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## PRESS EXCEPTIONALISM

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*I am very much afraid of definitions, and yet one is almost forced to make them. One must take care, too, not to be inhibited by them.*<sup>1</sup>

### INTRODUCTION

The Occupy Wall Street movement was one of the largest grassroots political demonstrations in American history.<sup>2</sup> The protests raised issues about government policies and social structures that sparked debate nationwide. Treatment of the demonstrators by public officials garnered scrutiny too,<sup>3</sup> as did the tactics of the protestors, which some alleged included unlawful conduct.<sup>4</sup>

Yet despite the high level of newsworthiness, many reporters who attempted to cover the protests faced significant roadblocks. Some were denied access to protest sites.<sup>5</sup> Others were arrested,<sup>6</sup> even when

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<sup>1</sup> Letter from Robert Delaunay, French artist, to August Macke, German artist (1912), *archived at* <http://perma.cc/W56K-RQRD>.

<sup>2</sup> Allison Kilkenny, *Year One: Occupy Wall Street Plans Anniversary Protest of Wall Street*, NATION (Sept. 10, 2012, 9:40 AM), <http://www.thenation.com/blog/169823/year-one-occupy-wall-street-plans-anniversary-protest-wall-street>, *archived at* <http://perma.cc/ML5Q-E4LG>.

<sup>3</sup> See, e.g., Al Baker & Joseph Goldstein, *Officer's Pepper-Spraying of Protesters Is Under Investigation*, N.Y. TIMES: CITY ROOM (Sept. 28, 2011, 1:37 PM), <http://cityroom.blogs.nytimes.com/2011/09/28/police-department-to-examine-pepper-spray-incident/>, *archived at* <http://perma.cc/W32Z-BFXX> (discussing NYPD officer's use of pepper spray on female protestors); Larry Gordon, *UC to Pay Settlement in Davis Pepper Spray Case*, L.A. TIMES, Sept. 13, 2012, <http://articles.latimes.com/2012/sep/13/local/la-me-uc-pepper-spray-20120914>, *archived at* <http://perma.cc/D5CD-UQ4T> (detailing settlement paid to UC Davis protestors after campus police used pepper spray on them).

<sup>4</sup> See, e.g., Charles P. Pierce, *This Cannot Be the Way Occupy Ends*, ESQUIRE: POL. BLOG (Nov. 17, 2011), <http://www.esquire.com/blogs/politics/occupy-wall-street-violence-6575448>, *archived at* <http://perma.cc/48VC-ZS62> (bemoaning protestors' "reciprocal violence" and arguing that the protest "can't end in images of bleeding cops and tossed barricades").

<sup>5</sup> Brian Stelter & Al Baker, *Reporters Say Police Denied Access to Protest Site*, N.Y. TIMES: MEDIA DECODER (Nov. 15, 2011, 11:06 AM), <http://mediadecoder.blogs.nytimes.com/2011/11/15/reporters-say-police-denied-access-to-protest-site>, *archived at* <http://perma.cc/5N7Z-QDKB>.

<sup>6</sup> See Brian Stelter, *Protest Puts Coverage in Spotlight*, N.Y. TIMES, Nov. 21, 2011, at B1 (noting that, as of November 2011, "26 reporters and photographers have been arrested at protests linked to the movement"); Press Release, Soc'y of Prof'l Journalists, SPJ Condemns Arrests of Journalists at Occupy Protests (Nov. 15, 2011), *archived at* <http://perma.cc/4983-ZCHN> ("[A]t least six journalists have been arrested or detained while covering the protests . . .").

they could and did display press credentials.<sup>7</sup> Airspace was blocked to prevent filming from news helicopters.<sup>8</sup> This shabby treatment of journalists led to condemnation by press organizations and caused the United States's ranking on the Reporters Without Borders' Press Freedom Index to drop sharply, from twentieth to forty-seventh place.<sup>9</sup>

The experiences of the reporters covering the Occupy protests reflect a broader reality about journalism: on a day-to-day basis, American journalists deal with legal uncertainties in the pursuit of news. There are difficulties of access to property (sometimes even public property),<sup>10</sup> information,<sup>11</sup> and government meetings.<sup>12</sup> Journalists have uncertain protections against subpoenas and face frequent government demands that they testify about what they have learned while gathering news or that they reveal the identities of confidential sources.<sup>13</sup> Reporters' notes, photographs, emails, drafts, and video

<sup>7</sup> Press Release, Soc'y of Prof'l Journalists, *supra* note 6 ("[T]he journalists were either wearing press credentials or explained to police that they were reporters covering the protests.")

<sup>8</sup> See Robert Mackey, *Drone Journalism Arrives*, N.Y. TIMES: THE LEDE (Nov. 17, 2011, 6:43 PM), <http://thelede.blogs.nytimes.com/2011/11/17/drone-journalism-arrives>, archived at <http://perma.cc/3M8R-M6Z8>.

<sup>9</sup> *World Press Freedom Index 2011–2012*, REPORTERS WITHOUT BORDERS, <http://en.rsf.org/press-freedom-index-2011-2012,1043.html> (last visited May 10, 2014), archived at <http://perma.cc/C83L-YDRU> ("The United States (47th) also owed its fall of 27 places to the many arrests of journalist [sic] covering Occupy Wall Street protests.")

<sup>10</sup> See, e.g., Mark Washburn, *Observer Religion Reporter Arrested in Raleigh Protest*, CHARLOTTE OBSERVER, June 10, 2013, <http://www.charlotteobserver.com/2013/06/10/4098290/observer-religion-reporter-arrested.html>, archived at <http://perma.cc/D2R2-BTLA> (stating that a reporter "failed to move away from a crowd of about 60 that was demonstrating and peacefully surrendering to arrest. . . . [He] was handcuffed and taken along with the arrested protesters. . . .").

<sup>11</sup> See 5 U.S.C. § 552b(c)(1)–(10) (2012) (outlining exemptions to government's obligation to release information under the Freedom of Information Act (FOIA), 5 U.S.C. § 552); *Response Times*, REPORTERS COMM. FOR FREEDOM OF THE PRESS, <http://www.rcfp.org/federal-open-government-guide/federal-freedom-information-act/response-times> (last visited May 10, 2014), archived at <http://perma.cc/444J-LJB3> ("For journalists, the nearly routine failure of agencies to provide timely access to records has triggered the need to go outside the [Freedom of Information] Act. . . ."). For examples of cases rejecting journalists' FOIA requests under the statutory exemptions, see *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 757, 780 (1989) (rejecting journalist's FOIA request for FBI record of organized crime figure suspected of bribing congressman); *FBI v. Abramson*, 456 U.S. 615, 631–32, 634 n.1 (1982) (rejecting journalist's FOIA request for FBI records requested by President Nixon); *U.S. Dep't of State v. Wash. Post Co.*, 456 U.S. 595, 596, 602–03 (1982) (rejecting newspaper's FOIA request for Iranian nationals' passport application information); *Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 936 (D.C. Cir. 2003) (rejecting public interest groups' FOIA request for information on thousands of foreign nationals detained during September 11 investigation).

<sup>12</sup> See 5 U.S.C. § 552b(c)(1)–(10) (listing exemptions); *The Government in the Sunshine Act*, REPORTERS COMM. FOR FREEDOM OF THE PRESS, <http://www.rcfp.org/federal-open-government-guide/federal-open-meetings-laws/government-sunshine-act> (last visited May 10, 2014), archived at <http://perma.cc/L28S-RXZS> ("The Sunshine Act includes 10 exemptions or reasons that the government can refuse to open an agency meeting.")

<sup>13</sup> See, e.g., *In re Grand Jury Subpoena*, Judith Miller, 438 F.3d 1141, 1145–50 (D.C. Cir. 2005) (upholding contempt orders against journalists for refusing to comply with subpoena).

outtakes are potentially subject to search by law enforcement.<sup>14</sup> Members of the press also face risks of criminal or tort liability if they engage in undercover reporting<sup>15</sup> or reveal leaked information.<sup>16</sup>

The underlying problem journalists face is that they are treated by the law as being no different than the subjects they are covering or, perhaps, mere curious bystanders.<sup>17</sup> For constitutional purposes at least, it is entirely irrelevant to courts whether the speakers are members of the press or whether they are actively pursuing the news.

To be sure, once journalists publish or broadcast a story, their speech — like everyone's speech — enjoys powerful First Amendment protections.<sup>18</sup> Journalists are shielded — again, as is everyone — from prior restraints<sup>19</sup> and content-based censorship of their messages.<sup>20</sup> But when it comes to recognizing the special role of reporters as watchdogs and conduits of information for the citizenry as a whole, the Supreme Court has taken a hands-off approach.

One of the primary reasons for this failure to distinguish between constitutional protections for speech and the press is the problem of identification. In order to recognize unique press protections, the Court must figure out who or what the press is. The Occupy protests again illustrate the problem. Among the crowds at these demonstra-

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<sup>14</sup> See, e.g., 42 U.S.C. § 2000aa(b) (2012) (setting forth situations where police may seize media's "documentary materials"). *But see* *Zurcher v. Stanford Daily*, 436 U.S. 547, 552–53 (1978) (rejecting Fourth Amendment challenge to police search of student newspaper office for photographs), *superse- ded by statute*, 42 U.S.C. § 2000aa, *as recognized in* *Sennett v. United States*, 667 F.3d 531 (4th Cir. 2012).

<sup>15</sup> See, e.g., *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 510 (4th Cir. 1999) (holding that journalists who lie on employment applications to gain access to private facilities or use secret cameras for newsgathering activities are not protected by the First Amendment and may be liable for trespass or other offenses).

<sup>16</sup> See, e.g., Ann E. Marimow, *A Rare Peek into a Justice Department Leak Probe*, WASH. POST, May 19, 2013, [http://www.washingtonpost.com/local/a-rare-peek-into-a-justice-department-leak-probe/2013/05/19/obc473de-be5e-11e2-97d4-a479289a31f9\\_story.html](http://www.washingtonpost.com/local/a-rare-peek-into-a-justice-department-leak-probe/2013/05/19/obc473de-be5e-11e2-97d4-a479289a31f9_story.html), *archived at* <http://perma.cc/TSE3-N962> (discussing the criticism of the Obama Administration's naming of Fox News reporter James Rosen as a "co-conspirator" in criminal activity for soliciting the leak of classified information).

