Freedom of the Press: A Liberty for All or a Privilege for a Few?

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I. Introduction

On the 17th of September, 1787, the Constitutional Convention sent forth a proposed Constitution that became recognized over the ages as the greatest governing document in the history of the world, providing for liberty and equality. It contained in it a provision that "no Title of Nobility shall be granted by the United States."[1] The original Constitution did not provide enough protection for liberty and equality to satisfy some Americans of the day. Two years and eight days later, the new Congress transmitted to the state legislatures 12 proposed amendments, 10 of which were ratified, effective December 15, 1791. The Fifth Amendment provided for the protection of "due process of law," which is generally recognized as containing an equal protection concept to protect against the unequal operation of federal law, comparable to the protection against the unequal operation of state law later provided by the Fourteenth Amendment.[2]

More directly on point with our subject, the First Amendment to the Constitution provided:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people

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[1] U.S. Const. art. I, § 9, cl. 8.

[2] See, e.g., Bolling v. Sharpe, 347 U.S. 497, 498 (1954); see also United States v. Windsor, 133 S. Ct. 2675, 2693 (2013).

> peaceably to assemble, and to petition the Government for a redress of grievances.

In this great amendment, the Framers and ratifiers of the Constitution provided for what has become known as the five freedoms: that is, the freedoms of speech, press, religion, petition, and assembly. The question we address today is to whom does the Constitution afford these freedoms, or at least one of them.

Omitting the one as to which a question may have arisen, let us examine the other four. First, as to speech: while the time, place, and manner of speech may be restricted, freedom of speech belongs to every person within the jurisdiction of the United States or the states. This view, as set forth by Justice Louis Brandeis's concurrence in *Whitney v. California*,[3] springs from the proposition that under the First Amendment, "the public has a right to every man's views and every man the right to speak them."[4] While some cases may have cast doubt on that proposition, including *American Communications Association*, in the end it is generally accepted that every person—to abandon what might now be sexist language—has the same protection for free speech as any other.

As to freedom of religion: the constitutional protection of religious liberty extends not only to the professional clergy or to adherents of majority faiths, but "liberty and social stability demand a religious tolerance that respects the religious views of all citizens."[5] The Free Exercise Clause provides and protects religious freedom not only for the adherents of majority religions but even for the practitioners of rituals that "may seem abhorrent to some."[6] The Supreme Court has expressly stated that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."[7] Unquestionably, the Free Exercise Clause provides religious liberty to all, not to a favored class.

[3] 274 U.S. 357, 373 (1927).

[4] American Commc'ns Ass'n v. Douds, 339 U.S. 382, 395 (1950) (citing Whitney at 373) (Brandeis, J., concurring).

[5] McCreary County, Ky. v. ACLU of Ky., 545 U.S. 844, 860 (2005) (quoting Zelman v. Simmons-Harris, 536 U.S. 639, 718 (2002) (Breyer, J., dissenting)).

[6] Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993).

[7] Thomas v. Review Bd. of Indiana Emp't Sec. Div., 450 U.S. 707, 714 (1981).

Freedom to petition: Like the other clauses, the clause of the First Amendment protecting the right to petition for a redress of grievances extends to all. As the Supreme Court has recently reminded us, "the First Amendment protects the right of [even] corporations to petition legislative and administrative bodies."[8]

Freedom of assembly: Again, the First Amendment protects the freedom of all to assemble. In *NAACP v. Alabama*, the Supreme Court recognized the availability of that protection to all without regard to the assemblers' identities.[9] They did not need to be members of any particular group. Indeed, the Freedom of Assembly Clause protects those who wish to assemble in privacy and with anonymity. The freedom of assembly belongs to all.

And yet in the face of all this evidence of egalitarianism and the protection of universal right, there is an insistence among some that the First Amendment, by providing that "Congress shall make no law . . . abridging the freedom . . . of the press," created a special class of privileged persons bearing the noble title "the press," and not equal protection for everyone who uses a communication method known as "the press"—protection paralleling the freedom of speech afforded to all by the two words that are separated from "the press" by only a comma.

Of course, the first question in determining whether "the press" refers to a method of communication or a privileged class of communicators is: What did the Framers intend in the adoption of the Bill of Rights? The First Amendment, along with the rest of the Bill of Rights, was added to the Constitution after the Anti-Federalists objected to the absence of such a listing of rights in the original Constitution. One of the Anti-Federalist objections was captured well by James Lincoln, a delegate to the South Carolina Convention that considered the Constitution in 1788. Lincoln, from the town of Ninety Six, South Carolina, stood to ask why the freedom of the press was not guaranteed in the Constitution, memorably stating, "The liberty of the press was the tyrant's scourge—it was the true friend and firmest supporter of civil liberty; therefore why pass it

[8] Citizens United v. FEC, 558 U.S. 310, 355 (2010) (quoting First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 792 n.31 (1978)).

