13

The Other Press Clauses

Christina Koningisor

The Constitution's free expression clauses are famously bare-bones: "Congress shall make no law . . . abridging the freedom of speech, or of the press."[1] The historical drafting record is likewise thin – the constitutional framers spent little time debating press protections at the Constitutional Convention.[2] Yet post-ratification, the paths of these two provisions have diverged. The Supreme Court has devoted substantial attention to the Speech Clause, interpreting it broadly to cover an array of activities. In contrast, it has largely ignored the Press Clause, reading it mostly as ancillary to the ever-expanding set of speech protections.[3] The Press Clause has little independent meaning today.[4]

Yet imagine a different text, with a different drafting history. What if the Constitution provided that "the liberty of the press shall forever remain inviolate,"[5] or that freedom of the press is "one of the invaluable rights of man?"[6] What if the Press Clause were a stand-alone provision, or the discussion of the meaning and scope of speech and press provisions had figured largely into the constitutional drafting debates?[7] Would protections for the press look different today?

[1] U.S. Const. amend. I.

[2] *See* David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. Rev. 455, 467 (1983) (noting that press clause protections were briefly debated, and speech rights were never proposed). *See also* Jud Campbell, *Natural Rights and the First Amendment*, 127 Yale L.J. 246, 250 (2017) (noting that "debates among the Founders" about the First Amendment "would seem to belie any broadly shared original understanding of speech and press freedoms").

[3] *See, e.g.*, Branzburg v. Hayes, 408 U.S. 665, 704 (1972); Zurcher v. Stanford Daily, 436 U.S. 547, 565 (1978); Houchins v. KQED, Inc., 438 U.S. 1, 13 (1978). *See also* Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. Rev. 1025, 1027 (2011) (reviewing these cases and observing that "a majority of the Court has, in essence, dismissed the clause as a constitutional redundancy").

[4] West, *supra* note 3, at 1027. This cuts against Chief Justice John Marshall's assertion in *Marbury v. Madison* that "[i]t cannot be presumed that any clause in the constitution is intended to be without effect." 5 U.S. 137, 174 (1803).

[5] *See, e.g.*, Ark. Const. art. II, § 6. *See also* Kan. Const. § 11; Minn. Const. art. I, § 3.

[6] *See, e.g.*, Ark. Const. art. II, § 6; Tenn. Const. § 19.

[7] *See, e.g.*, R.I. Const. art. I, § 20 (providing stand-alone protections for the press).

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Such language and history do exist – in state constitutions. All fifty states have adopted constitutions that explicitly shield freedom of speech and the press.[8] And nearly all of them contain language that is substantially different from the language of the First Amendment.[9] These state constitutions contain fifty separate speech and press provisions, each with different drafting processes and different histories of judicial interpretation.[10] Moreover, state constitutions contain myriad additional constitutional provisions – many without federal analogs – that both privilege and protect the press.[11]

Since the 1970s, members of the press have advocated for increased constitutional protections under the First Amendment.[12] Some of these efforts have been successful. Yet these rights have generally been extended to the public as a whole.[13] The Supreme Court has mostly rejected calls to read the First Amendment to extend exclusive constitutional protections for the press.[14] This has left the press without particularized constitutional shields for many newsgathering activities, like accessing prisons or shielding confidential sources.[15]

There are reasons to revisit these precedents today. The economic and political power of the institutional media has diminished in recent years, with local press institutions disappearing at alarming rates.[16] At the same time, attacks on journalists have increased.[17] In response to these growing pressures on the institutional media, scholars have turned their attention back to the First Amendment, asking, for example, whether the Press Clause could be "revitalized" or "awakened" to offer a more abundant set of rights and privileges for the press.[18]

[8] *See* App'x A, State Constitutional Free Expression Provisions, https://knightcolumbia.org/documents/2nb16t1vb4.

[9] The two exceptions are Hawaii and South Carolina. *See* Haw. Const. art. I, § 4; S.C. Const. art. I, § 2.

[10] *See* App'x A, State Constitutional Free Expression Provisions, *supra* note 8.

[11] *See*, *e.g.*, Cal. Const. art. I, § 2 (extending constitutional protection to journalists' confidential sources and information).

[12] *See* discussion *infra* Section 13.1.3.

[13] *See*, *e.g.*, Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980).

[14] *See*, *e.g.*, Branzburg v. Hayes, 408 U.S. 665, 690 (1972); Houchins v. KQED, Inc., 438 U.S. 1, 13 (1978). *See also* Citizens United v. Fed. Election Comm'n, 130 S.Ct. 876, 928 n.6 (2010) (Scalia, J., concurring) (arguing that "freedom of the press" means "everyone's right to . . . publish").

[15] *See Branzburg*, *supra* note 14, at 690; *Houchins*, *supra* note 14, at 13.

[16] *See* Penelope Muse Abernathy & Tim Franklin, The State of Local News 5 (2022) ("Since 2005, the country has lost more than a fourth of its newspapers (2,500) and is on track to lose a third by 2025.").

[17] *See* Kirstin McCudden, *Another Record Year for Press-Freedom Violations in the US*, Colum. Journalism Rev. (Jan. 12, 2022), https://www.cjr.org/analysis/2021-press-freedom-prior-restraint-arrests.php.

[18] *See*, *e.g.*, West, *supra* note 3, at 1032, 1045. *See also* Christina Koningisor, *The De Facto Reporter's Privilege*, 127 Yale L.J. 1176, 1265 (2018) (presenting arguments in favor of revisiting *Branzburg* and recognizing a First Amendment-based reporter's privilege).

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Earlier press law scholarship of this type focused on the meaning and scope of the Press Clause, including whether its drafters intended only to protect against prior restraints.[19] Professor David Anderson's landmark article from 1983 argued that the drafters intended the First Amendment to sweep more broadly. He contended that they envisioned constitutional press protections to operate as a structural check against governmental abuse.[20] More recent Press Clause scholarship has built upon this work, taking up related questions, such as how to define "the press" for constitutional purposes[21] and how the Supreme Court's perceptions of the press have changed over time.[22]

This work is rich and thoughtful, yet it focuses almost exclusively on the federal Constitution.[23] This chapter, in contrast, turns attention to the "other" press clauses, along with state constitutional speech protections and various other state constitutional provisions implicating the press. It asks how these various state-level protections might be utilized to protect the institutional press in new or better ways.[24] And it asks how the lessons of these state experiences might be applied back to the federal context.[25] In this way, the chapter plugs into two separate strands of scholarship.

The first is the small but expanding literature exploring the scope and meaning of the federal Press Clause.[26] The second is a larger body of work examining how state constitutional liberties offer expanded rights protection beyond what the federal Constitution guarantees.[27] This movement to expand state constitutional rights is

[19] *Cf.*, *e.g.*, Leonard W. Levy, Introduction to Freedom of the Press from Zenger to Jefferson xix, lvii (Leonard Levy ed., 1966) (arguing that the framers only intended the Press Clause to protect against prior restraints), *with* Anderson, *supra* note 2, at 455 (arguing that the drafters intended the press to operate as a meaningful check on government power and therefore sweep more broadly than a mere prohibition against prior restraint).

[20] Anderson, *supra* note 2, at 491.

[21] *See*, *e.g.*, Sonja R. West, *Press Exceptionalism*, 127 Harv. L. Rev. 2434, 2453–62 (2014) (proposing a definition for who qualifies as the "press"); RonNell Andersen Jones & Lisa Grow Sun, *Freedom of the Press in Post-Truthism America*, 98 Wash. U.L. Rev. 419, 460–72 (2020).

[22] *See*, *e.g.*, RonNell Andersen Jones & Sonja R. West, *The U.S. Supreme Court's Characterizations of the Press: An Empirical Study*, 100 N.C.L. Rev. 375, 379 (2022); RonNell Andersen Jones & Sonja R. West, *Presuming Trustworthiness*, 75 Fla. L. Rev. 799, 800 (2023).

[23] There are important exceptions. *See*, *e.g.*, Anderson, *supra* note 2, at 506–08 (chronicling the passage of state constitutional press protections); Sonja R. West, *The "Press," Then & Now*, 77 Ohio St. L.J. 49, 65–71 (2016) (pointing to state constitutional press provisions for evidence of the "dual functions" of the Press Clause). For works examining specific state constitutional free expression provisions, *see infra* note 45.

[24] For a discussion of previous scholarship addressing various aspects of state constitutional free expression protections, *see infra* note 45.

[25] *See*, *e.g.*, West, *supra* note 3, at 1063–68 (applying lessons of state legislative definitions of the press back to the federal context).

[26] *See supra* notes 19–22 and accompanying text.

[27] A possible third strand of scholarship that is relevant here explores how the lessons of state laboratories of democracy are relevant to federal constitutional debates. *See*, *e.g.*, Joseph Blocher, *What State Constitutional Law Can Tell Us About the Federal Constitution*, 115

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often described as "new judicial federalism." Supreme Court Justice William Brennan is widely credited as its founder, at least in the movement's modern form.[28] In his landmark 1977 Harvard Law Review article, State Constitutions and the Protection of Individual Rights, Brennan warned that the steady expansion of federal individual liberties' protections during the Warren Court had come to an end.[29] In the face of this federal rights retrenchment, he argued, state courts must take up the mantle of the progressive cause and construe state constitutional rights provisions to fill in these federal constitutional gaps. He urged state supreme courts to break with federal judges, even when interpreting analogous state constitutional provisions.[30]

Many did so. If the promise of state constitutional rights protection was overlooked at the time of Brennan's call to action, that is no longer true today. State courts have spent decades untangling the relationship between state and federal constitutional rights provisions.[31] They have developed a rich body of case law cataloging when and how state courts have interpreted state constitutional individual liberties provisions more expansively than their federal counterparts, as well as when they should.[32] Scholars have also developed typologies of different methodological approaches to state constitutional rights interpretation.[33] A wide variety of methods have been adopted, from "lockstep" interpretations adopting federal court constructions wholesale to "primacy" approaches that emphasize independent state

Penn St. L. Rev. 1035, 1036 (2011) (arguing that federal courts should look more often to the lessons of state constitutional law); Benjamin Silver, *Nondelegation in the States*, 75 Vand. L. Rev. 1211, 1215 (2022) (applying the "lessons of state nondelegation for the federal doctrine").

