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## ARTICLES

### USING THE PRESS CLAUSE TO AMPLIFY CIVIC DISCOURSE BEYOND MERE OPINION SHARING

*Akilah N. Folami\**

#### ABSTRACT

*The First Amendment unambiguously proclaims that “Congress shall make no law . . . abridging the freedom of speech, or of the press.” The First Amendment’s Speech Clause primarily bears the deliberative weight of protecting and maintaining the discursive space of America’s self-governing democracy. It has done so by indiscriminately protecting a broad array of expression from government intrusion. As a result, the Speech Clause has democratically legitimized such expression in America’s civic discourse. This legitimization is essential to a more deliberative democracy. The Speech Clause’s legitimizing function, however, has not helped to advance another essential element for a well-functioning deliberative democracy, namely, democratic competence. Instead, it has hurt it. Democratic competence relates to the cognitive empowerment of citizens within civic discourse and requires, at a minimum, deliberation-enhancing end-products and exchanges, grounded in factual truth and disclosure of corporate or government sponsorship when applicable. The protective scope of the Speech Clause has ironically contributed to the current*

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\* Associate Professor of Law at the Maurice A. Deane School of Law at Hofstra University. I would like to thank the organizers of the Northeast People of Color Conference hosted at the Maurice A. Deane School of Law at Hofstra University for allowing me to present earlier ideas on this paper. Many thanks also to the Southern Methodist University Law School junior faculty forum, the organizers of the Association of the Study of Law, Culture, and Humanities, and the Lutie Lytle Black Women Law Faculty Black Writing Workshop for allowing me to present and receive feedback on earlier drafts of this paper. I extend a thank you to Professors Alafair Burke, Angela Kupenda, Erika George, Janai Nelson, Julie Steiner, Kamille Wolff, Lyriisa Lidsky, RonNell Andersen Jones, and Michelle Adams for providing helpful comments to earlier oral presentations or written drafts of this paper as well. I would also like to thank Bethany Simmons, Adam Kahn, and Melissa Mendoza for their invaluable research assistance on this project.

*floodgates in American civic discourse of the opposite—unsubstantiated commentary, rumor, and manipulative spin. Developments in technology, citizen journalism, and online blogging have exacerbated this cacophony and discourage the production of deliberation-enhancing end-products and exchanges.*

*This Article turns to the Press Clause to advance democratic competence and to in turn amplify civic discourse beyond mere opinion sharing. It aims to do so by incentivizing the production and dissemination of deliberation-enhancing end-products. In so doing, this Article proposes a new justification for the Press Clause, whose justification has long been the source of controversy and debate, and provides a reinvigorated way of looking at that Clause and its utility within the larger constitutional structure. This Article’s proposal leaves intact the Speech Clause’s expansive reach and legitimizing function, while proposing an alternate basis of constitutional protection for a narrower category of speech—deliberation-enhancing end-products. Moreover, using the Press Clause in this manner provides a constitutional framework through which exclusive privileges may be awarded to anyone who produces these qualifying end-products. These privileges can therefore be made available to others besides members of the traditional news media who are currently the primary beneficiaries of such privileges. Civic discourse can, as a result, be opened up without sacrificing the long-acknowledged value of deliberation-enhancing end-products to civic discourse.*

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## I. INTRODUCTION

With the development of twenty-four hour cable television, the Internet, and wireless communication, the ability to distract and deceive an audience both with information and through emotions has seen an exponential increase . . . .

. . . [T]he scope of information, the weakness of guidelines to help us determine what is important and what is merely distraction . . . makes it difficult for the consumer of information to . . . pursue precise and deliberative public action.<sup>1</sup>

With technological developments that have liberated information sharing on the Internet and twenty-four-hour cable news services, the information cup metaphorically runneth over, with many voices (including corporate interests)<sup>2</sup> inundating the political public sphere. This explosion of, and unprecedented access to, unfiltered information has ironically not resulted in a more democratically competent and civically engaged citizenry.<sup>3</sup> Instead, a corporate-controlled news media<sup>4</sup> and robust populist commentary on the Internet provide the public with a considerable share of unsubstantiated opinions, false speech,<sup>5</sup> rumor, partisan spin,<sup>6</sup> “infotainment,”<sup>7</sup> and manipulative

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1. WAYNE LE CHEMINANT & JOHN M. PARRISH, *MANIPULATING DEMOCRACY: DEMOCRATIC THEORY, POLITICAL PSYCHOLOGY, AND MASS MEDIA* 157 (2011).

2. The Supreme Court has granted full protection under the First Amendment to the political advertisements of corporations. *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 914–16 (2010); see also *Am. Tradition P’ship v. Bullock*, 132 S.Ct. 2490, 2491 (2012) (applying the holding of *Citizens United* to state law).

3. See Akilah N. Folami, *Deschooling the News Media—Democratizing Civic Discourse*, 34 W. NEW ENG. L. REV. 489, 493–95 (2012) (citing statistics indicating the downward spiral of American civic engagement).

4. See Akilah N. Folami, *Freeing the Press from Editorial Discretion and Hegemony in Bona Fide News: Why the Revolution Must Be Televised*, 34 COLUM. J. L. & ARTS 367, 398–400 (2011) (noting broadcast deregulation and corporate consolidation). See generally Folami, *supra* note 3 (discussing the corporate consolidation of broadcast news and the negative impact on civic discourse and engagement).

5. Arguably, false speech is distinguishable from defamatory speech with the latter more readily regulated and restricted. Defamation law restricts false speech that allegedly defames private persons as it relates to purely private matters. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342–348 (1974). It however also requires a breathing space for civic discourse to flourish by requiring the defamed to prove falsity and fault on the part of the defamer on public matters regardless of whether the subject of the speech is a public figure or private person. *Id.* at 348–349 (holding that a private citizen’s recovery for defamation is limited if liability is not based on knowledge of falsity or reckless disregard for the truth); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (noting that a public official or public figure cannot recover under defamation unless the statements were made with actual malice). Moreover, the burden of establishing fault is considerably higher (i.e., actual malice) for comments that allegedly defame public officials or public figures. *Sullivan*, 376 U.S. at 279–80. Hence, false speech that harms the reputation of another in connection with matters relevant to the public may still make its way into the political public sphere if the plaintiff (the allegedly defamed) cannot meet the requisite showing of fault on the part of the defamer. *Id.* See *infra* Part IV.B.1 for a discussion of false speech in the political public sphere.

6. The news media however is often presumed, although not constitutionally required, to be objective, responsible, and nonpartisan when it receives select privileges from the courts. See Folami, *supra* note 4, at 403–04 (noting the FCC’s preference to assume a good faith broadcast judgment of a potentially partisan television appearance).

political rhetoric.<sup>8</sup>

This Article turns to the Press Clause to help advance civic discourse beyond mere opinion and manipulative spin, and towards the production of more deliberation-enhancing<sup>9</sup> end-products<sup>10</sup> and exchanges that are essential to attaining the goal of a deliberative democracy<sup>11</sup> advanced by some political theorists. I adopt Dean Robert Post's term "democratic competence,"<sup>12</sup> discussed in his recent book titled *Democracy, Expertise, and Academic Freedom*,<sup>13</sup> to capture this purpose as it is uniquely applied to the Press Clause herein. Democratic competence is the "cognitive empowerment" of citizens in civic discourse,<sup>14</sup> and it necessitates the production of knowledge-enhancing end-products and exchanges.<sup>15</sup>

I have discussed elsewhere that in order to effectuate a more deliberative democracy, the law must provide ample space and in turn legitimization for a wide array of end-products and the varied methods in which they are expressed.<sup>16</sup> This

7. BONNIE M. ANDERSON, NEWSFLASH: JOURNALISM, INFOTAINMENT, AND THE BOTTOM-LINE BUSINESS OF BROADCAST NEWS x–xi (2004); GEOFFREY BAYM, FROM CRONKITE TO COLBERT: THE EVOLUTION OF BROADCAST NEWS 2–3, 5 (2010) (defining infotainment as information that is presented on television or radio as serious news or other factual material in a manner and style intended primarily to entertain and distract rather than civically inform).

8. LE CHEMINANT & PARRISH, *supra* note 1, at 70–75.

9. The terms "deliberation-enhancing" and "knowledge-enhancing" are used throughout and interchangeably to denote the published, factually true, and transparent content and expression that this Article aims to incentivize via the Press Clause function and criteria proposed herein.

10. "End-products" as used herein refers to the expressions generally protected under the Speech Clause. The term is used interchangeably with the term "speech" unless otherwise noted.

11. Joseph Bessette is credited with coining the phrase "deliberative democracy" in 1980. See Joseph M. Bessette, *Deliberative Democracy: The Majority Principle in Republican Government*, in HOW DEMOCRATIC IS THE CONSTITUTION? 102, 102–16 (Robert A. Goldwin & William A. Schambra eds., 1980). Deliberative democracy is a form of democracy that deems wide and open public deliberation as central to decision making. Colin Farrelly, *Making Deliberative Democracy a More Practical Political Ideal*, 4 EUR. J. POL. THEORY 200, 200 (2005) ("Deliberative democrats are thus concerned with the *normative legitimacy* of a democratic decision . . ."). For a deliberative democracy, deliberation is the primary source of legitimizing the lawmaking process in that it requires that all citizens be given an opportunity to influence and express their opinions about the laws affecting them. *Id.* The legitimacy of decision making turns "on the degree to which those affected by [such decisions] have . . . had the opportunity to influence the outcomes." *Id.* (quoting IRIS MARION YOUNG, INCLUSION AND DEMOCRACY 5–6 (2000)).

12. See ROBERT C. POST, DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM 33–34 (2012).

13. *Id.*

14. *Id.* "Civic discourse" as used herein relates to deliberation relevant to the political public sphere in particular.

15. See *id.* at 32–34 (stating that "[c]ognitive empowerment is necessary . . . for intelligent self-governance" and describing knowledge as capable of being tested and verified).

16. I have focused primarily on protecting such space within the context of media, namely broadcast radio and television, which has arguably become the central location upon which deliberation and public opinion is waged. See Akilah N. Folami, *Deliberative Democracy on the Air: Reinvigorate Localism—Resuscitate Radio's Subversive Past*, 63 FED. COMM. L. J. 141, 171–79 (2010) [hereinafter Folami, *Deliberative Democracy*] (analyzing the deliberative value of music generally and early rock-and-roll infused rhythm and blues in particular in a racially segregated America); Folami, *supra* note 4, at 404–08 (analyzing the counter-hegemonic and deliberative value of certain politicized content as provided on cable entertainment programming like *The Daily Show*); Akilah N. Folami, *From Habermas to "Get Rich or Die Tryin": Hip Hop, The Telecommunications Act of 1996, and the Black Public Sphere*, 12 MICH. J. RACE & L. 235, 285–304

Article focuses on promoting democratic competence as distinguished from democratic legitimization—although the two are not conceptually mutually exclusive. Generally, democratic competence aims to empower citizens cognitively, while democratic legitimization aims to indiscriminately provide citizens with an expressive outlet for their opinions and ideas. A primary function of the Speech Clause has been to indiscriminately protect a broad array of expression from government intrusion.<sup>17</sup> In doing so, the Speech Clause has helped legitimize expression in America's civic discourse but has not particularly assisted in advancing democratic competence.<sup>18</sup>

This Article is the first to propose democratic competence as a Press Clause function and to advance criteria that aim to incentivize the production and dissemination of the knowledge-enhancing end-products necessary to promote it. Specifically, this Article embraces calls for Press Clause protections of the newsgathering process—a proposal recently advanced by another Press Clause scholar for other notable reasons.<sup>19</sup> To receive newsgathering protection however, this Article's criteria require speakers not only to engage in newsgathering activity but also to create and publish knowledge-enhancing end-products developed from the raw materials gathered from such newsgathering activity. Finally, to qualify as knowledge-enhancing end-products entitled to Press Clause protections, this Article's criteria require end-products to be published, factually true, and transparent with full disclosure of any underlying corporate or government sponsorship.

This Article's Press Clause function would result in the protection of a narrower category of speech (namely, knowledge-enhancing end-products) than that of the Speech Clause. It therefore provides an alternative basis of constitutional coverage given that these end-products would likely still receive full protection under the Speech Clause. The benefit of the additional or alternate Press Clause coverage proposed herein, however, is that it also serves as the basis upon which qualifying end-products

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(2007) (analyzing the deliberative value of commodified gangsta rap and images). First Amendment scholars have made comparable claims about the deliberative value of most expression to civic discourse be it explicitly political in content or not. POST, *supra* note 12, at 16–20, 23. Some deliberative democracy theorists however would likely disagree with my assertions and contend that only public opinion resulting from reasoned debate alone rather than varied modes of expression is of deliberative value in the public sphere. *E.g.*, Jürgen Habermas, *Further Reflections on the Public Sphere*, in HABERMAS AND THE PUBLIC SPHERE 421, 423–24 (Craig Calhoun ed., 1992). Similarly, some First Amendment theorists contend that only expression that is explicitly political on its face rather than broader in content is entitled to the highest level of First Amendment protections. *E.g.*, ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* (1965); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20 (1971). For a more detailed discussion of scholars' First Amendment protection preferences, see *infra* Section II.

17. See, e.g., *Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564, 573 (2002) (noting that the First Amendment prevents nearly all government regulation based on the content or subject matter of expression).

18. See POST, *supra* note 12, at 25, 34–35 (discussing that the Speech Clause's expansive reach and protection in legitimizing voices often undermines the development of democratic competence).

19. Sonja West, *Awakening the Press Clause*, 58 UCLA L. REV. 1025, 1068–70 (2011) (presenting a convincing argument for an independent function of the Press Clause—namely protecting the news-gathering process). Professor West stops short however of considering the deliberation-enhancing value of the end-products that result from such newsgathering process. This Article aims to continue that discussion by proposing a means by which the production and dissemination of these deliberation-enhancing end-products are specifically incentivized. See *infra* Part IV.A for a more detailed discussion of West's article.

might also receive additional and exclusive Press Clause privileges. Endorsing any specific privilege, for example the reporter's privilege that permits the news media<sup>20</sup> to refuse to disclose confidential sources in certain situations, is beyond the scope of this Article, but will likely be considered in future projects. This Article does not, however, foreclose the possibility that such privileges may be granted, indeed may be necessary, to effectuate democratic competence. This Article's broader contribution is that it provides a constitutional framework under the Press Clause through which such privileges may be evenly and uniformly granted to all pursuant to this nation's firm commitment to a wide, open, and robust civic discourse. It does so without sacrificing the long-acknowledged deliberation-enhancing function that news media end-products have traditionally served in civically informing and engaging the public. Reserved for future scholarly inquiry and analysis is the considerable effect this Press Clause proposal will likely have on other areas of law, namely commercial speech, privacy, and copyright law.<sup>21</sup>

Finally, with a function independent of the Speech Clause, the Press Clause is rescued from being what some have described as an interpretively vague, unhelpful, and redundant constitutional provision.<sup>22</sup> Indeed, while the Supreme Court has determined that the Press Clause is a fundamental personal right guaranteed to each individual,<sup>23</sup> it has not specified how such rights are distinguished from those granted under the Speech Clause.<sup>24</sup> The Supreme Court has also not conclusively elaborated on any uniquely identifiable Press Clause protections, or on who might qualify to receive them.<sup>25</sup> In the absence of definitive constitutional clarity regarding the Press Clause, many federal courts and administrative agencies, along with numerous state legislatures and courts, have awarded members of the news media with exclusive privileges and

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20. Although this Article does not disregard broader categories of "news media" if their end-products satisfy the Press Clause function and criteria advanced herein, the term "news media" in this Article refers to the profession traditionally and generally understood as part of the institutional press like newspapers, broadcast network news, and other public affairs programming provided on cable. *See* POST, *supra* note 12 at 20 ("First Amendment coverage presumptively extends to media for the communication of ideas, like newspapers . . .").

21. The proposal advanced herein essentially strips news media end-products of their presumed democratically enhancing value and function. It, as a result, calls into question any granting of special privileges to the news media pursuant to such presumptions such as are arguably present in some aspects of privacy law and the newsworthiness doctrine, and copyright and fair use exception.

22. *See, e.g.,* Melville B. Nimmer, *Is Freedom of the Press a Redundancy: What Does it Add to Freedom of Speech?*, 26 HASTINGS L.J. 639, 650 (1975) ("If 'speech' is held to refer to all forms of expression, it would include speech by newspapers and other segments of 'the press,' and freedom of the press would be a meaningless redundancy."); West, *supra* note 19, at 1027–28 (discussing First Amendment jurisprudence and noting that the concurring and dissenting opinions in *Citizens United v. Federal Election Commission* suggest that the Supreme Court "has, in essence, dismissed the [Press C]lause as a constitutional redundancy").

23. *See* *Gitlow v. New York*, 268 U.S. 652, 666 (1925) ("For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States.")

