issue, and then highlights the ways in which these risks are amplified and compounded in the area of press freedoms, where expressive liberties are at stake and the threat of chilling communicative behavior is pronounced.

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significance separate from the Speech Clause . . . ?"); Randall P. Bezanson, *Whither Freedom of the Press?*, 97 IOWA L. REV. 1259, 1263 (2012) ("The second issue raised by the *Citizens United* language is that its conclusion that the free-press guarantee of the First Amendment affords no greater or different protection to the press is almost offhanded.").

[13] *See* Bezanson, *supra* note 12, at 1263–70.

[14] *See generally* Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 U. PA. L. REV. 459 (2012) (arguing the historical accuracy of press-as-technology approach).

II. A JURISPRUDENCE OF DICTA

As a descriptive matter, two separate narratives have collided to create the unique story of the U.S. Supreme Court's treatment of the media. First, for what most observers would agree is now at least a five-decade stretch, the U.S. Supreme Court has neither given the Press Clause hefty independent significance for the organized press nor plainly and officially rejected this significance. Relying heavily on the Speech Clause and delivering holdings that apply to all speakers, even when the speaker in the particular case is a media speaker, the Court has dodged the question of whether the press is constitutionally unique.[15] The Supreme Court's references to the value of quality reporting, the unique reasons to protect the media in a democracy, and the virtues of a free press have all been in language that creates no real, binding law or clear constitutional precedent.

Second, during this same fifty years, the Court has nevertheless gone about deciding the foundational cases that define the boundaries of the journalistic endeavor and dictate the legal parameters within which the press organizes its work. The cases containing these dicta are cases that anchor virtually every section of a media law casebook—including watershed constitutional cases on questions of libel, rights of privacy, access to courtrooms and other proceedings, and reporter's privilege.[16] Deciding all of these critically important cases in a permanent state of dicta-based non-commitment about the Press Clause has produced opinions that read in what can only be described as a quirky, incongruous way. The Supreme Court announces that the media is valuable, that it is critically important to our democracy, and that it does work that

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[15] *See, e.g.*, West, *supra* note 12, at 1028 ("The Supreme Court occasionally offers up rhetoric on the value of the free press, but it steadfastly refuses to explicitly recognize any right or protection as emanating solely from the Press Clause.").

[16] *See, e.g.*, Press-Enter. Co. v. Super. Ct. (*Press Enterprise II*), 478 U.S. 1, 3 (1986) (concerning access to preliminary hearings); Press-Enter. Co. v. Super. Ct. (*Press Enterprise I*), 464 U.S. 501, 503 (1984) (concerning access to voir dire proceedings); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 573 (1980) (concerning access to criminal trials); Gertz v. Robert Welch, Inc., 418 U.S. 323, 325 (1974) (concerning libel); N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971) (concerning prior restraint on publication); Branzburg v. Hayes, 408 U.S. 665, 667 (1972) (concerning reporter's privilege); Time, Inc. v. Hill, 385 U.S. 374, 388 (1967) (concerning false light privacy); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 256 (1964) (concerning libel).

is deserving of protection.[17] It says the press is a unique check on government, a critical component of the discussion of public affairs, and a powerful antidote to abuses of power.[18] It tells how the media keep the public aware and keep elected officials responsible to those they were selected to serve.[19] And then it concludes that the case at hand is not squarely about the media or the protection that the media will receive.

Some prominent examples serve to illustrate the phenomenon.[20] The syllabus to *Nebraska Press Association v. Stuart* summarizes its holding without a single reference to press freedom, instead specifying that the case implicates "freedom of expression," and that the holding centers on the broad free-speech principle that the government bears a "heavy burden" of justifying *any* decision to impose a prior restraint on speech.[21] The opinion itself, in striking as unconstitutional a gag order on press coverage of a criminal trial, likewise emphasizes the non-media-specific scope of the holding, declaring that "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights"[22] and that any "prior restraint on publication" is "one of the most extraordinary remedies known to our jurisprudence."[23] Thus, the Court held, the governing rule of law is that prior restraints are presumptively unconstitutional, even in the face of other competing constitutional values.[24] *Nebraska*

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[17] *See, e.g.*, *N.Y. Times Co.*, 403 U.S. at 717 (Black, J., concurring) ("The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people."); *Richmond Newspapers*, 488 U.S. at 572–73 ("Instead of acquiring information about trials by first hand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media.").

[18] *See, e.g.*, Mills v. Alabama, 384 U.S. 214, 219 (1966) ("The Constitution specifically selected the press . . . to play an important role in the discussion of public affairs. Thus the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials . . . .").

[19] *See id.*; Cox Broad. Corp. v. Cohn, 420 U.S. 469, 491 (1975) ("[I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations.").

[20] For a fuller discussion of Supreme Court characterizations of the press and an investigation of the ways in which these characterizations sometimes conflict with the Court's own treatment of the media, see generally Jones, *supra* note 4.

[21] Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 539 (1976).

[22] *Id.* at 559.

[23] *Id.* at 562.

[24] *Id.* at 570.

