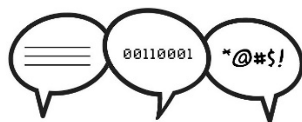

THE PRESS CLAUSE: IMPORTANT, REMEMBERED, AND EQUALLY SHARED

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INTRODUCTION

The Press Clause: The Forgotten First Amendment,[1] a Report from the Floyd Abrams Institute for Freedom of Expression, is a powerful argument for a broader understanding of the Free Press Clause. Much of its analysis will, I expect, prove important and useful to judges, lawyers, legal academics, and citizens. But one of its core premises—that the Free Press Clause should be read as conferring extra rights on the institutional press, beyond those possessed by others who speak to the public[2]—strikes me as mistaken.

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[1] Floyd Abrams, Sandra Baron, Lee Levine, Jacob M. Schriner-Briggs & Isaac Barnes May, *The Press Clause: The Forgotten First Amendment*, 5 J. FREE SPEECH L. 561 (2024).

[2] *Id.* at 566 (expressing concern that "The Press Clause itself has effectively been treated as having no independent meaning or impact," in part because "the Court has yet to provide the press with unique protection beyond that which all speakers who set forth their views in printed form receive"); *id.* at 585 (favorably quoting the view "that the press *is* different from individual speakers, that it serves particular democratic functions, and that it should be granted constitutional consideration as such"); *id.* at 632 (endorsing cases that the Report describes as "treating the press differently"); *id.* at 645–53 (discussing "who should be eligible to benefit from the rights and privileges emanating from an invigorated Press Clause?," and stating "[a]s an initial matter, the answer cannot be 'everyone'"); *id.* at 646 (endorsing the view that "only a select group should receive the protections of the Press Clause"); *id.* at 651 (discussing how to define which "individual[s] or institution[s]" "qualify for protection under the Press Clause"); *id.* at 653 (setting forth "criteria worth considering when determining whether a person or entity does or does not qualify for Press Clause protection").

The Court's current precedents take the view that the First Amendment secures an equal right of everyone to use mass communications technology. These precedents generally do not offer special First Amendment rights to "the press" in the sense of a particular set of businesses or institutions. Rather, they protect the freedom of all to use "the press" in the sense of the printing press and its modern technological descendants. And this is also the approach taken by the great bulk of authorities from before the Framing through the 1800s and 1900s to today.[3]

Under this model, the Press Clause is far from "forgotten" or stripped of "independent meaning or impact":[4] It secures the critically important right of all people to use the means of mass communications. By itself, the Speech Clause could easily have been understood as just protecting "speech" in the longstanding historical sense of face-to-face oral expression. Indeed, in the 1600s and 1700s many governments deliberately tried to constrain printing presses on the theory that mass communication via the printing press was more dangerous than face-to-face oral communication and thus needed to be specially suppressed.

The Press Clause made clear that the use of mass communication technology (originally just the printing press) should be as protected as the use of one's voice. This understanding has ensured that all mass communicators—institutional media as well as others—are constitutionally protected. To the extent that today courts often use "speech" as shorthand for speech and press (and petition), that is a product of the vigor of the Press Clause, not a sign that the Clause has been forgotten.

And, I argue below, the sources cited in the Report's originalist, traditionalist, precedential, and structural arguments do not support special First Amendment treatment for the institutional media. Instead, many of the sources the Report cites actually support the thesis that the right belongs to all who sought to communicate to the public.

I. ORIGINAL MEANING

Justices have long agreed that original meaning is at least *relevant* to interpreting the Constitution,[5] even if they have disagreed about how dispositive it should

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[3] Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology?—From the Framing to Today*, 160 U. PA. L. REV. 459 (2012).

[4] Abrams et al., *supra* note 1, at 566.

[5] *See, e.g.*, Engel v. Vitale, 370 U.S. 421, 425–30 (1962); Near v. Minnesota ex rel. Olson, 283 U.S. 697, 713–18 (1931).

be. My article *Freedom for the Press as an Industry, or for the Press as a Technology?—From the Framing to Today*[6] (let's call it *Press as Industry or Technology*) canvassed all the Framing-era cases and treatises that I found that could shed light on whether the Free Press Clause specially protected the press as a business sector, or instead generally protected anyone who used the press as a technology. The article's conclusion was that the sources supported the press-as-technology view.

The Report faults this analysis on three related grounds: (1) that the sources cited in the *Press as Industry or Technology* article don't sufficiently discuss "bottom up" evidence, including "views expressed in newspapers themselves";[7] (2) that the article doesn't adequately describe what "historical methodology" it followed (which is to say how the included sources were selected);[8] and (3) that the article didn't discuss the possibility that "the Press Clause can, should, and did protect certain *functions* and that those functions, carried out by printers during the eighteenth century, are today most frequently and capably carried out by the institutional press or 'press-as-industry.'"[9] Yet *Press as Industry or Technology* followed the normal methodology for seeking the meaning of a legal concept—discussing cases and legal treatises. Perhaps the article should have made this "methodology" express. But in any event, it reached its conclusion based on a comprehensive review of that particular dataset.

Of course, that leaves the possibility that *Press as Industry or Technology* missed some important sources, precisely because it did focus on cases and legal treatises, and didn't aim at comprehensively surveying various newspaper accounts. And it leaves the possibility that those other sources would point to the approach that the Report takes. I am therefore grateful that Matthew Schafer, on whose work the Report extensively relies, did survey those other sources in what is currently an unpublished working paper.[10] That survey rightly goes beyond the methodology of *Press as Industry or Technology*, considers "bottom up" evidence, and helps shed

[6] *See* Volokh, *supra* note 3.

[7] Abrams et al., *supra* note 1, at 618.

[8] *Id.* at 619.

[9] *Id.*

[10] Matthew Schafer, "*The Press*": *A Response to Professor Volokh* (Oct. 19, 2024), https://perma.cc/4QJN-Y3SC.

light on whether the Press Clause was seen as specially focused on particular "functions" that should be viewed as the particular province of the "institutional press."

Yet when one looks at the sources that Prof. Schafer has uncovered, they seem to actually support the press-as-technology thesis.

A. "No Exclusive Privilege" for "Printers," but the Same Rights as for "Every Other Citizen"

Consider, for instance, a "noteworthy example" that Prof. Schafer's "Press-Specific Rights" section offers as "an early argument for a press-specific actual malice rule":

> In a noteworthy example, New Jersey governor William Livingston argued in favor of press-specific protections from libel lawsuits for printers engaged in gathering and reporting the news. Livingston observed that "no man should be suffered to propagate, with impunity" injurious falsehoods "pass[ed] through the particular vehicle of the press." Drawing a contrast, however, he added, "But that a man ought to be criminated even for this, *is not universally true*. Printers often innocently publish what is false, believing it to be true." If printers were held liable for everything they published in good faith that turned out to be false, Livingston did not know "what news they could give us, without first applying to the court of chancery for a commission to examine witnesses in foreign parts, to ascertain the facts they find already published in the gazettes from which they select their intelligence." So if a New Jersey printer reprinted a Maryland printer's article that a man was executed for burglary, he should not be called to account even if it turned out that the man was no burglar.[11]

But, as Prof. Schafer acknowledges in his most recent draft,[12] the Livingston paragraph that Prof. Schafer quotes closes with the sentence,

> What is proved above, relative to Printers, may doubtless, there being no exclusive privilege in the case, be predicated of every other citizen.[13]

Indeed, earlier in the same paragraph, Livingston discusses the "Liberty of the Press" as a right equally belonging to all "Americans" when they act as "writer[s]":

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[11] *Id.* at 55–56 (quoting 5 THE PAPERS OF WILLIAM LIVINGSTON 106 (Carl E. Prince, Mary Lou Lustig & David William Voorhees eds., 1988), https://perma.cc/9H4Q-L6X7 (emphasis added)) (footnotes omitted).

[12] *Id.* at 56.

[13] Scipio, *On the Liberty of the Press; And a Certain Nonsensical Advertisement Against Scipio. Part I*, N.J. GAZ., Mar. 30, 1784, at 2 (quoted in LIVINGSTON, *supra* note 11, at 106, though that reprint omits the comma before "be predicated").

> [T]he Americans entertain very different sentiments about the Liberty of the Press. They have, and, as inseparably connected with the idea of freedom, they must have, a right to publish the conduct of their superiors . . . . All that a writer in this case is to look to, is, that his accusations be true; or at least so probably founded, that he cannot be supposed to be instigated by malevolence.[14]

(Livingston's whole series of articles, titled *On the Liberty of the Press*, was aimed at defending Livingston's own writings—writings that were not the work of a printer.[15]) Likewise, in defending the proposition that the New Jersey printer shouldn't be liable for innocently reprinting an article from a Maryland newspaper, Livingston appealed to generally applicable libel law principles, which covered all writers:

> [T]he English law . . . charges every libel in the process against the author of it to be not only *false*, but *malicious*, clearly affording the most violent implication that even a falsity unattended with *malice* . . . is not culpable.[16]

Livingston's conclusion that, when "[p]rinters . . . innocently publish what is false, believing it to be true," they should not "be liable for such error," stems from this generally applicable understanding of the malice requirement, which covered—as Livingston noted—"every libel" by any "author."[17]

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[14] *Id.* at 105–06. Later items in the same *On the Liberty of the Press* series echoed this, for instance asking "What then can we say through the press, without making it *licentious*?" (in response to a claim that his own work had been "turn[ing] the liberty of the press into licentiousness"). *Id.* at 113. To Livingston, the "liberty of the press" was the right that "we," not just some of us, have to "say [things] through the press." *See also id.* at 125 (rhetorically asking, "may not a man, in a free country, convey thro' the press his sentiments on publick grievances . . . without being obliged to [publicly identify himself]?").

