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Sonja R. West

University of Georgia School of Law, srwest@uga.edu



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The “Press,” Then & Now

SONJA R. WEST*

Does the First Amendment’s protection of freedom of the “press” simply mean that we all have the right to use mass communication technology to disseminate our speech? Or does it provide constitutional safeguards for a particular group of speakers who function as government watchdogs and citizen surrogates? This question defines the current debate over the Press Clause. The Supreme Court’s Citizens United decision, along with recent work by Michael McConnell and Eugene Volokh, suggests the answer is the former. This Article pushes back on that view by considering how the historical experience of early printing can best inform our modern view of press freedom.

It starts by expanding the scope of the relevant historical evidence. Discussions about the original meaning of the “press” typically focus only on the ratifying generation’s explicit rhetoric. This approach, however, fails to consider valuable evidence about colonial and early-American lived experiences with the printing press. To members of the framing generation, this new evidence reveals, the press was a tool of limited access, available only to certain speakers, controlled by gatekeeper printers, and used primarily for matters of public concern. Early Americans may have spoken of press freedom as open and inclusive, but printing, as they actually knew it, was not. Rather, it played a specific societal role.

Historical evidence is only of true value, moreover, if it is used to address the right question. This Article thus shifts the pertinent question from “what” members of the founding generation were protecting—technology or trade—to “why” they sought to protect it. History reveals that they saw the Press Clause as having two functions—an individual, self-expressive function and a structural, government-monitoring function. At the time, a singular notion of the “press” embodied all of these concepts (a technology as well as an expressive and a structural function), leaving no need to distinguish

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among them. Today, however, that conceptual overlap no longer exists. For a variety of reasons—including advances in communication technologies, expansion of access to these technologies, growing complexity of government, and development of journalistic standards—press functions and press technology are now unique concepts.

Today's advanced mass communication technologies, buoyed by our modern robust speech jurisprudence, provide individuals with extensive expressive channels. Modern 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.

TABLE OF CONTENTS

I.	INTRODUCTION.....	51
II.	THE SEARCH FOR THE MEANING OF THE "PRESS"	56
	A. Citizens United and the Current Views on the "Press"	56
	B. Uncertainty over the Meaning of "Press" Freedom	60
	C. The Primacy of "Press" Freedom	62
	D. The Dual Functions of the "Press" Freedom	65
III.	THE EARLY AMERICAN EXPERIENCE WITH THE "PRESS"	71
	A. Barriers of Access to the Printing Presses.....	73
	1. Literacy	74
	2. Supplies, Labor, and Costs	76
	3. Taxes	80
	B. The Product of Printing Presses	82
	C. Printers as Gatekeepers	85
IV.	APPLYING THE HISTORICAL FRAMEWORK TO A MODERN "PRESS"	89
	A. Evolving Concepts of the "Press"	90
	1. Journalism and Mass Communication Technology	91
	a. Rise of Journalism.....	91
	b. Advances in Mass Communication Technology.....	95
	2. Speech Clause and Press Clause	98
	B. Modern Role of the Press Clause.....	102
V.	CONCLUSION.....	104

"In order to know what [law] is, we must know what it has been, and what it tends to become."¹

"I am large I contain multitudes."²

I. INTRODUCTION

Press freedom is a right of significant historical and constitutional importance. On this point, there is no debate. Early Americans celebrated the "Liberty of the Press" as "a great Bulwark of the Liberty of the People."³ The Supreme Court has unequivocally declared a free press to be "a condition of a free society."⁴

The constitutional repository of this celebrated freedom, however, stands on shakier ground. While the Supreme Court has built a vigorous and intricate jurisprudence for the Speech Clause, it has been hesitant to allow the Press Clause to flex much constitutional muscle.⁵ The Court often makes grand pronouncements of the value of the press, while it simultaneously refuses to recognize actual Press Clause power.⁶ The question thus arises: Is the Court failing to give meaning to an important piece of constitutional text and thus underprotecting the freedom of the press?⁷

¹ OLIVER WENDELL HOLMES, *THE COMMON LAW* 5 (Mark DeWolfe Howe ed., Harvard Univ. Press 1963) (1881).

² WALT WHITMAN, *Song of Myself*, in WALT WHITMAN: COMPLETE POETRY AND COLLECTED PROSE 27, 87 (Justin Kaplan ed., Library of Am. 1982) (LEAVES OF GRASS 1855) (alteration in original); with credit to Joseph Miller in *Multitudes, Oral Argument Podcast* (Oct. 3, 2014), <http://www.hydratext.com/oralargument/2014/10/3/episode-35-multitudes-guest-bernadette-meyler> [<https://perma.cc/UL3A-TN6N>].

³ LEONARD W. LEVY, *LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY* 69 (1960) (quoting Letter from Massachusetts House of Representatives to Gov. Francis Bernard (Mar. 3, 1768), in JOSIAH QUINCY, JR., *REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY BETWEEN 1761 AND 1772*, at 274, 275 (1865)).

⁴ *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

⁵ See Sonja R. West, *Press Exceptionalism*, 127 HARV. L. REV. 2434, 2436 (2014) (describing the Supreme Court's different treatment of the Speech and Press Clauses); see also David A. Anderson, *Freedom of the Press in Wartime*, 77 U. COLO. L. REV. 49, 66 (2006) ("The Press Clause today is no more than an invisible force in constitutional law: it influences interpretation of the Speech Clause but has no independent effect.").

⁶ See Ronnell Andersen Jones, *The Dangers of Press Clause Dicta*, 48 GA. L. REV. 705, 709–10 (2014) ("Deciding all of these critically important cases in a permanent state of dicta-based non-commitment about the Press Clause has produced opinions that read in what can only be described as a quirky, incongruous way."); see also David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 457 (1983) ("[N]o Supreme Court decision has rested squarely on the press clause, independent of the speech clause."). *But see id.* at 459 ("If the Court has never given the press clause independent significance, neither has it foreclosed the possibility." (footnote omitted)).

⁷ For thoughts on how the Press Clause might protect and further the structural function of the press in a way that is distinct from Speech Clause rights, see West, *supra*

Much of the answer to this question lies in the proper interpretation of the phrase “the press” as used in the text of the First Amendment.⁸ Chief Justice Warren Burger, for example, saw the words “the freedom of speech, or of the press”⁹ as together forming nothing more than overlapping liberties of “expression and dissemination.”¹⁰ Justice Potter Stewart, on the other hand, asserted that the dual protection of speech and press rights in the First Amendment was “no constitutional accident, but an acknowledgment of the critical role played by the press in American society.”¹¹

This Article begins by adding new evidence to the current historical discussion of press freedom. Going beyond the ratifying generation’s explicit discussions of the “press,” it 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 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. Prior searches for the meaning of the Press Clause have considered only the historical rhetoric from this time period. The evidence of the framing generation’s actual lived experience with the press presented here provides crucial—and so far overlooked—context for understanding that rhetoric.

Historical evidence, of course, only has actual value if it is used to address the right question. Professor Eugene Volokh, for example, has turned to history seeking an answer to the question of “what” the framing generation aimed to protect—technology or industry.¹² But this question is practically meaningless in light of the dramatic transformations of both communication technology and the industry of journalism since the framing. Thus if our goal is to interpret the Press Clause today in a manner that is as faithful as possible to its original values, we cannot ignore the fundamental changes that have

note 5, at 2446–47; see also David A. Anderson, *The Press and Democratic Dialogue*, 127 HARV. L. REV. F. 331, 334 (2014) (noting that determining the meaning of the “press” should be allowed to “develop incrementally; it is unrealistic to expect its constitutional meaning to emerge full-blown”).

⁸ U.S. CONST. amend. I (“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; of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”).

⁹ *Id.*

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

¹¹ *Houchins v. KQED, Inc.*, 438 U.S. 1, 17 (1978) (Stewart, J., concurring).

¹² See generally Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 U. PA. L. REV. 459 (2012).

occurred in press technology and the press industry. Volokh emphasizes that it is highly unlikely that members of the founding generation used the term “press” to refer to an industry like journalism that was then in its infancy.¹³ That certainly may be true. But, following that logic, it is an absolute certainty that when speaking of the “press,” they did not mean modern mass communication mechanisms such as satellites, radio, wifi, mobile broadband networks and virtual clouds—technology that, Volokh rightly admits,¹⁴ has only a fleeting resemblance to the eighteenth-century process of printing.¹⁵ Simply put, any modern account of press freedom must take account of the significant evolutions of both mass communication technology and journalism since 1791.¹⁶

Rather than asking the specific question of “what,” the focus should be on the broader question of “why.”¹⁷ Why did members of the founding generation consider press liberty so significant and deserving of constitutional protection? Did they seek to secure only an individual liberty of self-expression? Or was their purpose to safeguard and further an informational structural defense against the failings of government?

A full account of First Amendment history suggests that the answer is *both*. In rhetorical treatments of press freedom, early Americans expressed

¹³ *Id.* 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.”); see also David Lange, *The Speech and Press Clauses*, 23 UCLA L. REV. 77, 90 (1975) (arguing that the notion that the Framers intended to protect modern journalists is unpersuasive, in part, because he said that the partisan press of the day “bore little relationship to . . . the press of Hearst and Pulitzer”). But see Randall P. Bezanson, *Whither Freedom of the Press?*, 97 IOWA L. REV. 1259, 1261 (2012) (“Professor Volokh, of course, is exactly right when judged by the spare and spartan doctrine of textualism and originalism. There was no organized press—I dare not say ‘institutional’—at the time of the founding, or indeed for many years after. There were not even, Volokh implies, any culturally and historically grounded values, such as commitment to truth, public need for information, or processes of selection and judgment. Of course, there was no air force then either; no automatic rifles or pistols.”); Patrick J. Charles & Kevin Francis O’Neill, *Saving the Press Clause from Ruin: The Customary Origins of a “Free Press” as Interface to the Present and Future*, 2012 UTAH L. REV. 1691, 1701 (“With only one publishing technology available circa 1791, it is impossible to ascertain how the founding generation viewed the Press Clause as an evolving technological right of the people to employ free speech. Are we to believe the founding generation had the foresight to predict other popular publishing mediums such as radio, television, and the Internet? The answer remains no.”).

¹⁴ Volokh, *supra* note 12, at 462 n.10.

¹⁵ See also Jasper L. Tran, *Press Clause and 3D Printing*, 14 NW. J. TECH. & INTELL. PROP. 75, 79 (2016) (arguing that 3D printers are “the modern equivalent of the printing press” and protected by the First Amendment).

¹⁶ See discussion *infra* Part IV.

¹⁷ See Bezanson, *supra* note 13, at 1267 (“[T]here is a rich scholarship on the questions of the press’s meaning and rights that deserves attention and that a common thread in the scholarship is attention to purpose and function in defining and protecting the press.”).

deep appreciation for two emerging ideals: the power of an autonomous citizenry free to share its sentiments on various issues, and the pressing need to check the government through the dissemination of information. In other words, they held the view that press freedom served both an expressive function and a structural function.

A no less important point is that early Americans' thinking about the press did not begin and end with writings they left behind. Their lived experience mattered as well. And evidence of their lived experience with the press reveals a key insight: In the world of the late-1700s, protecting the use of press technology was inextricably linked to press functions. In other words, it all overlapped—using the technology, checking the government, and engaging in self-expression. In the context in which the framing generation lived, there was simply no need to grapple with detailed questions of “press” meaning. Protecting a generic and ill-defined concept of “press” captured it all.

Understanding this conceptual overlap is important, because today that same overlap does not exist. For a variety of reasons—including the advances in communication technologies, the expansion of access to these technologies, the growing complexity of government, and the development of journalistic standards—press functions and press technology are now distinct concepts. In this new communication landscape, our thinking about how best to protect rights of self-expression and to ensure the meaningful monitoring of government should also progress.

Today our advanced mass communication technologies offer individuals extensive expressive channels, while modern journalistic practices fill a more dedicated and more refined watchdog role. To be sure, some overlap still exists. Broad use of mass communication technology provides a mechanism for scrutinizing government, and skilled journalism has expressive qualities. But the primary uses of the two have diverged significantly since the framing. An interpretation of the Press Clause that is faithful to the original goals of press freedom should not be blind to these modern realities.

Also important to any sensible understanding of the Press Clause is a recognition that First Amendment doctrine itself has evolved greatly over time. In the past century, the Supreme Court has embraced such an expansive notion of speech rights that when it comes to protecting individual self-expression, the Speech Clause occupies the field. Perhaps this leaves the Press Clause with little to do in furtherance of one of its original tasks—fostering a citizenry that is free to share its ideas. Yet the history of the First Amendment suggests that the Press Clause's work does not end there. While the Speech Clause now plays the lead role in safeguarding the human right of expressive freedom, the Press Clause can and should assume an equal, if not primary, role in safeguarding the structural watchdog values.

The goal of this Article is to provide a historically based framework for a contemporary Press Clause. When considered as a whole, the historical evidence and present-day realities point toward a particular constitutional role for the Press Clause. This role is as a repository of unique rights and

protections for those speakers who are fulfilling structural functions of the press and not a general right for all speakers to publish and disseminate their speech. Embracing press exceptionalism in this way obviously raises further issues that deserve thorough discussion, including both the substance of and appropriate recipients of these rights and protections. These next-level considerations, however, are beyond the scope of this piece.¹⁸

This Article explores these ideas in three parts. In Part II, I consider the historical debate over the original understanding of the Press Clause. My analysis shows that, contrary to the view that early usage of the term “press” referred solely to the technology of the printing press, the term had multiple “original” meanings. In particular the founding generation used the phrase “freedom of the press” to reference not only access to technology but also the ability of citizens to express their ideas and to check their government in a distinctive way.

In Part III, I examine the colonial and early-American experience with the printing press. This analysis strongly confirms the conclusion that the ratifying generation saw the printing press not simply as a technology anyone could use to disseminate any message, but instead as a specialized vehicle for comment on and monitoring of the operations of government. The printing press they experienced was a demanding creature in several ways. The press they knew was generally available for use only by a limited group of speakers and readers. Printing was hard work and fraught with costs and obstacles. It was typically reserved only for matters deemed to be of significant public importance. The printers themselves, moreover, responded to these challenges by taking on the role of gatekeepers and by developing a shared—albeit evolving—set of professional goals and values.

In Part IV, I offer an interpretation of the Press Clause that takes account of this rich and multifaceted body of historical evidence. Contrasting the role of the Press Clause and the modern and robust Speech Clause, I consider how the two fit together to further both the expressive and the structural purposes of press freedom. I then suggest how this interpretive approach interfaces with modern realities under which mass communication technology and journalism have become distinct and independently powerful concepts.

Press freedom has long occupied a complex role in our democracy. It is a reflection of both our most aspirational ideals and our darkest fears about our country. That the Press Clause embodies these complicated notions, however, is no excuse for oversimplifying its history or, for that matter, its future. It also does not mean we should ignore it all together. We should strive, rather, to find and fulfill its intended purpose.

¹⁸ For some other discussions about the role of the Press Clause, see generally Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. REV. 1025 (2011) [hereinafter West, *Awakening*]; West, *supra* note 5; Sonja R. West, *The Stealth Press Clause*, 48 GA. L. REV. 729 (2014) [hereinafter West, *Stealth*].

II. THE SEARCH FOR THE MEANING OF THE "PRESS"

A. *Citizens United* and the Current Views on the "Press"

The debate surrounding the proper interpretation of the Press Clause, which reached a high point in the mid-twentieth century,¹⁹ is experiencing a revival. That resurgence is attributable largely to the arguments advanced and decision reached in the high-profile case of *Citizens United v. FEC*.²⁰

During much of our history, discussion about the historical meaning of the Press Clause centered on the question of whether its reach went no further than affording protections against prior restraint. In 1960, Professor Leonard Levy gained notoriety for, but then later backtracked from,²¹ his theory that the framers' view of press freedom was so narrow that it only prohibited prior restraints.²²

Professor David Anderson, in 1983, presented a study of the pre-First Amendment paper trail and challenged Levy's assertions, arguing that the legislative history of the Press Clause shows it meant more than freedom from prior restraint but was intended to be the primary protection of government watchdogs.²³ This importance, he concluded, arose from a belief that freedom of the press served a freestanding structural role in preserving and purifying republican self-government.²⁴

More recently, however, interest in the Press Clause has reemerged and taken on a different focus. In *Citizens United*, the Supreme Court addressed the issue of whether corporations have full-fledged First Amendment free speech rights.²⁵ In support of its conclusion that they do, the Court noted that an alternative holding would mean that Congress could regulate news media corporations.²⁶ The Court concluded that either all corporations have First Amendment rights or none do, because "[t]here is no precedent supporting

¹⁹ See, e.g., ZECHARIAH CHAFEE JR., *FREE SPEECH IN THE UNITED STATES* 247–49 (1941); LEVY, *supra* note 3, at 1–17; see also David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 448 (2002) (referring to the period between the 1930s and 1960s as "the heyday of the Press Clause in the Supreme Court").

²⁰ *Citizens United v. FEC*, 558 U.S. 310 (2010).

²¹ LEONARD W. LEVY, *EMERGENCE OF A FREE PRESS*, at x (1985) (recanting his claim about practice and acknowledging that he had "ignored the nearly epidemic degree of seditious libel that infected American newspapers after Independence").

²² LEVY, *supra* note 3, at x.

²³ Anderson, *supra* note 6, at 537.

²⁴ *Id.* ("[M]ost of the Framers perceived, however dimly, naively, or incompletely, that freedom of the press was inextricably related to the new republican form of government and would have to be protected if their vision of government by the people was to succeed.").

²⁵ See *Citizens United*, 558 U.S. at 342 (stating that "political speech does not lose First Amendment protection 'simply because its source is a corporation'" (quoting *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 784 (1978))).

²⁶ *Id.* at 314.

laws that attempt to distinguish between corporations which are deemed to be exempt as media corporations and those which are not."²⁷ Along the way, the Court declared that "[w]e have consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers."²⁸

Citizens United is a Speech Clause case, not a Press Clause case.²⁹ The Court held that regulations on corporate campaign expenditures were unconstitutional, because they violated the corporations' rights to engage in political speech.³⁰ But the Court's precedents on campaign finance regulations, which typically included an exemption for the media, led to questions about whether it was proper or even possible to separate the press from other types of speakers.³¹

Justice John Paul Stevens (writing in dissent for himself and three other Justices) suggested, however, that the Court was overlooking a vital piece of the constitutional puzzle—the Press Clause. He argued that the text and history of the Press Clause show "why one type of corporation, those that are part of the press, might be able to claim special First Amendment status."³² The Press Clause itself, he said, was proof that the framers "did draw distinctions—explicit distinctions—between types of 'speakers,' or speech outlets or forms."³³ To which Justice Antonin Scalia (writing also for two other Justices) replied that the Speech and Press Clauses historically meant, "everyone's right to speak or publish" and not "everyone's right to speak or the institutional press's right to publish."³⁴

Around the same time, Professor Eugene Volokh was taking another look at the history, and asking a different question: Does the Press Clause protect freedom for the press as an industry or the press as a technology?³⁵ To Volokh, the Press Clause must operate either as an individual right of every citizen to use mass communication technology or as a special protection for

²⁷ *Id.* at 352.

