

Achieving the press freedom *telos*: Arguments to activate the “*Or of the press*” clause and to import a model of voluntary press regulation

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ABSTRACT

The First Amendment provides that ‘Congress shall make no law...abridging the freedom of speech, or of the press.’ By explicitly referencing the press, these last four words seem to indelibly etch press freedom into the Constitution in the form of a ‘press clause’. Cast in this way, press freedom *could* become a structural constitutional provision, requiring a higher threshold for state interference than the individual right to free speech. In turn an active press clause would give the press protection in a similar way to the European Court of Human Rights’ European Convention on Human Rights jurisprudence in recognition of the fact that the press discharges certain constitutional values. In the US, however, the prevailing model of press freedom determines that it and free speech are, essentially, equivalent, and therefore press freedom does not require any protection or privileges, and should not be subject to any duties, in excess of the right to free speech applicable to individuals, because this right sufficiently safeguards the press and its public watchdog function. This is because – so the argument goes – the Framers of the Constitution understood the words ‘or of the press’ to secure the right of *every person* to use communications technology, as opposed to laying down a right exclusively available to members of the press. Accordingly, the Supreme Court has consistently found that the First Amendment protects speech not speakers. This article’s significance and originality lie in its two core arguments. Firstly, it contends that the changed media ecology – which has seen a proliferation of new ‘types’ of non-institutional independent journalists making vital contributions to the public sphere – requires clear recognition of who, or what, is ‘the press’, which in turn requires a rejection of the equivalency model and the activation the ‘press clause.’ This is because the press is unique and fills a uniquely important function to the public sphere and democracy. And, therefore, individuals and organisations operating as press need the necessary protection, access, and recognition to fulfil their role. To facilitate this distinction the article advances a functional reconceptualisation of the press that accounts for the array of non-institutional speakers performing press functions. Secondly, in acknowledging that despite the force of the claim in favour of reactivating the press clause the current Supreme Court’s rhetoric suggests this is unlikely, it advances a solution to the constitutional voids this has left: the importation of a model of voluntary regulation that could, if implemented correctly, benefit the press and the public regardless of whether the press clause is, or is not, activated.

I. INTRODUCTION

The notion of press freedom is not new. In 1644 John Milton, in his pamphlet, *Areopagitica*, responded to the UK Parliament’s passage of a law requiring the government to approve all books prior to publication by stating that ‘[t]ruth and understanding are not such wares as to

be [monopolised] and traded in by tickets and statutes, and standards.’¹ A little over a century later, in 1766, the Swedish parliament passed the Freedom of the Press Act – the world’s first piece of legislation protecting press freedom, and the more broader principle that individuals should be able to express and disseminate information without fear of reprisal. In the UK, in 1769, Sir William Blackstone, in his *Commentaries on the Laws of England*, argued that press freedom was ‘essential to the nature of a free state’ and 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.’² And, in the US, in 1791, the First Amendment to the US Constitution was ratified, guaranteeing, inter alia, that ‘Congress shall make no law ...abridging the freedom of speech, or of the press...’

Despite this provenance, and the fact that what press freedom *means* is not in debate, what continues to be contentious amongst lawyers, judges, scholars and governments the world over is how its telos are *achieved*.³ Because of the textual reference to the press in the First Amendment, one would perhaps think that this would not be the case in the US, but the ‘press clause’ continues, in the words of Robert Post, to “pose something of a puzzle.”⁴ As explained in sections II and III, this is because of an enduring polarisation of teleological views on the clause. On one side sits the prevailing Supreme Court jurisprudence which has deactivated the press clause and arrested its development. This dormancy means that the First Amendment treats all speakers the same and therefore does not provide the press with any special protections. This is known as the equivalency model of press freedom. On the other side are those who argue (and is contended in this article) that, in a similar way to the European Court of Human Rights’ (ECtHR) jurisprudence on the European Convention on Human Rights (ECHR), the First Amendment should acknowledge the press’s unique role in the shaping of the public sphere and in discharging certain constitutional values by providing equally unique protections in exchange through an active and operative press clause.

Thus, after setting out the press’s claim to press freedom in section II, and interrogating the opposing equivalency model in section III, this article advances two core arguments, within which its originality and significance lie. Firstly, in section IV, it contends that the changed media ecology – which has seen a proliferation of new ‘types’ of non-institutional independent journalists making vital contributions to the public sphere – requires clear recognition of who, or what, is ‘the press’, which in turn requires a rejection of the equivalency model and the activation the press clause. This is because the press is unique and fills a uniquely important function to the public sphere and democracy. And, therefore, individuals and organisations operating as press need the necessary protection, access, and recognition to fulfil their role. To

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¹ J. Milton, *Areopagitica* (Clarendon Press Series, Leopold Classic Library, 2016).

² W. Blackstone, *Commentaries on the Laws of England*, (1769; reprinted by University of Chicago Press, 1979), 4:150-153. For an introduction to press freedom in Europe, see: J. Mchangama, *Free Speech: A Global History from Socrates to Social Media* (Basic Books, 2022), chp. 5.

³ P. Wragg, *A Free and Regulated Press: Defending Coercive Independent Press Regulation* (Hart, 2020), 24.

⁴ R.C. Post, ‘The Press and American Democracy’ in R.A. Jones and S.R. West (eds), *The Future of Press Freedom. Democracy, Law, and the News in Changing Times* (Cambridge University Press, 2025), 17-27, 17.

facilitate this distinction the article advances a functional reconceptualisation of the press that accounts for the array of non-institutional speakers performing press functions. Secondly, in acknowledging that despite the force of the claim in favour of reactivating the press clause the current Supreme Court's rhetoric suggests this is unlikely, in section VI it advances a solution to the constitutional voids that this has left: the importation from the UK of a model of voluntary regulation that could, if implemented correctly, benefit the press and the public regardless of whether the press clause is, or is not, activated.

II. THE INSTITUTIONAL PRESS'S CLAIM TO PRESS FREEDOM

Unlike other forms of media, the *institutional* press (that is, our established 'legacy' newspapers) is more than a medium: it transcends its industry parameters, in that it is part of our history and is ingrained within our cultural and social fabric – to the extent that individuals may identify with, or even be defined by, their allegiance to a newspaper, and entire communities may be associated with certain publications. This place within our psyche is unsurprising when one considers that since Johannes Gutenberg's invention and introduction of the printing press in the fifteenth century, to the dawn of the press barons, and up to the press barons of today,⁵ for most of our modern history the press has been the dominant form of mass communication: it was, until relatively recently, the only medium that had an amplification effect – in other words, the ability to 'control the message' that is received by the public. Consequently, the press has shaped, and continues to shape, the public sphere: by being an invaluable source of local and national information and inter-connection, newspapers are a source of, and arbiters of, popular public opinion.⁶

This role in society placed the institutional press in a unique position to contend that *it exclusively* discharges certain constitutional values, in that *it* (i) operates symbiotically with the public as *the* purveyor and conduit of democracy-enhancing public discourse, by acting as *the* proxy eyes, ears and mouthpiece for the public on matters of public importance,⁷ (ii) acts as a checking mechanism on the government and the powerful,⁸ (iii) creates and shapes the public sphere,⁹ and (iii) in Meiklejohnian terms enables the public to effectively self-govern.¹⁰ Indeed, because of this Jürgen Habermas has said that from its genesis the institutional press was "the

⁵ For detailed commentary on press barons see: P. Coe, *Media Freedom in the Age of Citizen Journalism*, (Edward Elgar, 2021), chp. 2; P. Brendon, *The Life and Death of the Press Barons* (Secker & Warburg, 1982); R.L. Weaver, *From Gutenberg to the Internet: Free Speech, Advancing Technology, and the Implications for Democracy* (2nd edn., Carolina Academic Press, 2019).

⁶ P. Coe, *Media Freedom in the Age of Citizen Journalism*, (Edward Elgar, 2021), chp. 2.

⁷ See generally: R.A. Jones, 'What the Supreme Court Thinks of the Press and Why It Matters', 66 *Ala. L. Rev.*, 253, 257 (2014); R.A. Jones, 'Press Freedom and the First Amendment Rights of Listeners', 90 *Colo. L. Rev.* 499, 540 (2019).

⁸ V. Blasi, 'The Checking Value in First Amendment Theory' (1977) *American Bar Foundation Research Journal* 521.

⁹ R.C. Post, 'The Press and American Democracy' in R.A. Jones and S.R. West (eds), *The Future of Press Freedom. Democracy, Law, and the News in Changing Times* (Cambridge University Press, 2025), 24-26.

