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Justice Stewart Meets the Press

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ABSTRACT

Among the Supreme Court Justices who have articulated distinctive views of free expression, Justice Potter Stewart alone placed particular emphasis on the First Amendment's protection of a free press. Drawing upon the lessons of history, the plain language of the Constitution, the political events of his day, and his own personal experience, Stewart argued that the organized news media should be considered an essential part of the checks-and-balances competition between the legislative, executive, and judicial branches of the federal government. Stewart's emphasis on the special structural function of the established press placed him at odds with most of his colleagues on the Supreme Court. His thinking is also in tension with recent changes in the news media landscape. With the decline of newspapers and the rise of the blogosphere, the United States faces the prospect of enjoying a great deal of free speech and yet losing its free press, as Stewart understood the term.

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Although there are nearly fifty words in the First Amendment, a few Supreme Court Justices have developed distinctive approaches to free expression by boiling the Amendment down to just a single phrase. Justice Hugo Black, for example, assigned special importance to three words: no law abridging. "Certainly the First Amendment's language leaves no room for inference that abridgments of speech and press can be made just because they are slight," Black wrote in the late 1950s. "That Amendment provides, in simple words, that 'Congress shall make no law . . . abridging the freedom of speech, or of the press.' I read 'no law . . . abridging' to mean *no law abridging*." Since no provision in the Constitution limits "the scope of these unequivocal commands," Black understood the First Amendment to hold that no "federal agencies, including Congress and the Court, have power or authority to subordinate speech and press to what they think are more important interests."[1]

Justice Potter Stewart, whose service on the Court (1958–1981) overlapped with Justice Black's for thirteen years, also found special significance in a small segment of the First Amendment. Taking up the same passage that attracted Black's attention ("Congress shall make no law . . . abridging the freedom of speech, or of the press."), Stewart zeroed-in on the words "or of the press."[2]

Stewart's selection is in many ways a curious one. For one thing, his preferred term does not have anything like the intuitive appeal or immediate force of Black's favored text. It is difficult to imagine Stewart successfully explaining his emphasis on the press simply by thundering, "I read 'or of the press' to mean *or of the press*!"

Judging by the views of other informed commentators, it is also by no means clear that Stewart identified the most significant or worthy protection in the First Amendment. Scholars

have argued that the Press Clause adds little value beyond that already secured by the Amendment's freedom of speech guarantee.[3] In the same vein, several Supreme Court Justices have written that members of the press do not possess any unique constitutional privileges beyond those held by other speakers.[4]

Indeed, some Justices have gone further and suggested that reporters, far from being elevated above other speakers, may actually be located somewhat beneath them.[5] Chief Justice Warren Burger resolutely opposed all broadcast news coverage of the Court and prohibited any television coverage of his otherwise public speeches. Burger was furious when CBS News broadcast selections from audio tapes of the Court's oral arguments (the fact that the tapes were ten years old did nothing to cool Burger's rage and he demanded that the FBI investigate how CBS News obtained the recordings[6]). Chief Justice William Rehnquist, Burger's successor, maintained the barriers to media coverage instituted by his predecessor. Rehnquist also once told a gathering of Court reporters, "the difference between us and the other branches of government is that we don't need you people of the press." Among the current members of the Court, Justice Samuel Alito, Justice Ruth Bader Ginsburg, Justice Anthony Kennedy, and Justice Antonin Scalia have all publically criticized journalists. Justice Clarence Thomas has called members of the media "smart-aleck commentators," "snot-nosed brats," "talking heads who shout at each other," and "snotty-nosed smirks."

Stewart's valorization of press freedom not only seems to be out of step with the views of other Justices, but also seems to be in tension with his own reputation as a jurist more interested in moderation and narrow reasoning than in bold statements.[7] Over time and across issues, Stewart voted both for and against the liberal decisions that defined the Court under

Chief Justice Earl Warren. As the Court grew more conservative under Chief Justice Burger, Stewart continued along a centrist path, endorsing different positions along the ideological spectrum from case to case. By all accounts, Stewart thought of himself as a careful lawyer advancing his arguments only so far as the issue at hand required. Stewart was willing to follow this method of highly specific analysis and narrow decision-making whether it led to the left, to the right, or to the ground between the contending voting blocs on the high bench. Thus the twin hallmarks of Stewart's overall jurisprudence were "the skill of precision" and "the penchant for compromise and moderation."[8] On the whole, "his opinions did not embody a judicial philosophy but rather were specific responses to legal problems that came before him in concrete cases."[9] This is hardly the sort of judge that one would expect to fashion a novel reading of the First Amendment.

Why did Stewart think freedom of the press deserved particular attention? How did the singular stress he placed on the press shape his understanding of free speech and inform his decisions on the Court? What was the value of Stewart's original vision? And with the press and the news media as a whole now undergoing significant change, what can Justice Stewart's press-freedom jurisprudence mean today?

In this chapter, I approach these questions first by surveying Stewart's career and identifying early indications of his interest in the press. I then flesh out Stewart's press-centered reading of the First Amendment by drawing upon the writing and judicial opinions he produced while on the bench. I explain his effort to anchor the distinctiveness of press freedom in the plain text of the Constitution, and I outline his arguments for treating established media as a fourth estate competing with the judiciary, legislative, and executive branches in the

Constitution's checks-and-balances system. Although there were some internal difficulties with his account and he did not win over a majority of his colleagues on the Court, his overall vision was a provocative one that portrayed the organized press as one of American government's key institutional structures.

Moving forward to the present day, I then consider how the modern transformation of traditional newspapers and broadcast media intersects with Stewart's philosophy of and arguments for press freedom. Stewart's views were rooted in a historically specific conception of the press as an adversarial watchdog committed to the objective reporting of facts and the continuous monitoring of government. News journalism has altered greatly in recent decades, producing a media landscape that would be almost unrecognizable to Stewart. I argue that the rise of news reporting written from an explicitly political perspective (evident in the work of MSNBC and Fox News) does not materially undermine Stewart's vision. The collapse of newspapers' traditional business model as well as the advent of the blogosphere are far more problematic. Even as the internet has enabled an unprecedented explosion of speech, there is the possibility that the United States may soon be without a free press, as Stewart understood the term.