²⁸ *Id.* (quoting *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 691 (1990) (Scalia, J., dissenting)).

²⁹ RANDALL P. BEZANSON, *TOO MUCH FREE SPEECH?* 40 (2012) (noting that the issue of the Press Clause was neither briefed nor argued in *Citizens United*).

³⁰ *Citizens United*, 558 U.S. at 319 ("The Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether.").

³¹ See RICHARD L. HASEN, *PLUTOCRATS UNITED: CAMPAIGN MONEY, THE SUPREME COURT, AND THE DISTORTION OF AMERICAN ELECTIONS* 126–27 (2016) (noting the difficulties the media exemption issue raises for campaign finance reformers, labeling it "the third rail of the campaign finance debate" and observed that when confronted with the problem many choose to "simply ignore it or quickly gloss over it").

³² *Citizens United*, 558 U.S. at 431 n.57 (Stevens, J., concurring in part and dissenting in part).

³³ *Id.*

³⁴ *Id.* at 391 n.6 (Scalia, J., concurring).

³⁵ Volokh, *supra* note 12, at 459.

members of a certain profession. Volokh argued for the former, press-as-technology interpretation,³⁶ pointing to early cases, treatises, and state constitutions that conceptualized press liberty as a right of “every freeman.”³⁷ Volokh concluded that the phrase “freedom of speech or of the press was seen as equivalent to the people’s right to speak, to write, or to publish their sentiments.”³⁸

In a 2013 article, Professor Michael McConnell applied Volokh’s all-inclusive view of the Press Clause to *Citizens United*, arguing that the clause would have protected the political organization’s right to disseminate its speech to the public.³⁹ The Press Clause, he argued, protects the activity of “publishing information and opinions to the general public” and not certain speakers,⁴⁰ and therefore should be interpreted as “the right of any person to use the technology of the press to disseminate opinions.”⁴¹

Thus, rather than serving as a safeguard of the fourth estate,⁴² the Press Clause under this view is relegated, in the words of Professor Paul Horwitz, to a mere “non-discrimination provision.”⁴³ In this narrative, not only does the clause not offer special protections to the press, but it actively denies the press any unique treatment.⁴⁴ Dean Robert Post called the *Citizen United* Court’s lumping together of the press and everyone else “fanciful and baffling”⁴⁵

³⁶ *Id.* at 464.

³⁷ *Id.* at 465–98.

³⁸ *Id.* at 468 n.28; see also Lange, *supra* note 13, at 88, 99 (arguing that the terms “speech” and “press” were “used quite interchangeably in the eighteenth century” and that press freedom was intended to extend speech freedom by giving citizens the ability to disseminate their messages). But see Charles & O’Neill, *supra* note 13, at 1701–02 (“[T]he fact that eighteenth-century commentators frequently referred to the freedom of the press as the right of every ‘freeman,’ ‘citizen,’ or ‘individual’ does not solely lead to a press-as-technology conclusion.”).

³⁹ Michael W. McConnell, *Reconsidering Citizens United as a Press Clause Case*, 123 YALE L.J. 412, 416 (2013); *id.* (stating that the Court “analyze[d] the case under the wrong clause of the First Amendment”).

⁴⁰ *Id.* at 418.

⁴¹ *Id.* at 441; see also David B. Sentelle, *Freedom of the Press: A Liberty for All or a Privilege for a Few?*, 2013–2014 CATO SUP. CT. REV. 15, 24 (“The original meaning of ‘the press,’ then, was not limited to an institution called ‘the press.’”).

⁴² Potter Stewart, “*Or of the Press*,” 26 HASTINGS L.J. 631, 634 (1975) (“The primary purpose of the constitutional guarantee of a free press was a similar one: to create a fourth institution outside the Government as an additional check on the three official branches.”).

⁴³ Paul Horwitz, *Institutional Actors in New York Times Co. v. Sullivan*, 48 GA. L. REV. 809, 839 (2014).

⁴⁴ *Id.* at 838 (“In Professor McConnell’s view of the Press Clause, however, the point is not that the institutional press receives any special protection. To the contrary, his point is that it receives *no* special protection.”).

⁴⁵ ROBERT C. POST, *CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION* 71 n.* (2014).

while Professor Randall Bezanson declared that it "eviscerate[d] the press clause as a distinct constitutional provision."⁴⁶

This interpretation, nonetheless, appears to be a rising—if not already prevailing—view of press freedom. In a 2014 speech, Judge David Sentelle, citing heavily to Volokh's article, stated, "it seems most likely that the public would have understood 'the press' to be referring to all writings, by all citizens, not just those by an elite group that did not even exist in 1791."⁴⁷ The same year, Justice Scalia flatly declared that the Press Clause gives no special rights to the "institutional press." Rather, it gives, in across-the-board fashion, "prerogatives to anybody who has a Xerox machine."⁴⁸ Even Bezanson, a strong critic of Volokh's position, concluded that the press-as-technology view "can no longer be said to be an emerging revolution, but an accomplished one."⁴⁹

The extent to which historical understandings of constitutional terms should dictate how we interpret the Press Clause today is debatable to say the least.⁵⁰ And even within the originalist framework, moreover, there is strong disagreement over how to use history when interpreting constitutional terms, particularly in the face of changing circumstances.⁵¹ This Article takes no position on that ongoing theoretical debate.

⁴⁶ BEZANSON, *supra* note 29, at 39; *see also* Bezanson, *supra* note 13, at 1260 (arguing that under *Citizens United*, "[t]here is no press freedom because there is no press, constitutionally speaking").

⁴⁷ Sentelle, *supra* note 41, at 29.

⁴⁸ 45 Words: A Conversation with U.S. Supreme Court Justices Antonin Scalia and Ruth Bader Ginsburg on the First Amendment, KALB REPORT (Apr. 17, 2014), <https://research.gwu.edu/kalb-report-archives> [<https://perma.cc/7ZL6-A54L>] (transcript available at https://research.gwu.edu/sites/research.gwu.edu/files/downloads/45Words_Transcript.pdf [<https://perma.cc/96A7-M5G9>]) (quoting Justice Antonin Scalia).

⁴⁹ Bezanson, *supra* note 13, at 1260; *see* Anderson, *supra* note 19, at 446 ("To the generation of the Framers of the First Amendment, 'the press' meant 'the printing press.' It referred less to a journalistic enterprise than to the technology of printing and the opportunities for communication that the technology created."); Jack M. Balkin, *Old-School/New-School Speech Regulation*, 127 HARV. L. REV. 2296, 2302 (2014) ("The word 'press' has the dual signification of an institution for creating and distributing content and a technology for creating and distributing content. At the Founding it referred to the freedom to use the key mass communication technology of the day—the printing press."); Edward Lee, *Freedom of the Press 2.0*, 42 GA. L. REV. 309, 315–16, 339–56 (2008) (arguing the "press" referred to the printing press and that "freedom of the press" was designed to protect "speech technology").

⁵⁰ For an argument against originalism, *see* DAVID A. STRAUSS, THE LIVING CONSTITUTION 4 (2010), stating: "But when it comes to difficult, controversial constitutional issues . . . originalism is a totally inadequate approach. It is worse than inadequate: it hides the ball by concealing the real basis of the decision."

⁵¹ *See, e.g.*, Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 305 (2007) (arguing that where constitutional text "is abstract, general or offers a standard, we must look to the principles that underlie the text to make sense of and apply it"); Saul Cornell, *The People's Constitution vs. The Lawyer's Constitution: Popular Constitutionalism and the Original Debate over Originalism*, 23 YALE J.L. & HUMAN. 295,

There is, however, consensus that history is important, and that scholars and judges should consider this evidence with care.⁵² As it turns out, the history of the Press Clause suggests that the founding generation's view of press freedom was far more complex than Volokh asserts,⁵³ as is the undertaking of applying this history to the modern world.

B. Uncertainty over the Meaning of "Press" Freedom

Professor Volokh is confident that his reading of the Press Clause as protecting the technology of publishing is not only reasonable but basically irrefutable. He declares in his "Industry or Technology" piece that the "historical evidence points powerfully in one direction,"⁵⁴ and, in a later piece, he states that his article "simply summarizes what American tradition and American law have nearly unanimously said throughout our nation's history."⁵⁵ So unambiguous is this evidence, Volokh contends, that anyone claiming that the Press Clause should be interpreted as providing rights or protections for particular speakers would necessarily have to rely on "sources other than text, original meaning, tradition, and precedent for support."⁵⁶

Many others who have delved into the historical meaning of the Press Clause, however, are far less certain. Unlike Volokh, they find the evidence to be "sketchy"⁵⁷ and have lamented the "paucity of surviving evidence" that makes the endeavor of uncovering press meaning "difficult to undertake."⁵⁸

337 (2011) (arguing that "[o]riginalist scholars and judges have not only shown a shocking lack of knowledge of Founding-Era interpretive practices, but they have also been ignorant of important recent developments in the humanities, including history, literature, and philosophy"); Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 *FORDHAM L. REV.* 1249, 1255 (1997) (arguing "that the moral judgment required to apply the abstract moral principles of the Constitution is constricted by history and precedent, in virtue of the commands of legal integrity, it is plainly not preempted by that history"); Lawrence B. Solum, *Semantic Originalism* 1 (Ill. Pub. Law & Legal Theory Research Papers Series, No. 07-24, 2008), <http://ssrn.com/abstract=1120244> [<https://perma.cc/ASF6-SKAX>].

⁵² See John Paul Stevens, *Originalism and History*, 48 *GA. L. REV.* 691, 697 (2014) ("[E]ven the most qualified historians may interpret important events quite differently.").

⁵³ Bezanson, *supra* note 13, at 1261–62 ("There are alternatives to the two-sided mantra that Volokh exploits; indeed, no legal scholar who has examined the 'press' question has seriously entertained the sparse and barren meanings Volokh presumes to test.").

⁵⁴ Volokh, *supra* note 12, at 538.

⁵⁵ Eugene Volokh, *Unradical: "Freedom of the Press" as the Freedom of All to Use Mass Communications Technology*, 97 *IOWA L. REV.* 1275, 1275 (2012).

⁵⁶ Volokh, *supra* note 12, at 465.

⁵⁷ Anderson, *supra* note 6, at 487.

⁵⁸ Lawrence Rosenthal, *First Amendment Investigations and the Inescapable Pragmatism of the Common Law of Free Speech*, 86 *IND. L.J.* 1, 18 (2011).

Indeed there is no evidence that Congress ever debated the meaning of the clause or made any effort to explain it.⁵⁹

This uncertainty is most likely not because the founders failed to articulate their thinking, but rather because they themselves were not completely sure of the meaning.⁶⁰ Professor Geoffrey Stone concluded that the phrasing of the clause more likely captured an "aspiration, to be given meaning over time," rather than anything with agreed-upon and tangible meaning.⁶¹ Levy similarly concluded that few of the framers "clearly understood what they meant by the free press clause, and we cannot know that those few represented a consensus."⁶² Confusion over the meaning and proper interpretation of the Clause goes deeper still, with historians struggling over not only the original

⁵⁹ Anderson, *supra* note 6, at 485–86; *see also* LEVY, *supra* note 3, at 4 ("The meaning of no other clause of the Bill of Rights at the time of its framing and ratification has been so obscure to us [as the Free Speech and Press Clause]."); Melville B. Nimmer, *Introduction—Is Freedom of the Press a Redundancy: What Does it Add to Freedom of Speech?*, 26 HASTINGS L.J. 639, 640–41 (1975) ("History casts little light on the question here posed.").

⁶⁰ *See* Zechariah Chafee, Jr., Book Review, 62 HARV. L. REV. 891, 898 (1949) (reviewing ALEXANDER MEIKLEJOHN, *FREE SPEECH: AND ITS RELATION TO SELF-GOVERNMENT* (1948)) ("The truth is, I think, that the framers had no very clear idea as to what they meant by 'the freedom of speech or of the press,' . . ."); *see also* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 22 (1971) (concluding that "[t]he framers seem to have had no coherent theory of free speech"). *See generally* Thomas I. Emerson, *Colonial Intentions and Current Realities of the First Amendment*, 125 U. PA. L. REV. 737 (1977).

⁶¹ GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME: FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* 42 (2004); *see also* LUCAS A. POWE, JR., *THE FOURTH ESTATE AND THE CONSTITUTION: FREEDOM OF THE PRESS IN AMERICA* 23 (1991) ("[I]t is simply impossible to turn to discussions by the framers . . . for definitive answers on the scope of freedom of the press."); STRAUSS, *supra* note 50, at 52 ("[T]he actual views of the drafters and ratifiers of the First Amendment are in many ways unclear."); Anderson, *supra* note 6, at 536 (stating that those who drafted and ratified the Press Clause "undoubtedly held various views"); Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 307 (1978) ("History tells us little . . . about the precise meaning contemplated by those who drafted the Bill of Rights."); Emerson, *supra* note 60, at 738 ("Different individuals, holding different philosophies, placed different interpretations upon the broad concept of freedom of speech, press, assembly, and petition. Moreover, not only was there no real concensus on these issues, but there was no extensive discussion of detailed constitutional application."); Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 529 (1995) (observing that study of early American constitutional history "reveals that neither those who would base their theories preeminently on rights and autonomy, nor those who would ground their paradigms exclusively on self-government and democracy, can lay easy claim to the traditions that the Constitution itself embodies—try though they might"); Rosenthal, *supra* note 58, at 13 (calling the historical evidence into the original meaning of the Clauses "frustratingly inconclusive").

⁶² LEONARD W. LEVY, *ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION* 209–10 (1988).

understanding of the Constitution but also the founding generation's conflicting views on how to interpret constitutional text. Historian Saul Cornell points specifically to disputes over the meaning of "freedom of the press" to illustrate the evolving Founding-era debate over how to read constitutional texts and concludes that "there was no interpretive consensus on the most basic issues of constitutional interpretation."⁶³

Indeed, bewilderment over the meaning of the Press Clause was not a modern affliction. In 1789, Benjamin Franklin described the liberty of the press as a freedom "which every Pennsylvanian would fight and die for; tho' few of us, I believe, have distinct Ideas of its Nature and Extent."⁶⁴

C. *The Primacy of "Press" Freedom*

Despite the lack of consensus about the specific meaning of the Press Clause, one thing is certain: Press freedom was of paramount importance at the time of the framing.⁶⁵ James Madison referred to liberty of the press as one of the "choicest privileges of the people" and proposed language to make press freedom "inviolable."⁶⁶

So clear was the significance of securing freedom of the press that it surpassed even the push for speech rights.⁶⁷ The primacy of press freedoms is supported by Professor Anderson's influential article, which follows the evolution of the clause⁶⁸ through pre-Revolutionary declarations and state constitutions as well as pronouncements at the constitutional convention and in the first congress. He concluded that, while the framers lacked a

⁶³ Saul Cornell, *Meaning and Understanding in the History of Constitutional Ideas: The Intellectual History Alternative to Originalism*, 82 FORDHAM L. REV. 721, 752–53 (2013).

⁶⁴ Benjamin Franklin, *An Account of the Supremest Court of Judicatures in Pennsylvania, viz., The Court of the Press*, 12 Sept. 1789, *Writings* 10:36–40, reprinted in 5 THE FOUNDERS' CONSTITUTION 130, 130 (Philip B. Kurland & Ralph Lerner eds., 1987), http://press-pubs.uchicago.edu/founders/documents/amendl_speeches16.html [<https://perma.cc/LRS2-CVQ8>]; see also Stephen Botein, "Meer Mechanics" and an Open Press: The Business and Political Strategies of Colonial American Printers, in 9 PERSPECTIVES IN AMERICAN HISTORY 127, 206 (Donald Fleming & Bernard Bailyn eds., 1975) ("There is no reason to believe that many or even any printers in colonial America thought deeply or systemically about [press liberties].").

⁶⁵ LEVY, *supra* note 3, at 214–15 ("Freedom of the press was everywhere a grand topic for declamation . . ."); Anderson, *supra* note 6, at 487 ("[F]reedom of the press, whatever it meant, was a matter of widespread concern.").

⁶⁶ JEFFERY A. SMITH, PRINTERS AND PRESS FREEDOM: THE IDEOLOGY OF EARLY AMERICAN JOURNALISM 166 (1988) (quoting Letter from James Madison to Edmund Randolph (May 31, 1789), in 5 THE WRITINGS OF JAMES MADISON 372, 377, 380 (Gaillard Hunt ed., 1904)).

⁶⁷ Anderson, *supra* note 6, at 508 ("The textual antecedents of the first amendment reflect a greater concern with press than with speech."); see also WENDELL BIRD, PRESS AND SPEECH UNDER ASSAULT 27 (2016).

⁶⁸ Anderson, *supra* note 6, at 463–86.

"comprehensive theory of freedom of the press," it was press freedom—not speech freedom—that was their principal concern.⁶⁹ Speech rights evolved only later "as an offshoot of freedom of the press, on the one hand, and on the other, freedom of religion—the freedom to speak openly on religious matters."⁷⁰

The documentary trail of press liberty begins with the frequently repeated declaration that "[t]he Liberty of the Press is a great Bulwark of the Liberty of the People: It is, therefore, the incumbent Duty of those who are constituted the Guardians of the People's Rights to defend and maintain it."⁷¹ This phrase, first appearing in an official form in a Massachusetts House resolution although borrowed from one of "Cato's Letters" published earlier in the *Boston Gazette*, reappeared in several early state declarations of rights, including those of North Carolina and Virginia.⁷² Massachusetts declared that "[t]he liberty of the press is essential to the security of freedom in a state: it ought not, therefore, to be restrained in this Commonwealth."⁷³

The absences of any reference whatsoever to speech rights in these early declarations of freedoms is notable. Press freedom, at least initially, stood alone as an independent and fundamental value. This pattern carries forward in other settings. The New York ratifying convention, for example, endorsed press freedom along with the rights to assemble, to instruct representatives, and to petition for redress of grievances.⁷⁴ Still unmentioned in the collection, however, was a right of free speech. Madison would later propose two press

⁶⁹ *Id.* at 536.

⁷⁰ *Id.* at 487 (quoting LEVY, *supra* note 3, at 5); see also *id.* ("The hypothesis that the Press Clause was merely 'complementary to and a natural extension of Speech Clause liberty,' advanced by Chief Justice Burger, is not supported by the historical evidence. Epistemologically, at least, the press clause was primary and the speech clause secondary." (footnote omitted)).

⁷¹ LEVY, *supra* note 3, at 69 (quoting Letter from Massachusetts House of Representatives to Gov. Francis Bernard (Mar. 3, 1768), in JOSIAH QUINCY, JR., REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY BETWEEN 1761 AND 1772, at 274, 275 (1865)).