¹⁰ A. Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (Oxford University Press, 1960), 42; R.H. Bork, 'Neutral Principles and Some First Amendment Problems' (1971) 47 *Indiana Law Journal* 1. This argument was made by the press in *Branzburg v Hayes* 408 US 665 (1972) (at 680), which the Supreme Court explicitly rejected (at 704-705).

public sphere's preeminent institution.”¹¹ As I discuss below, this contended ‘uniqueness’ and its inherent value has been inextricably tethered to the press’s claim to press freedom and its privileges;¹² it is the basis in Europe of the ECtHR’s jurisprudence on press freedom, and the arguments made in the US for an active press clause, and therefore as a rejoinder to the equivalency model.¹³

In Europe the press enjoys a privileged position, which is inextricably bound up with the ECtHR’s instrumental model of press freedom. This model determines that press freedom requires an elevated status to ‘the degree to which it promotes certain values at the core of our interest in freedom of expression generally.’¹⁴ In consistently emphasising the press’s vital contribution to democracy,¹⁵ and its purpose, not only as an ‘information purveyor’ on matters of public interest, but of the ‘public watchdog’,¹⁶ the ECtHR has imposed duties and responsibilities on the press to fulfil this purpose,¹⁷ and to act ethically and in accordance with the tenets of responsible journalism.¹⁸ Although Article 10(1) of the ECHR makes *no reference* to the press or press freedom,¹⁹ in exchange, the ECtHR, through its case law, has bestowed the press with an exceptional status, in that it interprets Article 10(1) to contain privileged protections of the press, distinct to those provided to individuals pursuant to the right to freedom of expression, even in the absence of express provisions to that effect.²⁰ The

¹¹ J. Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (Thomas Burger, translated 1989), 181.

¹² Paul Wragg speaks of this claim as being ‘axiomatic’: P. Wragg, *A Free and Regulated Press: Defending Coercive Independent Press Regulation* (Hart, 2020), 23. See also: P. Wragg, *Free Speech Theory. A Radical Restatement* (Hart, 2025), 163-168.

¹³ R.C. Post, ‘The Press and American Democracy’ in R.A. Jones and S.R. West (eds), *The Future of Press Freedom. Democracy, Law, and the News in Changing Times* (Cambridge University Press, 2025), chp. 2.

¹⁴ J. Lichtenberg, ‘Foundations and Limits of Freedom of the Press’ in J. Lichtenberg (ed), *Democracy and the Mass Media*, (Cambridge University Press, 1990), 104; E. Barendt, *Freedom of Speech*, (2nd ed. Oxford University Press, 2005), 422.

¹⁵ For example, see: *Cumpăna v Romania* App. no. 33348/96 10th November 2004, [17]; *Perna v Italy* (2004) 39 EHRR 28.

¹⁶ The ECtHR first identified the press’s role of ‘public watchdog’ in *Barthold v Germany* (1985) 7 EHRR 245, [65]. This function has since featured prominently in the Court’s jurisprudence. For example, see: *Bladet Tromsø and Stensaas v Norway* (2000) 29 EHRR 125, [59]; *Bergens Tidende v Norway* (2001) 31 EHRR 16, [48]; *Busuioc v Moldova* (2006) 42 EHRR 14, [64]-[65]; *Jersild v Denmark* (1995) 19 EHRR 1; *Janowski v Poland (No 1)* (2000) 29 EHRR 705, [32]; *The Observer and The Guardian v United Kingdom* (1991) 14 EHRR 153, [59], [75]; *Goodwin v United Kingdom* (1996) 22 EHRR 123, [39]; *Thorgeirson v Iceland* (1992) 14 EHRR 843, [63]; *Bladet Tromsø and Stensaas v Norway* (2000) 29 EHRR 125, [62]; *Cumpăna v Romania* App. no. 33348/96 10th November 2004, [17]; *Axel Springer AG v Germany* [2012] EMLR 15, [79]; *OOO Memo v Russia* (2022) App. no. 2840/10, [45]. In the UK see, for example: *Reynolds v Times Newspapers* [2001] 2 AC 127 per Lord Nicholls, 205; *Ashworth Hospital Authority v Mirror Group Newspapers Limited* [2002] 1 WLR 2033, per Lord Woolf CJ, [88] (cited by Steyn J in *Vardy v Rooney* [2022] EWHC 1209 (QB), [18]); *Bloomberg LP v ZXC* [2022] UKSC 5 per Lord Hamblen and Lord Stephens, [58]-[60].

¹⁷ Ibid. (*Axel Springer* and *Bladet Tromsø* [65]); *De Haes and Gijssels v Belgium* [1998] 25 EHRR 1, [39]; *Bédat v Switzerland* (2016) 63 EHRR 15, [50].

¹⁸ Ibid. (*Bladet Tromsø*). The English courts have also recognised these duties and responsibilities. For instance, in *McCartan Turkington Breen (a firm) v Times Newspapers Ltd* [2001] 2 AC 277, 298, Lord Steyn said that the press is the ‘eyes and ears’ of public opinion. Following this, in *Loutchansky v Times Newspapers Ltd* [2001] EWCA Civ 1805; [2002] QB 783, [36], Lord Phillips said: ‘The corresponding duty on the journalist (and equally his editor) is to play his proper role in discharging that function. His task is to behave as a responsible journalist.’

¹⁹ This also applies to Article 19 of the United Nations International Covenant on Civil and Political Rights and Article 13 of the American Convention on Human Rights.

²⁰ For example, see: *Busuioc v Moldova* (2006) 42 EHRR 14, [64]-[65]; *Wojtas-Kaleta v Poland* [2009] App. no. 20436/02, [46]; *Vejdeland and others v Sweden* [2012] ECHR 242. For analysis of these cases see: P. Coe, *Media Freedom in the Age of Citizen Journalism* (Edward Elgar, 2021), 98-99. For a detailed discussion on the arguments

Strasbourg Court has even said, in *Thorgeirson v Iceland*,²¹ that '[r]egard must...be had to the pre-eminent role of the press in a State governed by the rule of law.'²²

Unlike the ECHR, and as stated in section I, the First Amendment provides that 'Congress shall make no law...abridging the freedom of speech, or of the press...' By explicitly referencing the press these last four words seem to indelibly etch press freedom into the Constitution in the form of a 'press clause'. Cast in this way, press freedom *could* become a structural constitutional provision, requiring a higher threshold for state interference than the individual right to free speech. In turn an active press clause would give the press protection in a similar way to the ECtHR's ECHR jurisprudence in recognition of the fact that the press discharges the constitutional values referred to above. Accordingly, there was a period of Supreme Court jurisprudence that David A. Anderson has called "the heyday of the press in the Supreme Court."²³ In this period, in cases such as *Estes v Texas*,²⁴ *Mills v Alabama*,²⁵ *Miami Herald Publishing Co. v Tornillo*²⁶ and *Minneapolis Star & Tribune Co. v Minnesota Commissioner of Revenue*,²⁷ the court consistently acknowledged the press's 'uniqueness' – because of its vital role in ensuring the healthy functioning of a democratic public sphere – and that it should, therefore, be protected.²⁸

However, from the 1970s onwards the Supreme Court's appetite for an activated press clause has continued to diminish,²⁹ leaving it to commentators,³⁰ and dissenting Supreme Court opinions,³¹ to argue for this telos of the First Amendment. For instance, perhaps most famously, in his 1975 extra-judicial article 'Or of the Press' Justice Potter Stewart made the case for an active press clause, arguing that the Framers of the Constitution must have intended it to have a special meaning, over and above freedom of expression, else it would be constitutionally

relating to whether press (and media) freedom is distinct to that of freedom of expression see: 96-103, 123-126; E. Barendt, *Freedom of Speech*, (2nd edn. Oxford University Press, 2005), 419-424.

²¹ (1992) 14 EHRR 843.

²² Ibid. [63].

²³ D.A. Anderson, 'Freedom of the Press', 80 *Tex. L. Rev.* 429, 448 (2002).

²⁴ 381 US 532, 539 (1965).

²⁵ 384 US 214, 219 (1966).

²⁶ 418 US 241 (1974).

²⁷ 460 US 575 (1983).

²⁸ For further commentary and analysis on this period, see: R.A Jones and S.R. West, 'The Work of the Press Clause' in A. Bhagwat and A.K. Chen (eds), *The Elgar Companion to Freedom of Speech and Expression* (Edward Elgar, forthcoming 2026).

²⁹ S.R. West, 'Awakening the Press Clause' 58 *UCLA L. Rev.* 1025, 1036 (2011).