[28] *See* Stewart G. Pollock, *Address, State Constitutions as Separate Sources of Fundamental Rights*, 35 Rutgers L. Rev. 707, 716 (1983) (referring to the article as the "Magna Carta of state constitutional law"). Of course, there was ample previous state court precedent on this point, as well as previous scholarly exploration of independent state constitutional rights' protections. *See* Randall T. Shepard, *The Maturing Nature of State Constitution Jurisprudence*, 30 Val. U.L. Rev. 421, 422 n.5 (1996) (describing this earlier work).

[29] William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 495–98 (1977).

[30] *Id.* at 502.

[31] *See* Fred R. Shapiro & Michelle Pearse, *The Most-Cited Law Review Articles of All Time*, 110 Mich. L. Rev. 1483, 1489 (2012) (showing that Brennan's article is among the most cited).

[32] *See, e.g.*, West v. Thomson Newspapers, 872 P.2d 999, 1006 (Utah 1994) (outlining the leading methodological approaches). *See also* Jeffrey S. Sutton, 51 Imperfect Solutions: States and the Making of American Constitutional Law 174–90 (2018) (describing the various methodological approaches employed to interpret state constitutions).

[33] There are many works addressing this topic. For some of the most prominent approaches, *see, e.g.*, James A. Gardner, Interpreting State Constitutions: A Jurisprudence of Function in a Federal System 180–275 (2005); Sutton, *supra* note 32, at 174–90; G. Alan Tarr, Understanding State Constitutions (2005); Robert F. Williams, The Law of American State Constitutions 135–232 (2009). *See also* Goodwin Liu, *State Constitutions and the Protection of Individual Rights: A Reappraisal*, 92 N.Y.U.L. Rev. 1307, 1310 n.15 (2017) (describing this literature); Jonathan L. Marshfield, *America's Misunderstood Constitutional Rights*, 170 U. Pa. L. Rev. 853, 873–74 (2022) (delineating between state constitutional "positivists," "pragmatists," and "constitutional universalists").

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construction and give little weight to federal interpretations of equivalent provisions.[34]

This chapter mostly sidesteps these methodological debates.[35] It focuses instead on the specific context of state constitutional press protections.[36] Much of the "new judicial federalism" scholarship is subject specific. The courts' early jurisprudence in this area largely focused on the scope of criminal law protections, for example.[37] The Warren Court steadily expanded constitutional protections for criminal defendants, and in the face of the U.S. Supreme Court's retreat from this project, state supreme court judges asked whether state constitutions might fill the gap.[38] The legal scholarship followed suit.[39]

Since then, different substantive state constitutional provisions have captured judicial and scholarly attention at different moments. Today, for example, many advocates and scholars have turned to state constitutional privacy provisions as a potential source of reproductive rights protection in the wake of the Supreme Court's elimination of federal abortion protections in *Dobbs v. Jackson Women's Health Organization*.[40] And in the face of the growing climate crisis, advocates have

[34] *See Thompson Newspapers*, 872 P.2d at 1006 (describing these approaches).

[35] Such debates take different forms. Some scholars have argued in favor of lockstep interpretation only in the context of specific constitutional protections. *See, e.g.*, Michael E. Keasler, *The Texas Experience: A Case for the Lockstep Approach*, 77 Miss. L.J. 345, 367 (2007) (arguing in favor of lockstep interpretation for federal and state search and seizure protections). Others have argued in favor of lockstep interpretation only when state constitutional language closely tracks the federal text. *See, e.g.*, Gardner, *supra* note 33, at 6–7 (critiquing courts for "often appropriat[ing] and adopt[ing] federal constitutional doctrine as the rule of decision for state constitutional provisions not only when the state constitutional text is identical to its federal counterpart, but even when it differs in potentially significant ways"). Still others have argued that lockstep interpretation is especially problematic in the context of interpreting state constitutional structure. *See, e.g.*, Jonathan L. Marshfield, *America's Other Separation of Powers Tradition*, 73 Duke L.J. 545, 549–51 (2023) (arguing against a Madisonian inter-branch competition separation of powers justification for state constitutions, and in favor of a "public accountability" rationale that is more faithful to state constitutional history, text, and design). And so on.

[36] This chapter assumes that state court judges can and should construe state constitutional rights provisions independently, based on their own interpretive methods and precedents, and that there are a variety of acceptable methods of doing so. *See* Robert F. Williams, *Why State Constitutions Matter*, 45 New England L. Rev. 901, 905 (2011). Arguments against lockstep interpretation are especially strong where – as here – the federal and state constitutional texts diverge. *See* Gardner, *supra* note 33, at 6–7. In this context, forty-eight out of the fifty state constitutional press and speech provisions substantially diverge from the text of the First Amendment. App'x A, State Constitutional Free Expression Provisions (showing that Hawaii and South Carolina are the two exceptions).

[37] *See* Williams, *supra* note 36, at 905.

[38] *See* Liu, *supra* note 33, at 1308–09.

[39] *See supra* note 33 and accompanying text.

[40] *See, e.g.*, Robert L. Bentlyewski, *Abortion Rights Under State Constitutions: A Fifty-State Survey*, 90 Fordham L. Rev. Online 201, 203 (2022) (finding that as of 2022, all but one of the state supreme courts to address the issue had recognized a state constitutional right to an abortion).

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looked to state constitutional provisions addressing public health rights or the right to a healthy environment as a promising source of new legal protection.[41] As the Supreme Court moves further to the right,[42] progressive scholars and advocates will most likely continue to look to state constitutions as an alternative source of rights protection.[43]

In the decades since Brennan's article, scholars and judges have also looked to state constitutional speech and press provisions.[44] They have asked whether these protections sweep more broadly than the First Amendment Speech and Press Clauses, as well as whether they should.[45] State courts have also explored the meaning of state free expression protections when construing state constitutional

[41] *See, e.g.*, Hari M. Osofsky, *Litigating Climate Change Infrastructure Impacts*, 118 Nw. U.L. Rev. Online 149, 163 (2023); Quinn Yeargain, *Decarbonizing Constitutions*, 41 Yale L. & Pol'y Rev. 1, 6 (2023).

[42] *See* Nina Totenberg, *The Supreme Court Is the Most Conservative in 90 Years*, NPR (July 5, 2022), https://www.npr.org/2022/07/05/1109444617/the-supreme-court-conservative.

[43] *See, e.g.*, Matthew Segal & Julie Murray, *State Supreme Courts Offer the Best Chance to Advance Rights*, Am. Civ. Liberties Union (May 2, 2023), https://www.aclu.org/news/civil-liberties/state-supreme-courts-offer-the-best-chance-to-advance-rights#:~:text=Each%20state%20has%20its%20own,or%20preserved%20under%20federal%20law. The Roberts Court has expanded First Amendment protections for certain speakers, especially corporate and religious speakers. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010); 303 Creative LLC v. Elenis, 600 U.S. 570 (2023). In this sense, the First Amendment context is distinct from contexts like reproductive rights or climate change, where the Court has actively contracted federal constitutional protection. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022); West Virginia v. Environmental Protection Agency, 597 U.S. 697 (2022). But the Roberts Court has not expanded First Amendment protection for all speakers, and it has not expanded protections for the press. To the contrary, some of the strongest voices for expanded religious and corporate speech protections have argued in favor of contracting First Amendment protections for press speakers. *See, e.g.*, Berisha v. Lawson, 141 S.Ct. 2424 (2021) (Thomas, J., dissenting from denial of cert.); *id.* at 2425 (Gorsuch, J., dissenting from denial of cert.).

[44] For articles comparing free expression provisions across multiple states, *see, e.g.*, Peter P. Miller, *Freedom of Expression Under State Constitutions*, 20 Stan. L. Rev. 318, 325–31 (1968); Todd F. Simon, *Independent but Inadequate: State Constitutions and Protection of Freedom of Expression*, 33 U. Kan. L. Rev. 305, 308 (1985); Kathryn Dix Sowle, *A Matter of Opinion: Milkovich Four Years Later*, 3 Wm. & Mary Bill Rts. J. 467, 519 (1994); Brady C. Williamson & James A. Friedman, *State Constitutions: The Shopping Mall Cases*, 1998 Wis. L. Rev. 883 (1998). For articles examining the meaning of state free expression provisions in a single state, *see, e.g.*, Jeremy J. Bethel, *Freedom of Expression in New York State: What Remains of People Ex Rel. Arcara v. Cloud Books, Inc.?*, 28 Fordham Urb. L.J. 1797 (2001); Michael A. Giudicessi, *Independent State Grounds for Freedom of Speech and of the Press: Article 1, Section 7 of the Iowa Constitution*, 38 Drake L. Rev. 9, 26–28 (1988); Joseph H. Hart, *Free Speech on Private Property – When Fundamental Rights Collide*, 68 Tex. L. Rev. 1469, 1470 (1990); Anthony W. Kraus, *Beyond the First Amendment: What the Evolution of Maryland's Constitutional Free-Speech Guarantee Shows About Its Intended Breadth*, 47 U. Balt. L.F. 83, 84 (2017); Seth F. Kreimer, *The Pennsylvania Constitution's Protection of Free Expression*, 5 U. Pa. J. Const. L. 12, 13 (2002).