24. West, *supra* note 19, at 1027–29.

25. *Id.*; *see also* *Branzburg v. Hayes*, 408 U.S. 665, 681, 708–09 (1972) (holding the institutional press must disclose all relevant information pursuant to a grand jury investigation but also opining that there may be some level of newsgathering protection under the Press Clause).

protections that are not also granted to average citizens who are not members of the news media (non-news media).<sup>26</sup> To Justice Scalia's disagreement, Justice Stevens contended that the Press Clause provided the news media with First Amendment protections not accorded to non-news media speakers.<sup>27</sup>

Any selective protection (and privileges) provided exclusively to the news media alone under the Press Clause is problematic because they suggest that only the news media can perform such a deliberation-enhancing function.<sup>28</sup> This approach further presumes that the news media's disseminated end-product is of deliberative value solely because it was created by a member of the news media profession.<sup>29</sup> Moreover, such an approach assumes that the judicially valued functions ascribed to the news media's end-product (like objectivity, neutrality, and nonpartisanship) have been, or can ever be, accomplished.<sup>30</sup> Finally, this Article's Press Clause function and criteria

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26. Several federal courts have recognized a common law reporter's privilege. *E.g.*, *Fox v. Twp. of Jackson*, 64 F. App'x 338, 340 (3d Cir. 2003); *Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th Cir. 1993); *Von Bulow v. Von Bulow*, 811 F.2d 136, 142 (2d Cir. 1987). Almost all states have either specifically enacted legislation or recognized such rights in their courts. Joshua A. Faucette, Note, *Your Secret's Safe with Me...or So You Think: How the States Have Cashed in on Branzburg's "Blank Check"*, 44 VAL. U. L. REV. 183, 197-98 (2009). Other privileges include exemptions under FOIA that waive document production fees for the news media. See Stephen J. Markman, *New Fee Waiver Policy Guidance*, DEP'T OF JUSTICE FOIA UPDATE, Winter/Spring 1987, at 3, available at [http://www.justice.gov/oip/foia\\_updates/Vol\\_VIII\\_1/viii1page2.htm](http://www.justice.gov/oip/foia_updates/Vol_VIII_1/viii1page2.htm) (discussing the factors weighed in deciding a request for a FOIA fee waiver and that "[i]t reasonably may be presumed [] that those 'representatives of the news media,' as defined in the OMB Fee Guidelines, who have access to the means of public dissemination, readily will be able to satisfy [the contribution to public understanding] aspect of the statutory requirement"). Moreover, the news media benefits from other nonjudicial privileges such as congressional and executive press passes, access to courtroom proceedings, and privileged treatment from federal regulatory bodies stemming from their continued presumption of the democratically-enhancing value of news media's end-products. SCOTT GANT, *WE'RE ALL JOURNALISTS NOW: THE TRANSFORMATION OF THE PRESS AND RESHAPING OF THE LAW IN THE INTERNET AGE* 87-90 (2007); see also Folami, *supra* note 4, at 390-92 (discussing the ways in which the FCC has presumed that the broadcaster's public interest convenience and necessary standard, imposed in exchange for their free use of the nation's airwaves, was satisfied by the networks news programming). Finally, some state jurisdictions have also implicitly granted the news media special rights to invade individual privacy rights in the event such private information is deemed as newsworthy—a determination often presumptively defined by such news media. See, e.g., *Romaine v. Kallinger*, 537 A.2d 284, 293 (N.J. 1988) ("The 'newsworthiness' defense in privacy-invasion tort actions is available to bar recovery where the subject matter of the publication is one in which the public has a legitimate interest.").

27. *Id.* at 951-52 (Stevens, J., concurring in part and dissenting in part); see also *id.* at 928 n.7 (Scalia, J., concurring) (arguing that speech by an authorized corporate spokesperson should not be treated differently from the press's freedom to publish ideas).

28. Cf. CARNE ROSS, *THE LEADERLESS REVOLUTION: HOW ORDINARY PEOPLE CAN TAKE POWER AND CHANGE POLITICS IN THE 21ST CENTURY* 108-12 (2012) (encouraging people to take back decision-making responsibility); Folami, *supra* note 3, at 498-500 (considering the role of professional broadcast journalists in limiting the agency of average nonprofessional citizens in civic discourse as examined through the lens of Ivan Illich's deschooling theory).

29. Folami, *supra* note 4, at 398-400.

30. See David Lange, *The Speech and Press Clauses*, 23 UCLA L. REV. 77, 103-04 (1975) (noting that professional journalists are self-interested if not by monetary rewards then by reputational acknowledgment). In addition, this "objective" approach ultimately dismisses the possibility that press activity resulting in partisan end-products or nonmanipulative yet persuasive appeals to emotions can be of deliberative value. See Folami, *supra* note 4, at 404-06; see, e.g., POST, *supra* note 12, at 21-22 (noting that First Amendment jurisprudence must factor in the myriad ways in which the "rational" citizen deliberates).

do not presume that deliberation-enhancing end-products can only be created by the news media,<sup>31</sup> nor do they require such products to be neutral or objective.<sup>32</sup> Instead, this Article acknowledges that some form of self-interest has always been present in the news media and will likely always remain, especially given the commoditized and corporate-controlled media environment of the twenty-first century. It turns to the Press Clause to try to achieve a deliberatively useful end-product anyway that will advance democratic competence and in turn amplify civic discourse.

Section II of this Article explores the historic origins of, and early interpretive approaches to, the Press Clause. This Section also elaborates on the presumptions underlying the granting of special privileges to the news media. Finally, this Section considers instances where the Supreme Court has found value in deliberation-enhancing activity but refrained from explicitly etching out its constitutional protection under the Press Clause due to the Speech Clause's legitimizing function or to the definitional problems long associated with defining "the press" under the Press Clause. Section III discusses the jurisprudential development of the Speech Clause's legitimizing function and its resulting challenges to democratic competence. Section IV advocates for democratic competence as a functional purpose of the Press Clause—a purpose that is consistent with deliberative values long acknowledged by the Supreme Court, and that offers a viable resolution to some of the challenges to democratic competence and civic discourse highlighted in Section III.

## II. THE PRESS CLAUSE AND STEWART'S INSTITUTIONAL PRESS IN CONTEXT

The Constitution neither defines the meaning of the word "press" referenced in the First Amendment's Press Clause nor grants specific or exclusive protections and privileges to the news media alone pursuant to that Clause.<sup>33</sup> As with the First Amendment generally, the First Amendment's Speech and Press Clauses are not defined in the Constitution.<sup>34</sup> Moreover, neither the Constitution nor early constitutional history reveal conclusively which freedoms the Framers aimed to protect in either the Speech Clause or the Press Clause, whether such undefined freedoms were distinct or duplicious of each other, or whether one Clause enhanced the freedoms granted by the other.<sup>35</sup> Also lacking was clear guidance about who or what constituted

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31. Lange, *supra* note 30, at 103–04.

32. See Brent Cunningham, *Re-Thinking Objectivity*, COLUM. JOURNALISM REV., July-Aug. 2003, at 24, 28–31 (suggesting that journalists should acknowledge that their work is far more subjective than their objective aura implies). Persuasion and appeals to emotion are fine, but manipulation that deprives citizens of, and distracts them from, cognitive empowerment is not. LE CHEMINANT & PARRISH, *supra* note 1, at 70–75 (distinguishing deliberation-enhancing persuasion from strategic manipulative persuasion with the latter categorized as inhibiting deliberative choice and democracy).

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

34. See POST, *supra* note 12, at 5 (stating that the First Amendment is "mute about its purpose," and therefore such a purpose must be constructed).

35. Justice Brandeis in *Whitney v. California*—one of the earliest cases on the First Amendment—extolled the values of the first Amendment as self-fulfilling and as enhancing democratic dialogue. 274 U.S. 357, 375–77 (1927) (Brandeis, J., concurring). He did not, however, tease out the specific values that either the Speech or Press Clauses protected in furtherance of either causes. See Lange, *supra* note 30, at 102 (noting that Brandeis's opinion, while thoughtful, was not particularly helpful or instructive "about how the values are to



the press or press function protected under the Press Clause, and which speech<sup>36</sup> and speakers were protected under either or both Clauses.<sup>37</sup>

While the Supreme Court has developed a fairly comprehensive Speech Clause jurisprudence,<sup>38</sup> it has not resolved the interpretive issues related to the Press Clause.<sup>39</sup> Some contend that the Court has instead rendered the Press Clause a constitutional redundancy to the expansive scope of the Speech Clause.<sup>40</sup> This interpretive redundancy conflicts with a long standing constitutional canon that “[i]t cannot be presumed that any clause in the [C]onstitution is intended to be without effect.”<sup>41</sup> Although the Court has not expressly addressed the issue of the Press Clause’s constitutional meaning, one member of the Court, Justice Potter Stewart, did so over three-and-a-half decades ago.<sup>42</sup> In a now well-known speech at Yale Law School, Justice Stewart proclaimed that the Press Clause applied only to the institutional press and by extension to its members—professional journalists.<sup>43</sup>

Citing several Supreme Court cases that had recently been decided, Stewart asserted that these cases evidenced a developing Supreme Court Press Clause jurisprudence that privileged the institutional press and endowed it with such enhanced freedoms under the Constitution.<sup>44</sup> More specifically, Stewart contended that under the Press Clause, the institutional press was a protected fourth estate that was privileged with certain freedoms, including being exempt from compelled disclosure of

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be parceled out between individuals and the press” if it all).

36. The term “speech” itself was left undefined in terms of whether it related to oral utterances, conduct that communicates a message, or written communication.

37. See Nimmer, *supra* note 22, at 645–46 (citing *Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 102 (1973)) (discussing the Court’s failure in *Columbia Broadcasting* to efficiently distinguish between Press and Speech Clause speakers while aptly balancing First Amendment values).

38. End-products covered by the Speech Clause extend far beyond verbal expressions. *Spence v. Wash.*, 418 U.S. 405, 409–10 (1974). Coverage includes verbal, written, and even symbolic expressions. See *W. Va. State Bd. of Ed. v. Barnette*, 319 U.S. 624, 632 (1943) (“[T]he flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind.”). See *infra* Part III.C for a more detailed discussion of Speech Clause coverage.

39. Potter Stewart, “*Or of the Press*”, 26 HASTINGS L.J. 631, 633 (1975) (“If the Free Press guarantee meant no more than freedom of expression, it would be a constitutional redundancy.”).

40. *E.g.*, West, *supra* note 19, at 1070 (“[T]he Press Clause has been interpreted to mean nothing more than the freedom to publish or disseminate individual speech—a right that is of dubious value considering that the Speech Clause protects these same freedoms.”). Although the Press Clause may have originally related to written communications, some contend that the expansive scope of the Speech Clause that covers written communications as well has essentially rendered the Press Clause redundant or at the very least unclear as to what distinct protections the Press Clause now provides. See, *e.g.*, Seana Valentine Shiffrin, *Methodology in Free Speech Theory*, 97 VA. L. REV. 549, 556 n.21 (2011) (welcoming the redundancy of the First Amendment in its protection of individual rights).

41. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803); *accord* *Dist. of Columbia v. Heller*, 554 U.S. 570, 643 (2008).

42. Justice Stewart presented before the Yale Law School Sesquicentennial Convocation on November 2, 1974, the remarks of which were reprinted in the *Hastings Law Journal*. See Stewart, *supra* note 39, at 631.

43. *Id.* at 633.

44. Stewart cited to the then-recent libel, right to access, and reporter privilege cases that had recently been decided by the Court, which presumably prompted his remarks on the issue. *Id.* at 631–36. See *infra* Part II.D for a more detailed discussion of these cases.

confidential sources in grand jury investigations.<sup>45</sup>

To Stewart, these privileges and protections were not also available to non-news media speakers but were instead reserved only for this fourth estate and its professional members who disseminated information in that capacity.<sup>46</sup> Presumably, the institutional press provided a valued service to America's self-governing democracy and to civic discourse that other American speakers did not, or implicitly could not.<sup>47</sup> Through its professional journalists, the institutional press provided responsible, verifiable, objective, and neutral expert analysis and critique, which in turn checked government, exposed abuses of power, and enhanced the deliberative capacity of American citizens.<sup>48</sup> Therefore, to Stewart, the Press Clause protected and privileged the collective expression of the institutional press<sup>49</sup> while the Speech Clause protected individual expression.<sup>50</sup> For him, such exclusive privileges under the Press Clause were in exchange for the institutional press' provision of a much-needed end-product that enhanced civic discourse.<sup>51</sup>

A. *Originalism and the Press Clause—Early Press Function and Colonial Norms*

Prior to Justice Stewart's speech at Yale, the Supreme Court had never made such an explicit affirmative determination regarding the Press Clause's meaning, particularly as it related to a selective application of the Clause.<sup>52</sup> In fact, the matter remains open and unresolved by the Court, as evidenced by the recent disagreement between Justice Stevens and Justice Scalia in the concurring opinions of the *Citizens United* decision.<sup>53</sup>

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45. Stewart, *supra* note 39, at 634–35; see also Floyd Abrams, *The Press is Different: Reflections on Justice Stewart and the Autonomous Press*, 7 HOFSTRA L. REV. 563, 564–65 (1979) (discussing Justice Stewart's view that the Press Clause protects the press as an autonomous institution).

46. See *id.* at 635 (stating that the Supreme Court has never found the First Amendment to provide individuals immunity from defamation liability or nondisclosure of source protection). This professionalized capacity to Stewart reflected the norms and ethics of the responsible and professional journalists who were socially construed as the gatekeepers of civic discourse and the disseminators of reliable, objective, and civic knowledge to the public. *Id.* See *infra* Part II.D for a detailed discussion of Justice Stewart's views on news media hegemony and the Press Clause.

47. See *infra* Part II.C for a more detailed discussion of the professionalization of civic and political discourse.

48. See Stewart, *supra* note 39, at 634 (arguing that the constitutional protection of a free press was motivated by a desire to create an additional check on the three branches of government).

49. In referring to the institutional press it is not clear whether Justice Stewart was referencing newspapers only or other news media sources such as broadcast journalism. Unless otherwise noted, this Article uses the term "institutional press" to refer specifically to the structured and organized profession of newspaper journalism in particular and uses the term "news media" to refer to professional journalism more broadly in other mediums, including the institutional press.

50. Stewart, *supra* note 39, at 633.

51. See *id.* at 634 (recognizing that the institutional press was meant to act as a check on the three official branches of government).

52. *Id.* at 632 (noting that from the 1920s to the 1970s, First Amendment cases did not consider the guarantee of a free press).

53. *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 928–29 (2010) (Scalia, J. concurring); *id.* at 951–52 (Stevens, J., concurring in part and dissenting in part); see also West, *supra* note 19, at 1027 (noting that in the *Citizens United* case the two "justices were blowing the dust off of a constitutional question that the Court had not addressed in thirty years").

As Professor David Lange contends, “the Framers . . . left . . . language in the [F]irst [A]mendment which justifies the present debate—language which, under almost any view one takes, is less than clear.”<sup>54</sup> Indeed, Stewart’s declaration nearly fifty years ago spawned notable scholarly debate and analysis for decades.<sup>55</sup> Some scholars pointed out that Stewart’s reading of the Constitution was inconsistent with the original intent of the Framers given that no such institutional press—to which such privileged rights could have been extended—existed at the time the First Amendment was added to the Constitution.<sup>56</sup> For example, Professor Lange turned to colonial history to show that the “free and responsible press” advanced by Stewart as the constitutional recipient of such exclusive and heightened rights under the Press Clause was “scarcely institutional” in early colonial times and “bore little relationship” to the private enterprise of Stewart’s day.<sup>57</sup>

Hence, Stewart’s interpretation of the “press” referenced in the Press Clause as denoting a structured, objective, neutral, and critical institutional press that informed and enlightened the average American public “cannot have been what the Framers had in mind when they used the term ‘press.’”<sup>58</sup> Moreover, as Professor David Anderson contended, “[t]o the generation of the Framers of the First Amendment, the ‘press’ meant ‘the printing press.’”<sup>59</sup> Indeed, in the eighteenth century, the press consisted of printers engaged in a trade rather than in the professional enterprise of journalism<sup>60</sup>—an enterprise that would not develop until centuries later, eventually earning Stewart’s commendations.

Far from providing its own cohesive, structured, and independent critical analysis, printers essentially carried their own speech and that of others beyond the ambit of the

54. Lange, *supra* note 30, at 88; *see also* Zechariah Chafee, Book Review, 62 HARV. L. REV. 891, 898 (1949) (“The truth is, I think, that the framers had no very clear idea as to what they meant.”); Nimmer, *supra* note 22, at 641 (recognizing that current tensions, unanticipated at the time the text was written, have blurred understanding of the Framers’ intent).

55. *See generally* Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521; Lange, *supra* note 30; Nimmer, *supra* note 22.

56. Lange, *supra* note 30, at 90–91; David F. Partlett & Russell L. Weaver, *Remedies, Neutral Rules and Free Speech*, 39 AKRON L. REV. 1183, 1184 n.6 (2006) (“[T]he history of the Clause does not suggest that the authors contemplated a ‘special’ or ‘institutional’ privilege.” (quoting *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 798 (1978) (Burger, C.J., concurring))).

57. Lange, *supra* note 30, at 90–91; *see also* Patrick J. Charles & Kevin Francis O’Neill, *Saving the Press Clause from Ruin: The Customary Origins of a ‘Free Press’ as Interface to the Present and Future*, 2012 UTAH L. REV. (forthcoming 2013) (manuscript at 29–34) (discussing the historical context of the Press Clause and whether freedom of the press was an individual, collective, or industrial right prior to the Constitution).

58. David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 447 (2002).

59. *Id.* at 446.

60. *Id.* (stating that the Press Clause “referred less to a journalistic enterprise than to the technology of printing and the opportunities for communication that the technology created”). *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, 463 (2012) (“[P]eople during the Framing era likely understood the [First Amendment] as fitting the press-as-technology model—as securing the right of every person to use communications technology, and not just securing a right belonging exclusively to members of the publishing industry. The [First Amendment] was likely not understood as treating the press-as-industry differently from other people who wanted to rent or borrow the press-as-technology on an occasional basis.”).

speaker.<sup>61</sup> As a result, the printing press amplified civic discourse with speech that was often partisan,<sup>62</sup> and far from the presumably neutral end-products of the responsible press praised by Stewart. It also granted the less wealthy the ability to spread their thoughts and ideas beyond themselves to broader audiences.<sup>63</sup> In his book, *The Good Citizen*, historian Michael Schudson chronicled the effect of the printing press in spreading public opinion and widening a civic discourse that was at times driven by the more highbrow and oratorical local politicians who had the resources and ability to capture public attention.<sup>64</sup> The printing press often helped to mobilize and incite an average American citizenry that was marginalized, civically apathetic, or disengaged.<sup>65</sup>

Therefore, the average American citizen who may have been limited in ability or in resources to transmit ideas via public speaking or books could still capture the broader attention of his fellow citizens through use of the printing press.<sup>66</sup> With books scarce, expensive, or inaccessible, an elite few could control knowledge.<sup>67</sup> The development of the printing press, however, liberated information and the minds of average citizens.<sup>68</sup> Therefore, for Lange, “[f]ree speech could not exist in the fullest sense without freedom of the press; a free press, on the other hand, had no occasion to exist without freedom of speech. Thus viewed, the two could scarcely be set apart for neither had ever quite existed without the other.”<sup>69</sup>

Moreover, because individuals in early America relied on both oral discussions and print to communicate ideas, some have argued that references to speech and press protections in the First Amendment were likely understood by individuals and the Framers as protecting expression holistically.<sup>70</sup> Arguably, such expression rights were

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61. Lange, *supra* note 30, at 94–95.

62. *Id.*

63. *Id.* at 93–94.