Press Association is, without question, a precedent that guarantees this freedom from governmental prior restraint regardless of the character of the restrained speaker, rather than a media-focused holding about the contours and applicability of the Press Clause.[25]

But the opinion in *Nebraska Press Association* overflows with media-characterizing—and intensely media-praising—language that is unnecessary to its speech-rights holding. Indeed, although the Court itself notes that the majority opinion begins and ends with the true, all-speakers scope of the doctrinal rule,[26] it sandwiches within these statements of clear holding several layers of admiration for and celebration of the unique work done by the organized press, much of which cites to similar media-celebrating dicta from earlier cases that also did not hold that the press receives unique constitutional protection. The *Nebraska Press Association* Court suggests that the damage done by a prior restraint "can be particularly great" when imposed upon those that communicate "news and commentary on current events"[27] and that are fulfilling the valuable "traditional function of bringing news to the public promptly."[28] It praises the media's "impressive record of service over several centuries," contending that "[t]he press does not simply publish information about trials but guards against the miscarriage of justice" by carefully scrutinizing trial participants.[29] The media is characterized as imminently worthy of trust in its own editorial decisions about how and when to engage in newsgathering and publication[30] and is depicted as a critically important social entity that "has always been regarded as the handmaiden of effective judicial administration."[31] In the end, however, none of this language amounts to anything. It is, at best, in service of some hard-to-imagine rule that the already

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[25] The same is true of several other watershed cases involving prior restraints on the media, none of which ever specified that their holdings were press-specific. *See generally, e.g.*, N.Y. Times Co. v. United States, 403 U.S. 713 (1971) (per curiam) (concerning injunction against newspaper reports); Near v. Minnesota, 283 U.S. 697 (1931) (concerning statute suppressing defamatory publication).

[26] 427 U.S. at 570 ("Our analysis ends as it began. . . .").

[27] *Id.* at 559.

[28] *Id.* at 561.

[29] *Id.* at 560 (quoting Sheppard v. Maxwell, 384 U.S. 333, 350 (1966)).

[30] *Id.* at 560–61 (quoting Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 259 (1974) (White, J., concurring) (expressing skepticism about "measures that would allow government to insinuate itself into the editorial rooms of this Nation's press")).

[31] *Id.* at 559–60 (quoting *Sheppard*, 384 U.S. at 350).

immensely heavy presumption against prior restraints should somehow be taken even more seriously when the press is a party. More likely, it is in service of no legitimate jurisprudential principle at all. It is pleasant but purposeless dicta.

The pattern repeats itself in the Court's high-profile speech torts cases involving media parties. In *Time, Inc. v. Hill*,[32] a false light right of privacy case in which the Press Clause was not invoked and the holding was not media-specific, the Court nevertheless took the opportunity to speak to the democratic function served by the media. It stressed that "[a] broadly defined freedom of the press assures the maintenance of our political system and an open society."[33] Depicting the media as an earnest, hardworking institution that performs an "indispensable service . . . in a free society" and that needs latitude to make some errors in the course of its important work,[34] the Court expressed a deep fear of unnecessarily "saddl[ing] the press" with impossible burdens of verifying facts with certainty.[35] Such concern, however, to the extent that it was media-specific, was dicta to a broader non-media-specific holding.

Even the landmark *New York Times Co.* v. *Sullivan*,[36] although reaching a holding that ultimately proved to have everything to do with the status of the libel plaintiff and nothing to do with any Press Clause protection for the media defendant, got to its watershed holding about the role of "uninhibited, robust, and wide-open" debate on public matters by way of a formidable exposition of the power, promise, and purpose of the press in a free society and the views of the Founders on that matter.[37] Quoting Madison, the opinion asserted that in every state in the Union "the press has exerted a freedom in canvassing the merits and measures of public men, of every description," and underscored that "[o]n this footing the freedom of the press has stood; on this foundation it yet stands."[38] Jefferson is likewise invoked for the

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[32] 385 U.S. 374 (1967).

[33] *Id.* at 389.

[34] *Id.* at 388–89 (quoting James Madison: "Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press." (quoting 4 ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 571 (1876 ed.))).

[35] *Id.* at 389.

[36] 376 U.S. 254 (1964).

[37] *Id.* at 270.

[38] *Id.* at 275.

longstanding proposition that Congress ought not attempt to "controul [sic] the freedom of the press."[39] The case does not, in the end, invoke an *actual* Freedom of the Press, but it creates a bedrock of press-supportive dicta on the way to a press-prevailing but all-speaker-protecting conclusion.

In other cases, although the Court comes closer to holding that a case turns on the media character of the party involved because the particular prohibition at issue was a statutory restraint on media publication of particular matters, it still has fallen short of imbuing the Press Clause with unique meaning, thus rendering the expansive discussions of the unique role and value of the press dicta. In *Cox Broadcasting v. Cohn*, the core holding of which is that the distribution of lawfully obtained information cannot ordinarily be punished consistent with the Speech Clause,[40] the Court presents that holding in an opinion that repeatedly references lower-case "freedom of the press"[41] but nowhere acknowledges any Press Clause requirement of media-specific rights. The percentage of the opinion's analysis that is occupied with discussion of the nature, role, and virtues of the press is substantial: "In the first place," the Court begins, "in a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations."[42] The opinion goes on to herald the "[g]reat responsibility"[43] of the press and to speak of how fortunate the citizenry is that the media reports fully and accurately on the proceedings of government, because our constitutional democracy would disintegrate without it:

> Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally. With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to

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[39] *Id.* at 277 (citing an 1804 Letter to Abigail Adams as quoted in Dennis v. United States, 341 U.S. 494, 522 n.4 (1951) (Frankfurter, J., concurring)).

