Note

The Press Clause Needs Teeth: The Case for Strengthening Constitutional Press Protections at Protests

Ryan Liston∗

Journalists and the government have often had a tense relationship because of journalism's watchdog role. In recent years, that tension has reached a boiling point. Law enforcement arrested journalists at an unprecedented rate in 2020, primarily while they were covering racial justice protests after Minneapolis police officer Derek Chauvin murdered George Floyd. Given the press's watchdog role, the presence of journalists at protests criticizing government action (such as police brutality) is particularly important. Moreover, law enforcement seemingly targeted the press at these protests, even when they clearly presented themselves as journalists.

In Minnesota and Oregon, hotspots for these protests, courts responded by issuing injunctions which prohibited law enforcement from arresting journalists or enforcing dispersal orders and curfews against them, among other things. While these injunctions were welcome developments, neither are a permanent solution. The injunctions do, however, provide a helpful template for establishing constitutional protections for journalists covering protests.

∗ J.D. Candidate 2024, University of Minnesota Law School; Note & Comment Editor, *Minnesota Law Review* Volume 108. I would like to sincerely thank everyone who helped me produce this Note. Thanks to Calvin Lee and Jackie Cuellar for guiding me through the majority of the process and for providing genuine encouragement at every step. Thanks to Professor Elizabeth Bentley for her thoughtful feedback and suggestions. Thanks to Pat Ebeling and Abby Ward for the final substantive edit of this Note. Thanks to Maxwell Terry, Aidan McNamara, Brandon Stottler, Callan Showers, David Johnson, and Shannon Schooley for citechecking. Finally, and most importantly, thanks to my wife, Sienna, and our daughter, Blakeley, for bearing with me throughout the Note writing process—and law school in general.

The First Amendment reads, in part, "Congress shall make no law . . . abridging the freedom of speech, or of the press." This language establishes the Speech Clause and the Press Clause.

While the Supreme Court has developed robust Speech Clause protections, it has not identified any constitutional protections arising from the Press Clause alone. Indeed, when ruling in favor of journalists and news organizations, the Court has typically referenced both the Speech and Press Clauses. In many cases, this makes sense since the cases involve published material or information that is about to be published, making it natural to invoke both clauses. However, the Court's hesitance to rely solely on the Press Clause means journalists enjoy few constitutional protections for newsgathering practices.

Legal scholars, judges, journalists, and others have proposed several competing interpretations of the Press Clause. This Note identifies four dominant interpretations: Press as Publication, Press as a Technology, Press as Established Organizations, and Press as a Function. After discussing what each interpretation means and assessing each interpretation's validity, this Note asserts that the Press as a Function interpretation is the best because it is both faithful to Founding Era values and appropriate for the state of journalism today with many journalists working as freelancers or independently.

Under the Press as a Function interpretation, individuals exercising press functions are entitled to constitutional protections. In the protest context, these protections could be modeled off the Minnesota and Oregon injunctions. Specifically, journalists covering protests would not be subject to arrests, curfews, dispersal orders, or other law enforcement actions, so long as the journalists are acting lawfully.

Finally, this Note considers how to identify journalists at protests by considering two options: government credentialing and totality of the circumstances. This Note disfavors a government credentialing system and prefers a totality of the circumstances approach.

INTRODUCTION

Journalists and "the media"[1] have been foils for people in power since before the founding of the United States,[2] but in recent years, that adversarial relationship has reached dramatic new heights with the government using law enforcement against the press at an unprecedented rate. In 2020, law enforcement arrested or detained journalists in record numbers, with more than 140 verified incidents, up from just nine in 2019.[3] Most of these arrests and detainments occurred at protests over the murder of George Floyd by Minneapolis police officer Derek Chauvin.[4] Law enforcement justified these actions by leveling various charges at journalists, from "violating curfew orders

1. *See* Matt Giles, *When Richard Nixon Declared War on the Media*, LONGREADS (Nov. 8, 2018), https://www.longreads.com/2018/11/08/when-richard-nixon-declared-war-on-the-media [https://perma.cc/QA8Q-6TT4] ("During past administrations, the American news media had always been referred to as 'the press,' but Nixon, whose contentious relationship with the nation's newsrooms was longstanding, tweaked that policy, and began labeling the press as 'the media,' a term he felt sounded more ominous and less favorable.").

2. *See, e.g.*, Douglas E. Lee, *Seditious Libel*, FREE SPEECH CTR. (2009), https://www.mtsu.edu/first-amendment/article/1017/seditious-libel [https://perma.cc/N77K-HMSY] (describing New York Governor William Cosby's 1735 seditious libel case against journalist John Peter Zenger, who criticized the Governor in the New York Weekly Journal and was acquitted by a jury despite the clear preference of two judges who were hand-selected to oversee the case by Governor Cosby).

3. *New Report: A Record Breaking Number of Journalists Arrested in the U.S. this Year*, FREEDOM OF THE PRESS FOUND. (Dec. 14, 2020), https://freedom.press/news/2020-report-journalists-arrested-us/?123 [https://perma.cc/E8AQ-XDLM].

4. *Id.* Indeed, law enforcement responded more forcefully to racial justice protests (and other "leftwing protests") in general compared to "rightwing protests"—infamously arresting more people at a D.C. Black Lives Matter protest than during the January 6 Capitol Riot. Lois Beckett, *US Police Three Times as Likely to Use Force Against Leftwing Protesters, Data Finds*, GUARDIAN (Jan. 14, 2021), https://www.theguardian.com/us-news/2021/jan/13/us-police-use-of-force-protests-black-lives-matter-far-right [https://perma.cc/T73Y-6QKU] ("Police in the United States are three times more likely to use force against leftwing protestors than rightwing protestors . . . ."); Casey Tolan, *DC Police Made Far More Arrests at the Height of Black Lives Matter Protests than During the Capitol Clash*, CNN (Jan. 9, 2021), https://www.cnn.com/2021/01/08/us/dc-police-arrests-blm-capitol-insurrection-invs/index.html [https://perma.cc/D5W2-KFSX] (showing that 316 arrests were made during the June 1, 2020 Black Lives Matter protest, compared to 61 arrests made at the January 6, 2021 Capitol Riot). Nonetheless, these protests for racial justice and against police brutality are unlikely to end in the near future, and Press Clause protections for journalists covering protests are still warranted.

(despite clear rules exempting journalists)[,] to failure to disperse, to disturbing the peace and resisting or obstructing an officer."[5] Beyond the statistics, personal accounts from journalists, as well as video recordings,[6] shed light on the harrowing, and sometimes violent, encounters journalists faced at these protests.[7] On June 16, 2023, the Department of Justice and the United States Attorney's Office for the District of Minnesota published the findings of a federal investigation which concluded, in part, that the Minneapolis Police Department (MPD) "violates the First Amendment" based on a review of body

5. *U.S. Press Freedom in Crisis: Journalists Under Arrest in 2020*, FREEDOM OF THE PRESS FOUND. 11 (Dec. 11, 2020), https://media.freedom.press/media/documents/Journalists_Under_Arrest_in_2020_KLKbBVW.pdf [https://perma.cc/5PAC-A76Z].

6. *See* CNN, *Police Arrest CNN Correspondent Omar Jimenez and Crew on Live Television*, YOUTUBE (May 29, 2020), https://www.youtube.com/watch?v=ftLzQefpBvM (showing that CNN correspondent Omar Jimenez was arrested despite continuously identifying himself as a journalist); VICE News, *Journalists Covering Protests Are Being Attacked by Police Across America*, YOUTUBE (June 1, 2020), https://www.youtube.com/watch?v=8WJIlUrx5a4 (showing multiple journalist arrests and encounters, many of which show journalists clearly identifying themselves as members of the "press" to no avail).

7. *E.g.*, *Independent Portland Multimedia Journalist Tackled, Maced and Arrested by Federal Agents*, U.S. PRESS FREEDOM TRACKER (July 27, 2020), https://pressfreedomtracker.us/all-incidents/independent-portland-multimedia-journalist-tackled-maced-and-arrested-federal-agents [https://perma.cc/9AZX-VDYN] (describing journalist Grace Morgan's arrest for "assault on a federal officer" on July 27, 2020—the charge was dropped the same day); Josh Verges, *Journalist Blinded by Rubber Bullet During Protest Sues Minneapolis Police, State Patrol*, MERCURY NEWS (June 11, 2020), https://www.mercurynews.com/2020/06/11/journalist-blinded-during-protest-sues-minneapolis-police-state-patrol [https://perma.cc/CL8R-X4XV] ("Minneapolis police or state troopers first hit [freelance journalist Linda Tirado] with a green marker round, then shot her in the face with a foam bullet, breaking her goggles and leaving her permanently blind in her left eye, according to her complaint."); Erin McGroarty, *How Police Treatment of Journalists at Protests Has Shifted from Cohabitation to Animosity*, POYNTER (June 14, 2022), https://www.poynter.org/reporting-editing/2022/police-journalists-protects-press-freedom-attacks [https://perma.cc/DRL5-EJAS] ("Ed Ou, a visual journalist with NBC News, had his scalp lacerated by a projectile fired at close range by police while he was covering a protest in Minneapolis [on May 30, 2020]. Ou was wearing a clearly visible NBC press badge."); *see also Incident Database*, U.S. PRESS FREEDOM TRACKER, https://pressfreedomtracker.us/all-incidents [https://perma.cc/7ESA-EW8S] (filtering for incidents between January 1, 2020, and December 31, 2020, the U.S. Press Freedom Tracker has catalogued and detailed 145 journalist arrests).

camera footage from protests between 2016 and the present.[8] Regarding MPD's treatment of journalists, the report detailed violent interactions between MPD officers and journalists.[9] It further found "MPD officers also interfere with newsgathering by unlawfully limiting journalists' access to public spaces where protests take place, and thus their ability to report on police activity."[10] Even as protests became less frequent, the heightened arrest rate of journalists bled into 2021.[11]

This hostile environment for the press did not materialize out of thin air. Tension between the press and the government has a long history, due in no small part to the press's role as a watchdog of the government.[12] However, there is one person who is arguably most at fault for exacerbating modern anti-press sentiment: former President Donald Trump. President Trump waged a war on the press by capitalizing on growing public

---

8. *Investigation of the City of Minneapolis and the Minneapolis Police Department*, U.S. DEP'T OF JUST. C.R. DIV. 48 (June 16, 2023) [hereinafter *DOJ Investigation*], https://www.justice.gov/d9/press-releases/attachments/2023/06/16/minneapolis_findings_report_2023.06.15_0.pdf [https://perma.cc/U4LJ-Z6NS].

9. *Id.* at 51–52 (reporting that officers forcefully shoved journalists, including pointing a weapon at one, pressing his head into the ground, and pepper spraying him).

10. *Id.* at 52.

11. *See* Kirstin McCudden, *Another Record Year for Press-Freedom Violations in the US*, COLUM. JOURNALISM REV. (Jan. 12, 2022), https://www.cjr.org/analysis/2021-press-freedom-prior-restraint-arrests.php [https://perma.cc/ZX98-9PTK] ("While we did not see the scope of national social-justice protests of 2020—a year in which journalists were arrested or assaulted on average more than once a day—2021 still outpaced the years before it for press-freedom violations. . . . The 59 arrests or detainments [in 2021] documented by the Tracker nearly equals the arrests and detainments documented from 2017 to 2019 *combined*.").

12. *See* sources cited *supra* notes 1–2 (explaining the historic, and often contentious, relationship between the government and the press); *see also* Kate Harris & Michael Gonchar, *Analyzing the Relationship Between the Press and the President: A Lesson Plan*, N.Y. TIMES (May 11, 2017), https://www.nytimes.com/2017/05/11/learning/lesson-plans/analyzing-the-relationship-between-the-press-and-the-president-a-lesson-plan.html [https://perma.cc/B3A5-M2QY] (outlining a lesson plan with resources exploring the relationship between the press and the president throughout American history); *The Media's Role as Watchdogs*, FREEDOM F., https://www.freedomforum.org/freedom-of-press/the-medias-role-as-watchdogs [https://perma.cc/DAP5-P57N] ("An independent news media uses its watchdog role to investigate and report on government overreach and wrongdoing and hold those in power accountable for their actions.").

distrust of the press and conflating the proliferation of fake news with legitimate journalism that often painted him in a less-than-flattering light.[13] The impacts of President Trump's rhetoric have been far-reaching and could help explain why law enforcement felt emboldened to arrest journalists at such high rates during 2020 and 2021 protests.[14]

Beyond the former President and law enforcement, other politicians and government officials added fuel to the fire by parroting anti-press rhetoric.[15] This anti-press environment seems to have inspired private citizens across ideological lines to target journalists.[16] And targeting of journalists did not end with the

---

13. *See* Megan Brenan, *Americans' Trust in Media Remains Near Record Low*, GALLUP (Oct. 18, 2022), https://news.gallup.com/poll/403166/americans-trust-media-remains-near-record-low.aspx [https://perma.cc/N32B-MREU] (reporting on Americans' trust in media from 1972 to 2022, with just 34% of Americans saying they have a "great deal" or a "fair amount" of trust and confidence in the media in 2022); Shevon Desai & Jo Angela Oehrli, *"Fake News," Lies and Propaganda: How to Sort Fact from Fiction*, UNIV. OF MICH. LIBR.: RSCH. GUIDES, https://guides.lib.umich.edu/fakenews [https://perma.cc/XV4Y-FFE9] (last updated June 6, 2023) ("The technological ease of copying, pasting, clicking and sharing content online has helped misinformation and disinformation to proliferate."); David Remnick, *The Cost of Trump's Assault on the Press and the Truth*, NEW YORKER (Nov. 29, 2020), https://www.newyorker.com/magazine/2020/12/07/the-cost-of-trumps-assault-on-the-press-and-the-truth [https://perma.cc/GZA8-MGGH] (discussing former President Trump and his administration's practice of disparaging the press, including calling specific news outlets "the enemy of the American People").

14. *See generally* Andrew Solender, *Trump Says Police Violence Against Journalists Is 'Actually a Beautiful Sight*,*'* FORBES (Sept. 22, 2020), https://www.forbes.com/sites/andrewsolender/2020/09/22/trump-says-police-violence-against-journalists-is-actually-a-beautiful-sight/?sh=5b44e3f657d6 [https://perma.cc/8VV6-MLH4] (detailing instances of former President Trump's anti-journalist rhetoric).

15. *See, e.g.*, Alexandra Jaffe, *Kellyanne Conway: WH Spokesman Gave 'Alternative Facts' on Inauguration Crowd*, NBC NEWS (Jan. 22, 2017), https://www.nbcnews.com/storyline/meet-the-press-70-years/wh-spokesman-gave-alternative-facts-inauguration-crowd-n710466 [https://perma.cc/299L-NXXE] (describing Kellyanne Conway's anti-media stance—Conway served as counselor to former President Trump); Victor Wu, *Marjorie Taylor Greene's Supporters Don't Care What Critics Think*, WASH. POST (Nov. 17, 2022), https://www.washingtonpost.com/politics/2022/11/17/trump-greene-republicans-criticism [https://perma.cc/R384-PQ55] (quoting Representative Marjorie Taylor Greene (R-Ga.) as saying, "[a]nd the lying fake news media hates my guts. It's a badge of honor").

16. *See* Laurel Bowman, *January 6 Riot Changes Conversation About Media Safety in US*, VOICE OF AM. (Jan. 6, 2022), https://www.voanews.com/a/

election of President Joe Biden, although it seems to have receded a bit.[17] However, with Trump running for president again,[18] anti-press sentiments may ramp back up.

Protecting the press is therefore an urgent matter, especially in the protest context. One of the press's most critical roles is serving as a government watchdog.[19] In addition to that role, journalists are commonly referred to as the "eyes and ears of the public" for their work observing and reporting on newsworthy events.[20] These important press functions coalesce in the protest context. Journalists covering a protest report on the protest itself, as well as the law enforcement response. If law enforcement officers are free to arrest journalists at protests using curfews and dispersal orders as justification, they can kennel the very watchdog that is working to hold them accountable. This creates a situation ripe for police misconduct.[21]

---

january-6-riot-changes-conversation-about-media-safety-in-us/6385881.html [https://perma.cc/P3KY-DYTV] ("News crews attacked, equipment set on fire, 'Murder the media' scrawled on a Capitol door. Journalists as well as lawmakers were targeted during the January 6 riot at the U.S. Capitol."); *see also Incident Database*, *supra* note 7 (filtering by "assault," "private individual," and "oldest," there have been more than 300 verified assaults on journalists by private individuals since 2017, several of which were carried out at pro-Trump events or at Black Lives Matter protests).

17. *See* U.S. PRESS FREEDOM TRACKER, https://pressfreedomtracker.us [https://perma.cc/6YY9-BWPA] (recording more than 300 total incidents in 2021 and more than 100 in 2022, compared to over 1,000 in 2020).

18. Gabby Orr et al., *Former President Donald Trump Announces a White House Bid for 2024*, CNN: POL. (Nov. 16, 2022), https://www.cnn.com/2022/11/15/politics/trump-2024-presidential-bid/index.html [https://perma.cc/4HPW-6H6A].

19. *See* sources cited *supra* note 12 and accompanying text (outlining a traditional role of the press to watch over and report on government action).

