

## AWAKENING THE PRESS CLAUSE

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*The Free Press Clause enjoys less practical significance than almost any other constitutional provision. While recognizing the structural and expressive importance of a free press, the U.S. Supreme Court does not explicitly recognize any right or protection as emanating solely from the Press Clause. Recently in the Court's Citizens United decision, Justices Stevens and Scalia reignited the thirty-year-old debate over whether the Press Clause has any function separate from the Speech Clause.*

*The primary roadblock to recognizing independent meaning in the Press Clause is the definitional problem—who or what is the “press” in the First Amendment? Others have attempted to define the press, but the ubiquitous instinct toward constitutional overprotection tends to invite overly broad definitions that include potentially everyone. Proponents of these overinclusive definitions attempt to transfer our constitutionally overprotective approach from the Speech Clause to the Press Clause. The net result has been, ironically, fewer constitutional press rights rather than more.*

*This Article endeavors to break that cycle by arguing that the way to give long-overdue meaning to this important piece of constitutional text is to embrace press exceptionalism and a narrow definition of the press. By adopting an overly protective approach to the Press Clause, we have been sucked into a constitutional feedback loop: An expansive definition of the press means virtually complete overlap between press and speech and thus no meaningful way to interpret the Press Clause. Awakening the Press Clause, therefore, requires embracing a definition of the press that is sufficiently narrow. This Article furthermore submits that the definitional problem is manageable because line-drawing perfectionism is not required thanks to the fallback protections of the Speech Clause.*

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In the great preponderance of cases, a court has little difficulty knowing a journalist when it sees one.<sup>1</sup>

## INTRODUCTION

Buried in the separate opinions from the U.S. Supreme Court’s recent 183-page campaign finance case *Citizens United v. Federal Election Commission*<sup>2</sup> is a rarely seen tussle between two justices over one of the U.S. Constitution’s most overlooked mysteries—whether the Press Clause has independent significance. Arguing in favor of free speech rights for corporations, Justice Scalia pointed out that most newspapers are corporations and yet the thought that newspapers “have free-speech rights only at the sufferance of Congress[] boggles the mind.”<sup>3</sup> Thus, he analogized, if newspapers have broad First Amendment protections, so must corporations.

But of course newspapers have broader First Amendment rights than corporations generally, Justice Stevens argued,<sup>4</sup> pointing out that any other

1. Floyd Abrams, *The Press Is Different: Reflections on Justice Stewart and the Autonomous Press*, 7 HOFSTRA L. REV. 563, 580 (1979).

2. 130 S. Ct. 876 (2010).

3. *Id.* at 928 (Scalia, J., concurring).

4. *Id.* at 951 (Stevens, J., concurring in part and dissenting in part).

conclusion would ignore an important piece of constitutional text—the Free Press Clause.<sup>5</sup> Now it was Justice Scalia’s turn to be baffled: “It is passing strange to interpret the phrase ‘the freedom of speech, or of the press’ to mean, not everyone’s right to speak or publish, but rather everyone’s right to speak or the institutional press’s right to publish.”<sup>6</sup> Justice Stevens, however, countered that the textual and historical evidence behind the constitutional provisions “suggests why one type of corporation, those that are part of the press, might be able to claim special First Amendment status.”<sup>7</sup> He accused the majority of “tr[ying] to sweep this evidence into the Free Speech Clause, [when] the Free Press Clause provides a more natural textual home.”<sup>8</sup>

The debate in *Citizens United* over how to interpret the Press Clause has not received much attention.<sup>9</sup> But it should. The justices were blowing the dust off of a constitutional question that the Court had not addressed in thirty years: Does the Press Clause have significance separate from the Speech Clause, or is it nothing more than “complementary to and a natural extension of Speech Clause liberty”<sup>10</sup> with no functional role?

The First Amendment declares that “Congress shall make no law . . . abridging the freedom . . . of the Press.”<sup>11</sup> Yet despite this textual mandate and Chief Justice John Marshall’s admonition that “[i]t cannot be presumed that any clause in the constitution is intended to be without effect,”<sup>12</sup> a majority of the Court<sup>13</sup> has, in essence, dismissed the clause as a constitutional

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5. *Id.*

6. *Id.* at 928 n.6 (Scalia, J., concurring).

7. *Id.* at 951 n.57 (Stevens, J., concurring in part and dissenting in part).

8. *Id.*

9. See Seth Korman, *Citizens United and the Press: Two Distinct Implications*, 37 RUTGERS L. REC. 1, 2–3 (2010) (observing that “by affording all corporations the same rights as those granted the media, the decision at the same time seems to further enfeeble the Press Clause”); Eugene Volokh, *THE VOLOKH CONSPIRACY* (Jan. 21, 2010, 5:29 PM), <http://volokh.com/2010/01/21/lessened-corporate-first-amendment-rights-and-media-corporations> (arguing that the Press Clause protects “a technology” only). This debate over the significance of the Press Clause is also arguably dicta. See *Citizens United*, 130 S. Ct. at 976 (Stevens, J., concurring in part and dissenting in part) (“Our colleagues have raised some interesting and difficult questions . . . about how to define what constitutes the press. *But that is not the case before us.*”).

10. *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 800 (1978) (Burger, J., concurring).

11. U.S. CONST. amend. I.

12. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803); accord *District of Columbia v. Heller*, 554 U.S. 570, 643 (2008); see also Melville B. Nimmer, *Introduction—Is Freedom of the Press a Redundancy: What Does It Add to Freedom of Speech?*, 26 HASTINGS L.J. 639, 640 (1975) (“As nature abhors a vacuum, the law cannot abide a redundancy. The presumption is strong that language used in a legal instrument, be it a constitution, a statute, or a contract, has meaning, else it would not have been employed.”).

13. While Justice Stevens’s reading of the clause puts him in the minority of the current Court, his opinion in *Citizens United* was joined by Justices Ginsburg, Breyer, and Sotomayor.

redundancy. The Supreme Court occasionally offers up rhetoric on the value of the free press,<sup>14</sup> but it steadfastly refuses to explicitly recognize any right or protection as emanating solely from the Press Clause.<sup>15</sup> Because the freedoms to publish and to disseminate speech are also protected by the Speech Clause, the Press Clause has been left with nothing to do. Members of the press thus enjoy the same freedoms of expression as any individual person, but nothing more.<sup>16</sup> The rights to publish or to broadcast are the same as the right to speak, and what narrow protections for newsgathering the Court has recognized, such as limited rights of access to judicial proceedings, have been housed in a muddy combination of the freedoms of speech, assembly, and press and granted to everyone, not just the press.<sup>17</sup> The result is exactly what Chief Justice Marshall warned against—a specific constitutional phrase that has been dismissed as “mere surplusage.”<sup>18</sup>

Writing off the Press Clause as nothing more than the framers’ gentle reminder that we all have a right to publish our speech<sup>19</sup> is problematic on several levels. As a textual matter, it suggests that a pronouncement in the First Amendment, at most, restates only the obvious. And as a practical matter, it is unsatisfying to have a Press Clause that is powerless to protect

14. See, e.g., *Leathers v. Medlock*, 499 U.S. 439, 447 (1991) (“The press plays a unique role as a check on government abuse.”); *N.Y. Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring) (stating that the press plays an “essential role in our democracy”); *Mills v. Alabama*, 384 U.S. 214, 219 (1966) (“The Constitution specifically selected the press, which includes not only newspapers, books, and magazines, but also humble leaflets and circulars, to play an important role in the discussion of public affairs.”).

15. See David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 430 (2002) (“[A]s a matter of positive law, the Press Clause actually plays a rather minor role in protecting the freedom of the press.”); C. Edwin Baker, *The Independent Significance of the Press Clause Under Existing Law*, 35 HOFSTRA L. REV. 955, 956 (2007) (“The Court has never explicitly recognized that the Press Clause involves any significant content different from that provided to all individuals by the prohibition on abridging freedom of speech.”); see also David A. Anderson, *Freedom of the Press in Wartime*, 77 U. COLO. L. REV. 49, 69–70 (2006) (explaining that while early press cases did rely explicitly on the Press Clause, over time the Court’s cases reveal an “abandonment of the Press Clause as a specific source of constitutional authority” as “the Court gave the press whatever rights it recognized under the Speech Clause”).

16. See *Branzburg v. Hayes*, 408 U.S. 665, 704 (1972) (“Freedom of the press is a ‘fundamental personal right’ which ‘is not confined to newspapers and periodicals.’” (quoting *Lovell v. Griffin*, 303 U.S. 444, 450, 452 (1938))); Margaret A. Blanchard, *The Institutional Press and Its First Amendment Privileges*, 1978 SUP. CT. REV. 225, 225.

17. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980) (plurality opinion) (holding that in criminal trials, “media representatives enjoy the same right of access as the public”).

18. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803).

19. See *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 928 n.6 (2010) (Scalia, J., concurring); *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 799–800 (1978) (Burger, C.J., concurring) (arguing that the Speech Clause protects the right “to express ideas and beliefs, while the Press Clause focuses specifically on the liberty to disseminate expression broadly” (footnote omitted)).

reporters who, as members of the press, endeavor to inform the public and to check the government. The Court's refusal to breathe life into the Press Clause has denied the press the attainment of constitutional rights of access to government information, meetings, and places. Members of the press also have no constitutional safeguards from government subpoenas and search warrants demanding access to their sources,<sup>20</sup> newsrooms,<sup>21</sup> or work product.<sup>22</sup> And if a reporter commits a minor tort such as a technical trespass,<sup>23</sup> a minor deception,<sup>24</sup> or a breach of loyalty,<sup>25</sup>—all common tools in undercover reporting—no judicial consideration is given to the fact that she was engaged in newsgathering.

There is one formidable roadblock that stands in the way of recognizing the Press Clause's independent meaning—the problem of how to define the “press.” Recognizing distinct rights and protections necessarily raises the question of who would (and who would not) receive them.<sup>26</sup> To many jurists and scholars, the thought of identifying who constitutes the press reeks of government favoritism toward a privileged few and discrimination against other, less favored speakers.<sup>27</sup> Chief Justice Burger expressed this skepticism when he observed that creating a pecking order of communicators with some favored over others “is reminiscent of the abhorred licensing system of Tudor and Stuart England—a system the First Amendment was intended to ban from this country.”<sup>28</sup> The myriad problems with determining who is or is not the press have been called “definitional monsters,”<sup>29</sup> “difficult and vexing,”<sup>30</sup> and “painful.”<sup>31</sup>

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20. See *Branzburg v. Hayes*, 408 U.S. 665 (1972).

21. See *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978).

22. See *id.*

23. See *Le Mistral, Inc. v. Columbia Broad. Sys.*, 402 N.Y.S.2d 815 (App. Div. 1978).

24. See *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999).

25. See *id.*

26. See *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 801 (1978) (Burger, C.J., concurring) (arguing that a “fundamental difficulty with interpreting the Press Clause as conferring special status on a limited group is one of definition”); *Branzburg v. Hayes*, 408 U.S. 665, 703–04 (1972) (“The administration of a constitutional newsman’s privilege would present practical and conceptual difficulties of a high order.”).

27. See, e.g., David Lange, *The Speech and Press Clauses*, 23 UCLA L. REV. 77, 102–03 (1975); Anthony Lewis, *A Preferred Position for Journalism?*, 7 HOFSTRA L. REV. 595, 626–27 (1979).

28. *First Nat'l Bank*, 435 U.S. at 797–802 (Burger, C.J., concurring); see *Branzburg*, 408 U.S. at 705 n.40.

29. *Garcia v. Bd. of Educ.*, 777 F.2d 1403, 1411 (10th Cir. 1985).

30. *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1156 (D.C. Cir. 2006).

31. *Abrams*, *supra* note 1, at 572.

Despite these obstacles, many have attempted to define the press.<sup>32</sup> But in doing so, the natural urge is often toward a broad, overly inclusive definition that mirrors the Court's expansive reading of the Speech Clause. Our free speech jurisprudence is one of constitutional overprotection that seeks to embrace the so-called fringe speaker and speech that is of peripheral, or even no, value.<sup>33</sup>

But while constitutional overprotection makes sense as an interpretive theory of the Speech Clause, it does not logically transfer to the Press Clause for two primary reasons. First, a broad definition of the press, somewhat ironically, results in fewer press rights overall. For the Press Clause to mean something independent of the Speech Clause, it necessarily cannot apply to everyone. If every individual is also a journalist or every message is also news, then there

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32. See, e.g., SCOTT GANT, WE'RE ALL JOURNALISTS NOW: THE TRANSFORMATIONS OF THE PRESS AND RESHAPING OF THE LAW IN THE INTERNET AGE 89 (2007) (defining press freedoms as "a personal right, which can be exercised by people who do not devote themselves professionally or exclusively to journalism"); DAN GILLMOR, WE THE MEDIA: GRASSROOTS JOURNALISM BY THE PEOPLE, FOR THE PEOPLE (2d ed. 2006) (arguing that anyone can produce the news); W. Lance Bennett, *The Twilight of Mass Media News: Markets, Citizenship, Technology, and the Future of Journalism*, in FREEING THE PRESSES: THE FIRST AMENDMENT IN ACTION 111, 112 (Timothy E. Cook ed., 2005) ("Today, anyone with a computer or a mobile phone is a potential reporter and publisher."); Linda L. Berger, *Shielding the Unmedia: Using the Process of Journalism to Protect the Journalist's Privilege in an Infinite Universe of Publication*, 39 HOUS. L. REV. 137, 137 (2003) (arguing that the definition should focus on "the process through which information that is useful to self-governance is gathered and provided to the public"); Randall P. Bezanson, *The Developing Law of Editorial Judgment*, 78 NEB. L. REV. 754, 829 (1999) (advocating a "purpose-oriented definition"); Clay Calvert, *And You Call Yourself a Journalist?: Wrestling With a Definition of "Journalist" in the Law*, 103 DICK. L. REV. 411, 450-51 (1999) (suggesting that courts could define a journalist "in terms of one who provides information to inform the voting of wise decisions, a powerful goal of free speech often associated with philosopher-educator Alexander Meiklejohn"); Anne Flanagan, *Blogging: A Journal Need Not a Journalist Make*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 395, 425 (2006) (proposing the "journalistic process test," a functional consideration of whether the person "adhere[s] to a code of journalist professionalism"); Diana Owen, "New Media" and Contemporary Interpretations of Freedom of the Press, in FREEING THE PRESSES, *supra*, at 139, 158 (predicting that the "already flimsy boundaries of the institutional press are likely to disintegrate" and be replaced by an "open press" model where the rights belong to individuals and not an institution); Mary-Rose Papandrea, *Citizen Journalism and the Reporter's Privilege*, 91 MINN. L. REV. 515, 520 (2007) (arguing that a qualified testimonial privilege "should apply to anyone disseminating information to the public who is called to testify in a judicial or administrative proceeding"); Robert D. Sack, *Reflections on the Wrong Question: Special Constitutional Privilege for the Institutional Press*, 7 HOFSTRA L. REV. 629, 629 (1979) ("[A]ll citizens exercising the press function, including, but not limited to, journalists employed by the 'institutional press,' warrant [constitutional] protection."); Keith Werhan, *Rethinking Freedom of the Press After 9/11*, 82 TUL. L. REV. 1561, 1601 n.243 (2008) (favoring a definition of the press that includes "anyone who regularly gathers and disseminates information of public interest to the public").