[40] 420 U.S. 469, 471, 496–97 (1975).

[41] *Id.* at 497.

[42] *Id.* at 491.

[43] *Id.*

> bring to bear the beneficial effects of public scrutiny upon the administration of justice.[44]

In other, similar press cases speaking to the constitutional limits on the publication of truthful information,[45] the Court has taken the same tack—praising the press, sometimes gushingly, and characterizing its newsgathering role, educational virtues, and watchdog functions, but never going the distance to hold that the Press Clause is doing meaningful work in those cases, beyond the work already done by the Speech Clause. The substantial dialogue about the media's democratic traits and positive characteristics is non-binding dicta.

The press-characterizing dicta from the U.S. Supreme Court have not always been positive and praising—and indeed appear to have recently taken a decided turn for the negative,[46] with the Justices' assumptions about and characterizations of the media moving from appreciative, approving, and even romanticized to skeptical, critical, and dismissive. Most notably, in *Citizens United v. Federal Election Commission*,[47] a case actually involving the free-speech rights of a non-media corporation, two opposing sets of Justices nevertheless engaged in the most prominent debate in recent years over the specialness, or lack thereof, of the institutional press. Justice Stevens, dissenting in relevant part, contended that the organized media have rights separate and apart from those of other, non-media corporations, and in the course of making this assertion, he characterized the work done by these speakers in the press as uniquely valuable in a way that he said had been recognized since the time of the founding.[48] In contrast, Justice Scalia, concurring with a majority opinion that found broad Speech Clause rights for corporations regardless of

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[44] *Id.* at 492.

[45] *See, e.g.*, Florida Star v. B.J.F., 491 U.S. 524, 541 (1989) ("[W]here a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when namely tailored to a state interest of the highest order."); Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 104 (1979) ("If information is lawfully obtained, . . . the state may not punish its publication except when necessary to further an interest more substantial than is present here.").

[46] In a forthcoming article, I explore trends in the tone and content of the Court's characterizations of the press. *See* RonNell Andersen Jones, *What the Supreme Court Thinks of the Press and Why It Matters*, 66 ALA. L. REV. (forthcoming 2014).

[47] 558 U.S. 310 (2010).

[48] *Id.* at 431 n.57 (Stevens, J., concurring in part and dissenting in part).

their media status,[49] opined that the longstanding protection of the media was merely evidence of the longstanding tradition of protecting corporate speakers more generally. He suggested that members of the organized press served no unique role and scoffed at the notion that they were deserving of any unique protection of their own, calling the proposition "passing strange."[50] But again, these characterizations of the media, its role, and its unique societal contributions are made when the question of press freedom is not squarely before the Court, and the depictions are presented in passing, unconnected to a holding and unmoored in constitutional jurisprudence.

Time and again, then, the Court describes how the media are (or are not) special, in an opinion that does not hold that the media are (or are not) specially protected. Attorneys and scholars are left with isolated accolades and bold statements of the function and value of the press that look and feel significant—and indeed have been cited in briefs,[51] law review articles,[52] and subsequent judicial opinions[53] as if they were deeply significant—but by definition are not.

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[49] *See id.* at 342 ("The Court has recognized that First Amendment protection extends to corporations."); *id.* at 365 ("[T]he Government may not suppress political speech on the basis of the speaker's corporate identity.").

[50] *Id.* at 390–91 n.6 (Scalia, J., concurring).

[51] *See, e.g.*, Brief for Respondent at 18, Reichle v. Howards, 132 S. Ct. 2088 (2012) (No. 11-662) ("As Americans, the First Amendment embodies 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.' " (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964))); Brief for Respondents at 23, Snyder v. Phelps, 131 S. Ct. 1207 (2011) (No. 09-751) ("A broadly defined freedom of the press assures the maintenance of our political system and an open society." (quoting Time, Inc. v. Hill, 385 U.S. 374, 389 (1967))).

[52] *See, e.g.*, Lyle W. Denniston, *Constitutional Calvinism: The "Sins" of Broadcasting*, 54 TEX. L. REV. 1344, 1347 n.10 (1976) (reviewing FRED W. FRIENDLY, THE GOOD GUYS, THE BAD GUYS AND THE FIRST AMENDMENT (1976)); David F. Freedman, Note, *Press Passes and Trespasses: Newsgathering on Private Property*, 84 COLUM. L. REV. 1298, 1316 (1984) (relying on dicta from multiple cases); Amy E. Hooper, *Investigating Terrorism: The Role of the First Amendment*, 2004 DUKE L. & TECH. REV. 2, 3 (same).

[53] *See, e.g.*, Ashcraft v. Conoco, Inc., 218 F.3d 282, 287 (4th Cir. 2000) (citing *Time, Inc.*, 385 U.S. at 389, for the proposition that "[a] broadly defined freedom of the press assures the maintenance of our political system and an open society"); Peavy v. New Times, Inc., 976 F. Supp. 532, 539 (N.D. Tex. 1997) (quoting *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491–92 (1975) that a person "relies necessarily upon the press to bring to him in convenient form the facts of [government] operations").