Fast Track to the Supreme Court

Potter Stewart was born into a prominent and well-connected family in 1915.[10] His mother, Harriet Loomis Potter, came from a family that controlled the oldest bank in Michigan. His father, James Garfield Stewart, was a native Ohioan and staunch Republican who followed a very successful career as a lawyer with a very successful career in public life, first as a member

of the Cincinnati City Council, then as Cincinnati mayor, and ultimately as a justice on the Ohio Supreme Court.

Stewart's youth was one of material comfort and privilege. His boyhood home was a custom-built manse with a living room forty-six feet in length (for reference, forty-six feet is about five feet longer than a standard seventy-eight passenger school bus[11]). The house was so large that Stewart's father got lost in it when the family first moved in. Stewart attended private school in Cincinnati and then boarding school at Hotchkiss in Connecticut. He majored in English at Yale University, and was a member of the honor society Phi Beta Kappa and the elite secret society Skull and Bones.[12] After graduating in 1936, Stewart spent a year on fellowship at Cambridge University and subsequently enrolled in Yale Law School, where future President of the United States Gerald Ford and future Supreme Court Justice Byron White were among his classmates.[13]

Stewart's first job after law school was at the prestigious Wall Street law firm Debevoise, Stevenson, Plimpton & Page. Like many Americans of his generation, Stewart was swept up by World War II, and he ended up spending three years on active duty as a navigator in the Atlantic Fleet. Stewart returned to Debevoise after the war only to leave the firm and move back to Cincinnati with his young family in 1947. Stewart joined an established Cincinnati law firm and, like his father before him, became very active in the Republican Party and city politics. He was soon elected to the Cincinnati City Council and appeared to be on his way to becoming mayor. But Stewart instead found himself headed for the bench. As fate would have it, the death of eighty-year-old Judge Xenophon Hicks left a vacancy on the Sixth Circuit of Appeals. The two men initially considered for Hicks's position were rejected; the first because

of his advanced age and the second because his temperament seemed unsuited for judicial work. Stewart was then recommended to the Eisenhower Administration by Ohio Senator Robert Taft with the somewhat less-than-enthusiastic (and possibly apocryphal) endorsement, "I have finally found someone who is neither too old nor unqualified." Stewart was summarily nominated and confirmed. He was thirty-nine years old.

Stewart had been on the Sixth Circuit for only four years when Supreme Court Justice Harold Burton announced he would retire because of his declining health. Stewart was tapped for the open seat, in part because he was well-known to the Republican establishment and trusted by the Eisenhower Administration to side with the more conservative bloc on the Court (Justices Felix Frankfurter, Tom Clark, John Harlan, and Charles Whittaker) against the liberals (Chief Justice Warren and Justices Hugo Black, William Douglas, and William Brennan).[14] It also probably did not hurt that during the search for Burton's replacement Stewart had a chance to schmooze with the Eisenhower Administration's new Attorney General, William P. Rogers, at a Yale Law School alumni event.

Stewart's appointment came in the fall of 1958 just as the Court's term had begun. Since Congress was not in session, Stewart was sworn in and began to serve on the Court without Senate confirmation. The formal confirmation process followed his recess appointment six months later. During the Senate hearings, Stewart drew some opposition from Southern Democrats angered by his unwillingness to denounce the landmark desegregation decision, *Brown v. Board of Education*.[15] Stewart otherwise attracted broad bipartisan support and his confirmation passed the Senate by a large margin. Thus, Stewart became the second youngest person to join the Court since the Civil War.[16]

Taken as a whole, Stewart's life leading up to his Supreme Court appointment presents a record of unbroken professional success as well as a textbook illustration of the old boy network in action. If we look a bit more closely at these years, we can also find some indications of Stewart's special interest in the press.

Stewart had an impressive career as a student reporter and he ultimately became editor of the *Yale Daily News*.[17] During his time on the paper, he demonstrated a commitment to independent journalism by authoring articles in favor of New Deal programs that cut against the Republican sentiments of the Yale student body. Later in life, as a party activist and as an elected official, Stewart undoubtedly gained an appreciation of the role played by the press in the conduct of politics. And in his final months as a circuit court judge, Stewart began to show how his regard for the press could be translated into constitutional law.

The case was *Garland v. Torre*.[18] Marie Torre, an entertainment reporter for the *New York Herald Tribune*, wrote a story on the difficulties besetting the production of a television special featuring the actress and singer, Judy Garland.[19] A CBS executive told Torre that Garland had a "highly developed inferiority complex" generated by the fact that Garland thought of herself as "terribly fat." Torre quoted the executive in her story without providing the executive's name. After the story was published, Garland sued CBS for (among other things) making false and defamatory comments about her. In preparation for trial, Garland's lawyer demanded that Torre name her source and Torre refused, citing (among other things) the First Amendment's guarantee of a free press. A federal district court judge ordered Torre to give up her source, Torre continued to refuse, and the judge sentenced Torre to ten days in jail for

criminal contempt. Torre appealed the district court's decision and Stewart found himself with a high-profile freedom of the press controversy on his hands.[20]

Stewart upheld the district court ruling, but did so in a way that recognized important safeguards for reporters. He began with the assumption that the First Amendment gives journalists some protection against divulging their confidential sources: "we accept at the outset the hypothesis that compulsory disclosure of a journalist's confidential sources of information entails an abridgement of press freedom by imposing some limitation on the availability of news."[21] Stewart then argued that the essential task of the court was to balance this freedom of the press against the demands of the judicial process. "Freedom of the press, hard-won over the centuries by men of courage, is basic to a free society. But basic too are courts of justice, armed with the power to discover truth. The concept that it is the duty of a witness to testify in a court of law has roots fully as deep in our history as does the guarantee of a free press."[22] Stewart ruled that in the case at hand the interest in "fair administration of justice" trumped press freedom.[23] But he left open the possibility that the balance might come out the other way if the courts were being used "to force a wholesale disclosure of a newspaper's confidential sources of news" or where "the identity of the source was of doubtful relevance" to the case being litigated.[24]

Stewart's agreement with the lower court was clearly a loss for an individual reporter: it meant that Torre would go to jail for ten days. At the same time, Stewart's rationale was also an important victory for freedom of the press, signaling that other reporters might prevail in the future as courts considered the shielding of sources on a case-by-case basis. In ringing terms, Stewart had ruled that the Constitution provided some special protection to journalists'

newsgathering. This was a historic claim and it brought Stewart national attention for the first time in his career.[25] As we shall see, Stewart would substantially develop and deepen his commitment to press freedom during his tenure on the Supreme Court.