33. See *Cohen v. California*, 403 U.S. 15, 24-25 (1971) ("To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance.").

is no need for two distinct clauses. This is the prevailing view today.<sup>34</sup> The justices' understandable desire to avoid favoring an elite group<sup>35</sup> has led them to allow the Speech Clause to swallow up the Press Clause. In other words, the otherwise admirable and democratic objective to leave no one out of the press club creates a boomerang effect<sup>36</sup> that results in no club at all. But a limited press club is essential to unlocking the full potential of the Press Clause, as bestowing potential Press Clause rights such as certain investigative immunities to all members of the public would be impossible. In our drive for constitutional overprotection, therefore, we have created constitutional underprotection. Because the Press Clause lies dormant, rather than enjoying more constitutional rights, we have fewer.

The second reason it is not essential to adopt an overly protective approach to the Press Clause is that it enjoys fallback protections secured by the Speech Clause. These fallback protections lessen the impact of excluding some but not others as well as the costs of any definitional mistakes. We embrace constitutional overprotection when it comes to speech because the price of line-drawing errors is so high. If a speaker or a message is placed outside the protections of the Speech Clause, his or her voice is lost entirely and the idea does not enter our public debate.<sup>37</sup> This is a constitutional cost that the Court takes seriously,<sup>38</sup> and rightfully so.

An interpretation of the Press Clause, however, that would allow journalists additional and unique protections, primarily with respect to newsgathering, does not present this risk. All speakers, whether deemed members of

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34. See, e.g., *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 783 (1985) (Brennan, J., dissenting) (“We protect the press to ensure the vitality of First Amendment guarantees. This solicitude implies no endorsement of the principle that speakers other than the press deserve lesser First Amendment protection.”).

35. See *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 802 (1978) (White, J., dissenting) (“[T]he purpose of the Constitution was not to erect the press into a privileged institution but to protect all persons in their right to print what they will as well as to utter it. ‘... the liberty of the press is no greater and no less...’ than the liberty of every citizen of the Republic.” (quoting *Pennekamp v. Florida*, 328 U.S. 331, 364 (1946) (Frankfurter, J., concurring))).

36. See *infra* Part.III.B.2.

37. See *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949) (“Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.” (citation omitted)).

38. See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994) (comparing content-based regulations on speech to content-neutral ones, which “pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue”).

the press or not, retain their strong rights of expression, which include a right not to be subjected to government regulation based on the content of their speech. While any definition of the press will necessarily be imperfect, these mistakes at the margins will not remove a speaker's voice from our public debate as would a miscalculation in interpreting the Speech Clause. Even a wrongly excluded speaker will be able to express himself and will be protected by the myriad speech safeguards such as protections against prior restraints and content-based discrimination. Thus, the costs of error are much lower with the Press Clause, making constitutional overprotection not necessary.

By adopting the same overly protective approach to the Press Clause that we embrace with the Speech Clause, we have been sucked into a constitutional feedback loop: An overly broad definition of the press means virtually complete overlap between press and speech and thus no way to meaningfully interpret the Press Clause. Awakening the Press Clause requires embracing a definition of the press that is sufficiently narrow. Yet our overprotective instincts continually push us back toward a broad definition. The temptation then returns to declare that everyone is the press, and the cycle continues.

In this Article, I seek to break this cycle by arguing that we should not fear the idea of press exceptionalism. We instead should recognize the unique role of the press—as compared to individual speakers—through a narrow, and thus useful, definition. In doing so, we will be giving long overdue weight to this important constitutional text. In addition to supporting a narrower definition of the press, I submit that the definitional problem itself is manageable, in part because line-drawing perfectionism is not required thanks to the fallback protections of the Speech Clause. While I do not offer a definitive solution to the problem in this Article, I look to the unique functions of the press in our society and our democracy to offer some initial thoughts on which I will expand in a future article.

My analysis unfolds in several parts. Part I examines current interpretations of the Speech and Press Clauses and how the Court has allowed the latter to become constitutionally meaningless. Part II discusses the types of rights and protections an awakened Press Clause could offer. Part III considers how to define the press, exploring how the constitutionally overprotective approach of our speech jurisprudence is unnecessary in the press context because of the boomerang effect and the differences in fallback protections. A review of state and legislative experimentation with defining the press then establishes that the definitional problem is manageable. I conclude by offering preliminary thoughts on how the Court might give the term “press,” as read

in the First Amendment, a narrow and meaningful definition based on functional considerations.

### I. NO “MERE SURPLUSAGE”: RESCUING THE PRESS CLAUSE FROM CONSTITUTIONAL REDUNDANCY

What does the Press Clause mean, and does it differ from the Speech Clause? On a purely textual basis, the answers to these questions seem clear—it means something, and it is different. Yet somehow, over time, this promising provision has devolved into nothing more than constitutional window dressing. The Court’s modern practice of reading the First Amendment with its judicial thumb over the Press Clause has led to wide acceptance that the Press Clause has become “redundant and thus irrelevant”<sup>39</sup> and “about as useful as the vermiform appendix.”<sup>40</sup> Yet this marginalization of the Press Clause is contrary to both the clear meaning of the words and to the common intuition that there does exist a press that performs a special role in our democracy and is deserving of constitutional status outside the shadow of the Speech Clause.

Any fair reading of the Constitution begins with the text, and the text of the First Amendment suggests that the Press Clause should be read separately from the Speech Clause. The two rights, of course, are mentioned individually and even separated grammatically by a comma: “Congress shall make no law . . . abridging the freedom of speech, or of the press.”<sup>41</sup> The framers have been accused of being “especially promiscuous” with their use of commas.<sup>42</sup> But even accepting that the Constitution includes both “meaningful” and “superfluous” commas, “[i]t seems most charitable to begin with the presumption that commas were intended to be meaningful, so that the burden of proof should be on the person who wishes to ignore certain commas as superfluous.”<sup>43</sup> In addition to the comma, the use of the disjunctive conjunction “or” denotes separateness implying that Congress could potentially violate one but not the other.

Additionally, the Speech and Press Clauses are grouped together and separated from the other First Amendment liberties by semicolons. This suggests

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39. Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256, 1257 (2005).

40. Paul Horwitz, “Or of the [Blog],” 11 NEXUS 45, 46 (2006).

41. U.S. CONST. amend. I.

42. Jordan Steiker et al., *Taking Text and Structure Really Seriously: Constitutional Interpretation and the Crisis of Presidential Eligibility*, 74 TEX. L. REV. 237, 245 n.46 (1995).

43. *Id.*

that they were seen as sharing a commonality. Yet the First Amendment's prohibitions against laws "respecting the establishment of religion, or prohibiting the free exercise thereof"<sup>44</sup> or the protections of "the right of the people peaceably to assemble, and to petition the Government for a redress of grievances"<sup>45</sup> are also grouped together by semicolons. The Court, however, does not read either of these pairings to be anything other than separate, if related, constitutional provisions each with its own independent significance.<sup>46</sup> The Establishment Clause and the Free Exercise Clause both fall under the umbrella of the "freedom of religion," yet they have never been viewed as redundant.<sup>47</sup> So too with the Speech Clause and the Press Clause; they are logically read as related in nature but properly assigned different tasks.

Plain meaning textualism asks, "[G]iven the ordinary meanings of words and accepted precepts of grammar and syntax, what does the provision signify to the reasonable person?"<sup>48</sup> A reasonable person would clearly conclude that the words "freedom of speech" have a meaning that is significantly different from the words "freedom . . . of the press."<sup>49</sup>

One seemingly reasonable way to read the two clauses as having different meanings is to conclude that the Speech Clause and the Press Clause together provide that "individuals have the right to disseminate their views as well as to voice them."<sup>50</sup> This is the view of Justice Scalia in *Citizens United*<sup>51</sup> and, indeed, is the prevailing view.<sup>52</sup>

This alleged division of labor between the two phrases, however, is more a mirage than a distinct difference. What makes this interpretation a difference

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44. U.S. CONST. amend. I.

45. *Id.*

46. See, e.g., *Salazar v. Buono*, 130 S. Ct. 1803, 1815–16 (2010) (addressing an Establishment Clause claim but not a Free Exercise claim); *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2994–95 (2010) (discussing a Free Exercise Clause claim but not an Establishment Clause claim); *Duryea v. Guarnieri*, 131 S. Ct. 456, 457 (2010) (granting certiorari in a case involving a Petition Clause claim); *Chisom v. Roemer*, 501 U.S. 380, 409 (1991) (Scalia, J., dissenting) (observing that the right to peaceably assemble "has not generally been thought to protect the right peaceably to assemble only when the purpose of the assembly is to petition the Government for a redress of grievances").

47. See *Engel v. Vitale*, 370 U.S. 421, 430–33 (1962) (discussing the Establishment and Free Exercise Clauses and stating that "[a]lthough these two clauses may in certain instances overlap, they forbid two quite different kinds of governmental encroachment upon religious freedom").

48. WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 38 (1994).

49. U.S. CONST. amend. I.

50. *Baker*, *supra* note 15, at 956 (noting that "[a]ccording to this reading of Court decisions, the Press Clause is not meaningfully separate from the Speech Clause").

51. 130 S. Ct. 876, 925 (2010) (Scalia, J., concurring).

52. See *Baker*, *supra* note 15, at 956 (calling this "the common view").

without a distinction is that the Speech Clause has been interpreted to include far more rights than simply the right to speak. The Court has repeatedly held that the freedom of speech also includes the freedom to have willing, and sometimes even unwilling,<sup>53</sup> audience members receive the speech.<sup>54</sup> The protection the Speech Clause provides, the Court has stated, is “to the communication, to its source and to its recipients both.”<sup>55</sup> Thus with the Speech Clause already protecting both the right to express a message and the right to have it received by listeners, viewers, or readers, there is no additional task for the Press Clause. A Press Clause that protects only the right of individuals to disseminate their speech is redundant. Some propose that the Press Clause protects a particular technology—the printing press.<sup>56</sup> Again, however, this would suggest that the Speech Clause does not secure the rights to disseminate one’s speech via a particular method. This is in conflict with the Court’s interpretation of the Speech Clause. Even Chief Justice Burger, a proponent of the view that the Speech Clause protects expression and the Press Clause protects dissemination, acknowledged that there is “no fundamental distinction between expression and dissemination.”<sup>57</sup> Therefore, the claim that the Speech Clause protects speech while the Press Clause protects dissemination is an insufficient response to the textual evidence that the Press Clause and the Speech Clause are distinct.

Despite this textual and structural evidence, the Supreme Court has never recognized any constitutional rights or protections belonging exclusively to the press<sup>58</sup> that are distinct from the speech rights that all individuals (and even

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53. See *Schenck v. Pro-Choice Network*, 519 U.S. 357, 373 (1997) (stating that “in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment” (internal quotation marks omitted)).

54. See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 (1976) (stating that the freedom of speech “necessarily protects the right to receive” (internal quotation marks omitted)); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) (stating that the freedom of speech includes “the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences”); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (“It is now well established that the Constitution protects the right to receive information and ideas.”); see also Thomas I. Emerson, *The First Amendment and the Right to Know: Legal Foundations of the Right to Know*, 1976 WASH. U. L.Q. 1, 1.

55. *Va. State Bd. of Pharmacy*, 425 U.S. at 756.

56. See Volokh, *supra* note 9 (arguing that the Press Clause protects the press only as “a technology,” not as “an industry”).

57. *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 800 (1978).

58. See Anderson, *Freedom of the Press*, *supra* note 15, at 432 (“Nonconstitutional sources of special protection for the press are far more numerous.”).

corporations) enjoy<sup>59</sup> and has only implicitly recognized differences between the two in select areas.<sup>60</sup> This ongoing refusal to recognize any significance to the separateness of the freedom of speech and the freedom of the press has led the Court to use the phrases interchangeably, frequently combining them under the umbrella of the freedom of expression.<sup>61</sup>

As constitutional liberties go, the Press Clause is a late bloomer, with the Court not deciding a single press case until 1925<sup>62</sup> and not applying the provision to the states until 1931.<sup>63</sup> There was a brief period between the 1930s and the 1960s when the Court occasionally emphasized the Press Clause, although without explicitly relying on it as a separate right—a period that David Anderson has referred to as “the heyday of the Press Clause in the Supreme Court.”<sup>64</sup> It was not until the 1970s and 1980s, however, that the Court’s press jurisprudence ripened. And it was during this more recent period that the Court decreed that there is no independent role for the clause.<sup>65</sup>

While there are many cases that are often hailed as important press cases because the primary beneficiaries were journalists, the Court in these cases actually based its decisions on the Speech Clause or the freedom of expression and awarded rights or protections to everyone. In the famous defamation case, *New York Times v. Sullivan*,<sup>66</sup> for example, the benefactors of the favorable

59. See, e.g., *Pell v. Procunier*, 417 U.S. 817, 834 (1974) (“[N]ewsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public.”); accord *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 784 (1985) (Brennan, J., dissenting) (“[I]n the context of defamation law, the rights of the institutional media are no greater and no less than those enjoyed by other individuals or organizations engaged in the same activities.”); *Houchins v. KQED, Inc.*, 438 U.S. 1, 16 (1977) (“[T]he media have no special right of access to [a county jail] different from or greater than that accorded the public generally.”); *Saxbe v. Wash. Post Co.*, 417 U.S. 843, 850 (1974); *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972) (“[T]he First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally.”).