[9] 357 U.S. 449 (1958).

by in silence?"[10] The Federalists eventually agreed to the adoption of the Bill of Rights, passing a First Amendment that proscribes laws "abridging the freedom of speech, or of the press."

So what does the phrase "the press" refer to in the First Amendment? The first conception is that "the press" refers to the media as an institution, a type of fourth branch that provides an independent check on the three branches of government. The most famous expositor of this view was Justice Potter Stewart. Justice Stewart explained his view in a 1974 lecture at Yale Law School. According to Justice Stewart:

> [T]he Free Press Clause extends protection to an institution. The publishing business is, in short, the only organized private business that is given explicit constitutional protection. This basic understanding is essential, I think, to avoid an elementary error of constitutional law. It is tempting to suggest that freedom of the press means only that newspaper publishers are guaranteed freedom of expression. They *are* guaranteed that freedom, to be sure, but so are we all, because of the Free Speech Clause. If the Free Press guarantee meant no more than freedom of expression, it would be a constitutional redundancy. Between 1776 and the drafting of our Constitution, many of the state constitutions contained clauses protecting freedom of the press while at the same time recognizing no general freedom of speech. By including both guarantees in the First Amendment, the Founders quite clearly recognized the distinction between the two. . . . In setting up the three branches of the Federal Government, the Founders deliberately created an internally competitive system. . . . 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. . . . The relevant metaphor, I think, is the metaphor of the Fourth Estate.[11]

The second conception is that "the press" refers to the press as a medium of communication. Under this interpretation, the freedom of the press protects all individuals' written expression and is

[10] 4 Jonathan Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 314 (1876).

[11] Potter Stewart, Or of the Press, 26 Hastings L.J. 631, 633–34 (1975), reprinted in 50 Hastings L.J. 705 (1999) (emphasis added).

complementary to the freedom of speech. A well-known expositor of this view was Chief Justice Warren Burger, who wrote in response to the press-as-institution view:

> I perceive two fundamental difficulties with a narrow reading of the Press Clause. First, although certainty on this point is not possible, the history of the Clause does not suggest that the authors contemplated a "special" or "institutional" privilege. . . . [M]ost pre-First Amendment commentators "who employed the term 'freedom of speech' with great frequency, used it synonymously with freedom of the press." . . . Those interpreting the Press Clause as extending protection only to, or creating a special role for, the "institutional press" must either (a) assert such an intention on the part of the Framers for which no supporting evidence is available . . . ; (b) argue that events after 1791 somehow operated to "constitutionalize" this interpretation . . . ; or (c) candidly acknowledging the absence of historical support, suggest that the intent of the Framers is not important today. . . . The second fundamental difficulty with interpreting the Press Clause as conferring special status on a limited group is one of definition. . . . The very task of including some entities within the "institutional press" while excluding others, whether undertaken by legislature, court, or administrative agency, is reminiscent of the abhorred licensing system of Tudor and Stuart England—a system the First Amendment was intended to ban from this country. . . . In short, the First Amendment does not "belong" to any definable category of persons or entities: It belongs to all who exercise its freedoms.[12]

Perhaps it is this problem of definition raised by Chief Justice Burger that best illustrates the difficulty with the proposition that the freedom of the press protects a class of persons rather than all persons. Such a view raises the question: Who will define the class? Does it not seem at least passing strange that a Constitution that explicitly refuses to establish a religion would at the same time establish a professional class? Does it not seem at least passing strange that such a Constitution would afford the right to every citizen to express his or her views in speech, but at the moment that the citizen chose to commit those thoughts to writing, that constitutional protection

[12] Bellotti, 435 U.S. at 798–802 (Burger, C.J., concurring).

would vanish unless the speaker/writer belonged to the privileged profession?

I will interrupt the flow of my remarks on this subject to add that I am aware that the Congress is currently considering this definitional problem under the rubric of a shield statute. As to that, I will only say that I am not here to address the statutory problem, but only the constitutional problem. Back to my original topic.