<sup>17</sup> See Joe Strupp, *Texas Journalists: Lt. Gov's Threat to Arrest Reporters "Worrisome,"* MEDIA MATTERS FOR AM. (July 1, 2013, 3:58 PM), <http://mediamatters.org/blog/2013/07/01/texas-journalists-lt-govs-threat-to-arrest-repo/194705>, *archived at* <http://perma.cc/T387-5KY9>.

<sup>18</sup> See Potter Stewart, "Or of the Press," 26 HASTINGS L.J. 631, 633 (1975) (noting that the press is "guaranteed that freedom, to be sure, but so are we all, because of the Free Speech Clause").

<sup>19</sup> See, e.g., *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 570 (1976) (striking prior restraint on media coverage of criminal trial); *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam) (striking prior restraint on publication of Pentagon Papers); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 723 (1931) (striking prior restraint against anti-Semitic newspaper).

<sup>20</sup> See, e.g., *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 827 (2000) (striking law requiring cable operators to "scramble" sexually explicit programming); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 123 (1991) (striking law imposing financial burden on works describing author's crimes); *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 234 (1987) (striking content-based magazine tax).

tions were many people utilizing their constitutional speech rights in ways that might seem “press-like.” An office worker on his way to lunch might see a traffic backup caused by the protestors and use his smartphone to tweet a message to his followers warning them to avoid the area. A cable comedy show might send a “correspondent” to the site to interview protestors and poke fun at some of the colorful participants.<sup>21</sup> A newly graduated journalism student could decide to write an article about the protests with the hope of getting her first publication as a freelance writer. Then there are the bloggers. Some bloggers might post regularly about related issues and thus be attempting to gather information for their established readership whereas others might be offering unrelated content on an inconsistent basis to an unproven audience.

This all raises some important questions: Are these speakers the press? Are all of them or only some of them? And does the difficulty of answering this question confine us to a reading of the First Amendment that gives no meaning to the Press Clause that reaches beyond the Speech Clause?

This Article advances the principle of press exceptionalism — that there exist certain speakers who fulfill unique roles in our democracy. These press speakers devote time, resources, and expertise to the vital constitutional tasks of informing the public on newsworthy matters and providing a check on the government and the powerful.<sup>22</sup> We must recognize these speakers in order to consider and potentially protect their specific needs. A continuing refusal to do so, moreover, comes with risks. These risks include not only a failure to fulfill the promises of the First Amendment, but also widespread societal costs arising out of reduced information flow and weakened government scrutiny.

The challenge, however, is that there are also numerous other speakers who use their speech rights in ways that at times appear to be “press-like.” I refer to these speakers as “occasional public commentators.” Aided increasingly by advances in communication technology, occasional public commentators share information and ideas about matters of public interest to a potentially broad audience in a timely manner — the very activities that were once considered the exclusive province of the press. Because viewing occasional public commenta-

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<sup>21</sup> See, e.g., *The Daily Show with John Stewart: The 99%* (Comedy Central television broadcast Oct. 18, 2011), available at <http://www.thedailyshow.com/watch/tue-october-18-2011/the-99>, archived at <http://perma.cc/R9XM-SA7W>.

<sup>22</sup> Sonja R. West, *The Stealth Press Clause*, 48 GA. L. REV. (forthcoming 2014) (manuscript at 45–46) (on file with the Harvard Law School Library) (drawing on Supreme Court precedent to establish that the press fulfills two unique constitutional functions: gathering and disseminating news to the public and providing a check on the government and the powerful).

tors as press speakers comes with constitutional costs, as I explained in a prior article,<sup>23</sup> it is desirable to distinguish between the two groups. Therefore, I seek to establish a theoretically sound and practically workable methodology for identifying and distinguishing these two types of speakers.

Drawing on past attempts to identify the press and also using the Supreme Court's recent discussion of who is and who is not a "minister" for the purposes of the Religion Clauses of the First Amendment<sup>24</sup> as a model, I suggest that courts should take a holistic approach to finding the press. This approach could include relying on the cues of third parties and public institutions as proxies, as well as considering the speaker's track record of publication and audience to determine which speakers are best fulfilling the press functions.

I develop these ideas in three parts. Part I explores who are members of the press for First Amendment purposes, what they do, and why it matters that they be identified. Part II then considers how changing technology has impacted the search for the press, concluding that, rather than defeating the effort, it has helped to focus it and to alleviate concerns of elitism. Finally, Part III combines past efforts by others to identify the press with insights from the Court's recent discussion on how to determine who is a "minister" for the purposes of the Religion Clauses of the First Amendment to offer a usable beginning framework in our search for the press.

## I. IDENTIFYING THE PRESS

The First Amendment refers separately to freedoms of "speech"<sup>25</sup> and "press."<sup>26</sup> While it is clear that all individuals — and even corporations — have speech rights, confusion over the meaning of the term "press" abounds. This Part explores the relationship between the Speech and Press Clauses. It then discusses how press speakers differ from other speakers and why it matters that we identify them.

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<sup>23</sup> See Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. REV. 1025, 1030–31 (2011). Defining the press too broadly makes the Press Clause's protections redundant with those of the Speech Clause. *Id.* at 1056. Attempting to expand the definition of the press to cover even speakers on the periphery, moreover, devolves to including nearly everyone as potential members of the press. Such an overly broad definition is unworkable and prevents the expansion of rights to those performing press functions. *Id.* at 1057.

<sup>24</sup> See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012).

<sup>25</sup> U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . .").

<sup>26</sup> *Id.* ("Congress shall make no law . . . abridging the freedom of . . . the press . . .").

### A. *The Press Clause Versus the Speech Clause*

The relative successes of the First Amendment's expression clauses provide a study in contrast. The Speech Clause has assumed the role of favorite child, lavished with attention by the Supreme Court. Over the last century, the Court has solidified the central role of the Speech Clause, interpreting its protections generously in the face of ambiguity, confusion, and powerful countervailing interests. Undeterred by the difficulty of the questions presented, the Court has found in the Speech Clause a First Amendment home (even if at times a limited one) for such dubiously valuable forms of speech as indecency,<sup>27</sup> simulated child pornography,<sup>28</sup> corporate speech,<sup>29</sup> commercial speech,<sup>30</sup> hate speech,<sup>31</sup> animal snuff films,<sup>32</sup> and displays of racism.<sup>33</sup> Constitutional claims that were finding doors closing in other areas, meanwhile, found new life in the open embrace of the Speech Clause.<sup>34</sup>

The story of the Press Clause could not be more different. If the Speech Clause is the Court's favorite child, the Press Clause has been the neglected one. During the same period that the Court has developed wide-ranging protections under the Speech Clause, it has all but failed to notice the Press Clause's existence, and when it has noticed, it has been with a mindset of skepticism and defeatism. In the Speech

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<sup>27</sup> See *Cohen v. California*, 403 U.S. 15, 26 (1971) (reversing conviction for wearing indecent antidraft jacket in courthouse); cf. *FCC v. Pacifica Found.*, 438 U.S. 726, 746 (1978) (assuming that indecent monologue may have been protected if not disseminated through broadcast radio).

<sup>28</sup> See *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 258 (2002) (striking down the law that banned virtual child pornography not involving actual children).

<sup>29</sup> See *Citizens United v. FEC*, 130 S. Ct. 876, 886 (2010) (holding that the government may not suppress corporate political speech altogether).

<sup>30</sup> See *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 570–71 (2001) (striking down certain limits on tobacco advertisements); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980) (setting forth four-part test for when commercial speech may be regulated).

<sup>31</sup> See *Snyder v. Phelps*, 131 S. Ct. 1207, 1220–21 (2011) (rejecting suit against antigay group's hate speech at funeral protest).

<sup>32</sup> See *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010) (striking down a ban on depictions of animal cruelty).

<sup>33</sup> See *Virginia v. Black*, 538 U.S. 343, 365–67 (2003) (opinion of O'Connor, J.) (holding that the state could not ban all cross burnings); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395–96 (1992) (striking down content-based ban on cross burning).

<sup>34</sup> See, e.g., *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112 (2001) (holding that a school's exclusion of a religious children's club from meeting on school property was unconstitutional viewpoint discrimination); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 387, 396–97 (1993) (holding that a school district violated the Speech Clause by denying a church access to school grounds because of its religious viewpoint); see also Mark W. Cordes, *Religion as Speech: The Growing Role of Free Speech Jurisprudence in Protecting Religious Liberty*, 38 SW. L. REV. 235, 236 (2008) (exploring the growing strength of the Speech Clause for protecting religious liberty); Ralph D. Mawdsley, *Access to Public School Facilities for Religious Expression by Students, Student Groups and Community Organizations: Extending the Reach of the Free Speech Clause*, 2004 BYU EDUC. & L.J. 269, 270 (assessing the impact of recent Supreme Court jurisprudence on school districts and religious expression in schools).

Clause context, the Court has found almost no case too messy to untangle. In case after case, the Court has extrapolated a complex web of legal rules from the sparse text of the Speech Clause concerning protected and unprotected speech;<sup>35</sup> quasi-protected speech;<sup>36</sup> time, place, and manner restrictions;<sup>37</sup> viewpoint discrimination;<sup>38</sup> subject-matter discrimination;<sup>39</sup> symbolic expression;<sup>40</sup> and so on. Yet the Court has

<sup>35</sup> See, e.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (“There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.”); see also *New York v. Ferber*, 458 U.S. 747, 764 (1982) (holding that child pornography is not protected by the First Amendment); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam) (explaining that a state may proscribe advocacy of the use of force “where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action”); *Roth v. United States*, 354 U.S. 476, 485 (1957) (“[O]bscenity is not within the area of constitutionally protected speech or press”); *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952) (“Libelous utterances [are not] within the area of constitutionally protected speech . . .”).

<sup>36</sup> See, e.g., *FCC v. Pacifica Found.*, 438 U.S. 726, 747 (1978) (stating that the content of the broadcast program was “‘vulgar,’ ‘offensive,’ and ‘shocking’” and “content of that character is not entitled to absolute constitutional protection under all circumstances”); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976) (“In concluding that commercial speech, like other varieties, is protected, we of course do not hold that it can never be regulated in any way. Some forms of commercial speech regulation are surely permissible.”); *Bigelow v. Virginia*, 421 U.S. 809, 818 (1975) (“The fact that the particular advertisement in appellant’s newspaper had commercial aspects or reflected the advertiser’s commercial interests did not negate all First Amendment guarantees.”).