60. See *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982) (stating that freedom of the press fosters “discussion of governmental affairs” and other public issues); *Saxbe*, 417 U.S. at 864 (Powell, J., concurring) (noting that the press has a “constitutionally established role”).

61. See Elisabeth Zoller, *The United States Supreme Court and the Freedom of Expression*, 84 IND. L.J. 885, 886 (2009) (observing that “freedom of expression” is frequently used by the Court because “[f]reedom of speech and freedom of the press are so united in American culture today that, in practice, the Court makes almost no distinction between the two”).

62. *Gitlow v. New York*, 268 U.S. 652 (1925).

63. *Near v. Minn. ex rel. Olson*, 283 U.S. 697 (1931).

64. See Anderson, *Freedom of the Press*, *supra* note 15, at 448.

65. There is, however, some argument that the Court has implicitly recognized some differences between the clauses during this modern period. See Baker, *supra* note 15, at 958–59 (arguing that existing Court doctrine does recognize special treatment for the press).

66. 376 U.S. 254 (1964).

“actual malice” standard<sup>67</sup> were the newspaper and four individual nonmedia defendants.<sup>68</sup> The Court noted that the protective standard applied equally to the press and to the “citizen-critic.”<sup>69</sup> The Court made it even clearer that media and nonmedia defendants receive the same constitutional protection in defamation cases in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*<sup>70</sup> Admittedly, the Court came close to recognizing a differing standard for the press in select cases such as *Philadelphia Newspapers, Inc. v. Hepps*,<sup>71</sup> in which the Court ruled that defamation plaintiffs suing a “media defendant” must bear the burden of proving the falsity of the statement.<sup>72</sup> Yet in a footnote, the Court stated that it was not deciding what the burden would be if the case involved a nonmedia defendant,<sup>73</sup> and the Court in subsequent cases has refused to create different defamation standards for media and nonmedia defendants.<sup>74</sup> Likewise, in *Richmond Newspapers, Inc. v. Virginia*,<sup>75</sup> the Court relied on the freedoms of speech, press, and assembly to conclude that the First Amendment guarantees the right of the public, not just of the press, to attend criminal trials.<sup>76</sup> The Court’s reluctance to award the press any unique privileges has led it to adopt these broad holdings regardless of the desire or need of the public for the constitutional rights. In *Richmond Newspapers*, for example, the Court admitted that “[t]he public was not seeking access to courtrooms . . . and could not be widely accommodated if it did.”<sup>77</sup> Further, it reached this conclusion despite acknowledging that giving the press “special

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67. The “actual malice” standard requires that a plaintiff in a defamation lawsuit show that the defendant published the statement “with knowledge that it was false or with reckless disregard of whether it was false or not.” *Id.* at 279–80.

68. *Id.* at 256.

69. *Id.* at 282.

70. 472 U.S. 749, 758–59 (1985) (applying the same defamation standards to media and nonmedia defendants).

71. 475 U.S. 767 (1986).

72. *Id.* at 775. *Near v. Minn. ex rel. Olson*, 283 U.S. 697, 713–14 (1931), may also be seen as a press-only case because the Court spoke of the freedom of the press as including a right not to be subject to a prior restraint. But that case has been interpreted subsequently as prohibiting prior restraints on all speakers. See, e.g., *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 895 (2010).

73. *Phila. Newspapers, Inc.*, 475 U.S. at 779 n.4.

74. See, e.g., *Dun & Bradstreet*, 472 U.S. at 773 (White, J., concurring in the judgment) (noting that the plurality did not distinguish between media and nonmedia defendants); *id.* (“[T]he First Amendment gives no more protection to the press in defamation suits than it does to others exercising their freedom of speech. None of our cases affords such a distinction; to the contrary, the Court has rejected it at every turn.”); see also *Bartnicki v. Vopper*, 532 U.S. 514, 525 n.8 (2001) (“[W]e draw no distinction between the media respondents and [the individual who disclosed the secretly recorded tape].”).

75. 448 U.S. 555 (1980).

76. *Id.* at 577.

77. *Anderson, Freedom of the Press in Wartime*, *supra* note 15, at 75.

seating and priority of entry” would “contribute to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system.”<sup>78</sup> Ultimately, the Court has made clear its view that “the press does not have a monopoly on either the First Amendment or the ability to enlighten,”<sup>79</sup> and thus all protections belong to the public as well as the press.

In the same vein, when the press has lost major constitutional cases, the decisive argument has been that the press must follow the same rules as everyone else. The Court, for example, held that journalists enjoy no additional protections from government searches or subpoenas. In *Branzburg v. Hayes*,<sup>80</sup> a majority of the justices refused to give the reporters any immunity from having to testify before a grand jury and reveal their confidential sources and information. They did so out of a refusal to “interpre[t] the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy.”<sup>81</sup> The Court also rejected an argument claiming that newspapers should have special immunity from the execution of search warrants for their newsrooms and files.<sup>82</sup> Similarly, the Court denied the press the claimed rights to travel to Cuba for newsgathering purposes<sup>83</sup> and to avoid liability under “generally applicable laws” even if they have “incidental effects on [the] ability to gather and report the news.”<sup>84</sup>

To support his interpretation of the Press Clause as protecting only “the liberty to disseminate expression broadly,”<sup>85</sup> Chief Justice Burger relied heavily on the historical viewpoint of constitutional scholar David Lange.<sup>86</sup> Lange contended that “the freedom of speech, or of the press” is a constitutional redundancy because the two terms “were used quite interchangeably in the eighteenth century.”<sup>87</sup> Lange argued that the freedom of the press evolved as an extension or amplifier of the freedom of speech. He referenced English history, throughout which “the exercise of free expression obviously was confined by one’s capacity to disseminate one’s thoughts.”<sup>88</sup> These limits on expression were loosened by the invention of the printing press, which

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78. *Richmond Newspapers, Inc.*, 448 U.S. at 573 (internal quotation marks omitted).

79. *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 782 (1978).

80. 408 U.S. 665 (1972).

81. *Id.* at 690.

82. *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978).

83. *Zemel v. Rusk*, 381 U.S. 1 (1965).

84. *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991) (holding that “generally applicable laws do not offend the First Amendment simply because [of] their enforcement against the press”).

85. *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 799–800 (1978) (Burger, J., concurring).

86. *See id.* at 798.

87. Lange, *supra* note 27, at 88.

88. *Id.* at 93.

ensured that those other than the “rich and powerful” also had the tools to communicate effectively.<sup>89</sup> The printing press sparked a revolution of political thought that led to sweeping regulations by the King.<sup>90</sup> According to Lange, this “heritage of struggle” between the Crown and his English subjects gave free speech “new vitality by the introduction of the press, [which] colonials brought with them to the New World.”<sup>91</sup> The two terms were thus interchangeable because “[f]ree speech could not exist in the fullest sense without freedom of the press; a free press, on the other hand, had no occasion to exist without freedom of speech.”<sup>92</sup>

Lange’s interpretation, however, is only one of several prominent academic theories about the original intent behind the two clauses.<sup>93</sup> First Amendment scholar David Anderson concluded that “[f]reedom of the press—not freedom of speech—was the primary concern of [the framers].”<sup>94</sup> Anderson relied on the events and documents of early American history to reach his conclusion,<sup>95</sup> including pre-revolutionary declarations,<sup>96</sup> state constitutions,<sup>97</sup> the Constitutional Convention,<sup>98</sup> the state ratifying conventions,<sup>99</sup> the writing of the First Amendment in the First Congress, and the ratification

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89. *Id.* at 93–94.

90. *Id.* at 94–95.

91. *Id.*

92. *Id.* at 96.

93. See LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 272 (1985) (“When the framers of the First Amendment provided that Congress shall not abridge the freedom of the press they could only have meant to protect the press with which they were familiar and as it operated at the time. They constitutionally guaranteed the *practice* of freedom of the press. They did not adopt its legal definition as found in Blackstone or in the views of libertarian theorists. By freedom of the press the Framers meant a right to engage in rasping, corrosive, and offensive discussions on all topics of public interest.”).

94. David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 533 (1983).

95. But see Leonard W. Levy, *On the Origins of the Free Press Clause*, 32 UCLA L. REV. 177, 203, 214–15 (1984) (critiquing Anderson’s article as “confused” and arguing that “his use of historical evidence is irresponsible and a major weakness of his article”).

96. Anderson, *supra* note 94, at 463–64 (“The last right we shall mention, regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, in its ready communication of thoughts between subjects . . . whereby oppressive officers are shamed or intimidated, into more honourable and just modes of conducting affairs.”).

97. *Id.* at 464 (noting that nine of the eleven state constitutions adopted during the Revolutionary War included clauses protecting a free press).

98. *Id.* at 487 (stating that freedom of the press “was included in the bill of rights proposed at the constitutional convention; after that proposal was rejected, it was the only right proposed independently”).

99. *Id.* (stating that five of the seven proposed bills of rights at the ratifying conventions included provisions for freedom of the press).

of the First Amendment.<sup>100</sup> Anderson did not claim that the framers had any “comprehensive theory of freedom of the press.”<sup>101</sup> Rather, he argued that “[they] perceived, however dimly, naively, or incompletely, that freedom of the press was inextricably related to the new republican form of government and would have to be protected if their vision of government by the people was to succeed.”<sup>102</sup> Anderson had a like-minded counterpart on the Supreme Court in Justice Stewart, who also advocated for a distinct interpretation of the Press Clause. Justice Stewart concluded that the framers drafted the Press Clause as a structural provision that would allow the press to serve as the “fourth institution outside the Government as an additional check on the three official branches.”<sup>103</sup> The inclusion of two separate rights, he contended, “is no constitutional accident, but an acknowledgement of the critical role played by the press in American society.”<sup>104</sup>

Virtually all who have studied the issue have conceded that the original meaning of the two clauses is not obvious. Lange admitted that “the Framers have left us language in the first amendment . . . which, under almost any view one takes, is less than clear,”<sup>105</sup> and Anderson acknowledged that the “Framers simply did not articulate what they meant by ‘freedom of the press.’”<sup>106</sup> In their treatise on the freedom of speech, Rodney Smolla and Melville Nimmer summarized that “[h]istory casts little light on whether the Framers intended the Press Clause to have meaning palpably different than the Speech Clause.”<sup>107</sup>

Interpreting the Press Clause as either a literal or a functional redundancy is problematic. A textual analysis strongly indicates that the Speech and Press Clauses protect different rights. The simple explanation that one protects expression while the other safeguards dissemination, however, conflicts with the Court’s broad view of speech rights. The historical evidence on the meaning of the phrases is, at best, conflicting. Yet the Court appears to have gone out of its way to treat the press the same as the general public without

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100. *Id.* at 475–85.

101. *Id.* at 536.

102. *Id.* at 537.

103. Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 634 (1975).

104. *Houchins v. KQED, Inc.*, 438 U.S. 1, 17 (1974) (Stewart, J., concurring in judgment); see also *Abrams*, *supra* note 1, at 579 (“Whatever other conclusions may be drawn—and disputes engaged in—from the history of the adoption of the press clause of the first amendment, one thing is clear: The press clause of the first amendment was no afterthought, no mere appendage to the speech clause.”).

105. Lange, *supra* note 27, at 88.

106. Anderson, *supra* note 94, at 486.

107. 3 RODNEY A. SMOLLA & MELVILLE B. NIMMER, SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 22.4 (2010).

giving sufficient weight to the textual meaning of the two phrases and the functional difference between individual speakers and the press. As an interpretive matter, this approach is unsettling; and, as a practical one, it robs us of a functioning Press Clause.

## II. WAKING THE SLEEPING GIANT: WHAT MIGHT THE PRESS CLAUSE DO?

The debate over whether to interpret the Press Clause as independently significant also includes a discussion of pragmatic considerations. Is there a need or a place for an awakened Press Clause? How would it function? What role might it play?

It is undisputed that the Speech Clause broadly protects expression. The freedom of speech provides powerful safeguards from prior restraints and places a “heavy burden of showing justification for imposition of such a restraint”<sup>108</sup> on government officials who try to stop speech before it is spoken or published. Any regulation on speech that is content based must survive strict scrutiny,<sup>109</sup> and subject-matter and viewpoint discrimination are virtually never tolerated.<sup>110</sup> In the interest of providing “breathing space”<sup>111</sup> and avoiding a chilling effect, the courts have interpreted the First Amendment as providing immunity to speakers from liability even when their speech causes harm to others such as defamation,<sup>112</sup> privacy violations,<sup>113</sup> inflictions of emotional distress,<sup>114</sup> and even physical harm.<sup>115</sup> Federal and state lawmakers must draft any regulations with the utmost precision to avoid the “strong medicine” of the First Amendment’s vagueness and overbreadth doctrines.<sup>116</sup> The

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108. *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (internal quotation marks omitted).

109. See *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1132 (2009) (“[A]ny restriction based on the content of . . . speech must satisfy strict scrutiny, that is, the restriction must be narrowly tailored to serve a compelling government interest.”).

110. See *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 898 (2010) (“Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints.”).

111. *NAACP v. Button*, 371 U.S. 415, 433 (1963).

112. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

113. *Fla. Star v. B.J.F.*, 491 U.S. 524 (1989).

114. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988).

115. *Braun v. Soldier of Fortune Magazine, Inc.*, 968 F.2d 1110 (11th Cir. 1992).