Various justices and commentators have echoed Burger's concern with how we would define the press if we adopt the press-as-institution interpretation. In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, Justice William Brennan, joined in dissent by Justices Thurgood Marshall, Harry Blackmun, and John Paul Stevens, rejected the view that the Free Press Clause is limited to "media" entities because it is "irreconcilable" with First Amendment principles that protect speech, regardless of its origin, and because it would be impossible to define "media" entities.[13] Justice Byron White concurred with the dissent on this point, and the plurality did not reject it, turning its decision instead on the distinction between libelous speech on matters of private concern and libelous speech on matters of public concern.

The class-definition problem created by the press-as-institution interpretation underscores its erroneous nature. It would seem axiomatic that "the First Amendment . . . creates 'an open marketplace' in which differing ideas about political, economic, and social issues can compete freely for public acceptance without government interference."[14] Indeed, the protection of political speech has been repeatedly described by the Supreme Court as the core of the First Amendment.[15] How then is it consistent with First Amendment values to entrust the determination of the scope of free-press protection to the political entities the Framers hoped citizens would be free to criticize, challenge, or advise? How would such an allocation of protection proceed?

[13] 472 U.S. 749, 782–83 (1985).

[14] Knox v. SEIU, Local 1000, 132 S. Ct. 2277, 2288 (2012) (quoting New York State Bd. of Elections v. Lopez-Torres, 552 U.S. 196, 202 (2008)).

[15] See, e.g., Brown v. Hartlage, 456 U.S. 45, 52 (1982) ("At the core of the First Amendment are certain basic conceptions about the manner in which political discussion in a representative democracy should proceed.").

Would Congress, or some new undersecretary of the press, decide who is entitled to this press freedom? Could the president make a recess appointment to the official press? This definitional problem poses an insurmountable hurdle to the press-as-institution interpretation.

Before I go further, it is important to note that this debate is not merely academic. For example, recently the North Carolina Board of Dietetics/Nutrition threatened to send a blogger to jail for describing his battle against diabetes and encouraging others to use his diet and lifestyle as an example.[16] The blogger used his website to describe his experience on the "paleo" diet, which apparently is also known as the "caveman" or "hunter-gatherer" diet. On every page of his blog, he includes these words: "I am not a doctor, dietitian, nor nutritionist . . . in fact I have no medical training of any kind."[17] Yet the board conducted a line-by-line red-ink review of the blog site, citing specific words and phrases as impermissible and telling him to remove those lines on penalty of jail.[18] For instance, the board objected to the blogger's providing his daily meal plan on the ground that nonlicensed individuals cannot recommend diets to others. According to the board, the blogger "has a First Amendment right to blog about his diet, but he can't encourage others to adopt it unless the state has certified him as a dietitian or nutritionist."[19] The board's director also explained that it would be less likely to prosecute a writer who blogs about vegetarian diets "because a vegetarian is not really like a medical diet."[20] Apparently, the hunter-gathers came up with a medical diet long before penicillin was discovered.

Now, I don't know much about caveman diets, or dinosaur diets, or any other diets, for that matter. But I do know that the North Carolina Board's licensing requirements as applied to this public blog sound suspiciously like the "abhorred" press licensing requirements of old

[16] See Sara Burrows, State Threatens to Shut Down Nutrition Blogger, Carolina Journal, Apr. 23, 2012, available at http://www.carolinajournal.com/exclusives/display_exclusive.html?id=8992.

[17] *Id.*

[18] See N.C. Bd. of Dietetics/Nutrition Comments on Diabetes-Warrior.net Website, available at http://www.diabetes-warrior.net/wp-content/uploads/2012/01/Website_Review_Cooksey_Jan._2012.pdf.

[19] Burrows, *supra* n. 16.

[20] *Id.*

England that Chief Justice Burger mentioned. And unless the North Carolina Board has threatened the authors of many of the books on the Amazon bestseller list, the board seems to be applying a different standard to bloggers who write about diets than it does to "professional" authors who write about diets.

The blogger sued in the Western District of North Carolina. After the district court dismissed his claims on justiciability grounds, he appealed to the U.S. Court of Appeals for the Fourth Circuit, represented by the Institute for Justice and supported by amicus American Civil Liberties Union. The Fourth Circuit determined, rightly, that the claims should have been analyzed "under the First Amendment standing framework."[21] A Fourth Circuit panel that included the Honorable Sandra Day O'Connor, sitting by designation, determined that his claim was indeed justiciable and ripe, and remanded the case for appropriate consideration of his First Amendment claims.

