

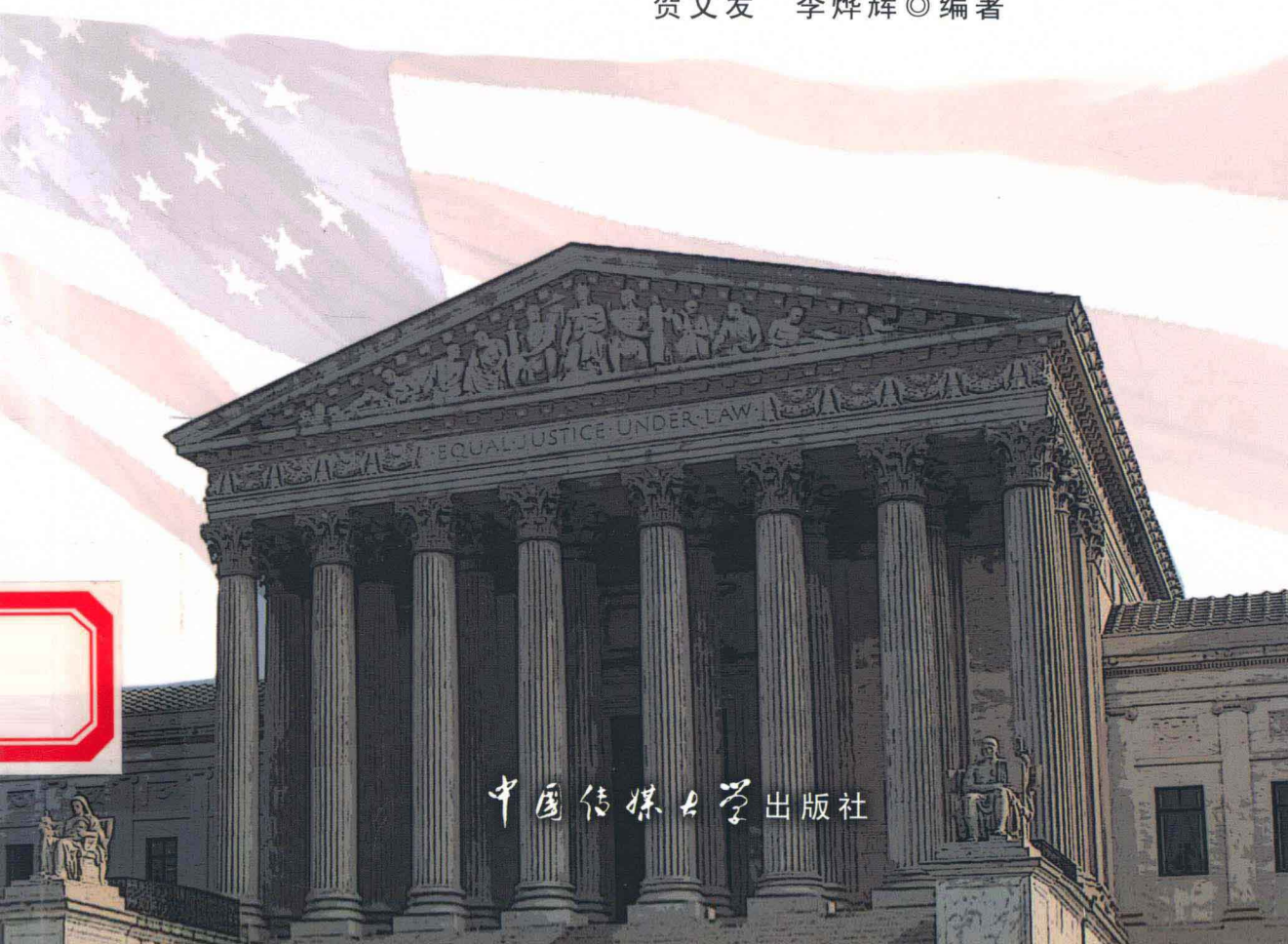
# AMERICAN PRESS AND SOCIETY

Democracy Evolutions, Freedom  
Boundaries and Judicial Precedents

## 美国报业与社会

民主进程、自由界定及司法判例

贺文发 李烨辉◎编著



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## Preface

The history of United States of America can be defined as the history of modern capitalist development, the history of fighting for democracy and freedom by all hierarchies of society, and the history of integration of immigrant cultures in the world. The staggered and overlapping development of the three histories mentioned above witnesses the growth of American mass media, particularly the history of liberty on American press. And, meanwhile, the history of American press, to some degree, is also the microcosm and reflection of American capitalist evolution on its democracy and freedom.

