2017

Justice Scalia and Fourth Estate Skepticism

RonNell Anderson Jones
S.J. Quinney College of Law, University of Utah, ronnell.jones@law.utah.edu

Recommended Citation
15 First Amend. L. Rev. 258, 287 (2017)

JUSTICE SCALIA AND FOURTH ESTATE SKEPTICISM

RonNell Andersen Jones*

INTRODUCTION

When news broke of the death of Justice Antonin Scalia, some aspects of the Justice's legacy were instantly apparent. It was immediately clear that he would be remembered for his advocacy of constitutional originalism, his ardent opposition to the use of legislative history in statutory interpretation, and his authorship of the watershed Second Amendment case of the modern era.[1]

Yet there are other, less obvious but equally significant ways that Justice Scalia made his own unique mark and left behind a Court that was fundamentally different than the one he had joined thirty years earlier. Among them is the way he impacted the relationship between the Court and the press. When Scalia was confirmed as a Justice of the U.S. Supreme Court in 1986, he joined a Court that had spent the previous two decades actively characterizing the press as an invaluable "Fourth Estate."[2] The Court had repeatedly and glowingly depicted a free press as an essential component of democracy—an accountability-enhancing watchdog,[3] a shaper of community

* Lee E. Teitelbaum Endowed Chair and Professor of Law, University of Utah S.J. Quinney College of Law.

[1] Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. TIMES (Feb. 13, 2016), http://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html?_r=0.

[2] For greater discussion of this trend and additional examples, see RonNell Andersen Jones, *What the Supreme Court Thinks of the Press and Why It Matters*, 66 ALA. L. REV. 253 (2014), [hereinafter Jones, *What the Supreme Court Thinks*].

[3] *See, e.g.*, Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 585 (1983) (asserting that "the basic assumption of our political system [is] that the press will often serve as an important restraint on government"); Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) (the press "does not simply publish information about trials but guards against the miscarriage of justice"); Sheppard v. Maxwell, 384 U.S. 333, 350 (1966) (calling the press "the handmaiden of effective judicial administration" and saying that its "record of service over several centuries" has been "impressive"); Mills v. Alabama, 384 U.S. 214, 219 (1966) (noting that "the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve").

dialogue,[4] a trusted public educator,[5] and a valuable proxy for the citizen in observing government affairs.[6] Thirty years later, that model of the press as a positively contributing social entity worthy of protection appears to be greatly diminished.[7] The old model has been replaced with Court depictions of the press as a profit-driven institution prone to error, guilty of distorting the political process and oversimplifying or ignoring issues, and unworthy of special constitutional consideration.[8]

This essay explores the frequency, tenor, and consequences of Justice Scalia's characterizations of the press, examining the Justice's personal and jurisprudential relationship with the media. It focuses on the ways in which Scalia signaled, both on and off the bench, his distrust of the institutional press and his wholesale rejection of any Fourth Estate specialness. It observes that this powerful brand of Fourth Estate skepticism not only dominated Justice Scalia's media-law jurisprudence—in which he repeatedly and adamantly insisted that the press is no different than any other speaker—but also permeated his writings on other topics, from election law and separation of powers to court cameras and recusals, and helped shepherd the Court into an era of profound cynicism about the media and its role in American society.

Justice Scalia was by no means alone in his personal misgivings about the press,[9] nor was he alone in expressing less-

---

[4] *See* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974) (emphasizing the importance of the exercise of newspapers' editorial judgment); Estes v. Texas, 381 U.S. 532, 539 (1965) (describing the press as "a mighty catalyst in awakening public interest in governmental affairs").

[5] *Minneapolis Star & Tribune Co.*, 460 U.S. at 585 (quoting Grosjean v. American Press Co., 297 U.S. 233, 250 (1936) (asserting that "[a]n untrammeled press [is] a vital source of public information"); Richmond Newspapers v. Virginia, 448 U.S. 555, 573 (1980) (noting the press is central to "public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system").

[6] Cox Broad. Corp. v. Cohn, 420 U.S. 469, 491–92 (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 . . . 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.").

[7] Jones, *What the Supreme Court Thinks*, *supra* note 2, at 261–62.

[8] *See, e.g.*, Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 351 (2010).

[9] *See generally* RICHARD DAVIS, JUSTICES AND JOURNALISTS: THE U.S. SUPREME COURT AND THE MEDIA (Cambridge Univ. Press 2011).

than-positive characterizations of the media in Court opinions.[10] Moreover, the media itself—and society's relationship with, reliance upon, and trust in the institutional press—changed radically in this critical time period that Justice Scalia occupied the bench.[11] This suggests that there are many more factors at play in the shift in press characterizations than the insistent views of one jurist. But a close look at the linguistic and attitudinal movement by the Court on the question of press characterization shows Justice Scalia pulling the laboring oar in many ways—moving the typical depiction away from a more positive view of the institutional press and toward a more denigrating one. This change, which Justice Scalia urged and contributed to both on and off the bench, may matter well beyond its ramifications for the press itself, and it may place the Court and the nation at an important turning point as Justice Scalia's replacement is named.

I. FOURTH ESTATE SKEPTICISM IN JUSTICE SCALIA'S PERSONAL INTERACTIONS WITH THE PRESS

Justice Scalia's characterizations of the media were complicated by the fact that he was not only a jurist who considered the question of press rights in his judicial opinions, but also a public figure who was himself the subject of press coverage. His personal interactions with the press were marked by agitation and tension for nearly all of the Justice's time on the Court.

Reporters who covered the Justice's appearances described his attitude toward working journalists as "churlish"[12] and "prickly" [13] and suggested that their exchanges were punctuated with "animosity."[14] Scalia "did not make it easy for journalists to cover his appearances," almost never allowing

---

[10] *See infra* notes 138–56 and accompanying text (discussing Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010) (majority opinion by Justice Kennedy)).

[11] *See* Jones, *What the Supreme Court Thinks, supra* note 2, at 264 (discussing changes in the technology by which news is delivered and the quality with which news is delivered that might have had an impact on the ways the Court depicts the press).

[12] Associated Press, *AP Photog Angers Scalia,* EDITOR & PUBLISHER (Oct. 21, 2004), http://www.editorandpublisher.com/news/ap-photog-angers-scalia/.

[13] *Id.*

[14] Gina Holland, Associated Press, *Scalia Turns Journalists Away From Speech,* EDITOR & PUBLISHER (Oct. 12, 2005), http://www.editorandpublisher.com/news/scalia-turns-journalists-away-from-speech/.

these appearances to be broadcast, and for many years forbidding them from being recorded "even by print reporters seeking to ensure the accuracy of their notes."[15] Over the course of his tenure on the Court, the Justice regularly made headlines when various reporters seeking to cover his remarks were turned away from public speeches or otherwise impeded in their work.[16] In 2003, he faced particularly sharp criticism for banning broadcasters from an event at which he received an award for supporting free speech.[17] The Justice gave remarks after being given a recognition called the "Citadel of Free Speech Award" at The City Club in Cleveland, Ohio.[18] The club traditionally taped its speakers for subsequent broadcast on public television,[19] but Scalia insisted on barring all television and radio coverage as a condition for accepting—a position media organizations criticized as hypocritical.[20]

The following year, Justice Scalia's tussles with the press made headlines again, when reporters from the Associated Press and a local newspaper were ordered by U.S. Marshals to erase their audiotape recordings of comments the Justice had made

---

[15] Liptak, *supra* note 1. The Justice's policy evolved to allow recordings by print journalists, but he continued to impose very strict limitations on coverage of his remarks. *See Biden, Clinton, Kagan, and Scalia Join Leaders from Government, Business, and Law at Conference Marking LSC's 40th Anniversary,* LEGAL SERV. CORP. (Sept. 12, 2014), http://www.lsc.gov/media-center/press-releases/2014/biden-clinton-kagan-and-scalia-join-leaders-government-business-and ("U.S. Supreme Court Justice Antonin Scalia delivered remarks during an afternoon luncheon. Justice Scalia's media guidelines allowed only still camera and/or pencil-and-pad coverage during the speech. Photos were [to] be limited to the first and last 1-2 minutes of the event. Recording devices were permitted for note-taking purposes and not for broadcast.").

[16] *See* James Vicini, *Justice Scalia Defends Bush v. Gore Ruling,* REUTERS (April 24, 2008), http://www.reuters.com/article/us-usa-court-scalia-idUSN2443345820080424 (describing a 2004 event in which Justice Scalia's "security detail forced two reporters in Mississippi to erase tape recordings of a speech he gave"); Gina Holland, *supra* note 14 (describing how an Associated Press reporter was turned away from a speech to the American Council of Life Insurers, "which was said to be a mistake as the event was not supposed to be closed to print press"); Paul Singer, Associated Press, *Justice Bars Media from Free-Speech Event,* TOPEKA-CAPITAL J. (March 20, 2003), http://cjonline.com/stories/032003/usw_freespeech.shtml#.WAoxizsdDww (describing Justice Scalia's insistence that television and radio coverage be banned when he received a free speech award) [hereinafter *Justice Bars Media from Free-speech Event*].

