Freedom of the Press: An Emerging Privilege

Martin J. Rooney
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MARTIN J. ROONEY*

I. INTRODUCTION

The first amendment states that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."¹ In recent United States Supreme Court cases concerning the first amendment, a privilege appears to be emerging that provides the press with rights distinguishable from the freedom of speech rights that citizens, the nonpress, possess. Although this "new" privilege has not yet been fully explored by the Court, a review of current legal literature reveals considerable debate concerning not only the existence of the privilege, but also its scope and meaning. After briefly reviewing the history of the speech and press clauses, this author will examine afresh the evidence for and against the existence of this "new" first amendment privilege.

Historically, under the first amendment neutrality doctrine, the Supreme Court has upheld the right of the press to almost complete autonomy from governmental restriction.² The absence of special press rights vis-a-vis the government is a corollary to government neutrality. However, the neutrality doctrine has been, and arguably should be, relaxed in some cases to accommodate the special roles that the government and the press play in our society. Strict application of the neutrality doctrine has been waived, for example, in the area of prior restraints, where it is widely acknowledged that the government can restrain the media from publishing even truthful information to insure the proper functioning of an

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1. U.S. CONST. amend. I.
essential governmental role, such as national defense. Conversely, the press should be allowed, in some limited circumstances, to go beyond the constraints imposed by the neutrality doctrine in order to protect its special role in society.

II. History

One certainty emerges from a review of the history of both the speech and press clauses: the true intent of the first amendment's authors is essentially unknown. "The precise motives of those who drafted the speech and press clauses of the first amendment are unlikely to be discovered now, if

3. See, e.g., Near v. Minnesota, 283 U.S. 697, 716 (1931) (protection from previous restraint is not absolutely unlimited); Schenck v. United States, 249 U.S. 47, 52 (1919) ("[t]he question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent"); United States v. Progressive, Inc., 467 F. Supp. 990 (W.D. Wis.) (preliminary injunction issued restraining publisher from printing allegedly restrictive data concerning the H-Bomb because publication would violate the Atomic Energy Act and endanger national security), appeal dismissed, 610 F.2d 819 (7th Cir. 1979).

4. While different historians and commentators have reached various conclusions about the meaning of the first amendment, there is broad agreement that the history of the amendment reveals little of the framers' intent. Dean Levy, in his extensive review of freedom of speech and press in early American history, demonstrates this fact at several points in his book entitled _Legacy of Suppression_. He notes:

[I]t is astonishing to discover that the debate on the bill of rights, during the ratification controversy, was conducted at a level of abstraction so vague as to convey the impression that Americans of 1787-1788 had only the most nebulous conception of the meaning of the particular rights they sought to insure; indeed many of the principal advocates of a bill of rights had only a nebulous idea of what it ought to contain. Freedom of the press was everywhere a grand topic for declamation, but the insistent demand for its protection on parchment was not accompanied by a reasoned analysis of what it meant, how far it extended, and under what circumstances it might be limited . . . .


indeed they were ever ascertainable.”5 Indeed, “[t]he truth is, I think, that the framers had no very clear idea as to what they meant . . . .”6 In his ground breaking address to the Yale Law School Sesquicentennial Convocation,7 Justice Potter Stewart proposed the theory that both the history of the Revolution and our relations with Britain revealed clearly the unique role of the institutional press in the nascent American colonies, and the need to protect it. “This formidable check on official power was what the British Crown had feared—and what the American Founders decided to risk.”8 Justice Stewart found additional support for his view in the wording of the first amendment itself:

This basic understanding is essential, I think, to avoid an elementary error of constitutional law. It is tempting to suggest that freedom of the press means only that newspaper publishers are guaranteed freedom of expression. They are guaranteed that freedom, to be sure, but so are we all because of the Free Speech Clause. If the Free Press guarantee meant no more than freedom of expression, it would be a constitutional redundancy. Between 1776 and the drafting of our Constitution, many of the state constitutions contained clauses protecting freedom of the press while at the same time recognizing no general freedom of speech. By including both guarantees in the First Amendment, the Founders quite clearly recognized the distinction between the two.9


Most recently, the Supreme Court came to the same conclusion that Dean Levy and other commentators have reached. Writing for the majority in Minneapolis Star & Tribune v. Minnesota Comm'r of Revenue, 103 S. Ct. 1365 (1983), Justice O'Connor stated:

In general, though, we only have limited evidence of exactly how the Framers intended the First Amendment to apply. There are no recorded debates in the Senate or in the States, and the discussion in the House of Representatives was couched in general terms, perhaps in response to Madison's suggestion that the representatives not stray from simple acknowledged principles.

Id. at 1371 n.6.

5. Lewis, supra note 4, at 599.
8. Id. at 634.
9. Id. at 633-34 (emphasis in original). Additionally, the wording of the original first amendment, as drafted by Madison, also contained a clear distinction between
Although this analysis has support in case law, many commentators and historians read the history of the speech and press clauses differently. According to Professor Levy, a leading first amendment scholar, a correct reading of the amendment would reveal that freedom of speech and freedom of the press were originally thought of as interchangeable. Several other commentators concur with his view that the framers intended to create one unified freedom, the freedom of expression, encompassing both freedom of speech and freedom of the press. Chief Justice Burger, a proponent of this view, believes that the press freedom "merit[s] special mention simply because it [has] been more often the object of official restraints." However, as another constitutional scholar points out, "the original understanding of the Founders is not necessarily controlling. It is what they said, and not necessarily what they meant, that in the last analysis may be determinative. This is particularly true when constitutional language is subjected to tensions not anticipated when the text was written."

III. THE EXTENT OF THE PRIVILEGE

The Supreme Court has not explicitly addressed the question of whether a separate, distinguishable right of freedom of the press exists apart from freedom of speech. The
Court however, has explored the rights of the press in several other contexts and has implicitly, though vaguely, outlined the parameters of the press privilege. This author will analyze these developments in six areas: (a) libel, (b) access by the press, (c) access to the press, (d) protection of confidential sources, (e) prior restraint of the news media and (f) taxation of the press.