While properly analyzing the First Amendment framework, the *Cooksey* decision *sub silentio* highlights another issue. The *Cooksey* panel generally analyzed the blogger's communications under a freedom of speech analysis without distinguishing freedom of the press. This highlights the fact that analysis of freedom of the press involves not only a determination of who enjoys the freedom, but also what means of communication are covered. That is, is the internet (and for that matter, television) a medium for exercising freedom of the press or freedom of speech or what? If we consider freedom of the press to protect all communication rather than the privilege given an institution, it doesn't matter much. If we consider it to protect the activities of a certain class, then it does matter. Under the institutional view, if the blogger not only communicated through the internet but either he or a follower printed out his blog and distributed the printed copies, then the protection would extend to him only if he were in the employ of the *New York Times* or some other representative of the established media but would vanish if he were not.

Back to the general proposition that under the First Amendment, the Constitution protects bad ideas as well as good, for only through the competition of ideas can we determine which ideas are in fact "good." As Justice Oliver Wendell Holmes famously said, "the ultimate good desired is better reached by free trade in ideas[, for] . . .

[21] Cooksey v. Futrell, 721 F.3d 226 (4th Cir. 2013).

the best test of truth is the power of the thought to get itself accepted in the competition of the market."[22] The question we confront today is whether it also protects all the purveyors of those ideas, regardless of their identity or affiliation with the elite media.

II. "The Press" as Originally Understood

As I noted earlier, our basic goal is to determine the original meaning of the Constitution's press protections. The press-as-an-institutional-elite view is inconsistent with the original public meaning of the First Amendment. History supports Chief Justice Burger's view of freedom of the press as extending to all citizens. In the late 18th century, state supreme courts, state constitutions, and commentators uniformly referred to "every man" or "every freeman" or "every citizen's" expressive rights, usually using words like those in the Kentucky Constitution of 1792: "[E]very citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty."[23] As the Pennsylvania Constitution of 1776 shows, freedom of the press described the individual rights of writing and publishing: "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."[24]

Noah Webster's 1828 dictionary defined, under the word "press," the "[l]iberty of the press, in civil policy" as "the free right of publishing books, pamphlets or papers without previous restraint; or the unrestrained right which every citizen enjoys of publishing his thoughts and opinions, subject only to punishment for publishing what is pernicious to morals or to the peace of the state."[25] Justice Joseph Story, in his famed *Commentaries on the Constitution*, described the First Amendment 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

[22] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[23] Ky. Const. of 1792, art. XII, § 7. 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, 466–68 (2012).

[24] Pa. Const. of 1776, ch. I, para. 12.

[25] 2 American Dictionary of the English Language 333 (1828) (reprinted 1970).

other person."[26] The original meaning of "the press," then, was not limited to an institution called "the press."[27]

The idea that the freedom of the press was intended to protect a right of all people is consistent with the structure of the publishing industry in the late 18th century. There were no large media conglomerates and few journalists as we now conceive of them. But there were individual authors who paid independent printers to print their pamphlets and small newspapers.[28] "[P]amphlets were written by amateur writers who held other occupations as lawyers, ministers, merchants, or planters."[29]

For instance, one of the most successful uses of a printing press in America at the Founding—and indeed in all of our history—was Thomas Paine's pamphlet *Common Sense*. Paine paid a printer to print the pamphlet anonymously and then donated all proceeds and his copyright to the United States for the cause of independence.[30] At the time, Paine was certainly not a member of any institutional press. He was by trade an excise officer and later a bridge designer. Yet his 1809 biographer wrote that *Common Sense* was entirely "unexampled in the history of the press."[31] Thomas Paine was exercising his freedom of the press, even though he was no professional newsman.

The same is conspicuously true of James Madison, Alexander Hamilton, and John Jay, who published *The Federalist Papers* anonymously in various newspapers. They were not part of an institutional press at the time of the Founding. Just try to imagine it. George Washington, holding a press conference before the White House Press Corps' precursor. "Any questions?" "Yes, this is James Madis . . . er, Publius. "What will be your response to the Whiskey Rebellion?" "No

[26] 3 Joseph Story, Commentaries on the Constitution of the United States 732 (1st ed. 1833).

[27] If freedom of the press applied only to the elite, Matt Drudge might still be just a guy with an old hat living in his mom's basement, unless, of course, he could scrape together enough to buy a newspaper and proclaim himself part of "the press."

[28] See McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 360 (1995) (Thomas, J., concurring in the judgment).

[29] Edward Lee, Freedom of the Press 2.0, 42 Ga. L. Rev. 309, 341 (2008) (internal quotation marks omitted).