To some extent, the American Independent Revolution under the banner of freedom started from struggle conducted by the press against stamp duty and other exorbitant tax levies imposed by the colonial government, which is a principle, I think, to be applied everywhere and everytime. After independence, the existed confrontation of two parties, Federal Party and the Democratic-Republican Party (the anti-federal party), produced the period of Partisan newspapers in the press history. Meanwhile the struggles of the parties and as a result the struggle of Partisan newspapers exactly made political foundation featured with separation of powers and checks and balances for the developments of *American Constitution* and *Bill of Rights*. Such good fruits from evil appearance is well worth thinking for us. With the fading away of Partisan newspapers and the formation of free market economy and Westward Movement, the Penny Press took shape in the history. Westward Movement strongly supports the ideas of resource space and environmental geographic determinism in American Exceptionalism doctrine. The argument about the cause-effect relationship between Westward Movement and the Penny Press seems similar to that of the traditional debate about the relationship between egg and chicken. The hateful and heated confrontations before and after American Civil War were reflected in the Press as the struggle between free industrial abolitionists and conservative owners of agricultural plantations. The press of that period showed the large-scale airing and debate with pens as appears and daggers. The Gilded Age after American Civil War produced Yellow Press, and in turn the latter pushed the former into more glory. The Progressive Movement, at the beginning of 20<sup>th</sup> century, which made profound impact on American history, couldn't be separated from Muck-racking journalism in American Press. After the Progressive Movement, the Laisser-faire free market economy respected by Classical-liberal philosophy encountered serious setbacks. The reflection about the Great Depression and the New Deal Reform of Social Liberalism pushed America stepping into modern society from classical society, which is rightly the same period that the Yellow Press was reformed into the Professional or the Objective newspapers. And the last but most importantly, after World War Two, the Civil Rights Movement, the great society period of American history, coincided with the glorious period of liberal American Press.

In summary, the history and American Press and the history of United States of America shares joys and sorrows and goes hand in hand. The history of American press is rightly the history of American capitalist evolution on its democracy and freedom. The study and research about American society and

culture would be incomplete without the research about American Press. It is a deficiency for the students in Communication University of China, one of highest institutions of media, not to understand American press. This book can not only meet the needs of students interested in American society and culture, but also of those majoring in American journalism, communications laws and so on. This book also shows the beneficial exploration and attempt in ESP teaching by Department of Foreign Languages, CUC. I sincerely congratulate on the publishing of the book and look forward to the positive response from readers.

Li Zuowen, Professor of English and the Dean of International Studies school, Communication University of China

## Introduction

The history of American press, without doubt, must have some correlation with American history, which, according to generally-accepted idea, would be divided into the following phases—Pre-Columbian era; Colonial period; Formation of the United States of America (1776 – 1789); Early national era (1789 – 1849); Civil War era (1849 – 1865); Reconstruction and a rise in power (1865 – 1918); Roaring Twenties, the Great Depression; World War II (1918 – 1945); The Cold War begins (1945 – 1964); Climax of liberalism; The Counterculture Revolution and Cold War Détente (1964 – 1980); The end of the Cold War (1980 – 1991); World superpower (1991 – present).

The following seven book-names, which constitute a seven – volume – series of American journalism history—The Early American Press (1690 – 1783); The Press of the Young Republic (1783 – 1833); The Popular Press (1833 – 1865); The Gilded Age Press (1865 – 1900); The Public Press (1900 – 1945); The Postwar Decline of American Newspaper (1945 – 1965); Journalism at the End of the American Century (1965 – present)—is a well – illustrated example to correspond to the division of American History. <sup>①</sup>

A very popular American Journalism History book, *The Press and America: An Interpretive History of the Mass Media* by Michael Emery, Edwin Emery and Nancy L. Roberts, also describes the alike historical framework of American Press—The Heritage of the American Press; The Colonial Years; The Press and the Revolution; Founding the New Nation; Westward Expansion; A Press for the Masses; The Irrepressible Conflict; A Revolution in National Life; The New Journalism; The People's Champions; Bastions of News Enterprise; War Comes to the United States; The Twenties; Radio, Movie, and Jazz Journalism; Depression and Reform; A World at War; Television Takes Center Stage; Challenges and Dissent; A Crisis of Credibility; Efforts to Improve the Media; Media Technology; The Challenge of the 21st Century.

American newspaper journalism, according to most journalism historians, could be divided into the following five eras: Colonial period (also the early American press); Partisanship newspapers; Penny newspapers (the popular press, or the press for masses); Yellow journalism (or stunt journalism, sensational journalism); Objective journalism (or professional journalism). The 5 evolution periods of American press involves objective or factual reporting versus subjective or advocacy reporting. The second and the fourth period, that is the partisanship press and the yellow press, were mostly regarded having been dominated by the subjective opinion of reporters, editors, and owners. The third and the fifth periods were mostly characterized by more dispassionate attempts to report news. Any division, however, suffers from some degree of oversimplification, but this one does point out a continuing historical cycle which perhaps would be significant.