64. See generally MICHAEL SCHUDSON, *THE GOOD CITIZEN: A HISTORY OF AMERICAN CIVIC LIFE* (1998).

65. Lange, *supra* note 30, at 93–94.

66. Most Americans in earlier colonial periods were not literate or formally educated which is why Thomas Jefferson, a proponent of a more populist civic engagement advocated for free public education. ROBERT W. MCCHESENEY & JOHN NICHOLS, *THE DEATH AND LIFE OF AMERICAN JOURNALISM: THE MEDIA REVOLUTION THAT WILL BEGIN THE WORLD AGAIN* 119 (2010) (discussing Jefferson’s view that in order to secure democracy, the government had to provide free public education and libraries to help create a more literate public that he believed could better take advantage of the guarantees provided under the First Amendment); Lange, *supra* note 30, at 93–94 (discussing the distributive powers of the printing press).

67. *Id.* at 94 n.92.

68. *Id.*

69. *Id.* at 96.

70. It has been argued that speech rights (related to utterances) were however slower in development in the prerevolution colony period, and were therefore subsequent to free press rights (related to written publications) given that press freedoms were fresh on the minds of those escaping the oppressive control and licensing of England over the printing press in the Old World. *Id.* at 97–98; LEONARD LEVY, *LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY* 5 (1960) (“[F]reedom of the speech . . . had almost no history . . . . It developed as an offshoot of freedom of the press . . . .”); see also Francis Ludlow Holt, *Of the Liberty of the Press*, in *FREEDOM OF THE PRESS FROM HAMILTON TO THE WARREN COURT* 16, 18–19 (Harold L. Nelson ed., 1967) (discussing Francis Ludlow Holt’s treatise reprinted in America in 1818 as describing the liberty of the press in England as relating to “personal liberty of the writer to express his thoughts in the more improved way invented by human ingenuity in the form of the

generally understood then to be personal and individualistic,<sup>71</sup> although not absolute.<sup>72</sup> The Framers likely intended the Press and Speech Clauses to provide personal and individual protections to the means of communicating and disseminating ideas available at the time.<sup>73</sup> It is unlikely however that the Framers intended them to be read as separate Clauses with one—the Speech Clause—constitutionalizing individual rights, and the other—the Press Clause—constitutionalizing rights for the institutional press.<sup>74</sup>

This evidence alone however does not tease out the distinguishing functions of either clause or the personal rights guaranteed thereunder.<sup>75</sup> It instead renders one clause redundant to the other—an approach that some legal scholars contend is the net result of the Supreme Court’s current interpretation of the Press Clause freedoms as being enveloped within the expansive reach of the Speech Clause.<sup>76</sup> Such interpretive redundancy arguably runs contrary to the prescriptions provided clearly in two distinct

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press”). Historians have also shown that colonialist sentiments were equally in favor of both ample speech and publication rights as part of a larger matrix of free expression rights by the time that the Constitution was adopted and the First Amendment was added. *Id.* Even if one concedes that the Framers had a clear distinction in mind regarding utterances and written publications when the First Amendment was adopted, the current interpretive scope of the Speech Clause provides coverage for both such that a concession as to the Framers’ intent on this point does not resolve the Press Clause redundancy issue. West, *supra* note 19, at 1035 (“[T]he claim that the Speech Clause protects speech while the Press Clause protects dissemination is an insufficient response to the textual evidence that the Press Clause and the Speech Clause are distinct.”); Nimmer, *supra* note 22, at 651 (explaining that defining “the press” based on the form of expression is both too narrow and too broad).

71. Lange, *supra* note 30, at 99 n.109 (arguing that the Framers did not provide for distinct protection of oral, written, and printed speech because they likely regarded them as covered under the umbrella of fundamental personal rights).

72. John Peter Zenger, an individual printer, was brought up on trial for violating a seditious libel law that prohibited publications criticizing the government. DAVID PAUL NORD, *COMMUNITIES OF JOURNALISM: A HISTORY OF AMERICAN NEWSPAPERS AND THEIR READERS* 66 (2001). Zenger was tried for breaching that law because he printed articles that were critical of New York government officials. *Id.* When the judge refused to dismiss the case based on a defense of truth, Andrew Hamilton, Zenger’s attorney and the most celebrated of American courtroom lawyers at the time, convinced the jury to nullify his conviction. *Id.* Zenger’s trial is often characterized as a victory for freedom of speech and the press in the colonies. Ironically though, just eight years after the First Amendment’s adoption to the Constitution, the Framers enacted the Sedition Act, which likewise prohibited written, and presumably oral, expressions against the government. *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 273–74 (1964) (discussing the Sedition Act). The Act was not popular in the new republic and, although it was never challenged constitutionally, it was not renewed and expired by its own terms a few years after its enactment. *See id.* at 276 (citing *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); *Beauharnais v. Illinois*, 343 U.S. 250, 288–289 (1952) (Jackson, J., dissenting)) (noting that “fines levied in its prosecution were repaid by Act of Congress” on the grounds that the Sedition Act was unconstitutional and that the President pardoned those who had been convicted under the Sedition Act). Decades later, the Court, in *N.Y. Times Co. v. Sullivan*, would refer to it as America’s sin to its open and accessible self-governing democracy. *Id.* at 273.

73. Lange, *supra* note 30, at 88.

74. *Id.*; Leonard W. Levy, *On the Origins of the Free Press Clause*, 32 *UCLA L. REV.* 177, 204 (1985) (“[T]he free press clause, like the due process clause, had only an established common law meaning: freedom to speak, write, and publish as one pleased, subject to subsequent punishment for being too offensive.”).

75. *Id.* (observing that listing the freedoms of speech and of the press separately in the First Amendment has either resulted in over two hundred years of potential confusion or is merely a redundancy).

76. *E.g.*, Nimmer, *supra* note 22, at 650; West, *supra* note 19, at 1027–28.

provisions of the Constitution.

Early Press Clause cases brought before the Supreme Court add insight and support for the separate Press Clause function advanced herein. Both the cases and their historical context evince the Supreme Court's acknowledgement of the value of deliberation-enhancing end-products to a well-functioning, self-governing democracy.<sup>77</sup> This Article also contends that both the cases and the historical context in which they arose reveal the presumptions underlying the advocacy of special protections and privileges for the news media alone. Indeed, by the time of Justice Stewart's declaration, the news media had developed into the profession of journalism. This development transformed the open, accessible, and fluid printing press of the Framers' era to a highly institutionalized industry.<sup>78</sup> The professionalized news media was soon positioned as the gatekeeper and arbiter of civic discourse<sup>79</sup> to the near exclusion of the average nonprofessional individual and non-news media speaker.<sup>80</sup>

*B. The Early Press Clause Cases and the First Amendment*

The Supreme Court did not hear its first Press Clause case until 1931—over 100 years after the adoption of the first amendment to the Constitution.<sup>81</sup> In *Near v. Minnesota*, the Supreme Court provided a very narrow function of the Press Clause—to protect against prior restraints.<sup>82</sup> *Near* invalidated a government restriction, which prohibited the publication of a “malicious, scandalous and defamatory newspaper, magazine or other periodical.”<sup>83</sup> A Minneapolis tabloid, *The Saturday Press*, was targeted for maligning local police and public officials with its sensationalist and lurid stories and was, as a result, charged with violating the Public Nuisance Law at issue.<sup>84</sup> The Court struck down the law's prohibition against written publications with specific reference to the Press Clause and that Clause's interpreted guarantee against prior restraints by government.<sup>85</sup>

Prior to *Near*, the Court had heard a sprinkle of cases related to the First Amendment but had not decided any of those cases under a specific provision of the

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77. POST, *supra* note 12, at 4–5 (suggesting that the most efficient way to effectively map the boundaries of First Amendment doctrine is to examine past efforts to use the Amendment in order to achieve desired constitutional values).

78. Anderson, *supra* note 58, at 446–47; Folami, *supra* note 4, at 381–85; *see also* Lange, *supra* note 30 at 99 (“The ‘publishing business’ referred to by Mr. Justice Stewart has come into its own, and undoubtedly it has achieved institutional status.”); MCCHESENEY & NICHOLS, *supra* note 66, at 43–52 (describing professional journalism and the corresponding problems arising with the institutionalization of the press).

79. *See* Lange, *supra* note 30, at 99–100 (examining the functions of the newly formed institutional version of the press).

80. *See* Anderson, *supra* note 58, at 447 (noting that over the second half of the nineteenth century, the press began to be viewed as a collective journalistic enterprise).

81. *Near v. Minn.*, 283 U.S. 697 (1931) (deciding the function of the Press Clause 140 years after the adoption of the First Amendment).

82. *Id.* at 698.

83. *Id.* at 697 (rendering unconstitutional Minneapolis' Public Nuisance Law that banned seditious libel).

84. *Id.* at 703–04.

85. *Id.* at 722–23.

Amendment.<sup>86</sup> In these early First Amendment cases, the Court instead referenced, liberally and interchangeably, either the broader freedom of expression principles guaranteed under the First Amendment, or two or more provisions of the First Amendment with no specific freedoms etched out under any particular provision.<sup>87</sup> Moreover, these early First Amendment cases were interpreted as dealing specifically with postpublication prosecutions for the offending oral or written expressive conduct.<sup>88</sup> Postpublication prosecutions and liabilities were generally understood as distinct from prior restraint considerations and protections—an exception the Court in *Near* duly acknowledged.<sup>89</sup> For the Court in *Near*, the issue before it was unrelated to postpublication prosecutions, but was instead related directly to an attempt to completely stamp out a publication in advance of its publication, irrespective of possible postpublication issues.<sup>90</sup>

Indeed, the public nuisance law at issue in *Near* was aimed at ridding Minnesota of tabloids, like *The Saturday Press*, which were deemed by certain segments of that society as a menace to the state's overall welfare.<sup>91</sup> Declining to frame the issue as confined to a postpublication issue, the Court determined that the public nuisance law essentially censored the publisher of *The Saturday Press* by banning the circulation of any previous editions or future disseminations of similarly styled (tabloid) papers.<sup>92</sup> For the Court, this sweeping restriction was clearly impermissible under the Press Clause as a prior restraint on written publications.<sup>93</sup> Arguably left open was the broader application of the Court's ruling to expression.

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86. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (ruling that the freedom of speech and press are protected by “the Fourteenth Amendment from impairment by the States”); *Schenck v. United States*, 249 U.S. 47, 48 (1919) (ruling that the First Amendment did not grant a right to freedom of speech when the speech sought to be protected was prohibited by the Espionage Act of 1917).

87. In *Schenck*, the Court referenced both freedoms of speech and the press. *Schenck*, 249 U.S. at 51–52. In *Gitlow*, where the Court applied the protections certified under the First Amendment to the states via the Fourteenth Amendment, the freedoms of speech and the press were likewise referenced without a distinction made between them as to their individual scope and meaning. *Gitlow*, 268 U.S. at 666–67.

88. Notably, the offending expressive conduct in these cases dealt with written publications, similar to that in *Near*. Moreover, the laws at issue in those cases were similar to the public nuisance law in *Near* in that they prohibited particular types of expressivity, namely, political critique and dissent. *Gitlow*, 268 U.S. at 667–69 (upholding a New York law that prohibited utterances about overthrowing the government); *Schenck*, 249 U.S. at 51–52 (prohibiting speech that interfered with the draft). Because these early First Amendment cases also dealt primarily or exclusively with written publications, the application of the Press Clause alone in *Near* does not seem to have turned solely on the fact that the form of expression was a written publication because written publications were the items at issue in these other earlier cases as well. See David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 457–58 (1983).

89. *Near*, 283 U.S. at 713–15.

90. *Id.* at 704–05.

91. *Id.* at 709. Presumably as well, the public nuisance law was insufficient to satisfy the exception to the prior restraint doctrine that allowed states to encroach upon First Amendment rights to protect against what they deemed as threats to the welfare of their own states. See *id.* at 716. Indeed, in striking the Minnesota law, the Court arguably rejected the notion that it was enacted as a measure to protect the general welfare of the state and its officials from the damaging effects of such tabloid journalism. See *id.* at 710–12 (acknowledging the continued authority of the state to enact laws that protect the general welfare of its people).

92. *Id.* at 720–21.

93. *Id.*

Moreover, the Court in *Near* did not expressly limit whatever Press Clause guarantees it was attempting to etch out to the newly emerging institutional press alone. Instead, the Court notably guaranteed prior restraint protections against a tabloid publication whose format, style, and journalistic ethic was a far cry from the institutional press later endorsed by Stewart and others.<sup>94</sup> By the time of the *Near* case, the unstructured trade of individual printers of the Framers' era had evolved into the more institutionalized profession of journalism,<sup>95</sup> which included its offshoot—tabloid journalism.<sup>96</sup> According to popular mainstream norms, a responsible press was expected to provide “reports and comments on political happenings, and even more importantly, commercial information such as shipping news [because] the audience was the property class, not the working class.”<sup>97</sup>

From inception, tabloid journalism was never deemed respectable journalism by the mainstream institutional press or cultural elites.<sup>98</sup> Tabloid journalism was maligned by cultural elites “for sensationalism and emotionalism, for over-simplification of complex issues, for catering to the lowest common denominator and sometimes for outright lies.”<sup>99</sup> It was also disliked due to its open self-interested attempts to increase readership and advertisement revenue through human interest news, everyday life stories, and coverage of “[s]candalous tales of sin, [and] the immoral antics of the upper class.”<sup>100</sup> *The Saturday Press* in the *Near* case was one such tabloid. Indeed, it was so despised that it was targeted for a complete ban by Minneapolis' Public Nuisance Law.<sup>101</sup> The tabloid press, however, served as a counterdiscourse to the mainstream institutional press because it “managed to attract new publics, by speaking to them about issues previously ignored” by the mainstream press.<sup>102</sup>

Seemingly indifferent to the method and manner of publication, the Court in *Near* broadly acknowledged the deliberative value that the institutionalized press, including

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94. By distinguishing prior restraint protections from postpublication prosecutions, the Court did not address whether or to what extent *The Saturday Press* could be liable for postpublication liabilities that might arise from a defamation or privacy action. Indeed tabloids, such as *The Saturday Press*, were known for their exaggeration and sensationalism, a point noted by the dissent. *Id.* at 724 (Butler, J., dissenting). Interestingly, while in private practice and in reaction to the perceived damaging effects of tabloids to individual privacy, future Justices Brandeis and Warren coauthored a law review article that laid down the foundation of what would become the body of privacy law in reaction to the perceived damaging effects of tabloids to individual privacy. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890).

95. Anderson, *supra* note 58, at 447. Indeed, before the end of the nineteenth century, printing press publishers began to hire their own employees to gather news and information and to produce related features and commentaries. *Id.*

96. Henrik Ornebring & Anna Maria Jonsson, *Tabloid Journalism and the Public Sphere: A Historical Perspective on Tabloid Journalism*, 5 JOURNALISM STUD. 283, 287 (2004).

97. *Id.* at 288.

98. *Id.* at 287.

99. *Id.*

100. *Id.* at 288.

101. *Near v. Minn.*, 284 U.S. 697, 703 (1931).

102. Ornebring & Jonsson, *supra* note 96, at 287. Indeed, some scholars have shown that tabloid journalism (also known as yellow journalism) successfully attracted the masses and poorer segments of the community because it was cheaper than the mainstream papers and included topics more relevant to their daily lives and interests, perhaps due in part to such sensationalist tactics. *Id.* at 288; W. JOSEPH CAMPBELL, *YELLOW JOURNALISM: PUNCTURING THE MYTHS, DEFINING THE LEGACIES* 52 (2001).



presumably the tabloid defendant before it, had come to serve to the broader public.<sup>103</sup> The Court noted that as “the administration of government has become more complex,” a “vigilant” and “courageous” press was “primary.”<sup>104</sup> In addition, in *Near*, Chief Justice Hughes made clear that the prohibition against prior restraint was the right of “every freeman” because “[t]he liberty of the press is indeed essential to the nature of a free state . . . to forbid this, is to destroy the freedom of the press.”<sup>105</sup> The Court’s granting of limited institutional press protections against prior restraint but not against postpublication prosecution (like defamation), and their granting of them to individual speakers and to tabloids, arguably fell far short of the Press Clause rights and application advanced by Stewart decades later.

The “responsible press” Stewart championed as his fourth estate developed more firmly during the 1930s to 1960s, a period Professor Anderson characterized as the heyday of the Press Clause.<sup>106</sup> It was soon socially elevated and construed as the primary, if not exclusive, entity capable of objectively and rationally guiding and informing the average American civically with its end-products.<sup>107</sup> Such elevation was (and continues to be) maintained by the exclusive privileging of the news media. The presumptions underlying this elevation and exclusive privileging are questionable because of technological developments, citizen journalism online, and consolidated conglomerate control of news media.

### C. *The Institutional Press and the Professionalization of Civic Discourse*

Some scholars contend that the development of Stewart’s professionalized news media and its exalted role in civic discourse came at a deliberative price to the more robust, open, and accessible press and press freedoms extended to wider segments of the population during America’s colonial tradition.<sup>108</sup> With the professionalization of the industry, mainstream norms and sentiments soon turned primarily to the news-media professionals for the relevant topics in civic discourse.<sup>109</sup> Individual voices and the tabloid press were eventually marginalized by mainstream sentiment.<sup>110</sup> For American printing press historian Robert Martin, early colonial Press Clause history reveals an understanding of the Press Clause at a time where public expression was protected more broadly. For Martin, two coexisting doctrines of the Press Clause, namely the free press and open press doctrines, were understood as protecting the

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103. *Near*, 284 U.S. at 699.

104. *Id.* at 719–20.

105. *Id.* at 713–14 (emphasis added) (quoting 2 WILLIAM BLACKSTONE, COMMENTARIES \*151–52).

106. Anderson, *supra* note 58, at 448.

107. See, e.g., Nimmer, *supra* note 22, at 653 (stating that speech made through the press makes a more significant contribution to the democratic dialogue than speech through other means).

108. See Anthony Lewis, *A Preferred Position for Journalism?*, 7 HOFSTRA L. REV. 595, 609 (1979) (noting increased constitutional protection of the news media implies that ordinary citizens are entitled to less protection); William W. Van Alstyne, *The Hazards to the Press of Claiming a “Preferred Position”*, 28 HASTINGS L.J. 761, 768–69 (1977) (arguing that offering special rights to the established news media may not actually serve the public good).