³⁰ Such as: M.B. Nimmer, 'Is Freedom of the Press a Redundancy: What Does it Add to Freedom of Speech?' (1974-1975) 26 *Hastings Law Journal* 639; R.P. Bezanson, 'The New Free Press Guarantee' (1977) 63 *Virginia Law Review* 731, 733; V. Blasi, 'The Checking Value in First Amendment Theory' (1977) *American Bar Foundation Research Journal* 521; F. Abrams, 'The Press is Different: Reflections on Justice Stewart and the Autonomous Press' 7 *Hofstra Law Review* 563, 585, 1979; C.E. Baker, *Human Liberty and Freedom of Speech*, (Oxford University Press, 1989), chps. 10-11; R.P. Bezanson, 'Whither Freedom of the Press?' (2012) 97 *Iowa Law Review* 1259; T.B. Dyk, 'Newsgathering, Press Access, and the First Amendment', 44 *Stanford Law Review* 927, 931-932 (1992); P. Horwitz, 'Universities as First Amendment Institutions: Some Easy Answers and Hard Questions' (2007) 54 *UCLA Law Review*, 1497, 1505 (2007). And see the extensive body of work by RonNell Andersen Jones and Sonja West referred to throughout this article.

³¹ See the dissenting opinions of: Stevens J in *Citizens United v Federal Election Commission* 130 S Ct 876, 951 (2010); Powell J in *Saxbe v Wash Post Company* 417 US 843, 863 (1974); Douglas J *Branzburg v Hayes* 408 US 665, 721 (1972).

redundant.³² He followed this in *Houchins v KQED Inc.*³³ stating that the textual reference in the First Amendment to separate speech and press rights are “no constitutional accident, but an acknowledgment of the critical role played by the press in American society. The Constitution requires sensitivity to that role, and to the special needs of the press in performing it effectively.”³⁴

III. THE EQUIVALENCY MODEL OF PRESS FREEDOM

Despite the efforts of Potter Stewart and other proponents of the press clause who followed, the current position in the US is markedly different to that in Europe. This is because the prevailing press freedom model in the US determines that press freedom and free speech are, essentially, equivalent, and therefore press freedom does not require any protection or privileges, and should not be subject to any duties, in excess of the right to free speech applicable to individuals, because this right sufficiently safeguards the press and its public watchdog function.³⁵ In sharp contrast to the case made for an active press clause, the counter argument is that the Framers understood the words ‘or of the press’ to secure the right of *every person* to use communications technology, as opposed to laying down a right exclusively available to members of the press.³⁶

The Supreme Court shares this view,³⁷ and has continued to resist the argument that the press clause should provide the press with constitutional privileges in excess of other speakers, as exemplified by select cases.³⁸ For instance, in *Branzburg v Hayes*³⁹ the court reaffirmed that “the First Amendment does not guarantee the press a constitutional right of special access to

³² P. Stewart J, ‘Or of the Press’, (1975) 26 *Hastings Law Journal* 631, 634. See also: M.B. Nimmer, ‘Is Freedom of the Press a Redundancy: What Does it Add to Freedom of Speech?’ (1974–1975) 26 *Hastings Law Journal* 639; K. Pasich, ‘The Right to the Press to Gather Information under the First Amendment’ (1978) 12 *Loyola University of Los Angeles Law Review* 357, 385; F. Schauer, ‘Towards and Institutional First Amendment’ (2005) 89 *Minnesota Law Review* 1256, 1263-1264; E. Ugland, ‘Demarcating the Right to Gather News: A Sequential Interpretation of the First Amendment’ (2008) 3 *Duke Journal of Constitutional Law and Public Policy* 118, 136.

³³ 438 US 1 (1978).

³⁴ *Ibid.* 17.

³⁵ For example, see: D.L. Lange, ‘The Speech and Press Clauses’ (1975) 23 *UCLA Law Review* 77; W.W. van Alstyne, ‘the Hazards to the Press of Claiming a “Preferred Position”’ (1977) 28 *Hastings Law Journal* 761, 768-669; A. Lewis, ‘A Preferred Position for Journalism’ (1978-9) 7 *Hofstra Law Review* 595; C.E. Baker ‘Press Performance, Human Rights, and Private Power as a Threat’ (2011) 5 *Law & Ethics of Human Rights* 219, 230; E. Volokh, ‘Freedom for the Press as an Industry, or the Press as a Technology? From the Framing to Today’, (2012) 160 *University of Pennsylvania Law Review* 538-539.

³⁶ E. Volokh, ‘Freedom for the Press as an Industry, or the Press as a Technology? From the Framing to Today’, (2012) 160 *University of Pennsylvania Law Review* 459, 463; D.L. Lange, ‘The Speech and Press Clauses’ (1975) 23 *UCLA Law Review* 77; W.W. van Alstyne, ‘the Hazards to the Press of Claiming a “Preferred Position”’ (1977) 28 *Hastings Law Journal* 761, 768-669; A. Lewis, ‘A Preferred Position for Journalism’ (1978-9) 7 *Hofstra Law Review* 595; C.E. Baker ‘Press Performance, Human Rights, and Private Power as a Threat’ (2011) 5 *Law & Ethics of Human Rights* 219; E. Volokh, ‘Freedom for the Press as an Industry, or the Press as a Technology? From the Framing to Today’, (2012) 160 *University of Pennsylvania Law Review* 459; P. Wragg, *A Free and Regulated Press. Defending Coercive Independent Press Regulation* (Hart Publishing, 2020), 25.

³⁷ S.R. West, ‘Awakening the Press Clause’ 58 *UCLA L. Rev.* 1025, 1028 (2011); C.E. Baker, ‘The Independent Significance of the Press Clause Under Existing Law’, 35 *Hofstra L. Rev.* 955, 956 (2007); D.A. Anderson, ‘Freedom of the Press in Wartime’, 77 *U. Colo. L. Rev.* 49, 69–70 (2006).

³⁸ Historically, see, for example: *Republica v Oswald* 1 Dall. 319, 325 (Pa. 1788); *Commonwealth v Freeman*, Herald of Freedom (Boston), Mar. 18, 1791, at 5 (Mass. 1791); *In re Fries*. 9 F. Cas. 826, 839 (Justice Iredell, Circuit Judge, C.C.D. Pa. 1799) (no. 5126); *Runkle v Meyer* 3 Yeates 518, 519 (Pa. 1803); *Associated Press v United States* 326 US 1, 7 (1945).

³⁹ 408 US 665 (1972).

information not available to the public generally.”⁴⁰ And, in doing so, it refused to acknowledge a “constitutional newsman’s privilege”⁴¹ because “freedom of the press is a fundamental personal right which is not confined to newspapers and periodicals” but, instead, attaches to “every sort of publication which affords a vehicle of information and opinion.”⁴² Significantly, the crux of the court’s reasoning against an active press clause was the complexity of identifying who, or what, the press actually is, as it would “present practical and conceptual difficulties of a high order” and that “[s]ooner or later, it would be necessary to define those categories of newsmen who qualified for the privilege...”⁴³ As I discuss in section IV, bearing in mind this judgment was handed down in 1972, long before the advent of the internet, the court’s anticipated challenges of defining the press *then* seem almost prophetic when we consider the public sphere *now*, and its facilitation of manifold non-press speakers whose contribution to public discourse may require protection similar to that afforded to the press.⁴⁴

A few years after *Branzburg*, in *First National Bank v Bellotti*,⁴⁵ the court seemingly opened the door to accepting Justice Potter Stewart’s argument – which had been published just three years previously – by acknowledging that “the press cases emphasize the special and constitutionally recognized role of that institution in informing and educating the public, offering criticism, and providing a forum for discussion and debate.”⁴⁶ However, in echoing *Branzburg* it went on to state “[b]ut the press does not have a monopoly on either the First Amendment or the ability to enlighten.”⁴⁷ In a concurring opinion, Justice Burger set out the court’s thinking in stark terms:

“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 country⁴⁸... In short, the First Amendment does not “belong” to any definable category of persons or entities: it belongs to all who exercise its freedoms.”⁴⁹

This line of reasoning continued,⁵⁰ and was reaffirmed with zeal in *Citizens United v Federal Election Commission*,⁵¹ in which the majority of the Supreme Court pronounced that “[w]e have consistently rejected the proposition that the institutional press has any

⁴⁰ Ibid. 684.

⁴¹ Ibid. 703.

⁴² Ibid. 704.

⁴³ *Branzburg v Hayes* 408 US 665, 703-704 (1972).

⁴⁴ I. Katsirea, *Press Freedom and Regulation in a Digital Era: A Comparative Study* (Oxford University Press, 2024), 88.

⁴⁵ 435 US 765 (1978).

⁴⁶ Ibid. 781.