A. Libel

Prior to Gertz v. Robert Welch, Inc., the Supreme Court utilized an unwieldy and impractical test to determine whether certain speech constituted libel. The pre-Gertz standard, advanced in New York Times Co. v. Sullivan, held that defamatory statements concerning public officials were privileged unless such statements were made with actual malice, that is, with knowledge of their falsity or with reckless disregard for their truth. The application of this standard was expanded in Rosenbloom v. Metromedia, Inc. to allow first amendment immunity not only for statements about public officials, but also for statements concerning matters of "public or general concern." In Gertz the Court retreated from the far reaching implications of the Rosen-
bloom decision\textsuperscript{21} and attempted to reconcile the common-law tort of defamation with first amendment principles.\textsuperscript{22} The issue in \textit{Gertz} was the extent of press liability for defamatory statements about private individuals.\textsuperscript{23} The Court decided that “[a]llowing the media to avoid liability only by proving the truth of all injurious statements does not accord adequate protection to First Amendment liberties.”\textsuperscript{24} The Court also asserted that as long as they “do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.”\textsuperscript{25} This holding, according to Justice Powell’s opinion, “shields the \textit{press and broadcast media} from the rigors of strict liability for defamation.”\textsuperscript{26}

\textit{Gertz} is characteristic of the Court’s increasing willingness to depart from a unitary free speech and press right.\textsuperscript{27} In its decision, the Court abandoned its traditional free speech analysis, which had focused on “the content of any given expression in light of [protection of the free exchange of ideas], on the nexus between the subject matter expressed and the function of the speech guarantee in our scheme of self-government, and on the character of the purported evil presented.”\textsuperscript{28} In place of the traditional analysis, the Court emphasized “institutional considerations unrelated to particularized content.”\textsuperscript{29}

Free press, not free speech, was the focus of the \textit{Gertz} opinion. “The basic principles of independence of the press from government and separateness of the press clause from the speech clause are implicit in the Court’s decision . . . .”\textsuperscript{30} The Court considered the facts surrounding publi-

\begin{itemize}
\item \textsuperscript{21} See \textit{Gertz}, 418 U.S. at 339-48.
\item \textsuperscript{22} See \textit{id.} at 349.
\item \textsuperscript{23} Nimmer, \textit{supra} note 12, at 648.
\item \textsuperscript{24} \textit{Gertz}, 418 U.S. at 340 (emphasis added).
\item \textsuperscript{25} \textit{id.} at 347 (emphasis added).
\item \textsuperscript{26} \textit{id.} at 348 (emphasis added).
\item \textsuperscript{27} Bezanson, \textit{supra} note 2, at 748.
\item \textsuperscript{28} \textit{id.} at 748-49 (footnote omitted).
\item \textsuperscript{29} \textit{id.} at 749.
\item \textsuperscript{30} \textit{id.}
cation, that is, the institutional processes, not the content, when it protected press rights.\textsuperscript{31}

\textbf{B. Access by the Press}

Although the Supreme Court has generally held that the press has no basic right to gather the news,\textsuperscript{32} the Court has stated that "news gathering is not without its First Amendment protections."\textsuperscript{33} This section will examine two areas which highlight these conflicting tensions: (1) access to prisons to gather news, and, more briefly, (2) access to the courts to report various proceedings.

The neutrality doctrine, that is, the autonomy of the press from government restriction or privilege, was initially established in prison visitation cases. In \textit{Pell v. Procunier},\textsuperscript{34} \textit{Saxbe v. Washington Post Co.}\textsuperscript{35} and \textit{Houchins v. KQED, Inc.},\textsuperscript{36} the Court denied the press expanded access to prison facilities for radio and television interviews. In \textit{Pell} and \textit{Saxbe} the Court held that the state's compelling interest in the internal security of prisons outweighed the speech rights of the inmates.\textsuperscript{37} Noting that other methods of communication in addition to radio and television interviews were open to the inmates, the \textit{Pell} Court concluded that the balance

\textsuperscript{31} However, one commentator did not feel that the Court's concentration on the processes of the press was significant:

[O]ne is left with the uneasy feeling that the Court's application of the new doctrine to what may be regarded as the freedom of the press arena, and its unarticulated exclusion of other "speech," may have been inadvertent, and that, further, the inadvertence was due precisely to the failure of the Court to recognize that the freedoms of speech and press are not necessarily coextensive.

\textsuperscript{32} See, e.g., \textit{Branzburg v. Hayes}, 408 U.S. 665, 684 (1972) (first amendment does not guarantee the press a constitutional right of special access to information not available to the public generally, for example, grand jury proceedings, Supreme Court conferences, the scenes of crime or disaster or trials); \textit{New York Times v. United States}, 403 U.S. 713, 728-30 (1971) (Stewart, J., concurring) ("the successful conduct of international diplomacy and the maintenance of an effective national defense require both confidentiality and secrecy"); \textit{Zemel v. Rusk}, 381 U.S. 1, 16-17 (1965) (travel ban on reporter's trip to Cuba is an inhibition of action, not an inhibition on first amendment rights).


\textsuperscript{34} 417 U.S. 817 (1974).

\textsuperscript{35} 417 U.S. 843 (1974).

\textsuperscript{36} 438 U.S. 1 (1978).

\textsuperscript{37} \textit{Pell}, 417 U.S. at 823; \textit{Saxbe}, 417 U.S. at 848.
struck did not infringe on the inmate's free speech right.38 Regarding the press, the Court found that no special right of access exists under the free press clause. Justice Stewart, writing for the majority, stated:

The First and Fourteenth Amendments bar government from interfering in any way with a free press. The Constitution does not, however, require government to accord the press special access to information not shared by members of the public generally. It is one thing to say that a journalist is free to seek out sources of information not available to members of the general public, that he is entitled to some constitutional protection of the confidentiality of such sources, . . . and that government cannot restrain the publication of news emanating from such sources . . . . It is quite another thing to suggest that the Constitution imposes upon government the affirmative duty to make available to journalists sources of information not available to members of the public generally.39

Furthermore, in his majority opinion in Houchins. Chief Justice Burger reasoned: "Neither the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control."40

These cases were among the first 41 to advance the doctrine of government neutrality towards the press. The doctrine, as applied in the prison visitation cases, postulates that:

By giving special visitation rights to the press that are not equally available to the general public, the government would be promoting dependence of the press on the government, which would be destructive of the very purpose of the press clause. The press is better off in the long run left to its own devices, without substantial restraint on its independent investigative or reporting activities.42

38. Pell, 417 U.S. at 830-31; see also Nimmer, supra note 12, at 642.
39. Pell, 417 U.S. at 834 (footnote and citation omitted).
40. Houchins, 438 U.S. at 15.
42. Bezanson, supra note 2, at 755; see also Minneapolis Star & Tribune v. Minnesota Comm'r of Revenue, 103 S. Ct. 1365, 1372 (1983). For further discussion of Minneapolis Star, see infra text accompanying notes 103-19.
Although the press possesses a somewhat greater right of access to the prisoners than the public under Pell and Saxbe, the right of access was not as broad as had been sought. The press had asserted the right to interview preselected prisoners, but the Pell Court found that it only had the right to interview inmates selected at random from the prison population.\(^4\) One author has speculated that when both the press and the public have no access or severely limited access, that is, the rights of the public and the press are essentially equal, a departure from the neutrality doctrine is necessary to provide some form of effective access.\(^4\)