109. Folami, *supra* note 3, at 498–99.

110. *Id.*

expressive rights of both individuals and the printing press, respectively.<sup>111</sup> The doctrines themselves reflected an early American commitment to a communicative infrastructure that aimed to inform and engage a broader participatory public,<sup>112</sup> the residue of which is arguably reflected in the *Near* decision.<sup>113</sup>

Beginning in the mid- to late-nineteenth century, however, this robust and easily accessible press and communicative infrastructure was undermined by a developing advertising industry and the professionalization of the printing trade.<sup>114</sup> Originally, views in the marketplace of ideas were theoretically plentiful with the explosion of local and regional newspapers due to low printing costs and increasing demand for advertising space.<sup>115</sup> The de facto effect of newspaper reliance on advertisement, however, soon pruned abundant and competitive markets into concentrated commercial ones.<sup>116</sup> Fewer and larger newspaper monopolies developed, thereby increasing economic barriers of new publishers to enter the industry and of smaller ones to compete “as advertisers rationally flocked to the leading newspaper(s) that could offer the best rates and the widest reach.”<sup>117</sup>

These larger newspapers became part of the mainstream civic discourse because they had “the largest audiences [and were] generally considered most important . . . by members . . . of the political, economic and cultural elites.”<sup>118</sup> To the ire of their most ardent middle and upper class supporters, they soon adopted the similar sensational stories and reporting styles of the tabloid press to broaden and increase their subscription base.<sup>119</sup> They, like the tabloid press, became the subject of elite and middle class contempt for abdicating public servant informational obligations—as such were defined by elitist cultural norms.<sup>120</sup> Moreover, these larger newspapers also faced strong criticism of monopolistic control from the Progressive Era voices of the popular press.<sup>121</sup> Critics, including famed writer Upton Sinclair, railed against the advertisement-based press structure whose growing concentrated nature threatened to undermine the ideals of the free and open communicative infrastructure of the early American printing press.<sup>122</sup>

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111. ROBERT W.T. MARTIN, *THE FREE AND OPEN PRESS: THE FOUNDING OF AMERICAN DEMOCRATIC PRESS LIBERTY, 1640–1800* 4–5 (2001).

112. MCCHESENEY & NICHOLS, *supra* note 66, at 120–21, 128. *But see* Folami, *supra* note 4, at 381 (noting that “early press history reveals a conspicuous exclusion and marginalization of the working and lower classes, women, the nonpropertied and those deemed property”).

113. In deciding the case specifically under the Press Clause, the Court spoke expressly about protecting personal individual freedoms while also emphasizing the importance of the press in society. *Near v. Minn.*, 283 U.S. 697, 716–18 (1931).

114. Folami, *supra* note 4, at 381–82.

115. MCCHESENEY & NICHOLS, *supra* note 66, at 133 (noting that with advertisement revenue, the printing press became independently commercially viable and less dependent on government subsidies, which discontinued soon thereafter).

116. *Id.* at 135.

117. *Id.*

118. Ornebring & Jonsson, *supra* note 96, at 283, 285.

119. *Id.* at 287.

120. MCCHESENEY & NICHOLS, *supra* note 66, at 138.

121. *Id.* at 138–39.

122. *Id.* *See generally* UPTON SINCLAIR, *THE BRASS CHECK: A STUDY OF AMERICAN JOURNALISM*

However, with the “voluntary” adoption of a professional code of journalism in the early 1920s—due in part to threats of government regulation to open up access—the institutional press evaded such growing and pressing populist concerns.<sup>123</sup> Publishers skillfully reshaped and narrowed sentiments about freedom of the press from concern regarding maintenance of an open and free communication infrastructure, to consternation regarding government encroachment upon them—the news gatherers and distributors.<sup>124</sup> Even while veiling their self-interests to attract more advertising revenue, they adopted a professional code that on its face addressed the articulated concerns of a growing number of culturally and politically elite supporters who rallied against the mainstream press’ adoption of elements of tabloid journalism.<sup>125</sup> Such professional code advanced the “disciplines of accuracy, disinterestedness in reporting, independence from the people and organizations reported upon or affected by the report, a mode of presentation sometimes called objective or neutral, and the clear labeling of what is fact and what is opinion.”<sup>126</sup> Moreover, the adoption of a professional journalism code positioned reporters and editors as the arbiters for determining newsworthiness and the acceptable forum, style, and manner for civic discourse.<sup>127</sup>

As a result, civic discourse was soon determined by respectable and presumably rationally objective professional journalists rather than by sensationalist journalists, an encroaching government, or even the popular sentiments and desires of the public.<sup>128</sup> The process of becoming a professional presumed an eradication of “petty passions and narrow ambitions,” which were both deemed flaws to reason.<sup>129</sup> For example, with the

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(1928).

123. PAUL ALFRED PRATTE, *GODS WITHIN THE MACHINE: A HISTORY OF THE AMERICAN SOCIETY OF NEWSPAPER EDITORS 1923–1993* 5–7 (1995); MCCHESENEY & NICHOLS, *supra* note 66, at 140.

124. MCCHESENEY & NICHOLS, *supra* note 66, at 140.

125. *See id.* (noting that “[f]or reporters and editors, professional journalism allowed them some autonomy from direct commercial pressures as they went about their work; for publishers, professionalism made their increasing market power and dependence upon advertising legitimate, and permitted them to generate extraordinary rates of return for a century”).

126. JACK FULLER, *WHAT IS HAPPENING TO NEWS: THE INFORMATION EXPLOSION AND THE CRISIS IN JOURNALISM* 12 (2010). In addition, the development of “objectivity” in reporting has been linked to efforts by newspaper owners and editors to increase newspaper sales and advertising revenues. MICHAEL EMERY & EDWIN EMERY, *THE PRESS AND AMERICA: AN INTERPRETIVE HISTORY OF THE MASS MEDIA* 178 (7th ed. 1992).

127. MCCHESENEY & NICHOLS, *supra* note 66, at 140; FULLER, *supra* note 126, at 12 (elaborating on the developmental principles of the Standard Model of Professional Journalism).

128. FULLER, *supra* note 126, at 14. Publishers and their professional code both reflected and benefitted from a citizenry coming out of the travesties of the American Civil War who found “the values of professionalism and expertise . . . attractive [because] they implied impersonality, respect for institutions as effective organizers of enterprise” and the “antidote to the human passions and fighting faiths that recently, as throughout history, had produced unutterable horror.” *Id.* at 13. Indeed, this Progressive Era sentiment, itself an extension of the historical era “generally referred to as ‘modernity’ . . . was marked by twin forces of rationalization and professionalization—the dividing of social life into distinct domains and the reliance on professional expertise to identify and solve problems within those domains.” BAYM, *supra* note 7, at 11.

129. *See* MCCHESENEY & NICHOLS, *supra* note 66, at 140 (noting the rise of professional journalism in the early twentieth century). Indeed, implicit in the allegiance to reason is a distrust of emotions, as made clear by Justice Pound that “[i]n place of reason we have subconscious wishes, repressed desires, rooted behavior tendencies, habitual predispositions.” MICHAEL SCHUDSON, *DISCOVERING THE NEWS: A SOCIAL HISTORY OF*

personification of the printing press' professional code of journalism in the visual images of anchormen like Edward Murrow and Walter Cronkite,<sup>130</sup> television was rescued from initially being perceived as a self-interested and commercialized threat to democracy.<sup>131</sup> Indeed, with the creation of the first news program by CBS in 1948, broadcast television was gradually welcomed in as an arm of the metaphorical fourth estate.<sup>132</sup> Ironically, broadcast owners succeeded in erecting it instead as the arbiter of all that was newsworthy and appropriate for civic discourse via their network news divisions and their professionalized broadcast journalists.<sup>133</sup>

This professionalization of the news media created and perpetuated, however, what some scholars have defined as a thin citizenship that limited who could initiate and how one could participate in civic discourse.<sup>134</sup> These professionalism norms "offered no role for the public to play save that of passive audience, whose requirements for citizenship could be fulfilled simply by watching TV. [The news media] thus encouraged a kind of thin citizenship, one that . . . confirmed the public's 'psychological incompetence' to participate in the 'culture of democratic publicity.'"<sup>135</sup> As a result, civic discourse was absconded from average American individual speakers, and largely became the domain of the professionals who were presumed to bracket and rise above private self-interests and experiences that, if left unchecked, undermined objectivity and neutrality.<sup>136</sup>

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AMERICAN NEWSPAPERS 126 (1978) (quoting Roscoe Pound, *The Cult of the Irrational*, WELLESLEY ALUMNAE MAG., Aug. 1929, at 368).

130. BAYM, *supra* note 7, at 9–10.

131. Folami, *supra* note 4, at 385–90 (discussing early congressional concern with broadcast television's distracting influence on politics given the self-interested, commercial, and entertaining nature of the medium from its inception).

132. BAYM, *supra* note 7, at 10–11.

133. PETER DAHLGREN, TELEVISION AND THE PUBLIC SPHERE 48, 62 (1995); JEFFREY P. JONES, ENTERTAINING POLITICS: SATIRIC TELEVISION AND POLITICAL ENGAGEMENT 149, 182 (2d ed. 2010). In addition, the networks' uniform construction of political news was sustained by a regulatory framework that readily accepted it as satisfaction of federally imposed public interest obligations. BAYM, *supra* note 7, at 10–11. Moreover, as Baym writes,

[F]ederal regulation was built on the principle of trusteeship, the insistence that in order to profit from the use of the public airwaves, broadcasters were obliged to act as trustees of the air and serve the "public interest, convenience, and necessity." . . . For many local television stations, that requirement was easily met by broadcasting the nightly network news.

*Id.* at 11 (citing EDWARD JAY EPSTEIN, NEWS FROM NOWHERE: TELEVISION AND THE NEWS 48 (1973)).

134. BAYM, *supra* note 7, at 170.

135. *Id.*

136. *See id.* at 11–12 ("[H]igh modern journalists were assumed to be informational professionals, value-free experts committed to the ideals of an objective public interest and the rational pursuit of social order."); JEFFREY P. JONES, ENTERTAINING POLITICS: SATIRIC TELEVISION AND POLITICAL ENGAGEMENT 44 (2d ed. 2010) (explaining that television journalists during the 1940s through 1960s were "representatives of the public and public interest"). However, the net result after such bracketing was a civic discourse that was guided by professional journalists who were primarily white and male. BAYM, *supra* note 7, at 49–50. Concerns and issues of those that were not discussed by these journalists, including those of minorities, were marginalized during what some have ironically characterized as the Golden Age of Journalism. *Id.* If not captured by the gatekeepers, the expressivity of such marginalized groups, be it in social protests or other activities, was presumed to be irrational, civically unruly and, indeed, antidemocratic. *Id.*

D. *Perpetuating News Media Hegemony*

For Justice Stewart, this professionalized news media was “a conspiracy of the intellect,” organized with reason and objectivity to provide expert scrutiny of government, which in turn entitled it to exclusive protections under the Press Clause.<sup>137</sup> Professionalism in journalism was grounded in an editorial judgment that exhibited “independent choice of information and opinion of current value, directed to public need, and born of non-self-interested purposes.”<sup>138</sup> This editorial judgment was “geared toward what [the public] need[ed] to know, not simply what [the public] want[ed] to know.”<sup>139</sup> Moreover, for Professor Vincent Blasi, the purpose of elevating such news media in exclusive First Amendment protective status was to enable it to excite, incite, and civically mobilize the disengaged public that was often unaware and disinterested in their government’s functioning.<sup>140</sup> Indeed, average non-news media speakers were presumed to contribute less to civic discourse than the self-restrained and professionalized members of the news media.<sup>141</sup>

This Article asserts, however, that any approach to the Press Clause that grants protections and privileges to the news media alone reaffirms presumptive norms regarding the news media’s exclusive ability to enlighten the public in civic discourse. It perpetuates the notion that average individual non-news media speakers lack the ability to reason, to engage critically, and to produce end-products of similar or equal deliberative value as that presumed to be provided by the news media.<sup>142</sup> The Supreme Court has on numerous occasions acknowledged the role that the news media has served in disseminating deliberation-enhancing end-products.<sup>143</sup> It has never, however, gone so far as to explicitly hold that the news media does so exclusively. In *Cox Broadcasting Corp. v. Cohn*, the Court praised the role of the news media in acting as a proxy for the wider public and an educator on the functioning of government.<sup>144</sup> In addition, the Court has heralded the “great responsibility” of the news media in reporting fully and accurately on the proceedings of government because “[w]ithout the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally.”<sup>145</sup>

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137. Stewart, *supra* note 39, at 634.

138. Randall P. Bezanson, *The Developing Law of Editorial Judgment*, 78 NEB. L. REV. 754, 856 (1999).

139. Randall P. Bezanson, *The Atomization of the Newspaper: Technology, Economics and the Coming Transformation of Editorial Judgment About News*, 3 COMM. L. POL’Y 175, 176 (1998).

140. Blasi, *supra* note 55, at 521.

141. Nimmer, *supra* note 22, at 655–56 (noting the countervailing self-interests of nonmedia speakers).

142. Anderson, *supra* note 58, at 452 (“This vision of a journalistic elite liberated from self-interest and the constraints of owners, advertisers, and audiences is . . . an accurate, if bald, depiction of traditional ideals of journalism.”).

143. *Id.*; *see, e.g.*, *Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 160 n. 10 (1973) (Douglas, J., concurring) (“Regardless of the economic, political, or social policies which [newspapers and magazines] espouse, they contribute to the nation’s thought process.”).

144. 420 U.S. 469, 491–92 (1975) (“In the first place, in a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations.”).

145. *Cox Broad. Corp.*, 420 U.S. at 492. The Court further stated that “the commission of crime,

However, when asked directly whether, as a result of performing this deliberation-enhancing function, the news media should be granted special protection and privileges, the Court has expressly declined to do so.<sup>146</sup> Even in the cases relied on by Justice Stewart to support his reading of a selective application of the Press Clause, the Court determined that the ability to “enlighten” the public in civic discourse does not belong to the news media alone, but to any member of the public.<sup>147</sup> For example, the Court determined that the right to attend and report on trials was available to all.<sup>148</sup> The Court still noted the deliberation-enhancing value of the news media’s end-product, stating that they “serve[] to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice.”<sup>149</sup>

In addition, in *Branzburg v. Hayes*,<sup>150</sup> the Court ordered the institutional press before it to comply with grand jury subpoenas requesting disclosure of their confidential sources in connection with end-products.<sup>151</sup> In doing so, the Court rejected the institutional press’ request for a limited privilege under the Press Clause, which was needed, according to the press, to protect the process of producing the deliberation-enhancing end-products the Court had in previous cases acknowledged as valuable to a self-governing democracy.<sup>152</sup> Notwithstanding such prior acknowledgements, the Court ruled that the institutional press was not entitled to any more Press Clause rights than those granted to any other American citizen in the grand jury subpoena context regarding compliance with such subpoenas.<sup>153</sup> Notably though, it was not clear whether the Court denied the privilege as an exclusive privilege available to the news media *alone*, or as applied to news media and non-news media speakers alike.

Moreover, the Court expressly declined to clarify the definitional issues related to who could qualify as a journalist. It did, however, note that others besides members of the news media, specifically the “lone pamphleteer,” would theoretically be included in any such definition.<sup>154</sup> Presumably, because of these definitional issues, the Court also declined to advance a Press Clause function that incentivized the production and dissemination of deliberation-enhancing end-products. The Court did acknowledge the

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prosecutions resulting from it, and judicial proceedings arising from the prosecutions, however, are without question events of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of government.” *Id.*

146. *See, e.g., id.* at 491–92 (holding that the state may not impose sanctions on a reporter for the accurate publication of the identity of a rape victim).

147. *Id.* at 496 (holding that public records are available to everyone, including the media).

148. *Id.*

149. *Id.* at 492.

150. 408 U.S. 665 (1972).

151. *Branzburg*, 408 U.S. at 709.

152. *Id.* at 679–80.

153. *Id.* at 691. (finding that the Constitution does not exempt the press from appearing and providing information relevant to a grand jury proceeding).

154. *Id.* at 704. In still other cases brought before it in which the news media requested exclusive affirmative rights related to gathering news, the Court has consistently rejected these requests and affirmed that the news media is not a privileged institution with more rights than those granted to citizens who are not a member of such institution. *See, e.g., Pell v. Procunier*, 417 U.S. 817, 834 (1974) (finding that the Constitution does not require that the government give the press special access to information not otherwise shared with the public).

constitutional prescription guaranteeing freedoms of the press, stating that such freedoms would be eviscerated without some protections of newsgathering.<sup>155</sup> It provided no further elucidation however of what newsgathering meant, or to whom such protections should be granted, for engaging in such theoretically protected activity.

Although some contend that the Supreme Court's *Branzburg* decision left far more questions open than it answered,<sup>156</sup> the Court has expressly rejected the news media's elevation as arbiter of civic discourse. It has likewise rejected the presumption that the news media is solely capable of producing deliberation-enhancing end-products that guide, enlighten, and amplify civic discourse.<sup>157</sup> However, in the absence of definitive constitutional clarity regarding the Press Clause's protections and privileges, federal courts and administrative agencies, along with numerous state legislatures and courts, have granted exclusive privileges to the news media<sup>158</sup> that are not granted to average citizens. For example, federal circuit courts have interpreted *Branzburg* in various ways, with several circuits finding that *Branzburg* left room for a qualified reporter's privilege granted to journalists to protect the identities of their confidential sources in certain situations.<sup>159</sup> Several circuits have recognized a reporter's

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155. *Branzburg*, 408 U.S. at 681.

156. See, e.g., Erik Ugland, *The New Abridged Reporter's Privilege: Policies, Principles, and Pathological Perspectives*, 71 OHIO ST. L.J. 1, 2 n.1 (2010) (discussing Justice Powell's decisive concurrence in *Branzburg* and noting that the justice left open the possibility that the privilege could be recognized in other contexts).

157. *Branzburg*, 408 U.S. at 704–05 (“The informative function asserted by representatives of the organized press in the present cases is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists.”).

158. See Bezanson, *supra* note 138, at 759–61 (providing detail on federal and state courts' awarding of privileges and protections to the news media).