⁴⁷ Ibid. 782. This accords with Sonja West’s argument that the court “occasionally offers up rhetoric on the value of the free press, but it steadfastly refuses to explicitly recognize any right or protection emanating solely from the press clause.” See: S.R. West, ‘Press Exceptionalism’, 127 *Harvard Law Review* 2434, 2436 (2014).

⁴⁸ Ibid. 801.

⁴⁹ Ibid. 802.

⁵⁰ For example, see: *Pell v Procunier* 417 US 817, 834 (1974); *Saxbe v Washington Post Company* 417 US 843, 848-849 (1974); *Richmond Newspapers, Inc. v Virginia* 448 US 555, 577 (1980); *Dun & Bradstreet, Inc. v Greenmoss Builders, Inc.* 472 US 749, 781 (1985); *In re Grand Jury Subpoena, Miller* 397 F 3d 964 (DC Cir 2005), *cert denied* 125 S Ct 2977 (2005).

⁵¹ 558 US 310 (2010).

constitutional privilege beyond that of other speakers.”⁵² And in alluding to *Branzburg’s* definitional concern it stated that “[w]ith the advent of the Internet and the decline of print and broadcast media...the line between the media and others who wish to comment on political and social issues becomes far more blurred.”⁵³

Thus, the court’s jurisprudence has clearly conceptualised the press ‘as a technology’ rather than a profession or industry,⁵⁴ and in doing so it determines that the First Amendment protects speech not speakers, regardless of the source of the expression.⁵⁵ Yet this does not tell the full story of the clause’s current state within the thinking of the Supreme Court. An excellent body of work produced by Ronnell Andersen Jones and Sonja West paints a picture of a press clause that is not just arrested in its development but is on life support. In their 2022 empirical study of the Supreme Court’s view of the press – which tracked every reference to the press by a Supreme Court Justice in the court’s opinions since 1784 – they found that not only does the court now talk about the press far less often; when it does, it speaks of the press more negatively.⁵⁶ They note that this trend has coincided with a sharp decline in references made by the justices to a right to press freedom generally, or in a way that develops the “conceptual scope of the right or advances the real-world protection of newsgatherers.” Consequently, “[t]he freedom of the press has simply disappeared at the Court.”⁵⁷ This step-change in the court’s rhetoric on press freedom, and its further marginalisation, does not correlate, they say, with its current “active – and at times groundbreaking – interest in First Amendment rights”⁵⁸ which are “aggressively expansive.”⁵⁹ Although, this has afforded wide-ranging protections to *all speakers*, including rights to publish and disseminate information, there are “press-specific rights that are not – and cannot be – covered” by this jurisprudence. Accordingly, they say, this has created “constitutional cavities” which has left speakers performing press functions without the “full scope of First Amendment rights and protections that are necessary to fulfil their designated structural role.”⁶⁰ Moreover, in echoing Anderson’s “heyday of the press” analysis I referred to in section II, their research finds that, previously, the court embraced what they call ‘the worthiness principle’ – that is, the presumption that the press is worthy of trust – and therefore should be given the benefit of the doubt where there are inaccuracies in reportage – because of its ‘uniqueness’ and the overall value of press speech to society, in that it makes vital contributions to democracy and the public sphere.⁶¹ However, although the current court continues, in its First Amendment jurisprudence, to enthusiastically extend this presumption of worthiness to various types of speakers – even where their veracity is in doubt, and where there

⁵² Ibid. 352.

⁵³ Ibid.

⁵⁴ P. Coe, *Media Freedom in the Age of Citizen Journalism* (Edward Elgar, 2021), 123-126.

⁵⁵ Ibid. 101-103; S.R. West, *Awakening the Press Clause*, 58 *UCLA Law Review* 1025,1027 (2011).

⁵⁶ R.A. Jones and S.R. West, ‘The U.S. Supreme Court’s Characterizations of the Press: An Empirical Study’, 100 *N.C.L. Rev.* 375 (2022), 379.

⁵⁷ R.A. Jones and S.R. West, ‘The Disappearing Freedom of the Press’ 79(4) *Wash. & Lee L. Rev.* 1377 (2022), 1381.

⁵⁸ Ibid. 1455.

⁵⁹ R.A Jones and S.R. West, ‘The Work of the Press Clause’ in A. Bhagwat and A.K. Chen (eds), *The Elgar Companion to Freedom of Speech and Expression* (Edward Elgar, forthcoming 2026) citing R. Collins and D. Hudson, ‘John Roberts: Mr. First Amendment’, *SCOTUSblog* 21 July 2020, at <https://perma.cc/9SKH-AYZG> (last visited 30 September 2025).

⁶⁰ R.A Jones and S.R. West, ‘The Work of the Press Clause’ in A. Bhagwat and A.K. Chen (eds), *The Elgar Companion to Freedom of Speech and Expression* (Edward Elgar, forthcoming 2026).

⁶¹ R.A Jones and S R. West, ‘Presuming Trustworthiness’ 75 *Fla. L. Rev.* 799 (2023), 800, 802-805.

are genuine reasons for believing their speech is harmful⁶² – it no longer seems to apply to the press. Ultimately, Jones and West conclude that “press speakers may have gone from once being uniquely valued, to now being distinctively disfavored.”⁶³ It therefore seems the press clause may not yet have reached its nadir, which brings me to the changed media ecology and how this bears upon the clause’s current condition.

IV. THE CHANGED MEDIA ECOLOGY: WHY THE EQUIVALENCY MODEL SHOULD BE REJECTED AND THE PRESS CLAUSE SHOULD BE ACTIVATED

The advent of the internet, and the proliferation of social media platforms over the past two decades or so, has changed the shape and substance of the public sphere, by providing the technological architecture that enables a wide range of speakers and listeners to access it and engage in public discourse. In turn, this has permanently altered the media ecosystem, changing the nature of journalism – and therefore those who can perform press functions – by enabling *non-institutional* journalism, in the form of independent publishers and citizen journalists, to flourish. By creating and publishing news content in their own right, and by acting as a source of news for the *institutional* press and wider mainstream media, these journalists are playing an increasingly important role in public discourse, becoming central to how we receive and impart information and ideas, and ultimately how we understand political matters and engage with the political and democratic process.⁶⁴ By entering the media marketplace, this new breed of journalist has wrested a degree of control over the message from our established newspapers, and in doing so, have stepped into the ‘watchdog shoes’ of the institutional press.⁶⁵

This tectonic shift in the established press paradigm has fuelled the equivalency movement because it means the *institutional* press can no longer lay claim to exclusively discharging the constitutional values set out above, which as stated was fundamental to its argument for an active press clause. Moreover, the fact that the expanded public sphere is now awash with speakers contributing to public discourse, some of whom are performing press functions, and many who are not, adds weight to the “practical and conceptual difficulties” underpinning the definitional concern raised in *Branzburg*, and later alluded to in *Citizens United*, in that an active press clause would require the clear identification of those individuals and organisations to which it applies. As I explain in section V, there is a solution to this definitional challenge, but before turning to that I will advance two inter-related reasons why, although *prima facie* these arguments appear to have substance, the time has come for the press clause to be embraced and activated.

A. Non-institutional journalists are discharging the constitutional values

Fundamentally, although proponents of the equivalency model may argue, perhaps correctly, that the institutional press’s claim to press freedom *exclusivity* through an active press clause

⁶² R.A Jones and S R. West, ‘Presuming Trustworthiness’ 75 *Fla. L. Rev.* 799 (2023), 815-830.

⁶³ *Ibid.* 831.

⁶⁴ P. Coe, *Media Freedom in the Age of Citizen Journalism*, (Edward Elgar, 2021), 7; I. Cram, *Citizen Journalists: Newer Media, Republican Moments and the Constitution* (Edward Elgar Publishing, 2015); I. Cram, *Liberal Democracy, Law And The Citizen Speaker*, (Hart Publishing, 2022).

⁶⁵ P. Coe, *Media Freedom in the Age of Citizen Journalism*, (Edward Elgar, 2021), 6-7, 93. See also: C.E. Baker, *Media Concentration and Democracy: Why Ownership Matters* (Cambridge University Press, 2007), 111; D. Gillmor, *We the Media: Grassroots Journalism By the People, For the People* (O’Reilly Media, 2004), 61-64.

has been undermined by the changes wrought to journalism by the internet, it does not account for the fact that other, non-institutional journalists, are performing these unique press functions, and therefore discharging the constitutional values set out above.⁶⁶ Accordingly, when constitutions, statutes and normative theory require protection of the press in addition to free speech, it is incumbent on the courts to delineate between the two, as demonstrated by ECtHR jurisprudence, despite the fact that such a challenging line-drawing exercise will from time-to-time inevitably generate controversial judgments.⁶⁷ Accepting that press speech is different to individual speech and, as I argue in section V, accepting that who or what is ‘the press’ should be defined functionally, meaning it can include non-traditional and non-institutional actors, is vitally important within the context of our modern public sphere, in which we can be constantly bombarded by a cacophony of information from different voices, which brings me to my second, related, point.