<sup>37</sup> See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (stating that the government may impose time, place, or manner restrictions that are content neutral, narrowly tailored to serve a significant government interest, and leave ample alternative channels open for communication); *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981) (“[T]he First Amendment does not guarantee the right to communicate one’s views at all times and places or in any manner that may be desired.”).

<sup>38</sup> See, e.g., *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (“The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.”); *R.A.V.*, 505 U.S. at 382 (“The First Amendment generally prevents government from proscribing speech or even expressive conduct because of disapproval of the ideas expressed.” (citation omitted)).

<sup>39</sup> See, e.g., *Boos v. Barry*, 485 U.S. 312, 316, 329 (1988) (holding that an ordinance that prohibited displays of a sign within 500 feet of a foreign embassy that “tend[ed] to bring that foreign government into public odium or public disrepute,” *id.* at 316, was unconstitutional on its face because it was a content-based restriction on political speech in a public forum and was not narrowly tailored to serve a compelling interest); *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983) (stating that for a state to enforce “a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end”); *Police Dep’t v. Mosley*, 408 U.S. 92, 95 (1972) (“[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”).

<sup>40</sup> See *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (“[C]onduct may be ‘sufficiently imbued with elements of communication to fall within the scope of the First . . . Amendment[.]’” (quoting *Spence v. Washington*, 418 U.S. 405, 406 (1974) (per curiam))); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505–06 (1969) (holding that wearing an armband with the purpose of expressing certain views “was closely akin to ‘pure speech,’” *id.* at 505, and “entitled to comprehensive protection under the First Amendment,” *id.* at 506).

found the task of applying the Press Clause to be far more intimidating, stating that it “would present practical and conceptual difficulties of a high order”<sup>41</sup> and bemoaning the “long and difficult journey to such an uncertain destination.”<sup>42</sup>

Why has the Court been so reluctant to breathe life into the Press Clause yet so willing to foster the Speech Clause? One argument in favor of this restrained Press Clause approach is that while the Speech Clause protects speakers, the Press Clause protects technology. The term “press” can, of course, refer both to those individuals who gather and convey news as well as to the device originally used to print text onto paper (the printing press). This ambiguity has led some to argue that the intent of including constitutional press freedoms was to protect the latter — the printing press or its modern equivalents.<sup>43</sup>

While an appropriately in-depth response to this argument is outside the scope and space constraints of this Article, I contend that there are reasons to be skeptical of interpreting the First Amendment’s reference to “the press” as referring only to the right to publish and disseminate one’s speech rather than as protecting a functional endeavor. First, the “press” of 1789 was a technology that allowed those with means the ability to reach a broad audience and thereby, to perform crucial functions in our self-government.<sup>44</sup> Yet what was once a single, overlapping endeavor of using the printing press to widely disseminate viewpoints as a means of informing others and checking the government has since split into two concepts — mass communication technology and journalism.<sup>45</sup> The understanding of the role and importance of the press at the time of the Framing maps more naturally

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<sup>41</sup> *Branzburg v. Hayes*, 408 U.S. 665, 704 (1972).

<sup>42</sup> *Id.* at 703.

<sup>43</sup> See, e.g., 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. 1371, 1401–02 (2003) (“When the First Amendment was written, the ‘press’ was literally the same as the printing press, merely a tool that any citizen could use to speak.”); Edward Lee, *Freedom of the Press 2.0*, 42 GA. L. REV. 309, 339 (2008) (“As originally understood, the Free Press Clause was meant to protect the printing press.”); 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, 463 (2012) (“[P]eople during the Framing era likely understood the text as fitting the press-as-technology model — as securing the right of every person to use communications technology, and not just securing a right belonging exclusively to members of the publishing industry.”).

<sup>44</sup> See Timothy E. Cook, *Freeing the Presses: An Introductory Essay*, in FREEING THE PRESSES 1, 7–8 (Timothy E. Cook ed., 2005) (stating that “there are two theoretical traditions to ‘freedom of the press’ in United States history,” *id.* at 7, and noting that the “open press model was as much in the air as the free press approach when the First Amendment was adopted,” *id.* at 8).

<sup>45</sup> See Tim Wu, *Machine Speech*, 161 U. PA. L. REV. 1495, 1530 (2013) (discussing the difference between search engines and newspapers and stating “the difference, in some fundamental way, between a tool and speech — the first directly serves the user, while the second attempts to persuade him”).

onto modern journalism than it does onto the personal use of modern communication technology.<sup>46</sup>

Additionally, the Supreme Court has interpreted the Speech Clause as more than merely a right to speak in a vacuum. Rather, speech rights include the right to connect with an audience.<sup>47</sup> If the Speech Clause protects not only a right to speak but also a right to reach and interact with a listener, this protection suggests that the Press Clause is the repository for rights beyond the mere ability of a speaker to publish and disseminate his speech.

For purposes of this Article, therefore, I use the term “press” as referring to more than a right to use technology to publish one’s speech. I contend that the First Amendment’s Press Clause was designed to protect speakers who fulfill specific and important “press” functions that differ from garden-variety speech values.

In an earlier article, moreover, I raised another theory for why the Court has been so favorable to speech rights while simultaneously so hesitant to embrace press rights.<sup>48</sup> The Court has interpreted the Speech Clause through the lens of constitutional overprotection. This instinct to be overinclusive with speech rights is important — it ensures that speakers and viewpoints are not left out of our public debate. Yet constitutional overprotection is a poor fit with the Press Clause. And, paradoxically, declaring that all or most speakers are members of the press leads to the recognition of fewer constitutional press rights.<sup>49</sup>

The Speech and Press Clauses function differently, yet they also complement each other.<sup>50</sup> The Speech Clause can work in tandem

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<sup>46</sup> See, e.g., West, *supra* note 23, at 1035–39 (detailing how the Supreme Court’s language involving the press is in line with the use of the term “press” to refer to the news media and conflicts with use of the term as “technology”).

<sup>47</sup> See, e.g., *Reno v. ACLU*, 521 U.S. 844, 874 (1997) (referring to the constitutional right of adults “to receive [speech] and to address to one another”); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976) (“Freedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both.” (footnote omitted)); *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972) (holding that speech rights include the listener’s right to “sustained, face-to-face debate, discussion and questioning”); *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”).

<sup>48</sup> West, *supra* note 23.

<sup>49</sup> *Id.* at 1056–58; cf. Philip Hamburger, Essay, *More Is Less*, 90 VA. L. REV. 835, 838 (2004) (observing, with respect to religious liberty, that “an enlarged definition of any right may invite limitations on the circumstances in which it is available”).

<sup>50</sup> See John D. Inazu, *The Four Freedoms and the Future of Religious Liberty* 24 (Wash. Univ. Sch. of Law Legal Studies Research Paper Series, Paper No. 12-10-08, 2012), archived at <http://perma.cc/MZ8J-9SRM> (“The modern era has witnessed a decline in . . . the distinctiveness of the rights contained in the First Amendment.”).

with the Press Clause<sup>51</sup> precisely because nonpress speakers can fall back on the many protections the Speech Clause puts in place.<sup>52</sup> Constitutional sorting always poses risks of discrimination, of course, but the real-world dangers of such discrimination in identifying the press are greatly muted because exclusion from that category does not leave the speaker out in the constitutional cold. The relationship between the two clauses, therefore, suggests not that we should presume that the Speech Clause has absorbed the Press Clause, but rather that “the press” has a distinct — albeit confined — meaning.

### B. *The Press Is Different*

Accepting the premise that the Press Clause establishes a distinctive constitutional status for those who perform certain functions in our democracy raises the question of how to identify those speakers. Many thoughtful legal observers have addressed the question of who constitutes “the press” for First Amendment purposes by seeking to frame a definition. I, too, have used “definition” terminology frequently and, in fact, continue to do so on occasion even in this Article. Despite this common reference to a “definition,” however, perhaps the more appropriate question is how to “identify” or “find” the press.

“Defining” the press suggests that some neutral arbiter (such as the great Judge Hercules of Professor Ronald Dworkin’s jurisprudence<sup>53</sup>) is hard at work carving out boundaries and creating distinctions where they previously did not exist. “Identifying” or “finding” the press, on the other hand, embraces practical distinctions that occur already in the real world. My thesis is that there exists a naturally evolving subset of speakers who fulfill unique and constitutionally valuable press functions. Thus, whereas a “definition” might draw static lines, a “search” for these special speakers would logically change as their tools and methods advance. The quest, therefore, should not be to define the press but rather to train our courts to recognize them in action. This section discusses some shared attributes of these speakers, and Part III considers how we might go about finding them.

The bottom line is that press speakers are those who fulfill the unique constitutional functions of the press, functions the Supreme Court has identified — often in dicta — as gathering newsworthy information, disseminating it to the public, and serving as a check on the

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<sup>51</sup> See *id.* (explaining the modern “conflation of First Amendment rights” in which we have “the worst of both worlds: a neglect of the ways in which First Amendment rights fit together and complement one another, and serious confusion over how each right is separately analyzed”).

<sup>52</sup> West, *supra* note 23, at 1058–60.

<sup>53</sup> RONALD DWORKIN, *LAW’S EMPIRE* 239 (1986).

government and powerful people.<sup>54</sup> Occasional public commentators might at times serve these functions, but the press has a commitment to these roles that reaches far beyond sporadic or ineffective efforts.

Compared to occasional public commentators, the press tends to possess distinct qualities. The press, for example, has knowledge, often specialized knowledge, about the subject matter at issue.<sup>55</sup> The press serves a gatekeeping function by making editorial decisions regarding what is or is not newsworthy.<sup>56</sup> The press places news stories in context locally, nationally, or over time.<sup>57</sup> The press strives to convey important information in a timely manner.<sup>58</sup> The press has accountability to its audience and gives attention to professional standards<sup>59</sup> or ethics.<sup>60</sup> The press devotes time and money to investigating and reporting the news.<sup>61</sup> It also expends significant resources defending itself against legal attacks as well as advocating for legal changes

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<sup>54</sup> West, *supra* note 22. For more analysis of the Supreme Court's view of the press's unique constitutional functions, see generally *id.*

<sup>55</sup> See EDMUND B. LAMBETH, COMMITTED JOURNALISM 25–26 (2d ed. 1992) (arguing that reporters must become familiar with the subject areas they cover).