A New Constitutional Structure: The Organized Press

Why did press freedom deserve special emphasis in constitutional law? In *Garland v. Torre*, Stewart answered that question by referring to the centuries-long struggle against censorship. As Stewart developed his free-press reading of the First Amendment while on the Supreme Court, he relied less on the long history of struggle and more on other sources. The first place he turned was to the plain text of the Constitution.

According to Stewart, the fact that press freedom is explicitly mentioned alongside free speech in the First Amendment must mean something: "If the Free Press guarantee meant no more than freedom of expression, it would be a constitutional redundancy."[26] Many state constitutions contemporaneous with the drafting the U.S. Constitution mentioned freedom of the press without recognizing a general right to free speech; since one freedom could be recognized without the other, Stewart reasoned that the Founders must have understood themselves to be communicating two separate ideas when they listed both freedom of speech and freedom of the press in the First Amendment.[27]

Stewart argued that the plain text of the Constitution also underscored the importance of press freedom in yet another way: the terms of the Constitution failed to extend protection directly to any private business other than the press.[28] As a "matter of abstract policy," we might think that the business of publishing a newspaper is no more worthy of protection than,

say, the business of banking or the practice of medicine. “But we are here to uphold a Constitution. And our Constitution does not explicitly protect the practice of medicine or the business of banking from all abridgement by government. It does explicitly protect the freedom of the press.”[29] Thus, freedom of the press was not only constitutionally distinct from freedom of speech—the press was also constitutionally distinct from all other private enterprise.

In Stewart’s view, the plain text of the Constitution also suggested that critical to the press was its status as a formally ordered establishment. Stewart noted that the roster of rights in the Constitution was addressed almost exclusively to individuals. “Most of the other provisions in the Bill of Rights protect specific liberties or specific rights of individuals: freedom of speech, freedom of worship, the right to counsel, the privilege against compulsory self-incrimination, to name a few.”[30] In contrast to the all these individual guarantees, “the Free Press Clause extends protection to an institution.”[31] As a result, the press freedom cannot be understood as simply one more individual liberty. Instead, the Free Press Clause must be understood as being, “in essence, a *structural* provision of the Constitution.”[32] Reporters do not receive protection as individuals, but as representatives of “the organized press,” an institution that Stewart defined as consisting of “daily newspapers and other established news media.”[33]

In principle, Stewart’s appeal to the words of the Constitution gave him important rhetorical leverage. He could concede that the news media has not always behaved well. “Newspapers, television networks, and magazines have some times been outrageously abusive, untruthful, arrogant and hypocritical,” Stewart acknowledged. The scorn that many people (including a number of Supreme Court Justices) heaped on individual journalists was often well deserved. Yet, in spite of the well-earned criticism, Stewart could argue that the protection of

the press as an institution must be maintained because it is clearly mandated by the plain language of the Constitution. In this same vein, Stewart could use the words of the Constitution against his colleagues on the Supreme Court. As we shall see, Stewart often advanced his understanding of the press freedom in dissent, with a majority of the Court disagreeing with his position. By grounding his views in the explicit words of the Constitution, Stewart endeavored to side-step judicial precedent that suggested freedom of the press extended no further than the individual right to freedom of speech.[34] In doing so, he could portray himself as an unwavering adherent to the letter of the nation's supreme law rather than as a Justice who happened to have a personal affinity for journalists.

As advantageous as the plain text of the Constitution could be for a press-centered view of the First Amendment, it also had an important limitation. The words of the Constitution conferred a special status on the press without ever explaining what such a status was for. Was the purpose of press freedom to "insure that a newspaper will serve as a neutral forum for debate, a 'market place for ideas,' a kind of Hyde Park corner for the community"?[35] Or was the purpose of press freedom the more specifically political one of guaranteeing "a neutral conduit of information between the people and their elected leaders"?[36] If the goal was to secure a forum in which any idea could be expressed, then constitutionally required press freedom was consistent with the government regulating the media to make sure that it is "genuinely fair and open" to all points of view.[37] On the other hand, if the goal was simply to establish clear lines of communication between the government and the governed, then press freedom was consistent with regulations limiting the media to being an unbiased carrier of political

messages. And what if the purpose of press freedom was something else altogether? What would be the appropriate reach of government regulation then?

In an innovative move, Stewart argued that the "primary purpose" of the Free Press Clause was to "create a fourth institution outside of the Government as an additional check on the three official branches."[38] Stewart supported his claim with a wide variety of sources.[39] He pointed to the British experience centuries before the American Revolution when the British Crown came to understand that a free press meant "expert, organized scrutiny of government." He also referred to the American Founders who thought of the press as an essential restraint on government excess, and to the nineteenth-century British thinker, Thomas Carlyle, who considered the press to be the "Fourth Estate," far more important than any of the parties that held elected office.

