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The Press and American Democracy

Robert C. Post

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press." The last three words pose something of a puzzle.

If the "freedom of speech" clause endows each and every speaker with the rights necessary to protect expression, what additional rights can or should be claimed by the press? It is an essential canon of legal interpretation that no word in a legal text should be regarded as mere surplusage.[1] But then, what do the words "or of the press" add to freedom of speech?

If the press can claim rights different from those guaranteed to every speaker, it must be because we understand the Press Clause to serve constitutional values that are different from those served by the "freedom of speech" clause and because these values require distinct forms of rights for their protection.

In this chapter, I shall explore four distinct constitutional values that at various times have been claimed to be uniquely served by the press: (1) the value of public discourse, (2) the Meiklejohnian value of distributing information, (3) the checking value, and (4) the value of the public sphere. Each of these values will yield a different constitutional definition of the "press," and each might imply a different array of rights that ought to accrue to the press. Although these values are distinct, the press may simultaneously serve one or more of them.

2.1 THE VALUE OF PUBLIC DISCOURSE

Our First Amendment jurisprudence of freedom of speech does not treat all expression equally. The First Amendment primarily protects speech that we deem constitutionally relevant to the formation of public opinion.[2] The object of ordinary First Amendment doctrine is to ensure, as the Court instructed us in *West Virginia State Board of Education v. Barnette*, that in the United States, "authority . . . is to be

[1] Antonin Scalia & Bryan A. Garner, Reading Law: The interpretation of Legal Texts 174–79 (2012).

[2] Robert C. Post, Democracy, Expertise, Academic Freedom: A First Amendment Jurisprudence for the Modern State 3–25 (2012).

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controlled by public opinion, not public opinion by authority."[3] Because democracy is a form of "government by public opinion,"[4] our First Amendment doctrine is designed to protect "the market of public opinion."[5] Following the Court's usage, I shall use the term "public discourse" to refer to the set of communications considered integral to the formation of public opinion.[6]

Public discourse encompasses all the various forms of expression necessary to produce "that public opinion which is the final source of government in a democratic state."[7] This modern concept of public opinion emerged in the eighteenth century with the creation of what we now call the "public sphere."[8] The public sphere facilitated the emergence of a "public,"[9] whose "public opinion" is the lifeblood of our democracy. The appearance of the public was made possible by "the circulation of texts among strangers who become, by virtue of their reflexively circulating discourse, a social entity."[10] In the words of Michael Schudson, the public is "the fiction that brings self-government to life."[11]

The public sphere was produced by the invention of printing, which enabled the widespread circulation of texts to strangers. The public sphere became entrenched in the eighteenth century when the circulation of newspapers became

[3] 319 U.S. 624, 641 (1943).

[4] Carl Schmitt, Constitutional Theory 275 (Jeffrey Seizer ed., trans., 2008) (1928). Pioneering American social psychologist Charles Horton Cooley writes that democracy is "the organized sway of public opinion." Charles Horton Cooley, Social Organization: A Study of the Larger Mind 118 (1909).

[5] Thornhill v. Alabama, 310 U.S. 88, 105 (1940).

[6] *See, e.g.*, Snyder v. Phelps, 562 U.S. 443, 460 (2011); Citizens United v. FEC, 558 U.S. 310, 373 (2010) (Roberts, C.J., concurring); Metromedia, Inc. v. San Diego, 453 U.S. 490, 515 (1981).

[7] Masses Publ'g Co. v. Patten, 244 F. 535, 540 (S.D.N.Y.) (L. Hand, J.), *rev'd*, 246 F.24 (2nd Cir. 1917).

[8] On the public sphere, *see* Jürgen Habermas, The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society (Thomas Burger trans., 1989); Charles Taylor, Philosophical Arguments 257–87 (1995). "The central conceptual feature of the public sphere is its openness to strangers. As opposed to private communication, public communication emerges wherever a speaker cannot control the boundaries of his or her audience. Public communication is communication to an anonymous audience, potentially engaging everyone." Andreas Koller, *The Public Sphere and Comparative Historical Research: An Introduction*, 34 Soc. Sc. History 261, 263 (2010). "While the adjective *public* has . . . a long trajectory, 'public opinion' as a political concept is an invention of the eighteenth century. Neither the term *Öffentlichkeit* nor the sphere it denotes existed before the eighteenth century." *Id*. at 267.