The Court of Appeals for the Ninth Circuit followed this reasoning in Houchins, a decision which sought to accommodate the press' special needs.\(^4\) The Supreme Court, however, declined to adopt the Ninth Circuit's reasoning, preferring instead to strictly apply the neutrality doctrine.\(^6\) Despite the Supreme Court's refusal to depart from the neutrality doctrine in these prison visitation cases, the issue of accommodation of the press' special needs remains unresolved. Only seven justices participated in the Houchins decision, with Justice Marshall and Justice Blackmun excusing themselves. However, both Justices Marshall and Blackmun have recognized press rights in other contexts.\(^4\)

Therefore, the issue of press accommodation has not been foreclosed.\(^4\)

The Supreme Court has also addressed the issue of access to courtroom news, including trials and hearings. In Nixon v. Warner Communications, Inc.,\(^4\) Warner attempted to gain access to President Nixon's unreleased Watergate

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43. Pell, 417 U.S. at 819-21.
44. Nimmer, supra note 12, at 644.
48. Indeed, in Minneapolis Star & Tribune v. Minnesota Comm'r of Revenue, 103 S. Ct. 1365 (1983), the Court seems to have adopted the theory sub silencio. See infra text accompanying notes 173-78.
tapes. The Court applied the neutrality doctrine, holding that: "The First Amendment generally grants the press no right to information about a trial superior to that of the general public."50

More recently, in Richmond Newspapers, Inc. v. Virginia,51 the Court continued to adhere to the neutrality doctrine holding that the press' right of access to a criminal trial is guaranteed by the first amendment. Although the case was decided on the basis of the public's right of access, it was both initiated by and beneficial to the press. As Justice Brennan pointed out in his concurring opinion, "the institutional press is the likely, and fitting, chief beneficiary of a right of access because it serves as the 'agent' of interested citizens . . . ."52 In the same vein, Justice Stevens described this case as a "watershed case" because:

Twice before [in Saxbe and Houchins], the Court has implied that any governmental restriction on access to information, no matter how severe and no matter how unjustified, would be constitutionally acceptable so long as it did not single out the press for special disabilities not applicable to the public at large . . . . Today, however, for the first time, the Court unequivocally holds that an arbitrary interference with access to important information is an abridgment of the freedoms of speech and of the press protected by the First Amendment.53

In the Supreme Court's most recent decision in this area, Globe Newspaper Co. v. Superior Court,54 the Court upheld the Richmond Newspapers decision and reaffirmed that the right of access to criminal trials is guaranteed under the first amendment.55 The Court did not specify whether this decision was based on speech or press clause, or both. It did, however, distinguish the press from the general public.56

50. Id. at 609.
52. Id. at 586 n.2 (Brennan, J., concurring).
53. Id. at 582-83 (Stevens, J., concurring) (emphasis added).
54. 102 S. Ct. 2613 (1982).
55. Id. at 2618-19.
56. Justice Brennan's majority opinion refers several times to the right of access being vested in "the press and general public." Id. See also id. at 2623 (O'Connor, J., concurring) ("the First Amendment protects the right of press and public to attend criminal trials.").
Given the Court’s growing willingness to allow access to at least some newsworthy information,\textsuperscript{57} coupled with an emerging distinction between the freedom of speech and freedom of the press analyses,\textsuperscript{58} the press may be gaining a constitutionally protected right to gather the news as part of the freedom of the press.

\textbf{C. Access to the Press}

While the neutrality doctrine has prevented the press from gaining any special access to information beyond that granted to the general public, the doctrine has also protected the press’ right to publish what it wishes. The content of what is published, with few exceptions, remains beyond government control.

In \textit{Miami Herald Publishing Co. v. Tornillo},\textsuperscript{59} the Court struck down a Florida “right to reply” statute, which required a newspaper publisher to print the replies of candidates for public office who had been assailed in the press.\textsuperscript{60} The Court, in a unanimous decision written by Chief Justice Burger, upheld the press rights involved. The Court viewed the press as a protected institution and rejected governmental interference in the editorial function.\textsuperscript{61} The Court concluded:

\begin{quote}
A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treat-
\end{quote}

\begin{footnotes}
\item[57] But see id. at 2628 (Stevens, J., dissenting) and \textit{Richmond Newspapers}, 448 U.S. at 582 (Stevens, J., concurring). Justice Stevens read all these cases as creating a right of access to all newsworthy matter, not solely to criminal trials as Justice O’Connor read the cases. \textit{Globe Newspaper}, 102 S. Ct. at 2623.
\item[58] See supra text accompanying notes 16-31.
\item[59] 418 U.S. 241 (1974).
\item[60] \textit{Id.} at 258.
\item[61] \textit{Id.} at 256. In addition, the Court stated:
\end{footnotes}

\begin{quote}
[We have] expressed sensitivity as to whether a restriction or requirement constituted the compulsion exerted by government on a newspaper to print that which it would not otherwise print. The clear implication has been that any such compulsion to publish that which “‘reason’ tells them should not be published” is unconstitutional. A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated.
\end{quote}
ment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.62

Government control of the editorial process, therefore, was not approved by the Court as a way to promote the press as a "marketplace of ideas," in which all viewpoints are brought forward.63 The Court distinguished between the press rights and the speech rights of candidates to have their positions printed, and acted to uphold the independence and autonomy of the press to publish only what they chose to print.64

The Court had previously supported the freedom of editorial discretion in Columbia Broadcasting System, Inc. v. Democratic National Committee.65 In a complex holding, the Court found that CBS's denial of television time to the Democratic National Committee for political advertising constituted state action; however, such action was not violative of the first amendment.66 The Court acknowledged that it was "[b]alancing the various First Amendment interests involved in the broadcast media and determining what best serves the public's right to be informed . . . ."67 It concluded that the right of the press to refuse editorial advertising outweighed the speech interests of the advertisers.68 As Chief Justice Burger said, "[f]or better or worse, editing is

62. Id. at 258 (footnote omitted).
63. The Tornillo Court elaborated on the "marketplace of ideas" concept: However much validity may be found in these arguments [for access to allow all points of view on a subject to be brought forward], at each point the implementation of a remedy such as an enforceable right of access necessarily calls for some mechanism, either governmental or consensual. If it is governmental coercion, this at once brings about a confrontation with the express provisions of the First Amendment and the judicial gloss on that Amendment developed over the years. Id. at 254 (footnotes omitted). See also Bezanson, supra note 2, at 758.
64. Bezanson, supra note 2, at 757-58. See also Tornillo, 418 U.S. at 247-55.
66. Chief Justice Burger, who was joined by Justices Stewart and Rehnquist in this part of his opinion, found that there was no state action. Id. at 119-21.
67. Id. at 102.
68. Id. at 121-25.
what editors are for; and editing is selection and choice of material." Justice Stewart, in his concurrence, stated that "if those [first amendment] 'values' mean anything, they should mean at least this: If we must choose whether editorial decisions are to be made in the free judgment of individual broadcasters, or imposed by bureaucratic fiat, the choice must be for freedom." Together the Tornillo and Democratic National Committee decisions reveal clearly the Court's strong belief in the autonomy of the press in its editorial capacity. Moreover, the two cases show the Court's even-handed application of the neutrality doctrine because the Court refused to impose governmental constraints on the editorial process, even though the constraints were sought for the purpose of promoting the speech rights of other citizens.