Most significantly, Stewart drew upon the modern American experience with "investigative reporting and an adversary press" that had exposed corruption at the highest levels of the federal government and had catalyzed the resignation of President Richard Nixon. Stewart celebrated the adversarial press and its dedication to discovering truth. He had great personal respect for Bob Woodward and Carl Bernstein, the *Washington Post* reporters who had doggedly investigated the Watergate burglary and cover-up.[40] In fact, after Watergate, Stewart encouraged Woodward to write an investigative exposé of the Supreme Court itself. Stewart wanted to use the press to check judicial excesses; he was especially interested in publicly revealing Chief Justice Burger's mismanagement of the Court and removing Burger from the bench. Woodward, along with his fellow *Washington Post* colleague Scott Armstrong,

took up Stewart's suggestion and in 1979 published *The Brethren,* a scorching behind-the-scenes critique of the Court that relied on Stewart as the primary source.[41]

For Stewart, then, history (both American and British) and contemporary experience together demonstrated that the function of the organized press was to be part of the checks-and-balances system. Committed to its own independent investigation and verification of events and facts, the press was locked in an endless competition with the legislative, executive, and judicial branches, working as an ever-vigilant guardian to keep government accountable and the people free.

Unlike other views of a free press's purpose that would allow regulation to ensure openness or neutrality, Stewart's checks-and-balances understanding put a premium on press autonomy and the protections that would grant the news media the wherewithal to confront government directly.[42] Thus, when the Supreme Court ruled that it should be difficult to sue newspapers for libel in order to ensure that the public discussion remained "uninhibited, robust, and wide-open" replete with "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials," Stewart voted with his fellow Justices.[43] When Stewart felt that the standard of proving libel had later shifted, making it more difficult for the news media to defend itself against lawsuits, he dissented and urged his colleagues to return to a standard that would save the press from potentially ruinous litigation.[44]

Stewart again dissented when a majority of the Justices expressed varying degrees of sympathy for the view that reporters could be required to disclose confidential sources and information to grand juries.[45] Stewart argued that the protection of confidentiality followed from a commonsense set of propositions: To serve their constitutional purpose of exposing

governmental malfeasance, newspapers must be able to publish. To publish, reporters must be able to gather news. And to gather news, reporters must be able to form confidential relationships with informants. "If it is to perform its constitutional mission, the press must do far more than merely print public statements or publish prepared handouts. Familiarity with the people and circumstances involved in the myriad background activities that result in the final product called 'news' is vital to complete and responsible journalism, unless the press is to be a captive mouthpiece of 'newsmakers'."[46] According to Stewart, giving grand juries unrestricted subpoena power over journalists would deter informants from talking to the press, and in turn would ensure that reporters would no longer be able to independently investigate and check abuses of power (for a indication of how the issue of shielding confidential sources should have been handled, Stewart helpfully directed his fellow Supreme Court Justices to his old circuit court decision *Garland v. Torre*).[47] In short, Stewart insisted that the sources and methods of the press must be shielded against government interference. In cases where the Court considered whether media could be compelled to follow governmental rules about what to publish, Stewart agreed with his colleagues when they supported press autonomy.[48] He vigorously dissented when he saw press autonomy sacrificed to government control. [49]

This is not to say that Stewart always sided with journalists whenever they landed in court. For Stewart, remember, the ultimate goal was to preserve a competitive system of checks-and-balances between the judiciary, the legislature, the executive, and the press. The system would not be meaningfully competitive if one player was given a permanent advantage. "The press is free to do battle against secrecy and deception in government," Stewart wrote.

"But the press cannot expect from the Constitution any guarantee that it will succeed. . . . [The Constitution] establishes the contest, not its resolution."[50]

Stewart believed it was appropriate for the government to recognize that reporters occasionally needed some practical accommodations (for example, space to use sound equipment and cameras) that members of the public did not.[51] But, as a matter of principle, Stewart thought the Constitution did not require that members of the press be given access to information and institutions beyond that given to the public. In several cases where journalists sued to open corrections facilities to greater coverage, Stewart not only voted against the press, but also wrote the opinion of the Court denying the press's demand for special access.[52] And when the Court ruled, in the famous *Pentagon Papers* case, that newspapers could publish an illegally leaked, classified history of the Vietnam War, Stewart explained that his agreement with the Court's decision did not mean that the newspapers could not ultimately be punished by Congress for what they had printed.[53] In the battle of checks-and-balances, every institution must learn to hold its own. Whether the press was to gain or lose the information it seeks in any given instance, Stewart thought "we must rely, as so often in our system we must, on the tug and pull of the political forces in American society."[54]

What can be made of Stewart's press-centric reading of the First Amendment? As a piece of constitutional theorizing, his reading was inventive and provocative. He made a novel case for the separating freedom of the press from freedom of speech, and then creatively incorporated the organized press into the Constitution's fundamental separation-of-powers architecture. As James Madison had written, in order to avoid the twin evils of anarchy and tyranny one "must first enable the government to control the governed; and in the next place

oblige it to control itself."[55] Madison believed that the constitutionally established rivalry between the legislative, judicial, and executive branches would achieve the goal of a self-controlled government by pitting ambitious officials against one another, arranging "the several offices in such a manner as that each may be a check on the other" and ensuring that "the private interest of every individual may be a sentinel over the public rights."[56] Stewart argued, in effect, that the press was as much a part of the Madisonian scheme as any department of the federal government. In making this argument, Stewart could claim to have developed a fresh way of understanding the First Amendment that placed the institutional media—an entity that he called "a conspiracy of intellect, with the courage of numbers"—at the very core of American constitutionalism.[57]

One difficulty with Stewart's argument is that he placed the press in the somewhat ambiguous position of playing official and non-official roles at the same time. On the one hand, Stewart was committed to media autonomy and to making sure that news could be gathered largely without governmental interference. On the other hand, Stewart assigned the press a governing position as a constitutionally denominated participant in the checks-and-balances system. News journalists were simultaneously outside of government and a constituent element of government. Stewart did not fully explain how this double role could be managed by the press or by the other branches of government. Nor did he explain why this arrangement would be accepted as legitimate by the people in a system where membership in the federal government typically required election or appointment. If journalists were to be a part of the government, why should they be exempt from formal processes of ratification?