159. Stephanie J. Frazee, Note, *Bloggers as Reporters: An Effect-Based Approach to First Amendment Protections in a New Age of Information Dissemination*, 3 VAND. J. ENT. & TECH. L. 609, 615 (2006) (discussing cases that have found a qualified reporter's privilege). An absolute privilege grants complete protection for journalists, while a qualified privilege requires disclosure under certain specified conditions. *Id.* at 616. As described by Frazee, the First, Second, Third, Ninth, Tenth, and D.C. Circuits seem to recognize a broadly qualified reporter's privilege. *Id.* at 615–19; see, e.g., *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 918 n.8 (8th Cir. 1997) (“Some courts have interpreted *Branzburg* as establishing a qualified news reporter's privilege . . . . Although the Ninth Circuit in *Shoen* cited our opinion in *Cervantes* for support, we believe this question is an open one in this Circuit.”); *Schoen v. Schoen*, 5 F.3d 1289, 1292 (9th Cir. 1993) (noting that the broad reporter's privilege “is a recognition that society's interest in protecting the integrity of the newsgathering process . . . is an interest of sufficient social importance to justify . . . sacrifice of sources of facts needed in the administration of justice”); *Von Bulow v. Von Bulow*, 811 F.2d 136, 142 (2d Cir. 1987) (noting that a qualified privilege “may be proper in some circumstances because newsgathering was not without First Amendment protection”) (emphasis in original); *Zerilli v. Smith*, 656 F.2d 705, 713 (D.C. Cir. 1981) (establishing a balancing test for disclosure against a presumption of reporter privilege in a civil action); *Silkwood v. Kerr McGee Corp.*, 563 F. 2d 433, 437 (10th Cir. 1977) (recognizing that the reporter's privilege, while required to testify in a subpoena, may still “claim his privilege in relationship to particular questions which probe his sources”); *New York Times Co. v. Gonzales*, 382 F. Supp. 2d 457, 490 (S.D.N.Y. 2005) (recognizing and interpreting a qualified privilege for reporters in *Branzburg*). Other circuits have recognized a highly qualified reporter's privilege. Frazee, *supra*, at 619–20; see, e.g., *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 520 (4th Cir. 1999) (viewing a First Amendment interest in newsgathering as “highly qualified interests”); *United States v. Smith*, 135 F.3d 963, 969 (5th Cir. 1998) (declining to recognize a broad, qualified privilege in criminal cases, but rather finding that the First Amendment may protect the press when a

privilege—be it broad, highly qualified, or limited, which has turned on a number of balancing considerations, including a focus on function over institutional form<sup>160</sup>—an approach more in line with the proposal this Article endorses. Thirty-six states have currently enacted reporter’s shield laws with varying scopes of privileged protection of confidential source afforded to reporters.<sup>161</sup>

Despite the Supreme Court’s refusal to hold that the Press Clause protects or provides privileges to the news media only, federal and state jurisdictions that do grant the reporter’s privilege limit coverage to specific types of news media<sup>162</sup> that do not include the Internet,<sup>163</sup> or to individuals who are regularly or frequently employed by an established news media entity.<sup>164</sup> However the reasons such privilege is limited to the news media or to professional journalists and not to the occasional blogger or citizen journalist who publishes end-products online or individually, rather than in the news media as a professional member of the news media, are rarely explicated.<sup>165</sup> This Article contends that these laws’ selective approach in privileging the news media over non-news media speakers is grounded in presumptions related to the news media’s traditionally and socially construed gatekeeper role in civic discourse. Moreover, maintaining a selective approach perpetuates these presumptions, which are harder to sustain given the current commercialized nature of the news media industry and the contribution of non-news media bloggers and citizen journalists to civic discourse.<sup>166</sup>

Rather than addressing this disjuncture by providing clarity to the Press Clause function and its applicability, the Court shifted from analyzing subsequent cases involving the news media under the Press Clause alone.<sup>167</sup> The Court has instead analyzed such cases more broadly under the Speech Clause, with perhaps an empty

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“grand jury investigation is being conducted in good faith”); *U.S. v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986) (stating that the standard for a highly qualified privilege mandates that information can only be taken from a reporter if it is “highly relevant, necessary to the proper presentation of the case, and [is] unavailable from other sources”).

160. Frazee, *supra* note 159, at 615; *see also* O’Grady v. Superior Court, 44 Cal. Rptr. 3d 72, 77 (Ct. App. 2006) (holding that if the petitioner differs in structure from the traditional journalist or broadcaster, the distinctions are constitutionally immaterial).

161. States have enacted absolute, highly qualified, and limited reporter’s privilege, while still others have denied a reporter’s privilege in all situations or have not clarified a stance on the reporter’s shield. *See, e.g.,* Faucette, *supra* note 26, at 200–01 (stating that “states are at odds as to the extent of protection a shield law’s privilege should grant to members of the media. The privileges offered by state reporter’s shield laws can be placed into four general categories: (i) an absolute privilege; (ii) a qualified privilege; (iii) a blended privilege; and (iv) immunity from contempt”).

162. Mary-Rose Papandrea, *Citizen Journalism and the Reporter’s Privilege*, 91 MINN. L. REV. 515, 564–66 (2007) (explaining that Arizona, Alaska, Illinois, Louisiana, Kentucky, and Oklahoma all require journalists to be “regularly engaged” in gathering and disseminating news).

163. *Id.* at 564–65.

164. *Id.* at 566.

165. *See* Adam Cohen, *The Media That Need Citizens: The First Amendment and the Fifth Estate*, 85 S. CAL L. REV. 1, 4 (2011) (“As journalism moves forward, media law and policy are looking backward.”); *see also* Jack M. Balkin, *Free Speech and Press in the Digital Age: The Future of Expression in A Digital Age*, 36 PEPP. L. REV. 427 (2009) (describing the increasing importance and relevance of free speech and First Amendment issues in the Internet and new technology context).

166. Papandrea, *supra* note 162, at 590–91.

167. Anderson, *supra* note 88, at 502.



reference to the Press Clause without any distinction being made between the two, and with Speech Clause principles seemingly driving the decision.<sup>168</sup> In doing so, this Article contends that the deliberation-enhancing end-products that the Court has long acknowledged and extolled as essential to self-governance have been undermined and have given way to the democratic-legitimization function of the Speech Clause.

### III. SPEECH CLAUSE LEGITIMIZATION

#### A. *Legitimizing Expansive Modes of Expression and Civic Discourse*

First Amendment Speech Clause jurisprudence provides a robust and expansive cover of protection for a wide array of expression.<sup>169</sup> For Dean Robert Post, this expansive scope of protection is essential to sustaining America's self-governing democracy because it helps to legitimize the voices of American citizens in civic discourse.<sup>170</sup> With the exception of a few categories of speech such as obscenity, fighting words, and speech that incites imminent lawless action, the Speech Clause protects individual speech from arbitrary government regulation.<sup>171</sup> More specifically, any government regulations that impose restrictions based on content must survive the highest level of Supreme Court review—strict scrutiny—by being narrowly tailored to satisfy a compelling governmental interest.<sup>172</sup> In addition, regulations that discriminate based on viewpoint or subject matter are generally prohibited,<sup>173</sup> as are prior restraints on speech that restrict it in advance of its publication.<sup>174</sup>

Moreover, the expansive breadth of the Speech Clause has been interpreted to

168. *Id.*

169. Barry P. McDonald, *Government Regulation or Other "Abridgments" of Scientific Research: The Proper Scope of Judicial Review Under the First Amendment*, 54 EMORY L.J. 979, 1009 (2005) (Indeed, "all speech receives First Amendment protection unless it falls within certain narrow categories of expression that are of 'such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality'—such as incitement of imminent illegal conduct, intentional libel, obscenity, child pornography, fighting words, and true threats." (emphasis added) (footnote omitted) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942))).

170. POST, *supra* note 12, at 17 ("First Amendment protections for speech are necessary, although not sufficient, for ensuring democratic legitimacy. If persons are prevented from participating in the formation of public opinion, to the end of rendering public opinion responsive to their own point of view, they are not likely to regard themselves as potentially the authors of those government decisions that affect them.").

171. *Id.* In recent Supreme Court decisions, the Court was disinclined to extend the categories of speech left unprotected by the Speech Clause even if the expression at issue was claimed to have grown to offend more modern sensibilities and standards. *See, e.g.*, *Brown v. Ent. Merchs. Ass'n*, 131 S. Ct. 2729, 2738 (2011) (holding that a California law prohibiting the sale or rental of violent video games to minors was an unconstitutional content-based restriction under the First Amendment); *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010) (holding that a federal statute criminalizing the creation, sale, or possession of articles depicting animal cruelty was a presumptively invalid content-based restriction on the First Amendment).

172. *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009) ("[A]ny restriction based on the content of . . . speech must satisfy strict scrutiny, that is, the restriction must be narrowly tailored to serve a compelling government interest . . .").

173. *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 898 (2010) ("Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints.").

174. *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971).

protect symbolic speech and other nonverbal expressive conduct or action intended by the “speaker” to impart a particularized message to an audience,<sup>175</sup> such as picketing,<sup>176</sup> flag burning,<sup>177</sup> and orderly and peaceful protests.<sup>178</sup> Moreover, the Speech Clause has been interpreted to protect a speaker’s right to expression even in the face of intolerant audience members.<sup>179</sup> Underlying the basis of such extended protection is the Holmesian notion of the marketplace of ideas, which has become a theoretical commonplace in First Amendment Speech Clause jurisprudence<sup>180</sup> and legal scholarship.<sup>181</sup> Pursuant to such understanding, the goal of the Speech Clause is generally accepted as “advanc[ing] knowledge and the search for truth by fostering a free marketplace of ideas and an ‘uninhibited, robust, wide-open debate on public issues.’”<sup>182</sup> Theoretically, through the exchange of ideas and opinions in the marketplace of ideas, room is made for the discovery of truth and the advancement of knowledge on issues of concern to the public.<sup>183</sup> The Speech Clause is deemed then as protecting public discussion itself for the purpose of assisting in the formation of public opinion on matters of public concern.<sup>184</sup> However, some early First Amendment

175. *Spence v. Washington*, 418 U.S. 405, 410–411 (1974).

176. *Cox v. Louisiana*, 379 U.S. 559 (1965).

177. *Texas v. Johnson*, 491 U.S. 397 (1989).

178. *See Brown v. Louisiana*, 383 U.S. 141, 142 (1966) (holding that peaceful protests of library segregation policies were protected under the First Amendment); *Garner v. Louisiana*, 368 U.S. 157, 201–01 (1961) (holding that the arrests made against those protesting the segregation policies of business establishments violated due process rights); *see also* HANNA ARENDT, *CRISES OF THE REPUBLIC* 69–102 (1972) (discussing civil disobedience as a means in America’s tradition of expressing public opinion and thereby influencing public opinion formation).

179. *Schenck v. Pro-Choice Network*, 519 U.S. 357, 373 (1997) (establishing that in public debate and discussion, citizens must tolerate expression of opinion with which they might disagree or deem personally offensive).

180. In *Abrams v. United States*, Justice Holmes first articulated the marketplace of ideas concept. 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). The Supreme Court has since repeatedly referenced the marketplace of ideas notion. *See, e.g.,* *Davenport v. Wash. Educ. Ass’n*, 551 U.S. 177, 188–89 (2007) (stating that the general prohibition of speech based on its content may drive those viewpoints from the marketplace of ideas); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) (finding that the purpose of the First Amendment is to protect the marketplace of ideas in which truth prevails).

181. POST, *supra* note 12, at x–xi.

182. Gloria Franke, *The Right of Publicity vs. The First Amendment: Will One Test Ever Capture the Starring Role?*, 79 S. CAL. L. REV. 945, 958 (2006); *see also* S. Brannon Latimer, *Can Felon Disenfranchisement Survive Under Modern Conceptions of Voting Rights?: Political Philosophy, State Interests, and Scholarly Scorn*, 59 SMU L. REV. 1841, 1862 (2006) (stating that a primary purpose of the First Amendment and the marketplace of ideas doctrine is to advance knowledge and truth).

183. *See* MEIKLEJOHN, *supra* note 16, at 26 (noting that despite general jurisprudential acceptance of Holmes’ marketplace of ideas theory, Holmes and his marketplace have received considerable criticism because “the marketplace of ideas does not offer the prospect of a just distribution of the opportunity to persuade. It does not offer the prospect of wisdom though mass deliberation, nor that of meaningful political participation for all interested citizens”).

184. POST, *supra* note 12, at 18–19. Indeed, “freedom of speech . . . embraces at the least the liberty to discuss publicly and truthfully all matters of public concern. . . . Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.” *Thornhill v. Alabama*, 310 U.S. 88, 101–02 (1940). The goal of protecting various modes of speech ultimately led to the granting of Speech Clause protections to corporate speech as well. *See First Nat’l Bank v. Belotti*, 435 U.S. 765, 790 (1978) (“To be sure,

scholars advocated for a narrow scope of Speech Clause protection for a certain type of public discussion, namely core political expression, and in so doing arguably elevated that category of expression over all others.<sup>185</sup>

*B. Legitimizing Hegemony in Civic Discourse: Core Speech and Reasoned Debate Alone*

For early First Amendment theorists, the essence of a self-governing democracy was connected directly to the principle of majoritarianism as expressed through the vote.<sup>186</sup> Pursuant to this theory, Speech Clause protections therefore only required the protection of expression related to core political governance.<sup>187</sup> For Robert Bork, “[t]he category of protected speech should consist of speech concerned with governmental behavior . . . . Explicitly political speech is speech about how we are governed, and the category therefore includes a wide range of evaluation, criticism, electioneering and propaganda.”<sup>188</sup>

Core political expression was therefore deemed the exclusive, or at the very least primary, target for Speech Clause protection because it was deemed necessary for the formation of public opinion and deliberation on issues related to voting.<sup>189</sup> Such deliberation authenticated the vote while simultaneously holding those in political power accountable.<sup>190</sup> This elevation of explicitly core political speech over broader topics of expression in public deliberation is similar to German philosopher Jürgen

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corporate advertising may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it: The Constitution ‘protects expression which is eloquent no less than that which is unconvincing.’” (quoting *Kingsley Int’l Pictures Corp. v. Regents of Univ. of State of N.Y.*, 360 U.S. 684, 689 (1959)).

185. See, e.g., OWEN FISS, *LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER* 146 (1996) (arguing that “democratically determined speech” should be more vigorously protected than other types of speech). For a fuller discussion of early First Amendment scholarship, see Robert Post, *Equality and Autonomy in First Amendment Jurisprudence*, 95 MICH. L. REV. 1517 (1997).

186. POST, *supra* note 12, at 15. In discussing the level of public access to media necessary in a deliberative democracy, Edwin Baker also succinctly summarized the various theories of democracy, which included elite and pluralist theories of democracy. C. Edwin Baker, *The Media that Citizens Need*, 147 U. PA. L. REV. 317, 343–48 (1998). He concluded that pluralist democratic values turn on a robust civic discourse among citizens, and that an accessible media is necessary to achieve this model of democracy. *Id.* at 343–44.

187. See Lawrence Solum, *Freedom of Communicative Action: A Theory of the First Amendment Freedom of Speech*, 83 NW. U. L. REV. 54, 73 (1989) (“Meiklejohn argues . . . absolute protection for speech relevant to political choices, but no protection for speech which is not connected to politics.”).

188. Bork, *supra* note 16, at 27–28. In addition, Alexander Meiklejohn famously proclaimed that “[w]hat is essential is not that everyone shall speak, but that everything worth saying shall be said.” MEIKLEJOHN, *supra* note 16, at 26.

189. See, e.g., MEIKLEJOHN, *supra* note 16, at 26, 55 (asserting that “[a]s the self-governing community seeks, by method of voting, to gain wisdom in action, it can find it only in the minds of its individual citizens”).

190. To Judge Learned Hand, “public opinion . . . is the final source of government in a democratic state.” *Masses Publ’g Co. v. Patten*, 244 F. 535, 540 (S.D.N.Y.), *rev’d*, 246 F. 24 (2d Cir. 1917). While to James Madison, “[p]ublic opinion . . . is the real sovereign” in a self governing democracy. James Madison, *Public Opinion*, NAT’L GAZETTE, Dec. 19, 1791, reprinted in 14 JAMES MADISON, THE PAPERS OF JAMES MADISON 170, 170 (Robert Al Rutland et al. eds., 1977); see also FRANCIS LIEBER, ON CIVIL LIBERTY AND SELF-GOVERNMENT 128 (3d ed. 1888) (explaining that the purpose of publicity is to safeguard the “great process by which public opinion passes over into public will, which is legislation”).

Habermas's seeming elevation of reasoned debate over other modes of expression in his theorized "public sphere."<sup>191</sup> For Habermas, reasoned debate and deliberation were arguably above all other forms of popular expression in the public sphere.<sup>192</sup> He essentially elevated it as the *only* method of communicative expression capable of formulating public opinion and, in turn, of holding ruling authority accountable.<sup>193</sup> He further contended that the public sphere was a domain where private individuals sought out information for the purpose of self-education and of cultivating a collective public voice on issues important to them.<sup>194</sup>

Habermas's theorized public sphere was not premised on a specific physical space per se, but was envisioned more as a "domain of social life in which such a thing as public opinion [could] be formed."<sup>195</sup> In this theoretical space, all had access, with participants bracketing differences, social inequalities, and even private interests for the sake of the common good.<sup>196</sup> The common good was to be determined by consensus of the participants, reached by reasoned, truthful, and enlightened deliberation, a process considered to be representative of the ideal speech scenario.<sup>197</sup> Through this process, participants, who started out with views based on their individual experiences and self-interests, experienced a "'self-revelation,' whereby private needs were brought to consciousness and adjudicated through rational dialogue."<sup>198</sup> To engage in this self-

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191. Habermas introduced his vision of the public sphere in his seminal book, *The Structural Transformation of the Public Sphere*, where he examined the rise and decline of a specific form of the public sphere—the liberal model of the bourgeois public sphere—that developed in Britain, France, and Germany in the eighteenth and early nineteenth centuries. See generally JÜRGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY* (T. Burger & F. Lawrence trans., 1989).

192. Habermas, *supra* note 16, at 423–25.

193. *Id.* at 423–24.

194. See Ken Hirschkop, *Justice and Drama: On Bakhtin as a Complement to Habermas*, in *AFTER HABERMAS: NEW PERSPECTIVES ON THE PUBLIC SPHERE* 49, 50 (Nick Crossley & John Michael Roberts eds., 2004). See generally JÜRGEN HABERMAS, *JÜRGEN HABERMAS ON SOCIETY AND POLITICS: A READER* (Steven Seidman ed., 1989).

195. Maria Simone & Jan Fernback, *Invisible Hands or Public Spheres? Theoretical Foundations for U.S. Broadcast Policy*, 11 *COMM. L. & POL'Y* 287, 291 (2006) (quoting HABERMAS, *supra* note 194, at 231) ("For a society founded on a principle of self-government, the development of public opinion is vital to its health. Said differently, self-government is only an illusion if the powerful are not held accountable to public opinion.").