[45] *See, e.g.*, Kraus, *supra* note 44, at 97–98 (arguing in favor of construing Maryland's free expression provisions more broadly than the First Amendment).

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speech and press provisions.[46] But more could be done. Press advocates haven't always utilized these press and other state constitutional provisions effectively.[47] And state courts have often construed state constitutional free expression provisions in lockstep with the First Amendment, despite significant textual and historical distinctions.[48]

Further, legal scholars have largely overlooked state constitutional protections for the press. Some have compared the development of free expression rights in the state versus federal constitutional contexts for specific states.[49] Yet the scholarship examining state constitutional protections for the press is more limited.[50] This is true even though these state constitutional press protections offer crucial benefits. State constitutions can provide protection where the U.S. Constitution has failed. Many state constitutional press and speech provisions already sweep more broadly than the First Amendment under current state precedent. And many more could be reasonably construed this way.[51] Moreover, state constitutions are more easily amended in response to new or changing threats to the press.[52]

The lessons of state constitutional law can also be useful for advocates of expanded federal press protections. Many of the policy arguments advanced by the U.S. Supreme Court in the course of rejecting particularized rights for the press can be challenged by the experience of the states. The state constitutional experience offers alternative law and policy choices, distinct from the path the U.S. Supreme Court has chosen under the First Amendment. Mining these state law histories can be helpful for refuting the Court's policy-oriented claims and imagining alternative futures for federal constitutional press protections.[53]

This chapter proceeds in two sections. Section 13.1 outlines the text, drafting history, and interpretive precedents of federal and state press and speech clause protections, focusing attention where state courts have interpreted state constitutional press protections to sweep more broadly than the First Amendment. Section 13.2 examines the future of federal and state press and speech clauses. It identifies state constitutional provisions and precedents that could be seized upon by advocates to expand protections for the press. And it provides examples of ways that the experiences of the states can be used to bolster arguments for broader press protections under federal law.

[46] *See* discussion *supra* note 32 and accompanying text.
[47] *See* Sutton, *supra* note 32, at 8 (noting that most litigants fail to raise state constitutional claims when available and arguing that this is a mistake).
[48] *See, e.g.*, Howard Cnty. Citizens for Open Gov't v. Howard Cnty. Bd. of Elections, 201 Md. App. 605, 623 (2011); In re Letellier, 578 A.2d 722, 726, 17 Media L. Rep. 2169 (Me. 1990); State v. Turner, 550 N.W.2d 622, 628 (Minn. 1999).
[49] *See supra* note 45 and accompanying text.
[50] *Id.*
[51] *See infra* Section 13.1.3.
[52] *See infra* Section 13.2.1.
[53] *See infra* Section 13.2.2.

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13.1 CONSTITUTIONAL PROTECTIONS FOR THE PRESS

Federal and state constitutions articulate very different textual protections for the press. This is true in terms of both press and speech clauses and more ancillary provisions like rights of information access. These state constitutions also have vastly different histories of drafting and judicial interpretation. This part maps out these distinctions across the federal and state contexts, focusing attention on the substantive areas where the states have extended press protections beyond what the First Amendment allows.

13.1.1 *Constitutional Text*

The Press Clause of the First Amendment provides that "Congress shall make no law . . . abridging the freedom . . . of the press."[54] It is paired with the Speech Clause, set off by semi-colons from both the religious clauses and the assembly and petition clauses that follow.[55] The U.S. Supreme Court has extended few, if any, substantive rights protections under the Press Clause alone.[56] Rather, press-related protections have been extended through some combination of speech and press rights. The Court has also repeatedly declined to extend exclusive constitutional protections enjoyed by press speakers alone.

In contrast, the states have taken a different approach. All fifty state constitutions extend protections for freedom of speech and the press.[57] But only two states – Hawaii and South Carolina – have adopted free expression provisions that track the language of the First Amendment.[58] The other forty-eight state constitutions depart from the federal model.[59] Many do so in ways that suggest strong protections for the press.

For example, many of these state free expression provisions protect a broader set of substantive rights than those contained in the First Amendment. Forty states protect the right to "speak, write, and publish" as three distinct components of freedom of expression.[60] A few state constitutions also make explicit the democratic role of free press provisions, specifying that the printing press must be free to those who wish to "examine" the work of "any branch of government."[61] Still others protect "the free

[54] U.S. CONST. amend. I.
[55] *Id. See also* West, *supra* note 3, at 1033–34 (arguing that the two semicolons suggest that the Speech and Press Clauses "were seen as sharing a commonality").
[56] West, *supra* note 3, at 1028.
[57] *See* App'x A, State Constitutional Free Expression Provisions, *supra* note 8.
[58] Haw. CONST. art. I, § 4; S.C. CONST. art. I, § 2.
[59] *See* App'x A, State Constitutional Free Expression Provisions, *supra* note 8.
[60] *See* App'x A, State Constitutional Free Expression Provisions, *supra* note 8.
[61] *See, e.g.*, Ky. CONST. § 8; Pa. CONST. art. I, § 7; Tenn. CONST. art. I, § 19.

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communication of thought and opinion," which may encompass a broader set of activities than speech and press protections alone.[62]

Protections for the press are also articulated in stronger terms in some state constitutions. For example, Kansas' speech and press clause provides that "the liberty of the press shall be inviolate."[63] Virginia's stipulates that "freedoms of speech and of the press are among the great bulwarks of liberty and can never be restrained except by despotic governments."[64] And Mississippi's provides that "freedom of speech and of the press shall be held sacred,"[65] elevating free expression provisions to those "worthy of religious veneration."[66]

There are notable structural distinctions as well. Most state constitutions protect speech and press in a single stand-alone provision. Only two pair free expression with religious rights.[67] And one state, Rhode Island, protects the rights of speech and of the press in separate constitutional sections.[68] Such structural separation further supports construing press and speech protections separately rather than as coextensive rights.

Most state constitutions also articulate press and speech rights in positive terms. Only a handful contain an exclusively negative expression of these rights, analogous to the First Amendment's prohibition that "Congress shall make no law" abridging the freedom of speech or the press.[69] The rest articulate protection at least in part in positive terms. Around three-quarters of state constitutions provide that "every person" has an affirmative right to speak and publish freely.[70] And about half contain both negative and affirmative articulations. They provide that "every person shall be at liberty to speak, write or publish his opinions on any subject." And they provide that "no law shall ever be passed curtailing the liberty of speech or of the press."[71]

State courts have often found this negative/positive rights distinction salient when interpreting the scope of state constitutional press shields.[72] They have pointed to these affirmative constructions of state constitutional provisions as evidence of an

[62] *See, e.g.*, De. Const. art. 1, § 5; Ind. Const. art. I, § 9; Tenn. Const. art. I, § 19. *See also* Utah Const. art. 1, § 1 (providing that all persons have the right "to communicate freely their thoughts and opinions").

[63] Kan. Const. Bill of Rts. § 11.

[64] Va. Const. art. I, § 12.

[65] Miss. Const. art. III, § 13.

[66] *See* Gulf Pub. Co. v. Lee, 434 So.2d 687, 696 (Miss. 1983).

[67] Haw. Const. art. I, § 4; S.C. Const. art. I, § 2. *See also* R.I. Const. art. I, § 21 (combining speech, assembly, and petition protections).

[68] R.I. Const. art. I, § 20 (freedom of the press); R.I. Const. art. I, § 21 (freedom of speech).

[69] Haw. Const. art. I, § 4; Ind. Const. art. I, § 9; Or. Const. art. I, § 8; S.C. Const. art. I, § 2; Utah Const. art. I, § 15; W. Va. Const. art. III, § 7.

[70] *See* App'x A, State Constitutional Free Expression Provisions, *supra* note 8.

[71] *See id.*

[72] *See, e.g.*, Davenport v. Garcia, 834 S.W.2d 4, 7–8 (Tex. 1992) (contrasting the affirmative expression of state constitutional rights with negative prohibitions contained in the First Amendment); Robert v. City of Norfolk, 188 Va. 413, 420, 49 S.E.2d 697, 700 (1948) (same); Immuno AG. v. Moor-Jankowski, 77 N.Y.2d 235, 249, 567 N.E.2d 1270 (1991) (same).

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intentional decision by state constitutional drafters to provide broader free expression protections than those provided by the First Amendment. For example, New York's highest court has interpreted the state's constitution to offer stronger defamation protections for statements of opinion than the U.S. Constitution provides.[73] In doing so, it reasoned that these state speech and press provisions "reflect the deliberate choice of the New York State Constitutional Convention not to follow the language of the First Amendment, ratified 30 years earlier, but instead to set forth our basic democratic ideal of liberty of the press in strong affirmative terms."[74]

This is not to say that all state constitutional textual distinctions trend in this same direction, toward broader protection. Some contain more watered-down articulations of free expression rights. For example, a handful provide that the liberty of the press "ought" not be violated, in contrast with the more forceful prohibition contained in the First Amendment.[75] Many state constitutions also spell out the limits of these protections more explicitly than the First Amendment. For instance, forty state constitutions include language specifying that those who exercise speech and press rights are "responsible for their abuse."[76] And around half of state constitutional free expression provisions stipulate that truth must be accepted as a defense to libel, which some courts have read to be rights-contracting.[77] Yet overall, many of these textual distinctions and departures in state constitutions suggest expanded state-level protections for the press in comparison to the First Amendment.