D. Protection of Confidential Sources

The Court addressed the question of a reporter's right to protect a confidential source in Branzburg v. Hayes. In a confusing five to four decision, which sets forth no clear test for lower courts to follow, the Court rejected the reporter's argument that he possessed a special first amendment privilege not to reveal confidential sources to a grand jury. Lacking further guidance from the Supreme Court, lower courts have construed Branzburg in various ways. Some courts have not recognized any privilege. Others have acknowledged a limited privilege. One court re-

69. *Id.* at 124.
70. *Id.* at 126 (Stewart, J., concurring).
72. *Id.* at 709-10 (Powell, J., concurring). Some commentators say the vote was actually 4-1/2 to 4-1/2, with Justice Powell's concurrence being the split vote due to his suggestion that in some circumstances there may indeed be some special press protection. See Bezanson, *supra* note 2, at 760; Stewart, *supra* note 7, at 635.
74. *Branzburg*, 408 U.S. at 698.
75. See, e.g., *In re* Tierney, 328 So. 2d 40 (Fla. Ct. App. 1976) (first amendment did not relieve newspaper reporter of obligation to respond to grand jury subpoena and answer questions related directly to sanctity and integrity of grand jury function; thus, reporter held to have no first amendment privilege to refuse to answer grand jury's questions).
76. See, e.g., *In re* Lewis, 501 F.2d 418 (9th Cir. 1974) (recognition of limited privilege if the grand jury investigation was instituted or conducted in other than
quired strict scrutiny of grand jury requests that a reporter testify.\textsuperscript{77}

Justice White, writing for the majority in \textit{Branzburg}, found that "news gathering is not without its First Amendment protections,"\textsuperscript{78} for "without some protection for seeking out the news, \textit{freedom of the press} could be eviscerated."\textsuperscript{79} However, the Court also found that the neutrality doctrine applied to this assertion of a special privilege.\textsuperscript{80} Although the press clause protects the press from governmental restraints and regulations, it also prevents the government from granting special privileges to the press which assist its efforts to gather the news. Therefore, the Court concluded that the reporter could not successfully assert a first amendment privilege not to reveal his confidential news source since a private individual could not do so.\textsuperscript{81} To allow a reporter to protect his source by quashing a subpoena, as requested in \textit{Branzburg}, would have been nonneutral governmental action. Such action would be tantamount to special treatment of the press.\textsuperscript{82}

Justice Powell concurred with Justice White, but stated that where the news reporter is being harassed, or the information being sought is at best tenuously related to the grand jury’s investigation, a motion to quash should be upheld.\textsuperscript{83} The dissenters, Justices Stewart, Brennan and Marshall, proposed a more stringent test than that put forth by Justice Powell.\textsuperscript{84} In order to subpoena a news reporter and require

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\item \textsuperscript{77} Morgan v. State, 337 So. 2d 951 (Fla. 1976). \textit{See generally} Bezanson, \textit{supra} note 2, at 760-61 n.137.
\item \textsuperscript{78} \textit{Branzburg}, 408 U.S. at 707.
\item \textsuperscript{79} \textit{Id.} at 681 (emphasis added).
\item \textsuperscript{80} \textit{Id.} at 684.
\item \textsuperscript{81} As a general rule, the public, through the grand jury, has a right to hear every person’s evidence and testimony. Blackmer v. United States, 284 U.S. 421, 438 (1932). “Citizens generally are not constitutionally immune from grand jury subpoenas; and neither the First Amendment nor any other constitutional provision protects the average citizen from disclosing to a grand jury information that he has received in confidence.” \textit{Branzburg}, 408 U.S. at 682. Of course, a valid privilege such as the fifth amendment privilege against self-incrimination would protect both newsmen and private citizens. \textit{Id.} at 688-700.
\item \textsuperscript{82} \textit{See} Bezanson, \textit{supra} note 2, at 762.
\item \textsuperscript{83} \textit{Branzburg}, 408 U.S. at 709-10 (Powell, J., concurring).
\item \textsuperscript{84} \textit{Id.} at 743 (Stewart, J., dissenting).
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him or her to reveal sources, the dissent thought the government should show: (1) that the information is clearly relevant; (2) that the news reporter has the information; and (3) that no other means are available to obtain the information.\(^{85}\) Applying this test would probably yield more decisions upholding a news reporter's privilege not to disclose his or her sources. The Court, however, rejected both the dissent's test and the analysis proposed by Justice Powell, which favored a strict application of the neutrality doctrine. The majority preferred an analysis which treated reporters identical to other citizens.\(^{86}\)

News sources are also not immune from discovery by warrant. Over a strong dissent by Justices Stewart and Marshall, the Court, in *Zurcher v. Stanford Daily*,\(^ {87}\) held that the first amendment granted the press no special privilege to resist a search warrant obtained by the government.\(^ {88}\) Equating the press with any other source of information, the Court noted that "[w]here the material sought to be seized may be protected by the First Amendment, the requirements of the Fourth Amendment must be applied with 'scrupulous exactitude.' "\(^{89}\) However, "no more than this is required where the warrant requested is for the seizure of criminal evidence reasonably believed to be on the premises occupied by a newspaper."\(^ {90}\) The reasoning underlying the Court's decision in *Zurcher*, as in *Branzburg*, was the application of the neutrality doctrine. The press received the same treatment with respect to a search warrant that an ordinary citizen would receive.\(^ {91}\)

### E. Prior Restraint

Strict application of the neutrality doctrine breaks down in the area of prior restraint.\(^ {92}\) As a general rule government
interference with the editorial process is not permissible, especially an interference as extreme as restraining the prospective publication of material.93 Thus, "'[a]ny system of prior restraints of expression come to this Court bearing a heavy presumption against its constitutional validity.'"94 However, in some limited instances, the Supreme Court has recognized that modification of the neutrality doctrine is appropriate as long as the government does not interfere with the editorial process.