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① As for the detailed contents of the seven – volume – series books, please see the Appendix 1.

This textbook, *American Press and Society*, could be divided into three major sections. One of the foremost sections of this textbook is mainly to focus on the democratic evolution of American press, especially specializing on the development of American newspaper.

Democracy is an egalitarian form of government in which all the citizens of a nation together determine public policy, the laws and the actions of their state, requiring that all citizens (meeting certain qualifications) have an equal opportunity to express their opinion. In practice, “democracy” is the extent to which a given system approximates this ideal, and a given political system is referred to as “a democracy” if it allows a certain approximation to ideal democracy. Although no country has ever granted all its citizens (i. e. including minors) the vote, most countries today hold regular elections based on egalitarian principles, at least in theory.

Aristotle contrasted rule by the many (democracy/polity), with rule by the few (oligarchy/aristocracy), and with rule by a single person (tyranny or today autocracy/monarchy). He also thought that there was a good and a bad variant of each system (he considered democracy to be the degenerate counterpart to polity).

For Aristotle the underlying principle of democracy is freedom, since only in a democracy the citizens can have a share in freedom. In essence, he argues that this is what every democracy should make its aim. There are two main aspects of freedom: being ruled and ruling in turn, since everyone is equal according to number, not merit, and to be able to live as one pleases. ①

In contemporary usage, the term **democracy** refers to a government chosen by the people, whether it is direct or representative. The Founding Fathers of the United States rarely praised and often criticized democracy, which in their time tended to specifically mean direct democracy; James Madison argued, especially in *The Federalist* No. 10, that what distinguished a **democracy** from a **republic** was that the former became weaker as it got larger and suffered more violently from the effects of faction, whereas a republic could get stronger as it got larger and combats faction by its very structure.

What was critical to American values, John Adams insisted, was that the government be “bound by fixed laws, which the people have a voice in making, and a right to defend.” As Benjamin Franklin was exiting after writing the U. S. constitution, a woman asked him “Well, Doctor, what have we got—a republic or a monarchy?” He replied “A republic—if you can keep it.”

Elements considered essential to democracy include freedom of political expression, freedom of speech, and freedom of the press, so that citizens are adequately informed and able to vote according to their own best interests as they see them. The term “democracy” is often used as shorthand for liberal democracy, which may include elements such as political pluralism; equality before the law; the right to petition elected officials for redress of grievances; due process; civil liberties; human rights; and elements of civil society outside the government.

Although not described as a democracy by the founding fathers, the United States founders also shared a determination to root the American experiment in the principle of natural freedom and equality. The United States Constitution, adopted in 1788, provided for an elected government and protected civil rights and liberties for some.

In the colonial period before 1776, and for some time after, often only adult white male property

① It will be very useful in going over the Appendix 2, *Basic Framework on Modern Philosophic Ideas*, before reading the whole text book, for it is a macro-illustration on the transformation of the Western modern philosophical ideas.



owners could vote; enslaved Africans, most free black people and most women were not extended the franchise. On the American frontier, democracy became a way of life, with widespread social, economic and political equality. However, slavery was a social and economic institution, particularly in eleven states in the American South, that a variety of organizations were established advocating the movement of black people from the United States to locations where they would enjoy greater freedom and equality.

During the 1820s and 1830s the *American Colonization Society* (A. C. S.) was the primary vehicle for proposals to return black Americans to freedom in Africa, and in 1821 the A. C. S. established the colony of Liberia, assisting thousands of former African-American slaves and free black people to move there from the United States. By the 1840s almost all property restrictions were ended and nearly all white adult male citizens could vote; and turnout averaged 60 – 80% in frequent elections for local, state and national officials. The system gradually evolved, from Jeffersonian Democracy to Jacksonian Democracy and beyond. In the 1860 United States Census the slave population in the United States had grown to four million, and in Reconstruction after the Civil War (late 1860s) the newly freed slaves became citizens with (in the case of men) a nominal right to vote. Full enfranchisement of citizens was not secured until after the *African – American Civil Rights Movement* (1955 – 1968) gained passage by the United States Congress of the *Voting Rights Act* of 1965.

If a key indicator of the health of a democracy is the state of its journalism, the United States is in deep trouble, especially after 1980s, when neo-liberalism and deregulation embraced the American press and mass media. In *Rich Media, Poor Democracy*, Robert McChesney lays the blame for this state of affairs squarely at the doors of the corporate boardrooms of big media, which far from delivering on their promises of more choice and more diversity, have organized a system characterized by a lack of competition, homogenization of opinion and formulaic programming.

Today, in a more broadly contextualization, according to Nikolas Kompridis, the professor of West Sydney, Democracy is not only a political system. . . It is an ideal, an aspiration, really, intimately connected to and dependent upon a picture of what it is to be human—of what it is a human should be to be fully human.