13.1.2 *Constitutional Histories*

The First Amendment drafting history is thin. The drafters spent little time debating proposed press protections at the Constitutional Convention.[78] And the debates of the state ratifying conventions often yielded conflicting conclusions.[79] The drafters

[73] Immuno AG. v. Moor-Jankowski, 77 N.Y.2d 235, 255 (1991).

[74] *Id.* at 249.

[75] Md. Const. Decl. of Rts. art. 40; Mass. Const. Pt. 1, art. XVI; N.H. Const. Pt. 1, art. 22; Vt. Const. CH I, art. XIII.

[76] *See* App'x A, State Constitutional Free Expression Provisions, *supra* note 8.

[77] *See id.* Some courts have held these provisions are rights-contracting. *See, e.g.*, Ex Parte Tucci, 859 S.W.2d 1, 24 (Tex. 1993) (Philips, C.J., concurring) (arguing that the inclusion of such libel provisions "reflected the framers' rejection of a broad commitment to a vigorous, untrammeled press"); Commonwealth v. Blanding, 20 Mass. 304, 304 (1825) (emphasizing that the state constitutional provision protects only against prior restraints on speech). Others have interpreted these provisions to be rights-expanding because they broadened the common law rule in force at the time that truth was not a defense to libel. *See, e.g.*, People v. Croswell, 1804 WL 874, 391–92 (N.Y. Sup. Ct. 1804) (citing these truth-as-defense provisions as evidence of the drafters' commitment to freedom of the press).

[78] *See* Anderson, *supra* note 2, at 466–67 (describing two brief discussions on proposed press protections at the Constitutional Convention).

[79] *Id.* at 467–75 (describing press and speech clause discussions during the state ratifying conventions). *See also* Leonard Williams Levy, Legacy of Suppression 4 (1960) ("[W]e know very little . . . about the original understanding of the First Amendment).

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almost certainly intended to restrict prior restraints against speech.[80] But consensus has splintered from there over the original meaning of the First Amendment.[81] There is a vast literature plumbing these drafting histories for evidence of the federal constitutional drafters' original intent when enacting these constitutional press and speech protections.[82] Ultimately, much of the confusion likely stems from the drafters' own differing visions of speech and press protections.[83]

When it comes to the drafting histories of the fifty state free expression provisions, however, the interpretive task becomes even more difficult. There are fifty state press clauses contained in fifty separate state constitutions. Collectively, these state constitutions have been amended more than 7,000 times.[84] It is impossible to provide a detailed accounting of each of these histories. They are too varied, too long, and too complex. Yet even a cursory review yields some insights.

The earliest state constitutional press clauses were drafted during the revolutionary period, and these state constitutional provisions reflect the drafters' preoccupation with checking government abuse.[85] The colonists chafed at British control over the press, and revolutionary leaders seized upon the issue of press freedom both to shore up support for the cause and to distinguish themselves from British rule.[86] They declared freedom of the press to be "a great bulwark of liberty,"[87] necessary for the "ready communication of thoughts" among citizens.[88] And nine of the eleven state constitutions adopted during the Revolutionary War contained a press clause.[89] These state constitutions were "revolutionary manifestos."[90]

The state constitutional texts embody this revolutionary history. Pennsylvania's 1776 Declaration of Rights, for example, provides that "the printing presses shall be free to every person who undertakes to examine the proceedings of the legislature, or any part of government."[91] Virginia's 1776 Declaration of Rights declares that

[80] *See* Erwin Chemerinsky, Constitutional Law 1177 (2020) ("It is widely accepted that the First Amendment was meant, at the very least, to abolish such prior restraints on publication").

[81] *See* Campbell, *supra* note 2, at 250–51 (2017) ("After a century of academic debate, however, the meanings of speech and press freedoms at the Founding remain remarkably hazy.")

[82] *Id*. at 250–51 (describing these scholarly debates).

[83] *Id*. at 254 ("Debates about expressive freedom also were wide ranging because the Founders often vehemently disagreed about which regulations of speech promoted the public good.").

[84] *See* John Dinan, *Constitutional Amendment Processes in the 50 States*, State Court Report (July 24, 2023), https://statecourtreport.org/our-work/analysis-opinion/constitutional-amendment-processes-50-states.

[85] *See* Anderson, *supra* note 2, at 488–94.

[86] *See* Bridges v. State of Cal., 314 U.S. 252, 264–65 (1941) (describing this history).

[87] Levy, *supra* note 79, at 69 (quoting the Resolution of the Massachusetts House (1768).

[88] Bernard Schwartz, The Bill of Rights 223 (1971) (reproducing *Address to the Inhabitants of Quebec* (1774)).

[89] Anderson, *supra* note 2, at 464. Only two contained a speech clause. *Id*. at 508–09.

[90] *Id*. at 489.

[91] Schwartz, *supra* note 88, at 273 (reproducing the Pennsylvania Declaration of Rights, 1776). *See also* West, *supra* note 23, at 66–67 (noting that two press protections were contained in Pennsylvania's Declaration of Rights, one in the "rights" section, and another in the "structure"

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"freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotic governments."[92] And New Hampshire's 1783 Bill of Rights provides that "the liberty of the press is essential to the security of freedom in a state; it ought, therefore, to be inviolably preserved."[93] As Professor Anderson has argued, these early press clause provisions suggested that press freedom operated as a structural democratic check against governmental abuse.[94]

State constitutional drafting documents provide further support for this proposition. For example, William Cushing, the chief justice of the Massachusetts Supreme Court and one of the drafters of the Massachusetts Constitution, exchanged a series of letters with John Adams in 1789 about Massachusetts' press clause.[95] They asked whether truthful criticism of government could be punished under this provision. Both men concluded it could not, and they rooted their decisions in structural democratic concerns.[96] "The liberty of publishing truth can never effectually injure a good government," Cushing argued, but it might restrain a despotic one.[97] Adams agreed. Otherwise, "how are the characters and conduct" of elected representatives "to be known by their constituents, but by the press?"[98]

This is not to say that the drafters and ratifiers of these state constitutional press provisions envisioned a wholly expansive set of rights. To the contrary, they tolerated substantial punishment of printers who supported the British cause.[99] John Adams signed the Sedition Act, and William Cushing enforced it.[100] These drafting histories are voluminous and contain many contradictions.[101] Yet the authors of these state press clauses were expressly concerned with the implications of a free press for a functioning democracy. As Professor Anderson put it, the drafters "may not have been sophisticated enough to realize that true freedom of expression must include freedom for even the most dangerous ideas, but they had seen the connection between press criticism and political change."[102]

In contrast, the language of the First Amendment became abstracted away from these revolutionary era claims over the course of its drafting process. The initial "bulwark of liberty" language was dropped from the First Amendment text. The speech and press protections were then joined with other expressive and religious

section, and that these dual provisions support "two distinct purposes emanating out of a single concept of press freedom – protection of an expressive function and also a structural function").

[92] *Id.* at 235 (reproducing Virginia Declaration of Rights, 1776).

[93] *Id.* at 378 (reproducing the New Hampshire Bill of Rights, 1783).

[94] Anderson, *supra* note 2, at 460.

[95] *See* Levy, *supra* note 79, at 192–97.

[96] *Id.*

[97] *Id.* at 194.

[98] *Id.* at 195.

[99] Anderson, *supra* note 2, at 535.

[100] Levy, *supra* note 79, at 198–99.

[101] *See* Anderson, *supra* note 2, at 505 ("[T]he evidence is contradictory, and we cannot know whether the Framers intended to limit the courts and the executive.").

[102] *Id.* at 535.

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liberties.[103] Yet many state constitutions still contain these original declarations explicitly tying freedom of the press to the preservation of democratic self-governance and the prevention of governmental abuse.[104] The text and histories of these early press clauses suggest that these state constitutional drafters viewed the press as a key check against the threat of an oppressive government.[105]

Another key theme to emerge from these fifty distinct drafting histories is that state constitutions have been repeatedly altered and replaced over the course of 200 years. They have been amended at a much higher rate than the federal Constitution – an average of 115 times, versus the 27 amendments of the U.S. Constitution.[106] Of the original thirteen colonial constitutions, only Massachusetts' survives today. The rest have been replaced one or more times.[107]

This makes the task of ferreting out original intent difficult. Should a judge consider only the statements of the original drafters? What if other parts of the constitution were changed but the free expression clause remained intact? What does such legislative silence tell us? Such questions not only make it more complicated to identify original meaning but also make it more difficult to offer a coherent story about the drafting histories of these fifty state constitutions. Each state's constitutional drafting history merits its own book-length treatment. This chapter does not attempt to offer a comprehensive account, nor does it provide a cohesive or overarching story of free expression in the states.[108] Instead, it focuses attention on a handful of substantive areas where press privileges and freedoms have been most strongly implicated.

13.1.3 *Constitutional Interpretations*

State courts have diverged in their interpretations of state constitutional press protections. This part surveys these precedents, focusing attention on the substantive areas where state constitutional texts have yielded more expansive protections for the press than the First Amendment. These include protections for confidential sources,

[103] *See* U.S. Const. amend. I.