196. See MICHAEL WARNER, *PUBLICS AND COUNTER PUBLICS* 70 (2002) ("[A] public can only produce a sense of belonging and activity if it is self-organized through discourse rather than through an external framework. This is why a distortion or blockage in access to a public can be so grave, leading people to feel powerless and frustrated. Externally organized frameworks of activity, such as voting, are and are perceived to be poor substitutes."); Folami, *Deliberative Democracy*, *supra* note 16, at 158–59 ("The formal public sphere was to operate separate and apart from the state and the market, where inequities abounded due to ethnic and socioeconomic differences. In operating separately and independently from the market and state, it was housed in the 'lifeworld'—which was situated in civil society—and was to be protected at all costs from being colonized by the systems world that housed both the market and the state—two mutually exclusive spheres in their own right." (footnotes omitted)).

197. Michael E. Gardiner, *Wild Publics and Grotesque Symposiums: Habermas and Bakhtin on Dialogue, Everyday Life and the Public Sphere*, in *AFTER HABERMAS: NEW PERSPECTIVES ON THE PUBLIC SPHERE* 28, 29 (Nick Crossley & John Michael Roberts eds., 2004).

198. *Id.* at 35 (citing 2 JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION* 330 (Thomas

bracketing and self-revelation was to engage in a communicative speech act geared toward deliberation and reaching a common consensus in public opinion.<sup>199</sup> To engage, however, in manipulative speech was to engage in a strategic speech act with ulterior motives other than that of reaching a common consensus—motives antithetical to the ideal speech scenario and, in turn, to deliberation in the public sphere.<sup>200</sup>

C. *Legitimizing Expansive Topics of Expression: Opinion and Other “Low Value Speech”*

Many scholars, enticed by Habermas’s public sphere theory, have found his historical reading of the bourgeois model of the public sphere problematic due to inherent ideological contradictions.<sup>201</sup> They contend that the bourgeois model of the public sphere upon which Habermas based his theory was anything but open and accessible to all, with private interests and inequalities of status bracketed.<sup>202</sup> Moreover, they contend that by idealizing the bourgeois public sphere and its definition of civic participation, Habermas failed to appreciate the true repressive nature of this sphere.<sup>203</sup> In doing so, he incorrectly situated it as *the* public—ignoring the existence of alternative nonbourgeois publics, and their alternate modes of engaging in civic discourse.<sup>204</sup>

Nancy Fraser, for example, highlights the many ways in which Habermas’s bourgeois public sphere and its cultural hegemony were challenged by what she calls “subaltern counterpublics” and “counterdiscourses.”<sup>205</sup> As a result, many deliberative theorists have envisioned a wider understanding of deliberative democracy that extends beyond reasoned debate and exchange.<sup>206</sup> Such understandings therefore encompass the

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McCarthy trans., 1987)).

199. Folami, *Deliberative Democracy*, *supra* note 16, at 158–59.

200. *Id.*

201. See Nancy Fraser, *Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy*, in HABERMAS AND THE PUBLIC SPHERE 109, 109–42 (Craig Calhoun ed. 1992) (arguing Habermas’ analysis needs reconstruction to be capable of theorizing limits on existing democracy); Mary P. Ryan, *Gender and Public Access: Women’s Politics in Nineteenth-Century America*, in HABERMAS AND THE PUBLIC SPHERE 259, 259–88 (Craig Calhoun ed. 1992) (arguing women’s place in society not advanced by changes in public sphere).

202. See Gardiner, *supra* note 197, at 29. In rereading eighteenth century European history, such theorists have revealed that the period’s norms excluded women, people of color, and unpropertied men from the bourgeois public sphere that Habermas idealized. Fraser, *supra* note 201, at 115–18.

203. Ryan, *supra* note 201, at 284. Scholars have revealed that “contemporaneous with the bourgeois public there arose a host of competing counterpublics, including nationalist publics, popular peasant publics, elite women’s publics, and working-class publics,” which emerged as popular movements that resonated with the same democratic fervor as the bourgeois public sphere and manifested their own distinctive cultures, norms, and desires. Fraser, *supra* note 201, at 116.

204. See Ryan, *supra* note 201, at 283–284 (listing working men, immigrants, African Americans, and women as groups who made way into public society from places of social injustice).

205. Fraser, *supra* note 201, at 123. Subaltern publics were parallel discursive arenas where members of subordinate social groups invented and circulated counterdiscourses. *Id.* These counterdiscourses formulated oppositional interpretations of their identities, interests, and needs, which in turn challenged the hegemony of the mainstream dominant public sphere. *Id.*

206. See Gardiner, *supra* note 197, at 44 (noting that such a sphere is as much of a place for fervent contestation as it is one for reasoned deliberation).

many subverted ways in which individuals, who are marginalized by societal inequalities, might “deliberate” or express opinion in the public sphere.<sup>207</sup> These alternate forms of expression might differ substantially from that required in Habermas’s vision of the public sphere but still serve as “a crucial resource through which the popular masses can retain a degree of autonomy.”<sup>208</sup>

Similar to the challenges forged against Habermas’s limited vision of the public sphere and civic deliberation, early theories of the Speech Clause that advocate limiting its coverage to core political speech alone have also been challenged.<sup>209</sup> These theories have been attacked as being the result of a limited understanding of democracy—one that focuses solely on majoritarianism and elections.<sup>210</sup> To focus on majoritarianism and elections alone is to focus solely on the techniques of, and mechanisms for, decision making in a self-governing democracy rather than on the larger participatory ideal of self-governance itself.<sup>211</sup> To these challengers, the ideal of America’s self-governing democracy is to ensure that persons who are subject to the laws of such democracy have the opportunity to influence, in varying manners and topics of expression, the creation of such law.<sup>212</sup>

Therefore, because it is “impossible to specify in advance” what elements of “public opinion” will ultimately sway and shape political action,<sup>213</sup> Speech Clause coverage should extend to all efforts to influence public opinion formulated in the public spheres of civic discourse.<sup>214</sup> Indeed, expression within the public sphere, regardless of its original purpose, may influence public opinion and government policies. For example, “[a] novel like *The Jungle* might inspire the reform of government inspection procedures for food; a movie like *Missing* might encourage a re-examination of foreign policy; [or] the sad tale of Charlie Sheen might instigate a re-examination of public health policies toward the mentally disturbed.”<sup>215</sup> Such a broad and expansive reading of the Speech Clause ensures that the very voice of the public is

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207. See *id.* at 43 (arguing that Habermas’s public sphere theory still contains a level of elitist idealism “because it supposes that material conflicts of a socio-economic nature can be effectively transcended or at least effectively sublimated into a rational discourse that can suspend ingrained power differentials”).

208. *Id.* at 39.

209. See, e.g., POST, *supra* note 12, at 17 (arguing literary, political, artistic, and scientific expression all deserve protection).

210. *Id.* (“These disparities between entrenched First Amendment doctrine and the conclusions of early democracy theorists were caused by the fact that the latter possessed a very inadequate understanding of the nature of democracy. They imagined that the basic principle of American democracy was majoritarianism, as expressed through elections.”).

211. *Id.*; WARNER, *supra* note 196, at 70.

212. POST, *supra* note 12, at 17.

213. *Id.* at 19.

214. *Id.*; see also *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (“Those who won our independence . . . believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.”).

215. POST, *supra* note 12, at 19.

legitimized and granted the possibility of influencing such public opinion.<sup>216</sup> Such expression need not first conform to a specific topic (core political speech) or presumably to a manner of civic discourse (reasoned debate) as required by Habermas or the hegemonic professionalism norms of the news media.<sup>217</sup>

The Supreme Court has also never explicitly adopted the narrow reading of the Speech Clause advanced by early First Amendment theorists.<sup>218</sup> Instead, it has extended such Speech Clause protections to literary, artistic, and other modes and types of expression in civic discourse that are not explicitly related to political advocacy or to self-governance.<sup>219</sup> The Court has stressed: “our cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters . . . is not entitled to full First Amendment protection.”<sup>220</sup> The purpose of the First Amendment then can be read as protecting “the open processes by which public opinion is constantly formed and reformed.”<sup>221</sup>

Some have categorized the Speech Clause’s interpretive breadth as welcomed constitutional overprotection.<sup>222</sup> Pursuant to such overprotection, the Supreme Court generally disfavors the elevation of some ideas and opinions over others.<sup>223</sup> Indeed, ideas themselves are protected as the Court has determined that no idea is false.<sup>224</sup> Pure opinion, meaning an expression of a subjective view or idea, is therefore protected by the First Amendment.<sup>225</sup> In addition, courts have carved out a communicative

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216. *Id.* (explaining that the First Amendment protects the media’s ability to communicate ideas which serve to define and sustain the public sphere). Dean Post states, however, that “[d]emocracy does not require that government be subordinated to any particular temporary manifestation of public opinion. It requires rather that public opinion remain continuously open to revision.” *Id.* at 20. Elections are the institutional mechanism by which this accountability is sustained. *Id.*

217. *See id.* (explaining that it is not possible to determine in advance what aspects of speech are political).

218. *See, e.g.,* *United States v. Alvarez*, 132 S. Ct. 2537, 2540 (2012) (providing that even false speech receives First Amendment protection).

219. *Miller v. California*, 413 U.S. 15, 22–23 (1973) (noting that the court must remain vigilant against infringements against freedom of speech); *see also Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (holding student conduct while at school to be protected under free speech clause).

220. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 231 (1977). For Dean Post, the First Amendment should attend “to media for the communication of ideas, like newspapers, magazines, the Internet, or cinema, which are the primary vehicles for the circulation of the texts that define and sustain the public sphere.” POST, *supra* note 12, at 20.

221. POST, *supra* note 12, at 21.

222. West, *supra* note 19, at 1030–31.

223. *See Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 898 (2010) (noting the Court’s disapproval of viewpoint-based discrimination); *see also FCC v. Pacifica Found.*, 438 U.S. 726, 745–46 (1978) (describing the First Amendment as idea neutral). *But see* West, *supra* note 19, at 1050–51 (noting that certain obscenities, fighting words, and commercial speech receive lesser or no protection).

224. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 51 (1988).

225. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20–21 (1990) (providing that an opinion receives full constitutional protection where it does not contain a provably false and defamatory factual connotation); *see also Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1227 (1993) (“A statement of fact is not shielded from an action for defamation by being prefaced with the words ‘in my opinion,’ but if it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable.” (citing *Milkovich*, 497 U.S. at 17–21)).

“breathing space” that is so expansive that it insulates expression that could in some instances lead to physical harm,<sup>226</sup> emotional harm,<sup>227</sup> or invasion of privacy.<sup>228</sup>

Accordingly, with an interpretive goal of legitimizing speech, the Speech Clause’s overprotection furthers America’s national and profound commitment to a robust civic discourse.<sup>229</sup> It therefore brings within its protective confines the maximum number of speakers and ideas.<sup>230</sup> It also addresses the concern that “[i]f a speaker is silenced or a message censored, the idea is removed completely from our public discourse. This can lead to serious consequences, including the ‘standardization of ideas either by legislatures, courts, or dominant political or community groups.’”<sup>231</sup> Moreover, an overprotective Speech Clause protects what some might deem as low value speech or “fringe” speakers in civic discourse as well.<sup>232</sup> It also prevents against the slippery slope into the regulation of core political speech itself, and against regulations requiring a speaker to speak or not speak or to be told what to say or not say.<sup>233</sup>

It is within this context of a firmly developed and expansive Speech Clause jurisprudence that the Court turned to analyzing cases involving the news media.<sup>234</sup> The news media, like other corporations, has been granted similar First Amendment rights as individuals.<sup>235</sup> It has therefore been granted the same democratically legitimizing speech protections under the Speech Clause as every other citizen speaker with no requirements of it—like other non-news media speakers—to produce nonpartisan, critical, balanced, knowledge-enhancing, verifiably true, or transparent end-products.<sup>236</sup>

For example, in *Miami Herald Publishing Co. v. Tornillo*,<sup>237</sup> the Court

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226. *E.g.*, *Braun v. Soldier of Fortune Magazine, Inc.*, 968 F.2d 1110, 1121 (11th Cir. 1992).

227. *E.g.*, *Hustler Magazine*, 485 U.S. at 46.

228. *See, e.g.*, *Fla. Star v. B.J.F.*, 491 U.S. 524, 526 (1989) (holding that the First Amendment protects a newspaper from being held civilly liable for publishing the name of a rape victim, which was obtained from a publically available police report).

229. *See, e.g.*, *Cohen v. California*, 403 U.S. 15, 24 (1971) (“The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.”).

230. *See, e.g.*, *United States v. Alvarez*, 132 S. Ct. 2537, 2551 (2012) (holding the First Amendment protects desirable and undesirable speech all the same).

231. *West*, *supra* note 19, at 1059 (quoting *Terminiello v. City of Chi.*, 337 U.S. 1, 4–5 (1949)).

232. *See, e.g., id.* at 1030 (stating that free speech enjoys “constitutional overprotection” that includes “fringe” speech).

233. *See, e.g., Alvarez*, 132 S. Ct. at 2540 (discussing that permitting the government to criminalize false statements about holding a military honor under the Stolen Valor Act “would endorse government authority to compile a list of subjects about which false statements are punishable,” which would be unacceptable under the First Amendment).

234. *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 753 (1985) (analyzing the rights of media and nonmedia defendants in the defamation context seemingly relying primarily on apparent Speech Clause considerations).

235. *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978).

236. *See Lange*, *supra* note 30, at 108 (noting that First Amendment does not require institutional press to maintain balance, objectivity, or fairness).

237. 418 U.S. 241, 256 (1974).



acknowledged that the First Amendment rights of the institutional press before it were not premised on it acting responsibly in publishing its end-products.<sup>238</sup> Although the Court analyzed this right to reply access case under the Press Clause only, the Court's analysis was seemingly a Speech Clause one. Specifically, the state was prohibited from forcing the institutional press to publish the reply of a local politician to criticisms printed against him in the paper.<sup>239</sup> Had the institutional press been forced to print the reply, it in essence would have been told what to say,<sup>240</sup> in opposition presumably to the Speech Clause's legitimizing function.<sup>241</sup>

The legitimizing function of the Speech Clause guards against this imposition by guaranteeing every citizen a generally unobstructed right to take part in civic discourse via their chosen expressive topics, modes, styles, and formats.<sup>242</sup> Speech Clause prohibitions against unconstitutional content-based regulation and discriminatory treatment of end-products are therefore essential to equalizing and legitimizing voices in the public sphere—be it end-products of news media or non-news media speakers. Such legitimization has not likewise resulted, however, in the advancement of democratic competence.<sup>243</sup> This Article asserts that civic discourse in America has itself become metaphorically defamed and littered with unsubstantiated opinion, rumor, and manipulative rhetoric.<sup>244</sup> Indeed, the very confidence in government and deliberation the First Amendment has always aimed to protect and guard is being challenged.<sup>245</sup> Rather than advocating for less protection or a more discriminating scope and application of the Speech Clause (as did early First Amendment theorists), this Article instead turns to the Press Clause and proposes a new (or reinvigorated) way of thinking about that Clause and its utility within the larger constitutional structure. Specifically, this Article calls upon the Press Clause to aid in the production of the knowledge-enhancing end-products and exchanges that are required to advance democratic competence.

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238. *Miami Herald*, 418 U.S. at 256 (“[A]ny such . . . compulsion to publish that which ‘reason’ tells them should not be published is unconstitutional. A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated.” (internal quotation marks omitted)).

239. *Id.* at 258.

240. See POST, *supra* note 12, at 21–22 (discussing “why the First Amendment has been interpreted to prohibit the state from compelling persons to speak within public discourse, even to the extent of . . . disclos[ing] true and material facts”). *But see* *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 385 (1969) (holding that broadcasters had an affirmative duty to make air time available to differing voices because of different considerations related to the public interest obligations of broadcasters).

241. See *Riley v. Nat’l Fed’n of the Blind*, 487 U.S. 781, 790–91 (“The First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it.”).

242. POST, *supra* note 12, at 23.

243. *Id.* at 34 (“It is plain that within public discourse the value of democratic legitimation enjoys lexical priority.”).

244. LE CHEMINANT & PARRISH, *supra* note 1, at 157.

245. *Dun & Bradstreet, Inc., v. Greenmoss Builders, Inc.*, 472 U.S. 749, 767 (1985); see also Folami, *supra* note 3, at 493 (discussing the “downward spiral of American civic literacy”).

## IV. DEMOCRATIC COMPETENCE AND THE PRESS CLAUSE

A. *The Value of the Press Clause and Newsgathering to Democratic Competence and Civic Discourse*

It has long been acknowledged that where citizens are granted the ability to govern themselves in a self-governing democracy, adequate (and presumably factually true) information about the government and its elected officials is of transcendent importance.<sup>246</sup> Early on in American civic history, the dissemination of information to the public regarding government functioning was deemed a predicate to a self-governing democracy.<sup>247</sup> A systemic press function that is structured to enlighten the public has been deemed a “precondition” for a well-functioning democracy.<sup>248</sup> Indeed, James Madison called a press infrastructure that failed to facilitate the dissemination of information that enlightened and informed the public citizenry as a farce, tragedy, or both to democracy.<sup>249</sup> Moreover, John Dewey determined that “[w]hatever obstruct[ed] and restrict[ed] publicity, limit[ed] and . . . distort[ed] *thinking* on social affairs.”<sup>250</sup> Furthermore, “[t]he welfare of the community require[d] that those who decide issues shall *understand* them,”<sup>251</sup> and that the First Amendment be directed against the “mutilation of the *thinking process* of the community.”<sup>252</sup>

According to Dean Post, protecting and preserving this thinking process *is* protecting democratic competence, which he argues requires the advancement of knowledge (versus mere opinion).<sup>253</sup> He defines democratic competence as the “cognitive empowerment of persons within public discourse.”<sup>254</sup> It is akin to “intelligent self-governance.”<sup>255</sup> It, like democratic legitimization of speakers and their varied end-products, is essential to advancing a well-functioning deliberative democracy.<sup>256</sup> Moreover, while democratic legitimization ensures protective space for a wide array of end-products, democratic competence requires at a minimum the

246. See, e.g., *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 51 (1988) (“The sort of robust political debate encouraged by the First Amendment is bound to produce speech that is critical of those who hold public office or those public figures who are ‘intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.’” (quoting *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring))).