In Schenck v. United States95 the Court advanced the theoretical justification for allowing violation of the neutrality doctrine in order to insure the proper functioning of the government:

The question in every case is whether the words used are used in such circumstances and are of such nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no court could regard them as protected by any constitutional right. It seems to be admitted that if an actual obstruction of the recruiting service were proved, liability for words that produced that effect might be enforced.96

The Court reiterated this clear and present danger theory in Near v. Minnesota,97 in which Chief Justice Hughes, writing for the Court, stated:

No one would question but that a government might prevent actual obstruction to its recruiting service or publication of the sailing dates of transports or the number and location of troops . . . . The security of the community

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93. See, e.g., Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) (newspaper publisher alleged violation of first amendment rights based on Florida's "right of reply" statute which granted a political candidate a right to equal space to reply to criticism and attacks on his record by a newspaper in its editorial capacity).
95. 249 U.S. 47 (1919).
96. Id. at 52.
97. 283 U.S. 697 (1931).
life may be protected against incitements to acts of violence and the overthrow by force of orderly government.98 Hence, prior restraint will be allowed when there is a sufficient showing by the government that the release of the information sought to be restrained will pose a clear and present danger of an immediate nature by impeding the proper functioning of the government.

The issue of prior restraint and the conflicting interests it involves were illustrated in a 1979 case. In *United States v. Progressive, Inc.*,99 a Wisconsin district court enjoined a magazine from publishing an article entitled, "The H-Bomb Secret—How We Got It, Why We’re Telling It."100 The court found that the publication of this article could seriously interfere with the security and defense of the United States by revealing defense secrets; therefore, the defendant’s first amendment rights had to give way to ensure that the government could properly perform its function of protecting the nation.101 Thus, where there is a threat of clear and present danger, an accommodation should be made. The strict hands-off approach of the neutrality doctrine must occasionally give way in order to enable the government to perform its special functions in society.102

**F. Taxation of the Press**

The Supreme Court’s most recent pronouncement in the first amendment area is a case involving state taxation of the press. In *Minneapolis Star & Tribune v. Minnesota Commissioner of Revenue,*103 the Court addressed the question of whether a use tax104 imposed on products consumed during

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98. *Id.* at 716 (footnote omitted).
99. 467 F. Supp. 990 (W.D. Wis.), *appeal dismissed*, 610 F.2d 819 (7th Cir. 1979). *See also* *United States v. Progressive, Inc.*, 486 F. Supp. 5 (W.D. Wis. 1979).
101. *Id.* at 991-97.
103. 103 S. Ct. 1365 (1983).
104. A use tax is one enacted to protect a state’s sales tax by eliminating the incentive for residents to go to states with lower sales taxes rather than buying those goods in-state. It does so by taxing those goods brought into and used in-state at a rate equal to the tax savings acquired by buying the goods out-of-state. *See id.*
the publication process was constitutional. Minnesota had passed a special use tax on ink and paper components; however, the first $100,000 of such goods used each year was exempt.105 The newspaper contended that the tax violated the constitutional guarantees of freedom of the press and equal protection.106 The Court agreed.107

The Court first addressed the issue of whether or not the tax violated the first amendment guarantee of freedom of the press. Rather than apply its general sales and use tax to newspapers, Minnesota had chosen to create a special use tax.108 The special use tax differed from the general use tax because it applied to all ink and paper used, not just those components bought out-of-state, and because it taxed an intermediate transaction, not an ultimate retail sale.109 The Supreme Court found that this differential taxation110 violated the freedom of the press as it is currently recognized under the neutrality doctrine.111 As the Court stated:

Differential treatment, unless justified by some special characteristic of the press, suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional. Differential taxation of the press, then, places such a burden on the interests protected by the First Amendment that we cannot countenance such treatment . . . .112

The Court clearly grounded its decision on the neutrality doctrine, although it did not label it as such. Instead the Court reasoned:

We would be hesitant to fashion a rule that automatically allowed the State to single out the press for a different method of taxation as long as the effective burden was no different from that on other taxpayers or the burden on the press was lighter than that on other businesses. One reason

105. Minneapolis Star, 103 S. Ct. at 1368.
106. Id. at 1368-69.
107. Id. at 1375-76.
108. Id. at 1370.
109. Id.
110. The term "differential taxation" is one that was used by the Court to characterize the special use tax. Id. at 1371.
111. Id. at 1372.
112. Id. at 1372 (citations omitted).
for this reluctance is that the very selection of the press for special treatment threatens the press not only with the current differential treatment, but with the possibility of subsequent differentially more burdensome treatment. Thus, even without actually imposing an extra burden on the press, the government might be able to achieve censorial effects, for "the threat of sanctions may deter the exercise of First Amendment rights almost as potently as the actual application of sanctions." 113

Applying the neutrality doctrine, the Court specifically rejected Justice Rehnquist's suggestion that striking down a favorable tax was, at best, foolish. Furthermore, the Court disagreed that the first amendment required such action. 114 Justice Rehnquist had concluded that because the tax was favorable to the press it was not burdensome and therefore not an abridgment of the freedom of the press. 115 The majority noted that Justice Rehnquist's suggestion would be much more persuasive if it were always possible to identify which differential treatment was really more or less burdensome, and concluded this type of differential treatment was unconstitutional. 116 Thus, the Court solidified the application of the neutrality doctrine to cases involving press rights in Minneapolis Star 117 and clearly outlined its theoretical justification. 118

113. Id. at 1374 (emphasis in original) (quoting NAACP v. Button, 371 U.S. 415 (1963)).
114. Id. at 1379 (Rehnquist, J., dissenting).
115. Id.
116. 103 S. Ct. at 1374 nn.11-12.
117. The Court also rejected Justice Rehnquist's equal protection analysis. Id. at 1372 n.7. For Justice Rehnquist's equal protection analysis, see id. at 1378-79 (Rehnquist, J., dissenting).
118. See supra note 113 and accompanying text. But see Grosjean v. American Press Co., 297 U.S. 233 (1936), in which the Court struck down a 2% license tax imposed on 13 newspaper publishers by the State of Louisiana. The Court in Minneapolis Star described the Grosjean case as one in which the result:
may have been attributable in part to the perception on the part of the Court that the state imposed the tax with an intent to penalize a select group of newspapers [for criticizing Senator Huey Long]. In the case currently before us, however, there is no legislative history and no indication, apart from the structure of the tax itself, of any impermissible or censorial motive on the part of the legislature. We cannot resolve the case by simple citation to Grosjean. Instead, we must analyze the problem anew under the general principles of the First Amendment. Minneapolis Star, 103 S. Ct. at 1369.
Finally, the Court found that the $100,000 exemption which tailored the tax so that it was applicable only to a handful of newspapers "present[ed] such a potential for abuse that no interest suggested by Minnesota can justify the scheme." 119