[104] Four still ensure that the printing press will be available to those who wish to examine government, for example. *See* De. Const. art. 1, § 5; Ky. Const. § 8; Pa. Const. art. I, § 7; Tenn. Const. art. I, § 19. Two refer to the press as a "great bulwark of liberty." N.C. Const. art. I, § 14; Va. Const. art. I, § 12. And one makes explicit that freedom of the press "can never be restrained except by despotic governments." Va. Const. art. I, § 12.

[105] *See* Anderson, *supra* note 2, at 490–92.

[106] *See* U.S. Const. amends. I–XXVII; Alicia Bannon, *Learning from State Constitutional Amendments*, NYU J. of L & Pub. Pol. (Apr. 18, 2023), https://nyujlpp.org/quorum/bannon-learning-from-state-constitutional-amendments/#:~:text=State%20constitutions%20are%20also%20far,contain%20more%20than%207%2C000%20amendments.

[107] *See* Bannon, *supra* note 106.

[108] *See*, *e.g.*, Gardner, *supra* note 33, at 1–22 (2005) (reviewing methodological questions that arise in the context of state constitutional interpretation).

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recognition of constitutional rights of access, prohibitions against prior restraint, and protections against liability for defamation.[109]

Not all of these protections are press specific. Some, like protections against prior restraints and defamation liability, extend to all speakers. Yet in practice, they tend to have an outsized effect on the press. Courts have long assumed that press speakers are uniquely at risk when it comes to both defamation lawsuits and the effects of a prior restraint on publication.[110]

13.1.3.1 Reporter's Privilege

The U.S. Supreme Court has repeatedly rejected the press's claims to First Amendment-based protections for newsgathering processes, including protection for reporters' confidential sources and information. In its landmark 1972 decision *Branzburg v. Hayes*, the Court addressed the claims of three reporters who refused to comply with a grand jury subpoena to reveal confidential information and sources.[111] The journalists argued that such disclosures would imperil the journalist-source relationship and impede the free flow of information to the public. They appealed to the Court to recognize a constitutionally based evidentiary privilege for journalists' confidential sources and other confidential information.[112]

The Supreme Court declined to do so, at least in the grand jury subpoena context. It reasoned that such a privilege does not appear in the text of the Constitution.[113] Nor had the courts recognized such a privilege at common law.[114] For more than 200 years, the Court wrote, the press had "flourished" without a First Amendment-based evidentiary shield.[115] The press was "far from helpless to protect

[109] This is not an exclusive list. For example, state courts have extended broader speech protections on private property. *See* Williamson & Friedman, *supra* note 44, at 887–93 (1998). They have also protected obscene speech more broadly. *See*, *e.g.*, City of Portland v. Jacobsky, 496 A.2d 646, 653 (Me. 1985). This chapter focuses on the areas that have the greatest impact on protections for the press specifically.

[110] *See*, *e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254, 294 (1964) (Black, J., concurring) ("The half-million-dollar verdict does give dramatic proof, however, that state libel laws threaten the very existence of an American press virile enough to publish unpopular views on public affairs and bold enough to criticize the conduct of public officials."); New York Times Co. v. United States, 403 U.S. 713, 717 (1971) ("In my view, far from deserving condemnation for their courageous reporting, the New York Times, the Washington Post, and other newspapers should be commended for serving the purpose that the Founding Fathers saw so clearly. In revealing the workings of government that led to the Vietnam war, the newspapers nobly did precisely that which the Founders hoped and trusted they would do.").

[111] Branzburg v. Hayes, 408 U.S. 665 (1972), at 667–80.

[112] *Id.*

[113] *Id.* at 689–90.

[114] *Id.* at 685–86.

[115] *Id.* at 698–99.

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itself" and didn't require further constitutional protection.[116] "We are asked to create another [constitutional privilege] by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy," the Court wrote. But "this we decline to do."[117]

In the decades since, many federal circuits have recognized a First Amendment-based privilege in other contexts. They have narrowed the holding in *Branzburg* to grand jury subpoenas, recognizing a qualified constitutional or common-law privilege in other judicial proceedings.[118] But they have splintered widely in their interpretations of this privilege, leading to a patchwork and inconsistent set of case law from one circuit to another.[119] For example, five circuits have recognized a qualified First Amendment privilege in some criminal cases. Two have extended the qualified shield only in some civil contexts. And one – the U.S. Court of Appeals for the Seventh Circuit – has held there is no reporter's privilege for nonconfidential material.[120]

The states have pursued a different approach. Some have extended greater state constitutional protections for reporters' confidential information and sources. California, for example, has enshrined the privilege directly into its state constitutional text. Article I, § 2 of the state constitution provides that members of the press may not be held in contempt for refusing to disclose either their confidential sources or their unpublished information gathered in the course of the reporting process.[121]

The history of this provision is instructive. The California legislature enacted a statutory shield law in 1935.[122] But the courts began to push back, arguing that the law interfered with the judiciary's inherent constitutional authority to execute its judicial duties.[123] Judges began to hold reporters in contempt, in spite of the requirements of the shield law.[124] The public responded by passing a ballot initiative in 1980 constitutionalizing the privilege.[125] The pamphlet accompanying the ballot explained to voters that the Supreme Court had declined to recognize a First

[116] *Id.* at 706.

[117] *Id.* at 690. *See also* Zurcher v. Stanford Daily, 436 U.S. 547, 550–53 (1978) (declining to extend special protections against searches of newsrooms by police).

[118] *See Introduction to the Reporter's Privilege Compendium*, Rep. Comm. for Freedom of the Press (2021), https://www.rcfp.org/introduction-to-the-reporters-privilege-compendium/ (describing these precedents).

[119] *See* Koningisor, *supra* note 18, at 1197–98.

[120] *See* Mayze Teitler & Samuel Aber, *The Law of the Reporter's Privilege Is a Mess. A Federal Shield Law Could Help Fix It*, Knight Inst. (Aug. 13, 2021), https://knightcolumbia.org/blog/the-law-of-the-reporters-privilege-is-a-mess-a-federal-shield-law-could-help-fix-it (summarizing this case law).

[121] Cal. Const. art. I, § 2.

[122] *See* Cal. Evid. Code § 1070; initially codified as Cal. Civ. Proc. Code § 1881 (1935).

[123] Voter Information Guide, *Primary Election*, at 18 (June 3, 1980), https://repository.uclawsf.edu/cgi/viewcontent.cgi?article=1884&context=ca_ballot_props.

[124] *Id.*

[125] Playboy Enterprises, Inc. v. Superior Ct., 154 Cal. App. 3d 14, 20 (Ct. App. 1984) ("By constitutional amendment in 1980, provisions virtually identical to section 1070 were added to article

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Amendment-based privilege in *Branzburg* and therefore enhanced state constitutional protection was needed. "If our democratic form of government – of the people, by the people – is to survive, citizens must be informed," the pamphlet stated. "A free press protects our basic liberties by serving as the watchdogs of our nation."[126]

While California is the only state to extend an explicit constitutional privilege for journalists, other state supreme courts have recognized an implicit privilege that derives from state speech and press protections.[127] Many others have enacted statutory shields, recognized a common law privilege, or extended protection through the rules of evidence.[128] These state privileges are often roughly equivalent to the scope of the qualified First Amendment privileges extended by the federal appellate courts.[129] But their boundaries can be distinct.[130] Moreover, these state provisions operate as an independent source of protection. This is significant, because the federal courts have been more reluctant in recent years to read *Branzburg* as extending constitutional protections for the press.[131] If the federal courts do roll back the scope of federal constitutional protections, such state-level shields will assume greater importance.[132]

13.1.3.2 Rights of Access

Throughout the 1970s, journalists petitioned the Supreme Court to recognize First Amendment rights to access government information. The Court repeatedly

I, section 2 of the California Constitution, elevating the newsperson's protection to the constitutional level.").

[126] Voter Information Guide, *supra* note 123, at 19.

[127] *See, e.g.*, In re Grand Jury Proc. (Ridenhour), 520 So.2d 372, 374 (La. 1988); O'Neill v. Oakgrove Const., Inc., 71 N.Y.2d 521, 524 (1988); Scott v. News-Herald, 25 Ohio St.3d 243, 245 (1986); Matter of Contempt of Wright, 108 Idaho 418, 419 (1985); Zelenka v. State, 83 Wis.2d 601, 617, 266 N.W.2d 279, 286 (1978); Winegard v. Oxberger, 258 N.W.2d 847, 852 (Iowa 1977); Opinion of the Justs., 117 N.H. 386, 389 (1977).

[128] *See* Rep. Comm. for Freedom of the Press, Shield Law Statute, Comparison, https://www.rcfp.org/privilege-sections/a-shield-law-statute/ (listing these laws). For protection extended through the rules of evidence, *see, e.g.*, N.M. R. Evid. 11-514; Utah R. Evid. 509.

[129] *See, e.g.*, Vaughn v. State, 259 Ga. 325, 326 (1989); In re Letellier, 578 A.2d 722, 726 (Me. 1990); State v. Turner, 550 N.W.2d 622, 628 (Minn. 1999).

[130] *See, e.g.*, Opinion of the Justs., 117 N.H. 386, 389 (1977).

[131] *See, e.g.*, McKevitt v. Pallasch, 339 F.3d 530, 532–33 (7th Cir. 2003) (critiquing generous lower court readings of *Branzburg*). *See also* Erik Ugland, *The New Abridged Reporter's Privilege: Policies, Principles, and Pathological Perspectives*, 71 Ohio St. L.J. 1, 4 (2010) (describing this shift in the federal courts' approach to the reporter's privilege).