Several philosophers and researchers outlined historical and social factors supporting the evolution of democracy. *Cultural factors* like *Protestantism* influenced the development of democracy, rule of law, human rights and political liberty (the faithful elected priests, religious freedom and tolerance has been practiced).

Others mentioned the influence of *wealth*. In a related theory, that the increase in living standards has convinced people that they can take their basic survival for granted, and led to increased emphasis on self-expression values, which is highly correlated to democracy.

Recently established theories stress the relevance of *education* and *human capital* and within them of *cognitive ability* to increasing tolerance, rationality, political literacy and participation. Two effects of education and cognitive ability are distinguished: a cognitive effect (competence to make rational choices, better information processing) and an ethical effect (support of democratic values, freedom, human rights etc.), which itself depends on intelligence (cognitive development being a prerequisite for moral development).<sup>①</sup>

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① Readers can find the provided basic democratic reading documents in the context of American history in Appendix 8 and make some further understanding on the evolution of democracy of the United States of America.



Part two of this textbook is to emphasize the evolution of the freedom of American press. Why the topic of freedom press is very essential part for researching the American press? The answer basically lies on the relationship between press and democracy. The creating of press is usually observed as the formal beginning of mass media. The creation of movable type printing press by Johannes Gutenberg in 1450 often is referred to as the bridging of "The Great Divide," because it opened up the possibilities of a public sphere in a way that never before existed. Manorma Singh in his book, *History of Journalism*, writes that "with increasingly fasted creation and distribution of ideas and information, the public not only had an increase in material, but also an incentive to become literate, and the public sphere owes its existence to a literate population." As Jurgen Habermas, the leading scholar on the emergence of the concept of "public sphere", explains that the development of the press allows the public to become more active and critical, to more easily express its acceptance or rejection of policies and laws.

It is a basic idea embraced by U. S. people that a right to criticize government is healthy for the political system. In the United States, the press has sometimes been described as an unofficial fourth branch of government, a branch which serves as a check on the other three and provides the information necessary for a democracy to function. The basis of this structural rationale for press freedom lies in the political and intellectual experiences of eighteenth-century America, experiences which shaped what is today the world's oldest written constitution still in use. Part of this frame of government is the First Amendment—Congress shall make no law... abridging the freedom of speech, or of the press—which guarantees but does not define "freedom of speech or of press". In condemning the *Sedition Act of 1798*, James Madison pointed out that old legal notions of seditious libel, which denied a fundamental right to criticize official actions and policies, were inappropriate in a nation which had erected a limited government responsible to the people. And moreover, he believed that the right of freely discussing public issues and public persons was the only effectual guardian of every other right.

The democratic theory of the press that gained ground (mainly in Western Europe) in the decades following World War II went further. It provided a theoretic basis for legislation to subsidize the press and to regulate ownership in the interest of greater diversity, fairness of access, and higher standards of journalism.

According to Habermas, the author of *The Structural Transformation of the Public Sphere*, a variety of factors resulted in the eventual decay of the public sphere, including the growth of a commercial mass media, which turned the critical public into a passive consumer public; and the welfare state, which merged the state with society so thoroughly that the public sphere was squeezed out. It also turned the "public sphere" into a site of self-interested contestation for the resources of the state rather than a space for the development of a public-minded rational consensus. Anyway, in terms of American press, after its Glorious Periods from 1950s to 1970s, and since the neo-liberalism revived by Regan administration, with the de-regulation policy, commercialization and conglomeration of American mass media, it is rightly the time for reflecting the concept of "public sphere" of the press. ①

Denis McQuail in his book, *Media Accountability and Freedom of Publication*, points out that "the contemporary idea of a public sphere emphasized the necessity for a democratic society to have a wide

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① Jürgen Habermas, one of the greatest contemporary critical theorists of "Frankfurt School", contributed this special term into the field of journalism and mass communication discipline and initiated reflections on the democratic role of the press thereafter. Readers can make some references from Appendix 6, *The Structural Transformation of the Public Sphere*.

range of means of communication independent of state and other powerful interests. Without this, active and informed citizenship is hardly possible." Michael Schudson summarizes in his book, *Why Democracies Need an Unlovable Press* (2008), that there are seven things news can do for democracy: **information; investigation; analysis; social empathy; public forum; mobilization** (though, sometimes, the mobilization or advocacy function may undermine the reality of the informational and investigative functions); **publicizing representative democracy**. Timothy E. Cook also lists six alike functions of the press in a democracy—the requisites of democracy; the press as marketplace of ideas; the press as agenda setter; the press as watchdog; the press as information disseminator; the press as mobilizer (*The Functions of the Press in a Democracy*, in *The Press*, edited by Geneva Overholser and Kathleen Hall Jamieson, Oxford University Press, 2005).