[30] 1 Moncure Daniel Conway, The Life of Thomas Paine 69–70 (1892) ("[P]eace f[ound] him a penniless patriot, who might easily have had fifty thousand pounds in his pocket.").

[31] *Id.* at 64.

comment. Next question? Brutus? You're awfully quiet today . . . ." It is inconceivable that the ratifying public would have thought that *Common Sense* and *The Federalist Papers* would not be covered by the freedom of the press.

The proposition that freedom of the press does not create a privileged profession is not at all intended to disparage, but rather to underline the importance of that First Amendment protection. The Framers knew full well the dangers against which they were protecting. In the late 17th century, it was a crime in England to publish news without first obtaining a license; "[w]hether the news was true or false, of praise or censure, was immaterial."[32] "[A]uthors and printers of obnoxious works were hung, quartered, mutilated, exposed in the pillory, flogged, or simply fined and imprisoned, according to the temper of the judges; and the works themselves were burned by the common hangman."[33] This law was followed by the Stamp Act, which placed a duty on all newspapers and advertisements. According to James Madison, the First Amendment's freedom of the press was understood to forbid precisely these types of laws that imposed prior restraints on publications or imposed *ex post* penalties on them.[34]

In England, such laws had been regularly applied against individual printers and writers, not just some institutional press.[35] In fact, the strongest opposition to the free press in England came from the governing classes—in other words, the elite.[36] The idea that the First Amendment, then, was designed to protect only the institutional elite has it backwards.

The history of press regulation in the American colonies also reveals early prosecutions that provide support for Burger's interpretation. One printer was arrested in Virginia for publishing the laws

[32] Edward Hudon, Freedom of Speech and Press in America 11 (1963).

[33] *Id.* (internal quotation marks omitted).

[34] See 4 Elliot, *supra* n. 10, at 569–70, reprinted from James Madison, Report on the Virginia Resolutions to the House of Delegates (1800) ("This security of the freedom of the press requires that it should be exempt, not only from previous restraint of the executive, as in Great Britain, but from legislative restraint also; and this exemption, to be effectual, must be an exemption, not only from the previous inspection of licensers, but from the subsequent penalty of laws.").

[35] See Hudon, *supra* n. 32, at 10–12; see also Volokh, *supra* n. 23, at 484–88.

[36] See Hudon, *supra* n. 32, at 11.

of that colony without having an appropriate license. (Perhaps he should have read the laws before printing them.) The colonial governor of Virginia a few years prior had expressed the following sentiment: "I thank God, we have 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."[37]

The first newspaper in the colonies was suppressed after its first issue because it mentioned the Indian Wars, raising the question, at what point does printing make one part of the institutional press? If the press-as-institution view prevails, is the printer of a first edition of a newspaper or periodical part of that institutional press or just an aspirant? If not a member, then how many issues does the printer have to issue before being admitted into the protected class? If one issue is enough, then might we not as well go back to Burger's view that the freedom of the press protects everyone who seeks to circulate a view or a report, not just those who do so at some recognized professional level? Given the early prosecutions of individual authors and printers, and the First Amendment's role in preventing such prosecutions, it seems implausible that the "freedom of the press" would apply only to an institutional press. Indeed, the earliest First Amendment cases nowhere suggest that the freedom of the press was so limited, for they apply the freedom of the press to individual writers and printers.[38]

The Supreme Court has held that "The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual."[39] The same value adheres to written expression, which serves to inform the public no matter its source. In other words, we do not change "freedom of the press" depending on the source's characteristics, its subscribers, or its ratings. Someone at CNN should breathe a sigh of relief.

The grammatical structure of the First Amendment also confirms Burger's interpretation of "the press" as written dissemination of information or opinion by anyone, not just the institutional press. It makes sense that the amendment, which refers to "the freedom of

[37] *Id*. at 18.

[38] See Volokh, *supra* n. 23, at 489–98.

[39] Bellotti, 435 U.S. at 777.

speech, or of the press" within the same clause, would extend both rights to everyone who might speak or write. Adopting the press-as-institution interpretation would require the strange assumption that the Framers used "speech" and "press" much differently—one to categorize the type of freedom protected and one to delineate the persons protected by a freedom. Given the history of contemporaneous constitutions protecting every citizen's "right to speak, to write, or to publish," this assumption, required by the press-as-institution view, seems even more strange. Justice Antonin Scalia calls attention to this strangeness in his concurrence in *Citizens United*. "It is passing strange to interpret the phrase 'the freedom of speech, or of the press' to mean, not everyone's right to speak or publish, but rather everyone's right to speak or the institutional press's right to publish."[40]