[15] *Id.* at 104–08, 110–14, 115–19, 122–25, 126–30.

[16] *Id.* at 106.

[17] Prof. Schafer tries to dismiss this quote by saying that Livingston's statement that "What is proved above, relative to Printers, may doubtless, there being no exclusive privilege in the case[,] be predicated of every other citizen" is "a point [Livingston] let blow in the wind":

> He did not explain whether he meant that citizens, like the printer, should not be presumed to be acting with malice in all cases, or whether he meant that a citizen could defeat malice in the same circumstances as described of the printer. The latter reading seems dubious for two reasons. First, his example is specific to the role of a printer *qua* printer. Everyday citizens were not generally engaged in selecting intelligence from other newspapers to give the public news in newspapers. That was the printer's role. Second, it seems

Say, then, that an ordinary citizen, who is not a printer, innocently quoted the Maryland newspaper in an article submitted to the New Jersey newspaper. As Prof. Schafer acknowledges, many newspapers items were actually submitted by people who weren't themselves professional printers or newspaper employees[18]—such as Livingston himself. And say that this citizen was prosecuted or sued for what he wrote.

Under Livingston's logic, the citizen's statement was not "malicious": "[E]ven a falsity unattended with malice" "is not culpable." This is itself a facet of "the Americans[']" "sentiments about the Liberty of the Press"—that "[t]hey have . . . a right to publish the conduct of their superiors." "[A] writer" (not just a newspaper publisher) need only "look to" "his accusations" being "probably founded, that he cannot be supposed to be instigated by malevolence." And these views, which Livingston said he "proved . . . relative to Printers," equally apply to "every other citizen," "there being no exclusive privilege in the case."[19]

B. Other Sources: A Right of "Every Briton" to "Communicat[e] His Sentiments" "Thro[ugh] the Channel of the Press"

Other sources that Prof. Schafer cites likewise show that the liberty of the press was understood as a right equally belonging to everyone, whether or not they were professional printers or editors. Prof. Schafer argues, for instance, that,

> In 1780, . . . Benjamin Rush reminded readers of the importance of newspapers, writing that the "enemy know full well that a free press is the ensign of liberty, and all their hopes of conquering us are in vain, while that bulwark of freedom exists among us." He added, "A free paper is the surest detection of fraud and corruption: the virtue and liberties of America, and the liberty of the press must stand or fall together."[20]

> unlikely (impossible even) that Livingston was proposing that citizens could avoid defamation liability simply on the belief that the defamation was true because they had heard it elsewhere. That would have been a seismic reimaging of libel law then existing. The better read seems to be the former one, that what was proved relative to the printer was that malice should not in all cases be presumed.

Schafer, *supra* note 10, at 56. I don't think this attempt to explain away Livingston's words is sound, or consistent with Livingston's statement. Those uncertain about this can see Livingston's entire passage at LIVINGSTON, *supra* note 11, at 106 (available online).

[18] Schafer, *supra* note 10, at 29–30 (discussion of correspondents).

[19] LIVINGSTON, *supra* note 11, at 105–06.

[20] Schafer, *supra* note 10, at 37–38 (citations omitted).

But this was Rush justifying *his own* publications that he had submitted to various newspapers.[21] The "liberty of the press" he was asserting was his own, not just the printer's.

Likewise, Prof. Schafer writes that, in 1766, William and Thomas Bradford faulted a Pennsylvania legislator on the grounds that "his attacks [on them] were an 'attempt to demolish the Liberty of the Press . . . because, through that Channel, his hidden Arts are brought to Light.'"[22] But the Bradfords also wrote in the same source of "the great Advantages derived to us very lately, from the unrestrained Liberty which every Briton claims of communicating his Sentiments to the public, thro' the Channel of the Press."[23] They too thus understood the "Liberty of the Press" as applying to "every Briton," not specially to printers such as themselves.

Similarly, Prof. Schafer argues that, "On April 25, 1781, Francis Bailey printed the first issue of the *Freeman's Journal* . . . Citing freedom of the press, he wrote, 'Great is the importance, in infant governments, raised on the basis of freedom, and where every freeman is himself a ruler, that the most unrestrained and impartial channel of intelligence be open to the citizens at large.'"[24]

But Bailey's note also quoted the Pennsylvania Constitution, which says "Printing-presses shall be *free to every person* who undertakes to examine the proceedings of the legislature, or any part of government." Bailey described opening a "free press," "unreservedly *free, to every citizen* indiscriminately, whose principles coincide with those of the Revolution, and whose object is confessedly known to point at public or private good." "[T]o it *every freeman*, so his publication be decent, and not repugnant to freedom, *shall have access*."[25] Here too the discussion was of the right of everyone to use the printing press without governmental suppression, not the special right of printers.

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[21] *To Doctor Shippen, Jun.*, DUNLAP AND CLAYPOOLE'S AMERICAN DAILY ADVERTISER 2 (Dec. 2, 1780).

[22] Schafer, *supra* note 10, at 44.

[23] William Bradford & Thomas Bradford, *To the Publick*, PA. GAZ., Sept. 11, 1766, at 3.

[24] Schafer, *supra* note 10, at 38.

[25] Francis Bailey, *The Printer of the Freeman's Journal, to the Public*, FREEMAN'S J., Apr. 25, 1781 (emphases added).

To be sure, the owners of printing presses retained a legal right to choose what to print.[26] But this didn't stem from any special legal privileges that the liberty of the press gave them as printers—rather, it stemmed from property owners' normal legal rights to decide how their property would be used.

C. The Author Disclosure Controversies: Protecting the Rights of "Every Writer"

Many of Prof. Schafer's examples in the section on supposed "Press-Specific Rights" involve printers who were ordered to identify the authors of pseudonymous articles that they had published, and who refused those orders, citing liberty of the press. Prof. Schafer analogizes these to modern reporter's privilege cases, but they are probably closer to modern anonymous speaker cases, where websites such as Yelp or Glassdoor resist subpoenas aimed at identifying people who posted on the site.[27]

But in all these cases, the liberty-of-the-press arguments against unmasking the anonymous author discussed both the liberty of the printer *and* the liberty of the author—and the author in each case wasn't a professional printer, which is why the authors submitted the articles to the printers to print. This too is analogous to modern controversies over author disclosure: A website operator, for instance, can assert its own First Amendment rights in resisting subpoenas seeking to identify people who posted comments on its site,[28] but it more often asserts the commenters' First Amendment rights.[29]

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[26] Prof. Schafer notes that many writers "expected that printers would carry letters submitted to them," by referring to the liberty of the press, Schafer, *supra* note 10, at 48, and acknowledges, "That these writers pleaded liberty of the press supports the idea that freedom of the press was understood as every man's right to access the press," *id.* at 49. But he also notes that "this expectation" of publication "was more aspirational than anything," and "[p]lacement was not always forthcoming." *Id.* at 49. Of course that's right: There was no recognized general right to access to others' printing presses, any more than to access others' meeting halls to give speeches or others' land to build churches. But the liberty of the press was seen as a right of "every citizen" to be free of *government constraints* on their ability to use printing presses—of course with the property owner's permission—to communicate to the public.

[27] The leading modern precedents on this are *Krinsky v. Doe 6*, 159 Cal. App. 4th 1154, 1167–72 (2008); *Doe v. Cahill*, 884 A.2d 451, 460–61 (Del. 2005); and *Dendrite Int'l, Inc. v. Doe No. 3*, 775 A.2d 756, 763–64 (N.J. Super. Ct. 2001).

[28] *See, e.g.*, Glassdoor, Inc. v. Superior Ct., 9 Cal. App. 5th 623, 631 n.3 (2017).

[29] *See, e.g.*, *id.* at 629, 634; *see also* Yelp Inc. v. Superior Ct., 17 Cal. App. 5th 1, 4 (2017).