Like all freedom, the freedom to print information must be ultimately be tempered by a certain responsibility. Some may think of freedom as absolute, yet freedom of speech does not include the right to "falsely shouting fire in a crowded theater" (*Schenck v. United States*, 1919). *Benjamin Gitlow v. People of the State of New York* (1925) also decides that "Freedom of speech and of the press, as secured by the Constitution, is not an absolute right to speak or publish without responsibility whatever one may choose or an immunity for every possible use of language." Originally, freedom of the press involved only books, but as newspaper, magazines, and other electronic media appeared, each brought its unique problems. The entire problem of freedom of the press involves relationships among three entities: press, public and government (which had been well illustrated in the Hutchins Report – *A Free and Responsible Press*, 1947).

Freedom of the press or freedom of the media is the freedom of communication and expression through vehicles including various electronic media and published materials. Leaders of Enlightenment considered freedom of speech and press indispensable to the life of a public capable of self-government. And if a man was rational, indeed, he needed access to maximum flow information and opinion as a basis for making decisions. Although the values of free speech and press may be considered paramount and be exalted, there are circumstances, however, where other values may take priority and win in a conflict over rights.

While such freedom mostly implies the absence of interference from an overreaching state, its preservation may be sought through constitutional or other legal protections. In America, the First Amendment, and furthermore, to be more exactly, the Supreme Court of United States is the last resort for press freedom.

The First Amendment to the U. S. Constitution bars the government from limiting freedom of expression, including expression in the mass media, or so it seems. However, for the first 134 years (that is from 1791, the year of ratification of the *Bill of Rights*—to the 1925, the year of the case *Gitlow v. New York*, 268 U. S. 652) of the Amendment existence, it appears that the states could ignore the federal Constitution and put their own restrictions on free expression because it did not apply to them. It was rightly in this case that the United States Supreme Court ruled that the Fourteenth Amendment to the United States Constitution had extended the reach of certain provisions of the First Amendment—specifically the provisions protecting freedom of speech and freedom of the press—to the governments of the individual states.

In other words, the second freedom of the First Amendment, the freedom of speech, or of the press, did not bring its legal force into play until 134 years later when from it comes into being. In *Barron v. Baltimore* (1833), the Supreme Court (mainly by the Mr. Chief Justice John Marshall) ruled that the

*Bill of Rights* did not apply to the states. After the Civil War, the framers and early supporters of the Fourteenth Amendment believed that it would ensure that the states would be required to recognize the individual rights the federal government was already required to respect in the *Bill of Rights* and in other constitutional provisions. However, until by the latter half of the 19th century, after many fierce argument between **Progressivists** and those **Conservatives** on the basis of the shift from **deontological philosophy** at the end of nineteenth century to the **teleological philosophy**<sup>①</sup> at the beginning of twentieth century, nearly all of the rights in the *Bill of Rights* had been applied to the states, under what is known as the *incorporation doctrine*.

Justice Black and Justice Douglas says in *New York Times Co. v. Sullivan* (1964), that “*This means to me that since the adoption of the Fourteenth Amendment a State has no more power than the Federal Government to use a civil libel law or any other law to impose damages for merely discussing public affairs and criticizing public officials.*” That perhaps is the main reason why the 14<sup>th</sup> Chief Justice Earl Warren (1953 – 1969) regards 14<sup>th</sup> Amendment the heart of U. S. Constitution. It also, from this perspective, can help us understand why historians agree with the notion that the Civil War of American reestablished (reconstructed or reborn) the United States of America.

And the last content of this textbook examines Judicial Cases (especially by the Supreme Court of the United States) in terms of the First Amendment among the press, the government and the public.<sup>②</sup> The Supreme Court never ruled on the constitutionality of any federal law regarding the Free Speech Clause until the 20th century. The Supreme Court never ruled on the *Alien and Sedition Acts of 1798*, whose speech provisions expired in 1801. It is *The Espionage Act of 1917* and *The Sedition Act of 1918*, totally due to the America involvement of World War I, that finally revitalized the flourishing of the Freedom of Speech and of the Press of the First Amendment to the Constitution of the United States.

This book, to a certain degree, is mainly constructed to reflect the freedom record of the footmark of American Press. There is a popular saying that in America every tough issue or problem in the final analysis lies on the law, constitution and the Supreme Court of the United States. That is the principle of the **rule of law** which suggests that governmental decisions be made by applying known legal principles. Rule of law implies that every citizen is subject to the law. It stands in contrast to the idea that the ruler is above the law or **rule by law** (which is a very easily confused concept by our Chinese, for both concepts, rule of law and rule by law, though have two different corresponding Chinese terms, they share the same pronunciation, FAZHI )

The rule of law is fundamental to the western democratic order. Aristotle said more than two thousand years ago, “*The rule of law is better than that of any individual.*” Lord Chief Justice Coke quoting Bracton said in the case of *Proclamations* (1610), “*The King himself ought not to be subject to man, but subject to God and the law, because the law makes him King.*”

As for the freedom of American Press, the Supreme Court plays a very important role in specifying the freedom boundaries. In 1907, in *Patterson v. Colorado*, Oliver Wendell Holmes wrote for the U. S. Su-

① As for the implications of the two Ethics Discipline terms in the contextualization of American Journalism History, readers can make some references from the Appendix 4, *Classical Liberalism, Social Liberalism and Neo - Liberalism*.