<sup>56</sup> See *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (“A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials — whether fair or unfair — constitute the exercise of editorial control and judgment.” (footnote omitted)); David Carr, *Local Papers Shine Light in Society's Dark Corners*, N.Y. TIMES, Feb. 9, 2014, <http://www.nytimes.com/2014/02/10/business/media/local-papers-shine-light-in-societys-dark-corners.html>, archived at <http://perma.cc/D3ZX-K7US> (detailing “the importance of local journalistic vigilance” in breaking the story of New Jersey Governor Chris Christie's office's involvement in closing two lanes of access to the George Washington Bridge, which led to a multi-hour traffic jam).

<sup>57</sup> See BILL KOVACH & TOM ROSENSTIEL, THE ELEMENTS OF JOURNALISM 43–44 (2001) (arguing that the press must provide context, as opposed to mere accuracy, in order to provide the audience with the full “journalistic truth,” *id.* at 43); *id.* at 145 (“Unless the [journalistic] forum is based on a foundation of fact and context, the questions citizens ask will simply become rhetorical.”).

<sup>58</sup> See Stephen Lacy et al., *Citizen Journalism Web Sites Complement Newspapers*, 31 NEWS-PAPER RES. J. 34, 42 (2010), archived at <http://perma.cc/4MLY-XMJP> (“Only slightly more than a quarter of the citizen news and blog sites published the same day they were visited, which indicates most are not as timely as daily newspaper sites.”).

<sup>59</sup> PAUL HORWITZ, FIRST AMENDMENT INSTITUTIONS 146, 155 (2013) (“Before a story is published, every line, every quote, every judgment call is subjected to checking and rechecking, debate and counter-debate, and institutional second guessing.” *Id.* at 155.).

<sup>60</sup> See *Pennekamp v. Florida*, 328 U.S. 331, 365 (1946) (Frankfurter, J., concurring) (“The press does have the right, which is its professional function, to criticize and to advocate. The whole gamut of public affairs is the domain for fearless and critical comment, and not least the administration of justice. But the public function which belongs to the press makes it an obligation of honor to exercise this function only with the fullest sense of responsibility. Without such a lively sense of responsibility a free press may readily become a powerful instrument of injustice.”).

<sup>61</sup> Chelsea Ide & Kanupriya Vashisht, *Today's Investigative Reporters Lack Resources*, AZCENTRAL.COM (May 28, 2006, 3:30 AM), <http://www.azcentral.com/specials/special01/0528bolles-stateofreporting.html?&wired>, archived at <http://perma.cc/CT7Q-KWTX> (discussing the amount of time and money reporters need to pursue investigative journalism).

that foster information flow.<sup>62</sup> And the press has a proven ability to reach a broad audience through regular publication or broadcast.

For all of these reasons, members of the press, in contrast to occasional public commentators, would be best positioned to use potential press rights in ways that would benefit society as a whole. Rights of access to places, information, and sources, for example, help the press inform the public and thereby check wrongdoing by powerful public officials, private individuals, and entities.<sup>63</sup>

Acknowledging a distinction between the press and occasional public commentators does not, of course, entail allowing any new restrictions on the rights of any individual to speak. Occasional public commentators are free — and should remain free — at all times to use fully their constitutional speech rights. These rights of expression are abundant and include the right to publish and disseminate their speech. Contrary to the arguments of others, recognizing a special measure of constitutional protection for the press does not require embracing a vision under which the press “will play an active role and the audience a passive one.”<sup>64</sup> The goal is to enhance the uniquely useful protections of this subset of speakers who have proven they will further certain societal goals, not to diminish the rights of other speakers.

Pretending that the press is no different than an army of individual speakers with megaphones is a dangerous road to travel. In theory all citizens armed with laptops and Internet connections might be able to gather and convey news and check powerful government and private interests. But the reality is that there are some speakers who do this work far more consistently and effectively than others. And common sense suggests that repeat-player specialists with proven track records will do the most valuable work. It is true that public commentators sometimes act like the press. But it is equally true that there exist press speakers who operate differently and with significantly greater impact than a mere collection of individuals exercising their speech rights.

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<sup>62</sup> See RonNell Andersen Jones, *Litigation, Legislation, and Democracy in a Post-Newspaper America*, 68 WASH. & LEE L. REV. 557, 559 (2011) (discussing “the critical, but underappreciated, role that traditional media entities have played as legal instigators and enforcers”).

<sup>63</sup> See *Leathers v. Medlock*, 499 U.S. 439, 447 (1991) (“The press plays a unique role as a check on government abuse . . . .”); *Branzburg v. Hayes*, 408 U.S. 665, 727 (1972) (Stewart, J., dissenting) (“As private and public aggregations of power burgeon in size . . . there is obviously a continuing need for an independent press to disseminate a robust variety of information and opinion through reportage, investigation, and criticism . . . .”); *Estes v. Texas*, 381 U.S. 532, 539 (1965) (describing the press as “a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences”).

<sup>64</sup> Adam Cohen, *The Media that Need Citizens: The First Amendment and the Fifth Estate*, 85 S. CAL. L. REV. 1, 4 (2011) (calling this view a “common deficiency” of attempts to rescue the press).

### C. *Why Finding the Press Matters*

Our public debate has never seemed noisier. The marketplace of ideas is overloaded with a cacophony of voices from both media and nonmedia speakers. Thus, thanks to our robust speech rights, it might appear that the courts' inattention to the Press Clause is at most harmless error. Yet allowing the Press Clause to lie dormant does matter.

The impact is most obvious in the context of newsgathering. Despite recognition that "without some protection for seeking out the news, freedom of the press could be eviscerated,"<sup>65</sup> the Supreme Court has extended to the press no protection for newsgathering. When analyzing tort violations such as trespass, fraud, or breach of duty of loyalty (common issues for undercover reporting), courts do not take into account whether the defendant was a journalist pursuing a story.<sup>66</sup> Reporters, likewise, are not protected from government subpoenas to testify about their confidential sources, notes, or work product.<sup>67</sup> They likely have no constitutional defense against having their newsrooms searched or their telephone records divulged.<sup>68</sup> A journalist who receives leaked information from a source about a newsworthy matter might be treated as a criminal.<sup>69</sup>

Members of the press also have unique needs for protection. They have special concerns, for example, about becoming tools of the government or law enforcement.<sup>70</sup> Forcing a member of the press to testify about personal observations or to reveal a confidential source to a grand jury brings about greater harms than compelling a nonpress in-

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<sup>65</sup> *Branzburg*, 408 U.S. at 681.

<sup>66</sup> See, e.g., *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999).

<sup>67</sup> *Branzburg*, 408 U.S. at 667.

<sup>68</sup> See, e.g., Mark Sherman, *Gov't Obtains Wide AP Phone Records in Probe*, ASSOCIATED PRESS (May 13, 2013, 10:53 PM), <http://bigstory.ap.org/article/govt-obtains-wide-ap-phone-records-probe>, archived at <http://perma.cc/NLM4-SHXW> ("The Justice Department secretly obtained two months of telephone records of reporters and editors for The Associated Press in what the news cooperative's top executive called a 'massive and unprecedented intrusion' into how news organizations gather the news.>").

<sup>69</sup> See, e.g., Brian Stelter & Michael D. Shear, *Justice Dept. Investigated Fox Reporter Over Leak*, N.Y. TIMES, May 20, 2013, <http://www.nytimes.com/2013/05/21/us/politics/white-house-defends-tracking-fox-reporter.html>, archived at <http://perma.cc/6QDB-Z2AF> ("Without naming Mr. Rosen [the reporter being investigated], the document describes the reporter as 'at the very least, either as an aider, abettor and/or co-conspirator.'" (quoting Aff. in Support of Appl. for Search Warrant at 27, *In re Search of [Redacted]*, No. 1:10-mj-00291-AK (D.D.C. May 28, 2010), archived at <http://perma.cc/YB23-4ZEE>)).

<sup>70</sup> See *Branzburg*, 408 U.S. at 725 (Stewart, J., dissenting) (expressing concern over "state and federal authorities . . . attempting to annex the journalistic profession as an investigative arm of government"); *Gonzales v. NBC*, 194 F.3d 29, 35 (2d Cir. 1999) ("[P]ermitting litigants unrestricted, court-enforced access to journalistic resources would risk the symbolic harm of making journalists appear to be an investigative arm of the judicial system, the government, or private parties.").

dividual to do the same thing.<sup>71</sup> According the government such a power could transform journalists into de facto police investigators whom prosecutors might summon at any time. Invocation of this power also could dry up valuable sources of information, in part because effective use of confidential sources often requires development of a trust-based relationship over time.<sup>72</sup> Similar concerns also arise in the civil context.<sup>73</sup> These concerns suggest that there is a special case to be made for protecting members of the press from subpoenas, search warrants, and other intrusions that could burden their newsgathering and reporting efforts.

We can never really know, of course, what information the public never received because of an absence of newsgathering protection. But we do know that without press protections, journalists were unable to get information about detainees at Guantanamo Bay<sup>74</sup> or gain access to a jail where there were reports of cruel conditions and an inmate suicide.<sup>75</sup> We know that reporters have gone to jail for refusing to reveal their sources<sup>76</sup> and risk liability if they engage in undercover reporting.<sup>77</sup> A failure to protect newsgathering by the press not only causes harm to those particular speakers but also imposes a shared cost. Treating the press like all other speakers obstructs the public's right to know and impedes an important check on the government.

Concluding that the Press Clause has meaning independent of that of the Speech Clause and that it is possible to identify press speakers are the preliminary tasks. Accomplishing those tasks will allow us to move on to the debate over what types of press rights and protections make sense.

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<sup>71</sup> See *Branzburg*, 408 U.S. at 728–36 (Stewart, J., dissenting) (outlining harm of subjecting journalists to unrestricted subpoena power).

<sup>72</sup> See *id.* at 729 (noting that “the promise of confidentiality may be a necessary prerequisite to a productive relationship between a newsman and his informants” because they “may be willing to relate that information only in confidence to a reporter whom [they] trust[.]”).