1. The Alexander McDougall incident

Consider a source that the Report itself relies on in discussing the breadth of Framing-era press freedom,[30] and that Prof. Schafer highlights: the prosecution of Alexander McDougall, who became "a martyr to press freedom."[31] "The case was well known through the colonies, and 'typical commentary' condemned the prosecution as a restraint on press freedom."[32]

Prof. Schafer cites the case because of printer James Parker's refusal to identify McDougall as the author of an anonymous anti-British handbill in 1769.[33] But he also quotes McDougall's describing *his own* arrest as "an attempt to restrain" "the American Press."[34] Likewise, a defense of McDougall a few weeks later characterized the author McDougall, not the printer Parker, as protected by "the liberty of the press":

> [A] single Member in Community, has an indisputable Right, to arraign at the public Tribunal, the Conduct of Persons in Authority. And how is this to be effected, but by maintaining the *Liberty of the Press*? Is it not the bounden, the indispensable Duty of Individuals, to watch for the Safety of the whole Community, to attend with a jealous Eye to the Conduct of its Servants . . . ? . . . And to this end, the Freedom of the Press is necessary. For how in any other Way shall one Man speak to the *Multitude* . . . ?[35]

The sources thus depict McDougall as suffering from the "liberty of the press" being violated, because he was using press technology, not because he was a printer or performing printer-specific functions. (He was a merchant, landowner, and political activist writing a one-off pamphlet that was printed by someone else.[36])

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[30] Abrams et al., *supra* note 1, at 605.

[31] Schafer, *supra* note 10, at 60.

[32] Abrams et al., *supra* note 1, at 605.

[33] Schafer, *supra* note 10, at 58–60.

[34] *From the New-York Gazette of Feb. 12, 1770. To the Freeholders, Freemen, and Inhabitants of the Colony of New-York. and to All the Friends of LIBERTY in North-America*, PROVIDENCE GAZETTE 1 (Feb. 24, 1770).

[35] Brutus, *Pro Patria*, N.Y. GAZ., Mar. 26, 1770, at 3 (cited in JEFFERY A. SMITH, PRINTERS AND PRESS FREEDOM: THE IDEOLOGY OF EARLY AMERICAN JOURNALISM 144 (1988), which is in turn cited by Schafer, *supra* note 10, at 58 n.535).

[36] *See* WILLIAM MACDOUGALL, AMERICAN REVOLUTIONARY: A BIOGRAPHY OF GENERAL ALEXANDER MCDOUGALL 19, 23, 25 (1977).

2. The Isaac Collins statements

We see the same in some of Prof. Schafer's other examples. Printer Isaac Collins, for instance, argued that identifying the author of an article "would place him 'far from acting as a faithful guardian of the Liberty of the Press' that he believed himself to be."[37] But in another article reprinted starting on the same page in Prof. Schafer's source, Collins endorses the view that "the Liberty of the Press"[38] means "the Americans" "have . . . a Right to publish the Conduct of their Superiors . . .— All that a Writer in this Case is to look to, is that his Accusations be true, or at least so probably founded that he cannot be supposed to be instigated by Malevolence."[39]

Indeed, Collins made clear he was speaking of "every Writer who will point out all those whose particular Conduct deserves to be criminated."[40] Collins thus understood that his role as "a faithful guardian of the Liberty of the Press" included guarding the liberty of nonprofessional authors using the printing press, and was not limited to guarding the liberty of professional publishers such as himself.

Likewise, in a different incident, Collins wrote to Gov. Livingston, whose essay he had reprinted, assuring him that "the author's [i.e., Livingston's] Name shall be kept a profound Secret."[41] But both the person demanding the author's name (Samuel Tucker) and Livingston himself discussed the matter as relating to rights of the *author*. Tucker wrote that the author's "performance is so replete with falsehoods, that their consequence may have a tendency to wound the fairest characters, and turn the liberty of the press to licentiousness."[42] Livingston asked, "What then can we say through the press, without making it licentious?"[43] The "liberty of the press" (however limited by the exclusion of licentiousness) was thus a right of everyone who speaks "through the press," even people (such as Livingston) who were not members of the publishing industry.

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[37] Schafer, *supra* note 10, at 62 (quoting JOHN COLLINS, REMINISCENCES OF ISAAC AND RACHAEL (BUDD) COLLINS 25 (1893)).

[38] COLLINS, *supra* note 37, at 25, 26.

[39] *Id.* at 26–27.

[40] *Id.* at 27.

[41] Schafer, *supra* note 10, at 62.

[42] LIVINGSTON, *supra* note 11, at 112.

[43] *Id.* at 113.

3. The Goddards and the Baltimore Whig Club incident

One way of testing this hypothesis is by asking: Say that a newspaper printer (call her Mary) receives an item from an author (call him Andrew) by way of an intermediary (call him William) who is not himself a printer or newspaper employee. And say that the *intermediary* is ordered to testify about the author's identity. Would the intermediary have been understood as entitled to object based on the author's free press rights? Or would the liberty of the press have been seen as irrelevant, because the matter would then involve only the non-professional-press author and the non-professional-press intermediary?

Prof. Schafer's own evidence suggests that the intermediary could have raised the liberty of the press, though the evidence is indeed suggestive, not conclusive. This, after all, was the scenario in the Baltimore Whig Club controversy that Prof. Schafer describes.[44] The *Maryland Journal* was at the time published by Mary-Katharine Goddard, William Goddard's sister. She published an anonymous author's article, and a local group demanded to know the name: "[T]hey sent a deputation to the printer [Mary], requesting the author's name. She referred them to me [William]; for she knew I had brought it to the office."[45] William then refused to identify the author, and later publicly defended his decision as necessary to protect the liberty of the press.[46]

But William did *not* rest his defense on his supposed rights as a member of the professional press. Indeed, he expressly noted that the newspaper was "printed by *Mary-Katharine Goddard*, my sister, to whom I ceded my business in this town";[47] though he had been a printer before, he stated that he wasn't a printer any longer. The newspaper likewise said it was "Printed by M.K. Goddard."[48]

When William spoke of people who demanded the author's name as "violently invading the Liberty of the Press," he was thus apparently referring to the liberty of authors and of intermediaries such as himself—it was their liberty that was most directly jeopardized by the demand. He was not referring to the liberty of printers

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[44] Schafer, *supra* note 10, at 57–58.

[45] WILLIAM GODDARD, THE PROWESS OF THE WHIG CLUB 4–5 (1777), https://perma.cc/JN5F-PWU9.

[46] *Id.* at 5.

[47] *Id.* at 3.

[48] MD. J., Nov. 25, 1777, at 4.

such as his sister. To be sure, there's reason to think that William had remained involved with the newspaper behind the scenes.[49] But the important thing is that his "Liberty of the Press" argument didn't rest on any role he held as a printer, since he had expressly disclaimed it.

And this is consistent with what Goddard had written some years before, when he had indeed been acting as a printer. He indeed wrote, as Prof. Schafer notes, that "The Public" "understood . . . that 'the Names of the Authors' in Goddard's paper would be kept secret."[50] But he explained that this stemmed from the principle that people's "Liberty of speaking and publishing their Thoughts, is one of the Greatest Blessings, and the chief Bulwark of my Liberty and Safety." "Few Men will care to point out . . . Mischiefs . . . unless they are confident that their Names will be concealed . . . ." And he gave example of execution of Algernon Sidney for his writings as a violation of the liberty of the press.[51] The liberty of the press belonged to all authors, including those who, like politician and book author Algernon Sidney, hadn't been members of the institutional press.

4. Charles Pinckney, William Duane, and the Senate controversy

Finally, one of the incidents Prof. Schafer mentions does involve something more like a modern newsgatherer's privilege: This was Sen. Charles Pinckney's opposing the Senate's plan to hold printer William Duane in contempt for refusing to reveal the name of a source.[52]

But in the process, Pinckney described "the true standard of freedom of the press" as "That the printing press shall be free to *every person* who undertakes to examine the proceedings of the Legislature" and that "*every citizen* may freely speak, write, and print, on any subject, being responsible for the abuse of that liberty."[53] And this was a facet of "the right to investigate the conduct of the Legislature, and official men," which "the Constitution seems to require . . . as a duty, *from*

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[49] *See* Schafer, *supra* note 10, at 60 (citing LAWRENCE C. WROTH, A HISTORY OF PRINTING IN COLONIAL MARYLAND 135 (1922)).

[50] Schafer, *supra* note 10, at 57 (quoting The Public, *To the Printer of the Pennsylvania Chronicle, &c.*, PA. CHRON., Feb. 9, 1767, at 1).

[51] The Public, *supra* note 50, at 1.

[52] Schafer, *supra* note 10, at 62–65.

[53] 10 ANNALS OF CONG. 73, 76 (1800) (quoting the Pennsylvania Constitution) (emphases added).

the citizens."[54] Later in the same passage, Pinckney hypothesizes "the exercise of this invaluable right" by a "disinterested and independent man," who is "an important member of your community," without any suggestion that only a printer or a journalist can qualify as such a man.[55] And Pinckney also speaks of the value of "the press" as a "means of defence" for politicians who had been "unjustly attacked,"[56] suggesting that politicians—almost none of whom were part of the institutional press—were protected by "the freedom of the press."[57]

Here too the liberty of the press was thus being used to protect the right of all to use the press as technology—"the printing press."[58] And this is consistent with the modern cases, laid out in *Press as Industry or Technology*, that recognize newsgatherers' First Amendment right to keep sources confidential, whether the newsgatherers are professional publishers or are political activists, academics, or book authors who only use mass communications technology occasionally.[59]

I will discuss Prof. Schafer's evidence in more detail in a later article, which I hope to publish when he publishes his own. But the big picture should be evident: Prof. Schafer's evidence is consistent with the view that the freedom of the press applied equally to all who used the press as technology. Indeed, in some respects it is inconsistent with the view that it applied specially to those who belonged to the press as industry.

