Thinking the Unthinkable about the First Amendment

Nicholas Lemann

The First Amendment's press clause has long played second fiddle to the speech clause. With the professional press in steep economic decline, it may be time to consider freedom of speech and freedom of the press separately, in order to shore up journalism's distinctive, and imperiled, role in a healthy democracy.

On my bookshelf is a treasured relic of a bygone age, a full print edition of *The Oxford English Dictionary* (OED): twelve volumes plus five supplements, the last of them published in 1986. The OED puts the first use of *journalism*, "the occupation or profession of a journalist; journalistic writing; the public journals collectively," at 1833. *Journalistic*, "of or pertaining to journalists or journalism; connected or associated with journalism," arrived a few years earlier, in 1829. *Reporter*, "one who reports, debates, speeches, meetings, etc., especially for a newspaper; a person specially employed for this purpose," originated earlier still, in 1813. And *interview*, "to have an interview with a person; specifically on the part of a representative of the press," didn't appear until decades later, in 1869.[1]

I served as dean of Columbia University's Graduate School of Journalism for ten years, from 2003 to 2013. During that time, I was privileged to attend dozens, or maybe even hundreds, of official journalism events: banquets, prize ceremonies, and so on. Almost invariably, the speakers would extol the First Amendment as a sacred constitutional enshrinement of our profession. Often one of them would observe that we are the only field of endeavor specifically mentioned in the Constitution, or assert that it was the framers' special intent to put the amendment that mentioned us first because it was so important to them.

But as we see from the OED, such sentiments are self-celebratory historical fantasies, because there were no journalists in 1791, when the First Amendment was ratified. At the Constitutional Convention, in 1787, the framers specifically declined to include a press freedom clause in the original document, which is why the First Amendment, along with the rest of the Bill of Rights, was added a few years later by Congress. In the original version of the Bill of Rights, the current First Amendment was actually the Third Amendment, in line behind two others that were dropped because they couldn't attract majority support.

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If there were no journalists to celebrate, then what was the intention of the First Amendment's press clause? The most enduring contrarian view is still probably that of historian Leonard W. Levy (first published back in 1962), who believed that the words to pay attention to in the First Amendment are "Congress shall make no law" – meaning that the First Amendment was supposed to clear the way for *the states* to restrict freedom of the press if they wanted to.[2] Levy also argued that even for the federal government, the First Amendment was meant only to forbid prior restraint, which is why the short-lived Sedition Act of 1798, which was practically enforceable only after publication, didn't contradict the First Amendment.

First Amendment scholar David A. Anderson, refuting Levy, argued that the First Amendment made national a principle that several states had already established.[3] The original source of the language of the First Amendment, according to Anderson, was the Pennsylvania state constitution of 1776, which asserted that "the people have a right to freedom of speech, and of writing, and publishing their sentiments; therefore, the freedom of the press ought not to be restrained."[4] Anderson next follows the First Amendment trail to the Virginia constitutional ratifying convention of 1788, which adopted language that he sees as having been taken from Pennsylvania's constitution: "That the people have a right to freedom of speech, and of writing and publishing their sentiments; that the freedom of the press is one of the greatest bulwarks of liberty and ought not to be violated."[5]

If one is searching for legal endorsement of the after-dinner speech version of the origin of the First Amendment, a good place to look would be a 1975 lecture by Justice Potter Stewart, called "Or of the Press," on the amendment's press clause. Stewart argued that the press clause should be understood as being aimed at the "organized" press, and is therefore conceptually distinct from both the speech clause and the rest of the Bill of Rights:

> Most of the other provisions in the Bill of Rights protect specific liberties or specific rights of individuals: freedom of speech, freedom of worship, the right to counsel, the privilege against compulsory self-incrimination, to name a few. In contrast, the Free Press Clause extends protection to an institution. The publishing business is, in short, the only organized private business that is given explicit constitutional protection.[6]

Stewart – who, for what it's worth, was chairman of the *Yale Daily News* as an undergraduate – understood this institutional protection the First Amendment afforded the press as a distinct and limited one. It was meant not to enable people who happened to be publishing their work through news organizations to say whatever they wanted, but to enable the public to have more access to public information, in cases where the presence of a journalist was required to maximize the flow of facts to a broad audience. He described the role of the journalist this way in a short concurrence to a 1980 decision in the case of *Houchins v. KQED*: "He

is there to gather information to be passed on to others, and his mission is protected by the Constitution for very specific reasons."[7]

Unlike Leonard Levy or David Anderson, Stewart made no claim to have gone through the contemporary historical materials underlying the drafting of the First Amendment, so what he said can't function as proof that the framers shared his institutional and informational understanding of the press clause. My own conjecture would be that, whatever it should mean now, back then the First Amendment probably envisioned "the press" as a method for printing and disseminating speech, not as an organized endeavor dedicated to gathering and publishing verified information about public affairs, because the latter activity didn't really exist yet. That is, originally the speech clause and the press clause would have referred to essentially the same thing, not to two distinct and separate activities, one citizen-empowering, the other profession-honoring.