20. *E.g.*, Ruth Bass, *Ruth Bass: The Media Are the Eyes and Ears of the World for Us*, BERKSHIRE EAGLE (Feb. 26, 2017), https://www.berkshireeagle.com/opinion/columnists/ruth-bass-the-media-are-the-eyes-and-ears-of-the-world-for-us/article_521c525a-06ab-5644-8f66-4bd557107882.html [https://perma.cc/GJ9N-UR6Q] (emphasizing the importance of journalists and their role in society); Siobhain Butterworth, *Journalists' Right to Act as Eyes and Ears of the Public Must Not Be Put at Risk*, GUARDIAN (Sept. 9, 2011), https://www.theguardian.com/law/butterworth-and-bowcott-on-law/2011/sep/09/journalists-police-questioning-amelia-hill [https://perma.cc/K5RU-ZKSR] ("The ability of journalists to inquire about law enforcement and to hold it up to scrutiny without fear of arrest is critical to a fully functioning democracy . . . .").

21. *See* Jasmyne Eastmond, *The Silencing of Fairy Creek Journalists: RCMP Threaten and Obstruct Free Press*, MAPLE (Sept. 12, 2021), https://www

Protections for journalists covering protests vary from jurisdiction to jurisdiction. Some jurisdictions exempt journalists from dispersal orders,[22] curfews,[23] and other law enforcement measures either through legislation, executive orders, or court orders.[24] In Oregon and Minnesota, federal district courts issued injunctions prohibiting law enforcement from arresting "any person whom they know or reasonably should know is a Journalist" in response to journalist arrests in Portland and Minneapolis

---

.readthemaple.com/the-silencing-of-fairy-creek-journalists-rcmp-threaten-and-obstruct-free-press [https://perma.cc/32HR-LKV9] ("On days when media access is completely denied, witness accounts report increases in police misconduct and aggression.").

22. *See* The Times Ed. Bd., Editorial, *Too Few Checks on Police Dispersal Orders*, L.A. TIMES (Sept. 30, 2021), https://www.latimes.com/opinion/story/2021-09-30/police-dispersal-unlawful-assembly [https://perma.cc/9KTJ-Z63M] (explaining that dispersal orders are intended "to make everyone leave, ostensibly to prevent or break up a riot").

23. *See* David L. Hudson Jr., *Curfews*, FREE SPEECH CTR., https://www.mtsu.edu/first-amendment/article/1206/curfews [https://perma.cc/36SM-6CHJ] (last updated June 3, 2020) ("Curfews are government policies that order certain persons — or all persons — to be off the streets by a certain time, usually in the evening, and to remain off the streets until the curfew is lifted, usually in the morning.").

24. *E.g.*, City News Serv., *Police Commission Approves Policy to Exempt Media from Protest Dispersals*, SPECTRUM NEWS (Dec. 14, 2021), https://spectrumnews1.com/ca/la-east/public-safety/2021/12/14/police-commission-approves-policy-to-exempt-media-from-protest-dispersals [https://perma.cc/87WW-MY8K] ("The Los Angeles Police Commission Tuesday approved an updated department policy to comply with Senate Bill 98, which exempts media professionals from having to comply with police dispersal orders while covering protests, marches and other types of demonstrations."); Alex Derosier, *Minnesota State Patrol Agrees to Changes After Journalists Mistreated Covering Twin Cities Unrest*, PIONEER PRESS (Feb. 8, 2022), https://www.twincities.com/2022/02/08/minnesota-state-patrol-agrees-to-changes-after-journalists-mistreated-covering-twin-cities-unrest [https://perma.cc/E4FL-S5JW] ("Under a permanent injunction granted by a federal judge Tuesday, the State Patrol is banned from arresting or using force against known journalists unless they are suspected of a crime. Journalists are exempt from police orders to disperse and officers cannot seize cameras, recording equipment or press passes."); Minn. Emergency Exec. Order No. 21-18 (Apr. 12, 2021), https://mn.gov/governor/assets/EO%2021-18%20Final_tcm1055-476249.pdf [https://perma.cc/SJS4-XK37] ("All law enforcement, fire, medical personnel, and *members of the news media*, as well as personnel and members of community groups authorized by local units of government, the Minnesota Department of Public Safety, Minnesota State Patrol, or Minnesota National Guard, are exempt from the curfew." (emphasis added)). The DOJ investigation determined that MPD violated the Minnesota Executive Order by enforcing the curfew against journalists. *See DOJ Investigation*, *supra* note 8, at 52.

during protests.[25] Other jurisdictions have no such exemptions.[26] As a general rule, journalists are subject to the same laws as the public at large,[27] so in the absence of specified exemptions, law enforcement may be free to arrest and detain journalists for violating curfews and dispersal orders.[28] In issuing its injunction, the United States District Court for the District of Oregon remarked:

> Someday, a court may need to decide whether the First Amendment protects journalists and authorized legal observers, as distinct from the public generally, from having to comply with an otherwise lawful order to disperse from city streets when journalists and legal observers seek to observe, document, and report the conduct of law enforcement personnel; but today is not that day.[29]

Given the dire consequences that come from silencing the press, this Note argues that day has arrived. The Supreme Court should establish constitutional protections for law-abiding journalists covering protests through the underutilized Press Clause

---

25. Index Newspapers LLC v. City of Portland (*Index Newspapers II*), 480 F. Supp. 3d 1120, 1155–56 (D. Or. 2020); Goyette v. City of Minneapolis, 338 F.R.D. 109, 121 (D. Minn. 2021).

26. *See* Sasha Peters & Linda Moon, *Curfew Orders Without Media Exemptions May Be Unconstitutional Under First Amendment*, REPS. COMM. FOR FREEDOM OF THE PRESS (June 12, 2020), https://www.rcfp.org/curfew-order-special-analysis [https://perma.cc/34EV-KA2G] (noting that some curfew orders do not have press exemptions and arguing those orders violate the First Amendment).

27. *See* Cohen v. Cowles Media Co., 501 U.S. 663, 670 (1991) (stating that the press is bound by "law[s] of general applicability").

28. *But see* Peters & Moon, *supra* note 26 ("In short, while there are no previous cases in which emergency curfew orders have been challenged for lacking media exemptions, related cases suggest that curfew orders that do not contain press exemptions may be unconstitutional under the First Amendment.").

29. *Index Newspapers II*, 480 F. Supp. 3d at 1126 n.3. The court said this issue was not presented in this case because the defendants were federal law enforcement officials who, unlike state and local law enforcement, cannot "lawfully issue an order declaring a riot or unlawful assembly on city streets." *Id.* at 1125–26. Moreover, the state defendants and the plaintiff journalists had "already *stipulated* to a preliminary injunction that provides that the Portland Police will not arrest any journalist or authorized legal observer for failing to obey a lawful order to disperse." *Id.* at 1126. *Compare id.* (suggesting that the constitutionality of applying dispersal orders to the press is an open question)*, with Goyette*, 338 F.R.D. at 115–17 (holding that dispersal orders issued by state law enforcement, without exemptions for the press, were not narrowly tailored to avoid infringing on newsgathering activities protected by the First Amendment).

of the First Amendment.[30] In other words, the Press Clause needs teeth.

To that end, this Note posits that journalists should be exempt from dispersal orders and curfews under the Press Clause. If dispersal orders and curfews can be constitutionally sustained against members of the press, law enforcement may abuse these orders by specifically targeting journalists under the guise of public safety without ever revealing their true intentions. Additionally, it is highly unlikely that a court would hold dispersal orders and curfews to be unconstitutional as applied to the general public under either the Speech, Assembly, or Petition Clauses of the First Amendment.[31] The Supreme Court has recognized a role for law enforcement intervention curtailing free expression when there is a "clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order,"[32] thus necessitating a carveout under the Press Clause for journalists.

Part I of this Note summarizes First Amendment cases involving the press to highlight how the Supreme Court has handled First Amendment issues vis-à-vis the press to this point. Part II focuses on competing interpretations of the Press Clause and concludes that a functional interpretation, which this Note labels "Press as a Function," is preferable to the alternatives. Part III more fully explores the need for press protections at protests, considers what protections could be implemented under an independent Press Clause, and explains why the functional interpretation achieves the best results.

---

30. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom . . . of the press . . . .").

31. *But see generally* Leah Reiss, Note, *Freedom to Pray, Not to Protest*, 107 MINN. L. REV. 2285 (2023) (making a convincing argument that politically-motivated curfews violate the First Amendment and disproportionately affect Black people, and laying out a strategy for challenging such curfews).

32. *See* Cantwell v. Connecticut, 310 U.S. 296, 308 (1940) ("No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect. When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious. Equally obvious is it that a State may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions.").

I. THE SUPREME COURT'S RELUCTANCE TO EMPOWER THE PRESS CLAUSE AND A PATH FORWARD FOR PRESS FREEDOM

The First Amendment, in its entirety, reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[33] Recognized within the First Amendment are distinct clauses: the Establishment Clause, the Free Exercise Clause, the Free Speech Clause, the Free Press Clause, the Right to Assemble Clause, and the Right to Petition Clause.[34]

Throughout American history, when the Supreme Court has dealt with First Amendment issues involving journalists and news organizations, it has been reluctant to grant the press any protections under the Press Clause independently.[35] Instead, when the Court has ruled in favor of journalists and news organizations, it has often based its reasoning on the Speech and Press Clauses combined, or on the First Amendment in general, meaning the pronouncements of the Court likely apply to the public at large, not just the press.[36] Furthermore, the Court has explicitly

---

33. U.S. CONST. amend. I.

34. *See, e.g.*, *First Amendment*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/constitution/first_amendment [https://perma.cc/3ZPG-A9TZ] (giving a brief overview of the rights protected by the First Amendment).

35. *See* David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 448–50 (2002) [hereinafter Anderson, *Freedom of the Press*] (noting the Supreme Court often cited the Press Clause from the 1930s through the 1960s, but since the 1970s has preferred to "treat[] media cases as free-speech cases rather than free-press cases"); Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. REV. 1025, 1025 (2011) [hereinafter West, *Awakening*] ("The Free Press Clause enjoys less practical significance than almost any other constitutional provision.").

36. *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 264–65 (1964) (holding that the Alabama courts' application of a libel law regarding a public official violated the Speech and Press Clauses and granting protections against libel to the *New York Times* and four individual petitioners); Landmark Commc'ns, Inc. v. Virginia, 435 U.S. 829, 838 (1978) ("We conclude that the publication Virginia seeks to punish under its statute lies near the core of the First Amendment, and the Commonwealth's interests advanced by the imposition of criminal sanctions are insufficient to justify the actual and potential encroachments on freedom of speech and of the press which follow therefrom."); *see also* Patrick Garry, *The First Amendment and Freedom of the Press: A Revised Approach to the Marketplace of Ideas Concept*, 72 MARQ. L. REV. 187, 187–88 (1989) ("The Court has

rejected protections for the press in some cases.[37] This First Amendment jurisprudence, summarized below, suggests that the Supreme Court is willing to protect the press's ability to disseminate information but has not been willing to protect various functions of the newsgathering process, even though it has stated, "news gathering is not without its First Amendment protections."[38] The Court has not elaborated much further.[39]

Part I will proceed by highlighting Supreme Court victories and defeats for the press. On issues affecting the dissemination of news, such as prior restraint,[40] and already published information, such as libel,[41] journalists have secured key protections under the First Amendment. Conversely, when journalists have sought protections for newsgathering activities less related to the eventual sharing of information, such as protecting confidential sources and accessing areas where the general public is not allowed, the Supreme Court has not established strong protections.[42]

A. VICTORIES OF THE PRESS

When the press has secured First Amendment victories, the Supreme Court has established protections for actions related to

---

never affirmatively given independent significance to the press clause. It has not given the press any more protection than an individual enjoys under the speech clause. Nor has any Supreme Court decision rested solely on the press clause independent of the speech clause." (footnote omitted)); Anderson, *Freedom of the Press*, *supra* note 35, at 430 ("Most of the freedoms the press receives from the First Amendment are no different from the freedoms everyone enjoys under the Speech Clause. The press is protected from most government censorship, libel judgments, and prior restraints not because it is the press but because the Speech Clause protects all of us from those threats."). *But see* C. Edwin Baker, *The Independent Significance of the Press Clause Under Existing Law*, 35 HOFSTRA L. REV. 955, 956–59 (2007) (arguing that the Supreme Court has implicitly treated Speech and Press Clause protections differently while acknowledging that such different treatment has never been explicit).

37. *See, e.g.*, Cohen v. Cowles Media Co., 501 U.S. 663, 671–72 (1991) (holding that the press is not exempt from state promissory estoppel laws under the First Amendment); Branzburg v. Hayes, 408 U.S. 665, 708–09 (1972) (holding that the First Amendment does not shield reporters from having to testify in front of a grand jury about confidential sources' identities).

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

39. *See id.*

40. *See infra* Part I.A.1.

41. *See infra* Part I.A.2.

42. *See infra* Parts I.B.1–2.

the dissemination of information, thus implicating the Speech Clause of the First Amendment in addition to the Press Clause.[43] Based on First Amendment case law, the Supreme Court seems more willing to rule in favor of the press under a combination of the Speech and Press Clauses but has been hesitant to establish press protections solely under the Press Clause.

1. Prior Restraints Face a Strong Presumption of Unconstitutionality

Prior restraint refers to government action that stops speech or expression, including publication, before it occurs.[44] Some have argued that limitations on prior restraint are press-specific protections.[45] But, in the seminal Supreme Court case dealing with prior restraint, *New York Times Co. v. United States* (also known as the "Pentagon Papers Case"),[46] the Court issued a three-paragraph per curiam opinion which did not even mention the First Amendment, and Justices in the majority wrote separately to explain their own reasoning.[47] In that case, the United States government under President Richard Nixon sought to enjoin the *New York Times* and the *Washington Post* from reporting

43. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of Speech . . . .").

44. *E.g.*, *Prior Restraint*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/prior_restraint [https://perma.cc/5E5S-M8ZN] ("In First Amendment law, prior restraint is government action that prohibits speech or other expression before the speech happens."); Daniel Baracskay, *Prior Restraint*, FREE SPEECH CTR. (2009), https://www.mtsu.edu/first-amendment/article/1009/prior-restraint [https://perma.cc/PV4P-LUMA] ("Prior restraint is a form of censorship that allows the government to review the content of printed materials and prevent their publication.").

45. *See, e.g.*, West, *Awakening*, *supra* note 35, at 1037 n.72 (explaining that *Near v. Minnesota*, a case involving a prior restraint of a controversial Minnesota newspaper, "may . . . be seen as a press-only case" while noting that the Supreme Court subsequently interpreted limitations on prior restraint as being applicable to the public at large); *see also* Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 722–23 (1931) (holding that prior restraint violates the "liberty of the press guaranteed by the Fourteenth Amendment," presumably through the Incorporation Doctrine); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 64, 71–72 (1963) (holding that prior restraint of a book publisher violates the First and Fourteenth Amendments, under the specific circumstances).

46. *See, e.g.*, Baracskay, *supra* note 44 (referring to *New York Times Co.* as the "Pentagon Papers Case"); Anthony B. Sanders, *Classified Documents*, FREE SPEECH CTR., https://mtsu.edu/first-amendment/article/classified-documents [https://perma.cc/8D23-2EZC] (last updated 2022) (same).

47. 403 U.S. 713 (1971) (per curiam).

on and publishing information about a top secret study detailing the United States' involvement in Vietnam prior to and during the Vietnam War.[48] The Supreme Court ruled 6-3 to allow the *New York Times* and the *Washington Post* to resume publication.[49] While this case clearly establishes protections that are beneficial to journalists, the fractured reasoning of the Court fails to pinpoint the source and scope of the protections.

Three justices were primarily concerned with how prior restraints implicate the First Amendment. Justice Hugo Black's concurrence focused on the Press Clause.[50] Specifically, Justice Black argued in favor of an absolute prohibition against prior restraints of the press: "[b]oth the history and language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints."[51] Justices William Douglas and William Brennan, in concurring opinions, focused on the First Amendment more generally.[52] Citing both the Speech and Press Clauses, Justice Douglas also favored an absolute prohibition against prior restraints of the press.[53] Unlike Justices Black and Douglas, Justice Brennan favored a qualified prohibition on prior restraints based on First Amendment precedent.[54] Under

48. *See* Bruce Altschuler, *Pentagon Papers*, FREE SPEECH CTR. (2009), https://firstamendment.mtsu.edu/article/pentagon-papers [https://perma.cc/4ARM-SPY4].

49. *Id.*

50. *N.Y. Times Co.*, 403 U.S. at 714–20 (Black, J., concurring).

51. *Id.* at 716–17 ("[James] Madison and the other Framers of the First Amendment, able men that they were, wrote in language they earnestly believed could never be misunderstood: 'Congress shall make no law . . . abridging the freedom . . . of the press . . . .' Both the history and language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints.").

52. *Id.* at 720–24 (Douglas, J., concurring) (emphasizing the purpose and powers of the First Amendment); *id.* at 724–27 (Brennan, J., concurring) (alluding to First Amendment protections generally rather than by clause).

53. *Id.* at 720 (Douglas, J., concurring) ("It should be noted at the outset that the First Amendment provides that 'Congress shall make no law . . . abridging the freedom of speech, or of the press.' That leaves, in my view, no room for governmental restraint on the press.").