D. The Report's Sources: Liberty of the Press for Clergy, Lawyers, and Scientists

Indeed, even some of the key Framing-era sources that the Report itself cites as supporting its general view of freedom of the press actually support the equal treatment of institutional-press and non-institutional-press speakers. The Report argues that the Framing-era liberty of the press forbade seditious libel prosecutions

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[54] *Id.* (emphasis added).

[55] *Id.* at 77.

[56] *Id.* at 77–78.

[57] *Id.* at 76. *Cf.* Volokh, *supra* note 3, at 491 (discussing the 1805 impeachment of Justice Chase, where Representative John Randolph, the leader of the House Democratic-Republicans noted that Justice Chase would have had a "right in common with his fellow citizens" to "speak and write and publish as he pleases," using the "free" "press").

[58] 10 ANNALS OF CONG. at 76.

[59] *See* Volokh, *supra* note 3, at 524–25.

by citing the examples of Junius's letters and a pamphlet republished by the Dean of St. Asaph's.[60] But the Dean of St. Asaph's was a clergyman, not a professional printer or journalist, and the pamphlet he republished was written by William Jones, a lawyer, judge, politician, and philologist who likewise wasn't part of the institutional press.[61]

Junius was an anonymous author who has similarly never been identified as a member of the institutional press. If, as the Report suggests, Junius would have been seen as protected in post-1791 America by the Free Press Clause, that suggests that the Clause covers everyone, not just institutional authors.

Likewise, the Report positively cites Bishop Thomas Hayter's work on liberty of the press.[62] But Hayter described the "Liberty of the Press" as applying the traditionally recognized "Use and Liberty of Speech" to "Printing," an activity that Hayter described as "only a more extensive and improved Kind of Speech."[63] The liberty of the press was a tool for speakers generally to communicate in "a more extensive" way, not a new right that belonged only to a tiny subset of speakers.

The Report also cites the First Continental Congress's *Address to the Inhabitants of Quebec* as an illustration of "the 'freedom of press' as an essential condition of freedom more broadly," and as "arguing that, through its exercise, 'oppressive officers are shamed or intimidated, into more honourable and just modes of conducting affairs.'"[64] But the *Address* also stressed the liberty of the press as a tool for "the advancement of truth, science, morality, and arts in general"—yet publications on science, morality, and arts were overwhelmingly written by scientists, theologians, and others, not by printers or newspaper publishers.[65] The liberty of the press was thus seen as protecting all who engage in mass communications to the public, not just the institutional press.

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[60] *See* Abrams et al., *supra* note 1, at 603.

[61] *See* Volokh, *supra* note 3, at 485. For more on the remarkable Jones, see Garland Cannon, *Sir William Jones, Language Families, and Indo-European*, 43 WORD 49 (1992); Garland H. Cannon, *Freedom of the Press and Sir William Jones*, 33 JOURNALISM Q. 179 (1956); GARLAND CANNON, THE LIFE AND MIND OF ORIENTAL JONES: SIR WILLIAM JONES, THE FATHER OF MODERN LINGUISTICS (1990).

[62] *See* Abrams et al., *supra* note 1, at 602.

[63] *See* Volokh, *supra* note 3, at 475–76.

[64] *See* Abrams et al., *supra* note 1, at 606.

[65] *See* Volokh, *supra* note 3, at 481–82.

E. A Third Way?

Finally, though Prof. Schafer suggests that the Press Clause may have provided some rights for everyone and some just for printers,[66] the sources cited in his draft do not appear to bear that out. Virtually none of those sources expresses the view that the Free Press Clause, which protected "every citizen," protected some citizens (those in the newspaper industry) more than others or even differently than others.[67]

Relatedly, the Report suggests the possibility that "the Press Clause can, should, and did protect certain *functions* and that those functions, carried out by printers during the eighteenth century, are today most frequently and capably carried out by the institutional press or 'press-as-industry.'"[68] And indeed the Framing-era debate about freedom of the press did discuss particular functions of the Press—its ability to inform the public, to "shame[] or intimidate[]" "oppressive officers," to

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[66] *See* Schafer, *supra* note 10, at 13 ("Perhaps a printer enjoyed a special right while the public enjoyed a general one."); *id.* at 67 (acknowledging that "at the Founding early Americans repeatedly described the liberty of the press as every man's right to use the press," but arguing that "early Americans recognized under the banner of liberty of the press protections relative to the newspaper industry specifically").

[67] The only source I could find among those cited by Prof. Schafer that speaks of any special status for printers is *To the Printer of the Freeman's Journal*, FREEMAN'S J., Apr. 10, 1782, at 2:

> A printer is in this country a sort of public officer, and in that character has a special protection. He ought to be of no party, so far as to exclude remarks on public measures, or public men where the honor of his press is not sullied by the meanness or the indecency of the composition, or his person or property endangered by the strictures of law. But above all when he admits personalities on one side, his press should be ever open to reply on the other, and the moment he shews his partiality he forfeits his protection, and degrades himself into the assassin of honest fame.

I am skeptical that even this source counsels for *legal* rules that the printer should be treated as "a sort of public officer," should be obliged to publish different viewpoints "on public measures, or public men," should have to "be ever open to reply" when he prints one side of the debate, or should have some sort of "special protection." Rather, it appears to me to be a discussion of what the author of the *Freeman's Journal* letter perceives as the ethical obligations of printers (the duties he describes) and the ethical obligation of the public to respect printers even when they publish controversial views pursuant to those duties (the "protection" he refers to). But if I'm wrong, this is still just one source, lined up against all the contrary sources cited here and in Volokh, *supra* note 3.

[68] *See* Abrams et al., *supra* note 1, at 619.

"advance[] . . . truth, science, morality, and arts,"[69] and more. But Prof. Schafer's sources and the Report's sources actually show that those functions were carried out both by printers *and* by nonprofessional authors in the eighteenth century. And, as discussed below in Parts III, IV, and V, they continue to be so carried out today.

II. TRADITIONAL MEANING

The Report also points to tradition as a tool for defining the meaning of the Free Press Clause,[70] suggesting that one might rely on "the duration and continuity of a political or cultural practice in order to determine that practice's interpretive authority," even if the practice doesn't date back to the Framing.

But that too is an argument for the press-as-technology view. As *Press as Industry or Technology* lays out, from the 1820s to the 1950s, there was a broad, deep, and essentially unanimous set of decisions among courts concluding that newspaper editors have no "other rights than such as are common to all."[71] Case after case, treatise after treatise, took this view.[72] Nor does the Report point to any important or authoritative extrajudicial sources from that era suggesting that there was some tradition of legal entitlement that contradicted these precedents.

Rather, the Report argues that "[p]recedential arguments, understood as referring to the precedent of the courts rather than Congress or the President, are also of little relevance to a traditionalist inquiry."[73] Instead of precedent, the Report's traditionalist approach would focus on "[t]he practices of printers in exposing governmental oppression or the endorsement of republican precepts by the country's political institutions, both of which have remarkable historical pedigree," which "can shed light on the kinds of activity the Press Clause was meant to protect."[74]

Yet while social tradition may be relevant to understanding the public's understanding of the Press Clause, surely legal tradition cannot be "of little relevance."

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[69] *Letter from the Continental Congress to the Inhabitants of the Providence of Quebec (Oct. 26, 1774)*, *in* 1 JOURNALS OF CONTINENTAL CONGRESS 1774–1789, at 105, 108 (1904).

[70] Abrams et al., *supra* note 1, at 594–95, 617.

[71] Root v. King, 7 Cow. 613, 628 (N.Y. Sup. 1827).

[72] Volokh, *supra* note 3, at 483–538.

[73] Abrams et al., *supra* note 1, at 595.

[74] *Id.*

After all, the Press Clause refers to a legal entitlement to protection from government action—action that itself often originated from the legal system (via prosecutions, civil lawsuits, and the like). The practices of courts in defining protections against governmental oppression, especially ones which themselves have a remarkable pedigree,[75] are thus powerful traditional support for the press-as-technology view.

III. CONTEMPORARY SUPREME COURT PRECEDENTS

A. "Acknowledg[ing] the Unique Role of the Press" but Still Calling for Equal Treatment

The Report cites various Supreme Court cases as "acknowledg[ing] the unique role of the press in terms that press advocates can and should invoke in support of a robust Press Clause."[76] But many of those very cases actually conclude that the First Amendment protects all people who use mass communications technology equally. Respect for the role of the institutional press, in the view of those opinions, coexists with equal respect for the role of noninstitutional speakers.

Thus,

- *New York Times Co. v. Sullivan*[77] made clear that, whether under the Free Press Clause or the Free Speech Clause, the noninstitutional media authors of an advertisement were protected to precisely the same degree as the *Times*.[78] And five Justices in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*[79] (including Justice Brennan, who wrote *Sullivan*) expressly rejected any greater First Amendment protection in libel cases for media defendants than for other defendants.[80]

[75] Volokh, *supra* note 3, at 483–538.

[76] Abrams et al., *supra* note 1, at 625.