② Appendix 7, *Library of Court Decisions for Freedom of Speech and Press*, presents some heritages of the freedom of speech and of press, and give some detailed classification of different category of the freedom of speech and press.

preme Court in rejecting Patterson's appeal. He reasoned that the First Amendment prohibits previous restraints, but allows for "subsequent punishment of such as may be deemed contrary to the public welfare." Truth, argued Holmes, was no defense. More than decades later, due to the influences of WWI, the first landmark case, *Schenck v. United States* (1919), resulted in Holmes' "clear and present danger" test. The test, which, in today's perspective, proved to be harmful to press freedom, however, was upheld for several years in the following judicial cases by the Supreme Court, though the test creator, Holmes and his loyal supporter, Brandeis, strongly against the paraphrases, explanations, and applications by his majority colleges, and thus won them the reputation, the great dissenter. And it was in this debating and confronting processes, **the marketplace of ideas**, the most important concepts in terms of freedom of speech and of the press, came into being.

In 1925, the case of New York radical Benjamin Gitlow produced another key advance; the First Amendment not only prevented infringement by the federal government, it enjoined the states as well, though Gitlow was finally found guilty by the Supreme Court. The Supreme Court acted to incorporate the First Amendment to the states six years later, in *Near v. Minnesota* (1931). The Chief Justice Charles Evans Hughes read the majority opinion, "*It is no longer open to doubt, that the liberty of the press and of speech is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action.*"

In 1964, *New York Times v. Sullivan*, Chief Justice William Brennan spoke for a unanimous Court in agreeing with Wechsler's reasoning: "Although the *Sedition Act* was never tested in this Court, the attack upon its validity has carried the day in the court of history. . . . Because of the restraint it imposed upon criticism of government and public officials, [the *Sedition Act*] was inconsistent with the First Amendment." Brennan went on to note that the risk of being sued by public officials placed a chill on freedom of discussion and public debate. The Court therefore included four rules to guide the legal principle of its ruling: (1) To prove libel, public officials would have to show the statements were made with "actual malice", meaning with knowledge the statements were false or with a "reckless disregard" of whether they were false. (2) Actual malice has to be proven with "convincing clarity." (3) A jury may not infer that criticism of a subordinate also criticizes a higher-ranking official. (4) Judges must review the material and determine if the evidence is constitutionally sufficient.

The principles of *New York Times v. Sullivan* were expanded to include public figures in two 1967 cases. In *Curtis Publishing Co. v. Butts*, a University of Georgia coach sued over an article alleging he tried to fix a game. *Associated Press v. Walker* concerned a retired general and an AP story that he led an anti-desegregation mob during riots at the University of Mississippi. The Court ruled in favor of the press in *Associated Press*, finding the media had greater freedom in reporting about public figures than with stories about private citizens. In *Curtis Publishing*, the Supreme Court found that Butts was a public figure, but ruled in his favor, saying elementary precautions were not followed in investigating the article about him.

Private individuals are different. They are people who are not known to the public. The public does not have a great interest in learning about private individuals, so the press does not need as much protection when reporting about them. In *Gertz v. Robert Welch, Inc.* (1974), the Supreme Court said that when the press prints an untrue statement about a private individual, the person can sue for libel even if the press did not know the material was untrue. The individual only must prove that the press was negligent, meaning careless, when it printed the false information.

A potential landmark case developed in 1973, when the *New York Times* began a series of stories that touched off an intense court battle. At issue were White House efforts to stop further publication through a court-ordered injunction. *New York Times Co. v. United States*, commonly known as the Pentagon Papers case, lasted only 15 days, and reaffirmed the ban on prior restraint established in *Near*.

But based on the ruling, if the government could prove damage to national security, it could still secure a restraining order. It happened eight years later in *United States v. Progressive Inc.* (1979). The magazine wanted to publish instructions for making an atomic bomb. A district court judge granted a restraining order to halt the article's publication, citing harm to national interests, based on the Pentagon Papers case.

Justice John Stevens declared that "without some protection for the acquisition of information about the operation of public institutions the process of self-governance contemplated by the Framers would be stripped of its substance." His words were written on the losing side, in a dissent, but they clearly framed the press' argument that the First Amendment protected access to information.

In a series of cases, the Court generally supported a right of access, though it also set limits. It was a balancing act of two constitutional questions: Did publicity create prejudice against defendants, and violate Sixth Amendment rights? Or was it vital to the public's right to be informed, under the First Amendment?