[9] John B. Thompson, The Media and Modernity: A Social Theory of the Media 126 (1995). "The public consists of those people who act together with an understanding of their relationship to each other.. . . There can be no vital political life, no viable institutions of government, no sense of mastery over our shared fate, no effective common endeavors of any kind without there being a foundation of public awareness and spirit." David Matthews, *The Public in Practice and Theory*, 44 Pub. Admin. Rev. 120, 123 (1984).

[10] Michael Warner, Publics and Counterpublics 11–12 (2002).

[11] Michael Schudson, *Why Conservation Is Not the Soul of Democracy*, 14 Critical Stud. Mass Comm. 297, 304–05 (1997).

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commonplace. "The true advent ... of the public"[12] occurred when newspapers began to offer a continual stream of information and opinion that united masses of people into a public that corresponded in scale to the newly entrenched nation-state.[13]

At its outset, the press was "the public sphere's preeminent institution."[14] The press provided the steady stream of communications that created and maintained the public sphere. That is why Thomas Jefferson could observe in 1787 that "the basis of our governments being the opinion of the people, the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter."[15]

At the present time, however, there are many other "media for the communication of ideas"[16] – like film, radio, television, art, or theater – which also serve this same function. They all underwrite the health of the public sphere, and they all thereby facilitate robust processes of public opinion formation. Because all such media allow multitudes of strangers to join together in common conversation, they are in First Amendment jurisprudence all presumptively categorized as public discourse.[17] As the first and most prominent medium for the communication of ideas, the legacy newspapers and magazines that we now colloquially call the "press" also receive this special constitutional treatment.

The categorization of the press as public discourse is, of course, only a default definition. Newspapers can carry commercial speech;[18] magazines can be obscene.[19] But unless special conditions obtain, speech carried by the press, like speech carried by any of the other media for the communication of ideas, will be classified as public discourse and will therefore receive full First Amendment protection. Speech within a newspaper is presumptively "newsworthy."[20] This is not the case with many other

[12] Gabriel Tarde, On Communication and Social Influence 278–80 (Terry N. Clark ed., 1969).

[13] On the relationship between the development of printing and the creation of the nation-state, *see* Benedict R. O'G. Anderson, Imagined Communities: Reflections on the Origin and Spread of Nationalism (1991).

[14] Habermas, *supra* note 8, at 181.

[15] Thomas Jefferson to Edard Carrington, Jan. 16, 1787, in 11 Papers of Thomas Jefferson 48, 49 (Julian P. Boyd ed., 1955). *See* James Madison, *Public Opinion*, Nat'l Gazette, Dec. 19, 1791, at 59.

[16] Post, *supra* note 2, at 19–20.

[17] Robert Post, *Recuperating First Amendment Doctrine*, 47 Stan. L. Rev. 1249, 1251–60 (1995).

[18] On the distinction between commercial speech and public discourse, *see* Robert C. Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. Rev. 1 (2000).

[19] Miller v. California, 413 U.S. 15 (1973).

[20] On the relationship between speech being "newsworthy" and speech being about "a matter of public concern," and hence within public discourse, *see*, *e.g.*, Bartnicki v. Vopper, 532 U.S. 514, 525 (2001); Time, Inc. v. Hill, 385 U.S. 374 (1967).

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forms of speech. It is not the case, for example, with commercial speech or expression about matters of private concern privately communicated.[21]

The press thus enjoys the special status of being classified as presumptively public discourse. But the press shares this special status with all media for the communication of ideas. In terms of the value of participating in public discourse, the press can claim only the right to be treated equally with every other participant in public discourse. The press earns this right by continuously seeking to reach out and communicate with strangers.[22]

2.2 THE MEIKLEJOHNIAN VALUE OF DISTRIBUTING INFORMATION

In the last third of the twentieth century, the Supreme Court seemed repeatedly to hold that the press was not entitled to claim special First Amendment rights that were not available to all other participants in public discourse.[23] One cause of this difficulty was that the press repeatedly chose to justify claims for special

[21] Snyder v. Phelps, 562 U.S. 443, 451–53 (2011); Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985).