247. See James Madison, *Letter to W.T. Barry (Aug. 4, 1822)*, in 9 THE WRITINGS OF JAMES MADISON 103, 103–09 (Gaillard Hunt ed., 1910) (1822) (arguing that the nation owed it to itself to have educated citizenry as liberty and learning are intertwined).

248. Yochai Benkler, *A Free Irresponsible Press: Wikileaks and the Battle over the Soul of the Networked Fourth Estate*, 46 HARV. C.R.-C.L. L. REV. 311, 361 (2011).

249. Madison, *supra* note 247, at 103–09; see also *Houchins v. KQED, Inc.*, 438 U.S. 1, 31–32 (1978) (finding that the press protections granted by the First Amendment serve to ensure that the public is fully informed on matters of public interest and importance).

250. JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS* 167 (1927) (emphasis added).

251. MEIKLEJOHN, *supra* note 16, at 26 (emphasis added).

252. *Id.* (emphasis omitted).

253. POST, *supra* note 12, at 33–34.

254. *Id.* at 34.

255. *Id.*

256. *Id.*

production and dissemination of knowledge-enhancing end-products in particular.<sup>257</sup>

Given the indiscriminate and expansive scope of the Speech Clause, its legitimization of public opinion often includes an embrace of individuals' subjective perspectives and opinions,<sup>258</sup> which often however "lack[s] the indicia of reliability that define knowledge."<sup>259</sup> Therefore, for Post, this predominate approach to protecting end-products under the Speech Clause has inhibited the advancement of knowledge—something he asserts cannot thrive or "exist except where there is systematic, thorough, and well-equipped search and record."<sup>260</sup> Traditionally, as discussed in Section II, the news media was a vehicle through which the public received such researched and vetted information.<sup>261</sup> Indeed, the news media became a surrogate for the public,<sup>262</sup> and in turn "a powerful antidote to any abuses of power by governmental officials."<sup>263</sup> It performed a similar function against private actors,<sup>264</sup> who feared exposure in the news media, which had a powerful chilling effect on unlawful or unethical private or public behavior.<sup>265</sup>

To facilitate the continued dissemination of such information, the Supreme Court therefore opined that newsgathering must be protected,<sup>266</sup> and deemed it as important

257. *Id.* at 33 ("[A] state that can manipulate the production of disciplinary knowledge [and democratic competence] can set the terms of its own legitimacy. . . . It can make a mockery of the obligation of a democratic government to be responsive to the views of its citizens.").

258. *Id.* at 28. Dean Post contends that "[t]he First Amendment guarantees the free formation of public opinion. But public opinion is, in the end, merely opinion." *Id.* at 27.

259. *Id.* at 28. Expressions "that describe present or past conditions capable of being known through sense impressions" have been generally characterized as factual statements. *Ollman v. Evans*, 750 F.2d 970, 978 (D.C. Cir. 1984). Expressions of "a subjective view, an interpretation, a theory, conjecture, or surmise" have been classified as opinion. *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1227 (7th Cir. 1993); *see also Gray v. St. Martin's Press, Inc.*, 221 F.3d 243, 248 (1st Cir. 2000) (holding that opinion "involves expressions of personal judgment, especially as the judgments become more vague and subjective in character").

260. POST, *supra* note 12, at 32 (quoting DEWEY, *supra* note 250, at 179).

261. *See Richmond Newspapers, Inc. v. Va.*, 448 U.S. 555, 572–73 (1980) (suggesting that people acquired information about trials chiefly through the news media rather than through firsthand observation or word of mouth); David F. Freedman, Note, *Press Passes and Trespasses: Newsgathering on Private Property*, 84 COLUM. L. REV. 1298, 1314–18 (1984) (discussing the need for a "free and unrestrained press" because it ensures that the public can hold their officials accountable); *cf.* Blake D. Morant, *Resolving the Dilemma of the Televised Fair Trial: Social Facilitation and the Intuitive Effects of Television*, 8 VA. J. SOC. POL'Y & L. 329, 348–67 (2001) (discussing television access to high-profile trials).

262. It is not feasible for individuals to personally educate themselves on every issue of importance, therefore, the public came to rely instead on the news media. *See infra* Part IV.A for a further discussion of the news media's role in democratic information gathering.

263. *Mills v. Alabama*, 384 U.S. 214, 219 (1966).

264. *Baker*, *supra* note 186, at 325.

265. W. Lance Bennett & William Serrin, *The Watchdog Role of the Press*, in *MEDIA POWER IN POLITICS* 395, 397 (Doris A. Graber ed., 6th ed. 2011).

266. *See, e.g., Branzburg v. Hayes*, 408 U.S. 665, 708 (1972) ("[N]ews gathering is not without its First Amendment protections, and grand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment."); *see also* John K. Edwards, *Should There Be Journalist's Privilege Against Newsgathering Liability?*, *COMM. LAW.*, Spring 2000, at 8, 12 (explaining a line of Supreme Court cases which confirm that newsgathering activity is entitled to First Amendment protection).

as the right to publish the end-product itself.<sup>267</sup> Although the Court stopped short of granting additional and exclusive privileges to the news media in furtherance of such valued newsgathering processes, the Court has determined that constitutional protection is afforded to lawful newsgathering activities.<sup>268</sup> In *Houchins v. KQED, Inc.*,<sup>269</sup> the Court explicitly affirmed that there is an “undoubted right to gather news ‘from any source by means within law.’”<sup>270</sup> Professor Sonja West’s recent article, *Awakening the Press Clause*, also does a convincing job of advancing reasons for adopting a Press Clause function that protects the newsgathering process.<sup>271</sup> West’s piece identifies, as does this Article, a pressing need for reconsidering the meaning of the Press Clause. She argues that current definitions of “the press” in the federal and state jurisdictions are underinclusive and have problematically led to the doling out of exclusive privileges to the news media.<sup>272</sup> She also points out that the Supreme Court’s current definitional approach to the “press” is overinclusive in that it covers all speakers and their end-products—a function the Speech Clause already serves.<sup>273</sup> Indeed, for Professor West, the Court’s approach to the Press Clause “robs us of a functioning Press Clause”<sup>274</sup> because the Court’s interpretation of that Clause is essentially folded into its Speech Clause jurisprudence. Professor West therefore offers a functional definition of the Press Clause that is separate and distinct from the Speech Clause in that it provides needed protection for certain newsgathering activity.<sup>275</sup>

For Professor West, the newsgathering process is increasingly under attack given the liabilities that can attach to minor torts—such as minor deception, breach of loyalty, or technical trespass—committed during the process of newsgathering.<sup>276</sup> Professor West surmises that the “right to publish [end-products] is indisputably strong” given the expansive scope of the Speech Clause.<sup>277</sup> She concludes, however, that when the courts turn to protecting conduct engaged in as part of the newsgathering process in gathering the information for such end-products, First Amendment protection “seems to disappear.”<sup>278</sup> The Press Clause must therefore, according to Professor West, be

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267. *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 103–04 (1979).

268. *Id.*

269. 438 U.S. 1, 11 (1978).

270. *Houchins*, 438 U.S. at 11. In addition, although it specifically referenced the news media, the Seventh Circuit determined that the news media “cannot be made to rely solely upon the sufferance of government to supply it with information” because the First Amendment protects the right of journalists to lawfully obtain information using routine reporting techniques. *Smith*, 443 U.S. at 104. *See, e.g.,* *Desnick v. ABC, Inc.*, 44 F.3d 1345, 1355 (7th Cir. 1995) (holding that the use of test patients with concealed cameras was not trespass, infringement upon the right to privacy, or illegal wiretapping).

271. West, *supra* note 19, at 1045.

272. *Id.* at 1066–77 (discussing several protections and privileges granted to “the press” as defined by news media circulation and publication in traditional news formats or by employment with the news media).

273. *Id.* at 1040–41. Professor West argues that because of the Speech Clause’s broad protection of end-products that result from the newsgathering process, the Press Clause should be called upon to protect the newsgathering process itself, including reporter notes and other collected raw material. *Id.*

274. *Id.* at 1041.

275. *Id.* at 1042–46.

276. *Id.*

277. *Id.* at 1042.

278. *Id.*

concerned then with protecting conduct related to obtaining information necessary for creating and publishing the news.<sup>279</sup> While the Court held that the First Amendment does not provide an “unrestrained right to gather information,”<sup>280</sup> Professor West asserts, and rightly so, that there is value in a Press Clause that provides at least some level of protection for newsgathering activity.<sup>281</sup> In addition, she maintains that Press Clause protections for newsgathering-related activity is essential because newsgathering is primarily protected by statutes, and “only exist[s] at the pleasure of the legislative branches”<sup>282</sup> and is “in constant risk of being diminished or eliminated.”<sup>283</sup> Moreover, these “statutory protections” are “inconsistent and vary from jurisdiction to jurisdiction, leading to uncertainty and, potentially, to a chilling effect.”<sup>284</sup>

Professor West ultimately advocates for a narrowed scope of protection under the Press Clause than that provided by the more expansive Speech Clause. Specifically, she argues for Press Clause protections against liability for certain torts such as minor deception, breach of loyalty, and technical trespass committed in connection with newsgathering.<sup>285</sup> Moreover, her proposed Press Clause function seems to protect the newsgathering activity of anyone who engages in such conduct and who falls presumably within a “narrower” and “more meaningful” definition of the press as a result of engaging in this activity.<sup>286</sup> Her proposal therefore intimates opening up newsgathering to others besides members of the news media alone, which, in turn, makes the Press Clause privileges she advances more broadly available. Finally, given the newsgathering qualifier for Press Clause coverage, Professor West contends that those engaging in such activity will likely produce end-products that promote the public good.<sup>287</sup> Indeed, Professor West states, “[i]t makes practical sense to give certain rights and privileges only to those who have demonstrated that they are more likely to use these protections responsibly and for the public good rather than to give similar rights to anyone with a computer.”<sup>288</sup>

This Article builds upon Professor West’s central proposal for an independent function of the Press Clause but requires more than the newsgathering qualifier, which to West serves sufficiently as an indication of the likely production and dissemination of end-products that are for the public good. This Article does not presume that deliberation-enhancing end-products will necessarily result from newsgathering activity alone. Instead, this Article takes such presumption to task in an effort to advance a particular public good, namely democratic competence. It contends, as a result, that newsgathering activity alone is not enough to effectuate the democratic

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279. *Id.*

280. *Id.* at 1043 (quoting *Zemel v. Rusk*, 381 U.S. 1, 17 (1965)).

281. *Id.*

282. *Id.* at 1045.

283. *Id.*

284. *Id.*

285. *Id.* at 1059–60.

286. *Id.* at 1061.

287. *Id.*

288. *Id.* at 1058.

competence Press Clause function endorsed herein. Specifically, in order for Press Clause coverage to apply, this Article requires newsgathering activity and the production and dissemination of deliberation-enhancing end-products stemming from such activity.

Moreover, this Article's criteria help to identify and incentivize the production and dissemination of deliberation-enhancing end-products. The criteria require end-products to be published, factually true, and transparent of underlying government or corporate interests in order to qualify as deliberation-enhancing end-products entitled to Press Clause coverage. In doing so, this Article also provides a constitutional framework through which deliberation-enhancing end-products might qualify for possible additional and exclusive privileges—including perhaps those discussed briefly by Professor West in her article.

*B. The Criteria: Promoting Knowledge-Enhancing End-Products in a Defamed Civic Discourse*

1. End-Products that are Fact Based and Not Verifiably False

First Amendment guarantees of freedom of expression are not only essential to foster self-government and check abuses of governing power, but also are intrinsic to individual liberty and instrumental to society's search for truth.<sup>289</sup> Truth, of course, can be subjective and highly contested even among the most reasonable of persons, especially in the context of political debate and public deliberation.<sup>290</sup> Nonetheless, political thought has been characterized as informed by factual truth.<sup>291</sup> In addition, the Supreme Court has determined that untrue statements of fact are especially harmful to public deliberation where they defame the reputation of public officials and figures.<sup>292</sup> It has found that the circulation of false factual statements about public officials and figures frustrates First Amendment deliberative values, lessens the confidence in government, and impugns the honesty of the defamed official.<sup>293</sup> However, to protect critical public assessment of government and its officials on matters of public concern, the Supreme Court carved out a distinction between fact and opinion and imposed a high degree of fault—actual malice.<sup>294</sup> More specifically, under the First Amendment,

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289. *See Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 503–04 (1984) (“The First Amendment presupposes that the freedom to speak one’s mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole.”).

290. *See generally* POST, *supra* note 12, at 28–32.

291. Hannah Arendt has comprehensively explored the tension between truth and politics and the challenges to finding “truth” in the context of political debate. HANNAH ARENDT, *BETWEEN PAST AND FUTURE* 238 (1968); *see also* POST, *supra* note 12, at 29 (asserting that First Amendment jurisprudence does not seem to directly address this theoretical certainty about the uncertainty of truth but shifts focus instead to the deliberative insignificance of verifiable false facts).

292. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (noting that neither the intentional lie nor calculated error materially advances society’s interest in “uninhibited, robust, and wide open” debate on public issues).

293. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 767 (1985) (White, J., concurring).

294. *Sullivan*, 376 U.S. at 279–80.

the Court protects false statements about public officials and figures on matters of public concern if they are presented as mere opinions, and not as false statements of fact.<sup>295</sup> Therefore, even if an opinion is grounded in false or incomplete information, it is protected if the opinion *itself* is presented as merely an opinion and not as a statement of fact that is untrue. Opinions *themselves* are after all matters of belief that cannot be proven one way or the other.<sup>296</sup>

Moreover, the Supreme Court even protects erroneous factual statements if they are not stated with actual malice.<sup>297</sup> By carving out such distinction and by imposing a high degree of fault, the Supreme Court's stated goal was to create a breathing space for the formation of public opinion without also suppressing imaginative expression and rhetorical hyperbole.<sup>298</sup> The Supreme Court acknowledged early on in defamation cases, however, that in exchange for a wider breathing space for civic discourse, opinions (grounded in false factual information) and false factual statements (stated without proven actual malice) about public officials and figures may more readily make their way into civic discourse.<sup>299</sup> Arguably, this standard, while aptly democratically legitimizing of speakers' beliefs, has helped to open the door to the current floodgates of unsubstantiated opinion in the public sphere.

Indeed, recently, the Supreme Court even protected false statements made outside of the context of defamation. In *United States v. Alvarez*, the Court invalidated a statute that criminalized a person's false representations about honors received for service rendered in the U.S. military.<sup>300</sup> The Court determined that the First Amendment protected the factually untrue statements at issue in the case because the statute prohibited speech based on its content without some accompanying harm like fraud.<sup>301</sup> The statute ultimately failed the Court's strict scrutiny test and was deemed invalid for impermissibly criminalizing and restricting a certain category of speech—false statements about military service—which would adversely impact freedom of expression.<sup>302</sup> As a result of the Court's ruling then, a speaker's factually false statement regarding military service was decriminalized and given the same breathing space in civic discourse as a speaker of factually true statements.<sup>303</sup> The Speech Clause essentially prevented the elevation of one category of speech, non-false speech, over another—false speech, and protected the expression of the former in the same manner

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295. *Id.*; see also *Telnikoff v. Matusevitch*, 702 A.2d 230, 246 (1997) (explaining that the Supreme Court has afforded full constitutional protection to statements of opinion pertaining to matters of public concern, so long as the speech does not contain provably false statements of fact).

296. See *Leidholdt v. L.F.P. Inc.*, 860 F.2d 890, 893–95 (9th Cir. 1988) (providing that an expression of an opinion does not require a determination as to the defamatory nature of allegedly false statements and that “[e]ven apparent facts must be allowed as opinion” when serving a purpose other than describing factual matters, such as ridicule).

297. *Sullivan*, 376 U.S. at 279–80; *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 14 (1990).

298. See Jeffrey L. Kirchmeier, *The Illusion of the Fact-Opinion Distinction in Defamation Law*, 39 CASE W. RES. L. REV. 867, 889–90 (1989) (discussing the deliberative value of imaginative expression and rhetorical hyperbole to American civic discourse).

299. See *Sullivan*, 376 U.S. at 279–80 (opposing a rule which serves to retard the vigor of public debate).

300. *United States v. Alvarez*, 132 S. Ct. 2537, 2543 (2012).

301. *Id.* at 2547.

302. *Id.* at 2547–48.

303. *Id.* at 2543.

that a speaker of the latter would most likely have been.<sup>304</sup> For Dean Post however, the First Amendment should also be concerned with protecting and promoting democratic competence and in turn the integrity of civic discourse itself. He argues that the Speech Clause in particular has done little to promote democratic competence and has, in fact, at times operated to constrain the production of the knowledge-enhancing end-products that undergird it.<sup>305</sup>

In addition, the production and dissemination of knowledge-enhancing end-products are also frustrated by technological advances in media, unfiltered commentary online, and consolidated conglomerate control of the news media.<sup>306</sup> With this explosion of voices in civic discourse, speakers, including the news media, are scrambling to attract a listening audience with end-products that do not necessarily further democratic competence.<sup>307</sup> Indeed, “[t]oday, the information environment is a chaotic and unmonitored playground of journalists, analysts, pundits, bloggers, and shock jocks.”<sup>308</sup>

For example, with the deregulation of broadcast ownership, network news programming that once served the primary function of providing these deliberation-enhancing end-products was bought out and taken over by large media and entertainment conglomerates.<sup>309</sup> In addition, decreased enforcement of public-interest obligations imposed on broadcasters prior to deregulation led new conglomerate broadcast owners to abandon their traditional public trustee function of civically informing the viewing public.<sup>310</sup> They focused instead on attracting viewers to increase advertising revenue,<sup>311</sup> and retaining network news’ audience given the competing twenty-four-hour public affairs programming available on cable.<sup>312</sup> Network news and its viewers soon became a commodity in the same manner entertainment programming had been for years.<sup>313</sup> In an effort to appeal to the viewer as consumer rather than as

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304. *Id.* at 2544 (explaining that this “comports with the common understanding that some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee”).

305. See POST, *supra* note 12, at 28 (arguing that by ensuring all are able to address the public, we further our goal of democratic legitimization).

306. LE CHEMINANT & PARRISH, *supra* note 1, at 157.

307. *Id.* at 165–66 (arguing that today’s media environment, consisting of many more news sources than in the past, has led to increased audience competition and efforts to produce more attention-grabbing headlines).

308. *Id.* at 165.