IV. THE PRIVILEGE OF INSTITUTIONAL PRESS UNDER ATTACK

The emerging theme of a separate right or privilege for the press, first noted by Justice Stewart, 120 has not been warmly received by some leading members of the press. 121 One journalist, Anthony Lewis, 122 has set forth several criticisms of the free press privilege. 123 First, he claims that most cases cited in support of the free press privilege could have been decided under a straight free speech analysis. 124 For example, Lewis contends that Branzburg v. Hayes 125 was decided on a free speech basis. 126 In Lewis' view, any attempt to find a free press right forces an artificial distinction among the clauses of the first amendment. 127 Similarly, commenting on Miami Herald Publishing Co. v. Tornillo, 128 Lewis argued that the "holding does not imply a distinction between the speech and press clauses of the First Amendment. Government can no more require a speaker than a newspaper to be neutral." 129 Lewis does not rely solely on Tornillo or Branzburg to support his viewpoint. In his words:

Nor do the cases distinguish the quality of freedom assured to the press and to speech. Of course there are practical distinctions between speeches and publications, and be-

119. Minneapolis Star, 103 S. Ct. at 1375-76.
120. See Stewart, supra note 7.
121. Id. at 631. See also Lange, supra note 4, at 88-95.
122. Lewis is a columnist for the New York Times and Lecturer on Law at the Harvard Law School.
124. Lewis, supra note 4, at 605.
126. Lewis, supra note 4, at 602.
127. Id. at 602-03.
129. Lewis, supra note 4, at 603.
between newspapers and books; and the law takes them into account. But as the decided cases show, they are distinctions without a difference in constitutional principle. No Supreme Court decision has held or intimated that journalism has a preferred constitutional position.\textsuperscript{130}

Despite Lewis' arguments, however, the preceding analysis has shown\textsuperscript{131} that the cases can and should be read as suggested by Justice Stewart. There is indeed a special and separate free press right that is currently being enforced within the confines of the neutrality doctrine.\textsuperscript{132}

Lewis apparently does not recognize the neutrality doctrine's main premise: that the press is to be treated in a fashion identical to the general public. This treatment is not based upon the speech rights of editors, but on their right to be free from all types of governmental restraints under the press clause.\textsuperscript{133} Lewis does not discuss the Court's shift in focus in \textit{Gertz v. Robert Welch, Inc.}\textsuperscript{134} from a speech analysis of media libel to a consideration of the institutional processes and values surrounding the publication of the information involved.\textsuperscript{135} Moreover, Lewis clings to the belief that the Holmesian concept of a marketplace of ideas, in which all ideas have the right to compete for acceptance, remains the prevailing standard in any first amendment controversy. While the marketplace concept remains valid under a speech clause analysis, it ignores the \textit{Tornillo} decision,\textsuperscript{136} which established that although the government could enforce the full airing of any ideas and views that people might wish to present on the village green, the government could not force the press to become the marketplace for airing all viewpoints. Such a result stems from the theoretical differences between the speech and press clauses.\textsuperscript{137}

\begin{footnotes}
\item 130. \textit{Id.} at 605.
\item 131. \textit{See supra} text accompanying notes 113-18.
\item 132. \textit{See} \textit{Stewart, supra} note 7.
\item 133. \textit{See supra} text accompanying notes 16-31.
\item 134. 418 U.S. 323 (1974).
\item 135. Lewis, \textit{supra} note 4, at 603.
\item 136. \textit{See supra} notes 59-63 and accompanying text.
\item 137. Lewis apparently acknowledges this point when he states: "Justice Stewart correctly described the decision [in \textit{Tornillo}] as rejecting the idea that government may force a newspaper to be a 'fair and open marketplace of ideas.'" Lewis, \textit{supra} note 4, at 603 (emphasis added).
\end{footnotes}
Lewis also attacks the free press privilege on three theoretical grounds. The first of these arguments stems from Lewis' reasonable fear that such a press "privilege" could actually result in greater governmental interference with the press. "The more formally [the press] is treated as a fourth branch of government, the more pressing will be demands that it be made formally accountable." Justifiably, this idea causes an "uneasy feeling" for Lewis. However, the application of the neutrality doctrine should ensure that the press does not gain a position equivalent to a formal fourth branch of government with its accompanying restraints. The neutrality doctrine would prohibit almost all governmental involvement with, or regulation of, the press. The creation of an accommodation doctrine, as discussed below in Part V, would not change the analysis, since it would grant the press special privileges only in rare circumstances. The press, therefore, would not rise to the level of a formal fourth branch of the government. It is true, however, that the tensions referred to by Lewis would be heightened.

Lewis' second theoretical argument is that a journalism-centered privilege would damage the rights of others, notably professors and researchers. "The insistence that a particular class [namely the organized press] has special immunities under the first amendment is likely to suggest to judges that persons outside that class are of a lower order of constitutional concern." While there is a certain truth in Lewis' fear that other "truth seekers" and informers of the public would be deprived of additional protection by singling out the press for separate treatment under the press

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138. Id. at 605-25.
139. Id. at 605 (footnote omitted). See Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976). "The extraordinary protections afforded by the First Amendment carry with them something in the nature of a fiduciary duty to exercise the protected rights responsibly — a duty widely acknowledged but not always observed by editors and publishers." Id. at 560.
140. Professor Lange suggests that this move to separate the press from the public would deprive the press from its basis of support, its constituency, which would drastically reduce its power as "[i]ts survival depends ultimately on the confidence and goodwill of the people who support it." Lange, supra note 4, at 108. See also Sack, supra note 4, at 630-31.
141. See infra text accompanying notes 163-65.
142. Lewis, supra note 4, at 609.
clause of the first amendment, that result would not deprive those others of the rights they already possess, rights which will not be and have not been ignored by the judiciary. As the Supreme Court observed in *First National Bank v. Bellotti:*  

"The press cases emphasize the special and constitutionally recognized role of that institution in informing and educating the public, offering criticism, and providing a forum for discussion and debate . . . . But the press does not have a monopoly on either the First Amendment or the ability to enlighten."  

As *Bellotti* makes clear, "the conclusion that the press has a 'special and constitutionally recognized role' is hardly inconsistent with the broadest grant of first amendment rights to others—when those others are constitutionally deserving of them."  