⁷² North Carolina Declaration of Rights, 1776, *reprinted in* 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 286, 287 (1971); Virginia Declaration of Rights, 1776, *reprinted in* SCHWARTZ, *supra*, at 234, 235. The Virginia Declaration of Rights read: "That the freedom of the Press is one of the greatest bulwarks of liberty, and can never be restrained but by despotick Governments." *Id.* This language was copied almost verbatim in the North Carolina Declaration of Rights of 1776. See North Carolina Declaration of Rights, 1776, *supra*, at 287 ("That the freedom of the press is one of the great bulwarks of liberty, and therefore ought never to be restrained."). Other states embraced more general declarations of press freedom. Maryland's formulation—which was followed almost exactly by Delaware, Georgia and South Carolina—stated "[t]hat the liberty of the press ought to be inviolably preserved." Maryland Declaration of Rights, 1776, *reprinted in* SCHWARTZ, *supra*, at 280, 284.

⁷³ Massachusetts Declaration of Rights, 1780, *reprinted in* SCHWARTZ, *supra* note 72, at 339, 342.

⁷⁴ Anderson, *supra* note 6, at 474.

freedom amendments, including one, later defeated, that would have prohibited states from violating “the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases.”⁷⁵ Again, there was no reference to speech rights.

Of the thirteen original states, nine specifically protected freedom of the press in their revolutionary declarations or constitutions, making it one of the most commonly recognized state rights.⁷⁶ All of the press provisions, moreover, were written in broad terms and included no limitations on the right. Yet only one state, Pennsylvania, included a protection for speech in its founding charter⁷⁷ (while making two references to press freedom, one of which referred to press rights alone).⁷⁸ Madison’s second proposed amendment, likewise, did include a reference to speech. It stated that “[t]he people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable.”⁷⁹ Arguably Madison’s phrasing establishes that he viewed “speech” protections as applying generally to speaking, writing, and publishing. By separating press freedom, however, he indicates its distinctiveness.⁸⁰

During the debates over the inclusion of a bill of rights, the need for explicit protection of the freedom of the press was a frequent antifederalist argument. Influential framers like Patrick Henry,⁸¹ Thomas Jefferson⁸² and James Madison⁸³ all noted the especially high importance of protecting press liberties.

⁷⁵ 1 JOSEPH GALES, THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES 1789–1791, at 452 (1834) [hereinafter CONGRESS DEBATES].

⁷⁶ See BIRD, *supra* note 67, at 27 (noting that only freedom of religion and the right to a jury trial were more prevalent).

⁷⁷ See STEPHEN M. FELDMAN, FREE EXPRESSION AND DEMOCRACY IN AMERICA: A HISTORY 52 (2008) (noting that Vermont, which was not part of the Union until 1791, included provisions protecting both press and speech in its 1777 constitution); Seth F. Kreimer, *The Pennsylvania Constitution’s Protection of Free Expression*, 5 U. PA. J. CONST. L. 12, 15 (2002).

⁷⁸ The significance of Pennsylvania’s dual protections of press freedoms is explored further *infra* Part II.D.

⁷⁹ CONGRESS DEBATES, *supra* note 75, at 451.

⁸⁰ See Burt Neuborne, *Felix Frankfurter’s Revenge: An Accidental Democracy Built by Judges*, 35 N.Y.U. REV. L. & SOC. CHANGE 602, 657–58 (2011).

⁸¹ THE COMPLETE BILL OF RIGHTS 642 (Neil H. Cogan ed., 2d ed. 2015) (quoting Patrick Henry as arguing a need for a bill of rights to protect “[t]rial by jury, and liberty of the press,” but not mentioning freedom of speech).

⁸² *Id.* at 179 (quoting several letters from Thomas Jefferson to others stating that there should be a bill of rights to secure certain freedoms among which he lists freedom of press but not of speech).

⁸³ RICHARD LABUNSKI, JAMES MADISON AND THE STRUGGLE FOR THE BILL OF RIGHTS 164 (2006) (quoting Letter from James Madison to George Eve (Jan. 2, 1789), *reprinted in* 11 THE PAPERS OF JAMES MADISON 404 (Robert A. Rutland & Charles F. Hobson eds., 1977), stating, “It is my sincere opinion that the Constitution ought to be revised, and that

One might counter that establishing press freedom as the primary concern and speech as the afterthought does not necessarily conflict with a press-as-technology or a press-as-dissemination thesis. But this evidence of the primacy of press freedom does not—to say the least—fit comfortably with the view that the Press Clause reflects a mere broadening of the Speech Clause to cover the written, as well as the spoken, word⁸⁴ or merely the right to disseminate one's speech.⁸⁵ Such views require speech to be the primary right and for press to fill a derivative position. At the least, the emphasis on press over speech during the pre-First Amendment era reflects a desire by the founding generation to protect press freedom uniquely as press freedom.⁸⁶ It was not seen as a mere appendage of, or add-on to, the freedom of speech.

D. *The Dual Functions of the "Press" Freedom*

What might at first blush appear to be contradictory, absent, or inconclusive evidence about the early meaning of press freedom most likely was a reflection of the fact that there simply was no single "press" value. Instead, as with many legal concepts, press freedom embodied an amalgam of norms and purposes. In the words of press historian Jeffery Smith, press freedom in its infancy "consisted of many strands and many colors."⁸⁷ Indeed, this view—that the Press Clause sprang from multiple, and very different, purposes—best fits the full range of historical evidence. Fair reliance on history in this field, therefore, must take account of both of these values.

Professor Robert W.T. Martin in his book *The Free and Open Press* details how, to the framing generation, press liberty was an umbrella concept that captured multiple, interchangeable ideas.⁸⁸ It took until the late-eighteenth century for the separate nature of these claims to surface "and was probably clear even then to only a few colonists."⁸⁹ Other press historians, like Smith,

the first Congress . . . ought to prepare and recommend to the States for ratification the most satisfactory provisions for all essential rights, particularly the rights of Conscience in the fullest latitude, the freedom of the press, trials by jury, security against general warrants &c." (alteration in original)).

⁸⁴ Volokh, *supra* note 12, at 475.

⁸⁵ See McConnell, *supra* note 39, at 454 (describing the freedom of the press as the right to "dissemination of opinion or information to the public through media or communications").

⁸⁶ See Stewart, *supra* note 42, at 634 ("By including both guarantees in the First Amendment, the Founders quite clearly recognized the distinction between the two.").

⁸⁷ SMITH, *supra* note 66, at 6; see also Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 538 (noting that the framing generation's "commitment to free expression embodied a complex of values").

⁸⁸ ROBERT W.T. MARTIN, *THE FREE AND OPEN PRESS: THE FOUNDING OF AMERICAN DEMOCRATIC PRESS LIBERTY, 1640–1800*, at 3 (2001).

⁸⁹ *Id.* at 4.

agree that press ideology “was remarkably lucid and dynamic in the eighteenth century.”⁹⁰

Martin identifies two primary press values celebrated by the founding generation. The first value “lionized the press as the prime defender of public liberty in its role as a bulwark against governmental tyranny” and the second “stressed the individual right of every man to air his sentiments for all to consider, regardless of his political perspective or the consequences for the people’s liberty.”⁹¹ In other words, freedom of the press was seen as protecting *both* an individual interest of personal expression and a structural check on government.

The early texts support these dual purposes. Pennsylvania’s state constitution, for example, illustrates them well. In its “Declaration of the Rights of the Inhabitants of the Commonwealth, or State of Pennsylvania,” Pennsylvania’s Constitution stated: “That the people have a right to freedom of speech, and of writing, and publishing their sentiments: therefore the freedom of the press ought not to be restrained.”⁹² Here we see the coupling of freedom of the press with one of the first references to speech as an issue of individual autonomy. These rights protected the ability of the people to express “their sentiments” regardless of the purpose or content, thus securing a freedom of individual expression.

The Pennsylvania Constitution, however, also included a second press provision. This was found in the section of the state Constitution labeled, “Plan or Frame of Government for Commonwealth or State of Pennsylvania.” It declared that “[t]he printing presses shall be free to every person who undertakes to examine the proceedings of the legislature, or any part of government.”⁹³ Unlike the protection of individual expression, this reference to press freedom is explicitly tied to the checking function—“to examine the

⁹⁰ SMITH, *supra* note 66, at viii; *see also* KENNETH SHEAR, UNORIGINAL MISUNDERSTANDING: PRESS FREEDOM IN EARLY AMERICA AND INTERPRETATION OF THE FIRST AMENDMENT 121 (2009) (observing that “different ‘founders’ (say, Madison and Hamilton) had very different views of what press freedom ought to mean, and leading politicians of the era such as Adams and Jefferson changed their positions greatly over time”); Charles & O’Neill, *supra* note 13, at 1712 (noting that in the early eighteenth century, “the philosophical and intellectual origins of a free press were developing in political thought”).

⁹¹ MARTIN, *supra* note 88, at 3–4; *see also* Botein, *supra* note 64, at 205 (explaining that in colonial times a “free” press could mean either a press that was open to anyone or a press, even if closed to some opinions, freely published criticism of the government).

⁹² Pennsylvania Declaration of Rights, 1776, *reprinted in* SCHWARTZ, *supra* note 72, at 263, 264, 266.

⁹³ *Id.* at 266, 273; *see also* Stephen A. Smith, *The Origins of the Free Speech Clause*, 29 FREE SPEECH Y.B. 48, 62 (1991) (noting the committee draft of this provision continued to state “and the House of Representative shall not pass any Act to restrain it: Nor shall any Printer be restrained from printing any Remarks, Strictures, or Observations on the Proceedings of the General Assembly, or any Branch of Government, or any public proceeding whatever” (quoting *The Proposed Plan or Frame of Government for the Common-wealth or State of Pennsylvania* 9 (Library Co. of Phila.))).

proceedings" of government.⁹⁴ The placement of this right in the part of the document establishing the state's organizational framework further emphasizes that press freedom filled a specific structural function.⁹⁵ And notably, unlike the first provision, this second reference to press freedom stands alone without an accompanying reference to speech.

We thus see two distinct purposes emanating out of a single concept of press freedom—protection of an expressive function and also a structural function. While members of the framing generation valued both, the evidence suggests they believed the structural function to be of paramount importance.⁹⁶ This evolving customary right was focused not on individual expression for its own sake but on its operational role in securing democracy.⁹⁷

This emphasis on the structural function is found in the early documents, which repeatedly hailed press freedom to be the "bulwark of liberty"⁹⁸ and "essential to the Security of Freedom in a the State."⁹⁹ The freedom of the press quite clearly had a job to do—to defend and protect the people and the republic. The importance of press freedom was rarely discussed as a matter of individual expressive value.¹⁰⁰ There are few early signs that freedom of the press should be protected as a means to individual self-fulfillment or self-realization,¹⁰¹ or pursuant to a Kantian sense of personhood.¹⁰²

⁹⁴ Timothy E. Cook, *Freeing the Presses: An Introductory Essay*, in *FREEDOM OF THE PRESS: THE FIRST AMENDMENT IN ACTION* 1, 7 (Timothy E. Cook ed., 2005) (quoting Anderson, *supra* note 6, at 465) (noting that the first section "values the press as a public forum open to all [while] [t]he second highlights the watchdog function").

⁹⁵ See Anderson, *supra* note 6, at 489–90 (stating that Pennsylvania's second Press Clause, is "unmistakable" evidence of "the right to examine government").

⁹⁶ *Id.* at 488, 537 (noting that the checking function of the press was "inextricably related to the new republican form of government" and "integral to the structure of the new government" (emphasis added)); see also *id.* at 537 (noting that freedom of the press "would have to be protected if their vision of government by the people was to succeed").

⁹⁷ Charles & O'Neill, *supra* note 13, at 1695 (concluding press freedom was "viewed as crucial to the success of a democratic government").

⁹⁸ *Id.* at 1694.

⁹⁹ *Id.* at 1735.

¹⁰⁰ See Emerson, *supra* note 60, at 744 ("The colonists were not thinking as intently as we do now in terms of protecting the individual against the manifold pressures of the collective.").

¹⁰¹ See Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 879 (1963) ("The right to freedom of expression is justified first of all as the right of an individual purely in his capacity as an individual."); see also Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 128 (1989) (explaining that a "nonconsequentialist reason [to protect speech] is one which claims that something about a particular practice is right or wrong independent of the consequences").

¹⁰² See Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 233 (1992) ("Freedom of expression is properly based on autonomy: the Kantian right of each individual to be treated as an end in himself, an equal sovereign citizen of the kingdom of ends with a right to the greatest liberty compatible with the like liberties of all others.").

Throughout the Revolutionary Period, rather, there was a broadly shared understanding of press freedom as vital to self-government. The question up for debate was how best to protect it from government suppression.¹⁰³ Anderson explained:

In other words, a press clause was necessary, not to induce the press to provide a check on governmental power, but because it was universally assumed that the press would indeed provide such a check and that government therefore would seek to suppress it.¹⁰⁴

Further lending strength to the structural vision of press freedoms is the "Quebec Address"—the famous 1774 statement of the first Continental Congress to the inhabitants of Quebec. In that address, Congress described freedom of the press in broad terms, reflecting the colonists' aspirations.¹⁰⁵ Again without reference to speech rights, the colonists declared their intentions that the free press be protected not only to further "the advancement of truth, science, morality, and arts in general," but also to ensure the "diffusion of liberal sentiments on the administration of Government, in its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated, into more honourable and just modes of conducting affairs."¹⁰⁶

The Quebec Address again highlights the dual visions for the press. It connected a matter now strongly associated with free speech, the protection of the quest for knowledge "in general," with press freedom. At the same time, it emphasized press freedom as fulfilling a structural role through examination of government. Thus when it came to the task of checking government power, according to Anderson, "speech was an afterthought, if it was viewed as serving that function at all; the press was expected to be the primary source of restraint."¹⁰⁷

The structural press function itself has at least two variations. Perhaps the most well-known structural role of the press is the checking function. Through the checking function of the press, as described by Professor Vincent Blasi in his influential 1977 article, the public protects itself from "the inherent tendency of government officials to abuse the power entrusted to them."¹⁰⁸

¹⁰³ See Anderson, *supra* note 6, at 490.

¹⁰⁴ *Id.* at 491.

¹⁰⁵ *Id.* at 464 ("The colonial press had no legal protection in 1774 other than the common law prohibition against prior restraints—hardly a sufficient safeguard for the ambitious role outlined for the press in the Quebec Address.").

¹⁰⁶ *Id.* at 463–64 (quoting Address to the Inhabitants of Quebec, 1774, *reprinted in* SCHWARTZ, *supra* note 72, at 221, 223).

¹⁰⁷ *Id.* at 534.

¹⁰⁸ Blasi, *supra* note 87, at 538; see also Floyd Abrams, *The Press Is Different: Reflections on Justice Stewart and the Autonomous Press*, 7 HOFSTRA L. REV. 563, 592 (1979) (stating that the press "serves as a vigilant protector of the public from its government").

The checking function is, according to Blasi, most likely "the single value that was uppermost in the minds of the persons who drafted and ratified the First Amendment."¹⁰⁹ It is a value grounded in distrust of government and, according to Lucas Powe, "assumes a darker side of human nature and holds that those who wield governmental power will be prone to overreaching, and thus that it is essential to provide information for a resisting citizenry."¹¹⁰ The press's criticism of the "conduct" and "tendency" of government is especially valuable, William Cushing wrote to John Adams in 1789, because "it may save a state and prevent the necessity of a revolution, as well as bring one about, when it is necessary"¹¹¹

In addition to monitoring government malfeasance, the second structural role of the press is to provide a public check on laws and policies. Writing in a 1789 newspaper essay, Benjamin Franklin contended that the press must have complete freedom for "discussing the propriety of public measures and political opinions."¹¹² Levy, likewise, suggests that the function of the press was not only to uncover government misdeeds but also to expose "policies contrary to the public interest."¹¹³ He points to a 1791 issue of the *Virginia Gazette and Winchester Advertiser* declaring that "[m]easures and not men are the proper subjects of cognizance to a free press"¹¹⁴ and a 1794 issue of the

¹⁰⁹ Blasi, *supra* note 87, at 527; see also LEE C. BOLLINGER, *IMAGES OF A FREE PRESS* 20 (1991) (stating that "the government is untrustworthy when it comes to regulating public debate, for it will forever try to recapture its authoritarian powers" and the press is "the public's representative, its agent, helping stand guard against the atavistic tendencies of the state").

¹¹⁰ POWE, *supra* note 61, at 238; see also SMITH, *supra* note 66, at 162 (noting that "[e]arly American journalists and libertarian theorists distrusted state power and continually argued that the press should serve as a check on its use"); Anderson, *supra* note 6, at 493 (observing that the "legislative history of the press clause also supports Professor Blasi's assertion" of the checking value); Charles & O'Neill, *supra* note 13, at 1712–13 (discussing Thomas Gordon in Cato's Letters writing that "exposing of 'publick wickedness' as a 'duty'" and noting "Gordon's rationale was that a free press would require politicians to maintain honest dealings and individual virtue"); C. Edwin Baker, *Press Rights and Government Power to Structure the Press*, 34 U. MIAMI L. REV. 819, 840 (1980) ("The checking function of the press clearly requires independence from government; it requires rights that give the press a defense against government intrusions."); SMITH, *supra* note 66, at 7 ("Freedom of the press, said an essay published in the *Boston Gazette* in 1755, meant a right to expose abuses of power and was considered 'essential to and coeval with all free Governments.'" (quoting BOS. GAZETTE, May 26, 1755)).

¹¹¹ BIRD, *supra* note 67, at 155 (alteration in original) (quoting Letter from William Cushing to John Adams (Feb. 18, 1789)).

¹¹² SMITH, *supra* note 66, at 11 (quoting Benjamin Franklin, FED. GAZETTE (Phila.), Sept. 12, 1789).

¹¹³ LEVY, *supra* note 21, at xii.

¹¹⁴ *Id.* at 291 (quoting VA. GAZETTE & WINCHESTER ADVERTISER, Jan. 5, 1791).

Philadelphia Aurora, stating that the role of the press was to “estimate justly the wisdom of leading measures of administration.”¹¹⁵

The framing generation’s appreciation for the structural function of the press is not controversial. The question, however, is how to utilize this knowledge in our current thinking about the Press Clause. One view, which is most identified with Justice Stewart, argues that because the history of the Press Clause points to a structural role, this should translate into special constitutional rights and protections for the “organized press.” This view embraces a concept of the press that is different from individuals exercising their speech rights. This concept is often described as the “fourth estate,” that the press provides “organized, expert scrutiny of government” and a “formidable check on official power” through “a conspiracy of the intellect, [and] with the courage of numbers.”¹¹⁶

The other view, as explained by Professor Vikram David Amar, sees “the checking function as animating the Speech Clause as well as the Press Clause, so that the Press is entitled to no ‘special’ protection.”¹¹⁷ This theory presumes that all citizens, when armed with the rights of speech and the ability to publish and disseminate that speech, can fill this structural role. By protecting the technology of mass communication, the argument goes, the Press Clause will protect the right of everyone to serve the checking function.

As with many questions in life and law, both views most likely embody some truth. The right of all speakers to publish and disseminate their speech surely was intended to and continues to play a role in checking government actors and policies.¹¹⁸ But the historical evidence suggests that the framing generation believed there was something unique about the structural role of press freedom that goes beyond the right of individuals to print their speech.¹¹⁹ Our task, therefore, is to identify that special feature they saw in the “press.”