[132] Of course, state privileges don't extend protection in the context of federal subpoenas. However, such subpoenas are rarer. *See* RonNell Andersen Jones, *Avalanche or Undue Alarm? An Empirical Study of Subpoenas Received by the News Media*, 93 Minn. L. Rev. 585, 654 (2008) (showing that media organizations receive substantially more subpoenas from state governments than from the federal government).

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declined to do so.[133] In the 1978 case *KQED v. Houchins*, for example, the Court rejected the press's claim to a First Amendment right to access prison facilities.[134] After multiple inmates died at a prison in California, the county sheriff curtailed journalists' access to the facilities.[135] A group of journalists sued, arguing that they had a constitutional right to access the prison. The Court denied the claim, holding that there is no First Amendment right of access to "all sources of information within government control."[136]

Two years later, in *Richmond Newspapers v. Virginia*, the Court did recognize a First Amendment right to access criminal trials.[137] But it made clear that the privilege extended to the public as a whole rather than to the press exclusively.[138] Moreover, the lower courts have largely limited the privilege to the judicial branch.[139] With a few exceptions for trial-like administrative proceedings like immigration hearings, the lower federal courts have not extended the right of access to the executive or legislative branches.[140]

Many states, in contrast, have extended constitutional access rights more broadly. A handful have enshrined rights of information access directly into the state constitutional text. At least six state constitutions contain explicit "right-to-know" provisions, which impose constitutional obligations on governments to provide public access to government records and proceedings.[141] These rights are often articulated in expansive terms. Louisiana's constitution, for example, provides that "no person shall be denied the right to observe the deliberations of public bodies and examine public documents, except in cases established by law."[142] These state right-to-know provisions can be used by courts to expand access rights beyond the federal minimum. Courts in these states often reference these constitutional provisions to

[133] *See, e.g.*, Pell v. Procunier, 417 U.S. 817, 822, 834 (1974); Saxbe v. Washington Post Co., 417 U.S. 843, 850 (1974); Houchins v. KQED, Inc., 438 U.S. 1, 7–8, (1978).
[134] *KQED*, 438 U.S. at 14.
[135] *Id.* at 3–5.
[136] *Id.* at 9.
[137] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980).
[138] *Id.* at 575.
[139] *See* Rep. Comm. for Freedom of the Press, The Roots of Access Rights, https://www.rcfp.org/open-court-sections/a-the-roots-of-access-rights/ (describing the evolution of constitutional right of access law in the various circuits).
[140] *See, e.g.*, *See* Christopher Dunn, *Column: Rediscovering the First Amendment Right of Access*, N.Y.C.L. Union (Aug. 4, 2011), https://www.nyclu.org/en/publications/column-rediscovering-first-amendment-right-access-new-york-law-journal (describing a handful of court decisions extending constitutional access rights to administrative proceedings like immigration hearings).
[141] Cal. Const. art. I, § 3; Fla. Const. art. I, § 24; La. Const. art. XII, § 3; Mont. Const. art. II, § 9; N.H. Const. pt. 1, art. 8; N.D. Const. art. XI, § 6. Another two states contain more narrow provisions providing access to state financial records and expenditures. *See* Ill. Const. art. VIII, § 1; Mich. Const. art. IX, § 23.
[142] La. Const. Ann. art. XII, § 3.

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underscore the sweeping nature of the transparency obligations imposed on state and local governments.[143]

Some state constitutions contain broader legislative transparency requirements as well. For example, Article I, § 5 of the U.S. Constitution provides that legislators may close proceedings when "in their Judgment" the discussion "require[s] Secrecy."[144] But equivalent state provisions do not always permit state legislatures this same discretion to close legislative doors.[145] Further, some state legislative access provisions expressly contemplate the unique position of the press. Alabama's constitution, for example, provides that under certain conditions the legislative houses may exclude the public from its proceedings, but they may not exclude "representatives of the press."[146]

There are other salient distinctions between federal and state constitutional access provisions as well. While the federal constitutional right of access is derived from the text of the First Amendment,[147] for example, roughly half of state constitutions contain express "open courts" provisions.[148] State courts, moreover, have often interpreted these requirements broadly. For instance, in Washington, the courts have held that the constitutional open-courts provision requires judges to proceed through a rigorous five-step analysis before they may exclude the public from access to certain court proceedings.[149]

State rights of access may also reach a greater set of government actors. The First Amendment right of access is limited to the judicial branch.[150] But many state constitutional access provisions extend further. At times this is explicit. For example, Missouri's constitution expressly states that legislative records are public records.[151] Voters made the change in 2018 after the legislature tried to exempt itself from the state public records law.[152] And Kentucky's constitution provides that a governor who grants pardons or commutes sentences must make the supporting records available

[143] *See, e.g.*, Herrmann v. Superior Ct. of Imperial Cnty., 75 Cal. App. 5th 535, 543, 290 Cal. Rptr. 3d 597, 603 (2022); Bd. of Trustees, Jacksonville Police & Fire Pension Fund v. Lee, 189 So. 3d 120, 125 (Fla. 2016).

[144] U.S. Const. art. I, § 5.

[145] *See* Idaho Const. art. III, § 12; Mo. Const. art. III, § 19; Nev. Const. art. IV, § 15; Or. Const. art. IV, § 14; Tex. Const. art. III, § 16.

[146] Ala. Const. § 57.

[147] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980).

[148] App'x B, State Constitutional Open Government Provisions, https://knightcolumbia.org/documents/1aod4m2wyq. These clauses, too, are generally framed in broad terms, providing that courts shall be open to "every person." *Id.*

[149] Seattle Times Co. v. Ishikawa, 97 Wash. 2d 30, 37 (1982).

[150] *See* discussion *supra* notes 140–141 and accompanying text.

[151] Mo. Const. art. III, § 19.

[152] *See* Jason Hancock, *Bill Carving Some Legislative Records out of Missouri Sunshine Law Advances in Senate*, Missouri Independent (Feb. 27, 2023), https://missouriindependent.com/2023/02/27/bill-carving-some-legislative-records-out-of-missouri-sunshine-law-advances-in-senate/.

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to the public.[153] Such provisions make clear that constitutional access requirements extend beyond the judicial branch.

Finally, implicit state constitutional rights of access – those that derive from explicit press and speech provisions – may also sweep more broadly than the federal constitutional right of access. For example, the Utah Supreme Court has held its state constitution requires additional factual showings before a court may order the press not to disseminate information about a trial, beyond what the First Amendment requires.[154] Taken together, these various state-level constitutional rights of information access can have important implications for the press's ability to engage in newsgathering efforts.

13.1.3.3 Prior Restraints

Under the First Amendment, prior restraints against publication are presumptively unconstitutional. But they are not prohibited outright. In *Near v. Minnesota*, the U.S. Supreme Court struck down a prior restraint on the publication of a magazine.[155] But it recognized there may be times where such restrictions were permissible, such as when protecting "the number and location of troops" in wartime.[156] Decades later, the Court reaffirmed its holding in the Pentagon Papers case,[157] holding once again that prior restraints are constitutionally disfavored but not categorically prohibited.[158]

A handful of states have taken a different approach. They have interpreted state constitutional free expression provisions to create an absolute prohibition against prior restraints. As early as 1805, for example, the Pennsylvania Supreme Court read the state's press provision to mean that citizens were free to "publish as [they] please in the first instance without control."[159] Later that century, the California Supreme Court held that the state constitution's speech and press provision forbids all prior government restraints on speech.[160] It reasoned that the First Amendment and the state constitution contained very different textual provisions. The state constitutional provision provided that "every citizen may freely speak, write, and publish his sentiments on all subjects." And the state supreme court concluded that the plain

[153] Ky. Const. § 77.
[154] KUTV, Inc. v. Wilkinson, 686 P.2d 456, 461–62 (Utah 1984) ("In addition, for purposes of our own constitutional direction that "[n]o law shall be passed to abridge or restrain the freedom of speech or of the press," Utah Const. art. I, § 15, we add a fourth test pertaining to during-trial publicity.")
[155] 283 U.S. 697, 715 (1931).
[156] *Id.* at 716.
[157] New York Times Co. v. United States, 403 U.S. 713, 714 (1971).
[158] *Id.*
[159] Respublica v. Dennie, 1805 WL 911, at *3 (Pa. 1805).
[160] Dailey v. Superior Ct. of City & Cnty. of San Francisco, 112 Cal. 94, 97 (1896).

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language of this provision made clear that a citizen "shall have no censor over him to whom he must apply for permission."[161]

Other states followed suit, rooting their decisions in textual distinctions between the federal and state speech and press provisions. Arizona's constitution, for example, provides that "every person may freely speak, write, and publish on all subjects."[162] The state supreme court has read this language to mean that "there can be no censor appointed to whom the press must apply for prior permission to publish."[163] Similarly, the Washington Supreme Court has read its free expression provision to "rule out prior restraints under *any* circumstances."[164] And the Missouri Supreme Court has read its constitutional protections for speech and the press to operate as "an affirmative prescription against any exception."[165]

These decisions do not rule out the possibility of post-publication liability. To the contrary, most state constitutions provide that individuals are "responsible for the abuse" of speech and press rights.[166] But in terms of ex ante restraints on speech, some state supreme courts have held that their state constitutional free speech and press provisions sweep more broadly than the First Amendment.