[77] 376 U.S. 254 (1964) (cited in Abrams et al., *supra* note 1, at 627).

[78] *See* Volokh, *supra* note 3, at 511.

[79] 472 U.S. 749 (1985).

[80] *See id.* at 515.

- *Estes v. Texas*[81] held that "[a]ll [journalists] are entitled to the same rights [of access to trials] as the general public."[82]
- *Mills v. Alabama*[83] expressly noted that "The Constitution specifically selected the press, which includes not only newspapers, books, and magazines, but also humble leaflets and circulars, see *Lovell v. City of Griffin*, to play an important role in the discussion of public affairs."[84]

Likewise, the Report argues in favor of strengthening *Bartnicki v. Vopper*.[85] But, as the Report acknowledges in a footnote,[86] *Bartnicki* concluded that the First Amendment equally protects people outside the professional media as much as people within the professional media.

The Report also argues in favor of constitutionalizing the "well-established precedent construing the fair report privilege."[87] But that privilege in most states protects all who write about court cases, not just the institutional media.[88]

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[81] 381 U.S. 532 (1965) (cited in Abrams et al., *supra* note 1, at 627).

[82] *Id.* at 540; *see also* Nixon v. Warner Commc'ns, 435 U.S. 589, 609 (1978) ("The First Amendment generally grants the press no right to information about a trial superior to that of the general public.").

[83] 384 U.S. 214 (1966) (cited in Abrams et al., *supra* note 1, at 628).

[84] *Id.* at 219.

[85] 532 U.S. 514 (2001) (cited at Abrams et al., *supra* note 1, at 641).

[86] *Id.* at 575 n.63.

[87] *Id.* at 643.

[88] *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 611 cmt. c (stating that the privilege "extends to any person who makes an oral, written or printed report to pass on the information that is available to the general public"); *id.* Reporter's Note to § 611 cmt. c ("A newspaper has no special privilege to publish defamation, and is privileged to publish only that which anyone else can publish."); Tonnessen v. Denver Publ'g Co., 5 P.3d 959, 964 (Colo. App. 2000); Missner v. Clifford, 914 N.E.2d 540, 550 (Ill. App. 2009); Rosenberg v. Helinski, 616 A.2d 866, 874 (Md. App. 1992); Sahara Gaming Corp. v. Culinary Workers Union Local 226, 984 P.2d 164, 166 (Nev. 1999); McNamara v. Koehler, 429 P.3d 6, 11 (Wash. App. 2018); Wayson v. McGrady, No. 3:18-CV-00163-SLG, 2019 WL 3852492, *3 n.26 (D. Alaska June 25, 2019); Sig Sauer, Inc. v. Jeffrey S. Bagnell, Esq., LLC, No. 3:22-CV-885 (JAM), 2023 WL 4421769, *3 (D. Conn. July 10, 2023); Adelson v. Harris, 973 F. Supp. 2d 467, 482 (S.D.N.Y. 2013), *aff'd*, 876 F.3d 413 (2d Cir. 2017); The Knit With v. Knitting Fever, Inc., No. CIV.A. 08-4221, 2010 WL 3792200, *5 (E.D. Pa. Sept. 28, 2010).

The Report also favorably cites *Richmond Newspapers, Inc. v. Virginia*, which recognized a public right of access to court proceedings.[89] But this case and its progeny have consistently been applied to provide a broad public right of access to court documents—a right not limited to institutional media.[90] In this, *Richmond Newspapers* is consistent with *Estes* and with *Nixon v. Warner Communications, Inc.*, which concludes that "[t]he First Amendment generally grants the press no right to information about a trial superior to that of the general public."[91]

B. Not "Treating the Press Differently"

The Report points, in a section titled "Judicial Action: Treating the Press Differently," to Supreme Court cases that it characterizes as "demonstrat[ing] that the Court well understands the press's unique importance," "includ[ing] cases concerning taxation, editorial discretion, and prior restraint."[92]

1. Prior restraint

But when it comes to prior restraint, the Court has consistently applied its doctrine to non-institutional-press speakers as well as to institutional press speakers.

A few jurisdictions' common-law or statutory privileges are limited to the institutional press, Ortega Trujillo v. Banco Cent. Del Ecuador, 17 F. Supp. 2d 1334, 1338 (S.D. Fla. 1998); *cf.* Smartmatic USA Corp. v. Newsmax Media, Inc., No. N21C-11-028 EMD, 2024 WL 4165101, *24 (Del. Super. Ct. Sept. 12, 2024) (so stating as well about the similar neutral reporting privilege), *reargument granted as to other matters*, 2024 WL 4263938 (Del. Super. Ct. Sept. 23, 2024), or to material submitted to the institutional press, CAL. CIV. CODE § 47(d)(1). But that is the minority view, *see* DAVID ELDER, DEFAMATION: A LAWYER'S GUIDE § 3:15 (2024) (concluding that the Restatement rule cited above "reflect[s] correctly the sentiment of U.S. decisions"), and I know of no case that suggests that a First-Amendment-based fair report privilege should be limited to the institutional media. *Cf.* Comins v. Vanvoorhis, 135 So. 3d 545, 554–56 (Fla. Dist. Ct. App. 2014) (rejecting the *Ortega Trujillo* reasoning as to a different matter that arose in both *Ortega Trujillo* and *Comins*—whether the state libel presuit notice statute applied to individual bloggers and not just media entities); Volokh, *supra* note 3, at 510–16, 526–32 (laying out the Supreme Court and lower court precedents that reject a First Amendment media/nonmedia distinction in libel cases).

[89] 448 U.S. 555 (1980) (cited in Abrams et al., *supra* note 1, at 569–70).

[90] *E.g.*, Globe Newspaper Co. v. Superior Ct. for Norfolk Cnty., 457 U.S. 596, 603–05 (1982) ("The Court's recent decision in *Richmond Newspapers* firmly established for the first time that the press *and general public* have a constitutional right of access to criminal trials.") (emphasis added).

[91] 435 U.S. 589, 609 (1978).

[92] Abrams et al., *supra* note 1, at 632–33.

Indeed, the case the Report cites[93] as to the institutional press—*Near v. Minnesota* (1931)—was promptly relied on in *Lovell v. City of Griffin* (1938) to recognize the "freedom from previous restraint" of non-institutional-press leafletters. Indeed, the paragraph following that citation to *Near* in *Lovell* expressly held:

> The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest. The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.[94]

The prior restraint cases thus protect the institutional press on the same footing as they protect others.[95] And unsurprisingly, the protection for non-institutional-press leafletters has in turn been used to buttress protection for newspapers.[96]

Indeed, the case the Report cites as supporting different treatment for non-press speakers, *Lowe v. SEC*, actually quoted *Lovell*'s statement that "The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion."[97] Partly to avoid a possible First Amendment problem, the *Lowe* majority interpreted a statute regulating financial advisers as excluding newsletters distributed by those advisers. And to the extent some of the Justices in *Lowe* endorsed the constitutionality of speech restrictions, they endorsed only restrictions on direct professional-client advice in which the professional "takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs."[98] Such advice is

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[93] *Id.* at 626; *id.* at 633 n.386.

[94] Lovell v. City of Griffin, 303 U.S. 444, 452 (1938).

[95] *See also, e.g.*, Org. for Better Austin v. Keefe, 402 U.S. 415, 418–19 (1971) (citing *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931), to strike down prior restraints involving non-institutional-press speakers, there political activists).

[96] *See* City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 761 (1988) (striking down prior restraint on placement of newspaper distribution boxes by concluding that "[t]he proper analogy is between newspapers and leaflets," "based on the accurate premise that peaceful pamphleteering 'is not fundamentally different from the function of a newspaper'" (quoting *Org. for Better Austin*, 402 U.S. at 419, and citing *Lovell*, 303 U.S. at 444, 450–52)).

[97] 472 U.S. 181, 205 (1985) (quoting *Lovell*, 303 U.S. at 451–52).

[98] *Id.* at 232 (White, J., concurring in the result).

speech that doesn't use the press as technology, because it communicates to a particular client in a specially regulated one-to-one relationship,[99] rather than to a broader audience.

2. Editorial discretion

Likewise with regard to editorial discretion: The leading case that the Report cites as to editorial discretion, *Miami Herald Publishing Co. v. Tornillo*,[100] has been relied on to protect the editorial discretion not just of newspapers but also of businesses distributing newsletters[101] and of social media platforms choosing what posts to include in their curated newsfeeds.[102] Indeed, *Miami Herald* has been applied to speech that wouldn't be viewed as "press" in any sense, such as charitable fundraising pitches[103] and parades.[104] The *Miami Herald* principle thus doesn't "treat[] the press differently."[105]

3. Taxation

That leaves taxation, as to which the Report cites *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*.[106] But that is a case about protecting the institutional press from discriminatory taxation,[107] not about reading the Free Press Clause as giving the institutional press discriminatory benefits.

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[99] *See* Jane R. Bambauer, *The Relationships Between Speech and Conduct*, 49 U.C. DAVIS L. REV. 1941 (2016).

[100] Abrams et al., *supra* note 1, at 633 n.385 (citing 418 U.S. 241 (1974)).