<sup>73</sup> See *Gonzales*, 194 F.3d at 35 (explaining the concern that if the press had no protection against civil subpoenas, “[t]he resulting wholesale exposure of press files to litigant scrutiny would burden the press with heavy costs of subpoena compliance, and could otherwise impair its ability to perform its duties — particularly if potential sources were deterred from speaking to the press, or insisted on remaining anonymous, because of the likelihood that they would be sucked into litigation”).

<sup>74</sup> See *Associated Press v. U.S. Dep’t of Def.*, 554 F.3d 274, 279 (2d Cir. 2009).

<sup>75</sup> See *Houchins v. KQED, Inc.*, 438 U.S. 1, 14–16 (1978).

<sup>76</sup> See *Paying the Price: A Recent Census of Reporters Jailed or Fined for Refusing to Testify*, REPORTERS COMMITTEE FOR THE FREEDOM OF THE PRESS, <http://www.rcfp.org/jailed-journalists> (last visited May 10, 2014), *archived at* <http://perma.cc/XQ6F-PJVZ>.

<sup>77</sup> See, e.g., *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 510 (4th Cir. 1999) (holding that journalists who lied on employment applications to gain access to private facilities or used secret cameras for newsgathering activities are not protected by the First Amendment and may be liable for trespass or other offenses).

## II. DOES CHANGING TECHNOLOGY CHANGE THE PRESS?

Finding the press in a sea of sundry speakers is not without its complications. Advances in communication technology that make it simpler and cheaper to share information widely are escalating the challenge. This section considers the impact of this new technology on the search for the press and concludes that it helps, not hinders, the quest by focusing our attention on the unique functions of the press and by reducing concerns of elitism.

### A. *Technology Focuses the Search for the Press*

It is now easier than ever for the occasional public commentator to act at times as a casual journalist. The Supreme Court has observed that thanks to “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 becomes far more blurred.”<sup>78</sup> These technological developments suggest to some that our view of the press should be expanding with no less rapidity than technological change.<sup>79</sup>

There is a tendency to throw up one’s hands in contemplating the impact of new technologies on the Press Clause. The Court, after all, has long had an uneasy relationship with the Clause, and new technologies seem to render claims for invigorating it messier than ever before. Yet the age of the Internet, bloggers, smartphones, and social

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<sup>78</sup> *Citizens United v. FEC*, 130 S. Ct. 876, 905–06 (2010).

<sup>79</sup> See *id.*; see also SCOTT GANT, WE’RE ALL JOURNALISTS NOW 6 (2007) (“Although we are not all engaged in the *practice* of journalism, anyone of us can be if we want to [due in part to technological advances]. In that respect, we’re *all* journalists now.”); David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 528 (2002) (“[I]t is difficult to distinguish the press from the rest because the press is ‘disappearing inside the larger world of communications.’” (quoting KOVACH & ROSENSTIEL, *supra* note 57, at 11)); W. Lance Bennett, *The Twilight of Mass Media News: Markets, Citizenship, Technology, and the Future of Journalism*, in FREEING THE PRESSES 111, 112 (Timothy E. Cook ed., 2005) (“Today, anyone with a computer or a mobile phone is a potential reporter and publisher.”); Cohen, *supra* note 64, at 3 (describing the rise of “an Internet-based Fifth Estate” where “anyone with a computer and Internet access can produce and disseminate news”); Mary-Rose Papandrea, *Citizen Journalism and the Reporter’s Privilege*, 91 MINN. L. REV. 515, 519–20 (2007) (arguing that a qualified testimonial privilege “should extend to anyone . . . disseminating information to the public,” *id.* at 520); Keith Werhan, Essay, *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”). But see West, *supra* note 23, at 1056–58 (explaining why a broad definition of the press leads to less robust protection of constitutional rights); but cf. *Houchins*, 438 U.S. at 5 (citing concern that expansive media access would “undermine jail security”); Hamburger, *supra* note 49, at 838 (noting concerns “that an enlarged definition of any right may invite limitations on the circumstances in which it is available”).

media is an especially good time to tackle this issue. Advances in mass communication might blur the lines between the press and everyone else, but they also offer an incentive to pinpoint with heightened specificity the distinctive functions the press performs in our democracy. Better understanding of those functions, in turn, helps to frame rules — including rules that reach beyond the Speech Clause — that ensure that those functions are carried out.

There was a time, for example, when how speakers communicated was a convenient proxy for who is and who is not the press, but that time is no longer.<sup>80</sup> In the past, identifiers such as affiliation with an established news organization or use of traditional media — television, radio, or newspapers — were relatively precise indicators. Nonpress speakers rarely had access to these modes of communication, and press speakers had no alternatives for reaching mass audiences. Today, however, nearly every established news media organization has a web site and disseminates news via electronic services such as Twitter and Facebook. Increasingly, news publishers provide online services only and no longer have print editions,<sup>81</sup> while many others are cutting back on the amount of content put into print in favor of web-based dissemination.<sup>82</sup> At the same time, however, hundreds of millions of speakers use blogs, social media, and similar means of communicating even though they are not functioning as the press.<sup>83</sup> The Court itself observed that constantly evolving technology meant that any business-structure or medium-based definition of the press “would likely be born an anachronism.”<sup>84</sup> An approach that accords press status to everyone engaged in online communication would fall short of effectively identifying only those speakers fulfilling press functions.

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<sup>80</sup> See LEE C. BOLLINGER, *IMAGES OF A FREE PRESS* 85, 108–20 (1991) (describing past approaches as “partial regulation,” *id.* at 116, of the press depending on the medium involved).

<sup>81</sup> *Slate Magazine* is one such example. See SLATE, <http://www.slate.com> (last visited May 10, 2014), archived at <http://perma.cc/8J2U-GYCD>.

<sup>82</sup> See Sarah Frier & Edmund Lee, *Newsweek to Become Online-Only After 80 Years in Print*, BLOOMBERG (Oct. 18, 2012, 3:29 PM), <http://www.bloomberg.com/news/2012-10-18/newsweek-to-become-online-only-after-80-years-in-print.html>, archived at <http://perma.cc/73PT-RBSA> (reporting on Newsweek’s move to an all-digital publication); Dan Reimold, *Revolution in Georgia: Student Newspaper Goes Digital First*, PBS (Aug. 18, 2011), <http://www.pbs.org/mediashift/2011/08/revolution-in-georgia-student-newspaper-goes-digital-first230.html>, archived at <http://perma.cc/QD9Z-MNQZ> (describing University of Georgia’s student newspaper’s move to a primarily online publication).

<sup>83</sup> See *Facebook Reaches Majority of US Web Users*, EMARKETER (Feb. 24, 2011), <http://www.emarketer.com/%28S%28rt15qoeuzflupcbj2u1lkpnp%29%29/Article/Facebook-Reaches-Majority-of-US-Web-Users/1008247>, archived at <http://perma.cc/457F-C2NT> (“By 2013, 62% of web users and almost half (47.6%) of the overall US population will be on Facebook.”).

<sup>84</sup> *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 782 (1985); *id.* at 782 n.7.

Modern communication technology makes it evident that a less static understanding of the press is needed. That understanding, moreover, should be rooted in what the press actually does. The explosion of technology has changed the way everyone creates and receives information. But — and this is the key point — it has not eliminated the vital functional roles played by the press in our society. The Internet is having the positive effect of focusing attention on the key functional criteria of press membership — that is, by directing attention to assessing who is truly carrying out the role of the press.<sup>85</sup>

*B. Embracing Press Exceptionalism but Not Elitism*

New technologies also have diminished the risks of elitism. One longstanding objection to embracing press exceptionalism is that it requires giving special rights to a few, already privileged speakers.<sup>86</sup> This concern is, at its core, one of speaker-based discrimination. The worry is that only certain types of primarily elite speakers will be considered part of the press and, therefore, only certain messages or viewpoints will receive, as a practical matter, heightened constitutional protections.<sup>87</sup>

This concern is valid. But the concern's alleviation does not require that every speaker be considered a member of the press. The objective should not be to treat all speakers equally regardless of whether they are fulfilling press functions, but rather to ensure equal opportunity for all speakers to be recognized as the press if deserved. And modern technology helps everyone in this regard by easing the path to constitutional press status.

The case against recognizing unique press rights is often rooted in the concept that the Constitution protects fringe speakers and messages that depart from the orthodox, sometimes even wildly so. This near-absolutist approach that we apply to speech has trained us to bristle at the notion of giving anyone "special" First Amendment protections.<sup>88</sup>

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<sup>85</sup> See discussion *infra* section III.A, pp. 2454.

<sup>86</sup> See *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 802 (1978) (Burger, C.J., concurring) ("[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." (quoting *Pennekamp v. Florida*, 328 U.S. 331, 364 (1946) (Frankfurter, J., concurring)) (alteration in original) (internal quotation mark omitted)); see also Clay Calvert, *And You Call Yourself a Journalist?: Wrestling with a Definition of "Journalist" in the Law*, 103 DICK. L. REV. 411, 413 (1999) (expressing concern that a narrow definition creates an "elite, protected class").

<sup>87</sup> See Anderson, *supra* note 79, at 479 ("In the case of the press, the decisions are made by a self-appointed elite."); 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); West, *supra* note 23, at 1054–55 (recognizing that some scholars fear and call for an end of the elite press).

<sup>88</sup> Anderson, *supra* note 79, at 529 (describing this negative view of unique press rights — which he does not share — as "the tyranny of a self-appointed elite that depicts the world through its own

Yet acknowledging the existence of press speakers who fill particular functional roles and identifying those who best satisfy those roles is not the same as being nonegalitarian. Developing such distinctions is common practice in constitutional law. In defamation law, for example, we divide plaintiffs between public officials,<sup>89</sup> public figures,<sup>90</sup> and nonpublic figures.<sup>91</sup> Depending on one's classification, different constitutional rules apply. The law thus recognizes that different people play different roles in our society. Distinguishing between press defamation defendants and nonpress defamation defendants would operate in a similar way.<sup>92</sup>

The functional role provided by the press centers on its role as watchdog of the powerful and as conduit of newsworthy information.<sup>93</sup> Identifying those speakers who are best suited to fill these roles, and providing them with rights that would help them pursue these endeavors, is not elitist. In fact, it is just the opposite. The press serves as a check on the most elite members of our society — high-ranking government officials and private but powerful figures — by gathering and supplying the general public with critical information about them.