Lewis raises a third important question: who is "the institutional press" protected by the first amendment? Does it include underground newspapers? Wall Street tip sheets? Mimeographed copies distributed to neighbors? The lonely pamphleteer? If the definition is broadened to include all these and many other publications, "then any publication becomes 'the press' and Justice Stewart's thesis loses its point. His argument was that the first amendment has special meaning for the news media." This is a strong point, but not insurmountable. The difficulty in defining "the press" is an insufficient basis for denying the existence of a right associated with the term. As a leading media lawyer suggests, freedom of religion is a most useful analogy. With equally vague constitutional guidance, courts regularly define which group is or is not a religion and, on a case by case basis, decide what constitutes religious activity. To limit the protection afforded under the first amendment simply because it is difficult to define "the press" precisely would lead "to the bizarre conclusion that in the interest of protecting first amendment rights, we are precluded from enforcing any such rights."  

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144. *Id.* at 781-82 (citations and footnotes omitted).
146. Lewis, *supra* note 4, at 607.
148. *Id.* at 581.
Three definitions of the press have been advanced. One is all-inclusive, and embraces individuals who write or broadcast. A second definition uses a functional approach on a case-by-case basis and would afford protection if the party involved was acting like the press. The third definition is a strict institutional press definition and is similar to the definition used in most state "shield laws," the laws which protect journalists from revealing their sources. Each of these approaches has its strengths and weaknesses, and the choice of one by the Court would necessarily reflect a philosophical judgment as to how broad the protection afforded under the first amendment should be. While the adoption of the third and narrowest definition would be the easiest, as well as the clearest answer, the functional approach strikes a better balance between the all-inclusive nature of the first proposal and the strict statutory approach. As one commentator points out: "In the great preponderance of cases, a court has little difficulty knowing a journalist when it sees one. Indeed, in virtually every first amendment press case in recent years, there has been no definitional difficulty at all."

V. THE ACCOMMODATION DOCTRINE

The neutrality doctrine has, on the whole, worked well to protect the press, permitting it to perform its important function in our society. However, in light of the changing role of the press, the Supreme Court should adopt an accommodation doctrine in order to better protect the press. The changing role of the press is perhaps best illustrated in the Miami Herald Publishing Co. v. Tornillo decision. In a unanimous opinion, the Court abandoned the theory of the press as a provider of a marketplace of ideas, and adopted the idea of the press as an adversarial check on the government. In Tornillo the "Court rejected any notion that, because the press right is derived partially from the individual's right to

149. Id.
150. Id. at 581-82.
151. Id. at 580.
153. Id. at 251, 258.
know, the government may impose restrictions on editorial freedom deemed promotive of that right. Instead, the Court viewed the press as an institution whose independence the First Amendment protects ....154 Professor Bezanson notes that:

[T]he marketplace conception is antithetical to the press’ function of taking positions on matters of public interest. *Tornillo* reflects the Court’s position that safeguarding this function of the press [as an adversarial monitor of the government] is more important than inquiring whether the coverage is balanced or partisan, responsible or irresponsible.155

As Justice Douglas has stated: “The function of the press is to explore and investigate events, inform the people what is going on, and to expose the harmful as well as the good influences at work.”156 The Court has continued to stress this structural, adversarial role. As Justice Brennan stated in *Richmond Newspapers, Inc. v. Virginia*,157 “the First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes: it has a structural role to play in securing and fostering our republican system of self-government.”158 The Court also acknowledged the important role the press plays in monitoring the government in *Nixon v. Fitzgerald*,159 in which it granted the President absolute immunity from civil damages for acts undertaken as President.

Similarly, in *Minneapolis Star & Tribune v. Minnesota Commissioner of Revenue*,160 the Court recently made statements regarding the impact of censorship. The Court expressed concern that government threats could “check critical comment by the press, undercutting the basic as-

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154. Bezanson, *supra* note 2, at 757 (footnotes omitted); see also *Tornillo*, 418 U.S. at 258.
158. *Id.* at 587 (Brennan, J., concurring) (emphasis in original).
159. 102 S. Ct. 2690 (1982). In *Nixon*, Justice Powell, writing for the Court, stated: “In addition [to impeachment], there are formal and informal checks on Presidential action that do not apply with equal force to other executive officials. The President is subjected to constant scrutiny by the press.” *Id.* at 2706.
160. 103 S. Ct. 1365 (1983).
sumption of our political system that the press will often serve as an important restraint on government.”

Justice Stewart has also forcefully rejected both the marketplace of ideas and the neutral conduit theories of the press. As he stated in his Yale Law School Address:

The primary purpose of the constitutional guarantee of a free press was a similar one: to create a fourth institution outside the Government as an additional check on the three official branches. Consider the opening words of the Free Press Clause of the Massachusetts Constitution, drafted by John Adams: “The liberty of the press is essential to the security of the state.”

To accomplish its purpose as an independent check on the government, the press must be guaranteed effective means to gather and disseminate the news. In most cases the neutrality doctrine serves this purpose well. It prohibits government interference in the editorial process, guarantees independence, and forces the press to act without special access to information. This independence prevents the press from becoming a quasi-governmental bureaucracy, with all its drawbacks, restraints and forced accountability. However, the neutrality doctrine’s rationale breaks down in prior restraint cases in which the government may encroach upon the domain of the editor and force him or her not to print or broadcast that which would otherwise be published. The justification for this violation of the neutrality doctrine is that such restraint is necessary for the government to perform one of its essential functions. For example, a government could not effectively wage a war if the press were

161. Id. at 1372. See also Grosjean v. American Press Co., Inc., 297 U.S. 233, 250 (1936) ("A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves.").

162. Stewart, supra note 7, at 634. See, e.g., N.H. Const. pt. I, art. 22 which states, "[f]ree speech and liberty of the press are essential to the security of freedom in a state: They ought, therefore, to be inviolably preserved." See also T. Wicker, On Press 259-60 (1978). Wicker suggests that the press should act like a defense lawyer on cross-examination—probe and make the opposition prove what they claim.

allowed to disclose secret troop or ship movements.\textsuperscript{164} If the neutrality doctrine can be modified to accommodate the special needs of the government, it should also be modified to accommodate the special role of the press. However, the press must clearly demonstrate that it needs a certain degree of preferential treatment to fulfill its duties as an investigatory, adversarial check on the government.\textsuperscript{165} In addition, it must show that granting those privileges will not create a long-term, debilitating dependence on the government and that no other means are available to enable the press to perform its constitutional function.