[22] A slightly more sophisticated analysis might introduce additional complexities into this analysis. First Amendment protections do not precisely extend to media for the communication of ideas, but instead to speakers who choose to express themselves through these media. Speakers who communicate in this way are constitutionally presumed to be seeking to influence public opinion. They are accorded full First Amendment protection – enjoying what the Court in other circumstances has called "ordinary First Amendment standards," Mahanoy Area Sch. Dist. v. B.L., 141 S.Ct. 2038, 2045 (2021) – so that they might experience the constitutional value of democratic legitimation. Post, *supra* note 2, at 1–25. Ordinary First Amendment standards ensure that speakers can aspire to render the state democratically accountable to their views. Commercial corporations, however, are not natural human beings. Because they therefore cannot experience the value of democratic legitimation, different kinds of constitutional protections are often accorded to their speech, even if it occurs through media for the communication of ideas. Robert C. Post, Citizens Divided: Campaign Finance Reform and the Constitution 66–76 (2014). Yet "ordinary First Amendment standards" were originally fashioned to protect the legacy press, despite the fact that most legacy press institutions were also for-profit corporations. This might be because these press corporations are what we would now classify as "expressive associations," Board of Directors of Rotary Intern. v. Rotary Club of Duarte, 481 U.S. 537, 545 (1987), which are entitled to full First Amendment protection even though they have assumed a corporate form. Or it might be because the Press Clause offers a special dispensation to press institutions to be constitutionally characterized as participants in public discourse, even though they are otherwise commercial entities out to earn a profit. Post, *supra*, at 71 note*.

[23] As even Justice Brennan was moved to observe: "We protect the press to ensure the vitality of First Amendment guarantees. This solicitude implies no endorsement of the principle that speakers other than the press deserve lesser First Amendment protection. 'In the realm of protected speech, the legislature is constitutionally disqualified from dictating . . . the speakers who may address a public issue.' The free speech guarantee gives each citizen an equal right to self-expression and to participation in self-government . . . Accordingly, at least six Members of this Court (the four who join this opinion and Justice WHITE and THE CHIEF JUSTICE) agree today that, in the context of defamation law, the rights of the institutional media are no greater and no less than those enjoyed by other individuals or organizations engaged in the

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constitutional treatment in terms of a constitutional value that members of the Court did not find convincing.

For many years, press lawyers argued that the unique constitutional value served by the press was the distribution of information necessary for self-government. In *Branzburg v. Hayes*,[24] for example, the press argued that it should receive a special privilege shielding the identity of confidential sources from grand jury subpoenas. The press contended that if a reporter is "forced to reveal these confidences to a grand jury, the source so identified and other confidential sources of other reporters will be measurably deterred from furnishing publishable information, all to the detriment of the free flow of information protected by the First Amendment."[25]

This argument was rooted in Alexander Meiklejohn's account of the First Amendment. Meiklejohn famously asserted that the reason why speech should receive constitutional protection is to ensure that citizens receive the information necessary for them to perform their civic obligations, like voting on referenda and candidates. In case after case, the press argued that it had a special responsibility to distribute information to citizens, who would not otherwise be informed about public matters requiring decision.

The Court explicitly rejected this argument. The Court did not deny that the First Amendment protected the circulation of information to citizens, but it did deny that any such need justified awarding distinct constitutional privileges to the press:

> Freedom of the press is a "fundamental personal right" which "is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." The informative function asserted by representatives of the organized press in the present cases is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists. Almost any author may quite accurately assert that he is contributing to the flow of information to the public, that he relies on confidential sources of information, and that these sources will be silenced if he is forced to make disclosures before a grand jury.[26]

The press's Meiklejohnian arguments, in other words, were met with the objection that all speakers circulate information to the public. Indeed, a Meiklejohnian conception of the First Amendment holds that the very meaning of freedom of speech is nothing other than the freedom to convey information.[27] The Court did

same activities." Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 783–84 (1985) (Brennan, J., dissenting).

[24] 408 U.S. 665 (1972).

[25] *Id.* at 680.

[26] *Id.* at 704–05.

[27] Alexander Meiklejohn, Political Freedom: The Constitutional Powers of the People 8–28 (1948).

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not answer the press's claim that it was uniquely responsible for the effective circulation of information, but in truth it is difficult to quantify the difference in how much information the press distributes as distinct from authors of bestselling nonfiction books or producers of popular documentary movies.