116. *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973).

government may not license or tax speech.<sup>117</sup> The Court also has interpreted the types of expression that are protected broadly to include not just words that are spoken, published, or broadcast, but also nonverbal expression such as music, dance, art, and forms of silent communication.<sup>118</sup> Similarly, the Court has held that the Speech Clause protects “expressive conduct” like flag or draft card burning and donations to political campaigns.<sup>119</sup>

These expansive constitutional protections, it has been often repeated, are a reflection of our “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”<sup>120</sup> They further reflect our varied views of freedom of speech as an avenue to self-fulfillment<sup>121</sup> and as a vibrant marketplace of ideas.<sup>122</sup>

With all of these protections for speech, it is worth asking whether there is any role left for an independent Press Clause. The answer lies not with the protection of the news itself once it is published or broadcast, but rather with the process of obtaining it. Once the press obtains information, its right to publish is indisputably strong. But when the courts turn to the newsgathering process, the First Amendment seems to disappear.<sup>123</sup>

The Court has recognized that the press informs the public<sup>124</sup> and checks on “what the government is up to.”<sup>125</sup> And it has acknowledged that “newsgathering is not without its First Amendment protections,”<sup>126</sup> for “without some protection for seeking out the news, freedom of the press could be eviscerated.”<sup>127</sup> Yet despite these recognitions of the important role that the press

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117. *Thomas v. Chi. Park Dist.*, 534 U.S. 316, 321 (2002) (holding that “a [governmental] scheme conditioning expression on a licensing body’s prior approval of content presents peculiar dangers to constitutionally protected speech” (internal quotation marks omitted)).

118. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

119. *Buckley v. Valeo*, 424 U.S. 1 (1976).

120. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

121. THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 6 (1970).

122. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

123. Cf. *Branzburg v. Hayes*, 408 U.S. 665, 727 (1972) (Stewart, J., dissenting) (noting that the “corollary of the right to publish must be the right to gather news”).

124. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 667 (1990) (recognizing that “media corporations differ significantly from other corporations in that their resources are devoted to the collection of information and its dissemination to the public”).

125. *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 780 (1989); see also *Mills v. Alabama*, 384 U.S. 214, 219 (1966) (“[T]he press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve.”).

126. *Branzburg*, 408 U.S. at 707.

127. *Id.* at 681.

plays in our democracy,<sup>128</sup> the Court rarely has supported these statements through actual safeguards for the process of seeking or obtaining information. It has furthermore never protected the rights of the press qua press to gather the news.

When faced with constitutional challenges to the government's impairment of access to information, the Court quickly becomes skeptical that the First Amendment is implicated<sup>129</sup> and sees itself as navigating "treacherous grounds for a far-reaching interpretation of the First Amendment."<sup>130</sup> The Court fears creating an expansive—and unworkable—right of access, noting that "[t]here are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow."<sup>131</sup> Instead, the Court has drawn the constitutional line at publication and has held that when there is "no penalty, civil or criminal, related to the content of published material," the First Amendment protections diminish sharply.<sup>132</sup> Thus, the Court has concluded that "[t]he right to speak and publish does not carry with it the unrestrained right to gather information."<sup>133</sup>

This approach to the First Amendment does a disservice to the important role that constitutional protections for the newsgathering process could play in the public discourse. It further overlooks the value of the Press Clause to allow appropriate (as opposed to "unrestrained") rights for the press to gather information.

A dynamic Press Clause could deliver a number of rights and protections. Whereas today journalists can be subpoenaed to testify and forced to reveal confidential sources<sup>134</sup> or, if they refuse to cooperate, held in contempt<sup>135</sup> and

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128. See, e.g., *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966) (lauding the press's "impressive record of service over several centuries" in "guard[ing] against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism"); *Estes v. Texas*, 381 U.S. 532, 539 (1965) (noting the press's role in "exposing corruption among public officers and employees").

129. See, e.g., *Zemel v. Rusk*, 381 U.S. 1, 16 (1965).

130. *Branzburg*, 408 U.S. at 699.

131. *Zemel*, 381 U.S. at 16–17.

132. *Branzburg*, 408 U.S. at 681.

133. *Zemel*, 381 U.S. at 17.

134. See Philip Shenon, *Times Reporter Subpoenaed Over Source for Book Chapter*, N.Y. TIMES, Feb. 1, 2008, at A17 (discussing *New York Times* reporter who was subpoenaed to reveal confidential sources); see also *Shields and Subpoenas: The Reporter's Privilege in Federal Courts*, REPORTERS COMM. FOR FREEDOM OF THE PRESS, [http://www.rcfp.org/shields\\_and\\_subpoenas.html#number](http://www.rcfp.org/shields_and_subpoenas.html#number) (last visited Feb. 22, 2011).

135. Torsten Ove, *Ex-Reporter Put in Tough Spot in Fight Over Sources*, PITT. POST-GAZETTE, Mar. 16, 2008, at A1 (discussing former *USA Today* reporter being held in contempt for refusing to identify her confidential sources).

sometimes jailed,<sup>136</sup> a Press Clause with bite could offer them reliable protection from prosecution in many cases. Further, the ability to convey this constitutional guarantee to potential sources would unlock doors to future information.<sup>137</sup> The same is true when government officials attempt to seize reporters' phone records or mail.<sup>138</sup>

The fact that members of the press are engaged in newsgathering, moreover, is not a factor when it comes to prosecution for ordinary torts or other law violations.<sup>139</sup> For example, journalists can be held liable for trespass onto property that is the scene of a crime or accident even when invited or accompanied by law enforcement.<sup>140</sup> An undercover reporter who misrepresents herself or her motivations by not revealing that she is investigating a news story can be held liable for fraud or breach of the duty of loyalty.<sup>141</sup> If she is wearing a hidden microphone or camera, she might face charges for wiretapping or eavesdropping.<sup>142</sup> Journalists also may be prohibited from entering places of

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136. See *In re Grand Jury Subpoena*, Joshua Wolf, 201 F. App'x 430 (9th Cir. 2006) (concerning a video blogger who spent more than seven months in jail for refusing to comply with a subpoena seeking his testimony and video footage); *In re Grand Jury Subpoena*, Judith Miller, 397 F.3d 964 (D.C. Cir. 2005) (concerning a former *New York Times* reporter who spent eighty-five days in jail for refusing to identify her confidential source); *Blogger Released From Prison*, REPORTERS COMM. FOR FREEDOM OF THE PRESS, <http://rcfp.org/news/2007/0404-con-bloge.html> (last visited Feb. 22, 2011); *Vanessa Leggett Released From Jail After 168 Days*, REPORTERS COMM. FOR FREEDOM OF THE PRESS, [http://www.rcfp.org/news/releases/view.php?2002\\_01\\_04\\_vlreleas.txt](http://www.rcfp.org/news/releases/view.php?2002_01_04_vlreleas.txt) (last visited Feb. 22, 2011) (concerning a freelance author who was held in contempt and served 168 days in jail for refusing to turn over tapes of interviews she had conducted with witnesses who prosecutors believed had information relevant to a murder investigation).

137. See *Branzburg*, 408 U.S. at 682 (considering reporters' argument that they should have testimonial privileges "because if forced to respond to subpoenas and identify their sources or disclose other confidences, their informants will refuse or be reluctant to furnish newsworthy information in the future").

138. See *N.Y. Times Co. v. Gonzalez*, 459 F.3d 160, 165 (2d Cir. 2006) (concerning a U.S. Attorney who seized the phone records of two *New York Times* reporters in order to learn the identities of their confidential sources); Mara H. Gottfried, *Police Return Reporter's Records*, ST. PAUL PIONEER PRESS, Dec. 20, 2007, at B3 (reporting the police seizure of a television reporter's cell phone records to uncover the identity of one of his sources).

139. See *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999) (stating that reporters are not immune from fraud, breach of duty of loyalty, and trespass claims); *United States v. Matthews*, 11 F. Supp. 2d 656, 660–64 (D. Md. 1998) (rejecting an argument by a journalist that a federal statute prohibiting the receipt and transmission of child pornography should not apply to him because he was researching a story about the availability of child pornography on the internet).

140. See, e.g., *Wilson v. Layne*, 526 U.S. 603 (1999); *Berger v. Hanlon*, 129 F.3d 505 (9th Cir. 1997).

141. See, e.g., *Food Lion*, 194 F.3d at 512–16.

142. See, e.g., *Deteresa v. Am. Broad. Co.*, 121 F.3d 460 (9th Cir. 1997); *Dietmann v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971); cf. *Shulman v. Group W Prods., Inc.*, 955 P.2d 469, 493 (Cal. 1998) (noting that an intrusion of privacy committed as part of newsgathering might trigger some constitutional protections for the reporter).

public accommodation if they do so for the purpose of newsgathering rather than to avail themselves of the goods or services provided by the business.<sup>143</sup> This is not to suggest that members of the press should be immune from laws; the question is whether the act of newsgathering on behalf of the public should be given any constitutional weight—currently, it receives none.

In addition to serving as a shield for reporters as they go about the process of newsgathering, a revived Press Clause could work as a constitutional sword. The press could claim constitutionally protected access rights to government information, places, and meetings. While reporters, along with everyone else, can take advantage of the Freedom of Information Act<sup>144</sup> and its many state counterparts,<sup>145</sup> there currently is no constitutional right of access to government information, even when there is no state interest in the government refusing to disclose.<sup>146</sup> Likewise, the Court has repeatedly rejected constitutional arguments in favor of access to government meetings<sup>147</sup> and government-run places.<sup>148</sup>

Statutory provisions allowing access to information and places do some of the work in protecting the newsgathering process.<sup>149</sup> But members of the press (along with the public) enjoy these privileges only at the pleasure of the legislative branches. These statutory rights, therefore, are in constant risk of being diminished or eliminated. Statutory protections, moreover, can be inconsistent and vary from jurisdiction to jurisdiction, leading to uncertainty and, potentially, a chilling effect. They frequently include numerous exemptions or do not cover some information or meetings.<sup>150</sup> In some cases, moreover, such as those involving government-run places, there is no statutory protection. A revitalized Press Clause could promote the same goals

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143. See *Le Mistral, Inc. v. Columbia Broad. Sys.*, 402 N.Y.S.2d 815 (App. Div. 1978) (upholding a finding of liability against a television station after its news crew entered the property of a restaurant that had been cited for health code violations).

144. 5 U.S.C. § 552 (2006).

145. See REPORTERS COMM. FOR FREEDOM OF THE PRESS, STATE OPEN GOVERNMENT GUIDE (2006), available at <http://www.rcfp.org/ogg/index.php> (compiling the open records laws of all states).

146. See *Houchins v. KQED, Inc.*, 438 U.S. 1, 15 (1978) (“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.”); Stewart, *supra* note 103, at 636 (“The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act.”).

147. See *Soc’y of Prof’l Journalists v. Sec’y of Labor*, 832 F.2d 1180 (10th Cir. 1987).

148. See *Houchins*, 438 U.S. 1; *Pell v. Procunier*, 417 U.S. 817 (1974); *Saxbe v. Wash. Post Co.*, 417 U.S. 843 (1974).

149. See *infra* Part III.C.1.

150. See, e.g., *Soc’y of Prof’l Journalists*, 832 F.2d at 1184–86 (dismissing on mootness grounds a district court order stating that, while the press and the public did not have a statutory right to cover a hearing by the Mine Safety and Health Administration, they did have a constitutional right to do so).

but without the inconsistencies or risks of curtailment inherent in the statutory rights.

The Court's fear of opening the floodgates with an unrestrained right of access is also unfounded. Even the broad speech liberties that the Court has recognized are not absolute. Similarly, press advocates have not sought complete protection of the newsgathering process. In the reporter's privilege case of *Branzburg v. Hayes*,<sup>151</sup> for example, the journalists requested, and the dissenters argued in favor of, only a qualified testimonial privilege.<sup>152</sup> Ironically, in ruling against the reporters, Chief Justice Burger turned their request for a conditional, as opposed to absolute, privilege against them. He reasoned that "[i]f newsmen's confidential sources are as sensitive as they are claimed to be, the prospect of being unmasked whenever a judge determines the situation justifies it is hardly a satisfactory solution to the problem. For them it would appear that only an absolute privilege would suffice."<sup>153</sup>

The reporter's privilege is one of the few instances in which journalists have sought to gain unique constitutional protections that would not apply to all speakers.<sup>154</sup> Yet a prominent part of the backlash against adopting an independent interpretation of the Press Clause both on and off the bench is the perception that doing so would necessitate giving the press "special rights."<sup>155</sup> First Amendment scholar and press advocate Floyd Abrams has challenged framing the debate as "whether the press is entitled to 'more' first amendment protection than others," instead of as whether "the press, however defined, [is] entitled to *any* different treatment because it is the 'press.'"<sup>156</sup>

It is important to emphasize that recognizing the independent significance of the Press Clause would result in a gain of constitutional protections only. No one, whether a member of the press or not, would lose the expressive

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151. 408 U.S. 665 (1972).

152. *Id.* at 680 (noting that the reporters assert they should not be forced to appear or testify before a grand jury "until and unless sufficient grounds are shown for believing that the reporter possesses information relevant to a crime the grand jury is investigating, that the information the reporter has is unavailable from other sources, and that the need for the information is sufficiently compelling to override the claimed invasion of First Amendment interests occasioned by the disclosure").

153. *Id.* at 702.

154. The reporters in *Branzburg* argued "that to gather news it is often necessary to agree either not to identify the source of information published or to publish only part of the facts revealed, or both; that if the reporter is nevertheless forced to reveal these confidences to a grand jury, the source so identified and other confidential sources of other reporters will be measurably deterred from furnishing publishable information, all to the detriment of the free flow of information protected by the First Amendment." *Id.* at 679–80.

155. See William W. Van Alstyne, Comment, *The Hazards to the Press of Claiming a "Preferred Position,"* 28 HASTINGS L.J. 761, 768 (1977).

156. Abrams, *supra* note 1, at 570.

rights that are already protected. There are no constitutional losers in this equation. Rather, placing newsgathering within the protections of the First Amendment would allow the Court to acknowledge the important and distinct role of the press in informing the public and checking the government. The Court has spoken of this role but has failed to support it and instead has let the Press Clause slumber.

### III. DEFINING THE PRESS

Justice Stewart once observed that the press has the unique distinction of being “the only organized private business that is given explicit constitutional protection.”<sup>157</sup> The exceptional status that this specific textual recognition gives to the press should not be taken lightly or ignored. As Justice Stevens recently pointed out, the inclusion of the Press Clause suggests that the First Amendment tolerates—indeed presumes—“some kinds of ‘identity’-based distinctions” among speakers at least as far as whether they are a member of the press.<sup>158</sup> The problem, however, is figuring out how to make these constitutional distinctions between who is and who is not the press. Arriving at a definition is so challenging that it is even difficult to settle on the appropriate framing of the question: Do we identify the press based on who they are, what they are doing, how they go about it, or why they want to?