Still, in the era of social media, it has become especially obvious that speech and press are not in fact the same thing. As Justice Stewart said, they should be conceived separately and legally treated separately. Considering this requires setting aside the fears many people, including my fellow journalists, have about the risks inherent in letting the law into journalism.

It was well into the twentieth century before the Supreme Court heard any cases about either the speech clause or the press clause of the First Amendment. Even then, as attorney and legal scholar Sonja R. West has argued, the Court "has steadfastly refused to recognize explicitly any right or protection as emanating solely from the Press Clause," which has "left us with a Press Clause that is a constitutional redundancy." West elaborated:

> Because the freedoms to publish and disseminate speech are also protected by the Speech Clause, the Press Clause has been left with nothing to do. Members of the press thus enjoy the same freedoms of expression as any individual person but nothing more. The rights to publish or broadcast are the same as the right to speak, and what narrow protections for newsgathering the Court has recognized, such as limited rights of access to judicial proceedings, have been housed in a muddy combination of the freedoms of speech, assembly and press and awarded to everyone, not just the press.[8]

In *The Liberal Tradition in America*, political scientist and historian Louis Hartz calls Supreme Court jurisprudence Talmudic. By that standard, one could argue that the existence of the press clause must indicate that a more profound meaning must inhere in it than the Court has chosen to find thus far – by definition, nothing in the Constitution can be accidental or meaningless, so the press clause can't be the constitutional equivalent of a vermiform appendix. Pursuing this is difficult if one wants to operate strictly within the confines of original intent, because of the absence of professional journalists when the press clause was draft-

ed and ratified. David Anderson gave it the old college try, writing: "The Framers perceived, however dimly, naively, or incompletely, that freedom of the press was inextricably related to the new republican form of government and would have to be protected if their vision of government by the people was to succeed."[9] But one could also be less strict and say that, like universal voting and public education, professional journalism was a happy accident that arrived in the nineteenth century, without specific constitutional sanction, but has shown itself to be democratically essential and so deserves constitutional protection.

In Potter Stewart's 1975 lecture, he listed a number of ways the Supreme Court had endorsed his view of the meaning of the press clause. These had come during what journalists of my generation think of as the golden age of press law, and they entail giving journalists and news organizations special privileges beyond what ordinary citizens have, in support of their special function. The glorious twin pillars of this jurisprudence, from a journalistic point of view, were the *New York Times v. Sullivan* case (1964) and the Pentagon Papers case (1971), which protected the press from libel suits filed by public officials and from efforts to restrain publication of government secrets. There was a near miss in the *Branzburg v. Hayes* case (1972), when the Supreme Court by a five-to-four vote declined to exempt reporters from testifying before grand juries.

My purpose here is not to review press clause litigation in detail; suffice it to say that those long-ago victories don't now look like the beginning of a string of significant Supreme Court decisions based on the press clause, and that the most obvious problem in many press clause cases has been the difficulty of determining whom would be granted journalistic privileges. We are an unlicensed profession, and there is a free speech risk inherent in dividing all self-declared journalists into two categories, one for the legally privileged elite and another for upstarts and outsiders. But, as West pointed out, states have enacted laws granting privileges to journalists, government entities don't grant press credentials to all applicants, and the Federal Communications Commission gets to choose, partly on journalistic grounds, which applications for broadcast licenses it will approve. It isn't an insuperably difficult or inescapably controversial task.

During the heyday of the journalistic establishment, the Court's nearly exclusive focus on the speech clause was not entirely disadvantageous for those working in the press. The customary interpretation of the First Amendment brought together reporters and publishers, two groups who often tussle, in common purpose: both got special constitutional exaltation, and the publishers also got an implicit freedom from regulation on free speech grounds, a privilege that other recognized professions don't have. One doesn't hear the owners of television stations, who prosper from political advertising, loudly objecting to the Court's 2010 *Citizens United v. Federal Election Commission* decision, which protected campaign spending as a form of free speech.

News organizations have continued to pursue the cause of legal privileges for journalists, but without a sense of existential urgency – partly, perhaps, because of a collective sense that it's a lost cause. But there may now be another and more pressing reason for trying to give greater legal meaning to the First Amendment's press clause: it might function as one of a number of tools for combating the economic calamity that has befallen the organized, reportorial press in the twenty-first century, mainly as a result of the rise of the internet.