54. *Id.* at 726–27 (Brennan, J., concurring) ("Our cases, it is true, have indicated that there is a single, extremely narrow class of cases in which the First Amendment's ban on prior judicial restraint may be overridden. Our cases have thus far indicated that such cases may arise only when the Nation 'is at war,' during which times '[n]o one would question but that a government might

Justice Brennan's opinion, the government would have to show that publication of the information at issue would "inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea" during wartime.[55] Justice Brennan did not think the government met its burden in this case.[56]

The other three justices concurring in the per curiam opinion were more concerned with separation of powers than Justices Black, Douglas, and Brennan. Justice Potter Stewart centered his argument around separation of powers augmented by First Amendment principles.[57] Specifically, he said that it was the constitutional responsibility of the Executive Branch to promulgate and enforce regulations to prevent the disclosure of classified information related to foreign affairs and national security, and that it was improper in this case to ask the Supreme Court to enjoin publication of the information because the government was not asking the Court to interpret a regulation or statute.[58] He added that an injunction was improper under the First Amendment because he could not "say that disclosure of any of [the documents] will surely result in direct, immediate, and

---

prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops.' . . . Thus, only governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order." (citations omitted) (first quoting Schenck v. United States, 249 U.S. 47, 52 (1919); and then quoting Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 716 (1931))).

55. *Id.*

56. *Id.* at 725–26 ("The entire thrust of the Government's claim throughout these cases has been that publication of the material sought to be enjoined 'could,' or 'might,' or 'may' prejudice the national interest in various ways. But the First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result.").

57. *Id.* at 728 (Stewart, J., concurring) ("In the absence of the governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry—in an informed and critical public opinion which alone can here protect the values of democratic government. For this reason, it is perhaps here that a press that is alert, aware, and free most vitally serves the basic purpose of the First Amendment. For without an informed and free press there cannot be an enlightened people.").

58. *Id.* at 728–30.

irreparable damage to our Nation or its people."[59] Finally, Justice Stewart noted that Congress could and had passed criminal statutes related to publishing confidential information, which suggests he may have been open to considering post-publication punishments for the *New York Times* and the *Washington Post*.[60]

Justice Byron White similarly believed an appropriate Congressional authorization could justify post-publication consequences and emphasized that prior restraints face a strong presumption of unconstitutionality under the First Amendment.[61]

The final concurring opinion by Justice Thurgood Marshall rested almost entirely on separation of powers.[62] Justice Marshall did not think it was appropriate to grant an injunction when Congress had refused to pass statutes which would have enabled the President to engage in prior restraint in certain circumstances.[63]

Even though the press ultimately prevailed in this case, these six concurring opinions fail to paint a clear picture of the extent to which the press are protected from prior restraints and the role of the Press Clause in establishing such protections. With only Justices Black and Douglas mentioning the Press Clause, it's unclear how much, if at all, that clause played in the other Justices' thinking. Additionally, Justice Douglas's citation of the Press and Speech Clauses suggests that Justice Black may

---

59. *Id.* at 730.

60. *Id.* at 729–30.

61. *Id.* at 733 (White, J., concurring) ("[T]erminating the ban on publication of the relatively few sensitive documents the Government now seeks to suppress does not mean that the law either requires or invites newspapers or others to publish them or that they will be immune from criminal action if they do. Prior restraints require an unusually heavy justification under the First Amendment; but failure by the Government to justify prior restraints does not measure its constitutional entitlement to a conviction for criminal publication. That the Government mistakenly chose to proceed by injunction does not mean that it could not successfully proceed in another way.").

62. *Id.* at 741 (Marshall, J., concurring) ("The issue is whether this Court or the Congress has the power to make law.").

63. *Id.* at 745–46 ("Even if it is determined that the Government could not in good faith bring criminal prosecutions against the New York Times and the Washington Post, it is clear that Congress has specifically rejected passing legislation that would have clearly given the President the power he seeks here and made the current activity of the newspapers unlawful. When Congress specifically declines to make conduct unlawful it is not for this Court to redecide those issues—to overrule Congress." (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952))).

have been the only one who considered the Press Clause, standing alone, sufficient to protect the press against prior restraints.

2. News Organizations and Journalists Are Protected from Libel Claims Brought by Public Individuals Absent "Actual Malice"

Libel is a tort related to the publication of false information.[64] Newsgatherers have won key protections against libel liability. The First Amendment protections that the Supreme Court has established related to libel are clearer than those related to prior restraint.

The 1964 standard-setting case in the area of libel, *New York Times Co. v. Sullivan*,[65] continues to stand the test of time despite a pair of current Supreme Court Justices expressing their desire to overturn it.[66] In *Sullivan*, the *New York Times* published an advertisement from the Committee to Defend Martin Luther King and the Struggle for Freedom in the South.[67] The advertisement contained a few inaccuracies regarding the number of times King had been arrested and included an apparently false claim that Montgomery police circled the Alabama State College campus and padlocked the dining hall in response to student protests.[68] L.B. Sullivan, a Montgomery, Alabama, City Commissioner who oversaw the police, sued the *New York Times* and four Alabama clergymen, whose names appeared on the advertisement, for libel even though Sullivan's name did not appear in the ad.[69]

---

64. *E.g.*, David L. Hudson Jr., *Libel and Slander*, FREE SPEECH CTR. (May 14, 2020), https://www.mtsu.edu/first-amendment/article/997/libel-and-slander [https://perma.cc/87XK-D8KJ] ("Defamation is a tort that encompasses false statements of fact that harm another's reputation. . . . Libel generally refers to written defamation . . . .").

65. 376 U.S. 254 (1964).

66. *See* Adam Liptak, *Two Justices Say Supreme Court Should Reconsider Landmark Libel Decision*, N.Y. TIMES (July 2, 2021), https://www.nytimes.com/2021/07/02/us/supreme-court-libel.html [https://perma.cc/ES9P-ETAY] (reporting that Justices Neil Gorsuch and Clarence Thomas believe the *Sullivan* decision provides too much protection to people spreading false information).

67. *Sullivan*, 376 U.S. at 256–57.

68. *Id.* at 256–59.

69. *Id.* at 256–58.

A unanimous Supreme Court ruled that, under the First and Fourteenth Amendments,[70] a public official is prohibited "from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[71] The Court determined that neither the *New York Times* nor the four clergymen acted with actual malice.[72]

The *Sullivan* Court grounded its decision in both the Speech and Press Clauses,[73] not the Press Clause alone, which makes sense considering that libel applies to published material. The advertisement at issue in the case had already been expressed (bringing it under the scope of the Speech Clause),[74] and the advertisement was intended to inform the public and check governmental power (bringing it under the scope of the Press Clause, as this Note views it).[75] Moreover, affording this protection to "critics of [a public official's] official conduct," including the individual petitioners, shows that this is not a press-specific protection.[76]

While protections against prior restraint and libel are critically important to the press, these victories fall short of truly ensuring freedom of the press because they do not protect the mechanics of newsgathering necessary for journalists to keep the public informed.

---

70. *Id.* at 276–77 ("It is true that the First Amendment was originally addressed only to action by the Federal Government . . . . But this distinction was eliminated with the adoption of the Fourteenth Amendment and the application to the States of the First Amendment's restrictions." (first citing Gitlow v. New York, 268 U.S. 652, 666 (1925); then citing Schneider v. New Jersey, 308 U.S. 147, 160 (1939); then citing Bridges v. California, 314 U.S. 252, 268 (1941); and then citing Edwards v. South Carolina, 372 U.S. 229, 235 (1963))).

71. *Id.* at 279–80.

72. *Id.* at 285–88.

73. *Id.* at 268 ("The question before us is whether this rule of liability, as applied to an action brought by a public official against critics of his official conduct, abridges the freedom of speech and of the press that is guaranteed by the First and Fourteenth Amendments.").

74. *See infra* note 143 and accompanying text (explaining that the Speech Clause protects published material, not just the spoken word).

75. *See infra* Part II.B.2 (explaining the Press as a Function interpretation of the Press Clause). To understand how this Note arrives at this interpretation of the Press Clause, see generally *infra* Part II.

76. *Sullivan*, 376 U.S. at 283.

B. DEFEATS OF THE PRESS

When the Supreme Court has considered questions regarding the constitutionality of newsgathering functions that are further removed from dissemination and thus are not as closely tied to speech, it has typically not established First Amendment protections. This is possibly because the Court would have to rely more heavily on the Press Clause without being able to shift some of the weight to the Speech Clause. Part of the Court's hesitance to grant press-specific protections likely stems from the need then to answer the difficult question, who or what is "the press?"[77] Indeed, the Supreme Court has expressed discomfort at the prospect of having to answer that question.[78]

1. Whether the Press Clause Establishes a Reporter's Privilege (or Shield) Is the Subject of a Confusing Debate

Reporters' privileges, or shields, protect a journalist's "right not to be compelled to testify or disclose [confidential] sources and information in court."[79] Almost all states, and D.C., have recognized some form of reporter's privilege either through

77. *See infra* Part II (explaining competing interpretations of the Press Clause and how such interpretations alter the scope of journalist protection).

78. *See* Branzburg v. Hayes, 408 U.S. 665, 704 (1972) ("Sooner or later, it would be necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods.").

79. *Reporter's Privilege Compendium*, REPS. COMM. FOR FREEDOM OF THE PRESS, https://www.rcfp.org/reporters-privilege [https://perma.cc/34JF-LT9W].

statutes, judicial decisions, or court rules.[80] However, there is currently not a federal shield law.[81]

The Supreme Court has seemingly refused the opportunity to create a federal reporter's privilege.[82] In *Branzburg v. Hayes*, the Court ostensibly ruled that the First Amendment does not create a constitutional reporter's privilege exempting journalists from disclosing confidential sources or information to a federal grand jury.[83] However, Justice Lewis Powell's concurring opinion, which gave the majority its fifth vote, has caused significant confusion regarding what the case actually stands for.[84] Justice Powell stated that he was concurring "to emphasize what seems to [him] to be the limited nature of the Court's holding" and further wrote:

---

80. *See Introduction to the Reporter's Privilege Compendium*, REPS. COMM. FOR FREEDOM OF THE PRESS [hereinafter *Compendium Intro.*], https://www.rcfp.org/introduction-to-the-reporters-privilege-compendium [https://perma.cc/7MH3-CLUZ] (last updated Nov. 5, 2021) (providing a "detailed examination" of the reporter's privilege in each jurisdiction); Jane E. Kirtley, *Shield Laws*, FREE SPEECH CTR. (Jan. 1, 2020), https://www.mtsu.edu/first-amendment/article/1241/shield-laws [https://perma.cc/7A3W-XS9H] (summarizing reporter's privilege at a high level); Caitlin Vogus, *Congress Has Reintroduced the PRESS Act. Now Lawmakers Must Pass It.*, FREEDOM OF THE PRESS FOUND. (June 21, 2023), https://freedom.press/news/congress-has-reintroduced-the-press-act-now-lawmakers-must-pass-it [https://perma.cc/WP8K-FBUN] (discussing potential solutions for providing a federal reporter's privilege).

81. *Compendium Intro.*, *supra* note 80 ("There is still no federal shield law. Members of Congress have proposed various iterations of one in recent years, though none have passed the Senate."); *see also* Vogus, *supra* note 80 (urging Congress to enact the recently reintroduced Protect Reporters from Exploitive State Spying (PRESS) Act, which would create a statutory federal reporter's privilege).

82. *Compendium Intro.*, *supra* note 80 (noting the Supreme Court has not considered a constitutionally based reporter's privilege since its 1972 *Branzburg* opinion); Kirtley, *supra* note 80 (same).

83. *Branzburg*, 408 U.S. at 702–04 ("We see no reason to hold that these reporters, any more than other citizens, should be excused from furnishing information that may help the grand jury in arriving at its initial determinations.").

84. *E.g.*, Adam Liptak, *A Justice's Scribbles on Journalists' Rights*, N.Y. TIMES (Oct. 7, 2007) [hereinafter Liptak, *Justice's Scribbles*], https://www.nytimes.com/2007/10/07/weekinreview/07liptak.html [https://perma.cc/HHC8-J3Y9] ("Thanks to a cryptic concurring opinion from Justice Lewis F. Powell Jr., to this day no one is quite sure what the decision meant."); *Compendium Intro.*, *supra* note 80 ("The high court has not revisited the issue, and the lower courts have disagreed in their interpretation of *Branzburg*.").

> The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.[85]

Since Justice Powell joined the majority opinion, some take the decision at the majority's word and interpret it as rejecting any reporter's privilege against grand jury subpoenas.[86] However, the above quoted language from Justice Powell's concurrence seems to recognize a qualified reporter's privilege.[87] By advocating for a balancing of interests on a "case-by-case basis" to judge an "asserted claim to privilege,"[88] his concurrence suggests there could be scenarios in which a journalist would be shielded from disclosing confidential information to a grand jury—even if the case in front of the court did not rise to that level.[89]

When Justice Powell's concurrence is combined with the four dissenters, this constitutes a majority of the court who favored at least a qualified privilege.[90] Notably, for the purposes of this Note, Justice Powell and the dissenters all refer primarily to the Press Clause in identifying where this privilege comes from.[91] Therefore, if the decision is read as creating a qualified

---

85. *Branzburg*, 408 U.S. at 709–10 (Powell, J., concurring).

86. *See* Liptak, *Justice's Scribbles*, *supra* note 84 ("On the one hand, the majority in the 5-to-4 decision said journalists had no First Amendment protection against grand jury subpoenas.").

87. *See id.* ("On the other, Justice Powell, who joined the majority, wrote a separate opinion calling on judges to strike the 'proper balance between freedom of the press and the obligation of all citizens to give relevant testimony' — whatever that means.").

88. *Branzburg*, 408 U.S. at 710 (Powell, J., concurring).

89. *See id.* ("In short, the courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection.").

90. *See Compendium Intro.*, *supra* note 80 ("However, a concurring opinion by Justice Lewis Powell and a dissenting opinion by Justice Potter Stewart recognized a qualified privilege for reporters. . . . Two other justices joined Justice Stewart's dissent. These four justices together with Justice William O. Douglas, who also dissented from the Court's opinion and said that the First Amendment provides journalists with almost complete immunity from being compelled to testify before grand juries, gave the qualified privilege issue a majority.").

91. *See Branzburg*, 408 U.S. at 710 (Powell, J., concurring) (referring to "freedom of the press"); *see also id.* at 721 (Douglas, J., dissenting) ("The press has a preferred position in our constitutional scheme, not to enable it to make money, not to set newsmen apart as a favored class, but to bring fulfillment to the public's right to know."); *id.* at 727 (Stewart, J., dissenting) ("A corollary of

reporter's privilege, that privilege rests almost entirely on the Press Clause.[92] Unfortunately, because of the confusion surrounding *Branzburg*, that is not the nationwide consensus view.[93]

2. The Press Clause May Not Grant the Press Greater Access Rights than the Public

In several Supreme Court cases, members of the press have unsuccessfully sought rights of access that differ from the public's access to certain spaces.[94] Some of the most prominent

---

the right to publish must be the right to gather news. The full flow of information to the public protected by the free-press guarantee would be severely curtailed if no protection whatever were afforded to the process by which news is assembled and disseminated.").

92. In his dissent, Justice Douglas also argues in favor of people's "absolute freedom of, and therefore privacy of, their individual opinions and beliefs" and discusses "freedom of association," an unenumerated right stemming from the First Amendment, as additional support for a constitutional reporter's privilege. *Id.* at 714–16 (Douglas, J., dissenting).

93. *See Compendium Intro.*, *supra* note 80 ("[I]n the decades since *Branzburg* was decided, most federal appellate courts have recognized some form of a qualified privilege for journalistic materials. The U.S. Courts of Appeal for the Seventh and Eighth Circuits are the only circuits that have not yet definitively done so. But the First, Second, Third, Fourth, Fifth, Sixth, Ninth, Tenth, Eleventh, and D.C. Circuits have recognized a privilege in at least some cases, derived from the First Amendment."); *see also* Liptak, *Justice's Scribbles*, *supra* note 84 ("Though Justice Powell's concurrence was almost perfectly opaque, press lawyers seized on it and for decades convinced countless lower courts that Branzburg had in fact been a victory for the press. That line of argument essentially ground to a halt four years ago when a federal appeals court judge called the press lawyers' bluff.").

94. *See, e.g.*, *Branzburg*, 408 U.S. at 684 ("It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally." (first citing Zemel v. Rusk, 381 U.S. 1, 16–17 (1965); then citing N.Y. Times Co. v. United States, 403 U.S. 713, 728–30 (1971) (per curiam) (Stewart, J., concurring); then citing Trib. Rev. Publ'g Co. v. Thomas, 254 F.2d 883, 885 (3d Cir. 1958); and then citing United Press Ass'ns v. Valente, 123 N.E.2d 777, 778 (N.Y. 1954))); s*ee also* Michael Roffe, *Journalist Access*, FREEDOM F. INST. (May 25, 2004), https://www.freedomforuminstitute.org/first-amendment-center/topics/freedom-of-the-press/journalist-access [https://perma.cc/CDY9-QGNL] ("Where a proceeding or an area is off-limits to the general public, the news media have no clearly established right to gain access to it."); David L. Hudson Jr., *Press Access*, FREE SPEECH CTR. (Jan. 1, 2019), https://www.mtsu.edu/first-amendment/article/1605/press-access [https://perma.cc/3BYX-SVZC] ("At times, the Court has recognized a right of press access, such as the right to attend criminal trials in *Richmond Newspapers, Inc. v. Virginia* (1980). However,

access cases, such as *Pell v. Procunier*, *Saxbe v. Washington Post Co.*, and *Houchins v. KQED, Inc.*, involved journalists seeking access to prisons and jails to interview inmates.[95] In each of these cases, the majority held that the press does not have a constitutional right to interview inmates and that the degree of access the press is afforded is equal to that of the public.[96]

In *Pell*, plaintiffs, who were prison inmates and journalists, challenged a California Department of Corrections regulation that "prohibit[ed] face-to-face interviews between press representatives and individual inmates whom they specifically name[d] and request[ed] to interview."[97] Journalists had previously been afforded the opportunity to conduct such interviews.[98] Members of the public had not.[99] The majority cited *Branzburg v. Hayes* as establishing that "the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally."[100] Since the regulation put members of the press on equal footing with the public, and did not grant the press fewer rights than the public, the majority held that it did not violate "the constitutional right of a free press."[101]

In *Saxbe*, the *Washington Post* and one of its reporters challenged a Federal Bureau of Prisons regulation that prohibited

---

the Court reasoned that by history and tradition both the press and the general public had a right to attend such trials, meaning that there was no special right of access for the press." (citing Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980))).