To date, the Court has not attempted to answer these questions and has never decided whether any particular person or entity is a member of the press under the First Amendment.<sup>159</sup> Instead, when faced with the issue, the Court has lamented the daunting task before it. Writing in *Branzburg v. Hayes*,<sup>160</sup> for example, Chief Justice Burger claimed that the Court could not recognize a constitutional reporter’s privilege because the need to define who qualified for the privilege “would present practical and conceptual difficulties of a high order.”<sup>161</sup> The undertaking is made all the more difficult, the Court

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157. Stewart, *supra* note 103, at 633.

158. *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 952 n.57 (2010) (Stevens, J., concurring in part and dissenting in part).

159. The Court has, however, decided cases in which it has simply accepted without analysis that a party was a member of the press. See Anderson, *Freedom of the Press in Wartime*, *supra* note 15, at 70 (observing that in early cases the Court “simply assumed that the litigants were press and did not consider how that identification might be made if it were not obvious”).

160. 408 U.S. 665 (1972).

161. *Id.* at 703–04.

has noted, because constantly changing technology means that any definition it might propose “would likely be born an anachronism.”<sup>162</sup>

While there is no doubt that defining the “press” is not an easy task, the difficulty of the challenge should not be an excuse to avoid the question altogether. The Constitution demands that the Court take on a range of abstract and complicated issues, and numerous constitutional phrases function sufficiently despite a cloud of ambiguity.<sup>163</sup> As Floyd Abrams has argued, “[I]t is simply unacceptable to say that because a word in the Constitution is difficult to define, it should be afforded no meaning at all.”<sup>164</sup>

#### A. The Pull Toward an Overly Broad Definition

When faced with the seemingly herculean task of defining the press, some have concluded that the difficulties are insurmountable;<sup>165</sup> but there are others who have ventured fearlessly onto the field of battle. The majority of past attempts, however, have ended with an overly broad definition that includes—or potentially could include—virtually everyone.<sup>166</sup> The inevitable consequence of this push toward overinclusiveness is a crippling of the Press Clause. I contend that in order for the Press Clause to have the independent weight it merits, the courts must give the term “press” a meaningfully narrow

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162. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 782 (1985).

163. See Abrams, *supra* note 1, at 580–81 (“A useful analogy is to that other central spoke of the first amendment: freedom of religion. Consider the paradox. It is plain that ‘we will not tolerate either governmentally established religion or governmental interference with religion.’ Yet, despite the evident risks of governmental decisionmaking in this excruciatingly sensitive area, we permit judicial definition of what is and is not a *religion* and which allegedly religious activities are and are not constitutionally protected.” (footnote omitted)).

164. *Id.* at 583; see also Werhan, *supra* note 32, at 1600 (“The problem of defining ‘the press’ is hardwired into the First Amendment’s limitation of government authority over a free press, and it cannot be avoided by ignoring the Press Clause.”).

165. See, e.g., *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964, 979 (D.C. Cir. 2005) (Sentelle, J., concurring) (“Are we then to create a privilege that protects only those reporters employed by *Time* magazine, the *New York Times*, and other media giants, or do we extend that protection as well to the owner of a desktop printer producing a weekly newsletter to inform his neighbors, lodge brothers, co-religionists, or co-conspirators? Perhaps more to the point today, does the privilege also protect the proprietor of a web log: the stereotypical ‘blogger’ sitting in his pajamas at his personal computer posting on the World Wide Web his best product to inform whoever happens to browse his way? If not, why not? How could one draw a distinction consistent with the court’s vision of a broadly granted personal right?”); Anderson, *Freedom of the Press*, *supra* note 15, at 435 (suggesting that “the demise of the press as a legally preferred institution is quite possible and perhaps even probable”); Geoffrey R. Stone, *Why We Need A Federal Reporter’s Privilege*, 34 HOFSTRA L. REV. 39, 47–48 (2005) (arguing that “[t]he idea of defining or ‘licensing’ the press in this manner is anathema to our constitutional traditions” although it could be done legislatively).

166. See *infra* Part III.A.2.

definition. Why do we feel this pull toward an expansive definition? And how can we resist this temptation in the future? I turn now to these questions.

### 1. Free Speech Overprotection

The reason we so naturally gravitate toward an all-encompassing view of the press lies in our attitude about the Speech Clause and our conviction that First Amendment freedoms “are delicate and vulnerable, as well as supremely precious in our society.”<sup>167</sup> With free speech, we have adopted an approach of constitutional overprotection under which we gather the maximum number of speakers and messages within the protective confines of the First Amendment. The reasons for taking this position with the Speech Clause are valid: We fear that, in the absence of such protection, the government will engage in viewpoint-based or other types of discrimination, resulting in the complete loss of important ideas from our public debate.<sup>168</sup>

For free speech advocates, the argument often focuses on protection of the “fringe,” suggesting that low-value or questionable speech is necessary to guarantee the security of core, high-value speech.<sup>169</sup> As a group of media amici once explained to the Supreme Court, “[I]t is most often the speech at the fringes of American life that defines the freedoms for those at the center.”<sup>170</sup> The news media in particular have embraced constitutional overprotection as a First Amendment theory. Linda Greenhouse, the former *New York Times* Supreme Court reporter, explained that the press “sees itself as the embattled defender of the constitutional guarantees of free speech and freedom of the press” and seizes upon each perceived affront whether “serious or slight.”<sup>171</sup>

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167. *NAACP v. Button*, 371 U.S. 415, 433 (1963).

168. See *Roth v. United States*, 354 U.S. 476, 488 (1957) (“Ceaseless vigilance is the watchword to prevent the[ ] erosion [of First Amendment rights] by Congress or by the States. The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests.”).

169. See Patricia R. Stembridge, Note, *Adjusting Absolutism: First Amendment Protection for the Fringe*, 80 B.U.L. REV. 907, 924 (2000) (referring to this approach as “Fringe Protection Theory”).

170. Brief for ABC, Inc. et al. as Amici Curiae Supporting Petition for Writ of Certiorari at 2, *Paladin Enters., Inc. v. Rice*, 523 U.S. 1074 (1998) (No. 97-1325) (listing amici curiae as ABC, Inc., The E.W. Scripps Company, Media General, Inc., Media Professional Insurance, Inc., National Association of Broadcasters, National Broadcasting Company, Inc., Newspaper Association of America, PriMedia, Inc., Radio-Television News Directors Association, The Reporters Committee for Freedom of the Press, Society of Professional Journalists, Thomas Jefferson Center for the Protection of Free Expression, Viacom Inc., and The Washington Post Company).

171. Linda Greenhouse, *Books of the Times: Embattled Defender*, N.Y. TIMES, July 4, 1981, at 12. But see JOHN LOFTON, *THE PRESS AS GUARDIAN OF THE FIRST AMENDMENT* 101 (1980) (arguing that during the pre-Civil War era the press did not actively defend First Amendment liberties).

Free speech overprotection has become a popular theory thanks in part to the fear of the slippery slope. The concern with allowing regulation of fringe speakers is that it will lead quickly and seamlessly to censorship of high-value speakers.<sup>172</sup> To prevent this, the belief is that we must construct a First Amendment fortress wherein no speech can be permissibly restricted no matter how questionable in value.<sup>173</sup> Core, high-value speech is tucked safely inside the fortress walls and far from the speech-restricting barbarians at the gate.

The Court's relationship with constitutional overprotection of the First Amendment has been mixed. While the Court has rejected free speech absolutism,<sup>174</sup> it has adopted a paradigm that is highly skeptical of any government regulation of speech based on its content<sup>175</sup> (outside of a few narrowly defined categories). If deemed to be content based, the regulation must be necessary to further a compelling state interest and must be the least restrictive regulation on speech necessary to serve that interest.<sup>176</sup> This approach, at least in theory, protects fringe speech with the same force as core speech and is in line with the Court's repeated declarations that core free speech rights need breathing room<sup>177</sup> before they are truly safe. The Court, however, does give lesser protection to fringe speech through its practice of categorizing certain

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172. See Brief for ABC, Inc. et al. as Amici Curiae, *supra* note 170, at 15 ("No expression—music, video, books, even newspaper articles—will be safe from civil liability.").

173. Unless, most advocates concede, it squarely falls into one of the Court's clearly delineated categories such as obscenity. See, e.g., Brief for Reporters Comm. for Freedom of the Press et al. as Amici Curiae Supporting Respondents at 3, *Schwarzenegger v. Entm't Merch. Ass'n*, 130 S. Ct. 2398 (2010) (No. 08-1448) (listing amici curiae as The Reporters Committee for Freedom of the Press, The American Society of News Editors, The First Amendment Project, The National Press Photographers Association, The Radio-Television Digital News Association, The Society of Professional Journalists, and Student Press Law Center) (arguing that "the unprotected categories of speech are extremely limited" and should not be expanded).

174. Cass Sunstein, *Words, Conduct, Caste*, 60 U. CHI. L. REV. 795, 807 (1993) (observing that "[u]nder current doctrine, and under any sensible system of free expression, speech that lies at the periphery of constitutional concern may be regulated on a lesser showing of harm than speech that lies at the core").

175. See *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 51 (1988) (noting that the Court has been "particularly vigilant to ensure that individual expressions of ideas remain free from governmentally imposed sanctions").

176. See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994) ("Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content.").

177. See, e.g., *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964).

low-value speech such as obscenity,<sup>178</sup> commercial speech,<sup>179</sup> and fighting words<sup>180</sup> as deserving lesser or no First Amendment protection.

Constitutional overprotection is an appealing approach for speech. It ensures that the maximum amount of speech enters the public debate, avoids the evils of prior restraints, and most importantly, guarantees that neither the government nor juries are allowed to restrict speech simply because of a disagreement with the message or a dislike of the speaker.<sup>181</sup> Indeed, the Court has shown great sympathy for these arguments in cases like *Hustler Magazine, Inc. v. Falwell*<sup>182</sup> and *Cohen v. California*,<sup>183</sup> and Justice Holmes famously extolled the virtues of being “eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death.”<sup>184</sup>

The numerous and widely varied functions of the Speech Clause also support an approach of constitutional overprotection for speech. Jurists and scholars have embraced the freedom of speech as a “good in itself”<sup>185</sup> and “[t]he essence of civic courage.”<sup>186</sup> The Speech Clause has been called “powerful medicine in a society as diverse and populous as ours”<sup>187</sup> and is attributed with

178. *Roth v. United States*, 354 U.S. 476, 484–85 (1957) (holding that obscenity is “utterly without redeeming social importance” and therefore “not within the area of constitutionally protected speech or press”).

179. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 563 (1980) (holding that the Constitution “accords a lesser protection to commercial speech than to other constitutionally guaranteed expression”).

180. See *FCC v. Pacifica Found.*, 438 U.S. 726, 743 (1978) (arguing that “the broadcasting of patently offensive references to excretory and sexual organs and activities . . . surely lie at the periphery of First Amendment concern”); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (stating that there are certain categories of speech that may be constitutionally regulated, including “the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words”).

181. See *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 818 (2000) (“What the Constitution says is that these judgments are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority.”).

182. 485 U.S. 46 (1988). See *id.* at 50, 55 (concluding unanimously that the First Amendment protected an advertisement parody that the Court found to be “gross and repugnant”—and intended to inflict emotional injury on its subjects—in part because an alternative ruling “would allow a jury to impose liability on the basis of the jurors’ tastes or views, or perhaps on the basis of their dislike of a particular expression”).

183. 403 U.S. 15, 25 (1971) (admonishing that we should embrace what might seem to be a “trifling and annoying instance of individual distasteful abuse of a privilege” as “not a sign of weakness but of strength”).

184. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). See also *Snyder v. Phelps*, 131 S. Ct. 1207, 1219 (2011) (stating that speech “cannot be restricted simply because it is upsetting or arouses contempt”).

185. EMERSON, *supra* note 121, at 6–9.

186. Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in Whitney v. California*, 29 WM. & MARY L. REV. 653, 691 (1988).

187. *Cohen*, 403 U.S. at 24.



view of the press. In his famous speech in support of additional press rights in 1974, Justice Stewart referred simply to the “organized press,” which he defined as “the daily newspapers and other established news media.”<sup>195</sup> This definition, however, was quickly and strongly criticized as being too restrictive. David Lange, for example, observed that it would exclude the occasional or alternative publisher. Lange argued that exclusion of these types of publications is “perverse” because these are “two elements in the contemporary press which the Framers themselves would have recognized” because of their similarities to the pamphleteer and the underground newspaper.<sup>196</sup>

To avoid similar criticisms, any attempt to define the press must deal with the case of the romanticized “lonely pamphleteer” or, in today’s world, the “the stereotypical ‘blogger’ sitting in his pajamas.”<sup>197</sup> Writing for the Court, Chief Justice Burger concluded that the press could not be defined in part because of “the traditional doctrine that liberty of the press is the right of the lonely pamphleteer . . . just as much as of the large metropolitan publisher.”<sup>198</sup> But the problem with adopting a definition that includes anyone with access to a laptop and a printer is that it effectively extinguishes all the airspace between the press and a general speaker.

Indeed, defining the press has always been hard and keeps getting harder because of new technologies and the emergence of an information-based society.<sup>199</sup> The “press,” for example, cannot simply mean all “written communication,” because that definition is so limited that it excludes broadcasting and so broad that it includes written material that was never distributed to anyone.<sup>200</sup> It similarly cannot be all “information providers” because that definition would include any person or business that trades or sells information regardless of its news value.<sup>201</sup> In our information-based society, moreover, the

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195. Stewart, *supra* note 103, at 631 (reprinted from an address on Nov. 2, 1974, at the Yale Law School Sesquicentennial Convocation in New Haven, Connecticut).

196. Lange, *supra* note 27, at 106.

197. *In re Grand Jury Subpoena*, Judith Miller, 438 F.3d 1141, 1156 (D.C. Cir. 2006); see also Horwitz, *supra* note 40, at 46 (“We might say that the rise of the blog represents the realization of the full promise of the ‘lonely pamphleteer.’”).