[17] *Justice Bars Media from Free-Speech Event*, *supra* note 16.

[18] *Id.*

[19] *Id.*

[20] *Id.* (quoting the president of the Radio-Television News Directors as saying "[t]he irony of excluding journalists from an event designed to celebrate the First Amendment's guarantee of free speech is obvious to all").

during an event at a high school in Hattiesburg, Mississippi.[21] The event was open to the press, but the Justice had insisted that it not be recorded, and the Marshal who required the tapes to be erased had cited this policy in doing so.[22] The Reporters Committee for Freedom of the Press wrote Justice Scalia a letter expressing disappointment in the action and encouraging the Justice to change his policy of forbidding recording. Scalia later apologized,[23] saying that neither the event security nor the U.S. Marshals work at the Justices' direction, but that he would express a preference that they not confiscate recordings. He agreed to reconsider his policy and begin allowing recording for the use by print media, but held firm on his ban on broadcasting any of his remarks. "The electronic media have in the past respected my First Amendment right not to speak on radio or television when I do not wish to do so," he said, "and I am sure that courtesy will continue."[24]

On some occasions, though, Justice Scalia's run-ins with reporters were angry and hostile. Once, during a meeting of the National Italian American Foundation, he brusquely snapped "that's enough" at a newspaper photographer who was shooting pictures of another panelist. When the photographer moved to the back of the room and began using a telephoto lens, Scalia "pointed out the photographer to the panel moderator and vigorously gestured for him to stop. Another photographer ventured to the front to take pictures, but scurried away in the face of angry looks from Scalia—dropping some of his camera

---

[21] *See* Vicini, *Justice Scalia Defends Bush v. Gore Ruling, supra* note 16.
[22] *Id.*
[23] *See* Gene Policinski, *Justice Scalia: The 45 Words – and Original Meaning – of the First Amendment*, NEWSEUM INST. (Feb. 16, 2016), http://www.newseuminstitute.org/2016/02/16/justice-scalia-the-45-words-and-original-meaning-of-the-first-amendment/ (last visited Sept. 16, 2016) (quoting the letter to the reporter as saying "I abhor as much as any American the prospect of a law enforcement officer's seizing a reporter's notes or recording. The marshals were doing what they believed to be their job, and the fault was mine in not assuring that the ground rules had been clarified . . . . I have learned my lesson (at your expense), and shall certainly be more careful in the future. Indeed, in the future I will make it clear that recording for use of the print media is no problem at all."); Liptak, *supra* note 1 (describing Scalia's apology to Antoinette Konz of the Hattiesburg American).
[24] Liptak, *supra* note 1; REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *Six degrees of Antonin Scalia,* 40 NEWS MEDIA & THE LAW (Winter 2016), http://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-winter-2016/six-degrees-antonin-scalia.

equipment, which he left behind."[25] A few years later, as Justice Scalia exited Red Mass in Boston, he was approached by a reporter who asked whether Scalia had taken "a lot of flak for publicly celebrating" his religious beliefs,[26] and who suggested that parties before the Court "might question his impartiality in church-state matters."[27] Justice Scalia responded with a chin flick that the journalist reported to be an obscene gesture, sparking a firestorm of commentary about the interaction.[28] Scalia ultimately wrote a letter to the Boston Herald, rebuking the reporter as having watched too many episodes of *The Sopranos* and insisting that the gesture was not vulgar, but simply meant "I couldn't care less. It's no business of yours. Count me out."[29]

Other journalists also found themselves the subjects of Scalia's vitriol and personal ire. In the fall of 2000, the Justice lashed out at *Legal Times* Supreme Court reporter, Tony Mauro, in a letter to the editor to the publication, in which he sarcastically used Mauro's surname as a derogatory adjective: "Mauronic."[30] Mauro and another journalist had published an article focused on a proposal to lift a ban on federal judges receiving speaking fees.[31] The article had suggested that Justice Scalia might be a major instigator of the push for these increased honoraria, quoting an unnamed judge as saying that "Scalia's the

---

[25] Associated Press, *AP Photog Angers Scalia,* EDITOR & PUBLISHER (Oct. 21, 2004), http://www.editorandpublisher.com/news/ap-photog-angers-scalia/.

[26] Peter Lattman, *Scalia's Gesture: Obscene or Not?*, WALL ST. J. L. BLOG (March 31, 2006 2:59 PM), http://blogs.wsj.com/law/2006/03/31/justice-scalias-gesture-obscene-or-not-obscene/.

[27] Vicini, *Justice Scalia Defends Bush v. Gore Ruling, supra* note 16.

[28] *See, e.g.*, Lattman, *supra* note 26; NATIONAL PUBLIC RADIO, Day to Day: *Justice Scalia's Under-the-Chin Gesture* (March 30, 2006, 1:00 PM) (transcript available at http://www.npr.org/templates/story/story.php?storyId=5312065); Dahlia Lithwick, *How Do You Solve the Problem of Scalia?*, SLATE (March 30, 2006), http://www.slate.com/articles/news_and_politics/jurisprudence/2006/03/how_do_you_solve_the_problem_of_scalia.html; Hillary Profita, *The Gesture in Question*, CBS NEWS (March 29, 2006), http://www.cbsnews.com/news/the-gesture-in-question/; Gina Pace, *Justice Scalia Gives Obscene Gesture?*, CBS NEWS (March 27, 2006), http://www.cbsnews.com/news/justice-scalia-gives-obscene-gesture/.

[29] *Scalia Letter to the Editor, Boston Herald*, PBS (Dec. 2006), https://www.pbs.org/wnet/supremecourt/personality/sources_document16.html; *see also* Liptak, *supra* note 1.

[30] Tony Mauro, *When Justice Scalia Turned My Name into an Adjective,* NAT'L L. J. (Feb. 24, 2016), http://www.nationallawjournal.com/id=1202750517722/When-Scalia-Turned-My-Name-Into-an-Adjective?slreturn=20160920173517.

[31] *Id.*

only one who talks about" the idea and asserting that "[o]n Capitol Hill, it became known as the 'Keep Scalia on the Court' bill," because the ban "was one of several factors that caused [Scalia] to muse aloud from time to time about leaving the court."[32]

Justice Scalia's response letter—a rare public statement by a sitting Justice—acknowledged that he had responded positively to inquiries about the proposal and believed it to be a "good idea," but castigated the reporters for falsely suggesting that he was driven purely by financial gain and for engaging in what he called "a mean-spirited attack on my personal integrity."[33] He wrote that "[o]nly someone intent on writing a slanted story" would make such assertions, and said that the article was "gossipy, titillating (and thus characteristically Mauronic)."[34]

For most of his years on the bench, Justice Scalia insisted that interactions between the press and sitting Justices were inappropriate.[35] He deviated from this position in 2008, when commentators noticed something of a "turnabout" as the "justice who once shunned the media" engaged in a "media blitz" while promoting a book he had written.[36] Outside this relatively brief period, however, Scalia's personal relationship with the press was at best strained, and at worst, deeply confrontational, with his skepticism of the Fourth Estate role both implicit in his behaviors and explicit in his commentary.

II. FOURTH ESTATE SKEPTICISM OUTSIDE OF MEDIA CASES

These more public demonstrations of disdain for the press were only the tip of the iceberg for the Justice. More than any of his peers, Justice Scalia went out of his way to negatively

---

[32] *Id.*; *Justice Scalia Tears into Newspaper, Denies his Needs Led Him to Back Pay Hike*, SF GATE (Oct. 3, 2000), http://www.sfgate.com/news/article/Justice-Scalia-Tears-Into-Newspaper-Denies-His-2703193.php; Anne Gearan, *Justice Scalia Complains of 'Attack'*, WASH. POST (Oct. 2, 2000), http://www.washingtonpost.com/wp-srv/aponline/20001002/aponline140643_000.htm.

[33] Gearan, *supra* note 32.

[34] *Justice Scalia Tears into Newspaper, supra* note 32.

[35] *Q&A with Justice Antonin Scalia* (CSPAN television broadcast July 19, 2012) [hereinafter *Q&A with Justice Antonin Scalia*], http://www.c-span.org/video/?307035-1/justice-antonin-scalia-19362016.