[101] Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1, 9–11 (1986) (plurality opin.) ("The concerns that caused us to invalidate the compelled access rule in *Tornillo* apply to appellant as well as to the institutional press").

[102] Moody v. Netchoice, LLC, 603 U.S. 707, 711 (2024).

[103] Riley v. Nat'l Fed'n of the Blind of N.C., 487 U.S. 781, 797 (1988).

[104] Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc., 515 U.S. 557, 570 (1995).

[105] *See* Abrams et al., *supra* note 1, at 632. The Report reasons that "editorial autonomy is especially crucial for the press and deserving of unique protections under the Press Clause separate, apart from and in addition to those afforded to tech platforms and others under the Speech Clause," *id.* at 642, but that is not the view taken by *Moody*. Nor is it the view taken by *Riley*, which made clear that the *Miami Herald* "rule did not rely on the fact that Florida restrained the press, and has been applied to cases involving expression generally." 487 U.S. at 797.

[106] 460 U.S. 575, 586 (1983) (cited in Abrams et al., *supra* note 1, at 632, 633 n.384).

[107] *See id.* at 582 ("Minnesota has singled out the press for special treatment.").

Indeed, just eight years after *Minneapolis Star*, *Cohen v. Cowles Media Co.* cited *Minneapolis Star* as an example of a case "holding that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news."[108] It followed the string citation that included *Minneapolis Star* with the conclusion that "It is, therefore, beyond dispute that '[t]he publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others.'"[109] And the Court later cited *Minneapolis Star* in First Amendment cases that didn't involve the institutional press, as exemplifying the general principle that certain kinds of financial burdens on communication are unconstitutional,[110] especially when they are speaker-based.[111]

IV. Lower Court Precedents

A. Right to Record

The Report also argues that "In the lower courts, the press has also been treated differently than the general public," and gives as one example that "Some (though not all) lower courts tasked with deciding 'right to record' cases have upheld the right to record in public on the basis of newsgathering freedom."[112] "These cases," the Report says, "illustrate that additional protection for the press in particular circumstances is hardly anathema to the First Amendment."[113]

But the right-to-record cases actually support the view that the First Amendment equally covers all who gather information to communicate it to the public, whether or not they are part of the "institutional press." Most of the cases cited in the footnote accompanying the Report's assertion involve non-institutional-press speakers: advocacy groups (the ACLU and PETA), a member of a police watchdog

[108] 501 U.S. 663, 669 (1991).

[109] *Id.* at 670 (quoting Associated Press v. NLRB, 301 U.S. 103, 132–33 (1937)).

[110] United States v. Nat'l Treasury Emps. Union, 513 U.S. 454, 468–69 (1995).

[111] Sorrell v. IMS Health Inc., 564 U.S. 552, 566 (2011).

[112] Abrams et al., *supra* note 1, at 633.

[113] *Id.* at 633–34.

group,[114] two "civil rights activists,"[115] and other ordinary citizens.[116] Only one of the plaintiffs was a media organization—Project Veritas, a conservative activist group whose stock in trade is making and publicizing secret recordings.

Indeed, one of the cited cases made clear that the public has the same rights as the press here, as the Report itself notes: "As no doubt the press has this right [to record police activity in public], so does the public.[117] Likewise, an earlier right-to-record case, which the Report didn't cite, reasons:

> It is of no significance that the present case . . . involves a private individual, and not a reporter, gathering information about public officials. The First Amendment right to gather news is, as the Court has often noted, not one that inures solely to the benefit of the news media; rather, the public's right of access to information is coextensive with that of the press. *Houchins*, 438 U.S. at 16 (Stewart, J., concurring) (noting that the Constitution "assure[s] the public and the press equal access once government has opened its doors"); *Branzburg*, 408 U.S. at 684 ("[T]he First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally."). . . .
>
> Moreover, changes in technology and society have made the lines between private citizen and journalist exceedingly difficult to draw. . . . [M]any of our images of current events come from bystanders with a ready cell phone or digital camera rather than a traditional film crew, and news stories are now just as likely to be broken by a blogger at her computer as a reporter at a major newspaper. Such developments make clear why the news-gathering protections of the First Amendment cannot turn on professional credentials or status.[118]

B. Interference with Nondisclosure Agreements

To be sure, the Report does offer one set of cases that could be read as providing special protection for the press—cases involving newsgatherers' tortious interference with potential sources' nondisclosure agreements.[119]

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[114] One of the plaintiffs in *Fields v. City of Philadelphia*, 862 F.3d 353 (3d. Cir. 2017).

[115] Two of the plaintiffs in *Project Veritas Action Fund v. Rollins*, 982 F.3d 813 (1st Cir. 2020).

[116] The plaintiff in *Turner v. Lieutenant Driver*, 848 F.3d 678 (5th Cir. 2017), and another of the *Fields* plaintiffs.

[117] *Fields*, 862 F.3d at 359 (quoted in Abrams et al., *supra* note 1, at 633 n.388).

[118] Glik v. Cunniffe, 655 F.3d 78, 83–84 (1st Cir. 2011) (paragraph break added).

[119] Abrams et al., *supra* note 1, at 625 n.344 (pointed to by *id.* at 633 n.387).

But it's not clear whether the press would indeed get special treatment under this doctrine, or whether courts would instead apply the same principles to information gatherers who aren't institutional press but still want to speak to the public. Might ideological activists, academics, or book authors likewise be immune from interference with contract claims when they ask nondisclosure agreement signers to disclose certain information? Might family members of the nondisclosure agreement signers be similarly immune if they encourage the signers to blow the whistle on what they see as abusive behavior?[120]

Indeed, all the jurisdictions from which the cited cases came have precedents generally rejecting institutional press/noninstitutional press distinctions in First Amendment tort law cases.[121] That suggests that courts might likewise treat equally everyone who gathers information to speak to the public (whether or not they belong to the institutional press) when it comes to interference with contract claims as well. And more broadly, even if some of these lower court cases could be read as interpreting the First Amendment to provide more protection for the institutional press, there is still a far broader volume of lower court cases rejecting such a distinction.[122]

V. Structure and Purpose

The Response also reasons that "The Constitution's structure and purpose—establishing a republican government under which the people govern themselves—are greatly benefitted by a free and vibrant press capable of disseminating knowledge and checking the government."[123] That is surely true.

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[120] *Cf.* Mark Fenster, *Breach Agents: The Legal Liability of Third Parties for the Breach of Reputational NDAs*, 6 J. FREE SPEECH L. 47, 75 (2025).

[121] *See* Flamm v. Am. Ass'n of Univ. Women, 201 F.3d 144, 149 (2d Cir. 2000); Gross v. N.Y. Times Co., 724 N.Y.S.2d 16, 17 (N.Y. App. Div. 2001) (endorsing *Hammerhead Enters. v. Brezenoff*, 551 F. Supp. 1360, 1369 (S.D.N.Y. 1982), which offers a more detailed First Amendment discussion); Miller v. Nestande, 237 Cal. Rptr. 359, 364 n.7 (Cal. Ct. App. 1987); Nodar v. Galbreath, 462 So. 2d 803, 808 (Fla. 1984); Shaari v. Harvard Student Agencies, Inc., 691 N.E.2d 925, 928–29 (Mass. 1998). I include here California, Florida, and Massachusetts because of three cases the Report didn't cite that likewise immunized newsgatherers from liability for interference with contract. *See* Jenni Rivera Enters., LLC v. Latin World Ent. Holdings, Inc., 36 Cal. App. 5th 766 (2019); Seminole Tribe of Fla. v. Times Publ'g Co., Inc., 780 So.2d 310, 318 (Fla. Ct. App. 2001); Dulgarian v. Stone, 652 N.E.2d 603 (Mass. 1995).

[122] *See* Volokh, *supra* note 3, at 505–38.

[123] *See* Abrams et al., *supra* note 1, at 616.

But why the limitation to the institutional press? The Supreme Court has repeatedly stressed that republican government is benefitted by free and vibrant public commentary from all sources. This is why *Lovell v. City of Griffin* concluded that leafletters were just as protected as newspapers.[124] It is why *Talley v. California* and *McIntyre v. Ohio Elections Commission* protected anonymous leafletters.[125]

It is presumably why *New York Times v. Sullivan* concluded that the activists who placed the ad in that case were as protected by the First Amendment as the *New York Times* was.[126] It is why *First National Bank of Boston v. Bellotti* concluded that "the press does not have a monopoly on either the First Amendment or the ability to enlighten."[127] Indeed, as noted above, some of the very sources that the Report points to as stressing broad protection for liberty of the press—such as the *McDougall* case and the *Address to the Inhabitants of Quebec*[128]—dealt at least in part with protection for non-institutional-press speakers.

And this makes sense, if one considers the structural checks and balances of our democracy. Of course the institutional media are an important check on abuses by government, businesses, religious institutions, advocacy groups, and more. But academics, even ones who participate in mass media only occasionally, can be an important check as well, especially because of their specialized expertise.