¹¹⁵ *Id.* (quoting PHILA. AURORA, Dec. 26, 1794).

¹¹⁶ Stewart, *supra* note 42, at 634; see also LEVY, *supra* note 21, at xii (concluding that, in the Framers’ view, press freedom “meant that the press had achieved a special status as an unofficial fourth branch of government, ‘the Fourth Estate’”); Anderson, *supra* note 6, at 493 (“Stewart’s structural theory accurately describes the role envisioned for the press in the new governmental scheme, and Blasi’s checking-function theory explains the means by which the press was expected to exercise that role.”).

¹¹⁷ Vikram David Amar, *From Watergate to Ken Starr: Potter Stewart’s “Or of the Press” A Quarter Century Later*, 50 HASTINGS L.J. 711, 713 (1999); Lange, *supra* note 13, at 103 (noting that “[i]t simply is not clear that media speech contributes more significantly to the democratic dialogue than does nonmedia speech”).

¹¹⁸ See Anderson, *supra* note 7, at 334 (arguing that the press might not be unique in its ability to inform the public or check the government, but it nonetheless “is enough that the press is one of the entities that usefully serve these functions, and is the one the Framers saw fit to recognize[;] [p]rotecting them all would be impossible, and protecting none would be intolerable”).

¹¹⁹ Charles & O’Neill, *supra* note 13, at 1731 (contending that the historical evidence shows that “a free press had constitutional layers or parts outside of its capabilities as a technology”).

We must then decide whether this press quality fits more naturally today with a view of the press as applying to experienced, devoted and effective government critics or with a concept of the press as everyone publishing any thought he or she desires.¹²⁰

To fully explore this issue, we need more information. The next Parts of this Article thus consider the founding generation’s actual experience with the printing press, developments in mass communication technology and journalism and the evolution of the Supreme Court’s speech jurisprudence.

III. THE EARLY AMERICAN EXPERIENCE WITH THE “PRESS”

While pre-ratification documents reveal that the framers valued press freedom immensely, even as compared to speech liberties, they tell us little about what they believed “freedom of the press” actually meant.¹²¹ As discussed earlier, other scholars have attempted to uncover the meaning by focusing on accounts found in official legislative records such as state constitutions, the records of the constitutional convention, and the legislative history of the First Amendment. Others have added in examples from early judicial works or founding era dictionaries,¹²² and some have expanded the timeframe to include pre-Revolutionary insights into the meaning and importance of a free press.¹²³

All of this information is certainly helpful in understanding the First Amendment’s Press Clause. But the historical picture remains incomplete. These sources focus on press freedom as seen from the top down, but fails to examine valuable evidence found from the bottom up.¹²⁴ We can learn as much about the meaning of our Constitution, suggests historian Saul Cornell, “from a popular play, a short newspaper squib, or tavern keeper’s musings, as one might learn from an elite text such as *The Federalist* or the decisions of the Marshall Court.”¹²⁵

One piece that is missing from the puzzle of press freedom is a “bottom up” exploration of early America’s lived experience with the press—including both the technology of printing press and how that technology functioned in

¹²⁰ Volokh, *supra* note 12, at 462.

¹²¹ Rosenthal, *supra* note 58, at 26 (“By now, it should be plain that the evidence regarding the original meaning of the Speech and Press Clauses is anything but easy to sort out.”).

¹²² Volokh, *supra* note 12, at 465–68 (citing, among other things, founding era cases, treatise, and dictionaries). *But see* Cornell, *supra* note 51, at 298 (arguing that “[o]riginalist faith in simply scouring the dictionary as a shortcut around the laborious process of doing genuine historical research rests on a serious misunderstanding of the history of dictionaries,” which “often had ideological and political agendas”).

¹²³ Charles & O’Neill, *supra* note 13, at 1714–27.

¹²⁴ *See* Cornell, *supra* note 51, at 303 (noting that there is historic value in the views and experiences of the non-elite as in “the more traditional top-down court-centered narratives of this period”).

¹²⁵ *Id.*

society.¹²⁶ This evidence matters, because the founding generation's understanding of the "press" necessarily was informed, at least in part, by the practical workings of the press at the time. This section explores that world by considering who had access to the printing press, the barriers they faced, the materials they published, and the audience they served.¹²⁷

The real-world press of colonial times, as we shall see, was fraught with significant constraints. Printing technology leading up to the First Amendment's ratification in 1791 was one of limited use and purpose. It was deployed by a highly select group of people who used it for certain types of messages. Holding the reins to this new, powerful technology, moreover, was a limited cadre of printers who served as gatekeepers by adhering to a developing set of ethical norms.

None of this discussion is meant to suggest, of course, that these real-world limitations on press access were desirable or should be viewed with nostalgia. What they demonstrate, however, is that the framing generation was not acquainted with anything resembling the ubiquitous, functional and affordable mass communication technology of today. With the flick of a finger on a device that fits in a pocket, nearly anyone today can publish any message at any time for any purpose and at negligible cost.

Early American printing, by contrast, was a precious commodity available to certain groups and the product of hardship, skill and scarce resources. This early evidence suggests that the framing generation was indeed comfortable with providing constitutional protection for an activity that was used by select speakers. These select speakers were those who invested resources and expertise in order to provide information of public value. This lived-experience evidence further highlights that even as lawmakers discussed press freedoms in broad terms, real-world demands were naturally tailoring the use of the press. Most importantly, understanding of press access during colonial and early American times sheds light on how the framing generation believed the press could fulfill structural goals like checking public officials and strengthening democracy through a citizenry that is knowledgeable about government policies.

¹²⁶ See Charles & O'Neill, *supra* note 13, at 1703 ("Unlike most Anglo-American rights, the development of a free press stems from customary practice. . . . [I]ts origins developed from the bowels of the print culture itself." (footnote omitted)).

¹²⁷ There is some debate about the relevant historical time frame for an inquiry into the meaning of the Bill of Rights. Most analysis focuses on the period surrounding the ratification of the First Amendment and decades leading up to it. Some have argued, however, that evidence surrounding the ratification of the Fourteenth Amendment, the vehicle for applying the amendments to the states, is also valuable. See Volokh, *supra* note 12, at 464. This Article focuses on the period leading up to and including 1791, but also embraces the view that the evolution of the role of the "press" in the period following the ratification is relevant to our current thinking.

A. Barriers of Access to the Printing Presses

The early story of access to the printing presses is one of overcoming technological and societal obstacles. By the late eighteenth century, the press might in theory have been belonged to "[e]very Freeman,"¹²⁸ but the reality was far more limited in reach.¹²⁹ Those with access to the technology of the printing press were almost exclusively male,¹³⁰ wealthy,¹³¹ educated,¹³² white,¹³³ and urban.¹³⁴ Authors of printed works were "confined to mercantile and political elites,"¹³⁵ and printers themselves were known to associate with those of the highest ranks of government and society.¹³⁶ Printing, moreover, demanded effort, knowledge and resources. In sum, a variety of practical obstacles greatly limited the reality of the freedom to publish. This section focuses on some of the most common difficulties.

¹²⁸ Volokh, *supra* note 12, at 465–68 (alteration in original) (emphasis added) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES 151 (1769)) ("[E]very freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press." (quoting BLACKSTONE, *supra*, at 151)); *see also* *Respublica v. Oswald*, 1 U.S. (1 Dall.) 319, 325 (Pa. 1788) (describing the freedom as "permitting every man to publish his opinions" (emphasis added)); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1874, at 732 (1833) (describing the right as providing that "every man shall have a right to speak, write, and print his opinions upon any subject whatsoever, without any prior restraint, so always, that he does not injure any other person . . . or attempt to subvert the government" (emphasis added)).

¹²⁹ Charles & O'Neill, *supra* note 13, at 1701–02 ("[T]he fact that eighteenth-century commentators frequently referred to the freedom of the press as the right of every 'freeman,' 'citizen,' or 'individual' does not solely lead to a press-as-technology conclusion.").

¹³⁰ JOHN CLYDE OSWALD, PRINTING IN THE AMERICAS 182 (1937).

¹³¹ JAMES MORAN, PRINTING PRESSES: HISTORY AND DEVELOPMENT FROM THE FIFTEENTH CENTURY TO MODERN TIMES 230 (1973) ("By the middle of the eighteenth century printing was being taken up as a hobby by fashionable people.").

¹³² PAUL STARR, THE CREATION OF THE MEDIA: POLITICAL ORIGINS OF MODERN COMMUNICATIONS 67 (2004) ("Earlier political writers, including colonial pamphleteers, had typically assumed a limited audience of gentlemen and made extensive use of classical allusions and complex ironies, but the mobilization of popular opinion for a revolution required more accessible prose.").

¹³³ MICHAEL WARNER, THE LETTERS OF THE REPUBLIC 12 (1990) ("[P]rinting constituted and distinguished a specifically white community . . .").

¹³⁴ OSWALD, *supra* note 130, at 30 ("Most of the printing offices were located at the seat of the provincial governments . . .").

¹³⁵ MICHAEL SCHUDSON, DISCOVERING THE NEWS: A SOCIAL HISTORY OF AMERICAN NEWSPAPERS 15 (1978).

¹³⁶ *See* MARK A. LAUSE, SOME DEGREE OF POWER 25–26 (1991) (noting relationships between printers and others like poet Philip Freneau, David Bruce, Thomas Paine, Benjamin Franklin, Dr. Benjamin Rush, Walt Whitman, George Washington, and Thomas Jefferson).

1. Literacy

Benjamin Franklin's editorial policy for his newspaper, the *New-England Courant*, invited "all Men, who have Leisure, Inclination and Ability," to contribute to his paper.¹³⁷ Many early Americans did not meet Franklin's basic requirements for several reasons, but let us begin with the last. The power of printing is dependent on the ability to read and write.¹³⁸ Literacy was, therefore, a necessary, although not sufficient, condition of access to the earliest American publications. According to one historian, however, only about 1.4% of the American population in 1775 had attained "liberating literacy" (as opposed to mere "technical" literacy).¹³⁹

As surely as the reach of printing was tied to literacy, literacy was tied to the availability of education with one fueling the other. The printing of publications that addressed matters of public interest produced a heightened desire for "literacy in segments of the population where illiteracy had long been no stigma. In the process, the pressure for schooling mounted."¹⁴⁰ Both proponents and critics of free press and education saw the connection between education and printing.¹⁴¹

Barriers to education, and thus literacy, however, were particularly pronounced for those who lived on the margins of political society.¹⁴² Laws in many states made it a crime to teach slaves how to read¹⁴³ on the theory that it

¹³⁷ BENJAMIN FRANKLIN, *THE AUTOBIOGRAPHY AND OTHER WRITINGS*, at xiii (2015).

¹³⁸ JEFFREY L. PASLEY, "THE TYRANNY OF PRINTERS": NEWSPAPER POLITICS IN THE EARLY AMERICAN REPUBLIC 7 (2001) ("Newspapers could reach only literate citizens, who were most likely to be white and male.").

¹³⁹ LAWRENCE A. CREMIN, *TRADITIONS OF AMERICAN EDUCATION* 32 (1977) (distinguishing between "inert" or technical literacy and "liberating literacy" and using newspaper circulations to suggest an increase in the latter). Newspapers at the time were sold almost solely as subscriptions. SCHUDSON, *supra* note 135, at 15 ("But a person could not buy one issue at a time except at the printer's office."). *But see* PASLEY, *supra* note 138, at 7–8 (discussing how some newspapers managed to reach other, even non-literate audiences through public readings in "taverns, coffeehouses, and hotels").

¹⁴⁰ LAWRENCE A. CREMIN, *AMERICAN EDUCATION: THE COLONIAL EXPERIENCE 1607–1783*, at 545 (1970).

¹⁴¹ The colonial Governor of Virginia, Sir William Berkeley, tellingly illustrated the point when he proclaimed: "But, I thank God, there are no free schools nor printing, and I hope we shall not have these hundred years; for learning has brought disobedience, and heresy, and sects into the world, and printing has divulged them, and libels against the best government. God keep us from both." OSWALD, *supra* note 130, at 2 (quoting 2 WILLIAM WALLER HENING, *THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619*, at 517 (1823)).

¹⁴² KENNETH A. LOCKRIDGE, *LITERACY IN COLONIAL NEW ENGLAND* 93 (1974) (noting that the story of literacy during this period is one of "progression and regression rolled into one" where the likelihood of literacy was linked closely to factors like sex, race, wealth, occupation and religion).

¹⁴³ *See* JOHN G. AIKIN, *A DIGEST OF THE LAWS OF THE STATE OF ALABAMA* 397 (1833) (Slaves, and Free Persons of Color, § 31); OLIVER H. PRINCE, *A DIGEST OF THE LAWS OF*

"tends to excite dissatisfaction in their minds, and to produce insurrection and rebellion."¹⁴⁴ In other states, it was "effectually prevented by public opinion."¹⁴⁵ Native Americans were, likewise, far less likely than the white settlers to have the ability to read the kind of text being printed at the time.¹⁴⁶

During early colonial times, moreover, "sex was one of the most powerful determinants of literacy."¹⁴⁷ Throughout most of the eighteenth century, education in schools was largely withheld from women and "popular culture of the time ridiculed anyone educating a woman."¹⁴⁸ Thus even as male literacy rates accelerated, women's rates stagnated.¹⁴⁹ The widening gap between male and female literacy was the result of "deliberate discrimination against women" that was considered part of the cultural "allegiance to tradition."¹⁵⁰

Wealth was, of course, also a significant indicator of literacy and the relationship between the two was "more consistently powerful in America than in England" at the time.¹⁵¹ Closely related was the matter of occupation, where laborers fell behind other occupations in learning to read and write.¹⁵² Geography similarly played a role with rural literacy rates dragging behind urban rates.

Literacy was an important tool for engaging with the printing press during the colonial and early American period—as either a writer or a reader. In the

THE STATE OF GEORGIA 455 (1822) (Slaves, Patrols, and Free Persons of Colour, para. 38); 2 THOMAS R.R. COBB, A DIGEST OF THE STATUTE LAWS OF THE STATE OF GEORGIA 981, 1001 (1851) (Slaves, Patrols and Free Persons of Color, paras. 57, 114); 1 HENRY A. BULLARD & THOMAS CURRY, A NEW DIGEST OF THE STATUTE LAWS OF THE STATE OF LOUISIANA 271–72 (1842) (Crimes and Offences, para. 154); 1 FREDERICK NASH ET AL., THE REVISED STATUTES OF THE STATE OF NORTH CAROLINA 209 (1837) (Crimes and Punishments, para. 74); 2 JOSEPH BREVARD, AN ALPHABETICAL DIGEST OF THE PUBLIC STATUTE LAW OF SOUTH CAROLINA 243 (1814) (Slaves, para. 53); 1 B.W. LEIGH, THE REVISED CODE OF THE LAWS OF VIRGINIA 424–25 (1819) (Slaves, Free Negroes and Mulattoes, para. 15); see also Corey Capers, *Black Voices, White Print: Racial Practice, Print Publicity, and Order in the Early American Republic*, in *EARLY AFRICAN AMERICAN PRINT CULTURE* 107, 107 (Lara Langer Cohen & Jordan Alexander Stein eds., 2012) (noting that "late colonial and early national newspapers and almanacs had frequently trafficked in jokes at the expense of African Americans").

¹⁴⁴ BRITISH & FOREIGN ANTI-SLAVERY SOCIETY, *SLAVERY AND THE INTERNAL SLAVE TRADE IN THE UNITED STATES OF NORTH AMERICA* 195 (1841).

¹⁴⁵ *Id.* at 194.

¹⁴⁶ See *EARLY NATIVE LITERACIES IN NEW ENGLAND* 4 (Kristina Bross & Hilary E. Wyss eds., 2008) (discussing how "Indians used various inscription technologies from their own traditions and readily integrated these practices into pen-and-ink inscriptions").

¹⁴⁷ LOCKRIDGE, *supra* note 142, at 52.

¹⁴⁸ EDWARD E. GORDON & ELAINE H. GORDON, *LITERACY IN AMERICA* 21 (2003).

¹⁴⁹ LOCKRIDGE, *supra* note 142, at 42 ("As with the other aspects of literacy, the changes in women's literacy went only so far, and in the case of women's literacy it was not very far at all.").

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 93.

¹⁵² *Id.*

founding generation's experience, however, these were skills that, while becoming more common, were far from universal and enjoyed primarily by certain privileged groups. Thus while the historical rhetoric of the press spoke of the right of "every freeman," "every man," or "every citizen," the real world at the time offered no such ubiquitous freedom.

The substantial advances in American literacy over the past two centuries are, without doubt, an inherently positive development.¹⁵³ Understanding the real and widespread limitations of literacy at the time, however, establishes that the framing generation was comfortable with constitutionally protecting the use of a tool that was beyond the reach of many Americans. The factors that once drew these lines—race, sex, wealth—would be rightfully unacceptable today. But the uncomfortable reality is that the founding generation saw those who were able to use the press (primarily wealthier, educated white men) as experienced and knowledgeable speakers who were able trustees for the general public's right to information.¹⁵⁴

2. Supplies, Labor, and Costs

The freedom of the press may only be guaranteed, as the twentieth century journalist A.J. Liebling famously quipped, "to those who own one,"¹⁵⁵ but even those who owned one faced serious obstacles to getting their desired messages out.¹⁵⁶ While printing had "cerebral and prestigious aspects," it was also exceedingly hard work and "a dirty, smelly, physically demanding job."¹⁵⁷ Necessary resources were frequently scarce. The costs associated with the printing presses were also significant—at times prohibitively so—for speakers and readers alike.

Machinery and supplies were expensive and generally imported from Europe.¹⁵⁸ In 1765, the printers of the *New England Almanack* complained that the importation rates were threatening to reduce them "to the State of Slaves and Beggars."¹⁵⁹ The mechanical difficulties of the presses, meanwhile,

¹⁵³ As of 2013, the American adult literacy rate was around eighty-six percent. See *Illiteracy Statistics*, STATISTIC BRAIN, <http://www.statisticbrain.com/number-of-american-adults-who-cant-read/> [https://perma.cc/LZ7G-8Z3M] (last updated Dec. 2, 2015).

¹⁵⁴ See PASLEY, *supra* note 138, at 28 (stating that in the seventeenth century colonies, newspapers were considered useful only for "delivering the small spectrum of thoughts and information that local elites deemed fit for broader consumption" and even then only "a very tiny fraction of the population [was] seen as needing to know or hav[ing] opinions about governmental affairs").

¹⁵⁵ A.J. Liebling, *The Wayward Press: Do You Belong in Journalism?*, NEW YORKER, May 14, 1960, at 105, 109.

¹⁵⁶ 2 DANIEL BERKELEY UPDIKE, *PRINTING TYPES: THEIR HISTORY, FORMS, AND USE* 156 (1922) (noting the problems of a "lack of good paper, good ink, and good workmen").

¹⁵⁷ PASLEY, *supra* note 138, at 25.

¹⁵⁸ *Id.* at 150.