[36] Vicini, *Justice Scalia Defends Bush v. Gore Ruling, supra* note 16.

characterize the press in judicial opinions where the press was not a party and where press freedoms were not squarely at issue. Likewise, in orders that he issued, in commentary during oral argument, and in interviews, speeches, and congressional hearings on various Court matters, Justice Scalia depicted the press as problematic, harmful, intrusive, gossip-seeking, confused, and above all, not worthy of any special protection—views that made their way into the Justice's opinions in press cases and ultimately influenced the characterization embraced by the Court's majority.

A. Skepticism in Commentary from the Bench

Scalia was prone to bringing up the press when other matters were being debated, and when he did so, his negative views were apparent. For example, in the oral argument for the case of *Garett v. Ceballos*,[37] a case focused on the scope of First Amendment free speech protections for government employees, Justice Scalia drew attention for turning the line of questioning to the behaviors of the press,[38] casting the media as focused on "gossip"[39] and "scurrilous"[40] rumors. He sarcastically doubted aloud whether the press's judgment about the newsworthiness of a matter was a proper mechanism for determining matters of public concern or legitimate news interests.[41] Although the Court's previous commentary on the Fourth Estate had insisted upon great deference to determinations of editorial judgment by the working press and had repeatedly praised the press for its role in identifying matters of public concern and educating the

[37] 547 U.S. 410 (2006).
[38] Gina Holland, *supra* note 14 (Scalia "talked about gossip-seeking reporters during a court argument about free-speech rights.").
[39] Transcript of Oral Argument at 50, Garcetti v. Ceballos, 547 U.S. 410 (2006) (No. 04-473) ("[H]is boss's wife, a mayor of a big city, is running around with somebody. Okay? And that's picked up by the press. It's there on the gossip pages. She's a public figure. You say that would be covered by this. . . Anything that would get in the press. That's it. . . . Wow.").
[40] *Id.* at 49.
[41] *Id.* at 48–49 (discussing "legitimate news interest": "[S]o if an employee . . . comes forward with some scurrilous information about a family member of his boss, who is a public figure, and his whole families are public figures, which would be picked up by the press, that would be a matter of public concern? . . . Gee, I never understood that that's what the test was").

citizenry about those matters,[42] Justice Scalia's tone and substance presupposed the opposite.

The Justice asserted a similarly critical characterization of the press in his 2004 memorandum describing why he would not be recusing himself from a case in which Vice President Dick Cheney was a named party.[43] Calls for Scalia's recusal had emerged when it came to light that while the case was pending before the Supreme Court, Scalia and Cheney had gone duck hunting together in Louisiana, with Cheney providing transportation on his plane for Scalia and members of his family.[44] Justice Scalia's memorandum detailed his reasoning for why recusal was not required under relevant precedent,[45] but also described a litany of sins that the Justice believed the media had committed. Although Scalia expressed concern about what he perceived as irresponsible factual errors committed by the press in reporting on the particular issue,[46] he also set forth a significantly more skeptical overarching view of the press than the Court had embraced in the immediately preceding years.[47] While the Court that Justice Scalia joined had consistently lauded the value of the press as a check on government,[48] Scalia's Cheney memorandum issued a rather blistering rebuke against

---

[42] *See, e.g.*, Richmond Newspapers v. Virginia, 448 U.S. 555, 573 (1980) (calling the press the "chief[]" source of public information); Estes v. Texas, 381 U.S. 532, 539 (1965) (praising the press for "informing the citizenry of public events and occurrences"); Grosjean v. American Press Co. 297 U.S. 233, 250 (1936) (noting that "[t]he newspapers, magazines, and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality . . . ").

[43] Cheney v. U.S. Dist. Court for D.C., 541 U.S. 913, 923, 927–28 (2004).

[44] *Id.*

[45] *Id.* at 921, 926 (arguing that a mere friendship with a government official who was a named party did not warrant recusal and that the flight on the jet was not a gift of any value).

[46] *Id.* at 928.

[47] *See id.*

[48] *See* Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 585 (1983) (asserting that "the basic assumption of our political system [is] that the press will often serve as an important restraint on government"); Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 560 (1976) (the press "does not simply publish information about trials but guards against the miscarriage of justice"); Sheppard v. Maxwell, 384 U.S. 333, 350 (1966) (calling the press "the handmaiden of effective judicial administration" and saying that its "record of service over several centuries" has been "impressive"); Mills v. Alabama, 384 U.S. 214, 219 (1966) (noting that "the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve").

what he saw as "inappropriate" and potentially "silly," "so-called investigative journalists,"[49] who assert too bold a role in calling for recusals[50] and who had produced a "blast of largely inaccurate and uninformed opinion."[51] He sweepingly argued that "constant baseless allegations of impropriety" are "the staple of Washington reportage"[52] and described newspapers that had covered him as misinformed, misleading, and miseducated.[53] "It is well established," he wrote, "that the recusal inquiry must be 'made from the perspective of a *reasonable* observer who is *informed of all the surrounding facts and circumstances*,'" and the press, he said, should not be considered such an observer.[54] To the contrary, he said, the media is "eager to find foot-faults"[55]—a criticism that stands in stark contrast to the repeated statements from the Court, in the time before Scalia joined it, that the willingness of the press to act as a watchdog was one of its most praiseworthy traits[56] and that it needed

---

[49] *Cheney*, 541 U.S. at 927 ("My recusal would also encourage so-called investigative journalists to suggest improprieties, and demand recusals, for other inappropriate (and increasingly silly) reasons.").

[50] *Id.* ("[R]ecusing in the face of such charges would give elements of the press a veto over participation of any Justices who had social contacts with, or were even known to be friends of, a named official. That is intolerable.").

[51] *Id.* at 924.

[52] *Id.* at 928.

[53] *Id.* at 924 ("And these are just the inaccuracies pertaining to the *facts*. With regard to the *law*, the vast majority of the editorials display no recognition of the central proposition that a federal officer is not ordinarily regarded to be a personal party in interest in an official-action suit. And those that do display such recognition facilely assume, contrary to all precedent, that in such suits mere political damage (which they characterize as a destruction of Cheney's reputation and integrity) is ground for recusal.").

[54] *Id.*

[55] *Id.* at 928 ("The people must have confidence in the integrity of the Justices, and that cannot exist in a system that assumes them to be corruptible by the slightest friendship or favor, and in an atmosphere where the press will be eager to find foot-faults.").

[56] *See, e.g.*, Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 585 (1983) (noting "the basic assumption of our political system that the press will often serve as an important restraint on government"); Houchins v. KQED, Inc., 438 U.S. 1, 8 (1978) (noting that "the role of the media is important," commenting that "they can be a powerful and constructive force, contributing to remedial action in the conduct of public business" and indicating that "[t]hey have served that function since the beginning of the Republic"); Mills v. Alabama, 384 U.S. 214, 218–19 (1966) (stating that "[t]he Constitution specifically selected the press . . . to play an important role in the discussion of public affairs," that "[t]he press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials," and that "the right of the press to praise or criticize governmental agents and to clamor and contend for or against change" is a matter that "the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free"); Estes v. Texas, 381 U.S. 532, 539 (1965) (noting the "free press has

"breathing space" to perform this task.[57] Justice Scalia's memorandum balked at the suggestion that "[he] must recuse because a significant portion of the press, which is deemed to be the American public, demands it."[58] Yet, during the Fourth Estate era, the Court had repeatedly suggested that the press did, in fact, echo the will of, and act on behalf of, the American public. It had explicitly noted that among the valuable roles played by the press is its capacity to reflect upon on and shape conversations for the American public.[59] Justice Scalia's counter-narrative rejected this Fourth Estate quality. The memorandum, like other writings from Scalia, offered a derogatory subtext about the American media and what the Justice perceived as its diminished place in the democracy.

B. Skepticism in Off-the-Bench Commentary

This same pattern of Fourth Estate skepticism permeated many of Justice Scalia's comments off the bench, with the Justice going out of his way to negatively depict the press even when it was not the primary topic at hand. He faulted it for public misinformation and used comments about the unpraiseworthy behaviors of the press as illustrative negative examples when he had other, wider points to make.

One of the most notable examples of this is seen in Justice Scalia's tendency to disapprovingly reference the landmark press case of *New York Times v. Sullivan*.[60] In panel discussions, interviews, and congressional hearings, the Justice regularly was asked for his views on separation of powers and the role of the judiciary in constitutional interpretation. Those views, for which Justice Scalia became well known during his time on the Court, centered on a concern about judicial overreach and an

---

been a mighty catalyst in . . . exposing corruption among public officers and employees").

[57] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 272 (1964).

[58] Cheney v. U.S. Dist. Ct. for D.C., 541 U.S. 913, 923 (2004).

[59] *See* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974) (emphasizing the importance of the exercise of newspapers' editorial judgment); *Estes*, 381 U.S. at 539 (describing the press as "a mighty catalyst in awakening public interest in governmental affairs"); Grosjean v. American Press Co., 297 U.S. 233, 250 (1936) ("A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves.").