13.1.3.4 Defamation

Some state constitutions also extend broader protections against defamation liability than those provided by the First Amendment. In *The New York Times Co. v. Sullivan*, the Supreme Court held that the First Amendment required government officials to show "actual malice," or either knowledge of the truth or reckless disregard for the truth, in order to prevail in a defamation suit.[167] The Court reasoned that aggressive libel lawsuits by government officials would have the effect of chilling public speech and criticism.[168] A decade later in *Gertz v. Welch*, the Court extended the requirement to public figures more broadly.[169]

In the decades since, *Sullivan* and its progeny have offered broad protections for the media to aggressively critique the government. They have also made it difficult for many defamation plaintiffs to prevail. The lower courts have expanded the definition of "public figure" to encompass many private figures unwittingly dragged

[161] *Id.*
[162] Ariz. Const. art. II, § 6.
[163] Phoenix Newspapers, Inc. v. Superior Ct. In & For Maricopa Cnty., 101 Ariz. 257, 259 (1966).
[164] *See* State v. Coe, 101 Wash. 2d 364, 374 (1984).
[165] Marx & Haas Jeans Clothing Co. v. Watson, 168 Mo. 133, 67 S.W. 391, 393 (1902). *See also* Lindsay & Co. v. Montana Fed'n of Lab., 37 Mont. 264, 96 P. 127, 131 (1908) (reading state constitution to prohibit all prior restraints).
[166] *See* discussion *supra* notes 77–78 and accompanying text.
[167] New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964).
[168] *Id.* at 282.
[169] 418 U.S. 323, 344–47 (1974).

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into a public controversy.[170] At the same time, the media landscape has also changed in important ways in recent years.[171] Some critics have pointed to these legal and societal changes to argue that *Sullivan* should be overturned. Most notably, Justices Clarence Thomas and Neil Gorsuch have attacked *Sullivan* on both historical and empirical grounds, arguing that the press no longer deserves such insulation against defamation liability.[172]

There is no indication that *Sullivan* is at imminent risk of being reversed.[173] But if it were to be overturned, state constitutional defamation law would take on new salience. Any loss of federal constitutional rights would put new pressure on the equivalent state constitutional provisions.[174] State constitutional speech and press provisions could act as a partial safety net against the threat of federal constitutional retrenchment of First Amendment rights.

Many state courts would likely retain actual malice requirements under their state constitutions, even if *Sullivan* were to be cast aside. Actual malice requirements originated in the states.[175] Although these early state court decisions were mostly rooted in common law rather than in state constitutional protections, these decisions predate *Sullivan* and would likely survive its repeal.[176] Further, state supreme courts have not had reason to weigh in on whether their state constitutions independently require actual malice. The First Amendment sets the constitutional floor, and any equivalent state law defamation protections would be redundant.[177] But the repeal of *Sullivan* would force state courts to confront this question. And it is likely that many would find that actual malice requirements persisted under state constitutional law, especially in states with a long tradition of extending broad speech and press protections.[178]

This is not the only way that state constitutions implicate defamation liability. State courts have also interpreted state free expression provisions to provide broader protections against defamation suits. One example is state constitutional protection

[170] *See* Berisha v. Lawson, 141 S.Ct. 2424, 2425 (2021) (Thomas, J., dissenting from denial of certiorari) (critiquing this line of cases in part for extending the definition of public figure too far).

[171] *See* Penelope Muse Abernathy, The State of Local News (2023), https://localnewsinitiative.northwestern.edu/projects/state-of-local-news/2023/report/.

[172] Berisha v. Lawson, 141 S.Ct. 2424, 2425–30 (2021) (Gorsuch, J., dissenting).

[173] *See id.* (garnering only two votes); Counterman v. Colorado, 600 U.S. 66, 143 S.Ct. 2106, 2109 (2023)(affirming *Sullivan*).

[174] *See* discussion *supra* notes 29–31 and accompanying text.

[175] *See* New York Times Co. v. Sullivan, 376 U.S. 254, 280 n.20 (1964) (listing these decisions).

[176] *See id.* Further, some of these state court decisions did address the state press and speech clauses in the context of actual malice. *See, e.g.*, Coleman v. MacLennan, 98 P. 281, 284 (Kan. 1908).

[177] *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[178] *See, e.g.*, Beach v. Shanley, 62 N.Y.2d 241, 255, 465 N.E.2d 304 (1984) ("This State has long provided one of the most hospitable climates for the free exchange of ideas.") (Wachtler, J., concurring).

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for statements of opinion. Until the 1980s, the federal lower courts offered extensive protections under the First Amendment.[179] The leading case was a U.S. Court of Appeals for the District of Columbia Circuit opinion that held that the First Amendment provided absolute immunity from defamation liability for opinion-based claims.[180] The D.C. Circuit case also articulated a four-part test for determining whether a statement qualified for this opinion-based protection.[181] Many other federal circuits and state supreme courts adopted this approach.

But the Supreme Court overruled the D.C. Circuit opinion in 1990, in *Milkovich v. Lorain Journal*.[182] It articulated a narrower conception of opinion protection instead, one that turned on whether a statement was provably false.[183] The decision sowed confusion in the lower courts.[184] And a number of state supreme courts eschewed this new approach, adhering instead to the more press-protective D.C. Circuit standard when it came to state constitutional defamation protections.[185]

Notably, these state courts often rooted these decisions in textual and historical features unique to their state. New York's highest court, for example, reasoned that the state constitution's free expression provision articulates protection in "strong affirmative terms," unlike the First Amendment's negative prohibition against government interference.[186] The state court also described the state's long history of press protection and New York City's role as the "cultural center for the Nation."[187] Such textual, historical, and cultural features distinct to the state, the court reasoned, weighed in favor of broader state constitutional protection against defamation liability.[188]

Other state courts adopted similar reasoning. They held that their state constitutions, too, provided more robust protection against defamation liability. They likewise rooted these decisions in their states' unique history and distinct constitutional texts. The Rhode Island Supreme Court, for example, emphasized that its colony had been founded by religious "dissenters" and that the "free flow of opinion and debate" had been especially "vital" to the state.[189] And the Utah Supreme Court cited the state's tradition of aggressive editorial dissent between newspapers representing Mormon and non-Mormon interests when justifying

[179] Olman v. Evans, 750 F.2d 970 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985).
[180] *Id.* at 971.
[181] *Id.* at 979–84.
[182] Milkovich v. Lorain J. Co., 497 U.S. 1 (1990).
[183] *Id.* at 19–20.
[184] *See* Kraus, *supra* note 44, at 94.
[185] *See, e.g.*, Immuno AG. v. Moor-Jankowski, 77 N.Y.2d 235, 261 (1991); West v. Thomson Newspapers, 872 P.2d 999, 1014 (Utah 1994); Dow v. New Haven Indep., Inc., 41 Conn. Supp. 31, 44 (Ct. Super. Ct. 1987).
[186] Immuno AG. v. Moor-Jankowski, 77 N.Y.2d 235, 249 (1991).
[187] *Id.*
[188] *Id.* at 249–52.
[189] Beattie v. Fleet Nat. Bank, 746 A.2d 717, 724 (R.I. 2000).

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recognizing broader defamation protections for statements of opinion than the First Amendment provided.[190]

13.2 THE FUTURE OF CONSTITUTIONAL PRESS PROTECTIONS

State constitutions already operate as a source of independent protection for the press. Press advocates could do more to capitalize on these constitutional provisions. They could utilize state constitutions to extend new or expanded protections for the press. They could also mine the experience of the states and the history of state constitutional experimentation to bolster arguments for expanded federal press protections.

13.2.1 *The Future of State Constitutional Press Protections*

Textual and historical distinctions between federal and state constitutions have sometimes yielded broad protections for the press, beyond what the First Amendment provides. Further, certain states have also developed strong traditions of press protection, ones rooted in the distinct cultural or political features of the state.[191] But these efforts could be expanded. Press advocates could be more aggressive in raising state constitutional claims.[192] State courts could interpret these textual and historical distinctions to offer broader constitutional protections for the press. And voters could amend state constitutions in response to new or growing threats to journalism.[193]

When it comes to state constitutional texts, there is significant overlap in the fifty state constitutional free expression provisions.[194] States that have already offered broader protections can serve as a roadmap for other states to follow. Decisions expanding press protections in one state can be utilized when advocating for similar recognition in another, especially when the textual language is closely aligned. For example, New York's supreme court invoked the state's "strong affirmative" right to "speak, write, and publish on all subjects" when extending strong protections for statements of opinion.[195] Thirty-nine other state constitutions contain this same

[190] West v. Thomson Newspapers, 872 P.2d 999, 1014 (Utah 1994).
[191] *See, e.g.*, Beach v. Shanley, 62 N.Y.2d 241, 255, 465 N.E.2d 304 (1984) ("This State has long provided one of the most hospitable climates for the free exchange of ideas.") (Wachtler, J., concurring).
[192] *See, e.g.*, Robert I. Berdon, *Freedom of the Press and the Connecticut Constitution*, 26 CONN. L. REV. 659, 669 (1994) (describing the problem of litigants not raising possible state constitutional press claims).
[193] *See* Jessica Bulman-Pozen & Miriam Seifter, *The Right to Amend State Constitutions*, 133 YALE L.J. FORUM 191, 195–201 (2023) (describing these amendment rights).
[194] *See* App'x A, State Constitutional Free Expression Provisions, *supra* note 8.
[195] Immuno AG. v. Moor-Jankowski, 77 N.Y.2d 235, 249 (1991).