The press's efforts to invoke a Meiklejohnian account of the First Amendment to justify special constitutional treatment were met with decisive judicial skepticism. The Court believed that the press was not all that different from other speakers when it came to the Meiklejohnian distribution of information.[28] This premise led the Burger Court to frequently demote the press to being "simply members of the public."[29]

2.3 THE CHECKING VALUE

The press has appeared differently to the Court, however, in the context of a distinct constitutional value. In *Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue*,[30] the Court considered a Minnesota statute imposing a special tax on the cost of paper and ink products used in the production of newspapers. The Court was offended that the tax "singled out the press for special treatment."[31] Such a tax, the Court concluded "cannot stand unless the burden is necessary to achieve an overriding governmental interest."[32] The Court's reasoning is instructive:

> When the State imposes a generally applicable tax, there is little cause for concern. We need not fear that a government will destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency. When the State singles out the press, though, the political constraints that prevent a legislature from passing crippling taxes of general applicability are weakened, and the threat of burdensome taxes becomes acute. That threat can operate as effectively as a censor to check critical comment by the press, undercutting the basic assumption of our political system that the press will often serve as an important restraint on government.[33]

The passage contains an entirely different constitutional image of the press than that contained in *Branzburg*. The Court invokes a "basic assumption of our political system that the press will often serve as an important restraint on government."[34] If in *Branzburg*, the press was simply one means among many to distribute information to

[28] *See supra* note 23.
[29] Christopher G. Blood, *Note: The Eroded Power of the Press and the Need to Apply Separation of Powers Principles*, 15 J.L. & POL. 781, 782 (1999).
[30] 460 U.S. 575 (1983).
[31] *Id.* at 582.
[32] *Id.* at 583.
[33] *Id.* at 585.
[34] *Id.*

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voters, in *Minneapolis Star and Tribune* the press was a unique institution operating to restrain government misconduct through "critical comment."[35]

This image of the press had been fully elaborated six years before in Vincent Blasi's pathbreaking article, "The Checking Value in First Amendment Theory."[36] Blasi argued that the press should be conceived as a specific kind of institution whose purpose was to guard "against breaches of trust by public officials."[37] Blasi built on the insight of Alexander Bickel that "the press was a constitutionally recognized countervailing power to the official branches of government."[38]

On this account, constitutional red flags would not be raised if Minnesota were to impose a special tax on films. Although movies are a medium for the communication of ideas, and although filmmakers are entitled to receive all the First Amendment rights accruing to participants in public discourse,[39] cinema is not an institution characterized by an adversarial relationship with government. It is not a "basic assumption of our political system" that films will "serve as an important restraint on government."

Following Blasi, I shall designate this constitutional conception of the press as the "checking value." From this perspective, the press should enjoy a unique constitutional role. If the press had appealed to the checking value in *Branzburg* instead of pushing a Meiklejohnian position, it is possible that the Court might have reached a different conclusion. We cannot know. All we can say with certainty is that in a context like *Minneapolis Star and Tribune*, where the press sought to prohibit legislation singling out the press for disadvantageous treatment, as distinct from a context like *Branzburg*, in which the press sought to claim special First Amendment privileges unavailable to other participants in public discourse, the Court was receptive to the checking value and prepared to give it constitutional effect.

The checking value imagines the press as an institution continually engaged with the government. The press is figured as an institution that is constantly seeking to hold the state accountable. It is certainly no accident that this image of the press rose to prominence during the time of Watergate[40] and the furor over the Pentagon Papers.[41] But if the checking value can justify awarding the press constitutional

[35] *Id*. *See also* Mills v. Alabama, 384 U.S. 214, 219 (1966): "The Constitution specifically selected the press . . . to play an important role in the discussion of public affairs. Thus the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve. Suppression of the right of the press to praise or criticize governmental agents . . . muzzles one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free."

[36] 1977 Am. Bar Fdn. Res. J. 521.

[37] *Id*. at 527.

[38] John E. Nowak, *Using the Press Clause to Limit Government Speech*, 30 Ariz. L. Rev. 1, 13 (1988). *See* Cass R. Sunstein, *Government Control of Information*, 74 Calif. L. Rev. 889 (1986).

[39] Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).

[40] United States v. Nixon, 418 U.S. 683 (1974).

[41] New York Times Co. v. United States, 403 U.S. 713 (1971).

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rights unavailable to other speakers in public discourse, it is far from obvious exactly how to define the "press" so as to serve this value.