[60] 376 U.S. 254 (1964).

opposition to the notion of a "living constitution."[61] But of all the examples of perceived judicial activism and departures from constitutional originalism that Justice Scalia could have drawn upon to demonstrate his uneasiness, he most regularly used the illustration of *Sullivan*,[62] a case that focused on the press's reporting on the civil rights movement. The case established a heightened standard that must be met by public officials who accuse the press of libel on matters related to their official duties,[63] and it was in many ways a centerpiece of the Fourth Estate jurisprudence of the pre-Scalia court. In his off-the-bench commentary, Justice Scalia acerbically condemned the decision as "a marvelous example of the living Constitution,"[64] in which the Court "simply [decided to] give the First Amendment a meaning that nobody, *nobody* ever ratified."[65] His fuller comments on the issue almost always accentuated his originalism by highlighting that Thomas Jefferson or George Washington "would have been appalled at the notion that they could be libeled with impunity"[66] and by insinuating that *Sullivan*

---

[61] *Considering the Role of Judges Under the Constitution of the United States: Hearing Before the Subcomm. on the Judiciary*, 112th Cong. 36–38 (2011) [hereinafter *Judicial Hearings*] (statement of J. Antonin Scalia) *available at* https://www.gpo.gov/fdsys/pkg/CHRG-112shrg70991/pdf/CHRG-112shrg70991.pdf.

[62] *See The Kalb Report: Justices Scalia and Ginsburg on the First Amendment and Freedom* (CSPAN television broadcast Apr. 17, 2014) [hereinafter *Kalb Report*], http://www.c-span.org/video/?318884-1/conversation-justices-scalia-ginsburg-2014; Don Franzen, *Reading the Text: An Interview with Justice Antonin Scalia of the U.S. Supreme Court,* L.A. REV. OF BOOKS (Oct. 1, 2012), https://lareviewofbooks.org/interview/reading-the-text-an-interview-with-justice-antonin-scalia-of-the-u-s-supreme-court; *Judicial Hearings*, *supra* note 61; *Washington Ideas Forum, Day 2, Morning Session* (CSPAN television broadcast Oct. 6, 2011), http://www.c-span.org/video/?301921-16/washington-ideas-forum-day-2-morning-session.

[63] *Sullivan*, 376 U.S. at 269.

[64] *Judicial Hearings*, *supra* note 61.

[65] Franzen, *supra* note 62 ("An example of how you could distort the First Amendment is *New York Times vs. Sullivan.* I mean, at the time the First Amendment was adopted, libel was not a permissible form of speech. You could be liable for slandering someone. The Warren Court just decided, well, it'd be better if the press could criticize political figures with impunity, so long as they had some reasonable basis.").

[66] *Kalb Report*, *supra* note 62 ("So long as he heard from somebody, you know, it makes it very difficult for a public figure to win a libel suit. I think George Washington, I think Thomas Jefferson, I think the framers would have been appalled at the notion that they could be libeled with impunity. And, when the Supreme Court came out with that decision, it was revising the Constitution. Now, it may be a very good idea to set up a system that way. And New York State could have revised its libel laws by popular vote to say, if you libel a public figure, it's okay unless it's

gave the press an unwarranted windfall to be able to act irresponsibly without consequence:

> [Y]ou can libel public figures without liability so long as you are relying on some statement from a reliable source, whether it's true or not. Now the old libel law used to be you're responsible, you say something false that harms somebody's reputation, we don't care if it was told to you by nine bishops, you are liable. *New York Times v. Sullivan* just cast that aside because the Court thought in modern society, it'd be a good idea if the press could say a lot of stuff about public figures without having to worry. Now, and that may be correct, that may be right, but if it was right it should have been adopted by the people. It should have been debated in the New York Legislature and the New York Legislature could have said, 'Yes, we're going to change our libel law.' But the living constitutionalists on the Supreme Court, the Warren Court, simply decided, 'Oh, yes, it used to be that . . . George Washington could sue somebody that libeled him, but we don't think that's a good idea anymore.'[67]

Justice Scalia made clear that he thought *Sullivan* "distort[ed] the First Amendment"[68] and that it represented a shift in law by judicial fiat, a practice of which he strongly disapproved. But his repeated narrative on this point—that the Court "just decided it would be a good idea if there were no such thing as libeling a public figure so long as you have good reason to believe the lie you tell about him"[69]—was as critical of the press as it was of the Court, and was an additional manifestation of his Fourth Estate skepticism.

---

malicious. But New York State didn't do that. It was nine lawyers who decided that that's what the Constitution ought to mean, even though it had never meant that.").

[67] *Washington Ideas Forum, Day 2, Morning Session* (C-SPAN television broadcast Oct. 6, 2011), http://www.c-span.org/video/?301921-16/washington-ideas-forum-day-2-morning-session.

[68] Franzen, *supra* note 62.

[69] *Judicial Hearings*, *supra* note 61, at 38.

Likewise, on the recurring question of cameras in the U.S. Supreme Court, Justice Scalia was heavily focused on his distrust of the media. To be sure, he was not the only Justice who was against the idea. Many justices have testified before Congress and spoken publicly over the years in opposition to broadcast coverage of the Court's oral arguments[70]—and even those who have initially expressed support for cameras have changed their minds and spoken against them.[71] But Justice Scalia's responses to inquiries about the possibility are unique among his colleagues for their strong Fourth Estate skepticism. His colleagues' resistance to cameras has often focused on the Court and its Justices. Justice Thomas, for example, has emphasized his security concerns.[72] Justices Kennedy and Breyer have usually discussed their fears that cameras would present a disruption to the traditional decorum of the Court's proceedings.[73] Justice Scalia's focus, in contrast, was often on the press, and his total surety that broadcast journalists covering oral argument would not use the footage in any responsible or helpful way.[74] In his remarks on the subject, he regularly suggested that

---

[70] *See* RonNell Andersen Jones, *U.S. Supreme Court Justices and Press Access,* 2012 BYU L. REV. 1791, 1812 (2012).

[71] *Id.*; *see also* Matt Sedensky & Sam Hananel, *Supreme Court's Kagan, Sotomayor Rethink Support for Cameras in the Courtroom*, WASH. POST (Feb. 2, 2015), https://www.washingtonpost.com/politics/courts_law/supreme-courts-kagan-sotomayor-rethink-support-for-cameras-in-the-courtroom/2015/02/02/1fb9c44c-ab34-11e4-ad71-7b9eba0f87d6_story.html?utm_term=.e542d340bb9f.

[72] *Fiscal Year 2007 Supreme Court Budget* (C-SPAN television broadcast Apr. 4, 2006), https://www.c-span.org/video/?191906-1/fiscal-year-2007-supreme-court-budget&start=1158 (statement of Clarence Thomas, Assoc. J. of the United States Supreme Court) ("[Cameras] will raise additional security concerns as the other members of the Court who now have some degree of anonymity, lose that anonymity. I probably have more of a public recognition than any of the current members of the Court, and that loss of anonymity raises your security issues considerably.").

[73] *See* Justice Stephen Breyer, Interview Response, *The Role of the Judiciary: Panel Discussion with United States Supreme Court Justices*, 25 BERKLEY J. INT'L L. 71, 86 (2007) ("[W]e see men and women of every race, every religion, every point of view, who have come into our court to resolve their differences . . . [a]nd we are trustees of that institution. And none of us, I think, wants to do anything to harm that institution."); *Cameras in the Court*, C-SPAN, http://www.c-span.org/The-Courts/Cameras-in-The-Court/ (last visited Sept. 19, 2016) (Justice Kennedy suggesting that "[w]e teach, by having no cameras, that we are different").

[74] Mark Sherman, Associated Press, *Scalia Loves His Gadgets, but Not Cameras in Court,* SAN DIEGO UNION-TRIBUNE (Nov. 22, 2010), http://www.sandiegouniontribune.com/sdut-scalia-loves-his-gadgets-but-not-cameras-in-court-2010nov20-story.html (noting Scalia's opposition to cameras: "[I]n the Court's heated cases about abortion, school prayer, gay rights and other high-

the press "miseducates" the American public.[75] His commentary nearly always included a disparaging reference to media "outtakes,"[76] which he said would confuse the public about the actual work of the Court, and he often chided the press for what he said he could "guarantee"[77] would be sensationalized or unrepresentative "man bites dog" coverage,[78] rather than serious journalism addressing the issues of the Court. Although his commentary on cameras was primarily focused on the broadcast media, it also conveyed distrust for print journalists who covered the Court.[79] He implied that the press would uniformly seek to make the Court and its Justices "entertainment" rather than

---

profile topics, he said interest would be so great that broadcasters would take snippets from the arguments and air them out of context.").