¹⁵⁹ LAWRENCE C. WROTH, *THE COLONIAL PRINTER* 141 (Dominion Books 2d ed. 1964) (1931) (quoting *NEW ENGLAND ALMANACK FOR 1765*); see also ROGER P. MELLEN, *THE*

"were many and vexatious."¹⁶⁰ Printing presses frequently broke and were difficult to repair, requiring skilled labor.¹⁶¹

Finding and retaining trained (and sober¹⁶²) labor was especially problematic. One historian noted that the concern that kept "the colonial printer awake at night [was] the restlessness, the inebriety, and the general scarcity of trained journeymen."¹⁶³ Skilled paper-making craftsmen were similarly hard to come by.

Most problematic for early printers, however, was a constant shortage of paper.¹⁶⁴ Few paper mills were operational in all of the colonies, and the paper they produced was in high demand with the government consuming much of the supply. Paper was produced from linen rags,¹⁶⁵ of which there was a constant shortage.¹⁶⁶ Newspapers regularly included an appeal for rags in tones that ranged "from the grave to the gay, from the impassioned plea to the frenzied demand."¹⁶⁷

Ink was scarce as well. Most ink came from England, but some printers resorted "from necessity rather than from choice"¹⁶⁸ to making their own¹⁶⁹ "by boiling lampblack (soot) in varnish (linseed oil and rosin)."¹⁷⁰ Making ink posed risks, not the least of which was the possibility of setting fire to the oil.¹⁷¹ One printer was said to have boiled his oil in a meadow to avoid "the danger of burning down his whole establishment."¹⁷²

ORIGINS OF A FREE PRESS IN PREREVOLUTIONARY VIRGINIA 34 (2009) (noting that this was not a situation that showed much hope for improvement throughout the colonial period when there was "little change in cost or availability" of supplies).

¹⁶⁰ OSWALD, *supra* note 130, at 33.

¹⁶¹ *Id.* at 37.

¹⁶² PASLEY, *supra* note 138, at 26 (explaining that "printing office culture was built around heavy, on-the-job drinking").

¹⁶³ WROTH, *supra* note 159, at 160–61 (describing a 1773 advertisement in which printer William Goddard sought "one or two sober Journeymen Printers who *can* and will work").

¹⁶⁴ 5 CHARLES EVANS, AMERICAN BIBLIOGRAPHY 1774–1778, at xiv (Peter Smith 1941) (1909) ("The scarcity of paper for writing and printing during the revolutionary period occasioned great inconvenience in all the Colonies."); WROTH, *supra* note 159, at 233 ("This high mortality among the newspapers can be best accounted for by . . . the difficulty experienced at various times and places of securing a steady supply of reasonably cheap paper.").

¹⁶⁵ MELLEN, *supra* note 159, at 34.

¹⁶⁶ WROTH, *supra* note 159, at 144.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 121.

¹⁶⁹ OSWALD, *supra* note 130, at 38.

¹⁷⁰ PASLEY, *supra* note 138, at 25.

¹⁷¹ *Id.* ("If the printing-office staff survived the noxious fumes and fire hazards of making ink, their persons and equipment nevertheless spent much of the workday covered in the stuff.").

¹⁷² WROTH, *supra* note 159, at 119.

Proximity posed its own problems. Printers often found themselves far away from the supplies they needed, the news they desired and the audience they wished to reach. Prior to late-eighteenth century, printing houses were generally only located in the capitals, so that residents of outlying areas had only limited access to printed materials.¹⁷³ As the Revolution took hold, printers became more common in smaller and more remote towns, but they too confronted challenges in gathering news and in distributing finished products. Weather often impeded communication so much so that winter was dubbed the “dead season” due to “frozen waterways and impassable roads [that] frequently forced [the printer] to reduce the size of his journal for sheer lack of news to fill it.”¹⁷⁴

The formation and development of the American postal system, beginning in 1774, reflects both the difficulties that the geographic landscape posed for early printers as well as the framing generation’s comfort with giving government favor to newspapers.¹⁷⁵ During this period, Congress enacted regulations designed to subsidize delivery of newspapers as compared to business or personal mail and, in particular, to rural areas. In his fourth address to Congress, President Washington emphasized “the importance of facilitating the circulation of political intelligence and information” and “the transmission of News-papers to distant parts of the Country.”¹⁷⁶ Congress also passed legislation aimed at protecting rural printers against the more economically advantaged urban newspapers.¹⁷⁷

Despite having the sympathies of many members of Congress, the printers struggled to stay afloat in their “notoriously unprofitable” business.¹⁷⁸ Difficulties in getting subscribers and advertisers to pay their bills were universal.¹⁷⁹ While long-distance subscriptions merely exacerbated these

¹⁷³ 1 ISAIAH THOMAS, *THE HISTORY OF PRINTING IN AMERICA* 18 (2d ed. 1874).

¹⁷⁴ WROTH, *supra* note 159, at 172.

¹⁷⁵ Frank W. Scott, *Newspapers, 1775–1860*, in 2 *THE CAMBRIDGE HISTORY OF AMERICAN LITERATURE* 176, 182 (William Peterfield Trent et al. eds., 1918). For an insightful discussion of the impact of the postal service on First Amendment development, see Anuj C. Desai, *The Transformation of Statutes into Constitutional Law: How Early Post Office Policy Shaped Modern First Amendment Doctrine*, 58 *HASTINGS L.J.* 671, 673–74 (2007).

¹⁷⁶ George Washington, President, Fourth Annual Address to the United States Senate and House of Representatives (Nov. 6, 1792).

¹⁷⁷ See WAYNE E. FULLER, *THE AMERICAN MAIL: ENLARGER OF THE COMMON LIFE* 113 (1972) (“The little newspapers in rural America, whose offices so often bulged with government documents, were the special darlings of Congress, whose policies were deliberately designed to foster them and make them competitive with city newspapers. It was to protect them against the encroachments of the urban press that Congress set the postage rate a half-cent higher on interstate newspapers going more than 100 miles.”).

¹⁷⁸ PASLEY, *supra* note 138, at 129; see also Botein, *supra* note 64, at 142 (stating that “the leading printing establishment in the colonies was little more than a middling business”).

¹⁷⁹ PASLEY, *supra* note 138, at 130 (explaining that the “problem was in the structure of newspaper debt: a large sum made up of hundreds or thousands of tiny sums due from

problems.¹⁸⁰ Even once the bills were paid, printers had to deal with a system in which each state had its own currency, some of which were deemed to be "of dubious value."¹⁸¹

These many costs of printing were naturally passed along to the readers, limiting access of those who could read the material in addition to those who could publish it. A newspaper "ordinarily cost the reader six cents an issue at a time when the average daily wage for nonfarm labor was less than eighty-five cents."¹⁸² Most newspapers were sold by subscription only, which would cost the prohibitive price of eight to ten dollars per year.¹⁸³

Yet even the citizen who had the funds to purchase a newspaper, access to obtain one, and the ability to read it still might be unable to read the news thanks to the crude printing technology. The necessity of relying on "wretched ink, and more wretched paper" affected the quality of the printed material.¹⁸⁴ In 1779, Benjamin Franklin wrote a letter to his niece thanking her for sending along copies of the Boston newspapers, but he complained that the quality of the printing was so poor that he could not read the words. "If you should ever have any Secrets that you want to be well kept," he wrote, "get them printed in those Papers."¹⁸⁵

All of these impediments naturally placed serious limitations on the output of a print shop.¹⁸⁶ The lack of paper forced "[e]ven the publishers of the greater journals" to "reduce the size of their sheets and in many cases to omit issues altogether."¹⁸⁷ Larger works such as books, moreover, were rarely published in the colonies, because they were too expensive.¹⁸⁸ The pure

individuals, each far too small to pay a lawyer to collect, especially if the debtor resided in a distant place").

¹⁸⁰ *Id.* at 139.

¹⁸¹ Scott, *supra* note 175, at 178.

¹⁸² SCHUDSON, *supra* note 135, at 15.

¹⁸³ *Id.* at 18. By the mid-nineteenth century, printing had started to become more affordable thus leading to creation of the "penny press." *Id.*

¹⁸⁴ OSWALD, *supra* note 130, at 38 (quoting THOMAS, *supra* note 173, at 123–24).

¹⁸⁵ UPDIKE, *supra* note 156, at 151; *see also* PASLEY, *supra* note 138, at 32 (quoting a Connecticut political writer complaining in 1811 that "I have . . . often been surprized that the most valuable communications in our papers should be in illegibly small type" (alteration in original) (quoting Letter from Abraham Bishop to Jonathan Law (May 1, 1811))).

¹⁸⁶ MORAN, *supra* note 131, at 158 (quoting Fairhaven Press's publicity critical of the commonly used "high-priced cylinder" press as complaining that the costs and need for skilled labor were "so great that [the press] cannot profitably be run in the average job printing office").

¹⁸⁷ WROTH, *supra* note 159, at 143–44.

¹⁸⁸ Joseph Rezek, *The Print Atlantic: Phillis Wheatley, Ignatius Sancho, and the Cultural Significance of the Book*, in *EARLY AFRICAN AMERICAN PRINT CULTURE*, *supra* note 143, at 19, 345 n.8.

physical effort of running the press alone might limit a newspaper's circulation or frequency of publication.¹⁸⁹

It is all enough to make one wonder why there was any printing at all. Yet infused deeply within the struggles of colonial and early American printing was a sense of great national purpose. Children were put to work sorting rag piles for paper,¹⁹⁰ and were instructed that "the saving of Rags is really a matter of great consequence and importance to our country."¹⁹¹ Papermakers were labeled as an "essential occupation" and exempted from military service.¹⁹² Printers often relied on the "good will of strangers" to gather the funds and equipment "to print the newspaper and other items needed in a community which frequently could not afford their product."¹⁹³ The printers clearly did not go to these great lengths for profit, because there rarely was one,¹⁹⁴ but rather out of a commitment to a belief that they were engaged in something of importance.

3. Taxes

If there was one issue that best illustrates the early printers belief in their unique service to the public, it was the matter of taxes. The most famous taxes on printed documents were levied via the Stamp Act of 1765¹⁹⁵ and the Townshend Act of 1767.¹⁹⁶ The Townshend Act also taxed tea, leading to the famous protest in Boston long associated with the onset of the Revolutionary War. According to one press historian, however, it was "quite likely that [the tax on] paper was more emphatically an immediate cause for the outbreak of the spirit of revolt than the insipid herb of which so much has been written."¹⁹⁷

¹⁸⁹ PASLEY, *supra* note 138, at 26 (explaining that "even a rural weekly, with a barely adequate circulation of only 500 or 600, required a day and most of a night of unremitting labor to produce" and "[p]ublishing a more ambitious or successful journal was commensurately harder on the staff").

¹⁹⁰ Jonathan Senchyne, *Bottles of Ink and Reams of Paper: Clotel, Racialization, and the Material Culture of Print*, in *EARLY AFRICAN AMERICAN PRINT CULTURE*, *supra* note 143, at 140, 146.

¹⁹¹ WROTH, *supra* note 159, at 146 (quoting Moses Johnson, *CHESHIRE ADVERTISER*, Mar. 22, 1792, addressing the children of his community in Keene, New Hampshire).

¹⁹² *Id.* at 144, 122–23 (noting the quality of the paper was "as variable in quality as one would expect from indifferent materials handled by provincial workmen in rude manufactories").

¹⁹³ ROLLO G. SILVER, *THE AMERICAN PRINTER 1787–1825*, at 64 (1967).

¹⁹⁴ Botein, *supra* note 64, at 143 (noting that for many printers "poverty was more than a remote contingency").

¹⁹⁵ Stamp Act of 1765, 5 Geo. 3, c. 12.

¹⁹⁶ Revenue Act of 1767, 7 Geo. 3, c. 46.

¹⁹⁷ WROTH, *supra* note 159, at 142–43.

Whether protesting taxes on tea or on paper, the printers were at the frontlines of the battle.¹⁹⁸

In the words of David Ramsay, a South Carolina delegate to the Continental Congress, who in 1789 wrote a history of the Revolutionary War, opposition to the Stamp Act "blazed forth from the press" in which the "tongues and the pens of the well informed citizens labored in kindling the latent sparks of patriotism."¹⁹⁹ Ramsay found it "fortunate for the liberties of America, that [n]ew-spapers were the subject of a heavy stamp duty," because "[p]rinters, when uninfluenced by government, have generally arranged themselves on the side of liberty."²⁰⁰

Printers challenged the British tax on paper by claiming a special place in the new republic and arguing that the tax burdened their ability to inform the people of public events and check abuses by the government.²⁰¹ They commonly argued that "the taxes would make it more difficult for their papers to circulate 'among all ranks of the people, even among those of the lowest fortune,' and would 'prevent the circulation of that political Intelligence, which is manifestly necessary to the virtue, freedom and happiness of the people.'"²⁰²

Their efforts brought public attention to the importance of the printers' work and their ability to unite through shared information.²⁰³ Thus "[a]s printers during the Stamp Act crisis began to identify their interests with resistance to the British, so patriot leaders came to identify their cause with the printing press."²⁰⁴ In the words of John Adams, the earliest settlers had come to America in search of liberty and believed that "knowledge diffused generally thro' the whole body of the people" and that "none of the means of information are more sacred, or have been cherished with more tenderness and

¹⁹⁸ See Jill Lepore, *Back Issues: The Day the Newspaper Died*, NEW YORKER, Jan. 26, 2009, <http://newyorker.com/magazine/2009/01/26/back-issues> [<https://perma.cc/KNS7-5KTL>] (stating that "the men who dumped the tea in Boston Harbor apparently changed into their disguises in the *Gazette's* back room"); see also BIRD, *supra* note 67, at 23 (noting that the Stamp Act, Townsend Act and other conflicts "unleashed a torrent of colonial dissent—press, speech, and petition—which brought increasing awareness of dissent's precarious legal status").

¹⁹⁹ 1 DAVID RAMSAY, *THE HISTORY OF THE AMERICAN REVOLUTION* 58 (Lester H. Cohen ed., 1789).

²⁰⁰ *Id.*

²⁰¹ STARR, *supra* note 132, at 65.

²⁰² MARTIN, *supra* note 88, at 102 (quoting Petition of John Mycall, Book Trades Collection, Box 1, Folder 7, American Antiquarian Society (photocopy of Senate File 718-5, Massachusetts State Archives)).

²⁰³ STARR, *supra* note 132, at 65 ("Far from stifling the press, however, the Stamp Act politicized it."); see also *id.* at 66 (noting that the campaign against the Stamp Act "led to the first intercolonial cooperation against the British" and "contributed to Americanization by fostering a sense of the colonists' common situation").

²⁰⁴ *Id.* at 66–67.

care by the settlers of America, than the Press.”²⁰⁵ The Stamp Act, Adams wrote, threatened “to strip us in great measure of the means of knowledge, by loading the Press, the Colleges, and even an Almanack and a News-Paper, with restraints and duties.”²⁰⁶

B. *The Product of Printing Presses*

The preceding account of the pre-constitutional American press points to one overarching conclusion: this “press” was not a press of easy accessibility. The many and varied obstacles to securing adequate supplies and skilled labor made printing a torturous endeavor. Difficulties posed by distance, illiteracy, and poor quality meant that reaching audiences with printed material was also a task fraught with challenge. Those who chose to face these obstacles, did so with a deep sense of public purpose. And they did not undertake these struggles only to disseminate messages of trivial value. So, in the real world of the late 1700s, what did these printers print?

They printed news. Early printers devoted most of their efforts to publishing information they deemed to be of public concern, and they did so primarily through newspapers that they personally owned and edited.²⁰⁷ As the country grew, moreover, so did the central and preeminent place of newspapers in early American publishing.²⁰⁸ Early newspapers “[were] not casual reading matter in the colonies,” according to historian Stephen Botein, but “were of enough consequence to be preserved serially in personal libraries, instead of being discarded once read.”²⁰⁹ Both in practice and in reputation, the printing press overlapped meaningfully with the growing concept of the “press” as a community of newspapers and the men who made them.

In the decades leading up the Revolutionary War, the number of newspapers in the colonies grew more than twice as fast as the population, and in the decades that followed the war, it was four times as fast.²¹⁰ While periods of struggle sparked higher demand for newspapers, the trend remained that the “newspaper press continued to grow far faster than the market for it.”²¹¹ An English writer in 1789 observed that the quality of American newspapers is “unequalled, whether considered with respect to wit and humour,

²⁰⁵ *Id.* at 67 (quoting John Adams, *A Dissertation on the Canon and the Feudal Law*, in 1 PAPERS OF JOHN ADAMS 113, 120 (Robert J. Taylor et al. eds., 1977)).

²⁰⁶ *Id.* (quoting Adams, *supra* note 206, at 128).

²⁰⁷ Botein, *supra* note 64, at 146.

²⁰⁸ LAUSE, *supra* note 136, at 8 (noting that without the regular work provided by newspapers, most printing shops would not have been able to stay afloat based solely on the “small jobs like broadsides or announcements and book work that, in the short run, could not pay for itself”).

²⁰⁹ Botein, *supra* note 64, at 146–47.

²¹⁰ PASLEY, *supra* note 138, at 33.

²¹¹ *Id.* at 201.

entertainment or instruction."²¹² He added that "[e]very capital town on the continent prints a weekly paper, and several of them have one or more daily papers."²¹³

Newspapers obtained a status "as a social necessity."²¹⁴ In an 1803 book, Samuel Miller wrote of newspapers that while "they once were, of small moment in society, they have become immense moral and political engines, closely connected with the welfare of the state, and deeply involving both its peace and prosperity."²¹⁵ They had become the primary means by which "the principles of government, the interests of nations, the spirit and tendency of public measures, and the public and private characters of individuals" were discussed and debated.²¹⁶

Beyond newspapers, early printers produced other publications that also focused on matters of public concern such as periodicals²¹⁷ and almanacs.²¹⁸ Almanacs provided information of community interest ranging from "the changes of sun, moon, and tide, in the coming of seed-time and harvest," to "dates of local court sessions, of schedules of post riders and of coaches and packet boats" as well as "verse of a serious or comic character, prescriptions for the cure of snake bites and fluxes."²¹⁹ Some pre-Revolutionary almanacs also included political essays "that influenced the people of the colonies in their progress towards separation from Britain."²²⁰

Printers further served their communities by printing official legal documents.²²¹ The government relied on printers for the printing of laws, legal agreements, civic orders and legal precedents, which brought a new kind of legitimacy, security and accessibility to government documents. Printing, one scholar noted, "substantially altered the relationship between the people and

²¹² WROTH, *supra* note 159, at 230 (quoting BIBLIOTHECA AMERICANA 14 (1789)).

²¹³ *Id.*

²¹⁴ *Id.* at 231.

²¹⁵ STARR, *supra* note 132, at 70 (quoting 2 SAMUEL MILLER, A BRIEF RETROSPECT OF THE EIGHTEENTH CENTURY 251 (1805)).

²¹⁶ *Id.* (quoting MILLER, *supra* note 215, at 251).

²¹⁷ WROTH, *supra* note 159, at 238–39 (observing that the "desire of printer and people for the publication of periodical magazines seems to have been as urgent and as widespread as for the issuance of newspapers" and noting that "[t]he periodical press . . . was no small factor in the cultural life of the nation").