95. Pell v. Procunier, 417 U.S. 817 (1974) (challenging constitutionality of prison regulation under which media members could not select specific inmates, nor could inmates initiate an interview); Saxbe v. Wash. Post Co., 417 U.S. 843 (1974) (challenging prison regulation prohibiting face-to-face interviews of individually designated inmates); Houchins v. KQED, Inc., 438 U.S. 1 (1978) (challenging prison's refusal to allow broadcasting company to inspect and take photographs of a particular portion of the jail with allegedly poor conditions).

96. *See Pell*, 417 U.S. at 834 ("[N]ewsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public."); *Saxbe*, 417 U.S. at 850 (relying on *Pell* to state the same); *Houchins*, 438 U.S. at 11 (same).

97. *Pell*, 417 U.S. at 819.

98. *Id.* at 831.

99. *Id.* at 833 ("[T]he media plaintiffs assert that, despite the substantial access to California prisons and their inmates accorded representatives of the press—access broader than is accorded members of the public generally . . . .").

100. *Id.* at 833–34 (quoting Branzburg v. Hayes, 408 U.S. 665, 684 (1972)).

101. *Id.* at 833–35.

journalists from interviewing inmates "in all medium security and maximum security institutions."[102] The Court found the "case constitutionally indistinguishable from *Pell* v. *Procunier*" and ruled accordingly.[103]

Finally, in *Houchins*, KQED, a radio and television broadcast operator, and the NAACP sued the Sheriff of Alameda County, California.[104] KQED reported on the suicide of an inmate at a county jail and, thereafter, sought access to the jail to investigate "a statement by a psychiatrist that the conditions at the Greystone facility were responsible for the illnesses of his patient-prisoners there."[105] The Sheriff began offering tours of the jail to the public and allowed KQED journalists to join.[106] However, the tours "permitted only limited access to the jail" and did not include areas where alleged violence had occurred.[107] Moreover, tour participants were not allowed to interview inmates—who "were generally removed from view"—and could not bring cameras or recorders.[108] KQED and the NAACP argued that this access was insufficient.[109] Noting the similarities with *Pell* and *Saxbe*, the Supreme Court ultimately denied the request for greater access to the jail.[110]

---

102. Saxbe v. Wash. Post Co., 417 U.S. 843, 844 (1974). The regulation originally prohibited journalists from interviewing inmates in minimum security prisons as well, but the policy was updated before the Supreme Court heard the case. *Id.*

103. *Id.* at 850.

104. Houchins v. KQED, Inc., 438 U.S. 1, 3–4 (1978).

105. *Id.* at 3.

106. *Id.* at 4.

107. *Id.* at 4–5.

108. *Id.* at 5.

109. *Id.* ("They contended that the monthly public tours at Santa Rita failed to provide adequate access to the jail for two reasons: (a) once the scheduled tours had been filled, media representatives who had not signed up for them had no access and were unable to cover newsworthy events at the jail; (b) the prohibition on photography and tape recordings, the exclusion of portions of the jail from the tours, and the practice of keeping inmates generally removed from view substantially reduced the usefulness of the tours to the media.").

110. *Id.* at 11–12 ("The issue is a claimed special privilege of access which the Court rejected in *Pell* and *Saxbe*, a right which is not essential to guarantee the freedom to communicate or publish.").

Dissenters in each case pointed out the important role of journalists in informing the public about carceral conditions.[111] Justice Douglas's dissent in *Pell*, which also served as a dissent for *Saxbe*,[112] focused primarily on the Press Clause and asserted that the public's "right to know" is diminished by blocking press access to prisons.[113] Justice Powell's dissent in *Saxbe* emphasized his view that the press are not entitled to "special privileges,"[114] but that the Press Clause protects the public's "right of the people to a free flow of information and ideas on the conduct of their Government."[115] Justice John Paul Stevens's dissent in

111. *See* Pell v. Procunier, 417 U.S. 817, 839–42 (1974) (Douglas, J., dissenting) ("The public's interest in being informed about prisons is thus paramount."); Saxbe v. Wash. Post Co., 417 U.S. 843, 862–64 (1974) (Powell, J., dissenting) ("The people must therefore depend on the press for information concerning public institutions."); *Houchins*, 438 U.S. at 30–34 (Stevens, J., dissenting) ("Our system of self-government assumes the existence of an informed citizenry." (footnote omitted)).

112. *Pell*, 417 U.S. at 836 (Douglas, J., dissenting) ("This opinion applies also to No. 73-1265, *Saxbe et al*. v. *Washington Post Co. et al., post*, p. 843.").

113. *See id.* at 841 ("It is thus not enough to note that the press—the institution which '[t]he Constitution specifically selected . . . to play an important role in the discussion of public affairs'—is denied no more access to the prisons than is denied the public generally. The prohibition of visits by the public has no practical effect upon their right to know beyond that achieved by the exclusion of the press. The average citizen is most unlikely to inform himself about the operation of the prison system by requesting an interview with a particular inmate with whom he has no prior relationship. He is likely instead, in a society which values a free press, to rely upon the media for information." (quoting Mills v. Alabama, 384 U.S. 214, 219 (1966))).

114. *Saxbe*, 417 U.S. at 857 (Powell, J., dissenting) ("I agree, of course, that neither any news organization nor reporters as individuals have constitutional rights superior to those enjoyed by ordinary citizens. The guarantees of the First Amendment broadly secure the rights of every citizen; they do not create special privileges for particular groups or individuals. For me, at least, it is clear that persons who become journalists acquire thereby no special immunity from governmental regulation. To this extent I agree with the majority. But I cannot follow the Court in concluding that *any* governmental restriction on press access to information, so long as it is nondiscriminatory, falls outside the purview of First Amendment concern.").

115. *Id.* at 864 ("This constitutionally established role of the news media is directly implicated here. For good reasons, unrestrained public access is not permitted. The people must therefore depend on the press for information concerning public institutions. The Bureau's absolute prohibition of prisoner-press interviews negates the ability of the press to discharge that function and thereby substantially impairs the right of the people to a free flow of information and ideas on the conduct of their Government. The underlying right is the right of the public generally. The press is the necessary representative of the public's

Houchins argued that journalists are not entitled to greater access but rather that the First Amendment remedies for the press and the public may be different when it comes to access.[116]

The Court's debates around access rights are particularly relevant to the protest context because if journalists are not subject to dispersal orders and curfews, it could be viewed as giving journalists access when the public is denied it. However, *Pell*, *Saxbe*, and *Houchins* should not be controlling in the protest context because there are considerable differences between covering protests and interviewing inmates.[117] One key difference is that prisons are operated by the government, which regulates access into the facilities, whereas protests often take place in public spaces like parks, sidewalks, and streets.[118]

Indeed, in issuing their injunctions,[119] both the Minnesota and Oregon district courts treated the protest cases before them as First Amendment right of access cases.[120] Citing the 1986 Supreme Court case *Press-Enterprise Co. v. Superior Court* (*Press-Enterprise II*),[121] both courts analyzed the issue of access rights

interest in this context and the instrumentality which effects the public's right.").

116. *See Houchins*, 438 U.S. at 39 (Stevens, J., dissenting) ("Though the public and the press have an equal right to receive information and ideas, different methods of remedying a violation of that right may sometimes be needed to accommodate the special concerns of the one or the other. Preliminary relief could therefore appropriately be awarded to KQED on the basis of its proof of how it was affected by the challenged policy without also granting specific relief to the general public. . . . Accordingly, even though the Constitution provides the press with no greater right of access to information than that possessed by the public at large, a preliminary injunction is not invalid simply because it awards special relief to a successful litigant which is a representative of the press." (footnote omitted)).

117. This is not to say that *Pell*, *Saxbe*, and *Houchins* were correctly decided. Nevertheless, they are currently precedential cases, so distinguishing the protest context from interviewing inmates becomes necessary.

118. *See Know Your Rights: Protesters' Rights*, ACLU, https://www.aclu.org/know-your-rights/protesters-rights [https://perma.cc/2A73-UAGD] ("Your rights are strongest in what are known as 'traditional public forums,' such as streets, sidewalks, and parks.").

119. *See supra* notes 25, 29, and accompanying text.

120. Goyette v. City of Minneapolis, 338 F.R.D. 109, 116–17 (D. Minn. 2021) (applying the Supreme Court's test for evaluating alleged violations of the right of access); Index Newspapers LLC v. City of Portland (*Index Newspapers II*), 480 F. Supp. 3d 1120, 1146–49 (D. Or. 2020) (same).

121. Press-Enterprise Co. v. Superior Ct. of Cal. (*Press-Enterprise II*), 478 U.S. 1 (1986).

under a two-part test.[122] Under part one, the court must determine "whether a right of access attaches to the government proceeding or activity by considering whether the place and process have historically been open to the press and general public and whether public access plays a significant positive role in the functioning of the particular process in question."[123] Under part two, "if the court determines that a qualified right applies, the government may overcome that right only by demonstrating 'an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.'"[124] Both courts concluded that the journalists "demonstrated a likelihood of success on the merits" and granted injunctions exempting law-abiding journalists from dispersal orders.[125]

Under the first part of the test, the two courts noted that the protests took place on public streets, sidewalks, and parks, and emphasized that "public observation of law enforcement activities in these public fora plays a significant positive role in ensuring conduct remains consistent with the Constitution."[126] Under part two, the courts each concluded that the dispersal orders were not narrowly tailored to avoid unnecessarily infringing on First Amendment rights because journalists had been exempted from dispersal and curfew orders in similar circumstances without any major issues.[127] These rulings provide the opportunity to develop right of access protections under the Press Clause of the First Amendment for journalists covering protests.

Interestingly, the *Press-Enterprise* cases and their predecessor Supreme Court cases established the *general public's*

122. *Index Newspapers II*, 480 F. Supp. 3d at 1147; *Goyette*, 338 F.R.D. at 116–17.

123. *Index Newspapers II*, 480 F. Supp. 3d at 1147 (citing *Press-Enterprise II*, 478 U.S. at 8–9); *see also Goyette*, 338 F.R.D. at 116 (quoting *Index Newspapers II*, 480 F. Supp. 3d at 1147).

124. *Index Newspapers II*, 480 F. Supp. 3d at 1147 (quoting *Press-Enterprise II*, 478 U.S. at 9); *Goyette*, 338 F.R.D. at 116 (quoting *Index Newspapers II*, 480 F. Supp. 3d at 1147).

125. *Goyette*, 338 F.R.D. at 117; *see also Index Newspapers II*, 480 F. Supp. 3d at 1156.

126. *Index Newspapers II*, 480 F. Supp. 3d at 1147; *see also Goyette*, 338 F.R.D. at 116–17.

127. *Index Newspapers II*, 480 F. Supp. 3d at 1147–49; *Goyette*, 338 F.R.D. at 116–17.

qualified right of access to various aspects of criminal proceedings.[128] Thus, the press also generally has access to such proceedings.[129] Lower courts have extended this line of cases to encompass various civil proceedings.[130] However, applying the *Press-Enterprise II* test to grant members of the press access when the general public is denied access (e.g., to exempt journalists from dispersal orders at protests)[131] seems to be a novel and clever application of the test. If the opportunity arises, the Supreme Court should endorse this application of the *Press-Enterprise II* test, thus establishing crucial Press Clause protections.

As the historical analysis throughout Part I shows, the Supreme Court's treatment of press rights is heavily context specific. Moreover, while the Court has not yet recognized any rights under the Press Clause alone, it has seemingly left the door open to do so.[132] Given the importance of protest reporting in the past several years, this Note sees the protest context as the proper starting point to develop rights under the Press Clause alone. So, what does "the press" mean under the First Amendment?

II. INTERPRETING THE PRESS CLAUSE

Legal and media scholars, judges, journalists, historians, and others have proposed competing interpretations of the Press Clause. Certain interpretations make the Press Clause little

---

128. *The Standard for Access*, REPS. COMM. FOR FREEDOM OF THE PRESS (2009), https://www.rcfp.org/journals/the-news-media-and-the-law-summer-2009/standard-access [https://perma.cc/492A-RT2X] ("From *Globe* through the 1986 case *Press-Enterprise Co. v. Superior Court*, the Court determined that a wide spectrum of criminal proceedings are presumptively open [to the public] — starting with jury selection and preliminary hearings.").

129. *See* Emilie S. Kraft, *Access to Courtrooms*, FREE SPEECH CTR. (Jan. 1, 2009), https://www.mtsu.edu/first-amendment/article/1547/access-to-courtrooms [https://perma.cc/9456-U5LW] ("The public and the press have a qualified First Amendment right of access to court proceedings and records.").

130. *Id.* ("The Supreme Court has never recognized a right of access to civil proceedings, although several state and lower federal courts have. Most have recognized that the openness of civil trials is also necessary to promote free participation and communication in a democratic society.").

131. *See Goyette*, 338 F.R.D. at 117; *Index Newspapers II*, 480 F. Supp. 3d at 1156.

132. *See* Branzburg v. Hayes, 408 U.S. 665, 707 (1972) ("[N]ews gathering is not without its First Amendment protections . . . ."); *see also supra* Part I.B.1 (discussing *Branzburg* and how the myriad concurring and dissenting opinions arguably could be read to support a qualified reporter's privilege under the Press Clause).

more than a tack-on to the Speech Clause.[133] Other interpretations view newsgathering or journalism as central to the Press Clause, giving it a role beyond complementing the Speech Clause.[134] These competing conceptions have significant implications for whether, and how, journalists are protected against government action. Journalists spend much of their time gathering the news—either by interviewing subjects, taking photos, shooting videos, or researching issues—and are not only engaged in distributing the news. A speech-centric conception of the Press Clause protects only those distribution-related activities and leaves journalists without any safeguards for the newsgathering process, whereas a journalism-centric conception provides an avenue for protecting activities that are foundational to a truly free press.

Part II continues with a discussion of four different interpretations of the Press Clause, two of which are speech-centric and two of which are journalism-centric. It concludes that a journalism-centric approach, specifically the Press as a Function interpretation, is the most appropriate one.

A. INTERPRETATIONS OF THE PRESS CLAUSE THAT CONFLATE IT WITH THE SPEECH CLAUSE

The first conceptions of the Press Clause laid out below essentially strip it of any independent significance by conflating its protections with those already guaranteed under the Speech Clause. Interpreting the Press Clause as nothing more than a companion to the Speech Clause is unacceptable as a matter of constitutional interpretation and in light of all relevant factors. These interpretations leave the Press Clause with no teeth.

1. Press as Publication

Some view the Press Clause as protecting the act of publishing or disseminating information.[135] Under the Press as

133. *See infra* Parts II.A.1–2 (discussing interpretations of the Press Clause that conflate it with the Speech Clause).

134. *See infra* Parts II.B.1–2 (discussing interpretations of the Press Clause that set it apart from the Speech Clause).

135. *E.g.*, Citizens United v. FEC, 558 U.S. 310, 390 (2010) (Scalia, J., concurring) ("The freedom of 'the press' was widely understood to protect the publishing activities of individual editors and printers.").

Publication view, the Press Clause encapsulates the act of sharing speech with the public.

The Press as Publication interpretation is perhaps best summarized by Chief Justice Warren Burger's concurring opinion in *First National Bank v. Bellotti*: "[t]he Speech Clause standing alone may be viewed as a protection of the liberty to express ideas and beliefs, while the Press Clause focuses specifically on the liberty to disseminate expression broadly and 'comprehends every sort of publication which affords a vehicle of information and opinion.'"[136] Thus, Chief Justice Burger and other supporters of this interpretation view the Press Clause as "complementary to and a natural extension of" the Speech Clause.[137]

These supporters often rest the bulk of their argument on Colonial and Founding Era writings, claiming that the common understanding during that time supports the Press as Publication framing. Indeed, in *Bellotti*, Chief Justice Burger quotes Andrew Bradford, "a colonial American newspaperman," who in 1734 wrote:

> [B]y the *Freedom of the Press*, I mean a Liberty, within the Bounds of Law, for any Man to communicate to the Public, his Sentiments on the Important Points of *Religion* and *Government*; of proposing any Laws, which he apprehends may be for the Good of his Countrey, and of applying for the Repeal of such, as he Judges pernicious.[138]

The original meaning of the First Amendment, however, has been greatly debated, and not everyone agrees that the original meaning supports the Press as Publication interpretation.[139]

---

136. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 799–800 (1978) (Burger, C.J., concurring) (footnote omitted) (quoting Lovell v. Griffin, 303 U.S. 444, 452 (1938)).

137. *Id.* at 800.

138. *Id.* at 798–99; *see also* McConnell v. FEC, 540 U.S. 93, 253 (2003) (Scalia, J., concurring) (turning to Founding Era writings to show taxes imposed on speech have long been considered "grievous incursions on the freedom of the press" (citing JOHN ADAMS, A DISSERTATION ON THE CANON AND FEUDAL LAW (1765))).