Another difficulty with Stewart's approach is that he did not persuade a majority of his colleagues on the Supreme Court to embrace his view. As a consequence, the Court's treatment of press freedom in some ways ended up being quite the opposite of what Stewart had hoped. Consider, again, the task of ensuring a competitive checks-and-balances system that included the organized press. Stewart's default preference was to allow the give-and-take of the political system to calibrate the positions of competing institutions. And, in fact, for much of American history the press established and defended its prerogatives in one political battle after another. Beginning in mid-twentieth century, however, cases involving the powers and freedom of the established press began to surface on the Supreme Court's docket.[58] At this point, the Court became a player *and* the referee in the extended checks-and-balances game. One could rightly note that the Court frequently plays both roles, and by the time the Court began hearing press cases it already had amassed a good deal of experience being both participant and rules keeper in earlier separation-of-powers disputes between the Court, Congress, and the President.[59] But in other separation-of-powers cases, all members of the Court recognized that the judiciary, legislative, and executive branches are the central, constitutionally sanctioned players. This was not the case when it came to the organized press.

Stewart deemed the news media to be engaged in adversarial competition along with the three branches of government, but other Supreme Court Justices did not see the constitutionally designated system of checks-and-balances at stake in the press cases they heard. Thus, in adjudicating press freedom disputes, the other Justices came to think of the news media as just another claimant rather than as a co-equal institution playing its constitutionally mandated structural role. It is this framing of the news media that prevailed in

the Court's First Amendment jurisprudence. As Chief Justice Roberts told an audience of reporters and journalism students several decades after Stewart left the Court, "Do not think for a moment that [the First Amendment's] words alone will protect you. Without an independent judiciary to give life and substance to the constitutional text as law, the words are nothing but empty promises."[60] Roberts's assertion that the media owes the Court a primary debt of gratitude is a long step away from Stewart's belief that every American should thank the press.[61]

One way back to Stewart's press-centered understanding of the First Amendment might be for the Supreme Court to disengage itself from press freedom disputes and, as Stewart suggested, allow the "tug and pull" of politics to determine the boundaries of the separation-of-powers system.[62] Calling for the modern Court to exit an area that has been under its jurisdiction is admittedly a tall order. And even if judicial disengagement occurred and formal legal doctrine no longer actively rejected the idea of special press freedom, there remains the issue of change in the press itself. Stewart anchored his view of the First Amendment in a specific understanding of journalism that in many ways no longer describes the media landscape. Regardless of the Supreme Court's current disposition toward the news media, we must ask whether it is still possible to situate the press within the checks-and-balances structure. I take up this question in the next section.

Watchdogs and Verification Today

When Stewart looked at the organized press of his day, he saw a set of print and broadcast entities that were dedicated to ideals of verification and watchdog journalism.[63]

The news media verified the accuracy of the information they gathered by accessing and comparing a wide variety of sources, and by filtering their reporting through a series of editors before publication or broadcast. These consensus rules and procedures of good journalism were designed to produce an objectively valid rendering of events. Although objectivity might not be achieved in any given news story, the pursuit of it was broadly accepted as a professional goal. Continuous scrutiny of government was another widely shared goal. News journalists not only strived to be a credible source of objective information, but also worked to monitor and critique those in power. The aim was to investigate the doings of officials, to uncover wrongdoing, and to present the results for discussion and judgment—all with an eye toward furnishing citizens with the information they needed to be self-governing.

The objective, watchdog news media that Stewart knew was of relatively recent vintage. The quest for objectivity did not emerge as a regulative ideal in American journalism until well after World War I.[64] The press's thoroughgoing commitment to government criticism came even later. It is true that the American practice of investigative journalism began in the early twentieth century with muckraking, a brand of reform-oriented reporting designed to expose corruption and to provoke change.[65] Even so, muckraking was an exceptional form of journalism until the 1960s when fallout from the Vietnam War led journalists to adopt a broadly adversarial relationship to government and to dedicate themselves to scrutinizing the uses of official power.[66]

Stewart understood that over time the news media had not always adhered to the same practices or ascribed to the same values.[67] Yet, he did not appear to consider whether

journalism would continue to change and how change might affect the press's constitutional role.

As it turns out, some of the changes that have occurred in the decades since Stewart's retirement from the bench are broadly consistent with Stewart's original vision. Consider the rise of journalism written from an explicitly partisan point of view. The established press of Stewart's time universally favored a studiously impartial voice for the reportage of news, with journalists' opinions reserved only for editorials. This consensus has fallen apart. Although outlets like MSNBC and Fox News share the same institutional structure as other news media, they present all their coverage from a clearly political perspective. Journalists who continue to stress impartiality in their reporting have argued that such "activist" news media seriously undermine the ideals of verification and watchdog monitoring: politically committed journalists not only portray facts as they would like them to be (rather than as they are), but also limit scrutiny to the public officials from opposing parties.[68] There is some truth to this criticism, but it should not be overstated. Unlike the partisan newspapers of early American history,[69] many of the crusading journalists of today still accept the ideal of objective verification and argue that the frank statement of personal values makes their reporting more accurate and reliable. As Glenn Greenwald argues, "rigorous adherence to the facts" is best promoted "by being honest about one's perspective and subjective assumptions rather than donning a voice-of-god, view-from-nowhere tone that falsely implies that journalists reside above normal viewpoints and faction-loyalties that plague the non-journalist and the dreaded 'activist'."[70] The disagreement between proponents of nonpartisan and partisan journalism is not over whether or not news reporting can objectively verify facts, but how such verification is best achieved. As for holding

officials accountable, it is no doubt true that ideologically committed journalists are more likely to monitor their opponents more closely than their allies. But so long as there are a multitude of such journalists writing from a wide range of perspectives, the news media as a whole can still play an important watchdog role no matter which party happens to be in power.[71]