²¹⁸ *Id.* at 228 (stating that most colonial printers "sought to render [their] establishment useful to the community by the publication of an annual almanac").

²¹⁹ *Id.* at 228–29.

²²⁰ *Id.* at 229.

²²¹ MELLEEN, *supra* note 159, at 37 (describing the primary output of a print shop in Williamsburg, Virginia, "was to print laws and other legal documents"); *see also* PASLEY, *supra* note 138, at 48 ("Very early on, Congress established an important source of income for newspaper publishers, one that would be very helpful in sustaining partisan newspapers, by providing for newspapers to publish the laws of the United States as they were passed."); Botein, *supra* note 64, at 166 ("Many colonial printers in the eighteenth century . . . looked to public authority as a source of income.").

their government”²²² by allowing the “people to know the law of the colony”²²³ and opening discussions about legal issues to “greater numbers of people.”²²⁴

While newspapers and periodic magazines were the staples of printers’ work,²²⁵ printers certainly took on other jobs to pay the bills,²²⁶ such as advertisements, form documents, and bills of sale.²²⁷ But, as the foregoing account reveals, the grist of the printers’ mill was material designed to advance the communal good through information about matters of public concern and with a special emphasis on the workings of government.²²⁸

The ongoing point is that the press of the founding generation was not merely an instrument for transmitting any kind of message to one and all. To the contrary, the messages it could and did deliver tended to be about public affairs.²²⁹ The framers understood this important point about the press of their time, and they saw a strong link between the printing press and an informed citizenry.

Consider, for example, the second Congress’s preferential treatment of newspapers over letters in the first Post Office Acts.²³⁰ Newspapers traveled for low or no postage, Professor Anuj Desai explained, because they “printed information about public affairs, whether as propaganda for the government or attacks on it.”²³¹ Indeed, in a 1792 address, President George Washington implored Congress to find a way to lower newspaper postage rates to more distant communities because of “the importance of facilitating the circulation of political intelligence and information.”²³² This favored status of newspapers

²²² MELLEN, *supra* note 159, at 38.

²²³ WROTH, *supra* note 159, at 227.

²²⁴ MELLEN, *supra* note 159, at 41.

²²⁵ WROTH, *supra* note 159, at 232 (“The establishment of a weekly journal, with its subscription list and advertisements forming a regular source of income, was the ambition of every progressive printer”); *see also id.* (noting that between 1694 and 1820, there were 1,934 different newspapers published); STARR, *supra* note 132, at 69 (observing that newspapers dominated books in publication).

²²⁶ SILVER, *supra* note 193, at 65 (“In small offices where the press was needed only a few days every week for the newspaper, jobs could be turned out in the remaining time with an obvious reduction of overhead costs.”).

²²⁷ *See, e.g.,* WROTH, *supra* note 159, at 216–22 (examining the published work of one Massachusetts printer, Franklin & Hall, for the year 1765).

²²⁸ *See* Botein, *supra* note 64, at 216 (discussing a study that found “political pamphlets alone developed into a sizeable trade interest after 1765”).

²²⁹ *Id.* at 184 (quoting Benjamin Franklin stating that “the Business of Printing has chiefly to do with Mens Opinions” (PA. GAZETTE, June 10, 1731)).

²³⁰ Desai, *supra* note 175, at 694.

²³¹ *Id.* at 694 n.104; *see also* RICHARD B. KIELBOWICZ, NEWS IN THE MAIL: THE PRESS, POST OFFICE, AND PUBLIC INFORMATION, 1700–1860s, at 121 (1989) (stating that “[w]hen Congress considered the relative merits of different kinds of mail matter in the 1790s, it decided that political intelligence deserved the greatest encouragement. Hence, the most privileged rate was reserved for newspapers, many of them avowedly political journals”).

²³² Washington, *supra* note 176.

stands in stark contrast to the treatment of handwritten letters. Letter writers paid up to sixteen times more for postage than newspapers, thus heavily subsidizing the cost of shipping newspapers.²³³

C. Printers as Gatekeepers

At the helm of each early American printing enterprise was a person charged with making final decisions about what his press produced. These men were called "printers"—a term that embraced "[a]ll designations of those responsible for the production of newspapers."²³⁴ A single person typically took on, all at once, the roles of reporter, editor, business manager and publisher. Often, the printer personally wrote most or even all of the content of his newspaper.²³⁵

Perhaps most importantly, however, printers decided what would and would not be published. Who were these men?²³⁶ They were "the intellectual elite of the early American working class" and often came from the ranks of "brainy working-class boys."²³⁷ They straddled the world of both laborers and intellectuals. On one hand, it was a position "of importance based upon responsibility" that held the potential, at least, of "social and political esteem."²³⁸ Yet, on the other hand, they "could not escape their identity as men who worked with their hands, in a society that regarded manual labor as the province of those too dull, weak, or lowly to escape it."²³⁹

But printers nonetheless occupied a unique place at the center of society. They had "local acclaim" as well as "contact with the local ruling, thinking, and writing classes: the government officials, political leaders, lawyers, and clergymen who were most likely to produce and consume printed matter."²⁴⁰

²³³ See Desai, *supra* note 175, at 692–94.

²³⁴ OSWALD, *supra* note 130, at 8.

²³⁵ CHRISTOPHER B. DALY, COVERING AMERICA: A NARRATIVE HISTORY OF A NATION'S JOURNALISM 16 (2012); OSWALD, *supra* note 130, at 8; SCHUDSON, *supra* note 135, at 16 ("Early newspapers were small operations. One man generally served as editor, reporter (insofar as there was any reporting at all), business manager, and printer."); WROTH, *supra* note 159, at 194 ("[T]he colonial printer in the small town found himself a man of varied interests: editor, printer, and publisher, he was usually postmaster, frequently a town official, and nearly always something of a general merchant.").

²³⁶ See OSWALD, *supra* note 130, at 182 (stating that although some women did operate printshops, all of them did so only following the deaths of their printer husband).

²³⁷ PASLEY, *supra* note 138, at 24; see also LAUSE, *supra* note 136, at 24 ("Individual printers shared the unique intellectual benefits of their craft, despite differing levels of formal education, ranging from charity and church schools to some time in universities.").

²³⁸ WROTH, *supra* note 159, at 187.

²³⁹ PASLEY, *supra* note 138, at 26.

²⁴⁰ *Id.* at 25; see also LAUSE, *supra* note 136, at 25 ("In this craft, journeymen as well as masters had close contact with the statesmen and men of letters of their day."); Botein, *supra* note 64, at 145 ("Printers in America were habitually at the center of things. Many staffed the colonial post office; some clerked for the governments whose laws and currency they printed.").

Their printing offices tended to be “one of the focal points of the town’s life, a place of congregation and of interchange of gossip” leading their owners to be “important, if not always eminent, among the citizens of their respective communities.”²⁴¹

While printers’ varied and collective practices changed over time, printers always exercised an important power over access to the press. In the words of Charles and O’Neill, the founding generation’s “press” did not equate with “the publication of anything or everything.”²⁴² Rather, many printers were “very limited in their views on what was acceptable to put in print.”²⁴³ In a newspaper editorial, for example, printer William Goddard declared that “the liberty of the press did not include ‘publishing all the Trash which every rancorous, illiberal, anonymous Scribbler’ might send to the printer, for it may be inconsistent ‘with the Gratitude, Duty, and Reverence [a printer] owes to the Public.’”²⁴⁴ Writing in 1782, Eleazer Oswald, printer of the *Independent Gazetteer*, likewise wrote that printers had a duty to judge “the Propriety, Nature and Tendency” of what they published and declared that “[w]ithout a Capacity to judge in these Essentials, [a printer] is not qualified for his Business.”²⁴⁵

The conventional wisdom of the early-American newspapers is that they were mere partisan tools of the competing political parties. Historian Jeffrey Pasley refers to this as the “origin myth” of modern journalism’s struggle “to emerge from the dark ages.”²⁴⁶ The partisan press, of course, is an important chapter in the story of the rise of journalism in America,²⁴⁷ but it is one that mostly follows the ratification of the Press Clause.²⁴⁸ The printers of the founding generation took varied and often evolving attitudes about their places in political debate.

In the colonial period most printers embraced a stance of neutrality on current issues while opening the pages of their newspapers to others to air their

²⁴¹ WROTH, *supra* note 156, at 187–88.

²⁴² Charles & O’Neill, *supra* note 13, at 1730–32.

²⁴³ See SCHUDSON, *supra* note 135, at 16; see also Botein, *supra* note 64, at 129 (stating that “any discussion of the early American press that focuses on products instead of entrepreneurial personnel—on imprints instead of printers—neglects the complex process by which private opinion was often softened if not suppressed before it could be articulated in public”).

²⁴⁴ Charles & O’Neill, *supra* note 13, at 1731 (alteration in original) (quoting PA. CHRON. & UNIVERSAL ADVERTISER, Mar. 9–16, 1767, at 31).

²⁴⁵ SMITH, *supra* note 66, at 38 (quoting INDEP. GAZETTE, Apr. 13, 1782).

²⁴⁶ PASLEY, *supra* note 138, at 3; see also MARCUS DANIEL, SCANDAL & CIVILITY: JOURNALISM AND THE BIRTH OF AMERICAN DEMOCRACY 6 (2009) (describing the conventional wisdom that the partisan press of the 1790s and early 1800s was “a less than heroic interlude between the nationalist triumphs of the revolutionary press and the rise of an independent, objective press in the nineteenth century”).

²⁴⁷ A discussion of the role of the partisan press can be found *supra* Part II.C.

²⁴⁸ See SMITH, *supra* note 66, at 38.

opinions.²⁴⁹ Norms developed of impartiality and respectability.²⁵⁰ Printers felt a duty to "remain open to sentiments on every side of an issue"²⁵¹ even when such opinions "were counter to a particular publisher's own views."²⁵² Many colonial newspapers adopted the masthead slogan of "Open to all parties, but influenced by none."²⁵³ Benjamin Franklin agreed that printers were obligated to publish all sides of an issue, while also emphasizing that they "continually discourage the Printing of great Numbers of bad things, and stifle them in the Birth."²⁵⁴

This occupational ideology of public service for printers was held not only by the printers themselves but also by the public at large.²⁵⁵ Perhaps the most famous expression of the public defense of printers as public servants came in the 1735 jury nullification of seditious libel charges against printer John Peter Zenger.²⁵⁶ Indeed, printers so embraced their democratic purpose that many went to jail, often repeatedly, for their cause.²⁵⁷

The rise of the partisan press as the revolution took hold altered the role of newspapers, but it did not lessen the power of the printers who were holding the keys to press access. The printers' control was evident through "the suppression of news, in the closing of his columns to the political articles of the opposition, or in the refusal to print pamphlets or broadsides inimical to the cause he favored."²⁵⁸

²⁴⁹ See *id.* at 7 (noting that printers "proclaimed their independence of factions and declared the importance of their serving as checks on government"); STARR, *supra* note 132, at 60.

²⁵⁰ Charles & O'Neill, *supra* note 13, at 1730–34; see Botein, *supra* note 64, at 176 (quoting Letter from colonial printer David Hall to William Strahan (Apr. 30, 1767), writing that he had always "endeavoured to keep well with both Parties" and "I thought it was my Business (without doing any thing mean) to do what I could, likewise to keep in with the other Side").

²⁵¹ MARTIN, *supra* note 88, at 106.

²⁵² Anderson, *supra* note 6, at 466 (quoting MERRILL JENSEN, *THE NEW NATION: A HISTORY OF THE UNITED STATES DURING THE CONFEDERATION 1781–1789*, at 430 (1958)); see also *id.* ("We usually think of the colonial newspapers as being intensely partisan, and most of them were. But many of them also served as forums for public debate.").

²⁵³ Botein, *supra* note 64, at 178.

²⁵⁴ Benjamin Franklin, *An Apology for Printers*, PA. GAZETTE, May 27, 1731.

²⁵⁵ SMITH, *supra* note 66, at 7; see Botein, *supra* note 64, at 177 ("Embedded in the prevailing colonial rhetoric concerning 'liberty of the press' was a principle readily embraced by much of the trade—that printers should be politically neutral in the conduct of their business, and publish whatever was submitted to them.").

²⁵⁶ Chris Donovan, *A Case for Jury Nullification*, MARQ. U. L. SCH. FAC. BLOG (Oct. 13, 2009), <http://law.marquette.edu/facultyblog/2009/10/13/a-case-for-jury-nullification/comment-page-1/> [<https://perma.cc/4F2K-KQ2D>].

²⁵⁷ SMITH, *supra* note 66, at 9 (noting that "James Franklin and James Parker spent more time in jail for contempt than any other printer yet neither altered his behavior").

²⁵⁸ WROTH, *supra* note 159, at 189; see also SCHUDSON, *supra* note 135, at 16 (stating that editors were "very limited in their views on what was acceptable to put in print").

Even printers of the more openly political press of the nineteenth century were not without their ideals.²⁵⁹ The editors of these newspapers “were purposeful actors in the political process, linking parties, voters, and the government together.”²⁶⁰ They encouraged their readers, moreover, to be active participants in democracy as both citizens and voters.²⁶¹

Printers viewed themselves in grand terms as fulfilling a specific and vital societal role in which they “stood near the cutting edge of their civilization” and “regarded their craft as an integral partner of the Enlightenment.”²⁶² In the words of one printer, they were a league of “men of integrity and wisdom—men who will keep constantly in view the permanent interests of mankind, and will never be diverted from the path of rectitude by a mercenary love of gain, by a servile fear of power, or by the capricious and fluctuating tide of public opinion!”²⁶³

Some of this rhetoric, surely, is guilty of over romanticization. The content of some early newspapers could be best described as “one long and uninterrupted invective, a ragged fleet of dung barges,” in the words of Professor Jill Lepore, ranging from “mere gimmickry and gambolling” to “just plain malicious.”²⁶⁴ Printing was also, of course, a business and carried with it all the typical commercial incentives. As Benjamin Franklin put it, many printers “cheerfully serve all contending Writers that pay them well.”²⁶⁵ Despite all of this, however, the work of the printers nonetheless had an important impact by creating “a long and revolutionary argument against tyranny, against arbitrary authority—against, that is, the rule of men above law.”²⁶⁶

Whether through openly partisan objectives or ideals of impartiality, colonial and early American printers made choices about who had access to their presses and what they would be allowed to print. The press the framing generation knew, therefore, lay in the hands of printers, who embraced and took pride in their gatekeeper roles.

²⁵⁹ See SMITH, *supra* note 66, at 38 (noting that even during the “most vicious and vituperative” period “[e]ditors nevertheless still insisted they served the cause of truth”).

²⁶⁰ PASLEY, *supra* note 138, at 3.

²⁶¹ GERALD J. BALDASTY, *THE COMMERCIALIZATION OF NEWS IN THE NINETEENTH CENTURY* 28 (1992) (quoting the Worcester MASS. SPY, Oct. 24, 1832, telling its readers: “Go to the polls and see that your neighbor goes, and there vote for the men who have always been faithful to you and your interests . . .”).

²⁶² LAUSE, *supra* note 136, at 25.

²⁶³ *Id.* at 27 (quoting George Churchill, Address Before the Albany Typographical Society (Nov. 6, 1813)).

²⁶⁴ Lepore, *supra* note 198.

²⁶⁵ Franklin, *supra* note 254.

²⁶⁶ Lepore, *supra* note 198.

IV. APPLYING THE HISTORICAL FRAMEWORK TO A MODERN "PRESS"

The more-complete historical record suggests that the term "Press" had multiple and overlapping significances that were deeply influenced by the ratifying generation's actual experiences with printing. These experiences reveal a press that was simultaneously precious and demanding. It was a tool. But it was a tool that was infused from the beginning with a distinct and revered sense of public purpose—primarily to discuss and monitor the political and newsworthy matters of the day.

The historical rhetoric of press freedom, as discussed above, showed that the framers primarily valued the structural role of the press—the need for a nongovernmental institution that will check the government through informed opinion and knowledgeable scrutiny.²⁶⁷ The lived experiences of the early press, moreover, support this view. The historical rhetoric also mentions a seemingly ancillary function of press freedom—protection of garden-variety personal expression. This expressive function, however, appears to have occupied a far smaller space in the real-world colonial press.

Armed with a more comprehensive understanding of the experiences of the founding generation with the press, we can now turn our attention to the task of interpreting the Press Clause today. If the purposes of press freedom were (and are) both to foster personal expression as well as to check and inform, the question becomes how to best further these values.

The framing generation was able to advance both objectives simultaneously by protecting the printers and their presses. Today, however, there are many modalities for fulfilling these functions. They include, most notably, all forms of modern mass communication technology and the field of journalism. The law, meanwhile, has likewise developed over time, raising the issue of how our modern expansive speech rights affect the interpretation of the Press Clause.

This section proceeds from the point where the historical evidence on the meaning of the press runs out. To proceed from this point, faithful

²⁶⁷ See SMITH, *supra* note 66, at 7 ("Freedom of the press, said an essay published in the Boston Gazette in 1755, meant a right to expose abuses of power and was considered 'essential to and coeval with all free Governments.'" (quoting BOS. GAZETTE, May 26, 1755)); *id.* at 162 (noting that "[e]arly American journalists and libertarian theorists distrusted state power and continually argued that the press should serve as a check on its use"); Anderson, *supra* note 6, at 493 (observing that the "legislative history of the press clause also supports Professor Blasi's assertion" of the checking value); Blasi, *supra* note 87, at 527 ("[I]f one had to identify the single value that was uppermost in the minds of the persons who drafted and ratified the First Amendment, this checking value would be the most likely candidate."); Baker, *supra* note 110, at 840 ("The checking function of the press clearly requires independence from government; it requires rights that give the press a defense against government intrusions."); Charles & O'Neill, *supra* note 13, at 1712–13 (discussing Thomas Gordon in Cato's Letters writing that "exposing of 'publick wickedness' as a 'duty'" and noting "Gordon's rationale was that a free press would require politicians to maintain honest dealings and individual virtue").

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,²⁶⁸ technology,²⁶⁹ and law.²⁷⁰

A. *Evolving Concepts of the “Press”*

The world has changed dramatically. Where there was once a single concept of the “Press” that centered on one publishing technology used by certain speakers to fulfill particular roles in society and government, there are now distinct concepts. In modern rhetoric we refer to these as “mass communication technology” and the field of “journalism,” and we understand the functions of each in very different ways.

To begin, modern mass communication technology is significantly different. Access to today’s technology, at least by way of the Internet, is relatively inexpensive and widely available.²⁷¹ It does not require unusual skills or resources,²⁷² and there are few barriers or gatekeepers. In contrast to the world of early Americans, today almost “anything and everything”²⁷³ truly can be published and widely distributed by basically anyone and with little cost. There are few to no established or customary guidelines for how this mass communication technology should be used and in practice there are no serious limits.

Journalism, meanwhile, is also significantly different. Reporting on public matters has exploded into a distinct endeavor that typically requires resources

²⁶⁸ See, e.g., AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION* 304 (2012) (suggesting that the Constitution “invites careful consideration of contemporary social meanings and popular understandings with regard to many issues of liberty and equality . . . including state practices, mass social movements, social meaning, lived experiences, and so on”).