139. *See, e.g.*, Sonja R. West, *The "Press," Then & Now*, 77 OHIO ST. L.J. 49, 52 (2016) [hereinafter West, *Then & Now*] ("Going beyond the ratifying generation's explicit discussions of the 'press,' [this Article] shines a light on colonial and early-American common practices in using the printing press. This evidence reveals that members of the framing generation knew the press as a tool of limited capability. In their experiences, the press was so infused with obstacles and costs that only certain speakers were able to use it and did so primarily only to publish specific kinds of messages. The press was, from the beginning, embraced as inescapably intertwined with news on public affairs. Thus while members of

Moreover, some scholars have pointed out the difficulty in ascertaining the original meaning of the Press Clause at all, particularly because the Framers of the First Amendment seemingly did not elaborate on it.[140]

Even if some individuals alive at or around the time the First Amendment was ratified viewed the phrase "the press" as indicative of publication or dissemination, those personal views and musings are not the First Amendment itself. Pursuing a purely originalist understanding of the Press Clause is an act in futility because, as First Amendment scholarship and jurisprudence reveals, advocates of any one of the competing definitions can find snippets of Founding Era literature that ostensibly supports their position.[141] This approach also fails to consider important developments in communications, journalism, and First Amendment jurisprudence since the Bill of Rights was ratified in 1791.[142]

Critics of the Press as Publication view also note that the Supreme Court has interpreted the Speech Clause itself to cover publication and dissemination, making this interpretation of the

---

the framing generation may have sometimes described the press as a tool that anyone was free to use for any reason, their lived experience suggested a very different understanding of what the press—and thus freedom of the press—embodied.").

140. *See, e.g.*, David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 486–87 (1983) [hereinafter Anderson, *Origins*] ("[T]he Framers simply did not articulate what they meant by 'freedom of the press.' Until some further evidence of their views turns up (which seems unlikely, in view of the vast amount of attention historians already have devoted to the Framers and their writings), attempts to divine the 'original understanding' of the press clause must begin with this sketchy history of its framing." (footnote omitted)); West, *Awakening*, *supra* note 35, at 1040 ("Virtually all who have studied the issue have conceded that the original meaning of the two clauses is not obvious.").

141. *See, e.g.*, *supra* notes 138–40 and accompanying text (showing how originalist interpretations of the Constitution can lead to competing outcomes on similar issues).

142. *See, e.g.*, West, *Then & Now*, *supra* note 139, at 72, 89–90 ("This section proceeds from the point where the historical evidence on the meaning of the press runs out. To proceed from this point, faithful constitutional interpretation requires more tools than just founding-era evidence. Thus we will build on the understanding of the multiple values of press freedom discussed above by considering developments in society, technology, and law." (footnotes omitted)). For a more in-depth discussion about these developments, see generally *id.* at 89–104.

Press Clause superfluous.[143] While Chief Justice Burger and other supporters of the Press as Publication may be fine with this duplication, the text of the First Amendment suggests the two clauses provide differing, albeit related, protections. The clauses are "separated grammatically by a comma" and "the disjunctive conjunction 'or,'" which "impl[ies] that Congress could potentially violate one but not the other."[144]

The Supreme Court's use of the phrase "the press" is particularly compelling evidence that the Press as Publication interpretation (and the Press as Technology interpretation)[145] does not accurately reflect the spirit of the Press Clause: "the Court has repeatedly used the term the 'press' as interchangeable with the news media. This usage adds further evidence to suggest that the press does not refer merely to everyone's right to publish his or her speech."[146]

Another bit of textual evidence suggesting that the Press as Publication interpretation is flawed is the word "the" before "press."[147] A natural reading of the phrase "the press" suggests it is referring to some concept, group, or tangible thing rather than to the act of publishing.[148] Perhaps one could argue that the Press as Publication view still works with this understanding

143. West, *Awakening*, *supra* note 35, at 1035 ("The Court has repeatedly held that the freedom of speech also includes the freedom to have willing, and sometimes even unwilling, audience members receive the speech.").

144. *Id.* at 1033; *see also* Houchins v. KQED, Inc., 438 U.S. 1, 17 (1978) (Stewart, J., concurring) ("That the First Amendment speaks separately of freedom of speech and freedom of the press is no constitutional accident, but an acknowledgment of the critical role played by the press in American society. The Constitution requires sensitivity to that role, and to the special needs of the press in performing it effectively.").

145. *See infra* Part II.A.2 (defining the Press as Technology interpretation of the Press Clause and its shortcomings).

146. Sonja R. West, *The Stealth Press Clause*, 48 GA. L. REV. 729, 748 (2014) [hereinafter West, *Stealth*]. For a more in-depth discussion about the Supreme Court's implicit acceptance that "the press" has a special relationship with journalism, see generally *id.* at 736–49.

147. U.S. CONST. amend. I.

148. *See The*, MERRIAM-WEBSTER COLLEGIATE DICTIONARY (11th ed. 2003) ("[U]sed as a function word before a noun or a substantivized adjective to indicate reference to a group as a whole;" "used as a function word before a singular substantivized adjective to indicate an abstract idea;" or "used as a function word to indicate that a following noun or noun equivalent is definite"); *see also* West, *Stealth*, *supra* note 146, at 748–49 ("Often, in the same breath as it discusses the press, the Court will substitute words like 'newspapers,' 'magazines,' 'journalists,' 'newsmen,' or 'reporters.'" (footnotes omitted)).

because it is protecting the group of people who are publishing or disseminating information, not just the act of publishing, but that still leaves the Press Clause as a redundancy to the Speech Clause.[149] The presumption against surplusage suggests that the Press Clause ought to mean something significant since the Framers took time to draft and adopt it.[150] The Press as Publication interpretation, frankly, renders it insignificant and unimportant.

2. Press as Technology

Another interpretation of the Press Clause, Press as Technology, is similar to the Press as Publication interpretation. The Press as Technology interpretation posits that the original meaning of freedom of the press in the First Amendment referred to "the right of every person to use communications technology, and not just securing a right belonging exclusively to members of the publishing industry."[151] "The press" thus refers to "the printing *press* (and its modern equivalents) *as a technology*."[152]

As with the Press as Publication interpretation, supporters of the Press as Technology view primarily base their argument on the supposed original meaning of the Press Clause.[153] The practical effect of this interpretation seems essentially the same as the Press as Publication interpretation because protecting

149. *See supra* note 143 and accompanying text (describing how Supreme Court interpretations of the Speech Clause makes the Press as Publication interpretation superfluous).

150. *See* West, *Awakening*, *supra* note 35, at 1027–28 ("The result [of conflating the Press Clause and the Speech Clause] is exactly what Chief Justice Marshall warned against—a specific constitutional phrase that has been dismissed as 'mere surplusage.'" (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803))); *cf.* Tania N. Shah, *Statutory Interpretation: Synthesizing a Rule*, LAWTUTORS (July 30, 2019), https://lawtutors.net/synthesizing-a-rule-from-a-statute [https://perma.cc/9YJQ-HPZD] ("Rule against surplusage: [w]here one reading of a statute would make one or more parts of the statute redundant and another reading would avoid the redundancy, the other reading is preferred.").

151. 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) [hereinafter Volokh, *Press as a Technology*].

152. *Id.* at 462.

153. *See generally id.* at 463 ("Both sides in the debate often appeal at least partly to the constitutional text and its presumed original meaning.").

peoples' ability to use communications technology has the effect of protecting the subsequent dissemination.[154]

While the Press as Technology interpretation does comport with the natural reading of "the press" by referring to a tangible item, the printing press and "its modern equivalents,"[155] it does not escape the redundancy issue.[156] Practically, it gives the Press Clause the same meaning as the Speech Clause even if it is technically distinct. It also falls victim to the difficulty of determining the original meaning of the Press Clause.[157] Specifically, "protecting the use of press technology [when the First Amendment was drafted and ratified] was inextricably linked to press functions . . . [of] checking the government, and engaging in self-expression" because using the printing press was the primary way these functions were actualized.[158] Thus, the Framers had "no need to distinguish" Press as Technology from the hallmarks of journalism.[159]

Today, however, the Press as Technology interpretation and the journalism profession are not as neatly aligned.[160]

---

154. *See* West, *Awakening*, *supra* note 35, at 1035 ("A Press Clause that protects only the right of individuals to disseminate their speech is redundant. Some propose that the Press Clause protects a particular technology—the printing press. Again, however, this would suggest that the Speech Clause does not secure the rights to disseminate one's speech via a particular method. This is in conflict with the Court's interpretation of the Speech Clause." (citing Eugene Volokh, *Lessened Corporate First Amendment Rights and Media Corporations*, THE VOLOKH CONSPIRACY (Jan. 21, 2010), https://volokh.com/2010/01/21/lessened-corporate-first-amendment-rights-and-media-corporations [https://perma.cc/5X34-37UQ])).

155. *See supra* notes 147–48, 152, and accompanying text (providing a statutory interpretation of the phrase "the press").

156. *See supra* notes 143–44, 150, and accompanying text (showing the Supreme Court's construction of the Speech Clause renders certain interpretations of the Press Clause superfluous).

157. *See supra* notes 139–42, 146, and accompanying text (highlighting issues with originalist interpretations of the Press Clause); *see also* West, *Stealth*, *supra* note 146, at 747–48 ("Through the personification of the press, the Court is implicitly acknowledging that when it discusses the press, it is not referring solely to publishing technology.").

158. West, *Then & Now*, *supra* note 139, at 54.

159. *See id.* at 49. For more on an interpretation that centers around these press functions, see *infra* Part II.B.2.

160. *See* West, *Then & Now*, *supra* note 139, at 50 ("Today's advanced mass communication technologies, buoyed by our modern robust speech jurisprudence, provide individuals with extensive expressive channels. Modern

Communications technologies are nearly ubiquitous now, and most people do not use communications technologies for journalistic endeavors—particularly serving as a watchdog of the government—unlike how people used the printing press in eighteenth-century America.[161] Since the Press as Technology interpretation is plagued by some of the same deficiencies as the Press as Publication interpretation and by its own flaws, it is likewise unconvincing.

B. INTERPRETATIONS OF THE PRESS CLAUSE THAT GIVE IT INDEPENDENT SIGNIFICANCE

A framing of the Press Clause that focuses on journalistic practices ensures it is faithful to Founding Era ideals and gives the Press Clause a distinct role from the Speech Clause. Indeed, these values are evident in the Andrew Bradford quote that Chief Justice Burger used to support the Press as Publication interpretation.[162] In discussing "Freedom of the Press," Bradford centers his remarks on the need for public discourse about "Important Points of *Religion* and *Government*" and the laws of the land.[163] Seemingly, these central values motivated Bradford to write about the importance of freedom of the press. Without functional protections for those who share such "[i]mportant [p]oints" about the government with the public (i.e., journalists), what good would freedom of the press do in advancing the values of which Bradford spoke? This provides compelling support that the Press Clause is a vehicle for upholding and protecting journalistic values which have existed throughout the history of the United States and are crucial to the functioning of democracy and the prevention of tyranny.[164]

---

journalistic practices, meanwhile, fill a more dedicated and refined watchdog role. To be sure, some overlap still exists. Broad use of mass communication technology can lead to government scrutiny, and journalism has expressive qualities. But the primary uses of the two have diverged significantly since the late-1700s. An interpretation of the Press Clause that is faithful to the original goals of press freedom should reflect these modern realities.").

161. *See id.* at 90–98 (comparing the historical role of communications technologies to how they are used today).

162. *See* text accompanying *supra* note 138.

163. *See* text accompanying *supra* note 138.

164. *See* Josh Stearns & Christine Schmidt, *How We Know Journalism Is Good for Democracy*, DEMOCRACY FUND (Sept. 15, 2022), https://democracyfund.org/idea/how-we-know-journalism-is-good-for-democracy [https://perma.cc/

However, even those who accept that protecting journalism is at the heart of the Press Clause are debating an important question: who is covered by these protections—people who work for established news organizations or people who engage in certain press functions?

1. Press as Established Organizations

The Press as Established Organizations interpretation comes into conflict with the Press as Publication and Press as Technology interpretations because it does not extend Press Clause protections to the public at large. Under this interpretation, the Press Clause protects "the organized press . . . the daily newspapers and other established news media," as Justice Potter Stewart explained in 1974.[165]

In a speech at Yale Law School, Justice Stewart cited numerous Supreme Court cases to support his proposition that the

QND3-QTKB] ("At Democracy Fund, we see every day how local news strengthens democracy. People rely on local news to figure out who to vote for, how to speak up at school board meetings, how to run for local office, where to find vaccines, when to organize for change, and more. From daily reporting that equips people to act, to huge investigations that reveal corruption, the health of local news is bound up with the health of our democracy."); *Our Mission*, COMM. TO PROTECT JOURNALISTS, https://cpj.org/about/video [https://perma.cc/L2JS-F6B7] ("Violations of press freedom often occur in a broader context — including discrimination and oppression based on political beliefs, race, ethnicity, religion, gender identity, sexual orientation, and socio-economic standing."); Sarah Repucci, *Freedom and the Media 2019: Media Freedom: A Downward Spiral*, FREEDOM HOUSE (June 2019), https://freedomhouse.org/report/freedom-and-media/2019/media-freedom-downward-spiral [https://perma.cc/R246-HQVH] ("The erosion of press freedom is both a symptom of and a contributor to the breakdown of other democratic institutions and principles . . . ."); West, *Then & Now*, *supra* note 139, at 102 ("The historical evidence, however, suggests that members of the framing generation sought to protect press freedoms for additional reasons beyond a basic human right to self-expression. A crucial—indeed primary—goal was to strengthen the republic through the mechanisms of informed citizens and nongovernmental watchdogs. Today, it is largely journalists who carry out these informing and checking jobs.").

165. Potter Stewart, Assoc. Just., U.S. Sup. Ct., Or of the Press, Address at the Yale Law School Sesquicentennial Convocation (Nov. 2, 1974), *in* 26 HASTINGS L.J. 631, 631 (1975). This interpretation clearly fits with a natural reading of "the press" by referencing news organizations as groups. *See supra* notes 147–48 and accompanying text (showing why "the press" should be interpreted to mean a concept, group, or tangible thing, rather than a simple action like publishing).

Court has essentially accepted this institutional framing.[166] He also provided his own understanding of the Framers' motivations for including the Press Clause in the First Amendment:

> For centuries before our Revolution, the press in England had been licensed, censored, and bedeviled by prosecutions for seditious libel. The British Crown knew that a free press was not just a neutral vehicle for the balanced discussion of diverse ideas. Instead, the free press meant organized, expert scrutiny of government. The press was a conspiracy of the intellect, with the courage of numbers. This formidable check on official power was what the British Crown had feared—and what the American Founders decided to risk.[167]

Justice Stewart concluded, "[t]he publishing business is, in short, the only organized private business that is given explicit constitutional protection."[168]

One of the main critiques of this view is that it extends protections to certain corporations that are not extended to individuals outside of the industry.[169] As a historical matter, some argue that granting news organizations "a special right" does not make sense because the news industry and news organizations during the Founding Era were miniscule compared to now.[170]

---

166. Stewart, *supra* note 165, at 632–33 (citing Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971); Curtis Publ'g Co. v. Butts, 388 U.S. 130 (1967); N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964); Branzburg v. Hayes, 408 U.S. 665 (1972); N.Y. Times Co. v. United States, 403 U.S. 713 (1971) (per curiam); Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973); Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974)).

167. Stewart, *supra* note 165, at 634. Along with explaining the Press as Established Organizations interpretation, this segment of Justice Stewart's speech further underscores the futility of pursuing a purely originalist interpretation of the Press Clause as Justice Stewart provides yet another Founding-era understanding that comes into conflict with others discussed in this Note. *See, e.g.*, *supra* notes 138, 151–53, and accompanying text (setting forth varying and conflicting originalist interpretations of the Press Clause).

168. Stewart, *supra* note 165, at 633.

169. *See generally* Volokh, *Press as a Technology*, *supra* note 151 (asserting that the Framers' understanding of the Press Clause fell under the Press as a Technology interpretation and disavowing the Press as Established Organizations interpretation); Anthony Lewis, *A Preferred Position for Journalism?*, 7 HOFSTRA L. REV. 595 (1979) (criticizing Justice Stewart's address at Yale Law School).

170. Volokh, *Press as a Technology*, *supra* note 151, at 469 ("It seems unlikely that the Framers would have secured a special right limited to this small industry, an industry that included only part of the major contributors to public debate. This is especially so given that some of the most powerful and wealthy contributors, such as the politicians and planters who wrote so much of the

As a practical matter, Anthony Lewis, a two-time Pulitzer Prize winning journalist himself, feared that the Press as Established Organizations interpretation would undermine First Amendment protections for people who were not members of the press.[171] To underscore his opposition to the Press as Established Organizations view, Lewis wrote: "The Constitution protects values, not particular classes of people. And the values are not limited to those listed by name in the Constitution; if the significance of that eighteenth-century document were limited by such literalism, it would long since have become a museum piece."[172] Lewis's fear of diminished First Amendment protections for others in the face of strengthened protections for the press is dubious, particularly because the case he referenced to support this argument seemingly would not have turned out differently if newsgatherers were protected under the Press Clause.[173]

---

important published material, weren't part of the industry. Some eighteenth-century American political figures—such as the young Benjamin Franklin and Representative Matthew Lyon, one of the targets of a Sedition Act prosecution—were indeed newspapermen, but they were rare exceptions.").