309. See Wilfrid C. Rumble, *The FCC’s Reliance on Market Incentives to Provide Diverse Viewpoints on Issues of Public Importance Violates the First Amendment Right to Receive Critical Information*, 28 U.S.F. L. REV. 793, 844–46 (1994) (discussing the corporate ownership of news networks such as ABC, NBC, and CBS).

310. Folami, *supra* note 4, at 398–99.

311. BAYM, *supra* note 7, at 14; see Rumble, *supra* note 309, at 845–47 (asserting that advertising profits almost entirely support network television).

312. BAYM, *supra* note 7, at 79–80; ANDERSON, *supra* note 7, at xvii.

313. See BAYM, *supra* note 7, at 38 (discussing Disney’s purchase of ABC and the resulting reference to ABC journalists as “cast members” of Disney’s production); W. LANCE BENNETT ET AL., WHEN THE PRESS FAILS: POLITICAL POWER AND THE NEWS MEDIA FROM IRAQ TO KATRINA 3 (2008) (asserting that information passed off as political news has become largely governed by “pollsters, image shapers, marketers, handlers, and spin doctors,” and now shapes much of the public’s political communication).



citizen, broadcast journalists became celebrities and network news was relegated to infotainment and spectacle.<sup>314</sup>

Instead of critically holding those in power accountable, network news' ethical standards of objectivity and impartiality were reframed as fair and balanced and then ultimately recast as uncritical and neutral.<sup>315</sup> Despite efforts to effectuate reframed notions of objectivity and impartiality via fair and balanced coverage, some broadcast journalists became the targets of masterful media manipulation by politicians and, ultimately, became complicit in the manufacturing of political spectacle.<sup>316</sup> In this current news media landscape, this Article turns to the Press Clause for deliberative assistance in amplifying civic discourse with deliberation-enhancing end-products.

More specifically, this Article proposes that Press Clause coverage apply to deliberation-enhancing end-products only,<sup>317</sup> which this Article defines as published<sup>318</sup> end-products that are factually true and transparent of underlying government or corporate sponsorship. To receive Press Clause protections and possible privileges, this Article asserts that the speaker must therefore not only engage in newsgathering activity but also must publish deliberation-enhancing end-products that are key to advancing democratic competence. In addition, this Article contends that the speaker must do more than publish the facts or other raw materials discovered during the newsgathering process in order to qualify her end-products for Press Clause coverage. Indeed, the Press Clause function proposed herein aims to do more than promote the disclosure of even more information to an already overloaded audience, which neurological science proves is cognitively ineffective.<sup>319</sup> The speaker must therefore

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314. BAYM, *supra* note 7, at 55, 69 (contending that “network journalists had abandoned the role of institutional observers, and instead become characters in their own stories, their individual identities celebrated” and that network news was transformed into “an instrument of ‘public opinion management’ rather than an institution of public information and accountability”).

315. *Id.* at 68–69.

316. *Id.* at 171.

317. This Article does not foreclose some level of Press Clause protection of the raw materials gathered during the newsgathering process (notes, files, etc.)—a position advanced by Professor West. A narrow exception to this Article's requirement that newsgathering activity result in the publication of deliberation-enhancing end-products would be in situations where the collected raw materials have not yet been transformed into end-products but are subject to a subpoena search. In this situation, the creators past production of deliberation-enhancing end-products may then be dispositive in determining whether the yet-to-be-transformed raw materials would be entitled to special privileges under the Press Clause in an effort to protect the newsgathering process function endorsed herein.

318. An exception to the requirement that the end-product be published may exist where an individual can show an intent to publish a qualifying end-product with an existing body of work that satisfies the criteria proposed herein. The existing body of work exception therefore provides support for probable intent to publish a qualifying end-product as established by an individual's past record of published deliberation-enhancing end-products. While the news media and professional journalists may more readily qualify for this exception, this exception is necessary to provide flexibility to non-news media newcomers to qualify, as well for the Press Clause protections advanced herein.

319. See Larissa Barnett Lidsky, *Nobody's Fool: The Rational Audience as First Amendment Ideal*, 2010 U. ILL. L. REV. 799, 832 (discussing how too much information can lead to decision paralysis). In addition to encouraging citizens to step up and engage deliberatively in civic discourse as Professor Lidsky does, *id.* at 849–50, this Article's proposal hopes to assist citizens by incentivizing the dissemination of the end-products necessary to do so.

create and disseminate her own distinct deliberation-enhancing end-product that derives from the discovered facts and raw materials. This requirement for Press Clause speakers to create and disseminate their own original deliberation-enhancing end-products encourages civic engagement and is adapted from copyright law.<sup>320</sup> In copyright law, in order for an author to receive copyright protection, a work must be original to the author.<sup>321</sup> Original, as the term is used in copyright, requires that the work for which the author is seeking copyright protection must be independently created by the author, as opposed to copied from other works, which turns on a degree of creativity on the part of the author.<sup>322</sup>

The requisite level of original creativity for federal copyright protection is not necessarily high but can instead be modest.<sup>323</sup> Moreover, as it relates to discovered facts in particular, the Supreme Court determined that there is no originality in facts because facts do not owe their origin to an act of authorship.<sup>324</sup> The key distinction for determining originality as it relates to facts is therefore between discovery and creation, with the first person finding and reporting a particular fact merely deemed as discovering its existence but not as creating, making, or originating it.<sup>325</sup> Similarly, this Article requires more than just the disclosure of “discovered” facts or raw materials. It instead requires the creation and dissemination of an “original” work of deliberation-enhancing end-products that stems from the facts and raw materials acquired during the newsgathering process. In addition, as with originality in copyright law, the originality of creation required for Press Clause coverage endorsed by this Article could likewise be minimal. This Article maintains however that the created end-product must remain factually true. Notably, even if the Press Clause coverage endorsed herein does not apply for lack of originality, the Speech Clause would arguably protect end-products that do nothing more than disclose discovered facts or raw materials gathered from newsgathering. Speech Clause protections notwithstanding, speakers would still likely

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320. U.S. CONST. art. I, § 8, cl. 8. Moreover and similar to this Article’s “originality” criteria, the Freedom of Information Act also requires the news media to convert disclosed raw materials to a new published product in order to receive a government waiver of the fees for the government’s reproduction and release of the requested raw material. Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, §§ 1801–1804, 100 Stat. 3207; *see also* OPEN Government Act of 2007, Pub. L. No. 110–175, § 3, 121 Stat. 2524, 2525 (amending definition of news media for Freedom of Information Act to include a representative of the news media); *Nat’l Sec. Archive v. Dep’t of Def.*, 880 F.2d 1381, 1387 (D.C. Cir. 1989) (defining representative of the news media as “a person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience”).

321. *See Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 544 (1985) (explaining that copyright protects original expression).

322. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 345 (1991) (determining unanimously that creativity is a necessary condition for copyright protection); *see also* 1 HOWARD B. ABRAMS, *THE LAW OF COPYRIGHT* § 2:2 (2d. ed. 2003) (explaining that copyright protection is limited to original authorship).

323. *See* 20A BRENT A. OLSEN, *MINNESOTA BUSINESS LAW DESKBOOK* § 15:2 (2011) (confirming that the creativity threshold is low).

324. *See Feist Publ’ns*, 499 U.S. at 344 (stating that “facts are not copyrightable”).

325. *See* Robert C. Denicola, *Copyright in Collections of Facts: A Theory for the Protection of Nonfiction Literary Works*, 81 COLUM. L. REV. 516, 525 (1981) (categorizing census takers not as creators of population figures that emerge from their efforts but as copying the figures from the world around them).

be incentivized to produce and disseminate deliberation-enhancing end-products because to do so is to qualify for possible exclusive privileges granted pursuant to this Article's democratic competence Press Clause function.

## 2. End-Products that are Transparent

Pursuant to the legitimizing function of the Speech Clause in protecting voices in the public sphere, the Supreme Court has been resigned to prohibit government regulation of speech that interferes with what speakers say or how they say it—a position that Dean Post contends often inhibits the production of democratic competence.<sup>326</sup> As established herein, the Supreme Court has long acknowledged the value of knowledge-enhancing end-products to civic discourse. As also discussed herein, the Court has never specifically implemented a functional purpose of the Press Clause through which the production of these end-products could be incentivized, presumably due to the definitional problems associated with that Clause and the overshadowing functioning of the Speech Clause. This Article points to commercial speech and political campaign finance jurisprudence for support in advancing a Press Clause function and criteria that incentivize the dissemination of these necessary end-products. Indeed, evidence in commercial speech jurisprudence<sup>327</sup> and political campaign finance law<sup>328</sup> shows that judicial steps like protecting disclosure requirements have been taken to promote and guard democratic competence, albeit outside of the context of civic discourse.<sup>329</sup>

Although pure commercial advertisements were initially left constitutionally unprotected from government restraint,<sup>330</sup> the Court later determined that protective regulation was necessary to foster the “free flow of commercial information.”<sup>331</sup> In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, the Supreme Court found that the dissemination of such commercial advertisements was indispensable to the formation of “intelligent opinion” on commercial matters, the economy, and its regulation.<sup>332</sup> The Court extended constitutional protection to such

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326. POST, *supra* note 12, at 34.

327. *Id.*; see also Lidsky, *supra* note 319, at 845 (discussing the regulation of commercial speech to protect the agency of the rational audience given scientifically proven cognitive limitations of human beings in processing complex information).

328. See, e.g., *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 490 (7th Cir. 2012) (“Amidst this cacophony of political voices—super PACs, corporations, unions, advocacy groups, and individuals, not to mention the parties and candidates themselves—campaign finance data can help busy voters sift through the information and make informed political judgments.”); *Vt. Right to Life Comm., Inc. v. Sorrell*, 875 F. Supp. 2d 376, 396 (D. Vt. 2012) (“The disclosure required of PACs bears a substantial relation to Vermont’s sufficiently important interest in permitting Vermonters to learn of the sources of significant influence in their state’s elections.”).

329. *Minn. Citizens Concerned for Life, Inc., v. Swanson*, 640 F.3d 304, 316–18 (8th Cir. 2011) (discussing how protections of the political public sphere have been indirect in prohibiting the government from interfering with expression, rather than direct and affirmative in requiring the disclosure of information or granting audiences with constitutional rights to certain information).

330. *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942), *overruled by Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

331. *Va. State Bd. of Pharmacy*, 425 U.S. at 748.

332. *Id.* at 765; *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 512 (1996); Robert Post, *Transparent*

advertisements, reasoning that it was a “matter of public interest that [commercial] decisions, in the aggregate, be intelligent and well informed.”<sup>333</sup> Therefore, for Dean Post, “[t]o assert that First Amendment coverage should extend to commercial advertising because it conveys factual knowledge that cognitively empowers public opinion is to affirm that speech can be protected because it serves the value of democratic competence.”<sup>334</sup>

Moreover, unlike in civic discourse, the Supreme Court compelled speakers to provide information in this context to aid public cognitive understanding.<sup>335</sup> In addition, to preserve democratic competence, the Court approved the regulation of commercial speech where the result led to a decrease in the dissemination of misleading information.<sup>336</sup> In the context of political campaign finance law, the Supreme Court likewise advanced democratic competence by empowering voters to consider the deliberation-enhancing quality of end-products.<sup>337</sup> Specifically, the Court did so by permitting mandatory disclosure requirements of campaign advertisement sponsors.<sup>338</sup> Knowing the source of political spending allows the voting public to better distinguish and assess the end-products of candidates and campaign contributors.<sup>339</sup> It also invites a healthy skepticism for end-products in the public sphere while cognitively empowering the public to investigate the motives, if any, of speakers.<sup>340</sup>

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*and Efficient Markets: Compelled Commercial Speech and Coerced Commercial Association in United Foods, Zauderer, and Abood*, 40 VAL. U. L. REV. 555, 558 (2006); Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 8 (2000) (discussing the development of commercial speech).

333. *Va. State Bd. of Pharmacy*, 425 U.S. at 765.

334. POST, *supra* note 12, at 40–41.

335. *E.g.*, *United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 660-66 (1985); *Glickman v. Wilerman Bros. & Elliott, Inc.* 521 U.S. 457, 491–92 (1997).

336. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980) (holding that “there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity”); *Va. State Bd. of Pharmacy*, 425 U.S. at 771–72 (“Obviously, much commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a State’s dealing effectively with this problem. The First Amendment, as we construe it today, does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely.” (footnote omitted)); Kathleen M. Sullivan, *Cheap Spirits, Cigarettes, and Free Speech: The Implications of 44 Liquormart*, 1996 SUP. CT. REV. 123, 153 (explaining that “[a] vast regulatory apparatus in both the federal government and the states has developed to control not only knowingly false statements of fact, but also potentially misleading or deceptive speech”).

337. *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 915 (2010) (holding that disclosures “avoid confusion by making clear that the ads [were] not funded by a candidate or political party”); *Human Life of Wash. v. Brumsickle*, 624 F.3d 990, 1005 (9th Cir. 2010) (“[B]y revealing information about the contributors to and participants in public discourse and debate, disclosure laws help ensure that voters have the facts they need to evaluate the various messages competing for their attention.”).

338. *Citizens United*, 130 S. Ct. at 915 (“At the very least, the disclaimers avoid confusion by making clear that the ads are not funded by a candidate or political party.”).

339. *See* Press Release, The White House Office of the Press Secretary, Remarks of President Barack Obama (Sept. 18, 2010), available at <http://www.whitehouse.gov/the-press-office/2010/09/18/weekly-address-president-obama-castigates-gop-leadership-blocking-fixes> (emphasizing the importance of public disclosure laws).

340. *See* DISCLOSE Act, H.R. 5175, 111th Cong., § 201 (2010) (requiring public disclosure of donations in certain circumstances); *see also* LE CHEMINANT & PARRISH, *supra* note 1, at 157 (discussing in

While reporting and disclosure requirements impose a burden on expression,<sup>341</sup> they have long been upheld in the context of campaign practices.<sup>342</sup> Moreover, they have been deemed as a “less restrictive alternative to more comprehensive regulations of speech.”<sup>343</sup>

Similarly, this Article’s criteria for qualifying as a deliberation-enhancing end-product entitled to receive Press Clause coverage requires disclosure of corporate or government sponsorship.<sup>344</sup> As with the goal behind the disclosure requirements long permitted in campaign advertisements, this Article’s transparency requirement aims to cognitively empower the public in civic discourse so they too can give due “weight to different speakers and messages.”<sup>345</sup> This disclosure, and in turn, transparency requirement, helps to arm the public with the tools (i.e., deliberation-enhancing end-products) necessary to engage in the thinking process of an “intelligent” self-governing democracy.

## V. CONCLUSION

A primary purpose of the First Amendment as a whole is to protect both the communicative space(s) in which civic discourse occurs and the free flow and formation of public opinion therein. In that vein, the Supreme Court has developed a firm Speech Clause jurisprudence that provides robust protections from government encroachment on speech, irrespective of whether such end-products express rumor, false ideas, lay opinion, or are corporate or government sponsored. The Speech Clause’s expansive reach is owing to its long-recognized goal of indiscriminately legitimizing public opinion in America’s self-governing democracy. Ironically, however, as more and more speakers are given space to speak and influence the formation of public opinion, civic knowledge and deliberation-enhancing end-products

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detail the ways in which hidden and, in turn, manipulative information disseminated in the political public sphere undermines voters’ deliberative choice and agency).

341. *Ctr. for Individual Freedom v. Tennant*, 849 F. Supp. 2d 659, 693–96 (S.D.W.Va. 2011) (declaring a West Virginia campaign finance law unconstitutional to the extent that it burdened newspapers and magazines with disclosure requirements).

342. *See Buckley v. Valeo*, 424 U.S. 1, 71 (1976) (affirming the validity of reporting requirements under the Federal Election Campaign Act).

343. *Citizens United*, 130 S. Ct. at 915. *See also* Richard Briffault, *Nonprofits and Disclosure in the Wake of Citizens United*, 10 *ELECTION L.J.* 337, 345 (2011) (reviewing the *Citizens United* holding and describing the “less restrictive alternative”).

344. With respect to transparency, although the Communications Act of 1934, 47 U.S.C. § 151 (2006), does not require sponsor disclosure where the broadcaster received no consideration for airing video news releases (VNRs), the FCC may sanction broadcasters for failing to disclose the sponsor of VNRs. *See* John Eggerton, *FCC’s VNR Fine: More to Come?*, *BROADCASTING & CABLE* (Sept. 30, 2007), [http://www.broadcastingcable.com/article/110551-FCC\\_s\\_VNR\\_Fine\\_More\\_to\\_Come\\_php](http://www.broadcastingcable.com/article/110551-FCC_s_VNR_Fine_More_to_Come_php) (discussing the FCC’s sanctioning of Comcast for failing to disclose the sponsor of a video news release). VNRs are essentially promotional videos (about a product, place, or thing) produced by the government or private corporations and provided to the network news for airing. Jeffrey Peabody, Note, *When the Flock Ignores the Shepherd—Corralling the Undisclosed Use of Video News Releases*, Note, 60 *FED. COMM. L.J.* 577, 579 (2008). Such VNRs are often presented without disclosure to the public as an end-product investigated, verified, and produced by the news media outlet itself. *Id.*

345. *Citizen’s United*, 130 S.Ct. at 916.

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and exchanges are steadily declining.

The Speech Clause has thus far borne the deliberative weight of maintaining civic discourse in America. Dean Post has argued that the Speech Clause's necessary function of legitimizing American voices and opinions has, however, undermined an equally valuable and necessary component of self-governance—democratic competence.<sup>346</sup> This Article uniquely turns to the Press Clause for deliberative assistance in promoting democratic competence. Optimistically, this proposed Press Clause function aims to also address the distracting, information-overload challenges currently facing the deliberating public due to a civic discourse filled with content that is false, unsubstantiated, and, at times, manipulative—the dissemination of which is made easier in today's media-rich environment and conglomerate-controlled news media.

In advancing a separate Press Clause function, distinct from the Speech Clause, this Article also gives effect to an express constitutional prescription guaranteeing press freedoms that some contend has been overshadowed by the Speech Clause's legitimizing function. Moreover, the Press Clause function and criteria proposed herein provide a constitutional framework through which special privileges might be granted uniformly to news media and non-news media speakers alike. This Article continues the worthy dialogue on opening up civic discourse, however, without sacrificing the deliberation-enhancing end-product on which democratic competence, and, in turn, civic discourse, depend.

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346. Post, *supra* note 332, at 53.