Criminal trials also create news gathering problems. The Sixth Amendment to the U. S. Constitution says criminal defendants have a right to a fair trial. Under the First Amendment, however, the press has a right to report criminal trials to inform the public about them. In some cases, the press's coverage of a trial can be so great that it hurts the defendant's Sixth Amendment right to a fair trial. For example, if people who are going to serve on the jury hear about the case from the press, they might make up their minds about whether the defendant is guilty before hearing the case as a juror. That would be unfair to the defendant.

The 1976 case of *Nebraska Press Association v. Stuart* came down on the side of access. It struck down a state court order that prohibited publication of a mass murderer's alleged confessions and other evidence given in a preliminary hearing. The lower courts justified the order as a way to keep sensationalism from impacting the trial. The Supreme Court ruled this impermissible prior restraint, especially since the trial court had other tools, such as change of venue, or jury sequestration, to protect against sensational publicity.

But three years later, the Court dodged the First Amendment, and supported a state court order, which closed the courtroom to the press and public during a pretrial hearing on suppression of evidence. In *Gannett Co. v. DePasquale* (1979), Justice Potter Stewart did not address the First Amendment. Instead he wrote that the Sixth Amendment right of a public trial existed for the defendant, not the press or the public. It was not a popular opinion, and was criticized for allowing secret trials.

Television also has created news gathering issues. Do television reporters have a right to attend criminal trials and to televise them to the public? A year later, Justice Warren Burger reversed such legal logic, and stressed the First Amendment, not the Sixth, in granting press access to a murder trial. In *Richmond Newspapers, Inc. v. Virginia* (1980), the Court ruled that reporters do have a right to attend criminal trials. In *Chandler v. Florida* (1981), it said trial judges may allow reporters to televise trials if they make sure it does not interfere with the defendant's right to a fair trial. Because of this, the public sometimes gets to watch important trials on television as they happen.

However, only two other Supreme Court Justices were in full agreement with Burger's opinion. Others concurred with him, but wrote opinions with differing views of the interplay of the First and Sixth Amendments. They touched on three themes; that trials have traditionally been open to the public, open trials guard against official misconduct, and such openness is a key to an informed and educated public.

Burger refined and re-enforced a First Amendment right of access two years later in *Globe Newspaper Co. v. Superior Court*. The Court struck down a Massachusetts law, a trial judge used to close the courtroom during testimony of an alleged child sexual abuse victim. Burger now left no doubt his *Richmond Newspapers* decision "firmly established for the first time that the press and general public have a constitutional right of access to criminal trials. . . to ensure that this constitutionally protected 'discussion of governmental affairs' is an informed one."

A First Amendment right of access had been established by the Court, but the justices did not go on to grant the press special treatment. In two cases involving reporter access to prisons, the Court upheld state and federal laws barring press interviews with prisoners. In the 1974 cases of *Pell v. Procunier* and *Saxbe v. Washington Post Co.*, the Court ruled that the press has access equal to that enjoyed by the public, but it did not have a right beyond it.

Reporter's Privilege means that journalists often rely on information from people who provide it on the condition that they are not revealed as the source. Reporters take the legal position that they have the right to keep such confidences, even if prosecutors want them to give up their sources to aid a law enforcement investigation. Such an arrangement is considered vital by journalists who seek to uncover the inner workings of government, or investigate illegal activity, for the benefit of an informed public. Many states agree with this reasoning. They have passed "shield laws" that prevent prosecutors or grand juries from forcing journalists to reveal confidential sources. But is there a constitutional right to such protection? Is there an implicit federal shield law? The answer to both questions is no, and *Branzberg v. Hayes* (1972) is the reason.

*Branzberg* was a composite of three cases in which reporters refused to testify before grand juries probing possible illegal activities. Paul Branzberg had reported on the street drug culture in Kentucky, while Earl Caldwell and Paul Pappas had researched unrelated stories on the Black Panthers. In each case, the reporters did not claim absolute privilege. Instead, they maintained they should not be forced to testify and reveal confidential sources and information, unless the government demonstrated two key points; that the material was important to the cases, and could not be obtained from sources other than journalists.

Justice Byron White wrote for the 5 - 4 majority, which rejected the notion that reporter's privilege was protected by the Constitution. He noted that news reporting came under the protection of the First Amendment. But he did not believe denying reporter's privilege rose to the level of press infringement, as did prior restraint. When he balanced the needs of law enforcement with those of news reporters, he sided with the authorities. "We cannot seriously entertain the notion," wrote Justice White, "that it is better to write about crime than do something about it."