Advocacy groups can provide important checks too. To be sure, advocacy groups will usually have ideological perspectives, but many organizations that are indubitably part of the institutional media (such as opinion magazines) frankly proclaim such perspectives. Indeed, even ostensibly neutral newspapers and broadcasters are themselves inevitably biased in various ways.[129]

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[124] Lovell v. City of Griffin, 303 U.S. 444, 452 (1938).

[125] 362 U.S. 60, 64 (1960) (noting that "[a]nonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind"); 514 U.S. 334, 347 (1995) ("Indeed, the speech in which Mrs. McIntyre engaged—handing out leaflets in the advocacy of a politically controversial viewpoint—is the essence of First Amendment expression.").

[126] 376 U.S. 254, 266, 283–84 (1964).

[127] 435 U.S. 765, 782 (1978).

[128] *See* Abrams et al., *supra* note 1, at 605–06.

[129] *See* Daniel Okrent, *The Public Editor: Is The New York Times a Liberal Newspaper?*, N.Y. TIMES, July 24, 2004, § 4, at 2, which answers the question in the article title with "[o]f course it is."

Individual citizens will likewise often have information that newspapers and others don't possess, at least until those citizens publicize it.[130] Businesses will often have specialized information about conditions in their industry and the effects of various government actions.

What's more, media institutions are themselves a powerful interest group that deserves public scrutiny, just as other influential businesses and interest groups deserve scrutiny. That scrutiny will sometimes come from a media organization's media rivals: Competition is a powerful force. But excessive professional courtesy, and professionals' desire to avoid alienating their friends and prospective future employers, can also be powerful forces.

It is true that "[t]rust in the press is at record lows,"[131] and that "fact-intensive reporting"[132] is tremendously important for a democracy. Yet trust in the institutional press has declined not just for political reasons, but also because of a considerable number of self-inflicted wounds—both outright errors and the willingness to let ideological concerns affect how stories are covered and which stories are covered. That is of course partly human nature: However much institutions may aspire to objectivity and fairness, the humans who populate the institutions will always fall short. But it also stems from the willingness of some in the media to deliberately reject or at least downplay the importance of objectivity, in favor of commitments to perceived social justice or other goals.

To have media that are worthy of trust and committed to "fact-intensive reporting" that is genuinely not "partisan," we need watchdogs who monitor the press—just as to have a government that is worthy of trust, we need watchdogs in the media (and elsewhere). This checking of the media must sometimes come from

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"[I]f you think The Times plays it down the middle" on "gay rights, gun control, abortion and environmental regulation, among other [social issues]," "you've been reading the paper with your eyes closed." *Id.*

[130] *See, e.g.*, Pickering v. Bd. of Educ., 391 U.S. 563, 572 (1968) (recognizing First Amendment protection for a public school teacher's speech in part because "[t]eachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent").

[131] *See* Abrams et al., *supra* note 1, at 581.

[132] *Id.*

nonmedia institutions and individuals. And it doesn't seem structurally and functionally sound to deny potential critics of the media the same First Amendment protection that the media itself enjoys.

VI. THE FREE EXERCISE CLAUSE ANALOGY

The Report also argues that "[r]ecent developments in the Supreme Court's Free Exercise Clause jurisprudence," which have supported the greater granting of constitutional religious exemptions, "are instructive for crafting analogous Press Clause protections":[133]

> If the Court can identify "religious exemptions" as against "secular exemptions" from laws of general applicability, it is capable of identifying exemptions for the press as against exemptions for the general public. There is no valid basis for protecting one First Amendment freedom but refraining from protecting another.[134]

But here too the analogy, I think, cuts *against* special treatment for the institutional press. First, the Court has expressly refused to treat the Free Exercise Clause as limited to institutionally endorsed practices, and has instead treated the Clause as protecting the equal rights of all individuals with respect to their personally held religious beliefs.[135] Around the Framing, this likely protected nearly everyone, since nearly everyone had some sort of religious beliefs (whether or not they participated in institutional religious observance). Even today, this protects a substantial majority of Americans.[136] The Free Exercise Clause analogy thus offers little support for the Report's call for "identifying exemptions for the press"—a small sliver of the population—"as against exemptions for the general public."

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[133] *Id.* at 634.

[134] *Id.* at 635.

[135] *See* Thomas v. Review Bd., 450 U.S. 707, 715–16 (1981).

[136] I set aside how Religion Clauses jurisprudence should deal with the growing number of Americans who identify themselves as nonreligious, RYAN P. BURGE, THE NONES: WHERE THEY CAME FROM, WHO THEY ARE, AND WHERE THEY ARE GOING (2021). One possible answer is that the Free Exercise Clause should be understood—as Title VII and some other religious exemption regimes have been understood—as protecting "moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views" and that "play the role of a religion and function as a religion in the registrant's life." 29 C.F.R. § 1605.1 (Title VII); Welsh v. United States, 398 U.S. 333, 339 (1970) (conscientious objector exemption); *see generally* Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV 1465, 1492–94 (1999).

Moreover, the claim that "[t]here is no valid basis for protecting one First Amendment freedom but refraining from protecting another" suggests that free speech ought to be offered the same sort of protection as free press. The Free Exercise Clause analogy suggests that communicative activity (speech or press) should sometimes be exempted from generally applicable laws—which is indeed already recognized under *United States v. O'Brien* as to inherently expressive activity (and I'd say the same as to certain information gathering activity).[137] But why should the analogy suggest that the Free Press Clause protects freedoms for a small subset of Americans that go beyond the universal freedom protected by the Free Speech Clause?

There are, of course, ample precedents for this principle of equally "protect[ing] . . . First Amendment freedom[s]." One is *New York Times v. Sullivan*'s conclusion that the Free Speech Clause protected the rights of the individual authors of the advertisement to precisely the same degree as the Free Press Clause protected the rights of the *Times*.[138] Another is *Lovell v. City of Griffin*'s conclusion that "[t]he liberty of the press is not confined to newspapers and periodicals," but "necessarily embraces pamphlets and leaflets," because "[t]he press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion."[139] But these are most consistent with the view that everyone is entitled to use the printing press as a technology (and of course to likewise use the printing press's technological descendants)—not that the First Amendment secures some special rights for the press as an industry.

VII. The Problems With Identifying Who "Qualif[ies] for Press Clause Protection"

Any limitation to the institutional press would also require judges to decide who counts as institutional press and who doesn't. The Report, to its credit, recognizes this and therefore offers "criteria worth considering when determining whether a person or entity does or does not qualify for Press Clause protection":

- The rights claimant is a member of a news organization;
- The rights claimant has a standing history of news reporting;
- The rights claimant has a sizeable audience;

[137] 391 U.S. 367, 385 (1968).

[138] 376 U.S. 254, 266, 283–84 (1964).

[139] 303 U.S. 444, 452 (1938).

- The rights claimant exercises editorial independence, especially from the subjects of their work;
- The rights claimant subjects their work to an editorial process as a means of quality control;
- The rights claimant adheres to professional standards and ethics;
- The rights claimant holds itself out as the press;
- The rights claimant is a human or, as in the case of entities, consists of humans;
- The rights claimant has training, education, or experience as a journalist; and
- The rights claimant is earning a living, or endeavoring to do so, from press activities.[140]

But these criteria just highlight, I think, the difficulties of the proposal, especially as, "with the advent of the Internet and the decline of print and broadcast media, . . . the line between the media and others who wish to comment on political and social issues [has] become[] far more blurred."[141]

First, the vagueness of some of the criteria invites viewpoint discrimination.[142] Consider, for instance, the query as to whether "[t]he rights claimant adheres to professional standards and ethics." It is of course human nature to see the lapses of one's friends as evidence that "even Homer nods," while seeing similar errors by one's adversaries as reflecting unprofessionalism and a lack of ethics. Requiring judges to evaluate whether MSNBC, Fox News, Project Veritas, *60 Minutes*, *The Nation*, or *The National Review* "adhere to professional standards and ethics" is unlikely to yield evenhanded results. And that is especially so since such "standards and ethics" are likely to be less well-defined and more contested than normal legal rules are.

Returning to the Report's Free Exercise Clause analogy, courts would surely eschew any inquiry into whether a religious observer or group "adheres to professional standards and ethics," or limit protection only to religious judgments that

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[140] *See* Abrams et al., *supra* note 1, at 653.

[141] Citizens United v. FEC, 558 U.S. 310, 352 (2010).

[142] *See* Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972) ("A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.").

are subjected to some review process by religious leaders.[143] Why should courts embrace such an inquiry under the Free Press Clause?

Likewise, what counts as having "a sizeable audience"? Is it an absolute measure, or one relative to the potential audience (for instance, with a lower threshold size for small-town newspapers, college newspapers, or magazines aimed at narrow professions)? In either case, what size is required to qualify?

Other criteria are largely circular, or turn on labeling. Many commentators call themselves "citizen journalists" or part of the "independent press." If that's all it takes to qualify under the "experience as a journalist" and "holds itself out as the press" factors, then those criteria are empty. But if those factors require experience in some specific job category working for some specific type of mass communications entity, or holding oneself out as a particular type of mass communications entity, then this returns to the question: What types of entities qualify?