To a far greater degree than the proliferation of openly partisan journalism, it is the rapid decline of the news media's business model (especially among newspapers) that threatens Stewart's conception of the press as an essential constitutional structure. Revenue generation has long played a critical role in the development of the American press into a powerful institution. As the great newspaper publisher Joseph Pulitzer explained, the relationship between profit and a robust press is quite direct: "Circulation means advertising, and advertisements mean money, and money means independence."[72] At newspapers today, money pays for journalists to gather the news, for editors to supervise the journalists, for fact-checkers to confirm claims, for graphic designers to convey information visually, for technical staff to build and use databases, and for lawyers to defend the press against lawsuits.[73] Unfortunately, the money is now drying up quickly: in 2013, the latest year in which data is available, newspaper print advertising revenue fell to its lowest level (in constant dollars) since the Newspaper Association of America began tracking revenue in 1950.[74] The revenue decline began in 2000 as advertising dollars fled from newspapers to other platforms. And the decline has only accelerated in recent years, with print advertising revenues decreasing more than 50% in the last five years alone.[75] Newspapers have reported some new advertising revenues from digital ventures. But the new revenue streams are not nearly large enough to compensate for the drop in print advertisements.[76] As a consequence, the capacity of newspapers to engage in

the sort of newsgathering and adversarial investigation that Stewart prized has significantly diminished.

In view of this decline, it is tempting to argue that the blogosphere is capable of taking over the role played by the organized press.[77] One might think of the blogosphere as a watchdog with many sets of eyes turned toward public affairs. The interests and opinions of individual bloggers are highly varied; and just as the politically committed news media in aggregate may check the government, so too the blogosphere as a whole may ensure that that every official act is monitored from a wide range of perspectives. One might also think of the blogosphere as enacting a decentralized form of verification.[78] The developing set of norms that call for bloggers to link to original sources, to post self-corrections, and to encourage critical feedback from commenters, engage the blogosphere in a collective process of error correction. The result is a kind of networked, peer-produced review that replaces the one-way transmission of news from press to readers with the multi-directional sharing of information among participants.

The blogosphere nonetheless falls quite short of replacing the Fourth Estate. As even some blogging boosters concede, the blogosphere is highly dependent on the reporting produced by the established press.[79] The collective error-correction practices of the blogosphere may help ensure that news reports are accurately disseminated across the internet. These practices might also help verify the accuracy of the news reports themselves as bloggers scrutinize a journalist's sources and reasoning. Yet, this dissemination and checking of the news is not the same as—or a substitute for—independent, professional newsgathering.[80]

As the established press shrinks and fewer news stories are produced, there is less grist to be run through the blogosphere mill.

Of course, it is true that blogs allow for an unprecedented number of people to publish information about what is happening immediately around them. It is also true that disclosures by figures like Edward Snowden and Bradley Manning (neither of whom are traditional news journalists) injected huge troves of information into the blogosphere and, in turn, produced heated discussion, sharp criticism, and sustained pressure for government accountability.

From Stewart's perspective, however, neither an increase in local reportage nor the bold actions of whistle blowers will suffice. Stewart envisioned the competition between the press and branches of government taking place at the national level, where the power is the greatest and the risks of tyrannical action are the most serious. More coverage of local affairs does advance the idea of an open press, a free marketplace for ideas that has space for every opinion and point of view. Yet, for Stewart, the crucial fact is that a marketplace for ideas does not directly address the Madisonian challenge of bringing a strong national government under control. Indeed, as we have seen, Stewart firmly rejected the notion that aim of the First Amendment's Press Clause was to create an open venue for all expression. He insisted instead that the primary purpose of press freedom was to fashion "a fourth institution outside of the Government as an additional check on the three official branches."[81] As we have also seen, Stewart's use of the word "institution" was intentional and important. Toe-to-toe confrontation with federal powers requires institutional organization to ensure that that engagement in the checks-and-balances system is vigorous, consistent, and sustained. Lone acts of whistle blowing may inspire debate and lead to policy change, but such acts are costly and unlikely to be

regularly repeated. The long prison term being served by Manning and the life in exile being faced by Snowden illustrate the high price individuals can be compelled to pay when they attempt to hold the government accountable on their own. By contrast, the institutional press spares its informants from enormous personal sacrifice by shielding their identities. Stewart understood that this practice was essential for newsgathering and for effectively checking government (that is why he believed the anonymity of sources deserved constitutional protection). He saw checks-and-balances as an endless, grinding contest waged by formally established rivals. Private individuals who jump in without organizational support run the risk of being crushed.

Can We Live Without An Institutional Press?

Stewart's reading of the First Amendment is an unusual one. Drawing upon history, the plain text of the Constitution, contemporary American experience, and his own biography, Stewart interpreted the Press Clause as a structural provision inserting the organized news media into the Constitution's checks-and-balances system alongside the judiciary, legislative, and executive branches of the federal government. He believed that if the established press's autonomy was preserved, then reporters would directly help realize the grand purposes of the Constitution's separation-of-powers design, ensuring that the ambitions of officials are pitted against one another and that the powers of government serve the public interest.

There were some internal tensions in his arguments and Stewart had limited success persuading his colleagues on the Supreme Court to accept his vision. Over time, an even greater difficulty for Stewart's view emerged: the established press around which he constructed his

arguments greatly declined. There is more and more speech today, with a huge diversity of ideas and opinions continually expressed in the blogosphere. But there is also less and less adversarial, investigative journalism backed by independent, formally organized media institutions. It is this kind of news journalism that is demanded in the ceaseless checks-and-balances contest. Without it, we are a nation with an overflowing free marketplace for ideas—but no free press.

Stewart actually contemplated a United States with only free speech and concluded that it was "possible to conceive of the survival of our Republic without an autonomous press."[82] "For openness and honesty in government, for an adequate flow of information between the people and their representatives, for a sufficient check on autocracy and despotism, the traditional competition between three branches of government might be enough."[83] It might work. But Stewart did not think this was the system we have had nor did he believe that it was one we should want.

Notes

[‡] Paul E. and the Hon. Joanne F. Alper '72 Judiciary Studies Professor, Syracuse University College of Law; Professor of Political Science, Maxwell School of Citizenship and Public Affairs; and Director, Institute for the Study of the Judiciary, Politics, and the Media at Syracuse University. I thank Nicole Elsasser Watson for truly excellent research assistance. In addition to her tireless research and careful copyediting, I am grateful to Nicole for highlighting the tensions in Stewart's treatment of the media as both an official and unofficial actor at the same time.