A potential objection to Burger's interpretation of "the press" is that it would render the freedom of the press superfluous, for anything it protects would already be protected by the freedom of speech. Burger answers this objection by providing some historical context:

> The Speech Clause standing alone may be viewed as a protection of the liberty to express ideas and beliefs, while the Press Clause focuses specifically on the liberty to disseminate expression broadly and "comprehends every sort of publication which affords a vehicle of information and opinion." *Lovell v. Griffin*, 303 U.S. 444, 452 (1938). Yet there is no fundamental distinction between expression and dissemination. The liberty encompassed by the Press Clause, although complementary to and a natural extension of Speech Clause liberty, merited special mention simply because it had been more often the object of official restraints. Soon after the invention of the printing press, English and continental monarchs, fearful of the power implicit in its use and the threat to Establishment thought and order—political and religious—devised restraints, such as licensing, censors, indices of prohibited books, and prosecutions for seditious libel, which generally were unknown in the pre-printing press era. Official restrictions were the official response to the new, disquieting idea that this invention would provide a means for mass communication.[41]

[40] Citizens United, 558 U.S. at 390 n.6 (Scalia, J., concurring).

[41] Bellotti, 435 U.S. at 799–801 (Burger, C.J., concurring).

It may well be that we have erred in dividing the Speech and Press Clauses. In the First Amendment, it reads as one clause: "the freedom of speech, or of the press." When we read this complete clause as protecting the individual right to disseminate ideas to the public, it makes sense that the Framers would have included the complementary concepts of speaking and writing. It is unlikely that the public in 1791 understood the "freedom of speech" in the broad way that we understand it today, and therefore it would have been perfectly sensible to explicitly protect both spoken expression and written expression in the First Amendment.[42]

In fact, of speech and press, the Founding generation more often emphasized the freedom of the press than the freedom of speech. Of course, this is reversed today: a recent poll found that 47 percent of Americans named freedom of speech as their most important freedom, while 1 percent named freedom of the press.[43] Only 14 percent of Americans could even name freedom of the press as a freedom protected by the First Amendment.[44]

But to a Founding generation troubled by British regulation of the use of the printing press, the liberty of the press was conspicuously important. It was through the use of the printing press that Protestants spread the Reformation to change the face of religion in Europe. It was the printing press that enabled Thomas Paine to reach a vast proportion of Americans living at the time with his pamphlet decrying British rule. It was with presses that the Federalists and Anti-Federalists conducted a widely followed debate on the merits of the new Constitution. In *Federalist No. 84*, Hamilton responds to the Anti-Federalist objection to the lack of a Bill of Rights in the Constitution. He discusses only one specific liberty, suggesting the importance placed on that liberty. That one liberty was the freedom of the press.[45]

Likewise, in 1774, the Continental Congress sent a letter to the inhabitants of Quebec attempting to enlist their support against the British. That was a year before we undertook a slight change in

[42] See Volokh, *supra* n. 23, at 477.

[43] First Amendment Center, State of the First Amendment: 2013, at 2 (July 2013), available at http://www.firstamendmentcenter.org/madison/wp-content/uploads/2013/07/SOFA-2013-final-report.pdf.

[44] *Id.* at 3.

[45] See The Federalist No. 84, at 513–14 (Clinton Rossiter ed., 2003).

strategy and simply invaded our hesitant northern neighbor. The letter, which lauded various rights enjoyed by Americans, contained no mention of the freedom of speech, but it had quite a bit to say about the freedom of the press:

> The last right we shall mention regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated into more honorable and just modes of conducting affairs.[46]

Given the importance of the press at that time, it is no surprise to find written expression explicitly protected in the First Amendment. Further, the content of the appeal to the inhabitants of Quebec illustrates once more the extension of the protection of the freedom of the press not to a professional class, but to all who communicate through that technology. While we might perhaps think of the professional journalist as advancing truth, the advancement of "science, morality, and arts in general" suggests the products of a much larger body of communicators. Thus, it should be apparent that the freedom of the press protects not only newspaper personnel, but scientists, moralists, and all engaged in all arts.

But returning to the superfluity question, 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]

[46] Appeal to the Inhabitants of Quebec, 1 Journals of the Continental Congress 105, 108 (1774).

[47] I have not attempted to catalog all of the cases from the early years of the Constitution in support of the definition of "the press" as referring to the means of communication rather than a privileged class. For further explication, I will again commend the exhaustive collection and analysis by Eugene Volokh in his article, 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).