III. POSSIBLE JUSTIFICATIONS FOR THE PATTERN OF DICTA

There are a number of possible explanations for this longstanding pattern by the Court of writing dicta that offer a characterization of the value, role, and uniqueness of the press without reaching a conclusion that speaks directly to media rights.

One explanation is that the Justices, although ultimately deciding a case on non-press-related grounds, are nevertheless sensitive to the facts of the case and feel compelled to remark on the notable virtues of the litigants before them. Although the Court has not felt it necessary to do this consistently with other arguably virtuous or society-serving litigants like schools, religions, or charitable organizations, it is possible that the Court feels uniquely driven to do so in the media context. It could believe that the media's "Fourth Estate" role renders it even more worthy of praise. The inclusion of the dicta may at least partially be a nod to a social reality and historical context, as many of these cases were decided at the height of the institutional media's popularity and democracy-enhancing prominence. A Supreme Court operating in the wake of Watergate and its aftermath, witnessing the rise of truly valuable investigative journalism,[54] and observing the increasing prominence of scholarly notions of the so-called "watchdog" and "checking"[55] functions of the press, might feel compelled to note that these services were being rendered by the media. As I have noted elsewhere,[56] a considerable amount of generalized First Amendment law in the last generation has come about through litigation funded by traditional legacy media, and the Court could believe that the press deserves at least passing mention when it litigates cases that defend broader free-speech principles.

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[54] *See* RonNell Andersen Jones, *Rethinking Reporter's Privilege*, 111 MICH. L. REV. 1221, 1228–31 (2013) (recounting the history of American investigative reporting and describing developments in Watergate-era watchdog journalism).

[55] Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 606 ("These news sources play a unique role in the checking process because they sometimes have access to inside information relating to the misconduct of public officials—information of the highest possible significance under the checking value.").

[56] *See* RonNell Andersen Jones, *Litigation, Legislation, and Democracy in a Post-Newspaper America*, 68 WASH. & LEE L. REV. 557, 570–80 (2011) (describing the ways in which "newspapers and newspaper companies have been at the forefront of major U.S. Supreme Court battles that recognized far-reaching public rights").

Alternatively, the Court could believe that the press is in particular need of aspirational reminders of the role that it is *capable* of playing in society, and it could be using the positive press-characterizing dicta as a reinforcement of what it hopes will continue. Because the legislature cannot require the press to behave in these admirable ways or to serve the educational or watchdog functions that are socially ideal, the Court may be using its persuasive voice to attempt to bring about those functions, by praising the media when it witnesses the functions being performed, even though unwilling to go the distance and constitutionalize unique protections for the performance of them.

Beyond these practical explanations, dicta may serve quasi-jurisprudential purposes, even when not directly contributing doctrine to the jurisprudence. Dicta can serve a signaling function,[57] and the Supreme Court's press-characterizing dicta could be motivated by a desire to lay down markers and invite future litigation. Certainly some piece of the explanation for the dicta about the media is a lingering sense by some of the Justices that the Press Clause *ought* to have heft and the media *ought* to have special rights. During the relevant time period, at least some Justices were openly and publicly advocating for a substantive Press Clause jurisprudence that would afford unique protections to the media.[58] It is possible that some Justices who were supportive of that notion, and who wanted to leave open the possibility of that development in the future or wanted to stake out unique constitutional ground for the press but found themselves unable to get the right case or the right set of Justices to produce the votes for that substantive holding, may instead have agreed to join opinions on the condition that the press-praising portions be added. As the opinions were circulated and altered to meet the preferences of all of the joining Justices, the media-praising language went in but the media-protective holding stayed out.

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[57] David Klein & Neal Devins, *Dicta, Schmicta: Theory Versus Practice in Lower Court Decision Making*, 54 WM. & MARY L. REV. 2021, 2046 (2013) (noting the valuable purpose of dicta in "clarify[ing] a complicated subject," or signaling a possible future constitutional challenge).

[58] *See, e.g.*, Potter Stewart, *"Or of the Press,"* 26 HASTINGS L.J. 631, 634 (1975) ("The primary purpose of the constitutional guarantee of a free press was a similar one: to create a fourth institution outside the Government as an additional check on the three official branches.").

Commentary about the virtues and role of the press in these cases, although not representing a holding, could also be argued to amplify important aspects of the wider holdings reached by the Court. Viewed generously, it might be suggested that the Court was merely citing the work of a subset of First Amendment speakers in order to highlight the virtues of all First Amendment-protected speech. Under this view, the Court would be discussing the socially significant contributions of the party at hand (for example, that the press educates others or that the press contributes to the flow of democratically valuable information) as an illustration of the role that *all* free speech plays in a society (for example, that all speakers carry the possibility of educating others or of contributing to information flows). The tone and contours of the dicta in these cases often suggest that the press is unique and distinct from other speakers, which undercuts this potential justification for the press-praising language, but it remains possible as at least a partial explanation for the phenomenon.