171. *See* Lewis, *supra* note 169, at 609 ("The insistence that a particular class has special immunities under the first amendment is likely to suggest to judges that persons outside that class are of a lower order of constitutional concern.").

172. *Id.* at 608.

173. To illuminate his concerns, Lewis referred to the case of *United States v. Marchetti*, which involved Victor Marchetti, a former CIA official who sought to publish a book about his time in the CIA. United States v. Marchetti, 466 F.2d 1309, 1312–13 (4th Cir. 1972). The CIA sued to enjoin the publication because Marchetti had signed a "secrecy agreement" upon joining the agency. *Id.* at 1312. Lewis argued that "the journalist-centered view of the first amendment may well reduce the legal prospects of a Victor Marchetti." Lewis, *supra* note 169, at 609. However, it is hard to see how Marchetti's prospects could have been reduced any further considering he ultimately lost the case after the Fourth Circuit found the secrecy agreement to be an enforceable contract, a fact that Lewis himself notes. *Id.* at 608 n.89. Giving the Press Clause a meaning related to journalism could surely not have made Marchetti lose to some greater degree. *See id.*; *see also* Katharine Q. Seelye, *Victor Marchetti, 88, Dies; Book Was First to Be Censored by C.I.A.*, N.Y. TIMES (Oct. 31, 2018), https://www.nytimes.com/2018/10/31/obituaries/victor-marchetti-dead.html [https://perma.cc/SF2V-GR3X] ("Mr. Marchetti signed a contract when he joined the C.I.A. in 1955 pledging not to disclose classified information. The contract stipulated that any books or articles he wrote had to be cleared by the agency in advance."). It's also important to state that neither this Note nor any proponent of a journalism-based Press Clause that this Author has encountered advocate for reducing already established First Amendment protections enjoyed by individuals.

However, Lewis's values-based argument and the historical argument are fairly compelling.[174] It seems odd that the Press Clause would only apply to certain established organizations and their employees, particularly because of the personal nature of the other First Amendment freedoms and the Bill of Rights.[175] Yet, even accepting these arguments and conceding that the Press as Established Organizations interpretation seems flawed does not mean the Press Clause is unrelated to journalism. Perhaps, like the other freedoms in the First Amendment, the Press Clause could protect values and functions that any citizen can choose to engage in, including protecting the people's right to engage in newsgathering.[176]

Consider each of the First Amendment's "five freedoms" (speech, religion, assembly, petition, and press).[177] Individuals can choose to speak or to abstain from speaking. They can choose to exercise any religion or no religion at all. They can choose to assemble with others or not. They can choose to petition the government or set whatever grievances they have aside. Each of these freedoms comes with attendant protections guaranteed by

174. This Note takes issue with the phrases "special right" and "special immunities." *See supra* notes 170–71 and accompanying text (discussing critiques of a journalism-centric Press Clause that use these phrases). More accurately, constitutional protections ought to be crafted to fit the particular situation at issue and to best uphold the constitutional values at stake. Regarding the Press Clause, protections related to journalism best support the core values at the heart of that clause.

175. *See, e.g.*, *The Bill of Rights: What Does It Say?*, NAT'L ARCHIVES, https://www.archives.gov/founding-docs/bill-of-rights/what-does-it-say [https://perma.cc/6MYE-F3V2] (last updated Apr. 27, 2023) ("The Bill of Rights is the first 10 Amendments to the Constitution. It spells out Americans' rights in relation to their government. It guarantees civil rights and liberties to the individual—like freedom of speech, press, and religion."). *But see* Citizens United v. FEC, 558 U.S. 310 (2010) (granting corporations the right to make "independent expenditures" for "corporate political speech" under the First Amendment).

176. *See infra* Part II.B.2 (explaining the Press as a Function interpretation).

177. *See, e.g.*, Christian Cotz, *Five Freedoms Empower Individualism, Allow Fringes of Society to Flourish – for Good or Ill*, FIRST AMEND. MUSEUM (Dec. 15, 2021), https://firstamendmentmuseum.org/the-five-freedoms-empower-our-individualism-and-allow-the-fringes-of-society-to-flourish-for-good-or-ill [https://perma.cc/99HG-SCNV] (setting forth the five freedoms contained within the First Amendment).

the courts (albeit not absolute protections),[178] so why shouldn't the courts craft constitutional protections ensuring people can choose to act as the press in certain situations?

Indeed, an additional critique of the Press as Established Organizations interpretation is that it either does not account for independent and freelance newsgatherers, or simply does not consider such individuals to be members of "the press."[179] This seems particularly troublesome given the growing importance of such independent newsgatherers to the entire field of journalism.[180] Moreover, determining what qualifies as "established" enough to receive protections would lead to arbitrary

178. *See, e.g.*, *Permissible Restrictions on Expression*, BRITANNICA, https://www.britannica.com/topic/First-Amendment/Permissible-restrictions-on-expression [https://perma.cc/H6Q4-ZJCK] (last updated Sept. 29, 2023) ("Despite the broad freedom of expression guaranteed by the First Amendment, there are some historically rooted exceptions.").

179. *See* West, *Awakening*, *supra* note 35, at 1053.

180. While there are no readily available statistics for the number of freelance journalists working in the United States, the United Kingdom's Office for National Statistics' Annual Population Survey identified nearly 32,000 freelance journalists in 2019—up from around 21,000 in 2010. Although the Society of Freelance Journalists says that these numbers are likely inaccurate, they still suggest that the number of freelance journalists is growing. *See* Soc'y of Freelance Journalists, *Society of Freelance Journalists—Written Evidence (FOJ0100)*, U.K. PARLIAMENT 2 (July 2020), https://committees.parliament.uk/writtenevidence/8921/pdf [https://perma.cc/5NCV-5S8Y]; *see also* Emily Tomasik & Jeffrey Gottfried, *U.S. Journalists' Beats Vary Widely by Gender and Other Factors*, PEW RSCH. CTR. (Apr. 4, 2023), https://www.pewresearch.org/short-reads/2023/04/04/us-journalists-beats-vary-widely-by-gender-and-other-factors [https://perma.cc/LN5K-828G] (noting that there is no readily available list of all U.S. journalists but that "about a third of the reporting journalists surveyed (34%) indicated that they are freelance or self-employed"). The trend is likely similar in the United States, especially as journalists are continuously laid off and local news organizations are shuttered. *See, e.g.*, Lauren Aratani, *Concern as US Media Hit with Wave of Layoffs amid Rise of Disinformation*, GUARDIAN (Dec. 10, 2022), https://www.theguardian.com/media/2022/dec/10/media-layoffs-cnn-buzzfeed-gannett-recount-protocol [https://perma.cc/E8XT-KQ8G] ("[T]he media industry has experienced waves of layoffs over the last decade, with newsroom employment falling 26% since 2008 . . . ."); Sara Fischer, *The Local News Crisis Is Deepening America's Divides*, AXIOS (July 4, 2022), https://www.axios.com/2022/07/04/local-newspapers-news-deserts [https://perma.cc/RR4T-N9RH] ("Around two newspapers in the U.S. are closing every week, according to a new report, suggesting the local news crisis spurred by the pandemic will worsen in coming years.").

distinctions between organizations.[181] The Press as a Function interpretation seems to address many critiques of the other interpretations discussed in this Part.

2. Press as a Function

The Press as a Function interpretation essentially posits, "it is not who you are that makes you a member of the press, but rather what you do."[182]

To determine what journalistic actions should be protected under the Press Clause, it is necessary to consider the Clause's underlying values. One proponent identifies "two primary constitutional functions of the *press qua press* [based on Supreme Court cases]: (1) gathering and disseminating news to the public and (2) providing a check on the government and the powerful."[183] Another points to colonial and early American sources as establishing that "press freedom was viewed as being closely related to the experiment of representative self-government" and that the Press Clause "provided a necessary restraint on what the patriots viewed as government's natural tendency toward tyranny and despotism."[184] Thus, Press Clause protections would extend to people who act as newsgatherers and check the power of the government and other influential actors in a given situation.

Before discussing any specific protections for journalists that could be adopted under the Press Clause, it's worthwhile to compare the Press as a Function interpretation to the others included in this Note.

The Press as a Function interpretation puts forth a meaning that is both a plausible reading of historical evidence (unlike Press as Established Organizations)[185] and that takes into account developments since the ratification of the Bill of Rights

---

181. For example, would a news organization be considered "established" based on the amount of time the organization has been operating, based on its circulation and audience size, or based on some measure of its credibility and reputation? Would the *New York Times* be considered "established" but a small-town paper would not?

182. West, *Awakening*, *supra* note 35, at 1054.

183. West, *Stealth*, *supra* note 146, at 750.

184. Anderson, *Origins*, *supra* note 140, at 533.

185. *See supra* notes 162–64, 170, 174–75, 184, and accompanying text (describing the shortcomings of the Press as Established Organizations interpretation).

(unlike Press as Publication and Press as Technology).[186] It does not suffer from the redundancy issues that undermine Press as Publication and Press as Technology because it gives the Press Clause a meaning that does not duplicate the Speech Clause—providing protections for newsgathering and not just for disseminating information.[187] Press as a Function, properly defined, is more faithful to the current state of journalism than Press as Established Organizations because, regardless of the specific functions, Press as a Function extends beyond Press as Established Organizations by covering independent newsgatherers and journalists working for less-prominent organizations.[188] In this way, Press as a Function also better reflects the values the Framers wanted to preserve than Press as Established Organizations because Press as a Function focuses more on what the individual is doing than what company they work for.[189]

As for the natural reading of "the press," the Press as a Function interpretation works better than the Press as Publication interpretation because viewing "the press" as the group of people engaged in newsgathering does not render the Press Clause superfluous—unlike viewing "the press" as the group of people publishing or disseminating information.[190] The former

186. *See supra* notes 139–46, 158–61, and accompanying text (describing the originalism bias of the Press as Publication and Press as Technology interpretations).

187. *See supra* notes 143–44, 149–50, 156–57, and accompanying text (arguing the Press Clause should be interpreted so as not to render it superfluous to the Speech Clause).

188. *See supra* note 180 and accompanying text. Perhaps in certain circumstances whether a journalist works for an established news organization (however that is ultimately defined) can be a factor strongly suggesting they fall under Press Clause protection. Take the White House Press Briefings, for example. For practical reasons (like understandable safety concerns and the sheer limitation on space), it may make sense to restrict access to journalists who work for established news organizations and not open these briefings up to anyone exercising press functions. But the Press Clause should not be limited to such journalists in every single situation. Using the Press as a Function interpretation allows the Court to determine the appropriateness and scope of press protections on a case-by-case basis.

189. *See supra* notes 162–64, 184, and accompanying text (discussing Founding Era values and the relationship between the Press Clause and individual rights).

190. *See supra* notes 147–50 and accompanying text (arguing for a construction of "the press" that includes groups of people engaged in newsgathering rather than publishing in general).

group is not currently covered by Speech Clause protections while the latter group is.[191]

Altogether, the Press as a Function interpretation provides a more airtight explanation of the Press Clause, marrying America's historical values with its modern realities.

A major criticism of the Press as a Function is that it is difficult to pinpoint what functions qualify as press functions and thus make someone a journalist.[192] Even those who favor the Press as a Function interpretation have differing views as to who qualifies as a journalist.[193] However, as others have argued, this difficulty does not justify completely abandoning any effort to give the press protections under the Press Clause.[194]

Supporters of the Press as a Function interpretation should embrace Justice William Douglas's position that "First Amendment principles must always be applied 'in light of the special characteristics of the . . . environment'"[195] to ensure that courts can tailor Press Clause protections appropriately to the wide

---

191. *See supra* notes 147–50 and accompanying text (arguing the Press as Publication view renders the Press Clause as a redundancy to the Speech Clause).

192. West, *Awakening*, *supra* note 35, at 1029 ("The myriad problems with determining who is or is not the press have been called 'definitional monsters,' 'difficult and vexing,' and 'painful.'" (first quoting Garcia v. Bd. Of Educ., 777 F.2d 1403, 1411 (10th Cir. 1985); then quoting *In re* Grand Jury Subpoena, Judith Miller, 438 F.3d 1141, 1156 (D.C. Cir. 2006); and then quoting Floyd Abrams, *The Press* Is *Different: Reflections on Justice Stewart and the Autonomous Press*, 7 HOFSTRA L. REV. 563, 572 (1979))).

193. *Compare* Robert D. Sack, *Reflections on the Wrong Question: Special Constitutional Privilege for the Institutional Press*, 7 HOFSTRA L. REV. 629, 629 (1979) ("Even if the 'institutional press' as such is not separately protected under the first amendment, all citizens exercising the press *function,* including, but not limited to, journalists employed by the 'institutional press,' warrant such protection."), *with* Sonja R. West, *Press Exceptionalism*, 127 HARV. L. REV. 2434, 2456 (2014) ("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.").

194. *E.g.*, West, *Awakening*, *supra* note 35, at 1048 ("While there is no doubt that defining the 'press' is not an easy task, the difficulty of the challenge should not be an excuse to avoid the question altogether. The Constitution demands that the Court take on a range of abstract and complicated issues, and numerous constitutional phrases function sufficiently despite a cloud of ambiguity.").

195. *See* Pell v. Procunier, 417 U.S. 817, 837 (1973) (Douglas, J., dissenting) (first quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969); then citing Healy v. James, 408 U.S. 169, 180 (1972)).

scope of scenarios journalists find themselves in.[196] As a threshold matter, though, those who support the functional view seem to agree that two traditional press roles should guide the search for Press Clause protections: informing the public and acting as a watchdog.[197]

Courts may be reluctant to expend already-strained resources to determine who qualifies as "the press" under such a nuanced approach.[198] However, if courts accept the premise that the Press Clause deserves independent significance (as they should),[199] then necessarily courts would need to determine who or what falls into the Clause's scope whether they followed the Press as Established Organizations interpretation or the Press as a Function interpretation. Because of the arguments laid out above, the Press Clause should be interpreted independently, and Press as a Function is the more appropriate interpretation. Therefore, concerns about court resources do not justify continuing to kick the Press Clause can down the road.

III. PRESS AS A FUNCTION IN ACTION: THE PROTEST CONTEXT

There is not one definition of "journalist" that will adequately account for every set of facts, nor is there any fixed set of protections that will adequately support the spirit of the Press

196. *See* Anderson, *Freedom of the Press*, *supra* note 35, at 524–25 ("[T]he Press Clause is an important potential weapon. Precisely what it should be interpreted to require when the occasion arises should be worked out incrementally, case-by-case, cautiously.").

197. *See, e.g.*, sources cited *supra* notes 183–84 and accompanying text (describing the press's role as "disseminating news to the public" and as providing "a necessary restraint" on governments); *see also* Tyler Valeska, *A Press Clause Right to Cover Protests*, 65 WASH. U. J.L. & POL'Y 151, 161–63 (2021) (describing the press's main roles as "Information Dissemination" and "Checking Governmental Behavior").

198. *See, e.g.*, Deanna Weniger, *Minnesota Courts Grapple with Seating Juries, Backlog amid COVID Pandemic*, PIONEER PRESS (Jan. 9, 2022), https://www.twincities.com/2022/01/09/minnesota-courts-grapple-with-seating-juries-backlog-amid-covid-pandemic [https://perma.cc/N342-ASQ2] ("The pandemic has significantly affected the Minnesota Judicial Branch. Judges, prosecutors, public defenders, victims, offenders, witnesses, jail personnel and jurors are all at risk to contract COVID. It's also created a case backlog, further burdening court schedules.").

199. *See generally* introductory discussion *supra* Part II.B (arguing for an interpretation of the Press Clause that gives it meaning apart from the Speech Clause).

Clause no matter the circumstances. Thus, it is more helpful to look at contemporary legal issues involving journalists to determine what protections are warranted in each setting. Given its relevance in recent years, the protest context provides fertile ground for cultivating Press Clause protections. Indeed, others who recognize the contemporary importance of protest journalism have proposed such protections under the Press Clause as well.[200]

Part III proceeds by explaining why Press Clause protections are particularly important in the protest context and by applying the Press as a Function interpretation discussed above. It then considers how law enforcement can identify journalists at protests to ensure any potential Press Clause protections exempting journalists from dispersal orders, curfews, and other law enforcement actions are respected.

A. THE PARTICULAR IMPORTANCE OF AN INDEPENDENTLY SIGNIFICANT PRESS CLAUSE IN THE PROTEST CONTEXT

As a matter of constitutional interpretation, the relative strengths and weaknesses of various Press Clause definitions outlined above show that the Press as a Function interpretation has ample support.[201] But the real-life impact of broadening protections under the Press Clause—beyond the scope of the Speech Clause—is arguably more persuasive than any theoretical debate about the proper definition of "the press." Giving the Press Clause teeth would protect newsgatherers, allow them to better inform the public, and ensure they can hold powerful actors accountable.

At a protest, there is a unique mix of First Amendment interests at play. The protesters enjoy protections under the First Amendment's freedom of speech, right to assemble, and right to petition the government.[202] These protections are not absolute, and law enforcement may intrude upon them in certain

200. *See* Valeska, *supra* note 197, at 158–66 (arguing for a Press Clause right for journalists to cover protests).

201. *See generally supra* Part II.B.2 (comparing competing Press Clause interpretations to the Press as a Function interpretation).