Obviously, legacy press like The New York Times or The Washington Post would qualify as the press under the checking value. So also would proto-legacy institutions like ProPublica. But what about commentators like Tucker Carlson or Mark Levin? What about internet sites like Gawker or BuzzFeed? What about individual unaffiliated bloggers? Exactly what kind of speakers in the contemporary world are fit to participate in what Alexander Bickel called "the adversary game between press and government"?[42]

Should candidates for this game qualify merely because they hold an antagonistic attitude toward government? Or should they qualify only if they also abide by the professional standards that, after the progressive era, we have come to expect of the legacy press? For purposes of the checking value, must the press be institutionalized, so that it contains the full paraphernalia of editors and reporters and fact-checkers, or can the press consist merely of individuals bursting with antagonism toward government action? Must the press be an institution that also reports facts, or can it consist of the continuous broadcast of opinion, however shrill?

Minneapolis Star and Tribune is clear that those who constitutionally qualify for the "adversary game" ought to be accorded constitutional privileges that are unavailable to other participants in public discourse. These privileges form the rules of the "adversary game" that is a fact of our national life. These rules restrain government dealings with the press. Exemplary are regulations promulgated by the Attorney General to specify the precise, limited set of conditions under which the Department of Justice can issue subpoenas to "members of the news media."[43]

2.4 THE VALUE OF THE PUBLIC SPHERE

If the checking value identifies members of the press by virtue of their potentially antagonistic relationship to the state, there is yet a fourth constitutional conception of the press, one that is compatible with almost the complete absence of a unique voice attributable to the press. This conception of the press flows from the public sphere itself. It can most clearly be seen in the decision of the Court of Justice of the European Union (CJEU) in *Google Spain SL v. Agencia Española de Protección de Datos*.[44]

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

[43] Memorandum of the Attorney General on the "Use of Compulsory Process to Obtain Information From, or Records of, Members of the News Media" (July 19, 2021), at DOJ Formally Adopts New Policy Restricting Use of Compulsory Process to Obtain Reporter Information: Attorney General Memo on Compulsory Process (justice.gov).

[44] Case C-131/12, Google Spain SL v. Agencia Española de Protección de Datos, 2014 E.C.R. 317 [hereinafter *Google Spain*].

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In *Google Spain*, the CJEU was required to interpret Directive 95/46/EC,[45] which protected data privacy throughout the EU. The Directive, which was at the time "probably the most influential data privacy text in the world,"[46] put stringent conditions on the processing of private data, creating what has been called the "right to be forgotten."[47]

In *Google Spain*, a Spanish lawyer argued that Google violated his right to be forgotten when its search engine produced references to an old newspaper article describing official attachment proceedings against him. Because the Directive exempted the processing of private data "solely for journalistic" use,[48] a major question in the case was whether the Google search engine could claim this journalistic exception. The CJEU denied that the exception applied to the Google search engine, holding that Google could set against the Spanish lawyer's right to data privacy only "the economic interest" of the company.[49]

The traditional public sphere was created in the seventeenth and eighteenth centuries when printed newspapers circulated among strangers and united them into a "public" capable of holding Europe's newly created centralized states to political account. These newspapers were private commercial enterprises with their own economic interests. Yet these enterprises created the "public" that made possible what we now call democracy. The "press" was able to perform this feat not merely because its voice was potentially antagonistic to states but also because it distributed common information to strangers who were thereby enabled to come together to form a public.

The twenty-first century has witnessed an immense transformation, from analog to digital information.[50] Digital information circulates on the internet with virtually zero marginal cost. This has facilitated the emergence of digital institutions like the

[45] Directive 95/46/EC of the European Parliament and of the Council of October 24, 1995, on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of such Data, 1995 O.J. (L 281) 31 (EC) [hereinafter Directive].

[46] Stefan Kulk & Frederik Zuiderveen Borgesius, *Privacy, Freedom of Expression, and the Right to Be Forgotten in Europe*, *in* Cambridge Handbook of Consumer Privacy (Jules Polonetsky et al. eds., 2018).

[47] *Factsheet on the "Right to Be Forgotten" Ruling (C-131/12)*, Eur. Commission 1–2, http://ec.europa.eu/justice/data-protection/files/factsheets/factsheet_data_protection_en.pdf [https://perma.cc/QSK7–57UD].