Other explanations for the dicta might focus on the litigation strategies of the entities bringing the media cases to the Court. The media bar has largely accepted press-generous language in the form of dicta, without pushing for it to become a press-specific constitutional holding, for a number of strategic reasons. Historically, there was significant concern about the possibility of any legislative or judicial definitions of the press, which were thought to smack of licensing and carry the risk of constricting rather than expanding rights.[59] The thinking was that a specialized doctrine for the press, however positive at its inception, could ultimately lead to media that are less protected rather than more protected than the average speaker.[60] More recently, given the negative signals sent in the dicta, attorneys for journalists and media companies may have shied away from aggressively asking

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[59] *See* Geoffrey R. Stone, Essay, *Why We Need a Federal Reporter's Privilege*, 34 HOFSTRA L. REV. 39, 47 (2005) ("The idea of defining of 'licensing' the press . . . is anathema to our constitutional traditions. The Court has never gone down this road, and with good reason.").

[60] *See* RonNell Anderson Jones, *Avalanche or Undue Alarm? An Empirical Study of Subpoenas Received by the News Media*, 93 MINN. L. REV. 585, 603 (2008) (citing historical evidence that members of the media did not want to lobby for federal shield legislation because they "worried that inviting governmental regulation would be a tacit recognition of the government's right to regulate the press in other ways, or that permitting the government to define 'the press' for purposes of the privilege could lead to further governmental control or licensing of the press" (citations omitted)).

the Court for very clear holdings on whether the media have distinctive Press Clause rights, for fear that the answer will be a very clear no.

Ultimately, however, the extensive line of press-characterizing dicta from the Court is a pattern of its own creation and is at least partially the result of simple jurisprudential imprecision and sloppiness—a decades-long failure to hone in on the specific doctrinal question at hand and to act decisively in choosing a protected entity and the grounds on which it is protected. Notwithstanding some of the understandable and seemingly benign or even positive explanations for the practice, the trend is not without consequences. A set of legal principles built almost entirely of dicta is fundamentally at odds with basic notions of constitutional jurisprudence and particularly harmful in an area that defines communicative rights.

IV. THE DANGERS OF DICTA

When the Court peripherally pontificates with niceties about the virtues of a deserving media or, more recently, finds itself on a tangent about why the media is undeserving, using dicta unmoored to any holding about the actual protection of the press, it creates two major sets of constitutional concerns. The first set is common to all exercises of dicta, no matter the substantive topic at issue. It focuses on the boundaries of the Court's proper role in articulating and defining legal rules. The second set is distinct to the communicative context and focuses on the unique harms created when individuals and entities are not offered clear statements on expressive freedoms and when the Court fails to consider the multiplicity of rights implicated by communicative scenarios.

A. GENERAL DANGERS OF DICTA

The type of dicta that is seen in the Court's press characterizations is somewhat peculiar. On the one hand, it is without question that this language about the nature of the media partakes of the quintessential components of dicta—"[a] judicial comment made while delivering a judicial opinion . . . [but] unnecessary to the decision in the case and therefore not

precedential."[61] On the other hand, whereas many traditional examples of dicta involve the Court speaking in the hypothetical by discussing facts not before them and thus hinting at an expansion of the holding beyond the actual facts presented,[62] the press-characterizing dicta does the opposite. The Court is not taking a narrow holding and using the dicta to illegitimately broaden it, but instead is issuing a broad holding and using dicta to hint at special treatment for a narrow subset of the parties included within that broad holding. That is, the Court in these cases is not hypothesizing that the press is the party before them—the party is in fact a media entity—but instead is hypothesizing that the case could implicate special rights for the press, which the Court's holding makes clear that it does not. The primary, central feature of dicta remains prominent: the Court is speaking through factual and analytical propositions that serve no role in "justifying the judgment."[63] Like all dicta from the Court, those press-characterizing dicta are largely defined in the negative[64]—they are unnecessary, not controlling, and not the holding.[65]

It is this negative definition that renders the press-characterizing dicta, like all dicta, constitutionally problematic. The case or controversy requirement of Article III, which sets forth the confines of the Court's constitutional job description,[66] is ignored when an opinion speaks to matters other than the actual controversy being resolved in that opinion.[67] Dicta are not given the precedential weight of holdings precisely because of this

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[61] BLACK'S LAW DICTIONARY 1177 (9th ed. 2009) (defining obiter dictum).

[62] *See* Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1263 (2006) ("Among the most common manifestations of disguised dictum occurs where the court ventures beyond the issue in controversy to declare the solution to a further problem—one that will arise in another case, or in a later phase of the same case.").

[63] *Id.* at 1269.

[64] *See* Judith M. Stinson, *Why Dicta Becomes Holding and Why It Matters*, 76 BROOK. L. REV. 219, 220 (2010) ("But most of the debate to date has focused on determining what qualifies as holding—and therefore by negative inference—what qualifies as dicta.").

[65] Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 959 (2005) ("In a case of just one issue and just one logical argument that can take a court from the facts to the judgment, discussions that do not lie along that path are unnecessary and are therefore dicter.").

[66] U.S. CONST. art. III, § 2, cl. 1.