202. *See, e.g.*, Edwards v. South Carolina, 372 U.S. 229, 235 (1963) (holding that "South Carolina infringed the petitioners' constitutionally protected rights of free speech, free assembly, and freedom to petition for redress of their grievances" when it arrested 187 Black high school and college students who were peacefully protesting segregation).

circumstances, including to "break up violent protests and arrest participants who engage in violence or property destruction," arrest people who disregard orders to disperse when law enforcement declares that a protest is "an unlawful assembly," and arrest people for violating curfews.[203] Journalists covering protests are fulfilling both their public information role, by covering the protest as an event, and their watchdog role, by documenting law enforcement involvement.

Yet, without an independently significant Press Clause, the journalists' roles are afforded no protection, unless the jurisdiction has otherwise established them.[204] This means law enforcement can generally arrest journalists along with other members of the public at protests upon issuing orders to disperse and under curfews, significantly impairing journalists' ability to keep the public informed about the protest and the police.[205] While journalists can still document their observations after being arrested or detained at a protest, the process of being arrested or detained, by its very nature, restricts journalists from being able to freely monitor what is happening. Other law enforcement actions, such as the use of rubber bullets and pepper spray, also greatly impair a journalist's ability to function.[206]

Additionally, it seems law enforcement targeted journalists through arrests and assaults as a tactic in recent years,

---

203. E.A. Gjelten, *What Can the Police Arrest You for at a Protest?*, NOLO: CRIM. DEF. LAW., https://www.criminaldefenselawyer.com/resources/what-can-the-police-arrest-you-for-at-a-protest.html [https://perma.cc/83SK-X8EB] (last updated June 1, 2021).

204. *See* sources cited *supra* notes 24–27 and accompanying text (discussing local solutions for journalist protection).

205. The DOJ investigation, however, embraces the position advanced by this Note that journalists should be exempt from dispersal orders and curfews. *See DOJ Investigation*, *supra* note 8, at 52 ("The First Amendment requires that any restrictions on when, where, and how reporters gather information 'leave open ample alternative channels' for gathering the news. Blanket enforcement of dispersal orders and curfews against press violates this principle because they foreclose the press from reporting about what happens after the dispersal or curfew is issued, including how police enforce those orders." (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984))).

206. *See, e.g.*, Verges, *supra* note 7 (reporting that a Minneapolis journalist was permanently blinded in her left eye by a foam bullet); McGroarty, *supra* note 7 (reporting that after a Des Moines journalist was "soaked" with pepper spray, she had to "strip and shower in front of female officers because [she] was in so much pain").

particularly 2020.[207] The Reporters Committee for Freedom of the Press compiled a press freedom report for 2020 documenting 438 physical attacks on journalists—80% of which were committed by law enforcement officers with almost 200 of the law enforcement attacks appearing deliberate.[208] The report also documented 139 arrests or criminal charges against journalists.[209] There were eleven times more attacks on journalists in 2020 than in 2019 and fifteen times more arrests.[210]

Consider all the videos, photos, and articles from protests in recent years showing the actions of protesters and police,[211] and imagine how much more footage and documentation may exist if

---

207. *See, e.g.*, McGroarty, *supra* note 7 ("For [Katherine Jacobsen, United States and Canada regional program director for the Committee to Protect Journalists], the issue has been getting worse in recent years and reaches far deeper than simply a lack of education. 'There's no better way to control coverage than to make sure that it's not possible to cover something safely in the first place,' she said."); *see also* sources cited *supra* notes 3–7 and accompanying text (discussing the increase in law enforcement violence against journalists in recent years); *Ninth Circuit Reinstates Injunction Barring Federal Agents from Assaulting Journalists*, FIRST AMEND. WATCH AT N.Y. UNIV. (Oct. 13, 2020) [hereinafter *Ninth Circuit Reinstates*], https://firstamendmentwatch.org/ninth-circuit-reinstates-injunction-barring-federal-agents-from-assaulting-journalists [https://perma.cc/5SJ9-R93K] ("In a 2-[1] decision issued on October 9th, a three-judge panel for the Ninth Circuit reinstated the lower court's injunction, citing 'numerous instances' in which agents appeared to deliberately target journalists. 'Despite the Federal Defendants' assertion that all of their officers and agents are adequately trained, the district court found numerous instances in which Federal Defendants shot munitions directly at journalists' and legal observers' chests, arms, backs, and heads while they were standing entirely apart from the protesters,' the court wrote.").

208. *See* McGroarty, *supra* note 7 ("The report identified that journalists faced 438 physical attacks in 2020 in the U.S. alone, more than 90% of which occurred as they reported on the nationwide racial justice protests. Police officers were responsible for 80% of these attacks, affecting 324 journalists. Nearly 200 of them appeared to be deliberately targeted by police, according to the Reporters Committee's 2020 Press Freedom report."); Sarah Matthews et al., *Press Freedoms in the United States 2020: A Review of the U.S. Press Freedom Tracker*, REPS. COMM. FOR FREEDOM OF THE PRESS 4–5, 8 (May 2021), https://www.rcfp.org/wp-content/uploads/2021/05/Press-Freedom-Tracker-2020_FINAL.pdf [https://perma.cc/SP8J-XC4S] (describing the frequency and nature of law enforcement attacks, many of which appeared deliberate).

209. Matthews et al., *supra* note 208, at 8.

210. *Id.* at 4.

211. *See, e.g.*, *George Floyd Protests: What Our Reporters Saw Around the Country*, N.Y. TIMES (June 9, 2020), https://www.nytimes.com/live/2020/george-floyd-protests-today-06-01 [https://perma.cc/Q35M-2FY5] (compiling various articles, videos, and images from George Floyd protests).

police had not targeted journalists at such astronomical levels. This information was inarguably vital to keeping the public informed and checking the power of the government vis-à-vis law enforcement. If the Press Clause provided protections beyond the Speech Clause, the picture of what occurred in these recent years of unrest may have been even clearer.

While 2020 remains the peak of law enforcement interference with the press, tensions between the two have persisted and journalists continue to be subject to law enforcement overreach.[212] Additionally, protests could ramp back up at any point, and there is no guarantee law enforcement will treat journalists any better amid another wave of societal unrest.

This is a particular concern in jurisdictions without ongoing legislative protections for journalists covering protests,[213] including Minneapolis and Portland. In those two jurisdictions, courts responded to law enforcement targeting of journalists by issuing temporary injunctions prohibiting certain law enforcement agencies from arresting or using force against "any person whom they know or reasonably should know is a Journalist"[214] and exempting journalists from dispersal orders.[215] These

212. *See, e.g.*, Kio Herrera, *More than 50 Journalists Arrested or Detained While on the Job in the US in 2021*, U.S. PRESS FREEDOM TRACKER (Nov. 22, 2021), https://pressfreedomtracker.us/blog/arrests-of-journalists-remain-a-threat-to-a-free-press [https://perma.cc/L2Z4-CCCT] (comparing the number of arrests of journalists in 2021 with previous years); Stephanie Sugars, *In 2022, 15 Journalists Arrested; More Face Charges*, U.S. PRESS FREEDOM TRACKER, https://pressfreedomtracker.us/blog/in-2022-a-dozen-journalists-arrested-more-face-charges [https://perma.cc/JN5D-G7KJ] (last updated Jan. 5, 2023) (describing the arrest and detention of journalists covering protests over reproductive rights in the summer of 2022); Deb Gruver, *KBI Takes Over*, MARION CNTY. REC., http://marionrecord.com/direct/seized_but_not_silenced_kbi_takes_over+5448kbi+5345495a45442e2e2e425554204e4f542053494c454e4345443a204b42492074616b6573206f766572 [https://perma.cc/5W5R-DQPU] (last updated Aug. 17, 2023) (describing police raids on the Marion County Record's newsroom and the home of Joan Meyer, the Record's 98-year-old co-owner, who died the next day).

213. *See, e.g.*, City News Serv., *supra* note 24 (discussing California's new legislative protections for journalists covering protests).

214. Index Newspapers LLC v. City of Portland (*Index Newspapers II*), 480 F. Supp. 3d 1120, 1155–56 (D. Or. 2020).

215. Index Newspapers LLC v. City of Portland (*Index Newspapers I*), 474 F. Supp. 3d 1113, 1126 (D. Or. 2020) (issuing temporary restraining order preventing enforcement officers from requiring Journalists or Legal Observers to disperse upon issuance of a dispersal order); Goyette v. City of Minneapolis, 338 F.R.D. 109, 121 (D. Minn. 2021) (same).

injunctions were both initially set to expire just fourteen days after they were entered.[216] After a settlement between the parties in Minnesota, the District Court for the District of Minnesota "convert[ed] the preliminary injunction into a monitored six-year injunction," which is set to expire in 2028.[217] While this extension and the terms of the settlement are considerable,[218] it still includes an expiration date and only applies to Minnesota State Patrol.[219] Oregon's injunction was initially entered in July 2020 and extended in August 2020.[220] After a temporary stay by the Ninth Circuit, it was reinstated in October 2020.[221] Such reactionary temporary orders fall well short of providing the necessary assurances that the law will protect the operation of a free press on an ongoing basis.

Moreover, law enforcement officers do not always respect these injunctions. In the days after the Oregon injunction was ordered, the American Civil Liberties Union of Oregon alleged multiple violations of the order and asked the court to find federal agents in contempt of the court.[222] A similar situation

---

216. *Index Newspapers I*, 474 F. Supp. 3d at 1127 ("This Order shall expire fourteen (14) days after entry . . . ."); *Goyette*, 338 F.R.D. at 122 (same).

217. Goyette v. City of Minneapolis, No. 20-cv-1302, 2022 U.S. Dist. LEXIS 22478, at *3 (D. Minn. Feb. 8, 2022).

218. *See* Press Release, ACLU of Minn., ACLU-MN Wins $825,000 Settlement, Reforms to End Minnesota State Patrol Attacks on Journalists (Feb. 8, 2022), https://www.aclu-mn.org/en/press-releases/goyettesettlement [https://perma.cc/DQ94-KC6U] (listing terms of the "ground-breaking injunction" in the settlement).

219. *See id.* ("The settlement only resolves the case against [the Minnesota State Patrol]. The allegations of law enforcement violating journalists' rights continue against the City of Minneapolis, former Police Chief Medaria Arradondo, former Minneapolis Police union head Robert Kroll, and the Hennepin County Sheriff.").

220. *See Ninth Circuit Lifts Injunction Exempting Journalists and Legal Observers from Dispersal Orders*, FIRST AMEND. WATCH AT N.Y. UNIV. (Sept. 1, 2020), https://firstamendmentwatch.org/ninth-circuit-lifts-injunction-exempting-journalists-and-legal-observers-from-dispersal-orders [https://perma.cc/2RDD-4GVY] ("On August 20th, [Judge] Simon extended the order and added other provisions including a requirement that all federal agents wear identifying markings.").

221. *Ninth Circuit Reinstates*, *supra* note 207.

222. *See* Tess Riski, *ACLU Asks Judge to Find Federal Agents in Portland in Contempt of Court for Violating Order*, WILLAMETTE WK. (July 28, 2020), https://www.wweek.com/news/courts/2020/07/28/aclu-asks-judge-to-find-federal-agents-in-portland-in-contempt-of-court-for-violating-order [https://

occurred in Brooklyn Center, Minnesota, the site of protests in the wake of the police killing of Daunte Wright.[223] Journalists there reported that police violated a judicial injunction prohibiting them from arresting or using force against journalists.[224] Officers reportedly punched one journalist and ripped off his press pass before kneeling on him and "smash[ing] his head into the ground," and "spray[ed] chemical irritants" at others while checking their press credentials.[225] Thus, some law enforcement officers are seemingly not deterred by such temporary injunctions.[226]

Unlike a patchwork of legislation and temporary injunctions, Supreme Court–established constitutional protections under the Press Clause would have the benefit of applying across all jurisdictions in the United States, and may serve as a better deterrent given the weight accorded to constitutional rights. Additionally, once established, the constitutional protections could preclude law enforcement from claiming qualified immunity.[227]

The Press as a Function interpretation would enable the courts to establish constitutional protections for journalists covering protests. Specifically, the courts could model Press Clause protections after the Oregon and Minnesota injunctions,

---

perma.cc/2Z4Z-7QWQ] ("'Every day it has existed, federal agents have intentionally violated the court's [order],' the court filing says. 'As a result of the federal agents' defiance of the court's order, the free press remains unsafe while trying to document and observe the cataclysmic violence that federal authorities are inflicting on Portland.'" (alteration in original)).

223. *See* Todd Richmond, *Journalists Allege Police Harassment at Minnesota Protests*, ASSOCIATED PRESS (Apr. 17, 2021), https://apnews.com/article/death-of-daunte-wright-shootings-journalists-minnesota-minneapolis-2f567f3c306d99ed146a6acb43c587a2 [https://perma.cc/7PFK-CB7A] (providing anecdotal evidence from journalists suggesting the temporary restraining order did not prevent violence against journalists from law enforcement officials).

224. *Id.*

225. *Id.*

226. *See also DOJ Investigation*, *supra* note 8, at 52 (noting that MPD ignored the journalist exemption in the Minnesota curfew).

227. *See* Index Newspapers LLC v. City of Portland (*Index Newspapers I*), 474 F. Supp. 3d 1113, 1127 (D. Or. 2020) (stating that, under the injunction entered, "the Court considers any willful violation of this Order, or any express direction by a supervisor or commander to disregard or violate this Order, to be a violation of a clearly established constitutional right and thus not subject to qualified immunity in any action brought against any individual employee, officer, or agent of the Federal Defendants under *Bivens*" (citing Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971))). It is unclear if this will remain the case in the absence of the injunction.

requiring mandatory press exemptions from dispersal orders and curfews, and prohibiting law enforcement from arresting or using force against journalists unless they are otherwise engaged in unlawful activity.[228] This would ensure journalists are able to continue gathering the news and watching law enforcement at the most volatile moments of protests, when it is arguably most important for someone to document the events. If the Supreme Court determines that the Press Clause establishes these protections for journalists at protests, it then becomes necessary to determine how journalists will be identified at protests.

B. HOW TO SPOT THE PRESS AT PROTESTS

Tyler Valeska, a fellow and lecturer at Stanford Law School, proposes two ways to identify the press at protests: officer discretion, subject to a reasonableness standard, and governmental credentialing.[229] Valeska weighs the relative pros and cons, concluding that "[n]either option is a perfect solution" but that both are "preferable to the status quo."[230] While that is true, the potential pitfalls of a government credentialing system make it a far less preferable option.[231] Moreover, rather than frame the alternative as "officer discretion," which raises red flags since many journalists were seemingly targeted by law enforcement *because* they were press,[232] a better framing might be "totality of the circumstances."[233]

---

228. *See id.* at 1126–27 (imposing such protections in Oregon); Goyette v. City of Minneapolis, No. 20-cv-1302, 2022 U.S. Dist. LEXIS 22478, at *8–11 (D. Minn. Feb 8, 2022) (imposing same in Minnesota).

229. Valeska, *supra* note 197, at 169–75 (outlining such proposals).

230. *Id.* at 175.

231. *See infra* Part III.B.1 (exploring a government credentials identification system for press, and how that is not ideal in the protest context).

232. *See supra* notes 207–10 and accompanying text (detailing journalist experiences where they were seemingly targeted by law enforcement).

233. Totality of the circumstances is a "standard that considers all of the relevant facts and circumstances, rather than a few specific factors." *Totality-of-the-Circumstances Test*, QUIMBEE, https://www.quimbee.com/keyterms/totality-of-the-circumstances-test [https://perma.cc/KX3U-3HFJ].

1. Government Credentials Are Inappropriate for the Protest Context

Several jurisdictions already offer press credentialing services.[234] The government-issued press credentials enable journalists to engage in certain newsgathering activities, such as "cross police, fire lines, or other restrictions, limitations or barriers established by the City government at emergency, spot, or breaking news events and non-emergency public events."[235] Press credentials may be issued by law enforcement or by another governmental entity. For instance, in Los Angeles, both the Sheriff's Department and the Police Department issue press credentials.[236] In New York City, the City Council recently transferred press credentialing from the New York Police Department to the Mayor's Office of Media and Entertainment.[237]

The primary benefit of a credentialing system is that it makes it easier to determine who is entitled to press protections—either you have the government credential, or you do not.[238] While these credentials may be beneficial in certain circumstances, such as planned or limited capacity events, they are not appropriate for determining who gets press protections in the protest context.

The idea of empowering the government, and especially law enforcement, to certify who is and is not a protected member of the press at protests is problematic to say the least, particularly because many recent protests have been critical of law enforcement and the government. Indeed, one of the reasons the City Council took press credentialing out of the hands of the NYPD

234. *See, e.g.*, *NYC Press Credentials*, N.Y.C. MEDIA & ENT., https://www.nyc.gov/site/mome/press-card/press-card.page [https://perma.cc/9A4U-5S58] (describing press credentials issued by New York City).

235. *Id.*

236. *Press Pass Portal*, L.A. CNTY. SHERIFF'S DEP'T, https://lasd.org/press-pass [https://perma.cc/PD3N-HFTR] (outlining online application process); *Media/Press Pass Policy*, L.A. POLICE DEP'T, https://www.lapdonline.org/public-communications-group/media-relations-division/press-pass-policy [https://perma.cc/SB8P-HJNZ] (same).

237. *See* Christopher Robbins, *The Mayor's Office—Not the NYPD—Will Now Issue NYC Press Credentials*, GOTHAMIST (Mar. 27, 2021), https://gothamist.com/news/the-mayors-officenot-the-nypdwill-now-issue-nyc-press-credentials [https://perma.cc/FU7Y-PXG8]; *see also NYC Press Credentials*, *supra* note 234 (outlining the rules of the newly created Press Credentials Office).