The key is making sure that there is equal access to recognition as a member of the press. As long as all speakers can gain the qualifications of press identification regardless of their message or their identity, inequality concerns are unfounded. In opposing efforts to provide special privileges for the press, Chief Justice Burger reasoned that “the First Amendment does not ‘belong’ to any definable category of persons or entities: It belongs to all who exercise its freedoms.”<sup>94</sup> But Chief Justice Burger's line of thinking about the First Amendment begs the question because we must ask how we “exercise its freedoms.”

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filter, tr[ying] to tell people what they need to know, and bedevil[ing] their elected officials and their celebrities in the names of their right to know”).

<sup>89</sup> See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (requiring public officials to prove actual malice to recover for defamation).

<sup>90</sup> *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 164–65 (1967) (Warren, C.J., concurring in the result) (applying “actual malice” test to public figures); see also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 335–36 (1974) (recognizing that *Curtis Publishing* extended the “actual malice” rule to public figures).

<sup>91</sup> See *Gertz*, 418 U.S. at 348–50 (requiring nonpublic plaintiffs to prove at least negligence to recover for actual injury when speech relates to a matter of public concern, and to prove actual malice to recover punitive damages); cf. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 757–61 (1985) (holding that when defamatory speech does not involve a matter of public concern, a plaintiff can recover without any showing of fault).

<sup>92</sup> To date, the U.S. Supreme Court has not addressed whether press defendants should be treated differently than nonpress defendants in defamation cases. See *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 779 n.4 (1986).

<sup>93</sup> See West, *supra* note 22, at 40–44.

<sup>94</sup> *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 802 (1978) (Burger, C.J., concurring).

His statement is consistent with an approach to the Press Clause that identifies the press as a subset of all speakers. If Press Clause protection goes to everyone who is exercising its freedoms in the sense of fulfilling the functions the Clause is meant to encourage, then it remains both an egalitarian and a theoretically consistent provision.

As with restrictions on speech, the limits imposed by the Press Clause must account for the potential for content- or speaker-based discrimination. Concern about such discrimination should take center stage, instead of some vague concern about favoring certain “elites.” Identifying the press in a way that looks for those members who are best fulfilling the unique roles of the press in society leaves ample room for minority, nontraditional, and outlying speakers to receive Press Clause protection.

Advances in mass communication technology, meanwhile, have opened the gates to press membership wider than ever before. By making it cheaper and easier for all speakers to reach large audiences, the Internet has eliminated many barriers to fulfilling press functions.<sup>95</sup> No longer must a speaker be affiliated with a formal news organization or have a broadcast license or access to a printing press to effectively function as the press.

Even with these technological advances, gathering news and publishing to a mass audience is, of course, not costless. While more accessible than ever before, the technology still requires resources, and the act of gathering and reporting news takes time that will burden some speakers more than others. Publishing, however, has always had its costs, as the Framers well knew. Colonial-era printing required money, labor, and often-scarce supplies.<sup>96</sup> Access to information and a delivery system were also barriers to printing,<sup>97</sup> as were the basics of literacy.<sup>98</sup> In short, exercising press freedoms has always required spe-

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<sup>95</sup> Anthony Ciolli, *Bloggers as Public Figures*, 16 B.U. PUB. INT. L.J. 255, 260 (2007) (“[A]nybody with a computer, an internet connection, and a cheap or free blogging program can become an amateur journalist and immediately have access to an international audience.”); Jay M. Zitter, Annotation, *First Amendment Protection Afforded to Blogs and Bloggers*, 35 A.L.R.6th 407, § 1 (2008) (“Blogs, short for ‘Web logs,’ are an increasingly popular form of interactive Web sites, since an individual can reach a potentially huge audience with a relatively small investment of time and energy.”).

<sup>96</sup> See LAWRENCE C. WROTH, *THE COLONIAL PRINTER* 233 (1931) (“This high mortality among the newspapers can be best accounted for by . . . the difficulty experienced at various times and places of securing a steady supply of reasonably cheap paper.”).

<sup>97</sup> See JOHN CLYDE OSWALD, *PRINTING IN THE AMERICAS* 30 (1937) (“Most of the printing offices were located at the seat of the provincial governments . . .”).

<sup>98</sup> See LAWRENCE A. CREMIN, *TRADITIONS OF AMERICAN EDUCATION* 31–32 (1977) (distinguishing between “inert” or technical literacy and “liberating literacy” and using newspaper circulations to suggest an increase in the latter in the eighteenth century).

cial investment, talents, and effort. The idea that some will have an easier path to exercising their rights is not a foreign concept to our Constitution.<sup>99</sup> It should invigorate, rather than diminish, the case for legal rights for the press, however, that the costs of gaining press membership are drastically decreasing.

Under the guidelines for identifying the press that I outline in Part III below, moving from occasional public commentator to press member would require the establishment of diverse criteria. The paths for a speaker to gain recognition as a member of the press are many and varied. A speaker can attain press status through some combination of institutional recognition, education, work history, publication record, established audience, and possibly other means. Recognizing this diversity of pathways lessens concerns about the monopolization of privileges by an advantaged elite.

### III. DEVELOPING A WORKABLE PATH FOR FINDING THE PRESS

Columbia University President Lee C. Bollinger has described “[t]he definitional problem — who constitutes ‘the press’” as “seem[ingly] intractable.”<sup>100</sup> I disagree. The problems posed by defining “the press” are not qualitatively different than the problems posed by defining terms found in other provisions of the Constitution. It is, of course, not necessary that a magic “sorting hat”<sup>101</sup> appear before the Press Clause can take effect. As they have done in other areas of the law, the courts can and should apply constitutional principles via an organizational process that unfolds over time.<sup>102</sup>

Many, if not most cases that involve claimed press membership would not be hard to resolve.<sup>103</sup> But there will be, as always, gray ar-

<sup>99</sup> See *Harrington v. Richter*, 131 S. Ct. 770, 780 (2011) (holding that criminal defendant lawyer’s failure to introduce any expert evidence did not violate defendant’s constitutional right to effective assistance of counsel); *Hodgson v. Minnesota*, 497 U.S. 417, 423 (1990) (upholding parental notification requirements for minors seeking abortions despite evidence that such requirements place particular burdens on minors and the poor); *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976) (per curiam) (“[R]estrict[ing] the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.”).

<sup>100</sup> LEE C. BOLLINGER, UNINHIBITED, ROBUST, AND WIDE-OPEN: A FREE PRESS FOR A NEW CENTURY 53 (2010).

<sup>101</sup> See J.K. ROWLING, *HARRY POTTER AND THE SORCERER’S STONE* 117 (1999).

<sup>102</sup> See THE FEDERALIST NO. 37, at 225 (James Madison) (Clinton Rossiter ed., 1961) (“All new laws, though penned with the greatest technical skill and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications.”).

<sup>103</sup> See Floyd Abrams, *The Press Is Different: Reflections on Justice Stewart and the Autonomous Press*, 7 HOFSTRA L. REV. 563, 580 (1979) (“In the great preponderance of cases, a court has little difficulty knowing a journalist when it sees one.”).

eas. That does not mean that courts should give up on interpretation. As Professor Frederick Schauer observed: “[C]ategorization is the only way in which we can organize and negotiate an overwhelming world whose vast array of particulars demands that it be sorted into categories.”<sup>104</sup>

A. *The Press Is as the Press Does*

The primary goal in our search for the press is to identify those speakers who are fulfilling particular constitutional functions. Thus, distinguishing the press from the occasional public commentator requires asking whether the speaker is carrying out the unique roles of the press. Focusing on the functional roles is both constitutionally based and allows for standards to adapt over time.

Many scholarly<sup>105</sup> and legislative<sup>106</sup> attempts to define the press have adopted a functional approach.<sup>107</sup> The problem is that these definitions tend to be overinclusive by embracing a broad view of the press as encompassing anyone who gathers or disseminates information to the public.<sup>108</sup> Or, if they try to pinpoint press activities more specifically, they risk being underinclusive and overlooking alternative journalists by mirroring too heavily the actions of the traditional media.<sup>109</sup>

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<sup>104</sup> Frederick Schauer, *Institutions as Legal and Constitutional Categories*, 54 UCLA L. REV. 1747, 1748 (2007).

<sup>105</sup> See, e.g., Randall P. Bezanson, *The Developing Law of Editorial Judgment*, 78 NEB. L. REV. 754, 829 (1999) (advocating a “purpose-oriented definition”); Paul Horwitz, *Or of the [Blog]*, 11 NEXUS 45, 52 (2006) (“The medium by which [blog-based] journalism is disseminated to the public matters far less than the fact that an individual has deliberately gathered and disseminated newsworthy facts.”); 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.”); Erik Ugland & Jennifer Henderson, *Who Is a Journalist and Why Does It Matter? Disentangling the Legal and Ethical Arguments*, 22 J. MASS MEDIA ETHICS 241, 247 (2007) (identifying the “egalitarian” definition of the press “in which all citizens are equally equipped and equally free to serve as newsgathering watchdogs”).

<sup>106</sup> See, e.g., MINN. STAT. § 595.023 (2012) (protecting any “person who is or has been directly engaged in the gathering, procuring, compiling, editing, or publishing of information for the purpose of transmission, dissemination or publication to the public”); N.C. GEN. STAT. § 8-53.11(a)(1) (2013) (protecting “[a]ny person . . . engaged in the business of gathering, compiling, writing, editing, photographing, recording, or processing information for dissemination via any news medium”).

<sup>107</sup> See also *Chevron Corp. v. Berlinger*, 629 F.3d 297, 308 (2d Cir. 2011) (concluding a filmmaker was not the press for reporter’s privilege purposes because he was not functioning as the press “in its valuable public service of seeking out and revealing truthful information”).

<sup>108</sup> See, e.g., Werhan, *supra* note 79, at 1601 n.243 (favoring a definition of the press that includes “anyone who regularly gathers and disseminates information of public interest to the public”).

<sup>109</sup> See, e.g., Papandrea, *supra* note 79, at 583 (arguing that some functional criteria could overly favor the traditional mainstream media).