III. Applicability of "The Press" to Modern Technologies

Two further questions arise for the originalist who adopts the liberty-for-all interpretation of "the press." First, does the freedom of the press protect only the actual production of written material? Second, if "the press" refers to the printing press, does the freedom of the press also protect blogs and television and all the other forms of communication that do not originate from a printing press?

The answer to the first question is surely no, for the Supreme Court has consistently held that the freedom of the press protects more than the mere writing of a material.[48] As the Court has explained, the freedom of the press would be meaningless without the included rights to write, publish, and circulate. Thus, Justice Scalia wrote in *McConnell v. FEC*: "License printers, and it matters little whether authors are still free to write. Restrict the sale of books, and it matters little who prints them . . . . What good is the right to print books without a right to buy works from authors? Or the right to publish newspapers without the right to pay deliverymen?"[49]

The breadth of the activity protected by the First Amendment's freedom of the press does not suggest, however, that that freedom affords special protection to a universe of acts by members of the professional media that would not be protected if engaged in by others. It is the excessive claims of such protection that first brought the subject to the front of my mind. It has become commonplace for members of the professional media to suppose that their special freedom enjoyed as members of "the press" includes freedom from the obligation to answer subpoenas, testify in court, or put up with all sorts of other things that the common people must endure.

A few years ago in Washington, D.C., a special prosecutor was leading a grand jury investigation of the suspected unlawful disclosure by high government officials of the identity of a covert CIA agent. As part of the investigation, the grand jury issued subpoenas to a *New York Times* reporter named Judith Miller, along with

[48] See, e.g., Ex parte Jackson, 96 U.S. 727, 733 (1877) ("Liberty of circulating is as essential to th[e] freedom [of the press] as liberty of publishing; indeed, without the circulation, the publication would be of little value.").

[49] 540 U.S. 93, 251–52 (2003) (opinion of Scalia, J.).

a correspondent for *Time* and the corporate entity producing that magazine.[50] It was undisputed that Miller had obtained information concerning the identity of a high government official who had leaked the name of the CIA agent. Miller, however, refused to provide her evidence to the grand jury, claiming that her information had come from a confidential informant and arguing that the First Amendment freedom of the press created a privilege for reporters to maintain the confidentiality of their sources. A unanimous panel of the D.C. Circuit, consisting of myself, along with Judges Karen Henderson and David Tatel, rejected the proposition that the concept of the "freedom of the press" contemplates protection beyond those actions properly classified as the preparation and circulation of publications. I stand by that today.

Not only did Miller or any of her supporters fail to produce any historical evidence that the concept of a free press at the time of the Framing (or for that matter, long after) included a broad protection of activities that would be unprotected if conducted by anyone other than a professional journalist, but also, as we noted in the *Miller* case, this question was definitively answered by the Supreme Court in *Branzburg v. Hayes*.[51] In *Branzburg*, as in *Miller*, a journalist who concededly had knowledge of criminal activity resisted a subpoena under the claim that the First Amendment provided protection to a journalist against the revelation of his sources. As we later echoed in *Miller*, the Supreme Court held that there is no such protection within the concept of First Amendment freedom of the press. Justice Byron White, writing for the Court, declared that:

> It is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability. Under prior cases, otherwise valid law serving substantial public interests may be enforced against the press as against others, despite the possible burden that may be imposed.[52]

[50] See In re Grand Jury Subpoena, Judith Miller, 438 F.3d 1141 (D.C. Cir. 2005). Although the other subpoenaed parties participated in the litigation, the relevant opinions principally address the rights claimed by Miller, and no other litigant raised any unique claim.

[51] 408 U.S. 665 (1972).

[52] *Id.* at 682–83.

Justice White went on to drive the point home: "The Court has emphasized that '[t]he publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others.'"[53]

I cannot leave this discussion of *Branzburg* without recalling one other pithy quotation from Justice White's opinion for the majority: "[W]e cannot seriously entertain the notion that the First Amendment protects a newsman's agreement to conceal the criminal conduct of his source, or evidence thereof, on the theory that it is better to write about crime than to do something about it."[54]

In another case involving a claim to special rights for the institutional press, *Flynt v. Rumsfeld*, the publisher of *Hustler* magazine asserted "a First Amendment right for legitimate press representatives to travel with the military, and to be accommodated and otherwise facilitated by the military in their reporting efforts during combat."[55] We rejected that proposition, holding that "[t]here is nothing that we have found in the Constitution, American history, or our case law to support this claim."[56]