B. More speakers performing press functions necessitates an active press clause

In a world where there are more speakers being granted ever-expanding First Amendment protection⁶⁸ an active press clause becomes more important than ever. This is because, in a speaker-and-content-saturated public sphere it would, firstly, protect those performing press functions. And, secondly, it would provide an objective method for various stakeholders, including the audience – the public – to delineate those acting as press by discharging the constitutional values from those who are not, and therefore help them in their assessment of the veracity of the speaker and their material.

(i) *Protecting speakers performing press functions*

This is important when one considers the different types of labour journalists undertake on the public’s behalf. Journalists are agents for the public⁶⁹ because they can, for instance, be physically present in places that many individuals cannot, and can gain access to people or organisations that are inaccessible to the public,⁷⁰ sharing with us the information they deem vital, based on their expertise and experience, for self-governance.⁷¹ Moreover, in doing so they add professional value to the content, by verifying information and often acting as translators, by interpreting complex or sensitive information, and making it more digestible for the audience.⁷² Thus, as Andersen Jones has said, this content-curation labour undertaken by the press on behalf of the public is “intimately related to the journalistic role”⁷³ and is,

⁶⁶ R.P. Bezanson, ‘Whither Freedom of the Press?’ (2012) 97 *Iowa Law Review* 1259, 1267.

⁶⁷ F. Schauer, ‘Towards and Institutional First Amendment’ (2005) 89 *Minnesota Law Review* 1256, 1260; C.E. Baker, ‘The Independent Significance of the Press Clause under Existing Law’ (2007) 35 *Hofstra Law Review* 955, 1016; S.R. West, ‘Awakening the Press Clause’ (2011) 58 *UCLA Law Review* 1025, 1048.

⁶⁸ See the body of work of Andersen Jones and West referred to in section III.

⁶⁹ *Saxbe v Washington Post Co.* 417 US 843, 863 (1974) (Powell J dissenting).

⁷⁰ R.A. Jones and L.G. Sun, ‘Enemy Construction and the Press’, 49 *Ariz. L.J.* 1301, 1358-59 (2017), 1364-1365.

⁷¹ *Cox Broad. Corp. v Cohn* 420 US 469, 491 (1975); *Saxbe v Washington Post Co.* 417 US 843, 863 (1974); N. Usher, ‘Post-Newspaper Democracy and the Rise of Communicative Citizenship: Good Citizen as Good Communicator’ in R.A. Jones and S.R. West (eds), *The Future of Press Freedom. Democracy, Law, and the News in Changing Times* (Cambridge University Press, 2025), 38-51, 41-42.

⁷² N. Gesualdo et al, ‘Journalists as Knowledge Brokers’, 21 *Journalism Studies* 127 (2020); D.A. Anderson, ‘The Press and Democratic Dialogue’ 127 *Harv. L. Rev. F.* 331, 331-333 (2014).

⁷³ R.A. Jones, ‘Press Freedom and the First Amendment Rights of Listeners’, 90 *Colo. L. Rev.* 499, 534 (2019).

according to Andersen Jones and West, “central to the operation of public discourse in a democracy.”⁷⁴

As I have argued elsewhere, one of the most democratically important labours undertaken by the press is facilitating open justice, by being the primary conduit through which the public receives its information on court proceedings and is therefore able to scrutinise the fairness of trials and the administration of justice.⁷⁵ This has been consistently recognised within English and ECtHR jurisprudence,⁷⁶ and has been acknowledged by the Supreme Court.⁷⁷ Indeed, in fulfilling this role, the press serves the ends of justice by virtue of the informing and scrutinising roles that it plays,⁷⁸ the exercise of which enhances the moral authority of the justice system.⁷⁹ However, as explained below, in recent years there has been a decline in the institutional press performing this task due to its lack of mass-audience appeal, and the fact that it is no longer profitable.⁸⁰ James S. Ettema and Theodore L. Glasner take this further by describing the press as “custodians of conscience” because of the ability of journalists to highlight to us shared normative concerns that appeal to human dignity rather than partisan identity.⁸¹ Thus, according to Nik Usher: “Journalists, then, serve the role of connected amplifier and public conscience for human dignity. By turning systematic injustice into digestible narratives for public consumption, journalists can help amplify marginalised voices.”⁸² Ultimately, without the press, we as the public simply would not know what is happening within our courts, and whether justice is, or is not, being served, and in turn there would not be a proxy platform for the public to call out injustice.

Although these democratically imperative labours are typically associated with institutional journalists, they are increasingly performed by non-institutional independent and citizen journalists.⁸³ For example, they provide local or hyper-local news in areas where the institutional local press has diminished or disappeared, connecting communities; they report on specific issues such as politics, or the practices of state actors or agencies, to leading on international investigations,⁸⁴ and in some cases they have been our primary source of news

⁷⁴ R.A. Jones and S.R. West, ‘The Work of the Press Clause’ in A. Bhagwat and A.K. Chen (eds), *The Elgar Companion to Freedom of Speech and Expression* (Edward Elgar, forthcoming 2026).

⁷⁵ P. Coe, *Media Freedom in the Age of Citizen Journalism*, (Edward Elgar, 2021), chp. 8.

⁷⁶ From England, see: *Attorney-General v Leveller Magazine Limited* [1979] AC 440, 450 per Lord Diplock; *R v Felixstowe Justices, ex parte Leigh* [1987] QB 582, 591, per Watkins LJ; *A v BBC* [2014] UKSC 25; [2015] AC 588, [26] per Lord Reed; *R (on the application of Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 158; [2011] QB 218, [38] per Lord Judge CJ; From the ECtHR, see: *Sunday Times v United Kingdom* App. no. 6538/74 (1979–1980) 2 EHRR 245, [65]; *Axel Springer v Germany (No. 1)* [2012] App. no. 39954/08, [80], [96].

⁷⁷ *Richmond Newspapers Inc. v Virginia* 448 US 555, 573 (1980); *Cox Broadcasting Corp. v Cohn* 420 US 469, 496 (1975).

⁷⁸ H. Fenwick and G. Phillipson, *Media Freedom under the Human Rights Act* (Oxford University Press, 2006), 167-168.

⁷⁹ T. Allan, ‘Procedural Fairness and the Duty of Respect’ (1988) 18 *Oxford Journal of Legal Studies* 507.

⁸⁰ J. Rowbottom, *Media Law* (2nd edn. Hart, 2024), 170.

⁸¹ J.S. Ettema and T.L. Glasner, *Custodians of Conscience: Investigative Journalism and Public Virtue* (Columbia University Press, 1998), 3-4.

⁸² N. Usher, ‘Post-Newspaper Democracy and the Rise of Communicative Citizenship: Good Citizen as Good Communicator’ in R.A. Jones and S.R. West (eds), *The Future of Press Freedom. Democracy, Law, and the News in Changing Times* (Cambridge University Press, 2025), 38-51, 42.

⁸³ See generally: I. Cram, *Citizen Journalists: Newer Media, Republican Moments and the Constitution* (Edward Elgar, 2015); I. Cram, *Liberal Democracy, Law and the Citizen Speaker* (Hart, 2022).

⁸⁴ E.g. *Bellingcat* and *ProPublica*.

from war zones.⁸⁵ Thus, they can, and often do, cover events that would have been, or have been, missed entirely by institutional media outlets.⁸⁶ But this expansion of speakers performing these democratically important press functions raises two related challenges that speak to the urgency of identifying them through an active press clause that recognises press based upon the discharging of the constitutional values.

Firstly, without clear delineation, via an active press clause, between press and non-press a credibility issue is created: some individuals who are performing these functions, but who are not recognised as press, may be prevented from gaining access to, for example, press conferences, court documents or legal proceedings and other events that are open to the ‘press’ but are otherwise closed to the public.⁸⁷ Consequently, these journalists are not able to provide their audience with what could be democratically important information, and in the case of court reporting, from facilitating open justice.⁸⁸ Because of the financial state of some factions of the institutional press – which means certain journalists may be discouraged from undertaking reportage that is not financially viable (such as court reporting)⁸⁹ – this identification gap, and the access issues it generates, has the potential to create a significant democratic deficit within the public sphere that could be mitigated by clearly identifying non-institutional speakers performing press functions.