I propose instead that we look to the Supreme Court to determine the constitutional roles of the press. In another piece, I concluded that the Court in its opinions has pinpointed two unique functions of the press.<sup>110</sup> These are to act as surrogates for and conduits of news to the public, and to serve as a check on the government and the powerful.<sup>111</sup> The goal is to recognize protections for those who are most effectively fulfilling these roles in our society.

### B. Hosanna-Tabor: A Helpful Model

The Supreme Court recently provided a helpful model demonstrating how to identify a group of distinct constitutional rightsholders in its unanimous 2012 decision,<sup>112</sup> *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*.<sup>113</sup> In that case, the Court was tasked with deciding whether a parochial school teacher was a “minister” for purposes of the “ministerial exception” to certain employment discrimination laws that derives from the Free Exercise Clause.<sup>114</sup>

The Court in *Hosanna-Tabor* was focused on a different First Amendment provision, of course, but its analysis promises to have broad and significant implications.<sup>115</sup> By holding that certain religious actors may claim First Amendment protections that other individuals and organizations may not, the Court embraced the concept that subsets of constitutional actors exist and can be identified. The relevance of the case to the search for the press is clear: the Court needed to and was able to distinguish those who were functioning with a protected constitutional purpose from those who were in a similar position but did not merit constitutional protection.

As I am proposing here, the Court in *Hosanna-Tabor* emphasized a functional inquiry. The Court examined the teacher’s actions for signs that she was discharging the “important religious functions”<sup>116</sup> of a minister. It was not necessary, the Court held, that the teacher “per-

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<sup>110</sup> West, *supra* note 22.

<sup>111</sup> *Id.*

<sup>112</sup> All nine Justices joined the majority opinion of *Hosanna-Tabor*, but Justices Thomas and Alito wrote separate concurrences, and Justice Kagan joined the latter concurrence.

<sup>113</sup> 132 S. Ct. 694 (2012).

<sup>114</sup> *Id.* at 699.

<sup>115</sup> See Michael W. McConnell, *Reflections on Hosanna-Tabor*, 35 HARV. J.L. & PUB. POL’Y 821, 836–37 (2012) (suggesting that it “may be the broader doctrinal implications of *Hosanna-Tabor* that have the most lasting significance,” *id.* at 837); Zoë Robinson, *What is a “Religious Institution”?*, 55 B.C. L. REV. (forthcoming 2014) (manuscript at 1) (on file with the Harvard Law School Library) (calling the decision a “jurisprudential earthquake” whose “biggest aftershock has yet to be felt”).

<sup>116</sup> *Hosanna-Tabor*, 132 S. Ct. at 708; see also *id.* at 714–15 (noting that the teacher taught scripture to her students, led daily prayer and devotional exercises, and occasionally led a school-wide religious service, which included “choosing liturgies, hymns, and readings, and composing and delivering a message based on Scripture,” *id.* at 715).

form exclusively religious functions,”<sup>117</sup> and while the amount of time she spent on religious activities was “relevant,” it was not alone determinative.<sup>118</sup>

Equally remarkable in *Hosanna-Tabor* is what the Court did not do. The Court did not conclude that the lack of a precise definition of “minister”<sup>119</sup> should deter it from dealing with a conflict between generally applicable employment discrimination laws and “the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations.”<sup>120</sup> The Court further did not feel compelled to draft an all-encompassing definition that would satisfy every conceivable hypothetical situation, stating instead that it was “reluctant . . . to adopt a rigid formula for deciding when an employee qualifies as a minister.”<sup>121</sup> The Court freed itself to proceed slowly on a case-by-case basis, declaring that “[i]t is enough for us to conclude” that the teacher in this case satisfied the exception.<sup>122</sup>

In its analysis, the Court in *Hosanna-Tabor* did not purport to create any official test or formal elements of a legal definition. The Court’s discussion instead highlighted certain attributes about the teacher involved in that case. No single factor appeared to be decisive. My proposal below envisions much the same approach for identifying the press.

### C. Guidelines for Identifying the Press

This section draws from the *Hosanna-Tabor* factors, as well as insights from past attempts by legislatures to define the press,<sup>123</sup> in order to identify reliable proxies and signals that will lead the courts to those speakers who best fulfill the unique constitutional functions of the press.<sup>124</sup> My analysis suggests that the following considerations are of the greatest importance: (1) recognition by others as the press; (2) holding oneself out as the press; (3) training, education, or experience in journalism; and (4) regularity of publication and established audience.

1. *Recognition as the Press.* — In *Hosanna-Tabor*, the Court relied on the fact that the church recognized the teacher “as a minister, with a role distinct from that of most of its members.”<sup>125</sup> The Court point-

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<sup>117</sup> *Id.* at 708 (quoting Brief for Federal Respondent at 51, *Hosanna-Tabor*, 132 S. Ct. 708 (No. 10-553)).

<sup>118</sup> *Id.* at 709.

<sup>119</sup> *See id.* at 707.

<sup>120</sup> *Id.* at 706.

<sup>121</sup> *Id.* at 707.

<sup>122</sup> *Id.*

<sup>123</sup> *See West, supra* note 23, at 1062–68 (examining legislative definitions of the press).

<sup>124</sup> *Cf. generally* Robinson, *supra* note 115 (offering a purposivist framework for defining a “religious institution” after *Hosanna-Tabor*).

<sup>125</sup> *Hosanna-Tabor*, 132 S. Ct. at 707.

ed to a title she had been given as a “called” as opposed to a “lay” teacher<sup>126</sup> and noted that the church referred to her as a “commissioned minister.”<sup>127</sup> The teacher’s job description included “ministerial responsibilities” and the requirement that she continue her education as a professional in the ministry.<sup>128</sup> In other words, the Court’s analysis suggests that we know she is likely a minister because the church labeled her one.

A similar approach to the press would go a long way (although not all the way) toward separating speakers who merit constitutional designation as press members from occasional public commentators. Employment by a news organization with a job description or title of “reporter,” “editor,” “photojournalist,” or the like would signal a level of seriousness that corresponds with the Press Clause’s goals. Membership in professional organizations would also be informative, as would an award of press credentials by a governmental entity or private organization.

There is no doubt that tying press membership to affiliations with a media company or press credentials would leave out some important speakers who are fulfilling press functions. That does not mean, however, that these traditional indicators of press membership are without value. News organizations, professional journalism societies, and groups that offer various types of press credentials reflect public norms regarding which speakers best fulfill the functions of the press.<sup>129</sup> In addition, these organizations do not operate in the shadows. They are accountable to the public, self-regulating, self-correcting, and sensitive about adapting to changing times.<sup>130</sup> In other words, these organizations can do much of the heavy lifting in singling out press members, and it would be imprudent to ignore them.

Institutional theorists suggest that societies should be left to build institutions as they see fit, and the courts should then look to those in-

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<sup>126</sup> *Id.* at 699.

<sup>127</sup> *Id.* at 708.

<sup>128</sup> *Id.* at 707.

<sup>129</sup> See Lacy et al., *supra* note 58, at 34, 42 (“[D]ata indicate that citizen journalism Web sites (news and blog sites) are generally not acceptable substitutes for daily newspaper Web sites.”); Pew Research Center’s Journalism Project Staff, *How News Happens: A Study of the News Ecosystem of One American City*, PEW RES. JOURNALISM PROJECT (Jan. 11, 2010), <http://www.journalism.org/2010/01/11/how-news-happens>, archived at <http://perma.cc/D57P-KDAS> (discussing an empirical study of Baltimore’s “news ecosystem” and noting that “of the stories that did contain new information nearly all, 95%, came from traditional media — most of them newspapers”).

<sup>130</sup> See, e.g., *Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 117 (1973) (“The power of a privately owned newspaper to advance its own . . . views is bounded by only two factors: first, the acceptance of a sufficient number of readers — and hence advertisers — to assure financial success; and, second, the journalistic integrity of its editors and publishers.”).

stitutions as guides in interpreting the law.<sup>131</sup> The Court has not heretofore taken this approach. Indeed, Schauer has argued that “the refusal of the Supreme Court to treat the press as different despite its identifiably distinct institutional status is part of a larger pattern of treating First Amendment doctrine as institutionally blind.”<sup>132</sup>

Relying on third-party recognition of the press would allow us to capitalize in a commonsense fashion on information gleaned in the real world. It is noteworthy that journalism has developed into a recognized profession organized in part around professional societies, credentialing systems, and formally structured news organizations. These institutions of working journalists have developed practical understandings as to who is and who is not functioning as the press.<sup>133</sup> In fact, the press might be one of the most natural places to rely on the structural guidelines that already exist.<sup>134</sup> The press as an institution, according to Professor Paul Horwitz, “is identifiable and long established; it is a major part of the infrastructure of public discourse; it follows its own norms, practices, and self-regulatory standards; and it is fully (if imperfectly) capable of acting autonomously.”<sup>135</sup> Thus, by credentialing, hiring, conferring degrees upon, or in other ways recognizing individuals as the press, journalistic institutions give us important cues regarding who is serving the core purposes of the press.

They also, however, raise concerns of favoring certain speakers over others. Nontraditional news sources run the risk of being left out even as they are operating to fulfill press functions. Guidelines established by professional organizations may be skewed in a manner that burdens particular messages or viewpoints to a greater degree than would rules forged by detached and politically insulated courts.

A look to press institutions, therefore, can begin — but must not end — the inquiry.

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<sup>131</sup> See Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 HARV. C.R.-C.L. L. REV. 79, 87 (2009) (asserting that an institutionally sensitive approach “understand[s] that some speech institutions are key contributors to our system of public discourse and that ‘the freedom of expression is not only enjoyed by and through, but also depends on the existence and flourishing of, these institutions’” (quoting Richard W. Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses*, 53 VILL. L. REV. 273, 274 (2008))).

<sup>132</sup> Schauer, *supra* note 104, at 1754. *But see* First Nat’l Bank of Bos. v. Bellotti, 435 U.S. 765, 798 (1978) (Burger, C.J., concurring) (“The Court has not yet squarely resolved whether the Press Clause confers upon the ‘institutional press’ any freedom from government restraint not enjoyed by all others.”).

<sup>133</sup> HORWITZ, *supra* note 59, at 165 (stating that courts should “focus on whether a given entity was a journalistic entity engaging in the act of journalism, subject to the norms, traditions, and self-regulating practices that characterize the press”).