At least two principal conceptions of the rule of law can be identified: a formalist or "thin" and a substantive or "thick" definition of the rule of law. Formalist definitions of the rule of law do not make a judgment about the "justness" of law itself, but define specific procedural attributes that a legal framework must have in order to be in compliance with the rule of law. Substantive conceptions of the rule of law go beyond this and include certain substantive rights that are said to be based on, or derived from, the rule



of law. That is also one of the main reasons for the arguments and disputes in terms of the freedom of speech and of press among the 9 Justices of the Supreme Court.

Though there are many arguments as for the performance of American Journalism, especially after its glorious years (1950s – 1970s) and since the late of 1980s of media deregulating-period. Several noted academics, for example, have provided various criticisms of Habermas's notions regarding the public sphere. John B. Thompson, a Professor of Sociology at the University of Cambridge and a fellow of Jesus College, has pointed out that Habermas's notion of the public sphere is antiquated due to the proliferation of mass-media communications. Michael Schudson argues more generally that a public sphere as a place of purely rational independent debate never existed. Michael Schudson, however, in his paper, *American Journalism in Historical Perspective*, mildly gave his comments that the American Journalism presents more information and less news since 1990. <sup>①</sup>

On the other hand, C. Edwin Baker, the professor from University of Pennsylvania Law School, points out that democracy of American press is at the crossroads, because the ownership matters in terms of democratic function of press. And moreover, Baker thinks that the defense for the proliferation of mass-media communication—there are, for example, many owners, many sources, and the new technology of internet and free market will eliminates media concentration—is not a real problem. (C. Edwin Baker, *Media Concentration and Democracy*, Cambridge University Press, New York, 2007). Marvin Kalb in 1999 also points out that news has become a big business controlled not by powerful families but by media moguls who place a higher priority on the size of the profits than on the value of their contribution to society.

Watchdog, Record Keeper, Coauthor of History, Citizen's guide to action, purveyor of daily sensation; all of the above are part of the job description of the American press, but what is the proper role of the press in a democracy? Of all the established functions of the press in American public life, the watchdog role is among the most hallowed and, at the same time, the least securely institutionalized in the daily mission of contemporary news organization (W. Lance Bennett and William Serrin, *The watchdog Role*, in *The Press*, edited by Geneva Overholser and Kathleen Hall Jamieson, Oxford University Press, 2005). W. Lance Bennett and William Serrin defines watchdog journalism as (1) independent scrutiny by the press of the activities of government, business, and other public institutions, with an aim toward (2) documenting, questioning, and investigating those activities, in order to (3) provide publics and officials with timely information on issues of public concern.

Helen Thomas in her book *Watchdogs of Democracy? —The Waning Washing Press Corps and How it has Failed the Public*, severely criticized the present performance of American press:

*Now I have to say the same thing about the press, or what is sweepingly called the media. Something vital has been lost—or have American journalists forgotten that their role is to follow the truth, without fear or favor, wherever it leads them. The truth, rather than an agenda, should be the goal of a free press. . . Journalists, as the purveyors of information, are the watchdogs of democracy. Without an informed people, there can be no democracy. It is the job of reporters and*

<sup>①</sup> There are two perspectives in evaluating the media industry: market model and public sphere model, and each model has its own advantages and disadvantages. Please see the Appendix 3, *Media Market and Public Sphere* for further explanations.



editors to ask tough questions of those in power and to act on the answers with trust, integrity, and honesty guiding their judgment. These ethical tenets have never changed, but journalism has changed over time – most would say not necessarily for the better. . . . Reporters should be free to operate independently and be courageous to keep critical eyes on those in power who fail to act in the interests of the nation. The media do not – and should not – expect to win popularity contests. But they will be respected only if they remain true to the ideas of the profession, they must be detached. But they must also care. Most of them know it is not merely a job, it is a way of life!

And moreover, she quoted Ted Stannard, an academic and former UPI (United Press International) correspondent, to express her anxiety and restlessness: “*When watchdogs, bird dogs, and bulldogs morph into lapdogs, lazy dogs, or yellow dogs, the nation is in trouble.*”

Anyway, the last but, absolutely, not the least, I will conclude my preface with the ideal journalistic ethics well accepted not only by the press, but by the public audiences. According to *The Elements of Journalism* by Bill Kovach and Tom Rosensteel, there are ten elements of journalism. In order for a journalist to fulfill their duty of providing the people with the information they need to be free and self-governing, they must follow these 10 guidelines.

1. *Journalism's first obligation is to the truth.*
2. *Its first loyalty is to the citizens.*
3. *Its essence is discipline of verification.*
4. *Its practitioners must maintain an independence from those they cover.*
5. *It must serve as an independent monitor of power.*
6. *It must provide a forum for public criticism and compromise.*
7. *It must strive to make the significant, interesting, and relevant.*
8. *It must keep the news comprehensive and proportional.*
9. *Its practitioners must be allowed to exercise their personal conscience.*
10. *Citizens, too, have rights and responsibilities when it comes to the news.*

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