[75] *Constitutional Conversation* (C-SPAN television broadcast Apr. 21, 2005) [hereinafter *Constitutional Conversation*], http://www.c-span.org/video/?186408-1/constitutional-conversation ("I have come to the conclusion that it will misinform the public rather than inform the public to have our proceedings televised."); *Judicial Hearings*, *supra* note 61 ("[T]hey would, in effect, be given a misimpression of the Supreme Court. I am very sure that that would be the consequence, and, therefore, I am not in favor of televising."); *Kalb Report*, *supra* note 62 ("[W]hy should I participate in the miseducation of the American people?"); *Q&A with Justice Antonin*, *supra* note 35 ("I am against it because I do not believe, as the proponents of television in the court assert, that the purpose of televising our hearings would be to educate the American people. That's not what it would end up doing . . . I am sure it will miseducate the American people, not educate them.").

[76] *Constitutional Conversation*, *supra* note 75 ("But if you send it out on C-SPAN, what will happen is, for every one person who sees it on C-SPAN gavel-to-gavel . . . 10,000 will see 15-second takeouts on the network news, which I guarantee you will be uncharacteristic of what the court does. So, I have come to the conclusion that it will misinform the public rather than inform the public to have our proceedings televised."); Harry A. Jessell, *Scalia's Media Legacy: More Good Than Bad,* TVNEWSCHECK (Feb. 19, 2016), http://www.tvnewscheck.com/article/92469/scalias-media-legacy-more-good-than-bad ("What most of the American people would see would be 30-second, 15-second take outs from our arguments and those take outs would not be characteristic of what we do."); *Q&A with Justice Antonin Scalia*, *supra* note 35 ("You have to be sure, what most of the American people would see would be 30-second, 15-second take-outs from our argument and those take-outs would not be characteristic of what we do. They would be uncharacteristic.").

[77] *Judicial Hearings*, *supra* note 61 ("a 30-second outtake from one of the proceedings, which I guarantee you would not be representative of what we do . . . I am very sure that would be the consequence . . . ."); *Constitutional Conversation*, *supra* note 75 ("15-second takeouts on the network news, which I guarantee you will be uncharacteristic of what the court does.").

[78] *Constitutional Conversation*, *supra* note 75 ("They want 'man bites dog' stories. They don't want people to watch what the Supreme Court does over the course of a whole hour of argument."); *Kalb Report*, *supra* note 62.

[79] *Q&A with Justice Antonin Scalia*, *supra* note 35 (when asked whether the broadcast snippets that he feared are merely the equivalent of newspaper quotations and summaries from oral argument, Justice Scalia replied that readers might conclude that "it's an article in the newspaper and the guy may be lying or he may be misinformed").

engaging in thoughtful news reporting.[80] Thus, while the Court that Justice Scalia joined in 1986 repeatedly characterized the press as trustworthy—as a valuable educator of and proxy for the citizens of the democracy[81] and as a particularly capable conveyor of accurate information about the work of Courts[82]—Justice Scalia presupposed the opposite, that the media would actively confuse and distort the goings-on of this branch of government and that it would never serve the Fourth Estate function if given the opportunity to record the proceedings of the high Court.

The Justice expressed similar sentiments minimizing the value of the press and emphasizing the inadequacies of media coverage when he participated in interviews and question-and-answer sessions, regularly opining that the press is biased, overly simplistic, unfairly critical, untethered by any standards, and unlikely to get things right, particularly as it pertains to the Court. In one 2012 speech, for example, Scalia "expressed disdain for the news media and the general reading public, and suggested

---

[80] *Today Show* (CNBC television broadcast Oct. 10, 2005), http://www.today.com/id/9649724/ns/today/t/justice-scalia-says-not-chance-cameras/#.V3mNS7grLb0 (Justice Scalia, when asked whether cameras would be allowed in the courtroom, replying, "Not a chance, because we don't want to become entertainment. I think there's something sick about making entertainment about real people's legal problems.").

[81] *See, e.g.,* Cox Broad. Corp. v. Cohn, 420 U.S. 469, 491–92 (1975) (noting that "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," describing the "[g]reat responsibility" of the "news media to report fully and accurately the proceedings of government," and stating that "[w]ithout the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally"); Thornhill v. Alabama, 310 U.S. 88, 102 (1940) (footnote omitted) (calling press freedom necessary "to supply the public need for information and education with respect to the significant issues of the times").

[82] *See, e.g.*, Richmond Newspapers v. Virginia, 448 U.S. 555, 573 (1980) (citation omitted) (calling the press critical to "public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system" and describing how it is a "surrogate[ ] for the public"); *Cox Broad. Corp.*, 420 U.S. at 491–92 (noting that "the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice"); Sheppard v. Maxwell, 384 U.S. 333, 350 (1966) (stating that the "responsible press has always been regarded as the handmaiden of effective judicial administration," noting that "[i]ts function in this regard is documented by an impressive record of service over several centuries," and describing how the press "guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism").

that together they condone inaccurate portrayals of federal judges and courts."[83] He asserted:

> "The press is never going to report judicial opinions accurately[.]" . . . "They're just going to report, who is the plaintiff? Was that a nice little old lady? And who is the defendant? Was this, you know, some scuzzy guy? And who won? Was it the good guy that won or the bad guy? And that's all you're going to get in a press report[.]"[84]

In testimony before the Senate Judiciary Committee, he made a similarly sweeping denunciation, saying that "criticism in the press" has "nothing to do with the law":

> If they like the result, it is a wonderful opinion and these are wonderful judges. And if they dislike the result, it is a terrible opinion. They do not look to see what the text of the statute is that was before us and whether this result is indeed a reasonable interpretation. None of that will appear in the press reports, which will just tell you who the plaintiff was, what the issue was, and who won.[85]

Justice Scalia made clear that he was angry with—and felt personally harmed by—the irresponsible press. When asked in a CSPAN program what things made him "mad," he answered that "the press . . . if you read it . . . gets under your skin," because "effectively, they can say whatever they want."[86] He noted that "one of the difficult things about the job . . . is that we are criticized in the press for our opinions, but cannot respond to press criticism."[87] Although Justice Scalia did, in fact, respond on a number of occasions to what he perceived as false or unfair statements by the press about matters other than his judicial opinions,[88] he bemoaned the "disabilit[y] we operate under" that

---

[83] John Heilprin, *Scalia Sees Shift in Court's Role*, WASH. POST, Oct. 23, 2006, at A19, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/10/22/AR2006102200965.html.
[84] *Id.*
[85] *See Judicial Hearings, supra* note 61, at 18.
[86] *Q&A with Justice Antonin Scalia*, *supra* note 35.
[87] *Id.*
[88] *See, e.g.*, Cheney v. U.S. Dist. Court for D.C., 541 U.S. 913 (2004) ("The

precluded response to reporting about opinions themselves.[89] "We get clobbered by the press all the time," he said.[90] "I can't tell you how many wonderful letters I've written to the Washington Post just for my own satisfaction and then ripped up and thrown away."[91]

Toward the end of his time on the Court, Justice Scalia told a *New York Magazine* reporter in an interview that he had long since cancelled his subscriptions to the *Washington Post* and *New York Times*, because they were "slanted and often nasty" and "so shrilly, shrilly liberal" that he "couldn't handle it anymore." [92] When the reporter questioned whether his consumption of only conservative media was an "isolating" behavior, he pushed back at the accusation.[93] But in another portion of same interview, he lobbed a similar accusation at the journalist, calling her "so out of touch with most of America" and "so, so removed from mainstream America" when she questioned some of his religious beliefs.[94]

All told, a blend of anger, cynicism, and sense of victimization permeated nearly all of Justice Scalia's

---

implications of this argument are staggering. I must recuse because a significant portion of the press . . . demands it. The motion attaches as exhibits the press editorials on which it relies. Many of them do not even have the facts right."); Peter Lattman, *Scalia's Gesture: Obscene or Not?*, WALL ST. J. LAW BLOG (March 31, 2006 2:59 PM), http://blogs.wsj.com/law/2006/03/31/justice-scalias-gesture-obscene-or-not-obscene/); ("[A] . . . reporter asked [Scalia] whether his participation in the Mass might cause some people to question his impartiality in matters of church and state. In response, Scalia gave the reporter a hand-off-the-chin gesture. The Herald wrote a story the next day characterizing Justice Scalia's gesture as obscene. Justice Scalia responded . . . explaining that the gesture was limited to 'fanning the fingers of my right hand under my chin' meaning 'I couldn't care less.' He concluded . . . 'your staff seems to have acquired the belief that any Sicilian gesture is obscene—especially when made by an "Italian jurist."'").

[89] *Considering the Role of Judges*, *supra* note 61, at 18

[90] *Q&A with Justice Antonin Scalia*, *supra* note 35.