238. *See* Valeska, *supra* note 197, at 173 ("A credential application process would remove concerns about chaotic, on-the-spot determinations.").

seems to be because "journalists [had] no due process rights when the NYPD suspend[ed] or revoke[d] their press card, and . . . [some] had their press cards taken by NYPD officers on the street."[239] However, moving that service to the Mayor's Office has not assuaged all concerns, since the Mayor's Office cares about its image in the press as well.[240]

Furthermore, having the government handle press credentialing raises the risk of partisanship. For instance, in a liberal jurisdiction, would *Fox News* reporters be granted credentials to cover protests?[241] And on the flip side, in a conservative jurisdiction, would *MSNBC* reporters be granted credentials? While not in the protest context, the Trump Administration's revocation of press passes highlights exactly what can happen if a politician or government entity decides it does not like a journalist's coverage and has the power to exclude that journalist.[242]

Valeska recognizes these issues and says, "[i]f such a system is required, credentialing should be done by an independent board or agency not directly accountable to police or related political officials."[243] While this would be preferable to either law enforcement or an explicitly political body handling credentialing, even independent bodies that derive their powers from the

239. Robbins, *supra* note 237.

240. *See id.* ("'The mayor's office is not independent and neutral, they generally like favorable press,' [civil rights attorney Norman] Siegel said, adding that his preference would have been Department of Consumer and Worker Protection. Still, he called the bill 'a step in the right direction.'").

241. Especially in light of recent revelations that *Fox News* perpetuated election lies on air while key figures privately acknowledged the 2020 presidential election was legitimate, it is important to state that this Note is not holding *Fox News* out as a reputable source of news. *See* Randall Chase, *Murdoch Acknowledges Some Fox Hosts 'Endorsed' False Election Claims*, PBS: NEWS HOUR (Feb. 28, 2023), https://www.pbs.org/newshour/nation/murdoch-acknowledges-some-fox-hosts-endorsed-false-election-claims [https://perma.cc/NVG3-3BTC]. Nevertheless, a *Fox News* reporter at a protest exercising press functions should be afforded Press Clause protections.

242. *See* Mathew Ingram, *White House Revokes Press Passes for Dozens of Journalists*, COLUM. JOURNALISM REV.: MEDIA TODAY (May 9, 2019), https://www.cjr.org/the_media_today/white-house-press-passes.php [https://perma.cc/T6Q5-CKVJ] ("The *Post* applied for and was granted exceptions for its White House correspondents, [*Washington Post* columnist Dana] Milbank says, but he was not given one. 'I strongly suspect it's because I'm a Trump critic . . . . The move is perfectly in line with Trump's banning of certain news organizations, including The Post, from his campaign events and his threats to revoke White House credentials of journalists he doesn't like.'").

243. Valeska, *supra* note 197, at 174.

government can be subject to political pressures as they operate at the mercy of the government.[244] There would almost certainly be no way to fully insulate a government body in charge of press credentialing from politics or the appearance of political bias.

A government credentialing system would also be inefficient. Protests often occur spur of the moment, meaning an uncredentialed journalist or a journalist who is waiting for their credentials to be issued may not be entitled to press protections if a protest arises suddenly and they want to cover it.[245] Even a journalist who has a press pass may misplace it on accident or be unable to find it in the event that a protest develops rapidly, meaning that such a simple issue could lead a journalist to lose profound constitutional protections. Additionally, as Valeska notes and the government argued in opposing the injunction extension in Oregon, law enforcement may struggle to see press passes during a protest because of the commotion and the cumbersome gear officers may be wearing.[246] So even if a journalist is wearing a press pass, law enforcement may not see it and may end up arresting them or forcing them to disperse. Moreover, by looking for such a particular sign that someone is a journalist (i.e., a press pass), law enforcement officers may overlook other indicia that would have led them to the correct conclusion.[247]

Journalists may also be justifiably apprehensive to wear press passes. Requiring journalists to wear visible identification to be afforded Press Clause protections could make the

244. *Cf.* Paul Stephan, *Are Independent Agencies Really Independent?*, REGUL. REV. (Dec. 14, 2016), https://www.theregreview.org/2016/12/14/stephan-independent-agencies-really-independent [https://perma.cc/LF4Y-7U96] (noting that because the President appoints agency members and Congress controls agency funding, scholars have debated whether federal independent agencies may still be subject to presidential and congressional influence).

245. Valeska, *supra* note 197, at 173–74 ("Another issue is one of timing: protests often spring up unannounced, forming rapidly in response to unforeseen events. This compresses the amount of time available to apply for credentials."). Valeska also points out the issues of relying on government entities, which are prone to capacity problems, and their timelines. *Id.* ("[D]uring recent protests in New York City, the police department entirely ceased issuing new press credentials to any applicants. These hurdles might exclude journalists who get an unexpected assignment or make a spontaneous decision to cover a protest." (footnote omitted)).

246. *Id.* at 175 (citing Federal Defendants' Opposition to a Preliminary Injunction at 31, Index Newspapers LLC v. City of Portland (*Index Newspapers II*), 480 F. Supp. 3d 1120 (D. Or. 2020) (No. 20-cv-1035)).

247. *See infra* Part III.B.2 (suggesting relevant indicia).

journalists easier targets for people who want to harm them.[248] Following a totality-of-the-circumstances approach would help ensure journalists can more safely cover protests while still benefitting from Press Clause protections.

Finally, freelance journalists and those working for smaller news organizations would likely be disproportionately denied credentials relative to journalists working for larger news organizations.[249] This would tip the scales back toward the Press as Established Organizations interpretation, which is not as faithful to modern day journalism or the values the Framers wanted to protect as the Press as a Function interpretation.[250] Rather than basing Press Clause protections on who has a press pass and who does not, these protections should be based on the totality of the circumstances.

2. A Totality-of-the-Circumstances Approach to Identifying Journalists Is Preferable and Workable in the Protest Setting

Under a totality-of-the-circumstances approach, law enforcement would be looking for indicia that someone is acting as a journalist at a protest. In issuing its injunction, the District Court for the District of Oregon provided helpful indicia that

---

248. *See supra* notes 6–11, 16, 207–10, 222–25, and accompanying text (describing violence targeted at journalists).

249. *See* Valeska, *supra* note 197, at 173 ("This extra work entrenches the advantage of institutional media, who generally have the knowledge, resources, and reputation that make it easier to navigate such processes. This is compounded by complaints that credentials are denied with disproportionate frequency to smaller, community-based, and/or ethnic-focused publications." (citing Press Release, N.Y.C. Comptroller, Comptroller Stringer Calls on Mayor de Blasio to Transfer Press Credential Issuance Away from NYPD and Create New Application Standards that Reflect the Diversity of New York City Reportage (June 6, 2020), https://comptroller.nyc.gov/newsroom/press-releases/comptroller-stringer-calls-on-mayor-de-blasio-to-transfer-press-credential-issuance-away-from-nypd-and-create-new-application-standards-that-reflect-the-diversity-of-new-york-city-reportage [https://perma.cc/GS24-RB2L])); John Wihbey, *Who Gets a Press Pass? Media Credentialing Practices in the United States*, JOURNALIST'S RES. (June 5, 2014), https://journalistsresource.org/media/who-gets-press-pass-credentialing [https://perma.cc/QPF4-PZMY] ("Certain categories of applicants are more likely to be denied than others: freelance journalists were significantly less likely to receive media credentials than employed journalists.").

250. *See supra* Part II.B.2 (discussing the Press as a Function interpretation).

serve as a starting point.[251] To summarize, the court's indicia include (1) the individual is wearing press identification, (2) the individual is carrying "professional photographic equipment," (3) the individual is standing away from protesters, and (4) the individual is not engaged in protest activities.[252] Further indicia to help law enforcement identify journalists could include (5) if the individual is intermixed with protesters, they are circulating and conversing with multiple seemingly unconnected participants, and (6) if the individual appears to be taking notes and/or recording conversations. These last two indicia would help identify journalists who are interviewing participants of the protest. Moreover, if someone is verbally identifying themselves as "press," that should be considered compelling evidence that they are a journalist, unless they have otherwise proven themselves not to be.[253]

The only mandatory indicium should be that the individual is not openly engaging in the protest, whether in support or opposition. Once a potential journalist begins to engage in protest, they have ceased operating strictly as a newsgatherer and have assumed the role of protester (or counter-protester). While this means that protesters who are sharing information about the protest and exhibiting some characteristics of journalists (such

---

251. *Index Newspapers II*, 480 F. Supp. 3d at 1156–57 (D. Or. 2020).

252. *See id.* ("To facilitate the Federal Defendants' identification of Journalists protected under this Order, the following shall be considered indicia of being a Journalist: visual identification as a member of the press, such as by carrying a professional or authorized press pass, carrying professional gear such as professional photographic equipment, or wearing a professional or authorized press badge or other official press credentials, or distinctive clothing, that identifies the wearer as a member of the press. It also shall be an indicium of being a Journalist under this Order that the person is standing off to the side of a protest, not engaging in protest activities, and not intermixed with persons engaged in protest activities, although these are not requirements. These indicia are not exclusive, and a person need not exhibit every indicium to be considered a Journalist under this Order."). The District Court for the District of Minnesota offered a similar list of indicia, including "press credentials or distinctive clothing that identifies the wearer as a member of the press." Goyette v. City of Minneapolis, 338 F.R.D. 109, 122 (D. Minn. 2021).

253. *See, e.g.*, sources cited *supra* note 6 (providing examples of journalists identifying themselves as "press" when encountering law enforcement). The indicia discussed in this section are appropriate for the protest context but may not adequately or effectively protect journalists in other circumstances. *See supra* note 196 and accompanying text (emphasizing the Press Clause needs to be tailored case-by-case to the wide array of scenarios journalists can end up in).

as video recording or live posting) would not be covered by the Press Clause protections proposed in this Note, it is necessary to draw the line somewhere so that not every protester can claim to be a journalist simply by posting to social media.[254] Additionally, protesters still have First Amendment rights under the Speech, Assembly, and Petition Clauses that protect their right to free expression.[255]

Law enforcement may argue that, even with these indicia, it is too difficult to distinguish between journalists and protesters.[256] However, in the Oregon case, the journalists' expert witness Gil Kerlikowske, who has spent his career in law enforcement, rebutted this claim: "trained and experienced law enforcement personnel are able to protect public safety without dispersing journalists and legal observers and can differentiate press from protesters, even in the heat of crowd control."[257]

Law enforcement in Oregon also alleged "that some persons wearing the indicia of press have engaged in violent or unlawful

---

254. *See* West, *Awakening*, *supra* note 35, at 1031 ("The [Supreme Court] justices' understandable desire to avoid favoring an elite group has led them to allow the Speech Clause to swallow up the Press Clause. In other words, the otherwise admirable and democratic objective to leave no one out of the press club creates a boomerang effect that results in no club at all. But a limited press club is essential to unlocking the full potential of the Press Clause, as bestowing potential Press Clause rights such as certain investigative immunities to all members of the public would be impossible. In our drive for constitutional overprotection, therefore, we have created constitutional underprotection." (footnotes omitted)).

255. *See supra* note 202 and accompanying text (describing the mix of First Amendment interests at play in a protest situation).

256. *See, e.g.*, Federal Defendants' Opposition to a Preliminary Injunction at 31, *Index Newspapers II*, 480 F. Supp. 3d 1120 (No. 20-cv-1035) (arguing the "chaotic" environment of a protest and the gear officers must wear make it difficult "to verify small indicia of press membership").

257. Index Newspapers LLC v. U.S. Marshals Serv., 977 F.3d 817, 833 (9th Cir. 2020); *see also id.* at 828 n.5 ("The district court found Kerlikowske to be a 'qualified, credible, and persuasive expert witness.' Kerlikowske is a former Commissioner of U.S. Customs and Border Protection, served as the Chief of Police in Seattle, Washington for 10 years, and as the Police Commissioner in Buffalo, New York. The district court recognized Kerlikowske's 'substantial training and experience with crowd control and civil unrest in the context of protests [and] use of force in that context,' and observed that Kerlikowske has 'led and orchestrated the policing of hundreds of large and potentially volatile protests, many of which were considerably larger than the recent protests in Portland.'" (alteration in original)); Valeska, *supra* note 197, at 172 (quoting Kerlikowske).

behavior,"[258] presumably to raise concerns that protecting the press at protests would encourage lawbreakers to impersonate the press.[259] However, the District Court for the District of Oregon "did not find persuasive evidence of any wrongdoing related to persons wearing indicia of press with two exceptions,"[260] suggesting these allegations may be overblown.[261] Moreover, anyone who is engaging in vandalism or violence would not be entitled to Press Clause protections, even if they are wearing press paraphernalia,[262] so law enforcement officers could still pursue these individuals.

In the face of ambiguity, law enforcement should err on the side of determining that a person is a journalist if they are exhibiting many of the indicia outlined above and are otherwise not engaged in violence or other unlawful activities. While this may mean some peaceful protesters are able to avoid having a dispersal order or curfew enforced against them, the alternative of accidentally arresting a bona fide member of the press is far more damaging to society.[263] As Valeska suggests, officers could be subject to a reasonableness standard upon judicial review, so if the officer's determination is reasonable given the totality of the circumstances, the officer should not be liable.[264]

---

258. *Index Newspapers II*, 480 F. Supp. 3d at 1138.

259. *See* Valeska, *supra* note 197, at 171–72 (elaborating on the issue of lawbreakers posing as members of the press in protest situations).

260. *Index Newspapers II*, 480 F. Supp. 3d at 1138.

261. *See* Valeska, *supra* note 197, at 172 n.143 (noting that, though the government submitted a handful of videos showing purported examples of press impersonation, only two were persuasive). One of the exceptions involved a person who was allegedly "assaulted by federal agents" and "hoped wearing clothing that indicates he is press would protect him from further violence." *Index Newspapers II*, 480 F. Supp. 3d at 1138. The second exception involved a person "who entered courthouse property and encouraged others to join," saying, "[t]hey can't arrest us all." *Id.*

262. This Note and other press advocates are certainly not arguing that journalists should be able to commit vandalism or assault with impunity. *See* Valeska, *supra* note 197, at 171 ("No reasonable standard would extend protection to someone so plainly engaged in violent criminal behavior, notwithstanding the journalistic value of any concurrent newsgathering efforts.").

263. *See supra* notes 18–21 and accompanying text (emphasizing the importance of journalists in a protest context to act as the watchdogs of government action).

264. Valeska, *supra* note 197, at 169–72 (outlining officer discretion, subject to a reasonableness standard).

For their part, journalists should consider wearing press paraphernalia—ideally issued from some official source—while covering protests if Press Clause protections are established.[265] Given the current targeting of journalists by law enforcement and private individuals, though, it is understandable that journalists may be hesitant to identify themselves. Journalists worried about their safety could wear press passes tucked into their clothing and reveal the passes to prove their status if questioned.

Furthermore, either as an alternative or in addition to displaying a press pass, a journalist could choose to show law enforcement copies of their work online using a mobile device and provide a form of identification to verify that the byline is theirs if their journalist status is called into question. However, this Note is not suggesting journalists should be compelled to let law enforcement look at their IDs or their mobile devices, especially considering journalists may have confidential information on their devices.[266] The important thing is that if the Press Clause protects journalists against dispersal orders, curfews, and arrests at protests, journalists should try to make it clear to law enforcement that they are there to report on the event, regardless of the specific method they use for identifying themselves.

CONCLUSION

The free press's precarious position today should serve as a catalyst for strengthening the Press Clause of the First Amendment. At protests, journalists face the prospect of being attacked, both by private citizens and law enforcement, and arrested simply for striving to fulfill their important societal functions:

---

265. While this Note disfavors government credentialing, news organizations often issue their own press credentials, which should be considered official. Moreover, several non-governmental organizations issue press credentials for freelance journalists. *See, e.g.*, *Press Passes for Freelance Journalists and Photographers*, NAT'L WRITERS UNION, https://nwu.org/journalism-division/press-passes [https://perma.cc/86GX-KEJL]; *Press Passes*, GUILD FREELANCERS, https://www.guildfreelancers.org/credentials [https://perma.cc/LXL3-DY35]. And even though this Note disfavors requiring government credentials to receive Press Clause protections, journalists who have government credentials could wear those.

266. *Cf.* Jorge Luis Sierra, *How Journalists Can Keep Their Mobile Phones Secure*, INT'L JOURNALISTS' NETWORK (Oct. 30, 2018), https://ijnet.org/en/story/how-journalists-can-keep-their-mobile-phones-secure [https://perma.cc/FA7X-6K9C] (providing tips on how journalists can protect sensitive information on their mobile devices).

informing the public and acting as a watchdog of the government.

Based on the history of the Press Clause and contemporary issues facing journalists, the Press as a Function interpretation provides the best framing for establishing press protections. In the protest context, this functional framing could translate to press exemptions from dispersal orders, curfews, and arrests in the absence of unlawful actions on the part of journalists themselves. Finally, to ensure a faithful application of functional press protections in the protest context, law enforcement could effectively identify journalists by considering the totality of the circumstances and looking for various indicia of newsgathering activities.

The functioning of a free press is vital to the survival of democracy and representative self-government. When the eyes and ears of the public are blinded and deafened, and when the government watchdog is kenneled, government abuse is inevitable. In the wake of unprecedented press abuses, it is clear: the Press Clause needs teeth.