[67] *See* Phillip M. Kannan, *Advisory Opinions by Federal Courts*, 32 U. RICH. L. REV. 769, 784 (1998) ("The statements that are not necessary to support the decision amount to an advisory opinion contained within the resolution of a case or controversy.").

substantial justiciability flaw. The statements involve questions not directly presented, and therefore the Court is in a poor practical position to address them well and a poor constitutional position to address them legitimately.[68] Although dicta are statements *about* the law, they are not law; "[t]he issues so addressed remain unadjudicated."[69]

As numerous scholars have noted, this ultra vires behavior presents risks to the accuracy, authority, and legitimacy of the law.[70] Dicta are often less carefully considered and less thoroughly reasoned than holdings and are, by definition, less accurate reflections of the state of the law.[71] The use of dicta "undermines the rule of law, first by reducing predictability and legal clarity, and second by inhibiting the emergence of nuanced doctrine."[72] Because the Court is speaking to matters unconnected to the holding, the care that it takes may be diminished.

Beyond this, the use of dicta creates significant difficulties for lower courts that are seeking guidance from and applying the doctrine set forth in the Court's opinions.[73] A lower court may have difficulty distinguishing between holding and dicta and, erring on the side of caution, choose to follow dicta, even though the language does not have the force and effect of law.[74] As these

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[68] *See generally* Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997 (1994) (discussing the practical and constitutional difficulties associated with dicta).

[69] Leval, *supra* note 62, at 1274.

[70] *See generally* Stinson, *supra* note 64 (discussing the difficulty in determining what are dicta); Leval, *supra* note 62 (stating how dicta are made to look like a holdings); Dorf, *supra* note 68 (noting that dicta are less likely to contain accurate statements of the law).

[71] Dorf, *supra* note 68, at 2000.

[72] Abramowicz & Stearns, *supra* note 65, at 1025.

[73] *See* Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1410 (1995) ("Dicta have useful purposes, but they also have mischievous potential to cloud the essence of the holding, to promise things in future cases they cannot deliver, to pressure officials in other branches they cannot control, to overexplain the writer to the reader.").

[74] Dorf, *supra* note 68, at 2026; *see also* Leval, *supra* note 62, at 1274 ("It is sometimes argued that the lower courts must treat the dicta of the Supreme Court as controlling. Various reasons are given: Great respect is owed to the Supreme Court; it always sits en banc, assuring that all of its Justices have participated in whatever it decides; its small docket means it will not likely hear enough cases to cover any area of law by its holdings."); Abramowicz & Stearns, *supra* note 65, at 989 (giving examples of lower courts differing on whether something is holding or dictum); Lisa M. Durham Taylor, *Parsing Supreme Court Dicta to Adjudicate Non-Workplace Harms*, 57 DRAKE L. REV. 75 (2008) ("[M]ost courts agree that lower courts should give some degree of respect to Supreme Court dicta if the Court dedicated sufficient consideration to such matters. Such courts are careful to note

other courts "look to the Supreme Court in formulating their own judicial opinions," "[t]his exacerbates the confusion between holding and dicta," setting off a potential "ripple effect" of one court using dicta as holding, and a subsequent court citing that holding as precedent.[75]

Different choices on this question by various lower courts can lead to disturbing inconsistencies in the law from jurisdiction to jurisdiction.[76] Indeed, when the Supreme Court fails to define and distinguish between dicta and holding with precision, it may enable lower courts to avoid stare decisis by defining portions of the opinion as dicta or holding, depending on whether the proposition supports the court's preferred conclusion.[77]

All told, the practice of the Court making unnecessary, non-precedential judicial comments carries with it substantial practical concerns and is of questionable constitutional validity, no matter what topic the Court is discussing in the dicta.

B. SPECIFIC DANGERS OF DICTA IN THE REALM OF COMMUNICATIVE FREEDOMS

The concerns that accompany all uses of dicta are amplified by additional dangers created when the Court speaks by dicta in cases involving communicative freedoms, as the press-characterizing cases do.

One unique problem created when the Court uses dicta to speak about the potential—but not actual—contours of communicative freedoms like the right to gather and publish the news is a problem analogous to the "chilling effect" that the Court itself has consistently recognized as a grave threat to free expression. When communicative individuals or entities are not plainly and unequivocally told the true scope of their constitutional freedoms, there is a risk that they will underestimate those rights and fail to

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that statements made in dicta are not binding in a precedential sense, but are nevertheless entitled to 'great deference.' " (citing SEC v. Rocklage, 470 F.3d 1, 7 n.3 (1st Cir. 2006))).

[75] Stinson, *supra* note 64, at 221–22.

[76] *See* Kannan, *supra* note 67, at 785 ("[Judicial advice] introduces instability and uncertainty in law, both of which are undesirable.").