The plaintiff appellant in *Flynt* relied on *Richmond Newspapers, Inc. v. Virginia*, in which the Supreme Court recognized, in a plurality opinion, a constitutional right of access to criminal trials for the news media.[57] The plurality in *Richmond* did not recognize a special status of the press under the First Amendment standing alone, however, but grounded its decision in large part on the openness mandated by the "public trial" provisions of the Sixth Amendment. It was only after extended discussion of the open-trial concept that the Court "h[e]ld that the right to attend criminal trials is implicit in the guarantees of the First Amendment."[58] Even then, the Court went on in the same sentence to state that "without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of *speech* and 'of the press could be eviscerated.'"[59] Thus,

[53] *Id.* at 683 (quoting Associated Press v. NLRB, 301 U.S. 103, 132–33 (1937)).

[54] *Id.* at 692.

[55] 355 F.3d 697, 703 (D.C. Cir. 2004).

[56] *Id.*

[57] 448 U.S. 555 (1980).

[58] *Id.* at 580.

[59] *Id.* (quoting Branzburg at 681) (emphasis added).

even the plurality in *Richmond Newspapers* did not accord a special right to the press as such, but only as representatives of the public, so that even in that case there is no recognition of a special class of persons more protected by freedom of the press than other persons. Admittedly, Justices Brennan and Marshall would have found the right of access to criminal proceedings in the First Amendment of its own force, but even they couched their concurrence in terms of a right of "First Amendment public access," rather than a special status for some specially privileged group called "the press."[60]

I turn now to the question concerning new technologies and the First Amendment. If we take as given that the Constitution means what the ratifying public would have originally understood its words to mean, perhaps the freedom of the press extends only to works produced by a printing press. Needless to say, the ratifying public in 1791 had no conception of iPads or computers or televisions. The question, then, is what does the originalist do when applying constitutional texts to new technologies. The answer is no different from our usual method of applying the Constitution: we determine how the technology fits into the text, sometimes by analogizing to the technology used in 1791. This issue often arises in the Fourth Amendment context, where the Court has applied the Fourth Amendment to dog sniffs, infrared scanners, and other devices unknown to the Founding generation. When the Constitution allocated war powers between the Congress and the executive, there was, of course, no air force. And yet the courts have had no difficulty in treating the president as "Commander in Chief of the Armed Forces," when the facts involved that branch of the service.[61]

In the First Amendment context, Chief Justice Charles Evans Hughes set out a relevant definition of "the press": "The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion."[62] Even the ratifying public probably did not consider the freedom of the press as being limited to works printed *on a printing press*. It strains credulity to suggest that people in 1791 would have considered the freedom of the press not to protect *handwritten* works as well.

[60] *Id.* at 597 (Brennan, J., concurring).

[61] See, e.g., Reid v. Covert, 354 U.S. 1, 38 (1957).

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

In 1769, Blackstone wrote that "[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."[63] Therefore, as Chief Justice Burger wrote, "It is not strange that 'press,' the word for what was then the sole means of broad dissemination of ideas and news, would be used to describe the freedom to communicate with a large, unseen audience."[64] The extension of "the press" to include new forms of communication recognizes that the freedoms of speech and press are complementary ideas contained in the same clause of the First Amendment and serve together to protect an individual right to disseminate ideas. Thus, protecting online posts, on-air statements, and other new forms of publishing technology is consistent with an originalist interpretation of the First Amendment. These new technologies make it even easier for all citizens to exercise their "freedom of the press," ensuring that it remains the "true friend and firmest support of civil liberty" in these United States.

In closing, I recall that in the wake of the Judith Miller decision, Joel Roberts of CBS stated that "[t]o read the other two judges [Sentelle and Henderson], you might think that journalists have the same First Amendment protections as sock puppets."[65] Since both Judge Henderson and I had written in the firm belief that journalists have the same First Amendment protections as all other Americans, the opinion of the CBS newsman must be that not only do the nobles of "the press" have special rights, but also that the rest of us are nothing but sock puppets. So I will end with a comment directed toward Mr. Roberts, CBS, and their colleagues: The inclusion of the words "the press" in the First Amendment does not confer upon you a title of nobility. You have the protection of the rights encompassed in the First Amendment, but so do the rest of us. You are not nobles, and we are not sock puppets.

[63] 4 William Blackstone, Commentaries *151.

[64] Bellotti, 435 U.S. at 800 n.5.

[65] Joel Roberts, Punishing Good Journalists, CBS News, February 16, 2005, available at www.cbsnews.com/news/punishing-good-journalists.