198. *Branzburg v. Hayes*, 408 U.S. 665, 704 (1972); see also *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 801 (1978) (Burger, C.J., concurring); *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938) (“The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets.”).

199. *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 905–06 (2010) (“With the advent of the Internet and the decline of print and broadcast media, moreover, the line between the media and others who wish to comment on political and social issues becomes far more blurred.”).

200. See Nimmer, *supra* note 12, at 651–52.

201. Anderson, *Freedom of the Press*, *supra* note 15, at 443 (noting that “information providers” include “[f]inancial services, credit agencies, travel services, Internet service providers, telephone, cable, and

line between those who trade in information and those who are news providers is becoming even more indecipherable.<sup>202</sup> David Anderson explained that “[i]t is impossible, or at least impractical, to extend press perquisites equally to all information providers, and it is difficult to distinguish the press from the rest because the press is ‘disappearing inside the larger world of communications.’”<sup>203</sup>

Many scholars, therefore, have turned to a functional definition instead—in other words, it is not who you are that makes you a member of the press, but rather what you do.<sup>204</sup> Linda Berger has suggested that the focus should be on the purpose of the proposed protections, which is to provide information to the public. She explained that “[i]t may be that those who fall within a definition of journalist are those most likely to produce the desired information, but they are certainly not the only individuals who might do so.”<sup>205</sup> Tom Rosenstiel, director of the Pew Research Center’s Project for Excellence in Journalism, described the process of determining who is a member of the press: “You can’t say, ‘I’m a journalist, here’s my press pass.’ You have to say, ‘I’m a journalist. Here’s my work.’ Some of the people with press passes don’t make the cut.”<sup>206</sup> Similarly, Scott Gant, former counsel for *The New Republic*, explained, “[J]ournalism is an endeavor, not a job title.”<sup>207</sup> Thus, anyone with a laptop, an internet connection, and the desire to relay what they hear, see, or think can function as a journalist and deserves the same constitutional rights

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satellite companies, public-relations counselors, mailing-list suppliers, directory publishers, health-information services, weather services, business consultants, and gambling tout sheets”).

202. See Philip Meyer, *Saving Journalism: How to Nurse the Good Stuff Until It Pays*, COLUM. J. REV. Nov.–Dec. 2004, at 55, 55 (“Our once noble calling is increasingly difficult to distinguish from things that look like journalism but are primarily advertising, press agency, or entertainment.”).

203. Anderson, *Freedom of the Press*, *supra* note 15, at 528 (quoting BILL KOVACH & TOM ROSENSTIEL, *THE ELEMENTS OF JOURNALISM* 11 (2001)).

204. See, e.g., Bezanson, *supra* note 32, at 829 (advocating a “purpose-oriented definition”); Sack, *supra* note 32, at 629 (stating that “all citizens exercising the press function, including, but not limited to, journalists employed by the ‘institutional press,’ warrant such protection”); see also Berger, *supra* note 32, at 1374 (proposing a functional definition that “focuses on the context within which the need for a privilege and the balance of costs is most clear”); Horwitz, *supra* note 40, at 52 (“The medium by which that journalism is disseminated to the public matters far less than the fact that an individual has deliberately gathered and disseminated newsworthy facts.”); Ugland & Henderson, *supra* note 194, at 247 (identifying the “egalitarian” definition of the press “in which all citizens are equally equipped and equally free to serve as newsgathering watchdogs”). *But see* Horwitz, *supra* note 40, at 53 (observing that “the functional approach may avoid one definitional problem—are blogs journalism?—only to replace it with other, equally difficult definitional questions: What is journalism, exactly?”).

205. Berger, *supra* note 32, at 1377.

206. Gina Barton, *What Is a Journalist?*, QUILL, May 2002, at 10, 11; see also *id.* (quoting Lucy Dalglish, head of the Reporters Committee for Freedom of the Press, as suggesting that a journalist is “someone who is collecting information with the purpose of disseminating it to the public”).

207. GANT, *supra* note 32, at 6.

and protections. In his book titled *We're All Journalists Now*, Gant calls for an end to any special treatment for the institutional press:

We should no longer accept the routine extension of special perks and protections to professional journalists that are denied to others seeking to engage in essentially the same activities. The First Amendment is for all of us—and not just as passive recipients of what the institutional press has to offer.<sup>208</sup>

Gant's claim that the news media enjoy "special perks" under existing law is highly questionable, at least as a constitutional matter.<sup>209</sup> But his sentiment is well received by many who share an aversion to the perceived elitism inherent in making the press a select group. Anderson described this view of the press—a view that he does not share—as "the tyranny of a self-appointed elite that depicts the world through its own filter, tries to tell people what they need to know, and bedevils their elected officials and their celebrities in the name of their right to know."<sup>210</sup>

This backlash and fear of elitism has led others to warn that defining the press at all could be detrimental to the press. Journalism scholar Philip Meyer cautioned that "special rights for the press could easily lead to special responsibilities" and create a "slippery slope leading first to the licensing of journalists and ultimately to censorship."<sup>211</sup> Indeed, while the press is frequently accused of seeking privileged rights for an elite few, the reality is quite the opposite. When arguing as parties in lawsuits, press litigants have gone out of their way not to seek special rights—an approach that paradoxically might hurt their cause and result in fewer constitutional protections for the press. A recent study of Supreme Court briefs filed by media litigants found that journalists have "more consistently championed an 'egalitarian' conception of the press that recognizes the ability and right of all citizens to seek and disseminate news."<sup>212</sup> Rather than seeking special rights, this study concluded that media litigants "have been more diligent than the Court in avoiding references and arguments that separate speech and press and that imply the need for unusual scrutiny of restraints media defendants."<sup>213</sup> This approach by press

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208. *Id.* at 5.

209. See Ugland & Henderson, *supra* note 194, at 245–47.

210. Anderson, *Freedom of the Press*, *supra* note 15, at 529; see also Mike Godwin, *Who's a Journalist?—II: Welcome the New Journalists on the Internet*, 13 MEDIA STUD. J. 38, 38–39, 42 (1999) (advocating the end of special privileges for the established press).

211. Philip Meyer, *What Defines a Journalist?*, USA TODAY, Jan. 3, 2002, at 11A.

212. See Erik Ugland, *Newsgathering, Autonomy, and the Special-Rights Apocrypha: Supreme Court and Media Litigant Conceptions of Press Freedom*, 11 U. PA. J. CONST. L. 375, 380 (2009).

213. *Id.*

advocates has led to phenomenal successes in winning constitutional protections for the free dissemination of news, but these rights were secured almost entirely under the Speech Clause.<sup>214</sup> When it comes to protections for the newsgathering process under the Press Clause, though, the news media's win column is virtually empty.<sup>215</sup>

In attempting to define the press, all roads lead to overprotection. Whether it is out of a democratic embrace of equality, a fear of government favoritism, or a repulsion to elitism, there is a shared instinct toward inclusion and a resistance to exclusion.

#### B. Embracing a Narrow Definition: Why Less Is More

Our urge to apply the same constitutional overprotection to the Press Clause that we apply to the Speech Clause comes from an admirable place. Including everyone within the definition of "press" appeals to our core democratic belief in equality as well as our faith in a vibrant marketplace of ideas. The problem, however, is that the overprotective approach is not a good fit with the Press Clause, and the consequence of this mismatch has been a serious weakening, if not an elimination, of our constitutional press rights. A closer analysis shows that constitutional overprotection is backfiring as a theory of press freedoms and needlessly so. Unlike the Speech Clause, which may be damaged without an expansive approach, the Press Clause could flourish under a narrower regime without many of the risks inherent in a limited speech theory. Thus, a narrower definition of the press can be both constitutionally acceptable and functionally superior.

##### 1. Boomerang Effect

We need to resist the urge to overprotect press freedoms through an overly broad definition of the press for one primary reason—it results in a disappearance of press protections. It does so by creating a feedback loop that ultimately erases any distinction between the Speech Clause and the Press Clause and thus eliminates the need for separate press rights. Ironically, the more vigorously that judges, scholars, and press advocates fight for broadly held press rights, the less likely it is that these protections will materialize. In his study of the definition of religion under the Free Exercise Clause, Philip

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214. See, e.g., *supra* notes 68–79 and accompanying text.

215. See, e.g., *supra* notes 134–148 and accompanying text.

Hamburger noted the same phenomenon, “that an enlarged definition of any right may invite limitations on the circumstances in which it is available . . . and its effects are apt to be felt with particular regret.”<sup>216</sup> The goal of constitutional overprotection has gone awry, and we are faced now with constitutional underprotection in the form of an incapacitated Press Clause.

This boomerang effect works in three stages. In the first stage, described above, we transfer our adoption of free speech overprotection to our interpretation of the Press Clause.<sup>217</sup> This fuels our desire to create a definition of the press that equally protects speakers and messages on the periphery and those at the core. Ultimately, we are forced to declare that virtually everyone is, or can be, a member of the press. In the second stage, this overly broad definition is quickly revealed to be unworkable. The complication is that, for the Press Clause and the Speech Clause to fill different roles, there needs to be a distinction between the press and everybody else. As Abrams explained, “The broader the class included within the definition of press, the more attenuated the distinction between press and speech.”<sup>218</sup> In other words, for the Press Clause to mean something, everyone cannot be a member of the press.

In the third and final stage, the Press Clause disappears into the Speech Clause. Because the Speech Clause already broadly protects expression and dissemination of expression,<sup>219</sup> the Press Clause is not needed. And the Court is reluctant to embrace what additional protections the clause could offer for newsgathering because it would require recognizing those rights for everyone.<sup>220</sup> Thus, the efforts to broaden the First Amendment’s press freedoms through an expansive definition have had the reverse effect and have left us with a Press Clause that is a constitutional redundancy.

One potential approach that allows the Press Clause to function separately from the Speech Clause is to interpret the Press Clause as offering protections only for information gathering. This could create a distinct role for the Press Clause even if the freedom of the press applied to everyone. There are, though, two problems with this approach. The first is that the Court already recognizes some rights to obtain information as part of our general speech

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216. Philip Hamburger, *More Is Less*, 90 VA. L. REV. 835, 838 (2004).

217. See *supra* Part III.A.

218. Abrams, *supra* note 1, at 583.

219. See *supra* notes 50–57 and accompanying text.

220. See, e.g., *Houchins v. KQED, Inc.*, 438 U.S. 1, 13–14 (1977) (rejecting the contention “that media personnel are the best qualified persons for the task of discovering malfeasance in public institutions” and thus suggesting that everyone potentially could play this role).

rights.<sup>221</sup> The second problem is a pragmatic consideration and another key part of the boomerang effect: It is highly impracticable to give these rights to everyone. We cannot rationally exempt virtually everyone from some testimonial duties, protect them from otherwise justified searches, give them access to government proceedings, or forgive them certain law violations like fraud or trespass based simply on a cursory finding that they were attempting to gather information with the intention of conveying it to others. It therefore appears that if judges must choose between granting these rights to everyone or no one, they will choose no one.

An overly broad definition of the press, moreover, does not allow members of the press—that is, those who have repeatedly committed time, resources and advanced skills—to take advantage of their abilities to earn reputational trust.<sup>222</sup> It makes practical sense to give certain rights and privileges only to those who have demonstrated that they are more likely to use these protections responsibly and for the public good rather than to give similar rights to anyone with a computer. Thus, the more exclusive and reputable the members of the press club are, it should follow that the courts will be more comfortable awarding them additional rights and protections under the First Amendment.

## 2. Fallback Protections

The second important way that constitutional overprotection is not as compatible with the Press Clause as it is with the Speech Clause is the existence of fallback protections. A narrow definition of the press is not as constitutionally problematic as might first appear because all individuals and entities have extensive communicative rights under the Speech Clause. In other words, our broad free speech rights for everyone justify a narrow rights regime for the press.

We have embraced an approach of free speech overprotection out of a desire to include the maximum number of voices and messages in our public debate. The Supreme Court has declared that “[a]ll ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection

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221. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 (1980) (“Free speech carries with it some freedom to listen. In a variety of contexts this Court has referred to a First Amendment right to receive information and ideas.” (internal quotation marks omitted)).

222. Horwitz, *supra* note 40, at 59 (“The established news media typically operate subject to a set of ethical and professional norms, made explicit in a host of ethical codes and, more importantly, absorbed by individual journalists in a deeply embedded sense of professional identity that shapes and constrains their actions.”).

of the guaranties” under the Speech Clause.<sup>223</sup> This constitutional protection alleviates concerns that expressive works that are not part of the press, but are still valuable as art, fiction, science, history, or entertainment, remain protected under the Speech Clause.<sup>224</sup> The same is true for individuals seeking to express themselves through their personal speech and even the occasional journalistic endeavor, regardless of whether they are deemed not to qualify as part of the press under a narrow definition. At the same time, every person enjoys the strongest protection against prior restraints, lessening the concerns that a licensing system will be imposed.<sup>225</sup>

This makes the Press Clause significantly different from the Speech Clause. We strive to overprotect speech rights in part out of a fear of the “grave results”<sup>226</sup> of making a mistake. If a speaker is silenced or a message censored, the idea is removed completely from our public discourse. This can lead to serious consequences, including the “standardization of ideas either by legislatures, courts, or dominant political or community groups.”<sup>227</sup> But the potential costs when a speaker is excluded from the Press Clause are not as high. Rather than being muzzled entirely, that speaker will still be free to express his or her message to a wide audience.

By the same logic, the danger of creating a chilling effect, in which potential speakers refrain from engaging in what would have been constitutionally protected speech out of a fear of prosecution, is far less with the Press Clause than it is with the Speech Clause. While it is possible, indeed likely, that some potential newsgatherers might refrain from taking action out of the fear that they would not be deemed to be part of the press, they would simply be left in the position that everyone (including journalists) are in today. They could pursue their information through different avenues<sup>228</sup> and disseminate

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223. Roth v. United States, 354 U.S. 476, 484 (1957).

224. See Bezanson, *supra* note 32, at 855–56 (arguing that works of fiction, history, entertainment, and art are protected as speech, but not as press).