[77] Dorf, *supra* note 68, at 2004–05; *see also* Leval, *supra* note 62, at 1259 ("Stare decisis requires a court to adhere only to its decision—its holdings . . . . It thus becomes of great importance to distinguish between a court's holdings, which become binding law for the future, and its dicta, which at least in theory do not.").

contribute in meaningful and protected ways to the marketplace of ideas, out of fear that they might exceed the unclear boundaries.[78]

The Supreme Court has consistently said that clarity is a critically important virtue when defining First Amendment values and the boundaries of expressive freedoms.[79] Although the Court has usually been speaking to its concomitant branches of government when it has called for this heightened standard of clarity, the underlying values that it has outlined should be equally applicable to the guidance the Court gives in its case law on communicative freedoms. Because freedoms of communication are "delicate and vulnerable, as well as supremely precious in our society," precision and intelligibility in the governing standard are essential.[80] When statutes govern these behaviors, the Court has stressed that "government may regulate in the area only with narrow specificity,"[81] lest the regulated communicators " 'steer far wider of the unlawful zone' . . . than [they would] if the boundaries of the forbidden areas were clearly marked."[82]

Similarly, where the Court itself uses unclear and confusing dicta in cases that " 'abut upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of (those) freedoms.' "[83] The same problem of fair notice and the same risk of inhibiting protected behavior arise from this pattern of speaking obliquely to unique media roles and characteristics without ever clearly enunciating a set of unique media rights. Journalists are making determinations about what behaviors they will engage in and are ordering their newsgathering decisions around the guidance they are getting from the Court. When what they receive

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[78] *See, e.g.*, Reno v. Am. Civil Liberties Union, 521 U.S. 844, 871–72 (1997) (noting that lack of clarity in a law that regulates expression "raises special First Amendment concerns because of its obvious chilling effect on free speech"); Baggett v. Bullitt, 377 U.S. 360, 372 (1964) (discussing how potential speakers may "steer far wider of the unlawful zone" when faced with unclear laws (quoting Speiser v. Randall, 357 U.S. 513, 526 (1958))).

[79] *See, e.g.*, Erznoznik v. City of Jacksonville, 422 U.S. 205, 217–18 (1975) ("Where First Amendment freedoms are at stake we have repeatedly emphasized that precision of drafting and clarity of purpose are essential."); Brown v. Entertm't Merch. Ass'n, 131 S. Ct. 2729, 2743 (2011) (" '[G]overnment may regulate in the area' of First Amendment freedoms 'only with narrow specificity.' " (quoting NAACP v. Button, 371 U.S. 415, 433 (1963))).

[80] NAACP v. Button, 371 U.S. 415, 433 (1963).

[81] *Id.*

[82] *Baggett*, 377 U.S. at 372 (quoting *Speiser*, 357 U.S. at 526).

[83] Grayned v. City of Rockford, 408 U.S. 104, 109 (1972) (quoting *Baggett*, 377 U.S. at 372 and Cramp v. Board of Public Instruction, 368 U.S. 278, 287 (1961), respectively).

is instead non-guidance, they may well err on the side of less speech and less newsgathering.

Given that a great deal of the dicta in these press-characterizing cases is positive, it might seem counterintuitive to think of the expansive, praising language as creating a chilling effect. But the delivery of this praise by obvious dicta from the Court places the media in the same position as a speaker who might or might not be regulated by a vague law related to speech. Because the Court in these cases is making clear that its holding is not press-specific, counsel for a media entity would never dare read the dicta about the press as creating any actual right to newsgather or any actual constitutional freedom to meet the goals that the Court is declaring admirable. Wary of the landscape created by this unclear language, a responsible attorney would be cautious and would advise the press that, although the language might *appear* to support additional media efforts to achieve those admirable goals, it in fact offers no such protection. Thus, no matter how praising, the dicta will not encourage any more behavior by the press in the exercise of rights beyond those shared by all speakers. Without ever squarely deciding rights, the Court is nevertheless affecting rights. The press ought not "be required to act at [its] peril here, because the free dissemination of ideas may be the loser."[84]

The excessive use of dicta in First Amendment cases involving the media is problematic for another reason that is unique to the substantive area. The pattern of hinting at distinct First Amendment rights and roles of the press within cases that reach only broader general holdings about the First Amendment rights of all speakers has created a systematic failure of the Justices, scholars, and media law advocates to think with precision about the specific nature of the rights at stake in a given situation. All have become so accustomed to this practice of press-praising dicta in generic speech-protecting opinions that they possess few good tools for thinking critically about communicative cases that as a practical matter are, or as a normative matter should be, about the media and its democracy-enhancing role, as compared to those that are, or more properly should be, about other sets of First

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[84] Smith v. California, 361 U.S. 147, 151 (1959).

Amendment rights and freedoms.[85] Because the Court is perpetually throwing this media-congratulatory language into cases that it then refuses to decide squarely as media cases, it has removed doctrinal incentives to think about *who* should be the focus of the legal analysis in any given communications situation. A clear resolution of the meaning of the Press Clause, then, could be expected to have much wider structural benefits for our First Amendment jurisprudence, and could act as a catalyst for clearer thinking about a wide range of communications law cases that have been victims of this mushiness for too long.

I have argued this point recently in a discussion of subpoenas related to newsgathering and the fickle doctrine of reporter's privilege,[86] where the governing case of *Branzburg v. Hayes*[87] offers a fine illustration of both the Court's dicta-based linguistic schizophrenia and the structural sloppiness that emerges when the Court engages in it.