[1] Smith v. California, 361 U.S. 147, 157–59 (1959) (Black, J., concurring) (emphasis original) (some internal quotation marks omitted). For a detailed treatment of Justice Black's understanding of the First Amendment, see Kevin J. McMahon and Michael Paris, "**[Chapter Title]**," chap. 3 in *The Free Speech Jurisprudence of Justice Hugo L. Black* (**[City]**: **[Press]**, **[Year]**).

[2] Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631 (1974–1975).

[3] Vikram David Amar, *From Watergate to Ken Starr: Potter Stewart's "Or of the Press" A Quarter Century Later*, 50 HASTINGS L.J. 711 (1999); Margaret A. Blanchard, *The Institutional Press and Its First Amendment Privileges*, 1978 SUP. CT. REV. 225 (1978).

[4] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 352 (2010); Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 783–84 (1985) (Brennan, J., dissenting).

[5] Except where indicated, I draw the information and quotations in the remainder of this paragraph from RonNell Andersen Jones, *U.S. Supreme Court Justices and Press Access*, 2012 B.Y.U. L. REV. 1791 (2012).

[6] Keith J. Bybee, *Open Secret: Why the Supreme Court has Nothing to Fear from the Internet*, 88 CHI.-KENT. L. REV. 309 (2013).

[7] Leon Friedman, "Potter Stewart," in *The Justices of the United States Supreme Court: Their Lives and Major Opinions*, eds. Leon Friedman and Fred L. Israel (New York: Chelsea House Publishers, 1997), 4: 1546–73; Gayle Binion, "Potter Stewart," in *Biographical Encyclopedia of the Supreme Court: The Lives and Legal Philosophies of the Justices*, ed. Melvin I. Urofsky (Washington, D.C.: CQ Press, 2006), 486–92.

[8] Binion, "Potter Stewart," 489.

[9] Friedman, "Potter Stewart," 1547.

[10] Except where indicated, this biographical section of the chapter draws upon Joel Jacobsen, *Remembered Justice: The Background, Early Career, and Judicial Appointments of Justice Potter Stewart*, 35 AKRON L. REV. 227 (2002) for the material on Stewart's life and early career.

[11] See "Blue Bird Vision," Blue Bird Corporation, accessed on June 2, 2014, http://www.blue-bird.com/uploadedFiles/Downloads/bb-vision.pdf.

[12] For more information on Phi Beta Kappa, see "The Phi Beta Kappa Society," The Phi Beta Kappa Society, accessed on June 2, 2014, https://www.pbk.org/home/index.aspx. On Skull and Bones, see Buster Brown, "Skull & Bones: It's Not Just for White Dudes Anymore," *The Atlantic*, February 25, 2013, accessed on June 2, 2014,

http://www.theatlantic.com/national/archive/2013/02/skull-and-bones-its-not-just-for-white-dudes-anymore/273463/.

[13] Stewart is also said to have attended Yale with future President of the United States George H.W. Bush (see Friedman, "Potter Stewart," 1458–49). This appears not to have been the case (Jacobsen, "Remembered Justice," 232). The mistake is understandable given the elite circles in which Stewart traveled and given the fact that Stewart and Bush were later to become friends.

[14] Friedman, "Potter Stewart," 1550. Given the record of moderation that Stewart compiled on the Court (described at the outset of this chapter), anyone who expected him to side only with the conservatives was bound to be disappointed.

[15] Brown v. Bd. of Educ., 347 U.S. 483 (1954). Although there were liberals and conservatives on the high bench, *Brown v. Board of Education* had been decided unanimously.

[16] When confirmed in 1991, Justice Clarence Thomas took over the spot of second youngest individual to join the modern Court by being a few months younger than Stewart.

[17] Friedman, "Potter Stewart," 1549; Rowena Scott Comegys, *Potter Stewart: An Analysis of his Views on the Press as Fourth Estate*, 59 CHI.-KENT L. REV. 157 (1983).

[18] Garland v. Torre, 259 F.2d. 545 (1958). This case was argued in the Second Circuit Court of Appeals. Stewart, a judge on the Sixth Circuit, was sitting by designation in the Second Circuit. For an overview of the designation process, see Dan Baker-Jones, "Sitting by Designation," *Nota Bene* (blog), April 25, 2012, accessed on June 2, 2014, http://notabeneuh.blogspot.com/2012/04/sitting-by-designation.html.

[19] I draw the background information of the case from Jacobsen, "Remembered Justice."

[20] *Garland* was decided by a three-judge panel. Stewart wrote the opinion and was joined by Second Circuit Chief Judge Charles Edward Clark and Second Circuit Judge Caroll C. Hincks. As luck would have it, both Clark and Hincks were, like Stewart, Yale men. See "Biographical Directory of Federal Judges: Clark, Charles Edward," Federal Judicial Center, accessed on June 2, 2014, http://www.fjc.gov/servlet/nGetInfo?jid=439&cid=999&ctype=na&instate=na; "Biographical Directory of Federal Judges: Hincks, Carroll Clark," Federal Judicial Center, accessed on June 2, 2014, http://www.fjc.gov/servlet/nGetInfo?jid=1052&cid=999&ctype=na&instate=na.

[21] *Garland*, 259 F.2d. at 548.

[22] Ibid.

[23] Ibid., 549.

[24] Ibid., 549–50.

[25] Jacobsen, "Remembered Justice," 246–47.

[26] Stewart, "Or of the Press," 633.

[27] Ibid., 633–34.

[28] Ibid., 633.

[29] Zurcher v. Stanford Daily, 436 U.S. 547, 576 (1978) (Stewart, J., dissenting).

[30] Stewart, "Or of the Press," 633.

[31] Ibid.

[32] Ibid. (emphasis original).

[33] Ibid., 631.

[34] For a list of such precedents, see Blanchard, "Institutional Press."

[35] Stewart, "Or of the Press," 634.

[36] Ibid.

[37] Ibid., 635.