[91] *Id.*

[92] Jennifer Senior, *In Conversation: Antonin Scalia,* N.Y. MAG. (Oct. 6, 2013), http://nymag.com/news/features/antonin-scalia-2013-10/.

[93] *Id.* ("Oh, c'mon, c'mon, c'mon! [*Laughs.*] Social intercourse is quite different from those intellectual outlets I respect and those that I don't respect. I read newspapers that I think are good newspapers, or if they're not good, at least they don't make me angry, okay? That has nothing to do with social intercourse. That has to do with 'selection of intellectual fodder,' if you will.").

[94] *Id.* ("You're looking at me as though I'm weird. My God! Are you so out of touch with most of America, most of which believes in the Devil? I mean, Jesus Christ believed in the Devil! It's in the Gospels! You travel in circles that are so, *so* removed from mainstream America that you are appalled that anybody would believe in the Devil! Most of mankind has believed in the Devil, for all of history. Many more intelligent people than you or me have believed in the Devil.").

commentary on and rhetoric about the press. He did not like the press, did not trust the press, and did not convey that he found any value in the work of the press. His persistent vocalization of this Fourth Estate skepticism was in stark contrast to the Court's previous, "almost uniformly affirmative characterization of the press as a critically important, positively contributing social entity that is worthy of protection and uniquely valuable[.]"[95] His contrary views may have shifted the Court more permanently in profound ways.

III. FOURTH ESTATE SKEPTICISM IN DEBATES OVER THE PRESS CLAUSE

These skeptical and accusatory characterizations of the press also appeared in Justice Scalia's judicial opinions, which were at times pointed in their commentary and were nearly always unflattering in their depictions of the press. In time, they became the characterization of the press adopted by the Court's majority. Scalia's position—that the press does little societal good and, as both a practical and an originalist matter, warrants no special protection or even praise from the Court—was rare at the beginning of his tenure, but by its conclusion, had infused itself into the rhetoric of the Court's most prominent statements on the press.

Justice Scalia believed the First Amendment's Press Clause was a companion to the Speech Clause, with the latter guaranteeing all speakers' right to speak and the former guaranteeing all speakers' right to publish.[96] The Press Clause was not, the Justice emphasized, "referring to the institutional press, the guys that run around with a fedora hat with a sticker in it that says 'Press.'"[97] Rather than giving "any prerogatives to the institutional press," it protects "anybody who has a Xerox

[95] Jones, *What the Supreme Court Thinks*, *supra* note 2, at 261.
[96] Marvin Kalb, *The Kalb Report: 45 Words, A Conversation with U.S. Supreme Court Justices Antonin Scalia and Ruth Bader Ginsburg on the First Amendment*, THE KALB REPORT, 1, 7 (April 17, 2014) [hereinafter *45 Words, A Conversation with U.S. Supreme Court Justices*], https://research.gwu.edu/sites/research.gwu.edu/files/downloads/45Words_Transcript.pdf (answering question about why the founding fathers added "of the press" after "freedom of speech" by asserting that, "all it means is the freedom to speak or to write.").
[97] *Id.*

machine."[98] The Supreme Court's media law jurisprudence had in fact been hesitant to afford special, affirmative rights to the press, but the Court in the 1960s and 1970s had nevertheless "recognized the press as constitutionally unique from nonpress speakers"[99] in cases dealing with distinctive press issues and, especially, in dicta praising the media "as a democracy-enhancing, power-checking, community-building institution with a critical role to play in informing, educating, and empowering a voting public."[100] Justice Scalia's strong view that the First Amendment should protect the freedom to speak and to publish without any special solicitude for the press as an entity[101] was accompanied by a new brand of negative dicta that, by the end of his time on the Court, had made its way from his separate opinions into the opinions of the majority, substituting pro-press rhetoric with rhetoric that was anti-press and, especially, anti-press specialness.

Both Justice Scalia's insistence that the press is no different from any speaker and his assertion that the press was not to be celebrated or trusted had appeared in opinions he authored as an appellate judge on the United States Court of Appeals for the District of Columbia Circuit before his nomination to the United States Supreme Court. In cases directly involving the press,[102] but also in cases not centered on media issues,[103] he commented that the Press Clause was not designed

---

[98] *Id.*

[99] Sonja R. West, *The Stealth Press Clause*, 48 GA. L. REV. 729, 731 (2014).

[100] Jones, *What the Supreme Court Thinks*, *supra* note 2, at 261.

[101] *45 Words, A Conversation with U.S. Supreme Court Justices*, *supra* note 96 ("All it means is the freedom to speak and to write . . . I don't know that there were any special rules applicable to the press. The press did not have to get permission of a censor to publish. But neither did anybody else . . . I have never thought that [the Press Clause] was anything except identical [to the Speech Clause]. I can't imagine that you can limit some things that can be spoken but cannot limit things that can be printed. I think it's the same . . . .").

[102] *In re* Reporters Comm. for Freedom of Press, 773 F.2d 1325, 1331 (1985) ("[T]he First Amendment generally grants the press no right to information about a trial superior to that of the general public.") (citing Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978)).

[103] Cmty. for Creative Non-Violence v. Watt, 703 F.2d 586, 622 (D.C. Cir. 1983) (Scalia, J., dissenting) ("I start from the premise that when the Constitution said 'speech' it meant speech and not all forms of expression. Otherwise, it would have been unnecessary to address 'freedom of the press' separately—or, for that matter, 'freedom of assembly,' which was obviously directed at facilitating expression. The effect of the speech and press guarantees is to provide special protection against all laws that impinge upon spoken or written communication . . . .").

to create press-specific treatment under the First Amendment. In *Ollman v. Evans*,[104] when a majority of the D.C. Circuit's *en banc* panel held that allegedly defamatory statements set forth in a syndicated column were protected expressions of opinion entitled to absolute First Amendment protection, Scalia dissented in part, emphasizing again that he believed any additional protections for the press should be the result of legislative action and not judicial declaration.[105] In the process of doing so, he conveyed negative depictions of the press and its work—describing the media's "intentional destruction of reputation,"[106] intimating that it had disproportionate power over government decision makers,[107] and placing the phrase "investigative reportage" in quotation marks, presumably to signal a lack of confidence that the practice occurs.[108] He colorfully empathized with those who "discern a distressing tendency for our political commentary to descend from discussion of public issues to destruction of private reputations," those who believe that the First Amendment is enhanced by "putting some brake upon that tendency," and those who "view high libel judgments as no more than an accurate reflection of the vastly expanded damage that can be caused by media that are capable of holding individuals up to public obloquy from coast to coast and that reap financial rewards commensurate with that power."[109]

This same tendency to judge the press as unlikely to make positive societal contributions followed Scalia to the high court, where he insisted that the press not be treated more favorably than any other speaker and where his judicial opinions repeatedly offered side jabs at the press in cases not directly involving the media.[110] Justice Scalia was consistently opposed

---

[104] 750 F.2d 970, 1038–39 (D.C. Cir. 1984) (Scalia, J., dissenting).
[105] *Id.* at 1038.
[106] *Id.* at 1038–39 (describing the problem of "the willfully false disparagement of professional reputation in the context of political commentary").
[107] *Id.* at 1039 ("It has not often been thought, by the way, that the press is among the least effective of legislative lobbyists.").
[108] *Id.*
[109] *Id.*
[110] *See, e.g.*, City of Littleton v. Z.J. Gifts D-4, L.L.C., 541 U.S. 774, 787 (2004) (Scalia, J., concurring) ("The notion that media corporations have constitutional entitlement to accelerated judicial review of the denial of zoning variances is absurd."); McConnell v. Fed. Election Comm'n, 540 U.S. 93, 253 (2003) (Scalia, J., dissenting); McIntyre v.

to differential treatment of the press, whether positive or negative.[111] So, for example, in *Florida Star v. B.J.F.*, when the Court held that a newspaper that lawfully obtained a rape victim's name from public police records could not be held liable for invasion of privacy, Scalia wrote separately to note that the spread of the news of her assault amongst her family and friends would have harmed the victim as much, if not more, than the publication of her name by a news outlet to people who did not know her.[112] Scalia objected to the imposition of a restriction upon the press that did not also apply to individual speakers.[113] In *Los Angeles Police Dep't v. United Reporting Pub. Corp.*,[114] Justice Scalia again wrote separately to articulate his concern with a law that distinguished the press from other speakers, this time to the media's benefit.[115] A publishing company challenged an amendment to a California law that limited the release of information about recent arrestees to those using it for certain purposes, including journalistic purposes.[116] Addressing the question of facial and as-applied challenges to the law, Scalia emphasized that "a restriction upon access that *allows* access to the press (which in effect makes the information part of the public domain), but at the same time *denies* access to persons who wish to use the information for certain speech purposes, is in reality a restriction upon speech rather than upon access to government information."[117]

The pattern of insisting that the press not receive special treatment was most prominent in the Court's campaign finance cases, where Justice Scalia wrote separately to offer a characterization of the press as "media corporations" with a bald moneymaking agenda no different than that of any other

Ohio Elections Comm'n, 514 U.S. 334, 373 (1995) (Scalia, J., dissenting) ("But, of course, if every partisan cry of 'freedom of the press' were accepted as valid, our Constitution would be unrecognizable"); Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 679 (1990) (Scalia, J., dissenting).