²⁶⁹ See, e.g., ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 85–86 (2012) (“Yet the reader should not be deluded by the caricature of originalism as a doctrine that would make it impossible to apply a legal text to technologies that did not exist when the text was created. . . . Drafters of every era know that technological advances will proceed apace and that the rules they create will one day apply to all sorts of circumstances that they could not possibly envision . . .”).

²⁷⁰ See, e.g., Randy J. Kozel, *Original Meaning and the Precedent Fallback*, 68 VAND. L. REV. 105, 108 (2015) (arguing that in situations where “vague constitutional terms, even when understood in historical context, . . . permit a range of outcomes,” courts should then rely on precedent to decide their meaning).

²⁷¹ See West, *supra* note 5, at 2450–53; see also Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805, 1807 (1995) (“Cheap speech will mean that far more speakers—rich and poor, popular and not, banal and avant garde—will be able to make their work available to all.”).

²⁷² LEE C. BOLLINGER, *UNINHIBITED, ROBUST, AND WIDE-OPEN: A FREE PRESS FOR A NEW CENTURY* 77–86 (2010) (noting the advances in communication technology over time, including the internet, and its worldwide availability and low costs).

²⁷³ Charles & O’Neill, *supra* note 13, at 1724.

and expertise that are not available to everyone. Like the printers in control of the early presses, today's journalists are part of a recognized field that follows an accepted, if not strictly defined, set of goals and ethics. While some modern journalists are self-taught, most are educated either formally or informally about the practices of their trade. Journalists devote time, resources and expertise to the specific tasks of checking the powerful and informing the public on newsworthy matters. Notably, both the Supreme Court and the public at large customarily refer to journalists and the news media as the "press."²⁷⁴

But which of these two divergent concepts embodies what the Press Clause was meant to protect? Is it the technology of mass communication that has freed and broadened individual expression? Or is it the enterprise devoted to the common objective of checking power through an informed citizenry? Is it both or something more? Is the modern equivalent of the founding-era press best found in the range of posts on social media? Or is the proper analogue the work of the news media? And, finally, does the modern expansion of our free speech rights affect the answer? I turn now to these questions.

1. *Journalism and Mass Communication Technology*

The current state of both mass communication technology and journalism would be unrecognizable to the ratifying generation. On both fronts, the past two hundred years have seen drastic changes and entirely new ways of thinking about how we communicate, why we communicate, and the value of that communication. While journalism has grown over time into a field unified by customs of expertise and shared ethics, mass communication technology has become increasingly fractionated, non-institutional, and personal.

a. *Rise of Journalism*

Members of the founding generation did not know the field of journalism as it is practiced today. They did, however, witness its birth. What started as "a kind of mechanical amplifier" for early colonial leaders to deliver a "small spectrum of thoughts and information that local elites deemed fit for broader consumption"²⁷⁵ would soon explode into a novel and at times quickly evolving profession of fervent, and certainly flawed, government watchdogs and citizen surrogates.

In 1719 there were only two newspapers in the colonies.²⁷⁶ By the outbreak of the hostilities with Britain, seven decades after the first American

²⁷⁴ See West, *Stealth*, *supra* note 18, at 748–49.

²⁷⁵ PASLEY, *supra* note 138, at 28.

²⁷⁶ SMITH, *supra* note 66, at 162.

newspaper had appeared,²⁷⁷ however, there were forty-two newspapers being printed in the mainland colonies.²⁷⁸ The world early Americans knew soon consisted of “[h]undreds upon hundreds of pamphlets, broadsides, and newspaper articles.”²⁷⁹ And by the end of the century, this “Hydra-headed press, always difficult to control, had become the eyes, ears, and voice of the electorate and its parties.”²⁸⁰

Early American newspapers were “[w]itty and worldly” with key printers like Benjamin Franklin beginning to cluster around a “tenacious sense of professional pride and mission,”²⁸¹ yet there was a long way to go before there was anything resembling the institution of journalism. During the years leading up to the Revolutionary War, some newspapers were loyalist to the British²⁸² but most American printers discovered that “zealous patriotism was the most prudent and profitable course.”²⁸³ This general unity in message and objectives of newspapers fed the growing ideology of a free press as key to a strong and secure country.²⁸⁴

The initial separation between printing as a method of general communication and journalism as a specialized endeavor likely can be traced to the post-Revolutionary period.²⁸⁵ The founding of a new republic created deep divides about its governance, which led to the formation of standing political parties and political struggle for control. This “overheated and polarized political atmosphere” of party struggle forced printers to abandon their “traditionally neutral approach.”²⁸⁶ The result was that “both the printing trade and journalism began to split and specialize during the 1790s.”²⁸⁷ Some printers opted to focus on the “commercial and mechanical” side of printing, while others jumped into the fray, embracing a role as “political communicators.”²⁸⁸

²⁷⁷ On September 25, 1690, Benjamin Harris published the continent’s first newspaper, *Publick Occurrences*. GEORGE HENRY PAYNE, HISTORY OF JOURNALISM IN THE UNITED STATES 19 (1920).

²⁷⁸ DALY, *supra* note 235, at 34.

²⁷⁹ *Id.*

²⁸⁰ SMITH, *supra* note 66, at 163.

²⁸¹ *Id.* at 162–63.

²⁸² Paulette D. Kilmer, *The Press and Government*, in AMERICAN JOURNALISM 23, 24 (W. David Sloan & Lisa Mullikin Parcell eds., 2002).

²⁸³ PASLEY, *supra* note 138, at 36.

²⁸⁴ Kilmer, *supra* note 282, at 24 (describing a letter printed in various newspapers, in which John Adams declared: “If the mobs were at first the sinews, the Press and the Committees were the nerves of the Revolution . . .” (alteration in original)).

²⁸⁵ See Botein, *supra* note 64, at 222 (“Out of the Revolutionary experience, then, came revised understandings of what it was to be an American printer.”).

²⁸⁶ PASLEY, *supra* note 138, at 22–23.

²⁸⁷ *Id.* at 46; see also Botein, *supra* note 64, at 222 (noting that during this time “printers began to insist that they were themselves men of principle and intellect and not ‘meer mechanics’”).

²⁸⁸ PASLEY, *supra* note 138, at 46–47.

During this time, newspaper editors were indisputably active political participants who were promoting a vision of "reality as it *ought* to be," declaring "one party as right, the other as wrong" and "urg[ing] voters to the polls, not just for the patriotic duty of voting, but specifically to elect the man chosen as the darling of the newspaper."²⁸⁹ And while they were "fierce partisans," they were not "simply party men," instead they often clashed with the professional politicians and maintained "a strong sense of their own ideological independence, which they guarded jealously."²⁹⁰

These partisan press newspapers could be "aggressively opinionated, often rancorous and sometimes scurrilous in their rebuke of public officials."²⁹¹ But they also secured their place as "the political system's central institution."²⁹² They brought new voices to the political process by adopting a "populistic tone" and refusing to "be blind to the hierarchies and inequalities that pervaded their society."²⁹³

The advent of the "penny press" in the 1830s was the next important step in the evolution of journalism and has been credited for "invent[ing] the modern concept of 'news.'"²⁹⁴ Rather than relying on subscriptions and partisan party donations to fund their publication, these tabloid newspapers followed a different financial model of maximizing circulation and advertising revenues.²⁹⁵ A reliance on a broad circulation,²⁹⁶ moreover, meant appealing to readers of all stripes through political neutrality and an embrace of an ethical standard of objectivity.²⁹⁷ Journalism historians generally agree that "the birth of modern American journalism and the rise of 'objectivity'" occurred during the Jacksonian era and was a reflection of "the 'democratic spirit' of the age."²⁹⁸

The financial freedom of the penny press helped create the professional journalist. Newspapers began hiring staffs of permanent, paid reporters both domestically and abroad—a practice that was at the time "not only novel but,

²⁸⁹ Julie Hedgepeth Williams, *The Purposes of Journalism*, in AMERICAN JOURNALISM, *supra* note 282, at 3, 5.

²⁹⁰ DANIEL, *supra* note 246, at 6–7.

²⁹¹ Stewart Jay, *The Creation of the First Amendment Right to Free Expression: From the Eighteenth Century to the Mid-Twentieth Century*, 34 WM. MITCHELL L. REV. 773, 788 (2008).

²⁹² PASLEY, *supra* note 138, at 3.

²⁹³ *Id.* at 20.

²⁹⁴ SCHUDSON, *supra* note 135, at 22.

²⁹⁵ *Id.* at 18.

²⁹⁶ DAVID T.Z. MINDICH, JUST THE FACTS: HOW "OBJECTIVITY" CAME TO DEFINE AMERICAN JOURNALISM 16–17 (1998) (discussing the period from 1830 to 1840 and claiming the daily circulation of newspapers quadrupled). *But see* PASLEY, *supra* note 138, at 415 n.26 (suggesting that "the evidence for [the penny press's] supposedly revolutionary impact on newspaper readership as a whole has been more assumed than demonstrated").

²⁹⁷ MINDICH, *supra* note 296, at 18–19.

²⁹⁸ *Id.* at 18.

to some, shocking.”²⁹⁹ In the decades that followed the Civil War, “reporting became a more highly esteemed and more highly rewarded occupation” with the higher salaries to show for it.³⁰⁰ In 1890, one author declared that reporting had become “a new and important calling.”³⁰¹ Editors were likewise finding new influence as specialists who were building an industry and overseeing ground-breaking newsgathering.³⁰²

Many other stages of journalism would follow. The yellow journalism period symbolized by Joseph Pulitzer’s *World* and William Randolph Hearst’s *Journal* focused on the sensational.³⁰³ The *New York Times*, established in 1896, by contrast, emphasized decency as much as accuracy.³⁰⁴ The early nineteenth century brought the “muckrakers,” who saw investigative journalism as a crucial means for public policy reform.³⁰⁵

By the early twentieth century, journalists began to develop particular areas of expertise, and were paid for what they knew as much as for how much they wrote.³⁰⁶ And while the two world wars brought back a media that rallied around government efforts through one-sided coverage,³⁰⁷ the new breed of journalist who questioned government “facts” would soon return.³⁰⁸

Through all of these phases, journalists sought and embraced customs of professionalism. The first school of journalism was opened at the University of Missouri in 1908,³⁰⁹ and the Columbia University School of Journalism followed shortly thereafter in 1912.³¹⁰ In 1924, Nelson Crawford of Kansas State University published the first textbook on proper newspaper ethics practices produced in the United States, *The Ethics of Journalism*.³¹¹

²⁹⁹ SCHUDSON, *supra* note 135, at 24.

³⁰⁰ *Id.* at 68–69.

³⁰¹ *Id.* at 70 (quoting E.L. Godkin, *Newspapers Here and Abroad*, 150 N. AM. REV. 197, 198 (1890)).

³⁰² *Id.* at 16 (stating that this new model of newspaper editor “grew in new directions—the editor made himself known, not only through editorials, but through the industry, enterprise, and innovation in his news gathering”).

³⁰³ *Id.* at 95 (noting that these newspaper publishers “discovered that everything, including news, could and should be advertising for the newspapers”).

³⁰⁴ *Id.* at 106–07; *see also id.* at 112 (attempting to distinguish the *Times* from the *Journal* or the *World*, it advertised itself with the slogan, “It does not soil the breakfast cloth.”).

³⁰⁵ *See* LEONARD RAY TEEL, *THE PUBLIC PRESS, 1900–1945: THE HISTORY OF AMERICAN JOURNALISM* 15–16 (2006). *See generally* DORIS KEARNS GOODWIN, *THE BULLY PULPIT: THEODORE ROOSEVELT, WILLIAM HOWARD TAFT, AND THE GOLDEN AGE OF JOURNALISM* (2013) (discussing the investigative journalists who “produced a series of exposés that uncovered the invisible web of corruption linking politics to business”).

³⁰⁶ TEEL, *supra* note 305, at 17.

³⁰⁷ Williams, *supra* note 289, at 10; *see also* SCHUDSON, *supra* note 135, at 122.

³⁰⁸ SCHUDSON, *supra* note 135, at 122.

³⁰⁹ John D. Keeler et al., *Ethics*, in *AMERICAN JOURNALISM*, *supra* note 282, at 44, 49.

³¹⁰ *Id.*

³¹¹ *Id.* at 51.

In 1910, the Kansas Editorial Association adopted the first official code of ethics for journalists, and other states soon followed.³¹² These codes provided ethical guidelines with respect to both the business operations and editorial practices of newspapers.³¹³ Newspapers began creating their own codes, which typically stressed the centrality of truth and accuracy in reporting and discouraged editorializing, conflicts of interest, and advertising disguised as news.³¹⁴

Journalism organizations began forming during this timeframe as well.³¹⁵ In 1922, the American Society of Newspaper Editors (ASNE) was organized to deal with "common problems and the promotion of their professional ideals."³¹⁶ In 1926, the Society of Professional Journalists adopted its first code of ethics, which again focused on a commitment to objectivity.³¹⁷

The rise of American journalism is a tale of an emerging specialized craft, an embrace of an institutionalized, professionalized endeavor, and the adoption of a philosophy of objectivity.³¹⁸ In the centuries since the ratification of the First Amendment, journalism has evolved into an established occupation that is distinct from the technology it employs.

b. *Advances in Mass Communication Technology*

The technology by which Americans communicated with each other, meanwhile, was also transforming. The journey of mass communication technology took place at exponential speed as each new discovery on how to transmit information through the use of text, sound and visual images spawning many more. And as new technologies have made communication easier, cheaper, faster and more vivid, American's relationship with it has likewise changed.

The ability for any individual to spread a message broadly was once unfeasible or, at a minimum, exceedingly difficult, expensive and rare. For much of American history, access to mass communication technology was controlled by the few. That changed in fundamental ways with the invention of the Internet. Mass communication technology is now increasingly a part of everyday life for many Americans. As it has become more available, it has also become more personal and less tied to the work of informing the public of important matters. A brief history illustrates the evolution.

The invention of the printing press was transformative. But Johannes Guttenberg's contribution to printing in the fifteenth century was not the

³¹² *Id.* at 49.

³¹³ *Id.*

³¹⁴ *Id.* at 50.

³¹⁵ Keeler, *supra* note 309, at 50.

³¹⁶ *Id.* (quoting the American Society of Newspaper Editors' constitution). It also adopted a code of ethics entitled *Canons of Journalism*. *Id.*

³¹⁷ *Id.*

³¹⁸ Kilmer, *supra* note 282, at 29.

simple ability to apply movable type to paper. (Indeed, the Chinese had developed this process 700 years earlier.)³¹⁹ Rather, what Guttenberg added was speed and efficiency by creating a machine that could mesh the paper against the typeset rather than requiring manual rubbing.³²⁰ Suddenly the publication of written text could be done not only with permanence but with timeliness and in significant quantities.

The earliest printings were books, making them available to the masses for the first time in human history. In the sixteenth century, between 150 and 200 million books were printed in Europe, which at the time had a population of roughly 78 million persons.³²¹ And soon, as we have already discussed, the printing presses of the American colonies were busy producing newspapers, magazines, pamphlets, and other items.

The invention of the telegraph in the 1840s allowed long-range interpersonal communication through the system of dots and dashes developed by Samuel Morse.³²² For early journalists, the telegraph was a tool for newsgathering and reporting. In 1848, the first “wire service,” the Associated Press, was formed. It consisted of six newspapers that joined together to share information gathered by reporters who were dispatched to remote locations.³²³

The telegraph led to the wireless telegraph in 1895, which led to the invention of radio broadcast soon after.³²⁴ Radio brought the first sound-based form of mass communication, and soon radio receivers were present in most American homes. The impact of radio communication derived from both immediate and mass-scale transmission. In 1927, for example, almost 30 million people listened together as Charles Lindberg was feted for completing the first solo transatlantic flight.³²⁵

Even as sound-based radio communication dominated the scene in the first half of the twentieth century, the search was on to find a mechanism for transmitting visual information. By the late-1800s, photographs could be reproduced in a way that allowed wide-scale distribution through publications in newspapers, books and magazines.³²⁶ Next came silent films, which later progressed to the “talkies.”³²⁷ By the mid-1900s, television had arrived in

³¹⁹ MARSHALL T. POE, *A HISTORY OF COMMUNICATIONS: MEDIA AND SOCIETY FROM THE EVOLUTION OF SPEECH TO THE INTERNET* 103–05 (2010).

³²⁰ *Id.*

³²¹ *Id.* at 111.

³²² RICHARD CAMPBELL ET AL., *MEDIA & CULTURE: AN INTRODUCTION TO MASS COMMUNICATION* 113–15 (5th ed. 2007).

³²³ *Id.* at 275.

³²⁴ *Id.*

³²⁵ *Id.* at 122.

³²⁶ Tim Dirks, *The History of Film: The Pre-1920s*, FILMSITE, <http://www.filmsite.org/pre20intro.html> [<https://perma.cc/DYZ9-8GLL>].

³²⁷ *Id.*

many American homes, although dominated by only a small number of key purveyors.³²⁸

Transmitting information to broad audiences via the broadcast airwaves created limitations on use. As the Supreme Court recognized in the 1969 case of *Red Lion Broadcasting Co. v. FCC*, because of the scarcity of the broadcast frequencies "[w]ithout government control, the medium would be of little use because of the cacaphony [sic] of competing voices, none of which could be clearly and predictably heard."³²⁹ The scarcity of broadcast airwaves meant that, even more so than with printing, there were severe limits on who had access. Government licenses were determined to be a necessity. When cable and satellite services came on the scene, the amount of content available to viewers exploded. Unlike the free broadcasting networks, however, these services required a monthly fee, which excluded many Americans.

In the 1990s, the methods of communication began to shift once again. This time it was to the move to digital code that was transmitted through a network of computers. As with broadcasting, the Internet moved through stages, shifting from transmission solely of text, next to sound and pictures and finally to video production.³³⁰

Unlike the technologies that came before it, however, the Internet has few barriers to entry. Internet users need not look to gatekeepers such as printers, broadcasters, or cable companies to determine what information they can access or generate. Audience members are free to seek out or create nearly endless amounts of communicative material. Current platforms that rely on user-generated content include social media services such as Twitter, Facebook, Instagram, and Snapchat; internet forums including WordPress, Typepad, and Tumblr; photo and video sharing sites such as Flickr, Picasa, YouTube, Vine, and Periscope; fundraising sites like Kickstarter and GoFundMe, and communal information projects such as Wikipedia.

The Internet is now accessible through increasingly affordable personal electronic devices, including home computers, laptops and smartphones. The result of this technology is astounding and unprecedented: Almost all individual speakers can now communicate their messages to a broad audience at any time and in virtually any place. There are few restraints on their ability to convey any messages.³³¹ And listeners, viewers, or readers are free to choose whatever information they wish to access.

³²⁸ CAMPBELL ET AL., *supra* note 322, at 172 (noting that from the 1950s until the 1980s, ninety-five percent of Americans watching television during primetime were viewing the programs of one the three primary networks).

³²⁹ *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 376 (1969).