225. In *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938), the Court declared that “[t]he liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets.” Yet that case involved a blatant licensing scheme that allowed for fines and imprisonment of a pamphleteer who distributed her leaflets “without first obtaining written permission from the City Manager.” *Id.* at 447.

226. *Cohen v. California*, 403 U.S. 15, 26 (1971) (“Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views. We have been able . . . to discern little social benefit that might result from running the risk of opening the door to such grave results.”).

227. *Terminiello v. City of Chi.*, 337 U.S. 1, 4–5 (1949).

228. This is, essentially, where the media stands today. The Fourth Circuit, for example, explained that it thinks the media has ample alternative avenues for newsgathering. See *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 521 (4th Cir. 1999) (“We are convinced that the

their experiences, thoughts, and ideas broadly. Moreover, depending on the definition of the press eventually adopted, they could endeavor to satisfy these criteria and further ensure their enhanced protection as a member of the press.

These fallback protections lessen the impact of adopting a narrower definition of the press and provide protection against potential mistakes in line drawing. As with any constitutional definition, some ambiguities are unavoidable when trying to define the press as meaning something other than everyone or no one. The Constitution and the Court do not demand perfection. Even in cases involving speech regulations, the Court has held that some imprecision is “not fatal” and “that lack of precision is not itself offensive to the requirements of due process.”<sup>229</sup>

Nonetheless, we are rightfully concerned about the harms of wrongfully removing constitutionally valuable speech from the protection of the First Amendment. We err on the side of overinclusiveness because the consequences of that mistake—complete stifling of the speaker—are so serious. The Court has noted that a wrongfully gagged speaker has little opportunity to convince others of the error. When discussing bans on obscenity, Justice Brennan explained that “one of the problems with erroneous determinations that prevent marginal material from ever reaching the public is that such material, which is by definition at the fringe of what is currently patently offensive to community standards, will never be able to exert an influence on those inherently evolving standards.”<sup>230</sup> The same risk is not present with the Press Clause. A speaker who is wrongfully deemed not to be part of the press can use his or her freedoms of speech to argue against that decision and ultimately to modify the definition.

Adopting a broad definition of the press, as attractive as the notion might be, has failed to maximize the role of the press in promoting our democratic values. The disappointing result of our attempts to overprotect with the Press Clause has been to destroy it. Therefore, it is time to consider another approach to defining the press that will revive the Press Clause and allow it to attain its textual and functional potential.

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media can do its important job effectively without resort to the commission of run-of-the-mill torts.”). The Fourth Circuit’s approach, in my view, does not give sufficient weight to the independent value of the Press Clause.

229. Roth v. United States, 354 U.S. 476, 491 (1957).

230. McKinney v. Alabama, 424 U.S. 669, 685 n.4 (1976) (Brennan, J., concurring).

### C. A Workable Problem

Accepting that a narrower, and thus more meaningful, definition of the press is desirable, the question remains whether it is attainable. Is there a way to identify the press that would avoid the pitfalls of the overinclusive approach while still avoiding constitutional concerns such as governmental favoritism or content-based discrimination? Unlike others who have concluded that the problems of this task are insurmountable, I contend that this is a workable problem. While promulgating the ultimate definition is outside the scope of this Article, the Court is capable of crafting a usable, albeit imperfect, definition that would adequately avoid constitutional violations such as vagueness, overbreadth, or viewpoint discrimination. I further agree with David Anderson that the definition need not arise overnight and may develop progressively over time.<sup>231</sup>

The first step to a workable definition is to accept that an identifiable press exists and that it is more selective than the general public but not necessarily limited to traditional news outlets. While it certainly is true that many, and perhaps even all, people act from time to time in ways that are somewhat press-like, there are unquestionably people and entities who devote far more time, experience, expertise, and resources to being the press as opposed to being a regular participant in our public debate. These journalists are repeat players who gather and disseminate news in a planned and consistent manner.<sup>232</sup> Their conspicuous presence as news providers, moreover, subjects them to the accountability of readers, viewers, listeners, and frequently to professional or industry norms. This is the group who, by informing the public and checking the government, most fulfills the functional purpose of the press and therefore benefits the public and our democracy.<sup>233</sup>

Another commonality of the members of this press club is that they are the people and entities most likely to utilize the rights and privileges of a stronger, more robust reading of the Press Clause as imagined above in Part II. Reasonable minds can debate how to define this group, and there will always

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231. See Anderson, *Freedom of the Press in Wartime*, *supra* note 15, at 52 (arguing “that the courts should work out the contours of the constitutional concept of ‘press’ gradually, on a case-by-case basis, just as they do with other constitutional concepts such as ‘speech’ and ‘religion’”).

232. See Ugland & Henderson, *supra* note 194, at 253.

233. See Anderson, *Freedom of the Press*, *supra* note 15, at 442 (arguing that the use of the word “press” in the First Amendment “implies the existence of something to which the collective singular can be properly applied—an institution, or at least a shared mission or common undertaking”).

be questions about the final membership list,<sup>234</sup> but it does not change the basic fact that the group exists. Identifying the press is hard and will require hard choices, but it is possible. How do we know this? Because it is done in this country every day and in every jurisdiction.

### 1. Experimentation With Defining the Press

What few legal privileges the press does enjoy are almost entirely nonconstitutional.<sup>235</sup> Thanks to federal and state legislation, the press receives press passes, press rooms, press galleries, press planes, press pools, and is often catered to by a press office and press secretary.<sup>236</sup> The press further owes lawmakers for varied protections from newsroom searches and seizures,<sup>237</sup> subpoenas,<sup>238</sup> and securities regulations.<sup>239</sup> The press also has been granted preferential tax policies,<sup>240</sup> postal rates,<sup>241</sup> and broadcasting licenses.<sup>242</sup> While this is an impressive list of benefits, they vary by jurisdiction and are enjoyed by the press only at the pleasure of the legislators, meaning that those who giveth can taketh away. These legislatively granted privileges, therefore, do not resolve the issue

234. Conversely, not all members of the “media” should necessarily be considered the “press” despite the common practice of using the two words interchangeably. According to David Anderson:

Most of the media are in the business of entertainment, engaged in activities that have little relation to the functions for which the law favors “the press.” The entertainment media have no better claim than any other industry for special access to courtrooms or Congress, or protection for confidential sources, or protection from discriminatory taxation.

*Id.*; see also Calvert, *supra* note 32, at 416 (observing that the line “between news and entertainment rapidly is fading in the world of infotainment”).

235. See, e.g., *In re Roche*, 411 N.E.2d 466, 472 n.9 (Mass. 1980) (noting that “the powerful rostrum of a newsroom or a broadcast studio may confer status of a type that is both real and laden with responsibility, but not, in [the Court’s] view, status of constitutional dimension”).

236. See Anderson, *Freedom of the Press*, *supra* note 15, at 430 (“The press pass, the press gallery, the press room, the press office, the press secretary (or public-information officer), the press bus or plane, and the press pool are usually created by some form of law—statute, regulation, rule, or policy.”).

237. 42 U.S.C. § 2000aa (2001).

238. *The Reporter’s Privilege Compendium: An Introduction*, REPORTERS COMM. FOR FREEDOM OF THE PRESS, <http://www.rcfp.org/privilege/item.php?pg=intro> (last visited Mar. 30, 2011) (noting that “31 states and the District of Columbia have enacted statutes—shield laws—that give journalists some form of privilege against compelled production of confidential or unpublished information”).

239. 15 U.S.C. §§ 80b-2(a)(II), 80b-3(a) (2001).

240. See Anderson, *Freedom of the Press*, *supra* note 15, at 495–505 & nn.368–439 (discussing the Court’s treatment of differential tax policies for the press).

241. 39 C.F.R. pt. 3001, subpt. C, app. A, § 411.2 (1999).

242. Thomas G. Krattenmaker, *The Telecommunications Act of 1996*, 49 Fed. Comm. L.J. 1, 12 (1996) (“Two features of the new Act combine to grant virtually perpetual licenses to all radio and television stations.”).

of constitutional Press Clause rights.<sup>243</sup> They do, however, highlight one important fact—defining the press can be done.<sup>244</sup> A quick review of legislative treatment of the press reveals a number of ways that lawmakers have come up with to separate the press from everyone else. Many states incorporate some combination of the following.

a. Medium of Communication or News Affiliation

Laws often grant rights to the press by looking to the medium of communication. That is, only individuals or organizations that communicate to the public via one of the listed media will qualify under these laws as members of the press.

The most popular media listed in such laws include all or some combination of broadcast and cable television, journals, magazines, news agencies, newspapers, periodicals, press associations, radio, and wire services.<sup>245</sup> These

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243. While the Supreme Court has never attempted to define the press as a constitutional matter, most lower federal courts have endorsed a test for determining who is eligible for a constitutional reporter's privilege. These courts have exploited the still unresolved ambiguity in the Court's *Branzburg* opinion over the existence of a constitutional reporter's privilege by limiting that holding to the specifics of the case. See *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 714 (1st Cir. 1998) (finding a scholar to be the press); *In re Madden*, 151 F.3d 125, 130 (3d Cir. 1998) (requiring the party to be involved in "investigative reporting"); *Shoen v. Shoen*, 5 F.3d 1289, 1293 (9th Cir. 1993) (finding that an investigative book author was the press); *Von Bulow v. Von Bulow*, 811 F.2d 136, 144 (2d Cir. 1987) (holding that parties can claim a constitutional reporter's privilege if they establish "the intent to use material—sought, gathered or received—to disseminate information to the public and that such intent existed at the inception of the newsgathering process"); *Apicela v. McNeil Labs., Inc.*, 66 F.R.D. 78, 84 (E.D.N.Y. 1975) (finding that a publisher of a technical newsletter was the press); see also *Sonja R. West, Concurring in Part & Concurring in the Confusion*, 104 MICH. L. REV. 1951 (2006) (discussing the ambiguity in the Court's opinion in *Branzburg*).

244. David Anderson has suggested that the definition could be treated as a political question, at least as to a reporter's privilege to keep confidential sources, arguing that the only proper constitutional question for the Court is not the scope of that protection, but rather "whether compelled disclosure of sources abridges freedom of the press." David A. Anderson, *Confidential Sources Reconsidered*, 61 FLA. L. REV. 883, 883 (2009).

245. Amy Bauer, Note, *Blogging on Broken Glass: Why the Proposed Free Flow of Information Act Needs a Specific Test for Determining When Media Shield Laws Apply to Bloggers*, 10 MINN. J. L. SCI. & TECH. 747, 747–48 (2009); see, e.g., ALA. CODE § 12-21-142 (LexisNexis 2005) (applying the state journalist's privilege law to newspapers, radio broadcasting stations, or television stations); ARIZ. REV. STAT. ANN. § 12-2237 (2003) (applying the state reporter's privilege to persons engaged in newspaper, radio, or television); ARK. CODE ANN. § 16-85-510 (2005) (applying the state reporter's privilege to newspapers, periodicals, and radio stations); COLO. REV. STAT. § 13-90-119 (2009) (extending the state reporter's privilege to newspapers or periodicals, wire services, radio or television stations or networks, news or feature syndicates, or cable television); GA. CODE ANN. § 24-9-30 (2010) (applying the state reporter's privilege to newspapers, books, magazines, radio, or television broadcasts); MD. CODE ANN., CTS. & JUD. PROC. § 9-112 (LexisNexis 2006) (applying the state reporter's privilege to those persons gathering news who have been employed by newspapers, magazines,

types of definitions are clearly aimed at identifying the more traditional news media. A New Jersey court, for example, concluded that the state legislature crafted its shield law with the goal of “protecting entities generally viewed as part of the news gathering apparatus in the United States.”<sup>246</sup>

One of the most obvious problems with this approach is that listing some affiliations suggests that no others qualify and thus raises the risk of wrongfully excluding a particular medium. It might also create new constitutional issues of equal protection.<sup>247</sup> In construing the Alabama shield law, for example, the Eleventh Circuit interpreted the language applying the statute “to newspapers, radio broadcasting stations, or television stations” as not extending to magazines.<sup>248</sup> A similar concern is that constantly changing technology and communication patterns could make the definition forever at risk of becoming outdated. The state shield laws, for example, often do not protect bloggers because they do not include the internet on the explicit list of shielded media. Indeed, it was not until 2007 that the first state, Washington, specifically applied its journalist’s privilege law to information disseminated over the internet.<sup>249</sup>

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journals, press associations, news agencies, wire services, radio, television, or any printed, photographic, mechanical, or electronic means of disseminating news and information to the public); MONT. CODE ANN. § 26-1-902 (2009) (applying the state reporter’s privilege to newspapers, magazines, press associations, news agencies, news services, radio stations, television stations, or community antenna television services); N.Y. JUD. LAW § 218(2)(c) (McKinney 2005) (defining the news media as those who will be allowed to cover court proceedings in an audiovisual manner, including those associated with “television, radio, radio and television networks, news services, newspapers, magazines, trade papers, in-house publications, professional journals or any other news reporting or news gathering agency, the function of which is to inform the public, or some segment thereof”); see also CAL. CONST. art. I, § 2(b) (applying the state reporter’s privilege to “[a] publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire service, or any person who has been so connected or employed . . . [or] a radio or television news reporter or other person connected with or employed by a radio or television station”).

246. *In re Napp Techs., Inc.*, 768 A.2d 274, 280 (N.J. Super. Ct. Law Div. 2000); see also N.J. STAT. ANN. 2A:84A-21 (West 1994) (providing protection to a “person engaged on, engaged in, connected with, or employed by news media for the purpose of” newsgathering).

247. See, e.g., *Garrett v. Estelle*, 556 F.2d 1274, 1279 (5th Cir. 1977) (rejecting the plaintiff’s argument that denying camera access amounted to an Equal Protection Clause violation).

248. *Price v. Time, Inc.*, 416 F.3d 1327, 1335–43 (11th Cir. 2005).

249. See *Bauer*, *supra* note 245, at 747; WASH. REV. CODE ANN. § 5.68.010 (West 2009) (applying protections to any “newspaper, magazine or other periodical, book publisher, news agency, wire service, radio or television station or network, cable or satellite station or network, or audio or audiovisual production company, or any entity that is in the regular business of news gathering and disseminating news or information to the public by any means, including but not limited to, print, broadcast, photographic, mechanical, internet, or electronic distribution”).