And other factors strike me as hard to justify. For instance, it's not clear why particular "training" or "education" (presumably separate from "experience") should bear on whether one is entitled to exercise a First Amendment right. Again returning to the Report's Free Exercise Clause analogy,[144] the First Amendment protects all who seek to preach, not just those who have divinity degrees.[145] Likewise, while there's nothing shameful about writing to "earn[] a living"—as opposed to out of moral conviction or personal interest—it's hard to see why doing so should give one extra constitutional rights.

Consider, for example, two hypothetical Substack newsletters, both providing news and analysis on law, one written by a law professor and another by a former newspaper reporter. The professor's Substack is free, because the professor has the luxury of a good day job; the ex-reporter's Substack is paid, because the ex-reporter is trying to make a living that way. Each Substack is new, and has only about a thousand subscribers (query whether that's "sizeable"). Each author claims to adhere to

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[143] *See, e.g.*, EEOC v. Consol Energy, Inc., 860 F.3d 131, 142 (4th Cir. 2017) ("[An employee's] religious beliefs are protected whether or not his pastor agrees with them, *cf. Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 715–16 (1981) (protection of religious beliefs not limited to beliefs shared by religious sect)").

[144] *See supra* Part VI.

[145] Many religious groups accept lay preachers who lack any formal religious education, just as many who use mass communications technology believe they are competent to do so without any formal education in journalism.

professional standards and ethics. Assume each "holds itself out as the press," whatever that means. Each author works without editorial help or editorial control. Here is how the Report's factors, quoted in the left-hand column, would apply:

Factor	Prof.	Ex-rep.
The rights claimant is a member of a news organization	No	No
The rights claimant has a standing history of news reporting	No	Yes
The rights claimant has a sizeable audience	Maybe	Maybe
The rights claimant exercises editorial independence, especially from the subjects of their work	Yes	Yes
The rights claimant subjects their work to an editorial process as a means of quality control	No	No
The rights claimant adheres to professional standards and ethics	Yes	Yes
The rights claimant holds itself out as the press	Yes	Yes
The rights claimant is a human or, as in the case of entities, consists of humans	Yes	Yes
The rights claimant has training, education, or experience as a journalist	No	Yes
The rights claimant is earning a living, or endeavoring to do so, from press activities	No	Yes

The ex-reporter looks good here, with 7 or 8 of the factors satisfied (depending on whether the thousand subscribers is "sizeable"). The professor, on the other hand, satisfies only 4 or 5 of the factors, chiefly because he has been (and remains) a scholar rather than a reporter. As a result, the professor may well enjoy fewer constitutional rights than the ex-reporter—even though both provide news and analysis on the same subject, and the professor may indeed provide it in a more expert way. Why would that be sound?

Of course, defenders of the test might argue that the professor should indeed prevail on these facts: Maybe 4 or 5 of the 10 factors are enough. But how can we be sure that judges would indeed so conclude—especially judges who might disapprove of the professor's perspectives? Advocates might like balancing tests because those tests are malleable: One can always argue that they *should* be applied to reach the right results. Judges might sometimes like balancing tests, too, for the same reason. But if we're looking for fair and evenhanded rules, such tests aren't particularly promising.

Indeed, in a polarized era, where we commonly hear—despite Chief Justice Roberts' objections—about the views of "Trump judges" or "Obama judges,"[146] deciding who "qualif[ies] for Press Clause protection" based on such multi-factor balancing tests seems especially dangerous. Even if the judges do try their best to apply the factors in a viewpoint-neutral way, they are only human.[147] And even if they succeed in being neutral, skeptical observers may feel they lack any assurance of such neutrality.

Disputes about who counts as the press, under the Report's approach, would also be ubiquitous. A vast range of bloggers or Tweeters, at least with a "sizeable" audience and claiming to be the "press," would have some factors on their side and some against them. Courts would thus have to constantly decide who merits Free Press Clause protection and who doesn't, under a vague and discretionary multi-factor balancing test.

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[146] *See, e.g.*, Mark Joseph Stern, *Trump Judges Have a New Strategy for Gutting Minority Rights*, SLATE (Aug. 22, 2023, 5:57 PM), https://perma.cc/88JQ-NKDT; Josh Gerstein & Kyle Cheney, *Trump Judges Are on a Tear*, POLITICO (Sept. 12, 2022), https://perma.cc/KSC8-D4MT; Elliot Mincberg, *How Trump Judges Are Trying to Repeal the New Deal*, PEOPLE FOR AM. WAY (Dec. 20, 2019), https://perma.cc/CWJ2-2U9N; Joan Biskupic, *DACA Advocates Tailor Their Appeal to Chief Justice John Roberts—With His Own Words*, CNN (Nov. 10, 2019), https://perma.cc/HC7C-RC7M ("Sorry Chief Justice Roberts, but you do indeed have 'Obama judges,' and they have a much different point of view than the people who are charged with the safety of our country." (quoting a Tweet from Donald Trump)).

[147] *See* James Weinstein, *Free Speech, Abortion Access, and the Problem of Judicial Viewpoint Discrimination*, 29 U.C. DAVIS L. REV. 471, 543 (1996):

> In emphasizing that free speech doctrine should be shaped so as to minimize the opportunity for judges to inject their own attitudes towards the speaker's views into the free speech analysis, I do not mean to suggest that judges are, as a breed, ideological [rogues] whose discretion must always be closely confined. To the contrary, judges are on the whole dedicated professionals who follow doctrine and strive for principled results. The emotion surrounding abortion access cases, however, might tempt even the most principled judges to let their views on abortion influence the decision. Even more than in the typical free speech case, then, there is a need in the these [sic] cases for bright line rules rather than vague standards requiring ad hoc judgments.

The same reasoning, I think, applies to deciding who is entitled to Free Press Clause protections.

To be sure, some degree of this is present in other First Amendment rules, such as the public figure / private figure distinction or the public concern / private concern distinction—as critics of the distinctions have pointed out.[148] But that shouldn't justify creating a new multi-factor balancing test, I think, when there is a viable alternative: treating users of mass communication technology the same, regardless of whether they are viewed as members of the institutional press.

Indeed, the problems with this balancing test are evident in the Report's own "observations" about how to "formulate a multi-factor test":[149]

> [G]ranting specific rights to the press, however defined, might result in more active judicial evaluation of how the press behaves. Were the Press Clause interpreted to afford broader press rights than are available under the Speech Clause, it might be seen as appropriate for courts to evaluate the availability of protection under a standard akin to England's "responsible journalism" construct. Criteria employed in a potential Press Clause test might include whether the press took appropriate steps to verify its information, the urgency of the subject matter it covered, whether the article captured the gist of competing parties' points of view or sought comment from them, and the general circumstances surrounding publication. This arrangement would conceptualize the Press Clause as a "quid-pro-quo" in which the press receives additional rights so long as it makes good-faith efforts to exercise those rights in a manner that serves its democratic functions.[150]

Can this "more active judicial evaluation of how the press behaves" really be consistent with the Report's calls for stronger free press protection? For instance, the Report repeatedly urges that the *New York Times v. Sullivan* actual malice test be reaffirmed[151]—but a major facet of the test is that "failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard."[152] If "availability of protection" turns on "whether the press took appropriate steps to verify the information," then that would point to cutting back *Sullivan* protections rather than reaffirming them.

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[148] *See, e.g.*, Berisha v. Lawson, 141 S. Ct. 2424, 2428 (2021) (Gorsuch, J., dissenting from the denial of certiorari); Eugene Volokh, *The Trouble with the "Public Discourse" Test as a Limitation on Free Speech Rights*, 97 VA. L. REV. 567 (2011); Nat Stern, *Private Concerns of Private Plaintiffs: Revisiting a Problematic Defamation Category*, 65 MO. L. REV. 597 (2000).

[149] Abrams et al., *supra* note 1, at 651.

[150] *Id.* at 652.

[151] *Id.* at 579–80, 642.

[152] Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 688 (1989).

Likewise, the Free Press Clause has long been understood to cover ideological advocacy (whether in ideological publications such as *The New Republic* or in op-eds in ostensibly objective newspapers), and not just straight-up news coverage. Yet such publications often do not aim to "capture[] the gist of competing parties' points of view." Will they lose Free Press Clause protection?[153]

Conclusion

Throughout American history, the legal guarantee of freedom of the press has generally protected everyone who uses the printing press (and its technological descendants) as a technology. It has not been understood as protecting only those who belong to the press as an industry.

This appears to have been true at the Framing, through the 1800s, through the 1900s, and under modern precedents. Technological changes have made the line between the institutional press and other users of mass communications harder to draw. But in any event, Free Press Clause law has not required that such a line be drawn.

The Report and the sources on which it relies do not, I think, cast doubt on this conclusion. They provide interesting and potentially persuasive arguments for why the freedom of the press should be read more broadly for all who use mass communications technology. But they do not justify denying certain Free Press Clause protection to those who aren't members of the institutional press.

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[153] Certain First Amendment doctrines, especially the neutral reportage privilege, are limited to balanced coverage of a matter. But those are just particular defenses; the Report is contemplating a threshold test that is required "whether a person or entity does or does not qualify for Press Clause protection," Abrams et al., *supra* note 1, at 652, in the first place.