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provision, articulated in the same affirmative terms.[196] Yet only a few have followed suit. Press advocates in those other states could look to New York's decision for guidance when raising similar claims.[197]

Press advocates could also raise novel claims for protection, ones rooted in the unique textual or structural features of the state constitutions or the state's distinctive histories and traditions. They could better capitalize on existing right-to-know protections, for example.[198] While state supreme courts often gesture to these provisions when discussing the state's strong support for open government, they rarely interpret these clauses to offer meaningful expansions of the state-level rights of access. Press advocates could take up this cause. They could argue, for instance, that the constitutional right of access reaches government actors or entities not covered by public records statutes.

Press advocates could also utilize textual provisions that clearly assign the press a structural democratic role. They could draw upon constitutional language that emphasizes the role of the press in overseeing government – for example, provisions that stipulate the "printing presses shall be free to everyone who undertakes to examine the proceedings of the legislature or any branch of government."[199] They could also invoke constitutional language that makes explicit the link between the suppression of the press and autocratic government, such as those declaring that freedom of the press "can never be restrained except by despotic governments."[200] Such textual provisions make a powerful constitutional statement about the democratic role and responsibility of the press.

Press advocates could also lean more heavily on the affirmative nature of state press protections.[201] These affirmative provisions could be cited to support a set of expanded positive rights and obligations that flow from state press and speech protections. They could be used to argue in favor of more affirmative and active government interventions – ones that would proactively ensure a vibrant and healthy information ecosystem. These could include, for example, expanded newsgathering protections. A more radical interpretation of these positive rights provisions might be that they impose affirmative obligations on the government to support local news institutions – for example, through tax breaks or subsidies.[202] The collapse of the local press has lent new urgency to such projects.

[196] *See* App'x A, State Constitutional Free Expression Provisions, *supra* note 8.
[197] Kraus, *supra* note 44, at 95 (advancing this argument in the context of Maryland's free expression provision).
[198] *See supra* note 142 and accompanying text.
[199] *See, e.g.*, Ky. Const. § 8; Pa. Const. art. I, § 7; Tenn. Const. art. I, § 19.
[200] Va. Const. art. I, § 12.
[201] *See* discussion *supra* notes 71–73 and accompanying text.
[202] *See* Christina Koningisor and Jacob Noti-Victor, *Innovation Policy and the Press*, *in* The Future of Press Freedom: Democracy, Law, and the News in Changing Times 437 (RonNell Andersen Jones & Sonja R. West eds., 2025).

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State constitutional structural design could also be used to support expanded press protections. For instance, Rhode Island's constitution enshrines protection for speech and the press in separate constitutional provisions.[203] The U.S. Supreme Court has interpreted these federal speech and press rights to overlap, leaving the Press Clause with little independent meaning.[204] Yet in the state constitutional context, such structural separation cuts against developing this same type of textual redundancy between press and speech rights.[205] Press advocates could better capitalize upon these types of distinctions.

Relatedly, variations in state constitutional drafting histories could also offer opportunities for press advocates. Many of the debates of the earliest state constitutions have been preserved.[206] Further, these original constitutions have all been amended or replaced, often repeatedly.[207] This introduces a range of methodological questions and complexities when it comes to state constitutional interpretation.[208] But it also means that there is a larger set of state-level drafting materials to draw upon.[209] These later state constitutions often have more detailed and better-preserved records of the drafting debates.[210] They, too, can be mined to support broader state-level press protections.

Finally, state constitutional processes can be used to expand protections for the press. State constitutions are more easily amended than the U.S. Constitution.[211] This permits voters to respond to new or emerging threats to the press through ballot initiatives and amendments. In this way, states' bill of rights provisions serve a distinct political function from the federal Bill of Rights. These state constitutional processes allow state voters to respond more quickly to "particular government failures."[212]

Consider the example of California's constitutional reporter's privilege shield. Voters responded to specific threats to the press by elevating statutory reporter's privilege protections to constitutional status.[213] Other states could follow suit. They could respond to new or emerging threats to the press through ballot initiatives and

[203] R.I. Const. art. I, § 20 (freedom of the press); R.I. Const. art. I, § 21 (freedom of speech).
[204] *See* West, *supra* note 3, at 1028.
[205] *See also* Ark. Const. art. II, § 6 (never mentioning speech protections at all).
[206] *See* Marshfield, *supra* note 33, at 886–93 (describing these debates).
[207] *See* The Book of the States, General Information on State Constitutions (as of Jan. 1, 2022), https://bookofthestates.org/tables/general-information-on-state-constitutions-as-of-january-1-2022/.
[208] *See* discussion *supra* notes 29–32 and accompanying text.
[209] *See* Marshfield, *supra* note 33, at 876–77 (noting that there have been 233 state constitutional conventions between 1776 and 2020, and drafting records exist for 114 of them).
[210] *See id.*
[211] *See* Dinan, *supra* note 84 (comparing the 27 amendments of the U.S. Constitution to the more than 7,000 amendments of state constitutions).
[212] *See* Marshfield, *supra* note 33, at 860.
[213] *See supra* notes 122–127 and accompanying text.

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amendments. They could amend state constitutions to enshrine all manner of press protections into the constitutional text – not just confidential sources but also expanded protections against defamation liability, prior restraints, government surveillance of journalists, and more. To the extent that existing statutory press provisions seem imperiled, voters could constitutionalize them, making them more difficult to ignore or circumvent in the future.

13.2.2 *The Future of Federal Constitutional Press Protections*

State-level constitutional experimentation might also hold important lessons for ongoing debates about federal protections for the press. This is not universally true. Different political, historical, and legal considerations are in play at the federal versus state levels. Some state-level protections – for example, absolute prohibitions against prior restraints – might be ill-suited to the federal context, given the unique national security and military considerations at stake at the federal level.[214] Moreover, there are important textual distinctions between federal and state press and speech provisions that limit the extent to which state constitutional interpretations can be adopted wholesale into the federal context.

Yet some state-level innovations might still be helpful in informing federal press-advocacy efforts. Specifically, the experience of the states could be mined to refute some of the Court's policy-based justifications for declining special First Amendment protections for the press. The Supreme Court has repeatedly declined to engage in the task of defining who qualifies for press-specific protections, for example. In *Branzburg v. Hayes*, the Court wrote: "Sooner or later, it would be necessary to define those categories of newsmen who qualified for the privilege," a task made complicated because 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."[215] In other words, the definitional questions are simply too difficult for the courts to untangle.

The experience of the states undermines this claim. Forty-nine states extend some form of reporter's privilege to journalists through a mix of common law, constitutional, and statutory protections.[216] This has required defining who qualifies for protection. The states have taken various approaches – some functional, others more formal.[217] But overall, the experience of the states suggests that this definitional concern may be overblown. The states have managed the task largely without controversy, often finding that the person asserting the privilege is so clearly a

[214] *See, e.g.*, Near v. State of Minnesota ex rel. Olson, 283 U.S. 697, 716 (1931).
[215] Branzburg v. Hayes, 408 U.S. 665, 704–05 (1972).
[216] *See* Koningisor, *supra* note 18, at 1202.
[217] *See* West, *supra* note 3, at 1063–68 (reviewing these various legislative approaches).

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journalist that they don't need to define the outer boundaries of its scope. As Professor Sonja West has argued, the experience of the states shows that "defining 'the press' can be done."[218]

We can also imagine how state experimentation might hold additional lessons for federal Press Clause constructions in the future. The Supreme Court has been hesitant to endow the federal Press Clause with any independent meaning. State constitutional examples can be used to illuminate new and different paths forward. These contrary experiences and histories of the states can be cited when urging the Court to revisit its holdings in such cases as *Branzburg* and *Milkovich*, for example.[219] State constitutional experimentation can be used to offer the Court a concrete set of examples for alternative options. And they can be used to help imagine a more expansive First Amendment – one that supports a more robust set of press rights.

13.3 CONCLUSION

The Roberts Court has curtailed the scope of various constitutional rights provisions in recent years. In response, scholars and activists have increasingly looked to state constitutions as an alternative source of protection. Across substantive areas like abortion and climate change, state courts have interpreted state constitutions to provide more expansive rights than the U.S. Constitution.[220] This chapter argues that members of the press should look to state constitutions as an alternative source of legal protection as well.

The U.S. Supreme Court has consistently declined to interpret the First Amendment in ways that extend special privileges to the press. But state constitutions can be used to fill in these federal constitutional gaps, operating as a powerful and independent source of protection for the media. Some states have already done so. They have extended greater protection under the state constitution when it comes to prohibitions against prior restraint, reporter's privilege shields, rights of information access, and protections against defamation liability.[221] These decisions are rooted in textual, structural, and historical distinctions between the federal and state constitutions, as well as differences in the federal and state political experiences.[222]

But more can be done. Press advocates could better capitalize on these distinctions going forward. They could look to the comparatively stronger texts of state constitutions to support stronger press rights. They could draw upon structural

[218] *Id.* at 1063.
[219] *See* discussion *supra* Section 13.1.3.
[220] *See supra* notes 43–44 and accompanying text.
[221] *See supra* Section 13.1.3.
[222] *Id.*

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distinctions in state constitutions to avoid interpreting state-level press clauses to be wholly duplicative of state speech clauses. They could amend state constitutions in response to new and growing threats to the press. And they could hold up the examples of state constitutional experimentation to help imagine a new and more expansive First Amendment. These fifty "other press clauses" could step in where the federal Press Clause has failed.

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