## b. News-Related Activities

Another legislative approach to defining the press is to describe news-related activities such as gathering, writing, and disseminating the news.<sup>250</sup> These statutes extend protection to individuals and organizations “based on the newsgathering function, not the news gatherer’s media affiliation.”<sup>251</sup>

A prime example can be found in Minnesota’s journalist shield law. The statute extends its protections to any “person who is or has been directly engaged in gathering, procuring, compiling, editing, or publishing of information for the purpose of transmission, dissemination or publication to the public.”<sup>252</sup> The federal Freedom of Information Act<sup>253</sup> provides a similar broad, functional definition of the press in the context of providing the press with reduced fees associated with document requests. According to the Act, “‘representative of the news media’ means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.”<sup>254</sup> Some of these activity-based definitions focus on the intent of the party. A federal court interpreting New York’s shield law concluded that

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250. See, e.g., D.C. CODE § 16-4701 (LexisNexis 2001) (including within its press definition “any printed, photographic, mechanical, or electronic means of disseminating news and information to the public”); MD. CODE ANN., CTS. & JUD. PROC. § 9-112 (LexisNexis 2006) (same); NEB. REV. STAT. § 20-146 (2007) (covering any person who is “engaged in procuring, gathering, writing, editing, or disseminating news or other information to the public”); OHIO REV. CODE ANN. § 2923.129(B)(2)(b) (West Supp. 2010) (defining journalist as a person connected with any news medium, including newspapers, magazines, press associations, news agencies, wire services, radio or television stations, or “a similar medium, for the purpose of gathering, processing, transmitting, compiling, editing or disseminating information for the general public”); OR. REV. STAT. § 44.510 (2009) (including those engaged in any medium of communication to the public); TENN. CODE ANN. § 24-1-208 (2000) (“A person engaged in gathering information for publication or broadcast connected with or employed by the news media or press, or who is independently engaged in gathering information for publication or broadcast, shall not be required . . . to disclose . . . any information or the source of any information procured for publication or broadcast.”); see also *People v. Vasco*, 31 Cal. Rptr. 3d 643, 654 (Ct. App. 2005) (interpreting California law and finding that “to qualify for the shield law protection, the newsperson must show that he is one of the types of persons enumerated in the law, that the information was obtained or prepared in gathering, receiving or processing of information for communication to the public, and that the information has not been disseminated to the public by the person from whom disclosure is sought” (internal quotation marks omitted)).

251. Bauer, *supra* note 245, at 757 n.65. See, e.g., MICH. COMP. LAWS ANN. § 767A.6 (West 2000) (“A reporter or other person who is involved in gathering or preparation of news for broadcast or publication.”).

252. MINN. STAT. ANN. § 595.023 (West 2010); see also N.C. GEN. STAT. § 8-53.11 (2009) (shielding those “engaged in the business of gathering, compiling, writing, editing, photographing, recording, or processing information for dissemination via any news medium”).

253. 5 U.S.C. § 552 (2006).

254. 5 U.S.C. § 552(4)(A)(ii)(II) (Supp. 2009).

would-be journalists must show that they engaged in the information gathering “with the intent of using the information collected, at least in part, to publish a report that would be widely and publicly circulated.”<sup>255</sup>

This approach avoids some of the pitfalls of the definition-by-affiliation approach discussed above. Most notably, it gives room for technology to change by focusing on the core activity at issue. This approach is also more egalitarian because it treats “the occasional pamphleteer precisely the same as the regularly employed journalist”<sup>256</sup> and leaves room to include internet newsmen.<sup>257</sup> At the same time, though, the broad definition raises the risk of redundancy between the Press Clause and the Speech Clause.<sup>258</sup>

### c. Circulation or Regularity of Publication

Still other statutes provide definitions of the press that demand a minimum circulation or regularity of publication. One example of a statute with these requirements is Illinois’s journalist shield law, which defines “news medium” as “any newspaper or other periodical issued at regular intervals . . . and having a general circulation.”<sup>259</sup> The Indiana reporter’s privilege statute contains similar requirements in that it covers persons connected with or employed by “a newspaper or other periodical issued at regular intervals and having a general circulation.”<sup>260</sup>

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255. *Schiller v. New York*, 245 F.R.D. 112, 119 (S.D.N.Y. 2007). Likely the only other reported case that interprets the New York shield law’s definitions clause is from the Superior Court of New Jersey. *Trump v. O’Brien*, 958 A.2d 85 (N.J. Super. Ct. Law Div. 2008) (holding that an author who gathered news sources for publication in his book qualified as a professional journalist under New York law).

256. *Abrams*, *supra* note 1, at 581.

257. *Bauer*, *supra* note 245, at 747. *See, e.g., O’Grady v. Superior Court*, 44 Cal. Rptr. 3d 72, 106 (Ct. App. 2006) (finding that bloggers are within protected class of California shield law).

258. *See supra* Part III.B.1.

259. 735 ILL. COMP. STAT. ANN. 5 / 8-902 (West 2003). In a case seeking to define “news media” for the purposes of a public disclosure bar to claims under the Illinois Whistleblower Act, an Illinois appellate court noted that the state legislature had not defined “news media” for purposes of the Whistleblower Act before borrowing and applying the legislature’s statutory definition of “news media” in the state’s reporter’s privilege law. *State ex rel. Beeler v. Target Corp.*, 856 N.E.2d 1096, 1104–05 (Ill. App. Ct. 2006).

260. IND. CODE ANN. § 34-46-4-1 (LexisNexis 2008); *see also* 42 PA. CONS. STAT. ANN. § 5492 (West 2000) (“No person engaged in, connected with, or employed by any newspaper of general circulation or any press association or any radio or television station, or any magazine of general circulation.”); R.I. GEN. LAWS § 9-19.1-1 (1997) (defining “newspaper” and “periodical” to mean only publications issued at regular intervals and with paid circulation and explicitly stating that the definition applies to those gathering or presenting news for any accredited newspaper).

Similarly, the federal code section regulating prison inmate mail correspondence allows inmates to write to news media and representatives of the media to initiate correspondence.<sup>261</sup> That regulation explicitly applies only to newspapers circulating among the general public and publishing news of general character or interest; news magazines with national circulation sold by newsstands and mail subscription to the general public; national or international news services; and radio or television programs with the primary purpose of reporting the news and holding FCC licenses.<sup>262</sup>

This approach to defining the press exemplifies an attempt to distinguish between repeat journalists with an established audience and the occasional public commentator. The idea behind these statutory definitions is that not just anyone should be able to claim status as a journalist and receive legal rights or protections. A benefit of this approach is that someone who is not associated with an established media outlet—the bedroom blogger, for example—may gain recognition as a member of the press over time if she publishes regularly and builds a consistent audience.

#### d. Wage Earning or Livelihood

Finally, some legislation requires that to receive protection as a member of the press, the individual must be employed as a professional journalist or earn his or her livelihood in the capacity of a reporter.

Delaware's reporter shield law, for example provides protections in cases in which the individual is "earning his or her principal livelihood" from newsgathering.<sup>263</sup> In the alternative, if a person does not earn his or her principal livelihood from journalism, the Delaware scheme offers protection to individuals who worked as a reporter for at least twenty hours in the three weeks prior or four of the previous eight weeks.<sup>264</sup> Along the same lines, other statutes extend legal protections or rights only to "professional journalists." For example, Florida's journalist's privilege law only addresses "professional [j]ournalists," defined as persons who regularly engage in newsgathering activity for gain or for livelihood while working as salaried employees or independent contractors.<sup>265</sup>

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261. 28 C.F.R. § 540.2 (2009).

262. *Id.*

263. DEL. CODE ANN. tit. 10, § 4320 (1999).

264. *Id.*

265. FLA. STAT. ANN. § 90.5015 (West 1999); *see also* N.Y. CIV. RIGHTS LAW § 79-h (McKinney 1999) (extending coverage to any "professional journalist," which it defines as a person

A provision in the Code of Federal Regulations providing an exception to prohibited travel-related transactions in Iraq for news-reporting activities sets forth similar “professionalism” requirements.<sup>266</sup> According to the regulation, transactions in Iraq by “persons regularly employed in journalistic activity by recognized newsgathering organizations” are not prohibited.<sup>267</sup>

This is yet another attempt to separate the repeat journalist from the occasional contributor to the public debate. Unlike the circulation or regularity of publication criteria, however, the wage-earning or livelihood requirement does not allow an amateur or unaffiliated would-be journalist to earn a press credential simply by being a consistent publisher and building an audience.

## 2. The Unique Functions of the Press qua Press

There is no dispute that the search for a workable definition of the press is filled with minefields. But unless some distinguishing criteria are adopted and some expressive activity excluded, our press rights will be nothing but a reiteration of our speech rights. Accepting that limiting factors must be chosen, however, raises the risk that certain speakers and messages will be excluded not for constitutionally significant reasons, but because they are disfavored by a governmental entity or the public generally. The challenge is to find a definition that is narrow enough to be distinct yet broad enough to be fair. The opposite approach—the one the Supreme Court is now taking—of not defining the press at all is unacceptable because it eliminates entirely the First Amendment’s separate press freedoms.

My goal with this Article has been to expose the problems with the current approach, to highlight the net loss of constitutional freedoms it has engendered, and to urge an embrace of press exceptionalism recognized through a narrow definition of the press. I make no pretense of settling the definitional question, and I will address this question more fully in a future article. But as an offering of preliminary thoughts, I suggest that the most promising avenue is to focus on the unique functions of the press qua press.

Because the inherent value of the Press Clause arises out of its separate role from the Speech Clause, I propose that this is where the focus belongs. Thus, by examining those functions that a free press fulfills in our democracy that are different from the values served by our speech freedoms,

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“who, for gain or livelihood, is engaged in gathering, preparing, collecting, writing, editing, filming, taping or photographing of news intended for” various news media).

266. 31 C.F.R. § 575.207 (2008).

267. *Id.* § 575.416.

we can close in on a meaningful definition. Defining the press through the lens of its unique functions has the primary benefit of ensuring that we avoid the redundancy problem. It does so by necessarily excluding a view of the Press Clause as guaranteeing that “all individuals have a right to disseminate their viewpoints for general consideration.”<sup>268</sup> Because the Speech Clause already protects the individual right to disseminate messages, this definition would not address any of the unique functions of the Press Clause.

The unique-functions approach further avoids the troublesome dichotomy of having to choose between a definition that is too elitist and one that is too inclusive. Many scholars have tended toward a broad definition of the press in which everyone is or easily can be a journalist.<sup>269</sup> They elect an overinclusive approach in part to avoid the criticism that a narrower definition establishes an “elite, protected class.”<sup>270</sup> In addition to creating the redundancy problem, this dichotomy does not allow us to recognize and protect those who have specialized abilities and resources for newsgathering as well as a proven commitment to news dissemination. Thus, the “genuine difficulty” in crafting a definition, Floyd Abrams has argued, has “deter[red] us from affording protection to those who are plainly entitled to it.”<sup>271</sup>

Through a proper analysis of the unique functions of the press qua press, the Court can identify characteristics that avoid the disconcerting conformity and favoritism of the elite while still allowing us to recognize and benefit from the press’s knowledge, skills, and dedication. A unique-functions approach allows the Court to embrace all the advantages of the egalitarian definition by crafting a definition of the press in which not everyone is a member, but everyone has the equal potential of becoming a member.

So what are the unique functions of the press? I suggest that the press fills two primary roles that go beyond the values served by our basic free speech rights. The first is that the press gathers and conveys information to the public about newsworthy matters; and the second is that the press serves as a check

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268. See Timothy E. Cook, *Freeing the Presses: An Introductory Essay*, in *FREEING THE PRESSES*, *supra* note 32, at 1, 8.

269. See Ugland & Henderson, *supra* note 194, at 247 (identifying the “egalitarian model . . . in which all citizens are equally equipped and equally free to serve as newsgathering watchdogs”).

270. Calvert, *supra* note 32, at 413 (1999); Ugland & Henderson, *supra* note 194, at 246–47 (identifying the “expert model, in which journalists are conceived of as a uniquely qualified and clearly identifiable collection of professionals who serve as agents of the public in the procurement and dissemination of news”).

271. Abrams, *supra* note 1, at 580.

on the government by conveying information to the voters about “what [their] Government is up to.”<sup>272</sup> Both of these functions have been recognized by the Court yet have never been given significance in terms of constitutional protections. A definitional analysis thus can build on these functions as a method of pinpointing the people or entities that most fulfill these roles. We can look, moreover, to legislative experimentation with defining the press as a starting point by asking which, if any, of these definitions best captures the special role of the press. Under any definitional scheme, of course, the courts must continually patrol for signs of content-based or viewpoint-based discrimination.

### CONCLUSION

Few constitutional provisions have been given as little practical weight as the Free Press Clause. Despite an explicit textual directive, the Press Clause has been interpreted to mean nothing more than the freedom to publish or disseminate individual speech—a right that is of dubious value considering that the Speech Clause protects these same freedoms. The result is a constitutional regime in which the Press Clause has been relegated to a mere redundancy.

Even those who interpret the constitutional text and history as giving the clause more significance, however, have considered the definitional problem an insurmountable roadblock. The ubiquitous acceptance today of the need for a constitutionally overprotective approach to the Press Clause—as is the practice with the Speech Clause—makes it impossible to define the press in a meaningful way. To rouse the Press Clause from its slumber, it is necessary to reject an overprotective approach and to embrace a narrow definition that separates a member of the press from an occasional public commentator. The constitutional fallback protections, meanwhile, ensure that the marketplace of ideas is vibrant. The Press Clause needs a distinct definition to truly fulfill its unique functions in our society and our democracy.

The Constitution gives the press explicit protection. It does so because the press has always played an exceptional and important role in our society and our democracy. It is up to us to recognize, honor, and protect that unique role. We should no longer fear press exceptionalism. The press is not everyone; everyone is not the press.

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272. U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 780 (1989); see also *Leathers v. Medlock*, 499 U.S. 439, 447 (1991) (“The press plays a unique role as a check on government abuse.”).