[38] Ibid., 634.

[39] Ibid., 631–32, 634, 637. For brief review of the term "Fourth Estate," see Comegys, "Potter Stewart," 162–63.

[40] Richard Davis, *Justices and Journalists: The U.S. Supreme Court and the Media* (New York: Cambridge University Press, 2011), 137–38.

[41] Bob Woodward and Scott Armstrong, *The Brethren: Inside the Supreme Court* (New York: Simon and Schuster, 1979).

[42] Stewart did not think that effective press scrutiny of different parts of government required identical levels of press freedom. Given the different way in which the judiciary functions, for example, greater restrictions on access and disclosure may be appropriate for coverage of the courts. See Comegys, "Potter Stewart," 179–80.

[43] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279 (1964).

[44] Herbert v. Lando, 441 U.S. 153, 199–203 (1979) (Stewart, J., dissenting).

[45] Branzburg v. Hayes, 408 U.S. 665, 725–52 (1972) (Stewart, J., dissenting).

[46] Ibid., 729.

[47] See *Branzburg*, 408 U.S. at 743, n. 33.

[48] Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 132–46 (1973) (Stewart, J., concurring); Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974).

[49] Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 400–04 (1973) (Stewart, J., dissenting).

[50] Stewart, "Or of the Press," 636.

[51] Houchins v. KQED, Inc., 438 U.S. 1, 16–19 (1978) (Stewart, J., concurring).

[52] Pell v. Procunier, 417 U.S. 817 (1974); Saxbe v. Wash. Post Co., 417 U.S. 843 (1974).

[53] N.Y. Times Co. v. United States, 403 U.S. 713, 727–31 (1971) (Stewart, J., concurring).

[54] Stewart, "Or of the Press," 636.

[55] THE FEDERALIST NO. 51 (James Madison).

[56] Ibid.

[57] Stewart, "Or of the Press," 634.

[58] The date is from ibid., 632. Blanchard traces the first institutional press cases to the late 1930s and early 1940s ("Institutional Press," 228).

[59] One of the earliest and more striking examples of the Court's double role in the separation-of-powers context can be found in Marbury v. Madison, 5 U.S. 137 (1803).

[60] Carol L. Boll, "Newhouse III Dedication: A Day to Remember," *Newhouse Network*, Fall 2007, 3. Although the Supreme Court's doctrine is not particularly favorable to the press, scholars have noted that the lower courts have in practice recognized some special accommodations for reporters. See, for example, David A. Andersen, *Freedom of the Press*, 80 TEX. L. REV. 429 (2002). For the argument that the Obama Administration has similarly pursued a somewhat

contradictory policy of refusing and endorsing special press protection, see Adam Liptak, "Supreme Court Rejects Appeal From Reporter Over Identity of Source," *New York Times*, June 2, 2014, accessed on June 2, 2014, http://www.nytimes.com/2014/06/03/us/james-risen-faces-jail-time-for-refusing-to-identify-a-confidential-source.html.

[61] Stewart, "Or of the Press," 637.

[62] Ibid., 636.

[63] I draw the description of the news media in this paragraph from Michael Schudson, *Discovering the News: A Social History of American Newspapers* (New York: Basic Books, 1978). For an extended discussion of journalistic ideals, see Bill Kovach and Tom Rosenstiel, *The Elements of Journalism: What Newspeople Should Know and the Public Should Expect* (New York: Crown Publishers, 2001).

[64] Schudson, *Discovering the News*, 121–59.

[65] Louis Filler, *Crusaders for American Liberalism* (Yellow Springs: Antioch Press, 1961); Thomas C. Leonard, *The Power of the Press: The Birth of American Political Reporting* (New York: Oxford University Press, 1986).

[66] Schudson, *Discovering the News*, 160–94.

[67] Stewart, "Or of the Press," 631.

[68] Bill Keller, "Is Glenn Greenwald the Future of the News?," *New York Times*, October 27, 2013, accessed on June 2, 2014, http://www.nytimes.com/2013/10/28/opinion/a-conversation-in-lieu-of-a-column.html?module=Search&mabReward=relbias%3Ar.

[69] Schudson, *Discovering the News*, 12–60.

[70] Keller, “Glenn Greenwald”.

[71] For the argument that watchdog journalism has long had a political bias, see Ricardo Puglisi and James M. Snyder, Jr., “Newspaper Coverage of Political Scandals,” *The Journal of Politics* 73 (2011): 931–950.

[72] Quoted in George Brock, *Out of Print: Newspapers, Journalism, and the Business of News in the Digital Age* (London: Kogan Page, 2013), 56.

[73] Keller, “Glenn Greenwald”.

[74] Mark J. Perry, “Creative Destruction: Newspaper Ad Revenue Continued Its Precipitous Free Fall in 2013, and It’s Probably Not Over Yet,” *American Enterprise Institute: Carpe Diem* (blog), April 25, 2014, accessed on June 2, 2014, http://www.aei-ideas.org/2014/04/creative-destruction-2013-newspaper-ad-revenue-continued-its-precipitous-free-fall-and-its-probably-not-over-yet/.

[75] Ibid.

[76] Jordan Weissmann, “The Decline of Newspapers Hits a Stunning Milestone,” *Slate: Moneybox* (blog), April 28, 2014, accessed on June 2, 2014, http://www.slate.com/blogs/moneybox/2014/04/28/decline_of_newspapers_hits_a_milestone_print_revenue_is_lowest_since_1950.html

[77] Steven Johnson and Paul Starr, “Are We on Track for a Golden Age of Serious Journalism?,” *Prospect*, May 4, 2009, accessed on June 2, 2014, http://www.prospectmagazine.co.uk/magazine/areweontrackforagoldenageofseriousjournalism/.

[78] Paul Horwitz, *First Amendment Institutions* (Cambridge: Harvard University Press, 2013), 166–73.

[79] Ibid., 171.

[80] Johnson and Starr, "Golden Age".

[81] Stewart, "Or of the Press," 634.

[82] Ibid., 636.

[83] Ibid.