Secondly, and notwithstanding the financial plight of some institutional publications, these non-institutional speakers are unlikely to have the same financial resources and legal support at their disposal as most of the institutional press.⁹⁰ As well as contributing to the credibility issue, this may discourage them from publishing public interest content that may expose them to litigation or other risk. They may, therefore, adopt a more risk-averse approach to publication, curtailing the scope of their public interest reportage, which ultimately has a negative impact on the public sphere. Thus, the Supreme Court’s current jurisprudence on the press clause is, as Irini Katsirea has said, “not conducive to legal certainty for those who, while not full-time journalists, serve a journalistic function well.”⁹¹ This risks withholding “protection from those who most need it – speakers most likely to lack funds and libel insurance.”⁹² An active press clause that protects those performing press functions, regardless of their non-institutional status, would enable such speakers to avail themselves of a patchwork of legal protections afforded to members of the institutional press by various federal and state laws would also apply to them.⁹³ Moreover, it would provide the “constitutional structures” for

⁸⁵ P. Coe, *Media Freedom in the Age of Citizen Journalism*, (Edward Elgar, 2021), 3-7. D. Tapscott and A.D. Williams, *Wikinomics: How Mass Collaboration Changes Everything* (Atlantic Books, 2008), 308-309; See generally: D. McGoldrick, ‘The Limits of Freedom of Expression on Facebook and Social Networking Sites: A UK Perspective’ *Human Rights Law Review* 13 (2013) 125-151; N. Miladi, ‘Social Media and Social Change’ (2016) *Digest of the Middle East* 25(1), 36-51.

⁸⁶ D. Gillmor, *We the media: Grassroots Journalism By the People, For the People*, (O’Reilly Media, 2004), 136-137.

⁸⁷ P. Coe, *Media Freedom in the Age of Citizen Journalism*, (Edward Elgar, 2021), 89-90.

⁸⁸ *Ibid.* 238.

⁸⁹ *Ibid.* chps. 2 and 3, 238.

⁹⁰ *Ibid.* 255. See also: R.A. Jones, ‘Litigation, Legislation, and Democracy in a Post-Newspaper America’, 68 *Wash. & Lee L. Rev.* 557 (2011).

⁹¹ I. Katsirea, *Press Freedom and Regulation in a Digital Era: A Comparative Study* (Oxford University Press, 2024), 90.

⁹² *Ibid.* citing: *Service Employees International Union Local 5 v Professional Janitorial Services of Houston*, 415 SW3d 387 (Tex App 2013) (Willett J, dissenting), 5.

⁹³ *Ibid.* (Katsirea), 88-89, and notes 73,74. These relate to, for instance, access to information, defamation, and intellectual property. There are also various state shield laws providing a qualified level of protection for

the development of various other doctrinal newsgathering protections and rights that are not currently included within the “aggressively expansive” equivalency-based First Amendment jurisprudence.⁹⁴

(ii) *Trust and the audience’s assessment of the veracity of the speaker and their content*

The online public sphere is saturated by speakers producing and disseminating badly researched, poor quality or false content.⁹⁵ Consequently, in addition to the credibility issues explained above, this has contributed to a precipitous decline in public trust in journalists in the US,⁹⁶ and elsewhere in the world.⁹⁷ Thus, being able to identify speakers performing press functions, and distinguishing them from those who may *appear* to be journalists, is not only imperative for the health of the press itself, but it is also vitally important for the audience, and for individual’s ultimate ability to make an informed judgement on the quality of what they are reading or viewing. This need is particularly acute in the context of the modern media ecology within which many non-institutional journalists operate online and/or independently and are therefore not necessarily writing for a publication that would be known to the audience;⁹⁸ a challenge for the audience that is compounded by the fact that many publish content anonymously, or under a pseudonym.⁹⁹

By activating the press clause, and in doing so making press freedom a structural constitutional provision that acknowledges the uniqueness of the press by protecting speakers performing press functions in equally unique ways, the audience is not simply benefited, potentially, by more providers of public interest content. This is because, to be recognised as press, and therefore in exchange for the unique protection this affords, speakers would be expected to discharge the constitutional values underpinning press freedom in a similar way to the ECtHR’s ECHR jurisprudence explained in section II. Therefore, this constitutional

journalists against revealing their confidential sources. For example: Freedom of Information Act 5 USC s.552(a)(4)A(ii)(II)(2016); Lanham Act 15 USC s.1125(a)(3)B (1998); District of Columbia Free Flow of Information Act, DC Code, s.16-4701-4704 (1992); Oregon Revised Statutes s.44.520 (2020). See also: E. Ugland, ‘Demarcating the Right to Gather News: A Sequential Interpretation of the First Amendment’ (2008) 3 *Duke Journal of Constitutional Law and Public Policy* 118; R.A. Jones, ‘Media Subpoenas: Impact, Perception, and Legal Protection in the Changing World of American Journalism, 84 *Wash. L. Rev.* 317, 348 (2009); N. Usher, ‘Post-Newspaper Democracy and the Rise of Communicative Citizenship: Good Citizen as Good Communicator’ in R.A. Jones and S.R. West (eds), *The Future of Press Freedom. Democracy, Law, and the News in Changing Times* (Cambridge University Press, 2025), 38-51, 42.

⁹⁴ Andersen Jones and West suggest these rights and protections could include protecting undercover reporting, access rights, protections from arrest and detention, and searches and subpoenas. See: R.A Jones and S.R. West, ‘The Work of the Press Clause’ in A. Bhagwat and A.K. Chen (eds), *The Elgar Companion to Freedom of Speech and Expression* (Edward Elgar, forthcoming 2026).

⁹⁵ P. Coe, *Media Freedom in the Age of Citizen Journalism*, (Edward Elgar, 2021), 150-151.

⁹⁶ M. Brenan, ‘Americans’ Trust in Media Remains at Trend Low’, *Gallup* at <https://news.gallup.com/poll/651977/americans-trust-media-remains-trend-low.aspx>; M. Brenan and L. Saad, ‘Five Key Insights into Americans’ Views of the News Media’, *Gallup* at <https://news.gallup.com/opinion/gallup/657239/five-key-insights-americans-views-news-media.aspx>

⁹⁷ Newman, *Digital News Report 2024*, 64–65; ‘Which Media Outlets do Britons Trust in 2023?’ *YouGov*, at <https://yougov.co.uk/topics/politics/articles-reports/2023/05/25/which-media-outlets-do-britons-trust-2023>; King’s College London’s World Values Survey at <https://www.kcl.ac.uk/policy-institute/assets/confidence-in-institutions.pdf>.

⁹⁸ P. Coe, *Media Freedom in the Age of Citizen Journalism*, (Edward Elgar, 2021).

⁹⁹ P. Coe, *Media Freedom in the Age of Citizen Journalism*, (Edward Elgar, 2021), chp. 7; P. Coe, ‘Anonymity and Pseudonymity: Free Speech’s Problem Children’ (2018) 22(2) *Media & Arts Law Review* 173; E. Barendt, *Anonymous Speech* (Hart, 2016).

condition – baked into the press clause’s activation – would provide the audience with an objective means to assess the speaker’s veracity, and that of their content. Thus, such an approach would satisfy both speaker and audience interests.

V. OVERCOMING THE DEFINITIONAL CONCERN

In *Slater v Blomfield*¹⁰⁰ Asher J, in the High Court of New Zealand, determined that a blogger could be considered a journalist for the purposes of section 68 of the New Zealand Evidence Act 2006 provided, inter alia: ‘(i) the medium used by the journalist disseminates the information to the public or a section of the public; (ii) what is disseminated is news and observations on news; and (iii) the person claiming to be a journalist is a person who, in the normal course of that person’s work, might be given information by informants in the expectation that it will be published in a news medium.’¹⁰¹ Although this is a case from New Zealand, in dealing with these points in respect of a blogger making contributions to public discourse, Asher J provided guiding principles that I suggest could form the basis of the functional definition of the press that I advance below, which could apply in *any* jurisdiction. Consequently, these principles could, if embraced, help to overcome the Supreme Court’s definitional concern – that is the “practical and conceptual difficulties” – of identifying the non-institutional speakers performing press functions.

Specifically, the judge laid down the following five principles. Firstly, a speaker can begin publishing in a non-journalistic capacity, but later become a journalist once a certain level of work and content is achieved.¹⁰² Secondly, an speaker that regularly disseminates news to a significant body of the public can be a journalist.¹⁰³ Thirdly, just because a speaker is a blogger does not mean they cannot be considered a journalist.¹⁰⁴ Indeed, ‘a blogger who regularly disseminates news to a significant body of the public can be a journalist.’¹⁰⁵ Fourthly, a speaker that publishes a single news item would not qualify as a journalist. Regular commitment to publishing new or recent information of public interest is required for a publication to be considered news media. However, the quantity of content produced does not have to be equivalent to an institutional publication.¹⁰⁶ Finally, to determine whether a speakers work within the context of the medium makes them a journalist, the following factors are relevant: (i) whether the receiving and disseminating of news through a news medium is regular; (ii) whether it involved significant time on a frequent basis; (iii) whether there was revenue derived from the medium; and (iv) whether it involved the application of journalistic skill.¹⁰⁷

By applying these principles we can depart normatively from institutional definitions of the press to four simple functional identifiers that can be deployed by, for example, courts,

¹⁰⁰ [2014] NZHC 2221.