[111] *See e.g.*, Florida Star v. B.J.F., 491 U.S. 524 (1989); Los Angeles Police Dep't v. United Reporting Pub. Corp., 528 U.S. 32 (1999).

[112] 491 U.S. 524 at 542 (Scalia, J., concurring).

[113] *Id.* ("This law has every appearance of a prohibition that society is prepared to impose upon the press but not upon itself.").

[114] 528 U.S. 32 (1999).

[115] *See id.* at 42 (Scalia, J., concurring).

[116] *Id.* (majority opinion).

[117] *Id.* at 42 (Scalia, J., concurring).

corporate speaker. The trajectory of these opinions can be traced to their culmination in the majority opinion in *Citizens United* v. *Federal Election Commission*,[118] where, for the first time, a majority of the Court embraced not only Scalia's position on the regulation of corporate speech in the campaign finance setting but also the deep Fourth Estate skepticism that accompanied it.[119]

In 1990's *Austin v. Michigan Chamber of Commerce*,[120] the Court upheld, against First Amendment challenge, a provision of the Michigan Campaign Finance Act that prohibited all corporations except media corporations from using general treasury funds for independent expenditures in connection with state candidate elections.[121] Justice Scalia dissented.[122] He pushed back against the majority's assertion that there is a compelling state interest in preventing corruption or the appearance of corruption in the political arena by reducing the threat of amassed corporate wealth skewing political debate, and he emphasized that he found this assertion inconsistent with the majority's decision to uphold the exemption for media corporations.[123] In the course of doing so, he countered the longstanding narrative regarding "the unique role that the press plays in 'informing and educating the public, offering criticism, and providing a forum for discussion and debate,'"[124] and argued that, under the majority's rationale, the press should actually be seen as a particularly *harmful* entity that Michigan had an especially strong reason to regulate.[125]

Substituting the Fourth Estate depiction with a characterization of the press as primarily or exclusively driven by financial gain and bent on skewing public debate,[126] Justice Scalia abandoned previous rhetoric about the press being likely

---

[118] 558 U.S. 310 (2010).
[119] *See id.*
[120] 494 U.S. 652 (1990).
[121] *Id.* at 657–66.
[122] *Id.* at 690 (Scalia, J., dissenting).
[123] *Id.* at 690–91.
[124] *Id.* (internal citation omitted).
[125] *Id.* at 691.
[126] *Id.* ("But media corporations make money *by* making political commentary, including endorsements. For them, unlike any other corporations, the whole world of politics and ideology is fair game.").

to act for the public good. Where the Court in the preceding years had called the media "the 'eyes and ears' of the public,"[127] had assumed it would "report fully and accurately on the proceedings of government,"[128] and had credited it with being a "mighty catalyst" in exposing citizens to competing viewpoints on civic matters,[129] Scalia spoke of the threat of "[a]massed corporate wealth that regularly sits astride the ordinary channels of information,"[130] the likelihood that media companies would produce "too much of one point of view,"[131] and his view that the press had both "vastly greater power"[132] and "vastly greater opportunity"[133] to "perpetrate the evil of overinforming."[134] As he had done in the past, he stressed the non-specialness of the press under the First Amendment: "We have consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers."[135] To Justice Scalia, this principle was not just one of Press Clause doctrine; it was a new and diminished description of an entity and its societal worth.

More than a decade later, in another campaign finance case, *McConnell v. Federal Election Commission,*[136] Justice Scalia again pressed his position that limitations on campaign contributions violate the First Amendment and again did so by invoking media cases in ways that challenged the Fourth Estate framework. Before Justice Scalia joined, the Supreme Court had made clear that differential taxation of the press was constitutionally problematic,[137] and its opinions in those tax

---

[127] Houchins v. KQED, Inc., 438 U.S. 1, 8 (1978).
[128] *Cox Broad. Corp.*, 420 U.S. at 492.
[129] Estes v. Texas, 381 U.S. 532, 539 (1965).
[130] Austin v. Michigan Chamber of Commerce, 494 U.S 652, 691 (1990).
[131] *Id.*
[132] *Id.*
[133] *Id.*
[134] *Id.*
[135] *Id.* (internal citation omitted) (Thus, the Court's holding on this point must be put in the following discouraging form: "Although the press' unique societal role may not entitle the press to greater protection under the Constitution . . . it does provide a compelling reason for the State to exempt media corporations from the scope of political expenditure limitations . . . One must hope, I suppose, that Michigan will continue to provide this generous and voluntary exemption.").
[136] 540 U.S. 93, 253 (2003) (Scalia, J., dissenting).
[137] *See, e.g.*, Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983); Grosjean v. American Press Co., 297 U.S. 233 (1936).

cases contained some of the strongest statements of press specialness and some of the strongest rhetoric about the value of a free press in a democracy.[138] Media scholars have recognized that the tax cases are among the best examples of "ways in which the press is historically and functionally unique" and "the Constitution seeks to protect those differences."[139] As Professor Sonja West described, the "logic and language of the taxation of the press cases reveals that the Court was recognizing that press speakers function differently from individual speakers." [140] Indeed, the best reading of these cases is that the Court believed the uniquely valuable contributions of a free press demand uniquely careful protection from targeted tax schemes, which "can operate as effectively as a censor to check critical comment by the press [and undercut] the basic assumption of our political system that the press will often serve as an important restraint on government."[141]

Scalia's use of the selective press taxation cases in his separate opinion in *McConnell* turned this characterization on its head. He cited the major newspaper-taxation cases, not to illustrate the distinct value of the press or the particularly pressing need to protect it, but rather to suggest the opposite—the identicalness of all "money used to fund speech."[142] Justice Scalia noted, as an originalist matter, that the founders considered taxes on the press that were responses to unfavorable coverage to be "grievous incursions on the freedom of the press,"[143] but his central thesis was not that the cases showed rhetorical support for press specialness, but that "[t]hese press-taxation cases belie the claim that regulation of money used to

---

[138] *See Minneapolis Star & Tribune Co.*, 460 U.S. at 585 (stating that "the basic assumption of our political system that the press will often serve as an important restraint on government" and emphasizing that "'[a]n untrammeled press [is] a vital source of public information' and an informed public is the essence of working democracy") (quoting *Grosjean*, 297 U.S. at 250); *Minneapolis Star & Tribune Co.*, 460 U.S. at 585 n.7 (noting that "the Framers perceived singling out the press for taxation as a means of abridging the freedom of the press").

[139] Sonja R. West, *The Stealth Press Clause*, 48 GA. L. REV. 729, 736–37 (2014).

[140] *Id.* at 738.

[141] *Minneapolis Star & Tribune Co.*, 460 U.S. at 585. *See also id.* at 586 (referencing "the censorial threat implicit in a tax that singles out the press").

[142] McConnell v. Fed. Election Comm'n, 540 U.S 93, 252 (2003) (Scalia, J., dissenting) (arguing that "where the government singles out money used to fund speech as its legislative object, it is acting against speech as such").

[143] *Id.* at 253.

fund speech is not regulation of speech itself."[144] That the press was involved in those cases was seemingly irrelevant to him.

After twenty years of insisting that the press plays no special First Amendment role—and of replacing positive press depictions with skeptical ones—Justice Scalia ultimately saw his position embraced by a majority of the Court. In *Citizens United v. Federal Election Commission*,[145] five members of the Court not only adopted Justice Scalia's substantive position in the case, holding that the First Amendment precludes the government from limiting the independent political expenditures of corporations and unions,[146] but also, along the way, built a negative characterization of the press on the foundation Scalia had laid. Commentators recognized in the majority opinion a new and "deep suspicion, even hostility, to the media's role as the 'Fourth Estate'" that "gives cause for concern that future decisions might erode the few 'special rights' the media currently enjoy."[147] Among "the extensive dicta in *Citizens United* suggesting that a majority of the Justices on the Roberts Court are deeply suspicious of the claim that the media play a special constitutional role in our democracy,"[148] much of the language was Justice Scalia's. Indeed, Justice Kennedy's majority opinion, joined by Chief Justice Roberts and by Justices Scalia, Alito, and Thomas,[149] cited Justice Scalia's *McConnell* opinion for its reference to the press taxation cases[150] and cited his *Austin* dissent for the proposition that newspapers are no different than

---

[144] *Id.* at 253–54 (arguing that "restrictions on the expenditure of money for speech are equivalent to restrictions on speech itself" and that "[i]f denying protection to paid-for speech would shackle the First Amendment, so also does forbidding or limiting the right to pay for speech") (internal citations and quotations omitted).