[48] Directive, *supra* note 45, at art. 9. *See* David Erdos, *European Union Data Protection Law and Media Expression: Fundamentally Off Balance*, 65 Int'l Comp. L.Q. 139 (2016); David Erdos, *Statutory Regulation of Professional Journalism Under European Data Protection: Down but Not Out?* 8 J. Media L. 229 (2016); David Erdos, European Regulatory Interpretation of the Interface between Data Protection and Journalistic Freedom: An Incomplete and Imperfect Balancing Act (Cambridge Legal Stud. Res. Paper Series, Paper No. 61/2015, 2015).

[49] *Google Spain*, *supra* note 44, at para 81.

[50] On the implications of this transformation, *see* Robert Post, *The Internet, Democracy, and Misinformation*, in Disinformation, Misinformation and Democracy (A. Koltay et al. eds., Cambridge University Press, forthcoming 2025).

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Google search engine, which circulates far more information than any previous entity. Whereas in the eighteenth century, newspapers used their unique voice to attract readers and so expose them to common information, the Google search engine provides common information as requested by its users. It has no need to develop a distinctive voice to invite readers to use its services and partake in a common pool of "public" information.

The Google search engine is thus able to circulate common information to vast numbers of people and so to maintain a public, without any audible voice at all. Without in any way fulfilling the checking value or purporting to speak in its own voice about public affairs, it nevertheless performs the same sociological, public-sustaining function as does the legacy press. It is a purely public-maintaining institution.

This is, in my view, a central constitutional function of the press, one that deserves the kind of protection that the Directive in fact awarded to journalism. It is a function that is threatened by the current trend toward the protection of data privacy.[51] If the press could not publish common facts, we could not sustain the public conversation necessary for democratic self-government. That is why data privacy regulations typically exempt the press. Yet, the CJEU was not able to recognize the Google search engine as an enterprise that served this journalistic function, most likely because the engine lacked the voice we have always associated with the legacy press.

If the CJEU had instead focused on the constitutional value of sustaining the public sphere, it might have reached a different conclusion. The Google search engine performs the same public-maintaining function as did the traditional, analog press. The search engine sustains a digital public. This is a constitutional value that deserves its own distinct form of constitutional protection.

2.5 CONCLUSION

We have thus identified four distinct constitutional functions performed by the "press": The press participates in public discourse, it distributes information, it is a potentially antagonistic counterweight to government, and it maintains the public sphere. Each of these different functions leads to a different specification of what institutions should be included in the constitutional definition of the press. Each leads to a different form of constitutional protection. Although these functions are conceptually distinct, they need not be incompatible. A particular institution of "the press" can simultaneously serve one or more of them.

As a speaker, the press is presumptively a participant in public discourse, entitled to all the same First Amendment protections as other speakers in public discourse.

[51] For a detailed exposition of the argument in text, *see* Robert Post, *Data Privacy and Dignitary Privacy: Google Spain, the Right to Be Forgotten, and the Construction of the Public Sphere*, 67 Duke Law Journal 981 (2018).

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As a distributor of information, however, the Court has repeatedly held that the press is not entitled to any privilege not held by all other distributors of information. Yet the Court is prepared to recognize the press as distinctive insofar as it is potentially locked into an "adversary game" with the state. Our history and tradition have not cast other media in this unique role. If we take this constitutional value seriously, as has the Court in a few decisions, the press should be entitled to special constitutional privileges. The government should be prevented from unduly oppressing the press or from freely appropriating its resources.

Finally, there have emerged during the twenty-first century wholly new kinds of institutions that are engaged in the pure distribution of information without any pretension to voice. Exemplary is the Google search engine. These institutions, made possible by the digitization of information, produce publics in a manner analogous to the newspapers of the eighteenth century. They continuously endow strangers with common sources of information that are of interest to them.

These new digital institutions can certainly make no claim to the special privileges implied by the checking value. It is not even clear whether they should be entitled to rights that protect speakers who contribute to public discourse. But with regard to data privacy regulations like the Directive that seek specifically to block the transmission of data to strangers,[52] they ought to be able to claim the same protections as we are willing to give to the press generally.

[52] The Directive has now been superseded by the powerful General Data Protection Regulation (GDPR). *See* Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 2016 O.J. (L 119) 1.

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