Both the *Branzburg* majority, in flatly rejecting a First Amendment-based journalist privilege to refuse to respond to a subpoena arising out of newsgathering,[88] and the dissent, in crafting the reporter's privilege test that would ultimately be widely adopted by circuit courts in cases not on all fours with *Branzburg*,[89] engaged in significant generic cheerleading of the press. In the forty years since the case was decided, a scholarly and judicial debate has raged over how that celebratory language about the press could or should have led to clearer newsgathering rights and treatment of reporters that is distinct from the treatment of others who receive subpoenas for information.[90] But—in large part because the dicta is so distracting— the

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[85] For an excellent discussion of the potential rights that might be occupied exclusively by those invoking the Press Clause, see West, *supra* note 12, at 1028–29.

[86] Jones, *supra* note 54, at 1221.

[87] 408 U.S. 665 (1972).

[88] *See id.* at 681 ("We do not question the significance of free . . . press . . . to the country's welfare."); *id.* at 704 (describing freedom of the press as a "fundamental personal right" (quoting Lovell v. Griffin, 303 U.S. 444, 450 (1938))); *id.* at 707 ("[N]ews gathering is not without its First Amendment protections . . . .").

[89] *Id.* at 726–27 (Stewart, J., dissenting) (stating that a "free press is . . . indispensable to a free society," that the press has aided in "awakening public interest in governmental affairs," and that it fosters "[e]nlightened choice by an informed citizenry").

[90] *See, e.g.*, RonNell Andersen Jones, *Media Subpoenas: Impact, Perception, and Legal Protection in the Changing World of American Journalism*, 84 WASH. L. REV. 317, 322 n.14 (2009) (highlighting voluminous scholarship on the reporter's privilege and the treatment of journalists who receive subpoenas).

discussion has largely ignored the fact that the dynamic between a reporter and an anonymous source implicates not only whatever newsgathering rights are possessed by the reporter but also the long-recognized and crucially important anonymous speech rights of the source.[91] In other contexts, the Court's anonymous speech doctrine makes clear that a core expressive freedom is the ability not to attach one's name to one's expression.[92] The Court has made clear that in some crucial instances, speech will be expressed either anonymously or not at all, and that it is through the protection of individuals who wish to remain anonymous that we protect the wider social goals of free-flowing information.[93] It is at least possible, then, that reporter or media rights are not the only rights at play in the confidential source context, and maybe are not even the most important ones.

These questions—about whose rights are at stake and how those rights are implicated—are important structural inquiries and ought to be given careful investigation before the courts assign a particular communicative situation a constitutional home. The staggering diversion of language that is press-praising or press-critiquing but not doctrinally Press-Clause-amplifying has robbed the judiciary and the relevant litigants of this exactitude and kept them from approaching like cases in like ways.

A clear Press Clause doctrine that is precise in its contours and dicta-free in its delivery could also provide this top-level, structural clarity in other cases in which the media traditionally have been key litigants. This improved structure might, for example, help the Court feel fully comfortable in allowing the *Richmond Newspapers* holding to just be a holding about openness of trials for all, and in saving its language about prioritizing mass media access for subsequent cases in which questions of priorities of access or limited seating are actually at issue. Under such a dicta-free structure, the subsequent case would give institutional answers separate and apart from the core access question.[94]

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[91] *See* Jones, *supra* note 54, at 1245–46 (noting that uncertain application of the reporter's privilege has led to confusion among both reporters and sources).

[92] *Id.* at 1249–50 ("Supreme Court justices have stressed both that the Framers considered a right to speak without identifying oneself to be foundational and that it continues to be a fundamental right housed within the First Amendment's Speech Clause.").

[93] *See id.* at 1247 (noting that when protection of anonymous sources is uncertain, reporters and sources will "err on the side of caution" and not report).

[94] *See* discussion *supra* notes 4–8 and accompanying text.

Cases implicating true newsgathering behaviors, true watchdog or checking functions, or true instances of the press as proxy for or educator of the wider public could live in their own sphere, and could properly be the home to expositions of the role of the press in a democratic society and the need to protect its behaviors in order to meet constitutionally valuable goals squarely implicated by the Press Clause. But because we would now be in a world in which the initial question could be asked—"Is this a Press Clause issue or is this a Speech Clause issue?"—we would expect more careful consideration of what rights are actually at stake and for which parties, and a real rather than passing assessment of the social and large-scale governance values of both the relevant communicative institutions and the relevant communicative individuals.

V. CONCLUSION

Doctrinal non-development by dicta is a pernicious path to travel and places the Court in the position of acting beyond the scope of its legitimate constitutional role. It is especially problematic in areas involving the communicative freedoms of the press. This is true both because the absence of clarity in the realm of expressive freedoms may cause speakers to self-censor and because a lack of clarity in cases that happen to involve the press can lead the courts to focus on the press as litigants without considering whether the rights at stake are more sweeping rights possessed by all speakers or more specific rights that ought to be possessed exclusively by the media. Declaring that a particular communicative act—or the work of a particular communicative entity—is valuable, without actually assigning any constitutional home to that value, creates a harmful vacuum of rights that hampers choices and creates barriers to the free flow of societally important information.

Scholarly conversations about the Press Clause should expand to recognize that the Court's patterns of tangentially praising or criticizing the press and opining about its role in a democracy in cases not squarely reaching a Press Clause holding are jurisprudentially dangerous. These patterns are harmful not only because media-protective substance would be better than media-impairing emptiness, but also because the Court's substitution of

dicta for doctrine has itself had a negative impact on our overall precision in dealing with communications issues.