The accommodation doctrine has been alluded to in case law. In the \textit{Houchins v. KQED, Inc.}\textsuperscript{166} decision, in which the Court upheld restrictions on press access to a jail, Justice Stewart concurring with the majority and stated:

\begin{quote}
We part company however, in applying these abstractions [of the neutrality doctrine] to the facts of the case. Whereas [Chief Justice Burger] appears to view "equal access" as meaning access that is identical in all respects, I believe that the concept of equal access must be accorded more flexibility in order to accommodate the practical distinctions between the press and the general public.\textsuperscript{167}
\end{quote}

He adds: "In short, terms of access that are reasonably imposed on individual members of the public may, if they impede effective reporting without sufficient justification, be unreasonable as applied to journalists who are there to convey to the general public what the visitors see."\textsuperscript{168}

Justice Powell also appears to acknowledge the need for an accommodation doctrine, although he based his dissent in \textit{Saxbe v. Washington Post Co.}\textsuperscript{169} on a general first amendment right and not specifically on the press clause. In the \textit{Saxbe} case, in which the Court again upheld restraints on prison access, Justice Powell stated in his dissent:

\begin{quote}
\textsuperscript{165.} See generally Bezanson, \textit{supra} note 2, at 770-71.
\textsuperscript{166.} 438 U.S. 1 (1978).
\textsuperscript{167.} \textit{Id.} at 16 (Stewart, J., concurring).
\textsuperscript{168.} \textit{Id.} at 17.
\textsuperscript{169.} 417 U.S. 843 (1974).
At some point official restraints on access to news sources, even though not directed solely at the press, may so undermine the function of the First Amendment that it is both appropriate and necessary to require the government to justify such regulations in terms more compelling than discretionary authority and administrative convenience. It is worth repeating our admonition in *Branzburg* that “without some protection for seeking out the news, freedom of the press could be eviscerated.”

Similarly, in *Branzburg v. Hayes*, Justice Powell wrote:

> The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case by case basis accords with the tried and traditional way of adjudicating such questions.

In the area of press rights, Justice Powell believes that there should be no per se rules at work. Rather, in light of the special role the press fulfills in our society, there should be a balancing of constitutional interests and an accommodation on behalf of the press.

Recently the Court came close to explicitly adopting the accommodation doctrine in *Minneapolis Star & Tribune v. Minnesota Commissioner of Revenue*, in which the Court found that the select differential tax imposed on newspapers by the state of Minnesota violated the neutrality doctrine. However, rather than basing its opinion solely on that doctrine, the Court proceeded to weigh the countervailing interests asserted by the state to justify the differential taxation scheme. In effect, the Court applied the rationale of the accommodation doctrine and examined whether using the dif-

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170. *Id.* at 860 (Powell, J., dissenting) (quoting *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972)). See also Justice Powell's opinion in the companion case, *Pell v. Procunier*, 417 U.S. 817 (1974), in which he states, "I would hold that California's absolute ban against prisoner-press interviews impermissibly restrains the ability of the press to perform its constitutionally established function of informing the people on the conduct of their government." *Id.* at 835 (Powell, J., concurring in part and dissenting in part).


172. *Id.* at 710 (footnote omitted).


174. *Id.* at 1372.
ferential taxation scheme was necessary for the state to perform an essential governmental function. The implication seemed to be that if the tax was necessary, the Court would accommodate the State's special need and allow the neutrality doctrine to be modified.\textsuperscript{175}

Regarding the state's interest, the Court commented that "[d]ifferential taxation of the press, then, places such a burden on the interests protected by the First Amendment that we cannot countenance such treatment \textit{unless} the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation."\textsuperscript{176} Minnesota claimed that the essential governmental function involved was that of raising revenue.\textsuperscript{177} The Court responded that there were many alternative methods of raising revenue that did not adversely affect first amendment rights.\textsuperscript{178} Thus, it was not necessary to bend the neutrality doctrine in order to accommodate an essential government function, as it is sometimes necessary to do, for example, in the area of prior restraints. When applying prior restraint, it is theoretically necessary to infringe upon the freedom of the press in order to allow the government to fulfill one of its essential functions, such as national defense. In the revenue raising area, however, the Court correctly held that it was not necessary to infringe on freedom of the press. Therefore, since the Court has implicitly recognized the theory of accommodation in two areas of first amendment law, prior restraint and taxation, it is now time for it to recognize that the accommodation doctrine can and should work in favor of, as well as against, the press. Recognition of the press' need for accommodation and the strong policy reasons favoring the recognition of such need should move the Court to adopt an accommodation doctrine.

An accommodation doctrine, such as that hinted at in the case law,\textsuperscript{179} is vital to the proper fulfillment by the press of its role. Just as the government, on occasion, needs some

\textsuperscript{175} See supra notes 163-65 and accompanying text.
\textsuperscript{176} Minneapolis Star, 103 S. Ct. at 1372, (emphasis added; footnote omitted); see also id. at 1370.
\textsuperscript{177} Minneapolis Star, 103 S. Ct. at 1372.
\textsuperscript{178} Id.
\textsuperscript{179} See supra notes 164-75.
special accommodation to enable it to perform fully and efficiently its duties, the press, on occasion, has the same need for accommodation in order to fulfill its responsibilities.

VI. Conclusion

The murky history of the first amendment makes it impossible to know with certainty why its framers wrote separate speech and press clauses. Case law has developed the tacit recognition of a separate press right, a right circumscribed by the dictates of the neutrality doctrine. The neutrality doctrine acts to preserve the independence of the press by insulating it from the "heavy hand" of the government in editorial matters. At the same time, it prohibits granting special privileges to the press that could eventually create a self-defeating dependence by the press on the government. As a result of the doctrine, the press generally has only those rights enjoyed by the general public.

Yet, as discussed above, in order for the press to properly perform its constitutional role as an independent check on government, it may be necessary, in certain limited situations, to bend the application of the neutrality doctrine to accommodate the interests of the press. Protection of confidential sources, for example, may be an appropriate justification for accommodation. At least twenty-six states have recognized the need to enact, and have enacted, shield laws to protect such sources.

180. See, for example, Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), in which the court bent the strict neutrality doctrine by imposing a negligence standard for media libel of nonpublic persons rather than taking a hands-off approach by leaving the standard to the statutory or common law of the individual states.

181. A Depressing Tale, supra note 123 ("[The Sunday Times] has proved, contrary to the current American press mystique, that a newspaper can get vital information from confidential sources without any special legal protection.").

The time is ripe for the Supreme Court to explicitly address the question of press rights and to adopt the accommodation doctrine to protect the constitutionally guaranteed right of freedom of the press. To treat the press under a per se neutrality rule and grant the press only the privileges that all citizens have as part of their right of free speech may be insufficient to enable the press to properly perform the duties our society imposes upon the press. Moreover, adoption of the accommodation doctrine may also be necessary in order to give full effect to the language of the first amendment and the guarantees afforded thereunder.