I assume I am writing for a mainly academic audience here. If your primary daily news source is *The New York Times*, and if you feel yourself to be generally awash in media content of all kinds, and if you're used to thinking of universities as perpetually beleaguered, you may not be fully aware of how much more beleaguered journalism is. According to Pew Research Center, newsroom employment in the newspaper industry fell by 57 percent just in the twelve years between 2008 and 2020, and the decline is surely continuing.[10] Overall editorial employment in other journalistic media has not fallen as rapidly, but newspapers are especially important because in most communities they do the lion's share of the kind of original reporting that we associate with professional journalism's social value. Digital-only news organizations like HuffPost and Vox, which not so long ago were being touted as journalistic replacements for newspapers, are laying journalists off too; Buzzfeed, also much touted, has entirely shut down its news organization.[11]

Journalism, especially the newspaper industry, didn't see this coming. In the spring of 2008, the Newseum opened a grand new headquarters, on Pennsylvania Avenue in Washington, D.C., midway between Congress and the White House, featuring a seventy-five-foot-high rendition of the First Amendment carved on a stone tablet that God might have been embarrassed to hand to Moses at Mount Sinai lest He appear immodest. Gannett, the nation's largest newspaper company and chief sponsor of the Newseum, was sold to a private equity company in 2019, after a vertiginous economic decline. That same year, the Newseum went out of business. At around the same time that the Newseum was opening, the three remaining major party presidential candidates – John McCain, Barack Obama, and Hillary Clinton – gave speeches at the annual convention of the American Society of Newspaper Editors (ASNE), in accordance with long-standing custom. The next year, there was no ASNE convention. The organization has since been reconstituted twice under different names, but it's a safe bet that the 2024 presidential candidates didn't come to its convention.

One sometimes hears the argument that the decline of the newspaper business owes to its having lost our trust, or to some other moral failing. That's nonsense, and indicative of the long-running failure of not just the courts, but also the public conversation overall, to recognize the meaningful difference between speech and journalism. The lost-trust theory rests on objections to the press's role as a platform for opinions, or opinions disguised as reporting, not as an information-

providing institution of the kind Potter Stewart envisioned. The professional reportorial press has long been underrecognized in debates about journalism. Even a journalism establishment production like the 1947 Hutchins Report, officially called "A Free and Responsible Press" and financed by Henry Luce of Time Inc., was primarily worried about the effect of concentration of media ownership on diversity of opinion and only secondarily worried about too-low professional standards in journalism. The more recent "media reform" movement has similarly focused its critique on corporate media ownership – and in this it has something in common with the antimedia aspect of the conservative movement, which for decades has assumed that big media companies are promoting a liberal agenda, just as media reformers assume they are promoting a conservative agenda. In all these forms, critiques of the press have rested on the assumption that organized journalism entails the privileged few speaking to the voiceless many, so redressing that balance would be a good cause.

If this was one's frame of reference, then the advent of the internet – in particular, the World Wide Web – seemed providential. It would be a medium unregulated by government, and therefore immune to the most obvious threat to freedom of speech and press, and it would permit anybody to publish anything, without interference, to a potentially infinitely large global public, and anybody to have access to any and all publications, corporate-approved or *samizdat*. The persistent top-down problem inherent in "press," as opposed to speech, would vanish. Even in journalism there was a sweeping optimism about the effects of the internet's open-access aspect.

Obviously, we are in a very different moment now. New companies like Google and Facebook found ways to make themselves among the most valuable in the world by inserting themselves as an information-providing layer between billions of people and the web. Google, at least in its early days, referred to itself as a media company, but unlike traditional media companies, it didn't create content, but merely compiled content that already existed. It would have seemed fanciful to traditional newspaper publishers that this could pose an existential economic threat to them – but it did. The economic decline of newspapers happened entirely for business reasons, not because they lost our trust.

When the internet first appeared, there may have been some newspaper publishers who believed it was just a passing fad, but more common was the theory that the leading newspapers would launch free websites, develop enormous audiences for them, and make lots of money through advertising sales, their traditional main source of revenue, while gradually shedding the expenses associated with paper, printing, and distribution. Instead, classified advertising platforms like Craigslist and display advertising platforms like Google and Facebook, offering much more efficient targeting of potential customers at much lower prices, took away the bulk of the newspaper industry's revenues.

Even more humbling, platforms based on searching efficiently for information that already existed (like Google) or on soliciting voluntary editorial contributions from great masses of amateurs (like Facebook) showed that they could create unimaginably larger audiences for their content than newspapers could. And with very few exceptions, newspapers have found themselves unable to persuade more than a small fraction of their readers to pay for online subscriptions, partly because they had already become accustomed to reading online content, including from newspapers, without paying for it.