¹⁰¹ Ibid. [34].

¹⁰² Ibid. [36].

¹⁰³ Ibid. [54].

¹⁰⁴ This accords with the treatment of citizen journalists by the Court of Justice of the European Union in the context of data protection jurisprudence which has afforded citizen journalists the same status, and the ability to take advantage of the same exemptions, as the institutional press: See *Tietosuojavaltuutettu v Satakunnan Markkinapörssi Oy, Satamedia Oy (Satamedia)* Case C-73/07; *Sergejs Buivids v Datu valsts inspekcija* Case C-345/17.

¹⁰⁵ *Slater* [2014] NZHC 2221.

¹⁰⁶ Ibid. [54], [65].

¹⁰⁷ Ibid. [74].

audiences, or regulators to identify speakers performing press functions, as follows: is the speaker: (i) regularly (ii) engaged in the process of gathering information of public concern, interest and significance (iii) with the intention, and for the purpose of, disseminating this information to a section of the public (iv) while complying with objective standards governing the research, newsgathering and editorial process.

Moreover, and significantly for the activation of the press clause, in moving away from the institutional-only definition of a journalist or publisher, determined by education, training or employment,¹⁰⁸ this functional reconceptualisation of the press is tethered to the speaker's performance of the constitutional values underpinning press freedom and their adherence to standards of professional behaviour (for example, acting ethically and responsibly in the newsgathering process). Speakers adhering to these norms and standards – which could be assessed over a 'review period'¹⁰⁹ – would be subject to protections provided by an activated press clause, regardless of institutional or non-institutional status. Conversely, speakers that do not adhere to these standards and behaviours on a consistent basis over the 'review period'¹¹⁰ – because, for instance, they publish false or other harmful content – would not be privileged.¹¹¹ This, in effect, merges institutional benefits with a functional conceptualisation of the press, alleviating the tension between the two.¹¹² Reconceptualising the press in this way is supported theoretically by the idea of institutional-like protection and privileges for the press being exclusively connected to those speakers adhering to ethical journalistic processes in relation to their newsgathering, publication and editorial practices,¹¹³ rather than being fastened simply to the institutional status of the speaker. Importantly, delineating press function-performing speakers from non-press speakers in this way would not deny those who may from time-to-time disseminate public interest content from protection or restrict their rights to propagate

¹⁰⁸ P. Coe, 'Redefining 'media' using a 'media-as-a-constitutional-component' concept: an evaluation of the need for the European Court of Human Rights to alter its understanding of 'media' within a new media landscape', (2017) *Legal Studies*, 37(1), 25-53.

¹⁰⁹ I envisage this to be an annual review carried out by an independent body, or even a regulator (see section VI).

¹¹⁰ This means that a publisher will not cease to be protected if, for example, they publish one article that happens to contain a false statement. Rather, the cessation of protection will occur where it is demonstrated they are consistently failing to meet the standards. Equally, if they can subsequently demonstrate improvement, the protection will be reinstated.

¹¹¹ J. Oster, "Theory and Doctrine of 'Media Freedom' as a Legal Concept" (2013) 5(1) *Journal of Media Law* 57, 59.

¹¹² P. Coe and A. Koltay, 'An Anatomy of the Press Freedom 'Grand Bargain': Mitigating Its Democratic Deficit Through the Reconceptualisation of Journalism and a Re-Casting of Press Regulators' (*forthcoming*). Hitherto a bright-line distinction exists in scholarship between those who advance an institutional approach and those who argue in favour of a functional approach. For discussion and comparison, see, e.g.: J. Oster, "Theory and Doctrine of 'Media Freedom' as a Legal Concept" (2013) 5(1) *Journal of Media Law* 57; S.R. West, Press Exceptionalism, 127 *Harvard Law Review* 2434, (2014); E. Ugland and J. Henderson, "Who Is a Journalist and Why Does It Matter? Disentangling the Legal and Ethical Arguments" (2007) 22(4) *Journal of Mass Media Ethics* 241; I. Katsirea, *Press Freedom and Regulation in a Digital Era: A Comparative Study* (Oxford University Press, 2024); F. Schauer, "Towards an Institutional First Amendment" (2005) 89 *Minnesota Law Review* 1256; E. Ugland, "Demarcating the Right to Gather News: A Sequential Interpretation of the First Amendment" (2008) 3 *Duke Journal of Constitutional Law and Public Policy* 118, 136-38.

¹¹³ O. O'Neill, "Media Freedoms and Media Standards" in N. Couldry, M. Madianou, and A. Pinchevski (eds.), *Ethics of Media* (Palgrave Macmillan, 2013), 21-38; M. Deuze, "What is Journalism? Professional Identity and Ideology of Journalists Reconsidered" (2005) 6(4) *Journalism* 442, 447. This has been advocated by civic society as *high journalism ethics*. See, e.g., A. White, "Ethical Journalism: An Inspiration for Responsible Communications in Europe" in O. Andreotti (ed.), *Journalism at Risk: Threats, Challenges and Perspectives* (Council of Europe, 2015), chp. 7.

such content: they would still be subject to the expansive First Amendment protection referred to above.¹¹⁴ Thus, re-casting the press in these terms helps to support the press clause, if activated, as a structural constitutional provision of the First Amendment by ensuring the underpinning principles of press freedom are upheld.

VI. IMPORTING VOLUNTARY REGULATION?

Despite the changes to the media ecology explored in section IV, and how this has altered journalism by introducing an array of non-institutional speakers performing press functions into the public sphere that, I have argued, necessitates the activation of the press clause, the Supreme Court's rhetoric analysed in section III suggests that this would be difficult for it to countenance. Is there, then, another way of mitigating the constitutional voids left by the press clause's dormancy that would serve to protect, at least to an extent, the public and speakers performing press functions, taking into account the functional reconceptualisation of the press advanced in section V?

My argument here is that *voluntary* self-regulation of the press, if designed correctly, and articulated in a way to accentuate its empowering, enabling and protective properties, could provide such a solution by helping the press, and encouraging it, to meet and exceed certain objective standards aligning with the constitutional values that underpin press freedom. There is, in social responsibility theory, a clear theoretical foundation for the importation of voluntary regulation that aligns with a constitutional structuring of the press clause. The theory's application to the press¹¹⁵ can be traced to two reports published in the 1940s: the Royal Commission on the Press in the UK¹¹⁶ and the Hutchins Commission Report in the US.¹¹⁷ It dictates that the press, as beneficiaries of press freedom, are obliged to preserve democracy by fulfilling essential normative functions of mass communication that extend beyond the mere provision of a robust expression marketplace, including: (i) "servicing the political system" by providing information, discussion and debate on public affairs; (ii) "enlightening the public" so as to make it capable of democratic self-governance by disseminating information of public interest; (iii) "protecting the rights of the individual" by acting as the public watchdog.¹¹⁸ Accordingly, SRT is not just at the core of ECtHR's instrumental model of press freedom, and the press regulation ideal of effective voluntary self-regulatory codes that exist across Europe and in the UK¹¹⁹ but, significantly for the US, the argument for an activated press that recognises the press's role in discharging the constitutional values of press freedom. Thus, there is a clear and bright line connecting the US press's claim to press freedom, and for a working press clause, and the theoretical values that underpin voluntary regulation in the UK and elsewhere in Europe. That all said, at this juncture I must acknowledge that, undoubtedly, the

¹¹⁴ S.R. West, Press Exceptionalism, 127 *Harvard Law Review* 2434, 2437 (2014).

¹¹⁵ SRT's theoretical genesis can be traced to John Stuart Mill's 'harm principle' – which had already been sketched by John Locke. Mill says that *only* when the actions of individuals harm other individuals is society justified in imposing restrictions on those actions. This principle resonates with the Kantian understanding of 'law', which justifies the restriction of an individual's freedom of action if this is required to reconcile it with the freedom of others. See: J.S. Mill, (1869) *On Liberty*, (republished: Walter Scott Publishing Co., 1989), 21-22; J. Locke, (1689) *Two Treatises of Government, Second Treatise* (A. Millar et al, 1689), Book 2, chp. 2, section 6; I. Kant, (1797) *The Metaphysics of Morals*, (republished: Cambridge University Press, 1996), 24.