³³⁰ See generally CHRISTOS J.P. MOSCHOVITIS ET AL., *HISTORY OF THE INTERNET: A CHRONOLOGY, 1843 TO PRESENT* (1999).

³³¹ See Volokh, *supra* note 271, at 1807 ("Cheap speech will mean that far more speakers—rich and poor, popular and not, banal and avant garde—will be able to make their work available to all.").

The takeaway of these two stories is that since the framing, communication technology has transformed from a resource of limited access and reach to one of wide-open availability and global scope. The field of journalism, meanwhile, has moved from a random scattering of widely dispersed printers to an established field with a shared professional identity and common ethical standards.

2. *Speech Clause and Press Clause*

The jurisprudence of the First Amendment has also evolved since the late eighteenth century.³³² While the Press Clause has sat on the sidelines, the Speech Clause has become a first line of defense in protecting and expanding expressive liberties.

Even though press freedom was initially hailed as one of the “bulwarks of liberty,” it played only a minor role in the first chapter of our First Amendment doctrine, and the Speech Clause played almost no role at all.³³³ That first conflict concerned the Sedition Act, the 1798 law which made it a crime to “write, print, utter or publish . . . any false, scandalous and malicious writing . . . against the government of the United States, or either house of the Congress of the United States, or the President.”³³⁴ The Sedition Act is often referenced as triggering a national learning process on the importance of press freedom—not because of how it protected press rights, but rather because it allowed them to be so seriously trampled.³³⁵ As Justice William Brennan explained in *New York Times v. Sullivan*, “[a]lthough the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history.”³³⁶

The trial of John Peter Zenger in 1735 is similarly hailed as an important, if indirect, moment of victory for our press freedoms. Zenger was tried for seditious libel after publishing a newspaper that opposed the administration of New York Governor William Cosby.³³⁷ Although legally Zenger could not raise the truth of his publication as a defense, the jury acquitted him nonetheless to the cheers of courtroom spectators.³³⁸

³³² See Jay, *supra* note 291, at 775 (observing that the “legal protections for speech and press at the time the First Amendment was written were vastly less libertarian than modern judicial interpretations”).

³³³ Anderson, *supra* note 6, at 487 (noting the Press Clause “had little history as an independent concept when the first amendment was framed”).

³³⁴ Sedition Act of 1798, ch. 74, § 2, 1 Stat. 596, 596–97.

³³⁵ See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 273 (1964) (stating that the Sedition Act “first crystallized a national awareness of the central meaning of the First Amendment”).

³³⁶ *Id.* at 276 (footnote omitted).

³³⁷ Arthur E. Sutherland, Book Review, 77 HARV. L. REV. 787, 788 (1964) (reviewing JAMES ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER (1963)).

³³⁸ *Id.*

The lack of prosecutions or convictions of publishers such as Zenger has been long seen as evidencing a culture of press freedoms. Following the Zenger trial, there were no convictions in the American colonies of seditious libel because, as legal historian Michael Kent Curtis explained, "[g]rand juries refused to indict; and petit juries refused to convict."³³⁹ Professor Levy contrasted the "law and theory" of the time, which he claimed supported suppression of the press, with "newspaper judgments on public men and measures," where there was "an expanding legacy of liberty."³⁴⁰ Thus even if the narrow Blackstonian view of the free press was the legal progenitor of American press freedom, "that concept never really took root in America."³⁴¹

For more than a century after the First Amendment was ratified, the Supreme Court was silent about constitutional protections for free speech and press. The Court's 1925 decision in *Gitlow v. New York* is notable for extending the Amendment's protection to the state governments and thus opening up many new opportunities for judicial intervention on behalf of free expression rights.³⁴² Yet, even then, "a majority of the Court demonstrated almost unrelenting hostility toward the speech and press rights of political dissidents."³⁴³

This would all change with the dawn of modern free speech jurisprudence in the 1930s.³⁴⁴ In a string of decisions, beginning first with Justice Holmes' opinion in the 1919 case of *Abrams v. United States*,³⁴⁵ the Justices began to lay the groundwork for our current vision of the First Amendment. What followed over the rest of the century was nothing short of a "seismic shift" in the Court's approach to First Amendment rights.³⁴⁶ The end result is a modern First Amendment under which "the Court—including its most conservative members, who at times lead the charge—has time and again shielded speakers and writers from suppression of their opinions."³⁴⁷

³³⁹ MICHAEL KENT CURTIS, FREE SPEECH, "THE PEOPLE'S DARLING PRIVILEGE": STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY 46 (2000); see also Jay, *supra* note 291, at 788 ("Colonial legislatures, following the example of Parliament, called publishers and writers to account for writings they deemed breaches of their 'privilege' on at least twenty occasions, imprisoning some. Yet the press overall was not cowed by these legislative actions, and the practice of legislative investigations for breach of privilege largely ended with the Revolution." (footnote omitted)).

³⁴⁰ LEVY, *supra* note 21, at vii–xi.

³⁴¹ Rosenthal, *supra* note 58, at 29–30.

³⁴² *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

³⁴³ Jay, *supra* note 291, at 774.

³⁴⁴ *Id.* at 783 ("Comparing the current body of First Amendment law, there is a radical difference in outlook regarding freedom of expression between the eighteenth and the late twentieth and early twenty-first centuries.").

³⁴⁵ *Abrams v. United States*, 250 U.S. 616 (1919).

³⁴⁶ Jay, *supra* note 291, at 775.

³⁴⁷ *Id.*

At first during this period, the Speech and Press Clauses were frequently considered together. The term "freedom of expression" first appears in 1921³⁴⁸ and then reappears in hundreds of cases over the next almost century. But by the mid-twentieth century, it was the Speech Clause that had emerged as the constitutional powerhouse. The Court expanded the concept of what is speech and deepened the reasoning on why it must be vigorously protected. This individual right of expression has "deep roots in our history," but according to Thomas Emerson, "the concept as we know it now is essentially a product of the development of the liberal constitutional state."³⁴⁹

This line of reasoning would lead to speech doctrines concerning protected and unprotected speech;³⁵⁰ quasi-protected speech;³⁵¹ time, place, and manner restrictions;³⁵² viewpoint discrimination;³⁵³ subject-matter discrimination;³⁵⁴

³⁴⁸ *United States ex rel. Milwaukee Soc. Democratic Publ'g Co. v. Burleson*, 255 U.S. 407, 431 (1921).

³⁴⁹ Emerson, *supra* note 101, at 878; see also John Paul Stevens, Address, *The Freedom of Speech*, 102 YALE L.J. 1293, 1301 (1993) ("Despite the fact that the development of First Amendment law during the twentieth century is entirely the product of judicial lawmaking rather than the legislative process, scholars and opinion writers have displayed an almost hypnotic fascination with the endeavor to explain and to organize that development in rigidly defined compartments.").

³⁵⁰ See, e.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem."); see also *New York v. Ferber*, 458 U.S. 747, 764 (1982) (holding that child pornography is not protected by the First Amendment); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (*per curiam*) (explaining that a state may proscribe advocacy of the use of force "where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action"); *Roth v. United States*, 354 U.S. 476, 485 (1957) (holding that "obscenity is not within the area of constitutionally protected speech or press"); *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952) ("Libelous utterances [are not] within the area of constitutionally protected speech . . .").

³⁵¹ See, e.g., *FCC v. Pacifica Found.*, 438 U.S. 726, 747 (1978) (stating that the content of the broadcast program was "'vulgar,' 'offensive,' and 'shocking'" and "content of that character is not entitled to absolute constitutional protection under all circumstances"); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976) ("In concluding that commercial speech, like other varieties, is protected, we of course do not hold that it can never be regulated in any way. Some forms of commercial speech regulation are surely permissible."); *Bigelow v. Virginia*, 421 U.S. 809, 818 (1975) ("The fact that the particular advertisement in appellant's newspaper had commercial aspects or reflected the advertiser's commercial interests did not negate all First Amendment guarantees.").

³⁵² See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (stating that the government may impose time, place, or manner restrictions that are content neutral, narrowly tailored to serve a significant government interest, and leave ample alternative channels open for communication); *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981) ("[T]he First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired.").

³⁵³ See, e.g., *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) ("The government must abstain from regulating speech when the specific

symbolic expression;³⁵⁵ and more. The effect of this jurisprudence has been vast. As Justice John Paul Stevens observed:

Even if the concept originally embraced little more than matters that were appropriate subjects of debate at a New England town meeting, and even if the dictionary definition of the word "speech" has not changed since 1791, it is now settled that constitutionally protected forms of communication include parades, dances, artistic expression, picketing, wearing arm bands, burning flags and crosses, commercial advertising, charitable solicitation, rock music, some libelous false statements, and perhaps even sleeping in a public park.³⁵⁶

Also included in these stronger, more expansive speech protections was a right to reach an audience. In the words of Chief Justice Burger "there is no fundamental distinction between expression and dissemination,"³⁵⁷ and Professor Volokh likewise agrees that speech rights have evolved "to include both in-person speech and mass communications."³⁵⁸

Left behind on this road to robust constitutional protection, however, was the Press Clause, which the Court has generally ignored.³⁵⁹ Over time it has become the commonly suggested view that freedom of the press does not provide for any kind of "special rights."³⁶⁰ This approach, ironically, has

motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) ("The First Amendment generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed." (citations omitted)).

³⁵⁴ See, e.g., *Boos v. Barry*, 485 U.S. 312, 316, 329 (1988) (holding that an ordinance that prohibited displays of a signs within 500 feet of a foreign embassy that "tend[ed] to bring a foreign government into public odium or public disrepute" was unconstitutional on its face because it was a content-based restrictions on political speech in a public forum and was not narrowly tailored to serve a compelling interest); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (stating that "[f]or the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end"); *Police Dep't v. Mosley*, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

³⁵⁵ See *Texas v. Johnson*, 491 U.S. 397, 404 (1989) ("[C]onduct may be 'sufficiently imbued with elements of communication to fall within the scope of the First . . . Amendment[.]'" (quoting *Spence v. Washington*, 418 U.S. 405, 409 (1974) (per curiam))); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505-06 (1969) (holding that wearing an armband with the purpose of expressing certain views "was closely akin to 'pure speech,'" and "entitled to comprehensive protection under the First Amendment").

³⁵⁶ Stevens, *supra* note 349, at 1298 (footnotes omitted).

³⁵⁷ *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 800 (1978) (Burger, C.J., concurring).

³⁵⁸ Volokh, *supra* note 55, at 1278.

³⁵⁹ West, *Awakening*, *supra* note 18, at 1027-28.

³⁶⁰ C. Edwin Baker, *The Independent Significance of the Press Clause Under Existing Law*, 35 HOFSTRA L. REV. 955, 962 (2007).

placed the protection of the freedom of the press at the mercy of the Speech Clause.³⁶¹ This is entirely at odds with the framers' view of press rights as paramount as compared to speech.³⁶² It also raises the question of whether there is a role left for the Press Clause to fill today.

B. *Modern Role of the Press Clause*

The "press" of 1791 was, indeed, a technology. It was a technology that fulfilled particular and highly valued functions. The printing press was a means of mass communication that was used by certain people primarily to perform crucial functions—informing the citizenry and checking the government. Today, however, the technology that allows anyone to communicate with others for any reason has become cheaper and more widely available. There are few barriers to access, no accepted gatekeepers, and no generalized norms that focus speech on democracy-enhancing functions. Robust speech rights, moreover, provide broad protections for all speakers and their messages.

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.

Whereas the obstacles to accessing mass communication have decreased, moreover, the demands of journalism have increased. Truly acting as a government watchdog and effectively informing the public requires more than a passing interest in the "news" or a mere desire to express one's opinion. The government is increasingly complicated, thus requiring expertise to understand it fully. It is also vast, thus requiring time and resources to investigate it effectively.³⁶³ The "size and complexity of modern government," Professor Blasi argued, intensifies "the need for well-organized, well-financed, professional critics to serve as a counterforce to government."³⁶⁴ At the time of the founding, Blasi suggested, "It may have been possible . . . to arouse the populace against a particular official or policy by amateur, makeshift protest methods. Today, however, it is virtually impossible to do so, at least beyond the local level."³⁶⁵

Modern mass communication technology allows the dissemination of far more content than anything the framers would have recognized. Certainly this

³⁶¹ See Anderson, *supra* note 19, at 430 ("[A]s a matter of positive law, the Press Clause actually plays a rather minor role in protecting the freedom of the press.").

³⁶² See *supra* Part II.C.

³⁶³ See Blasi, *supra* note 87, at 541 ("It is largely because government today has to be so big that it has to be so closely scrutinized.").

³⁶⁴ See *id.*

³⁶⁵ *Id.*

is to be applauded for adding new voices and new perspectives to our ever-expanding marketplace of ideas. Yet this "noise" also creates a stronger-than-ever need for journalists, who have established themselves as sufficiently accountable and knowledgeable to provide valuable information within a proper context. In the words of Professor Anderson, mass communication without journalists resembles "a town meeting with no moderator and no agenda; freedom of speech may be maximized, but to no common purpose."³⁶⁶ Journalists do more than simply provide additional information, they also help their audiences sort and understand that information through a "core of shared information and common purposes."³⁶⁷

Searching for the proper interpretation of the Press Clause does not end at the moment of ratification. If it did, even the technology-only view of the Press Clause would be of limited importance.³⁶⁸ Modern communication platforms such as Internet blogs, social media and even television and radio would have been entirely unimaginable to the founding generation.³⁶⁹ We must extrapolate core values from the experiences of those at the time of the framing and apply them to present times. Otherwise the Press Clause would protect only an antiquated technology found in museums.³⁷⁰

This leaves us with the necessary task of applying the text and the original understanding of the Clause to a very different modern reality. Taking into account the complete historical record, it is evident that press freedom had not one but multiple layers of importance. These include the desire to protect individual expression and the focus on promoting structural checks. As a practical matter, these individual and public roles correlate naturally with mass communication technology and journalism respectively. They further fit with the expansive protections of Speech Clause, which safeguard individual communication interests. This leaves the Press Clause, which currently has

³⁶⁶ Anderson, *supra* note 7, at 333.

³⁶⁷ *Id.* at 332.

³⁶⁸ See *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008) ("Some have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment. We do not interpret constitutional rights that way. Just as the First Amendment protects modern forms of communications, and the Fourth Amendment applies to modern forms of search, the Second Amendment extends, *prima facie*, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." (citations omitted)).

³⁶⁹ See Charles & O'Neill, *supra* note 13, at 1701 ("The technological vehicle of printing books, pamphlets, and newspapers remained unchanged from the late seventeenth century through the [E]arly Republic. This historical fact alone derails Volokh's approach to understanding the founding era. With only one publishing technology available circa 1791, it is impossible to ascertain how the founding generation viewed the Press Clause as an evolving technological right of the people to employ free speech. Are we to believe the founding generation had the foresight to predict other popular publishing mediums such as radio, television, and the Internet? The answer remains no.").

³⁷⁰ SCALIA & GARNER, *supra* note 269, at 86 ("Drafters of every era know that technological advances will proceed apace and that the rules they create will one day apply to all sorts of circumstances that they could not possibly envision.").

little to do, with a key part to play in preserving the structural role of journalists.

Interpreting the Press Clause as protecting a function that is today served by journalists does not require playing constitutional connect-the-dots any more than does the press-as-technology theory. Extrapolating protection of the printing press into a First Amendment safeguard for internet- or satellite-based methods of communication also entails embracing a flexible or evolutionary approach to constitutional interpretation.³⁷¹ It is, in fact, inherently logical to conclude that journalism is the modern corollary to the early “press” as it was experienced in the 1700s. The founding generation would certainly have found today’s news media to be no more alien than it would view cloud-based streaming, mobile broadband, or Bluetooth technologies. In fact, they arguably would have found it much more familiar.

It is perhaps telling that our understanding of the term “Press” has shifted over time to one that is used today in reference to professional journalists or their publications and broadcasts and not to mean modern mass communication technology.³⁷² The Supreme Court similarly has adopted an understanding of the “press” that is synonymous with journalism, including referring to the press as distinct from a collection of all speakers, using the term interchangeably with other forms of news media and imbuing the term with personified attributes that are inconsistent with a view of press as technology only.³⁷³ If word usage reflects public understanding, then the “Press” today is not YouTube or Yik Yak or anyone with access to such platforms. It is, instead, certain speakers, entities and institutions that are devoted to the tasks of gathering and disseminating the news. The public understands that the “press” is more than technology and more than a collection of speakers with Internet access; the law should also reflect this understanding.

V. CONCLUSION

In this Article, I weave together several different threads about press freedom: the early proclamations of the primacy of press liberty, the overlapping expressive and structural functions, the colonial experience with

³⁷¹ See McConnell, *supra* note 39, at 428 (“As the technology for dissemination of ideas and opinions to the public has advanced, from the printing press to radio to television to film to the internet, blogs, Twitter, and video games, the Supreme Court has quite properly (in my opinion) extended the principle of freedom of the press to the various media for the dissemination of opinion and information to the general public.”).

³⁷² See, e.g., *Press*, MERRIAM-WEBSTER DICTIONARY 983 (11th ed. 2003) (defining “press” to include both “printing press,” “the gathering and publishing or broadcasting of news,” “newspapers, periodicals, and often radio and television news broadcasting” and “news reporters, publishers, and broadcasters”); see also Stevens, *supra* note 349, at 1296 (“The word ‘press,’ though encompassing newspapers, periodicals, and political pamphlets, is by no means a synonym for ‘all written words.’” (footnote omitted)).

³⁷³ See West, *Stealth*, *supra* note 18, at 748–49.

the printing press, the evolution of technology, the birth of journalism, and the development of a strong individual speech jurisprudence. Stepping back to take in the entire tapestry, we can see it all come together naturally. The historical evidence reveals that the Press Clause has a prominent, multi-layered and uniquely valuable place in our Constitution. Modern developments, meanwhile, have separated our means for expressing individual sentiments from our government watchdogs. Because we have embraced a view of the Speech Clause that strongly protects the former, we are left with a question mark as to how we protect the latter. How do we protect the progeny of the "press" that is the community of devoted and effective government watchdogs and citizen surrogates? The answer is with the Press Clause.

Fully understanding the original layers of press functions leads us toward a contemporary interpretation of the Press Clause that is a stronger coherent fit than other suggested approaches. What were once overlapping concepts of expressive and structural press functions map comfortably on to today's mass communication technology and field of journalism. Focusing on the question of "why" rather than "what," moreover, frees us from an interpretation of the Press Clause that dismisses some historic evidence as anomalous and creates a constitutional redundancy.

The framing generation very well might have been referring to a technology when they chose to protect the freedom of the "press." But it was a technology that, in their experience, was inextricably linked with a group of specialists who were discharging a particular set of functions by informing the citizenry about matters of public concern and checking government abuses. The technology was thus only a means to an end. Thanks to advances in mass communication technology and journalism, those means and ends are no longer so tightly interwoven. We now have vast mass communication technologies that are detached from the functions of informing the public and checking the government. While the speakers who are consistently devoted to fulfilling these functions—and whose work would most resemble the work of the early printers—have found a new identity as journalists.