[145] 558 U.S. 310 (2010).

[146] *See id.* at 386.

[147] Lyrissa Barnett Lidsky, *Not a Free Press Court?*, 2012 BYU L. REV. 1819, 1832 (2012). For my earlier discussion of this hostility, see Jones, *What the Supreme Court Thinks*, *supra* note 2.

[148] Lidsky, *supra* note 147, at 1831–32.

[149] *Citizens United*, 558 U.S. at 310.

[150] *Id.* at 353 (citing McConnell v. Fed. Election Comm'n, 540 U.S. 93 at 252–53 (2003) (Scalia, J., dissenting) and Grosjean v. American Press Co., 297, U.S. 233, 245–48) (1936) (suggesting the First Amendment "was understood as a response to the repression of speech and the press that had existed in England and the heavy taxes on the press that were imposed in the colonies," but that it "was certainly not understood to condone the suppression of political speech in society's most salient media")).

any other corporation[151]—using Scalia's precise language from *Austin* to "reject[ ] the proposition that the institutional press has any constitutional privilege beyond that of other speakers."[152]

The *Citizens United* majority also echoed Justice Scalia's earlier sentiments, both on and off the bench, about the press, with an overall theme that "media corporations are elitist, wield political power and influence disproportionate to their public support, and are no more deserving of special protection than any other corporation."[153] The longstanding prevailing depiction of the press as an entity that "plays a unique role not only in the text, history, and structure of the First Amendment but also in facilitating public discourse"[154] was, for the first time in the modern media era, relegated to the dissenting position. It was replaced by a majority view that the press is just another speaker that "use[s] money amassed from the economic marketplace to fund [its] speech."[155] The majority repeatedly described the press as primarily an "[a]ccumulator of wealth" and of "unreviewable power."[156] Gone was any mention of the press as a surrogate for the people, of the press's "impressive record of service over several centuries" in "guard[ing] against the miscarriage of justice,"[157] or of the way "the press serves and was designed to serve as a powerful antidote to any abuses of power"[158]—replaced by strong suggestions that the press bears no meaningful relationship to the citizenry and is itself likely to abuse its own power. The Court characterized members of the media as

> purveyors of a "24-hour news cycle" that is "dominate[d]" by "sound bites, talking points, and scripted messages," and as players in an institution on the "decline"—amorphous and

[151] *Id.* at 352, 361 (citing Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 687, 691 (1990) (Scalia, J., dissenting)).
[152] *Id.* at 352.
[153] Lidsky, *supra* note 147, at 1833.
[154] *Citizens United*, 558 U.S. at 473 (Stevens, J., dissenting).
[155] *Id.* at 351.
[156] *Id.* (asserting that there are "vast accumulations of unreviewable power in the modern media empires[,]" and that "media corporations accumulate wealth with the help of the corporate form [and] the largest media corporations have 'immense aggregations of wealth'") (internal citations omitted).
[157] Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 560 (1976) (quoting Sheppard v. Maxwell, 384 U.S. 333, 350 (1966)).
[158] Mills v. Alabama, 384 U.S. 214, 219 (1966).

> hard to peg because, given "the advent of the Internet and the decline of print and broadcast media, . . . the line between the media and others who wish to comment on political and social issues becomes far more blurred."[159]

The opinion implied that press coverage was "distorting" to the political process,[160] and it characterized the press as expressing "views [that] often 'have little or no correlation to the public's support' for those views."[161]

Justice Scalia concurred separately in *Citizens United* to reinforce both his originalist position on the First Amendment and this sea change in press depiction.[162] He drove home his now firmly cemented position that the press is not a specific entity with any constitutional otherness, but rather includes any publisher, whether an individual, a printer, a newspaper, or other corporate entity.[163] He chastised the dissent's interpretation of "the Freedom of the Press Clause to refer to the institutional press," calling it "passing strange to interpret the phrase 'the freedom of speech, or of the press' to mean, not everyone's right to speak or publish, but rather everyone's right to speak or the institutional press's right to publish."[164] He praised the majority for confirming the stance that he had long asserted, both judicially and personally: that the decades of Fourth Estate

---

[159] Jones, *What the Supreme Court Thinks*, *supra* note 2, at 261 (citing *Citizens United*, 558 U.S. at 364, 352) (internal citations omitted).

[160] *Citizens United*, 558 U.S. at 326.

[161] *Id.* at 351 (quoting Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 660 (1990)).

[162] *See id.* at 385 (Scalia, J., dissenting).

[163] *Id.* at 390 ("Historical evidence relating to the textually similar clause 'the freedom of . . . the press' also provides no support for the proposition that the First Amendment excludes conduct of artificial legal entities from the scope of its protection. The freedom of 'the press' was widely understood to protect the publishing activities of individual editors and printers . . . But these individuals often acted through newspapers, which (much like corporations) had their own names, outlived the individuals who had founded them, could be bought and sold, were sometimes owned by more than one person, and were operated for profit.").

[164] *Id.*, n.6 ("No one thought that is what it meant. Patriot Noah Webster's 1828 dictionary contains, under the word 'press,' the following entry: '*Liberty of the press*, in civil policy is the free right of publishing books, pamphlets or papers without previous restraint; or the unrestrained right which every citizen enjoys of publishing his thoughts and opinions, subject only to punishment for publishing what is pernicious to morals or to the peace of the state.' As the Court's opinion describes, our jurisprudence agrees with Noah Webster and contradicts the dissent.") (internal citations omitted).

rhetoric from the Court should no longer be the prevailing characterization.

IV. POTENTIAL CONSEQUENCES OF FOURTH ESTATE SKEPTICISM

The about-face in characterization of the press during Justice Scalia's three decades on the Court is worthy of a discussion about its underlying causes and also a discussion about its potential effects. As I have noted elsewhere,[165] both the explanations for the shift and the possible ramifications of it are complex and multifaceted. Scalia's push for a new, less positive depiction of the press came at a time when the institutional press experienced significant change and its reputation among the American public plummeted—suggesting that Justice Scalia (and, ultimately, his colleagues on the Court) were merely being perceptive observers of the new media reality, "[m]apping [their] views onto more widely held societal views that the press is no longer valuable or laudable" and reflecting in their opinions the growing consensus that "the modern-day press, in its day-to-day operations, is not doing a good job of being press-like in the constitutional sense." [166] But the reversal from positive to skeptical depictions by the Court is noteworthy, no matter its cause, both because of its likely impact on the institutional press and because of the potential that it will impact wider First Amendment rights.

Working journalists in America will surely find this diminished characterization distressing, because the Court's positive rhetoric about the press in the past appears to have been key to positive outcomes in cases involving the press. [167] "A negative Supreme Court characterization of the press thus might be expected to have a correspondingly negative effect on the operation of the journalistic enterprise and, concomitantly, on the many Americans who consume that journalistic work product."[168]

---

[165] *See* Jones, *What the Supreme Court Thinks*, *supra* note 2.
[166] *Id.* at 266.
[167] *See id.*
[168] *Id.*

More broadly, the new Fourth Estate skepticism in the Court's writings about the press is cause for concern because the victories that the press garnered during the pre-Scalia era of positive portrayals were not victories enjoyed by the press alone, but instead expanded the First Amendment rights of all citizens. As I investigate in more detail elsewhere, "[a] sizable amount of vital constitutional doctrine in this country developed as a result of constitutional cases in which mainstream media companies, often newspapers, aggressively fought for fundamental democratic principles that had public benefits beyond the scope of the individual [press] litigants' successes."[169] It is primarily, and sometimes exclusively, because of cases argued before the high court by the positively characterized press that the wider citizenry enjoys a First Amendment right to observe trials and other government proceedings, to access public documents, to be free from prior restraints, and to speak openly about matters of public concern.[170]

Justice Scalia's personal and jurisprudential statements devaluing the press, recharacterizing it as something less than a Fourth Estate, appear to have held sway with a majority of his colleagues by the end of his time on the Court. Among the questions that should be asked as we reflect on his legacy is whether that negative characterization might have lasting effects that are detrimental to the nation as a whole.

---

[169] RonNell Andersen Jones, *Litigation, Legislation, and Democracy in a Post-Newspaper America*, 68 WASH. & LEE L. REV. 557, 571 (2011).
[170] Jones, *What the Supreme Court Thinks*, *supra* note 2, at 269–71.