¹¹⁶ The Royal Commission on the Press, 1947–1949, Report (Cmnd. 7700).

¹¹⁷ The Commission on Freedom of the Press, *A Free and Responsible Press* (University of Chicago Press, 1947).

¹¹⁸ F. Siebert, T. Peterson and W. Schramm, *Four Theories of the Press* (University of Illinois Press, 1956), 74.

¹¹⁹ See generally: P. Coe, '(Re)embracing social responsibility theory as a basis for free speech: shifting the normative paradigm for a modern media' (2018) *Northern Ireland Legal Quarterly*, 69(4), 403-431.

UK's system of voluntary self-regulation of the press is far from perfect, but interrogating its deficiencies is not the purpose of this discussion, and it has already been covered comprehensively elsewhere.¹²⁰ Rather, for reasons I will explain, I will point to Impress's regulatory scheme,¹²¹ and advance principles upon which regulatory a model could be based that the US could potentially import, and that could facilitate the press in discharging the constitutional values.

In typical mandatory regulatory environments, the relationship between the regulator and regulatee is top-down, narrow and linear because the regulated has no choice over the body that regulates them. In the UK and in Europe, for the press the situation is different: voluntary self-regulation means that publishers can choose whether to engage with regulation, and they may even have a choice between regulators (as is the case in the UK with Impress and Ipso). Consequently, to attract and retain members, press regulators have to offer something more than the typical regulator/regulatee linear relationship. For example, both Impress and Ipso provide arbitration schemes, access to advice on their respective codes, and training opportunities.¹²²

In recent years Impress, in particular, has developed its role, and in performing functions that would align with the constitutional values of press freedom it could act as a blueprint for a US regulator. In particular, it has departed from simply being a regulator to that of an empowering professional organisation that has standard setting, advisory and educational functions. Consequently, and significantly, this has had the effect of distinguishing mere regulation from standards codes, in that regulation becomes the legal “floor” that regulatees should not fall through, whereas standards codes are the ethical and behavioural benchmarks set by the regulator – such as Impress – that regulatees should *aspire to meet*. This captures in press regulation “soft ethics” or “post-compliance ethics”; that is “considering what ought and ought not to be done over and above the existing regulation.”¹²³ Translating this into a regulatory model for the US, the introduction of such standards codes, compliance with which would be overseen by the regulator, would give effect to the reconceptualisation of the press set out in previous section, including the idea of adherence to ethical journalistic processes.¹²⁴ In other words, this would provide the objective means for the audience to assess whether speakers are meeting the ‘norms and standards’ tied to the constitutional values underpinning press freedom over the review period.

There are, however, certain other functions that could be baked into a regulator's role, should the US press decide to introduce one, that would provide unique protection and opportunities for the press, whilst also serving to protect audience interests.

¹²⁰ See e.g.: P. Wragg, *A Free and Regulated Press: Defending Coercive Independent Press Regulation* (Hart, 2020); P. Coe, ‘Press Regulation in the United Kingdom in a Changed Media Ecosystem’ in P. Wragg and A. Koltay (eds.) *Global Perspectives on Press Regulation* (Hart, 2023), 209-234.

¹²¹ <https://www.impressorg.com/>. Impress is the is the Press Recognition Panel (PRP) approved regulator of the UK press: <https://www.pressrecognitionpanel.org.uk/>.

¹²² See <https://www.ipso.co.uk/what-we-do> and <https://www.impressorg.com/join-us/membership/about-membership>.

¹²³ L. Floridi, ‘Soft Ethics, the Governance of the Digital and the General Data Protection Regulation’ (2018) *Phil Trans R Soc A* 376, 5: 20180081.

¹²⁴ J. Oster, “Theory and Doctrine of ‘Media Freedom’ as a Legal Concept” (2013) 5(1) *Journal of Media Law* 57, 59.

As is the case with Impress, a regulator could provide, or facilitate access to, a range of tailored training,¹²⁵ education resources, law and policy updates, active advice¹²⁶ and governance tools¹²⁷ to help journalists to develop their journalistic practice, and to, for example, understand and comply with the standards code and provide them with a requisite level of knowledge to report appropriately on court proceedings. This would be particularly attractive to non-institutional journalists, and certainly citizen journalists, who are unlikely to have had any ‘formal’ journalistic or legal training or have access to a legal team. Although not a complete shield, access to training, education and advice is likely to reduce their risk of liability and exposure to unmeritorious claims. It will also enable and give journalists the confidence to report on controversial matters of public interest relating to individuals, organisations or state actors that they would not have otherwise reported on due to fears of being sued. Thus, it will help these journalists to perform press functions. Furthermore, a journalist’s engagement with these services indicates to the public that they are making every effort to operate professionally and within law, and in doing so that they are trying to insulate themselves from unnecessary litigation risks.¹²⁸

A regulator could award regulated journalists a ‘kitemark’ to demonstrate membership of, and compliance with, the regulator’s standards code.¹²⁹ This would have the added benefit of allowing anonymous speakers to promote their membership without having to be named. In doing so this would confer reputational, or brand, advantages on to regulated journalists, in that membership demonstrates to the outside world that they have bound themselves to act responsibly, in accordance with the regulator’s standards, and are ultimately prepared to be accountable for their actions.¹³⁰ This could alleviate some of the credibility, access, identification and trust issues discussed in section IV, therefore enabling these journalists to provide what potentially democratically valuable information to the audience.

Finally, the regulator could engage in education and outreach work. This would promote the role of the regulator, and the benefits of regulation to journalists, thereby attracting more to regulation and improving source diversity. This is even more important in respect of citizen journalists, who may not know that what they are doing is journalistic and that they are, as a result, journalists, and could be subject to regulation and the benefits it brings. Because many of them will not have professional journalistic experience, or hold a journalism qualification, they may not make the link between their newsgathering and online publication activity, and journalism. This will help to foster the constitutional values and realise the potential of non-institutional journalism. Engaging with the public would also bring broader public sphere benefits, in that by informing the public of how the regulator protects them and journalists, and

¹²⁵ As opposed to just setting training requirements. See: T. Gibbons, “Conceptions of the Press and the Functions of Regulation” (2016) 22(5) *Convergence: The International Journal of Research into New Media Technologies* 484, 487.

¹²⁶ Rather than “static” advice, in the form of advisory documents, active advice would include helplines and access to panel lawyers to assist with complex and dynamic problems.

¹²⁷ Impress launched a regulatory governance tool for independent journalists on an international scale at the RightsCon Summit 2023.

¹²⁸ P. Coe and A. Koltay, ‘An Anatomy of the Press Freedom ‘Grand Bargain’: Mitigating Its Democratic Deficit Through the Reconceptualisation of Journalism and a Re-Casting of Press Regulators’ (*forthcoming*).

¹²⁹ Impress has recently introduced a “trust mark”.

¹³⁰ P. Coe and A. Koltay, ‘An Anatomy of the Press Freedom ‘Grand Bargain’: Mitigating Its Democratic Deficit Through the Reconceptualisation of Journalism and a Re-Casting of Press Regulators’ (*forthcoming*).

how it can contribute, in the ways presented here, to improving journalistic practices, it could improve public trust in the press, thereby increasing source diversity.¹³¹

Ultimately, if the US press were to introduce a regulator and regulatory scheme in this form, and with these functions, it would not only have the potential to attract non-institutional speakers performing press functions to regulation, as has been the case with Impress in the UK¹³² but, significantly, it would help them to discharge the constitutional values.

VII. CONCLUSION

Although the press has been much maligned in recent years – at times for good reason because of its malfeasance – it is undeniable that it remains a vital cog in democracy. It continues to underwrite the health of the public sphere in the myriad ways outlined in this article pertaining to the constitutional values underpinning the claim to press freedom. Because of this the press clause should be activated and put to work to provide the press with rights and protections to enable it to discharge its constitutionally vital functions. This is a claim that has become more imperative and urgent because of the changed media ecology, and the array of new non-institutional speakers performing vital press functions it has facilitated, requiring a clear delineation between speakers performing press functions and those that are not. Despite the Supreme Court’s view that identifying such speakers presents “practical and conceptual difficulties” for the activation of the press clause, the functional definition of the press advanced in section V provides a practical, albeit theoretically supported, solution. And if the Supreme Court refuses to change course and continues to resist a constitutional construction of the clause in favour of the prevailing equivalency model, then all is not lost for the press and press freedom. If the US press were to import and embrace voluntary regulation, designed as recommended in this article, it could serve to mitigate the constitutional voids left by the press clause’s dormancy.

¹³¹ Ibid.

¹³² To date Impress regulates approximately 200 mostly small and/or independent publications.