<sup>134</sup> See Horwitz, *supra* note 105, at 58 (“If we think of the First Amendment in institutional terms, the Press Clause is obviously the most natural, most textually rooted place to find some form of institutional autonomy for what we might label the conventional working press.”).

<sup>135</sup> HORWITZ, *supra* note 59, at 146.

2. *Identification as the Press.* — In addition to looking to third-party recognition of the press, courts can also take note of whether the speaker has identified himself as the press. In *Hosanna-Tabor*, the Court looked to evidence that the teacher had “held herself out as a minister of the Church” by claiming special privileges and making a statement referring to herself as a minister.<sup>136</sup> Regardless of affiliation with or recognition by a news organization, evidence that a speaker claims a role as the press would be instructive (although rarely decisive), and would lessen the risk of an overly elitist definition.

Relying solely on self-identification as the press would, of course, allow too many occasional public commentators to label themselves as the press. As the New Jersey Supreme Court has recognized: “[S]elf-appointed journalists or entities with little track record who claim the [reporter’s] privilege require more scrutiny.”<sup>137</sup>

Nonetheless, as with the self-titled minister in *Hosanna-Tabor*, evidence that a speaker has self-identified as the press does provide some useful information regarding possible press membership. An established history of holding oneself out as a member of the press might provide insight into the speaker’s intentions.<sup>138</sup> Similarly, it could reveal whether others presumed the speaker was a member of the press and relied on that representation.<sup>139</sup> Acknowledging a proven history of self-identification as the press would leave open the possibility for many speakers to earn a designation as the press while also weeding out those who might claim the title sporadically or pretextually.<sup>140</sup>

3. *Training, Education, or Experience.* — In *Hosanna-Tabor*, the Court also pointed to the teacher’s religious training and continuing education as a minister.<sup>141</sup> These factors would also be helpful for identifying the press. Many members of the press today have studied journalism formally, have been trained as part of a mentorship, or

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<sup>136</sup> *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 707 (2012); *id.* at 708.

<sup>137</sup> *Too Much Media, LLC v. Hale*, 20 A.3d 364, 383 (N.J. 2011).

<sup>138</sup> See *Von Bulow v. Von Bulow*, 811 F.2d 136, 145 (2d Cir. 1987) (denying the press privilege to someone who did not have the intent to publish the information she was collecting at the time she collected the information, stating, “the talisman invoking the journalist’s privilege is intent to disseminate to the public at the time the gathering of information commences”).

<sup>139</sup> Reporters are frequently denied the protections of the privilege if they conceal the fact that they are a reporter from their source. See, e.g., N.J. STAT. ANN. § 2A:84A-21a(h) (West 2012) (“In the course of pursuing his professional activities’ . . . does not include any situation in which a reporter intentionally conceals from the source the fact that he is a reporter . . .”).

<sup>140</sup> See *In re Madden*, 151 F.3d 125, 130 (3d Cir. 1998) (“Although Madden proclaims himself to be ‘Pro Wrestling’s only real journalist,’ hyperbolic self-proclamation will not suffice as proof that an individual is a journalist.”).

<sup>141</sup> *Hosanna-Tabor*, 132 S. Ct. at 707.

have built a history of experience through independent journalistic activity.<sup>142</sup>

There is some overlap here with other factors. When a journalism school educates a student and confers a degree in “journalism,” it is providing institutional identification of a speaker as the press.<sup>143</sup> So too with the speaker who has been hired, trained, or mentored by an established news organization. Likewise, a speaker who has a track record of experience in journalistic activity also can show that she has been functioning as the press and perhaps can point to regularity of publication and an established audience.<sup>144</sup>

4. *Regularity of Publication or Established Audience.* — Finally, courts should consider the regularity of publication or a showing of an established readership.<sup>145</sup> Some legislative approaches take these factors into account. The journalist shield laws in both Indiana and Illinois, for example, cover those who publish “at regular intervals” and have “a general circulation.”<sup>146</sup>

Examining how often a speaker publishes and to whom the publication is directed is helpful in identifying the press for several reasons. First, and most importantly, the factors of publication and circulation record relate closely with the unique functions of the press qua press. Of particular importance, effectively disseminating news to the public requires actually reaching the public. Speakers likewise cannot be said to impose a check on either government or powerful nongovernmental figures if the conversation occurs in a vacuum.

A proven track record of publication similarly correlates with devoting time and resources to informing the public and scrutinizing the powerful. An isolated or sporadic publication might further these functions, but at best it does so marginally. It is those speakers who return to the marketplace of news again and again who best serve the roles of a rigorous and vigilant press. Thus, regularly communicating with a broad audience is a necessary, although not always sufficient, qualification to fulfill the press’s informing and checking functions. Regularity of publication is a useful device for separating the press

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<sup>142</sup> See Ide & Vashisht, *supra* note 61 (quoting David Boardman, managing editor of *The Seattle Times* and president of Investigative Reporters and Editors, the nation’s foremost organization devoted to investigative reporting, who stated: “To do good investigative journalism, you need training, and a lot of these are sophisticated skills that if there’s nobody to teach it, nobody will know how to do it”).

<sup>143</sup> See *supra* section III.C.1, pp. 2456–58.

<sup>144</sup> See *infra* section III.C.4, pp. 2460–62.

<sup>145</sup> See 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. 1371, 1411–12 (2003) (defining journalism in part by asking whether information is “regularly disseminated,” *id.* at 1412).

<sup>146</sup> 735 ILL. COMP. STAT. 5/8-902(B) (2012); IND. CODE § 34-46-4-1(1)(A) (2013).

from occasional public commentators who act sporadically in a press-like manner but who are not repeat players committing time and resources to press functions.<sup>147</sup>

Second, regularity of publication and the existence of an established audience ensure accountability for the press. The Court has recognized that one of the only limits on the press is “the acceptance of a sufficient number of readers — and hence advertisers — to assure financial success.”<sup>148</sup> Without the demands of regular readers, we lose an important check on the press. Those speakers who publish regularly and have a following also can more readily correct errors, follow up on stories, and provide context across topics. Any potential risks of recognizing constitutional rights and privileges of the press are lessened by the responsibility that comes with having a reputation built on a publication record and answering to an established readership.

Third, an established publication track record and substantial circulation helps to weed out pretextual claims. The objective is to separate those speakers opportunistically claiming to be the press while avoiding an approach that favors only the elite. An inquiry into the publication record and the scope of an audience addresses these concerns. A speaker who is pretextually asserting press status in order to claim, for example, a right of access or testimonial privilege would almost always be unable to show a consistent publication record or a following by a meaningful audience. A publication record reflects a dedication to distribution of the news that almost by definition is not a quality of the occasional public commentator.

Finally, using regularity of publication and established readership as a means to find the press also addresses concerns of elitism. As we have seen, advances in mass communication technology have made it easier and cheaper for most speakers to publish to a broad audience.<sup>149</sup> The explosion of bloggers exemplifies this phenomenon. While not all bloggers function as the press, those who do often provide valuable vantage points that differ from the traditional media. Any constitutional recognition of the press needs to embrace these diverse speakers

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<sup>147</sup> See, e.g., DEL. CODE ANN. tit. 10, § 4320(4)(a) (2013) (specifying that to be a “reporter” for the purposes of the state’s reporter’s privilege law, one must “earn[] his or her principal livelihood by, or in each of the preceding 3 weeks or 4 of the preceding 8 weeks [have] spent at least 20 hours engaged in the practice of, obtaining or preparing information for dissemination with the aid of facilities for the mass reproduction of words, sounds, or images in a form available to the general public”). For membership purposes, the Society of Professional Journalists considers anyone who spends more than half of their time working as a journalist or journalism educator to be a “professional journalist.” *Become an SPJ Member*, SOC’Y OF PROF’L JOURNALISTS, <https://www.spj.org/whyjoin5.asp> (last visited May 10, 2014), archived at <http://perma.cc/E4JX-DYLU>.

<sup>148</sup> *Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 117 (1973); accord *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 255 (1974).

<sup>149</sup> See *supra* section II.A, pp. 2448–50.

equally with those representing more mainstream approaches. Giving attention to the speaker's publication record and the expansiveness of an audience serves this goal.

Under the methodology proposed here, virtually anyone can become a member of the press. At the same time, not everyone with a smartphone or laptop will make the cut. Being a member of the press is a role that no speaker is born into and few can attain overnight; rather, such membership comes with the exertion of effort over time. The Court in *Hosanna-Tabor* signaled a similar view as to attaining the status of "minister." By relying on experience, training, and past identification as a minister, the Justices indicated comfort with a framework that emphasizes past activities to establish a place in a constitutional category. While the focus is on function, examination of external cues guides the way. Someone with no training or experience who does not regularly connect with a congregation is not likely to be much of a minister. By the same token, according press rights to neophytes and dabblers will do little to further the functional goals the Press Clause was meant to serve.

#### IV. CONCLUSION

With the explosion of technology, we all now have at our fingertips the power to convey information broadly. This newfound ability to speak with each other is immensely valuable, which is why the Speech Clause protects it so robustly. Yet it does not make us all the press for Press Clause purposes. This is why the time has come to embrace press exceptionalism. Acknowledging that there are certain speakers who are most effectively fulfilling valuable roles in our democracy creates an opportunity to give needed meaning to the First Amendment's Press Clause.

It is neither elitist nor discriminatory to separate the press from other types of speakers. Our equality principles are satisfied as long as we ensure that all speakers have a fair opportunity to attain this status. Technological developments are advancing, rather than inhibiting, this goal by opening up increasingly more paths for nontraditional speakers to function as the press.

Accepting that it is a subset of speakers, and not everyone, who is consistently and effectively playing these functional roles is the first step. The second step is to have the confidence that we can identify these special speakers with sufficient (albeit not perfect) specificity. Analyzing the role of "minister" in *Hosanna-Tabor*, the Court showed us how to take a holistic approach that focuses on unique functions and relies on valuable cues provided by third parties and public institutions as proxies.

At times it might feel as if we are all now not just speakers but also the press. We are not, and we should embrace this distinction. Ultimately, everyone benefits by properly protecting those few who truly are fulfilling this unique and constitutionally recognized role.