A good deal of journalistic content gets read not through the websites of the organizations that produced it, as news organizations had hoped, but in the form of individual stories, photographs, and videos that zoom around cyberspace on their own, searched for, aggregated, or passed around along with a mass of family photos, individual hot takes, memes, and so on. For years, the major news organizations and Google and Facebook have engaged in a game of chicken: if you don't compensate us for our content, the news organizations say, we will withdraw and you will see large reductions in your audiences. Google and Facebook have consistently declined, without the threat of audience reduction being realized. From a First Amendment point of view, the online platforms, and the internet more broadly, operate on the assumption that free press is merely a subcategory of free speech, with no consequential difference. The global citizenry seems to agree, and we see the result in the declining economic fortunes of journalism.

We have entered what are surely the early stages of a period of government regulation of the major internet companies that is analogous to the advent of regulation of major industrial and financial companies during the Progressive Era. Absolute free speech online has already ended – substantially because internet companies themselves actively censor certain kinds of content, partly as a way of staving off government's taking on that task – though they argue at the same time that they should be exempt from the legal responsibilities of conventional publishers. The debate about the proper role of governments, nongovernment organizations, and private companies in limiting expression online is not my subject here; I'll just note that it is taking place, with rising temperatures on all sides. Because my concern is with press as opposed to speech, I want to focus on nonmarket activity that is beginning there, and that isn't yet as widely known.

The Biden administration's multi-trillion-dollar Build Back Better Act of 2021, which fell victim to the objections of moderate Democratic Senators and then passed in smaller form as the Inflation Reduction Act of 2022, contained a $1.7 billion subsidy for local news reporting in the form of a payroll tax credit. The subsidy didn't make the transition from one bill to the other, but it is still waiting in the wings, as are a number of other proposed government policies to provide aid to journalism. Senator Amy Klobuchar, the daughter of a Minneapolis newspaperman, has rounded up fourteen cosponsors from both major parties in support of

a bill that would give news organizations an antitrust law exemption so they can bargain collectively with Facebook and other platforms for the use of their content. Senator Maria Cantwell has proposed a Local Journalism Sustainability Act that would give tax credits to businesses that take out advertising in local news publications. There are also several proposed state initiatives. In private philanthropy, the MacArthur Foundation is leading an effort called Press Forward, which has created a $500 million fund to support local journalism.

It seems inevitable that not-purely-market varieties of journalism are going to emerge more strongly in the coming years as a way of preserving the reportorial function of journalism in the wake of the collapse of its economic support. These will likely take a number of different forms: from public news organizations on the model of the BBC, to private for-profit organizations that get special help through various public policies, to not-for-profits that benefit greatly from federal tax policy. The advent of such policy-enabled news organizations reopens the question of the distinction between free speech and free press. The aim of the press-encouraging ideas that are circulating now is not to promote speech – the wide circulation of a variety of ideas that is essential in a healthy democracy – but to promote reportorial journalism, which is something different. They are aimed at enhancing a socially beneficial function, which both new and existing organizations can take on, not at bailing out a dying industry. So it also seems inevitable that the courts will be asked to state a principle for inclusion in the new policy-enabled world of journalism. This would require differentiating the speech and press clauses of the First Amendment. Already, for example, a coalition of big-tech lobbyists and free-expression organizations like the ACLU and Public Knowledge have criticized Klobuchar's bill as a violation of free speech. If the bill were enacted, and those groups challenged it legally, how would the courts rule?

It isn't always clear to the outside world what goes on in a first-rate newsroom, and therefore why these institutions might deserve special legal and policy consideration. Journalism is an open-access profession. It requires no specific credentials. It has no dispositive field-wide code of ethics. Almost all substantial news organizations combine journalism that matches our preferred rhetoric about public service with journalism that aims solely to entertain. Because it was pre-internet, we can't know exactly how many people were reading Carl Bernstein and Bob Woodward's Watergate stories in *The Washington Post*, but it's a fair bet that it was fewer than were reading the comics, or the movie listings, or the paper's coverage of the local sports teams.

Still, there are meaningful distinctions between professional journalism and other kinds of published expression that could more fairly be considered speech, not press. Reporters, most often through the primary research technique of interviewing, surface new information that previously had not been publicly available.

Reporting can be done well or badly, but when done well, it is meaningfully different from expressing a personal opinion, and much more time-consuming and expensive, and therefore hard to accomplish as a volunteer solo activity. At news organizations, even the opinion writers do active first-hand research. The organization as a whole has a stated commitment to the extremely difficult tasks of avoiding mistakes in the vast torrent of material they publish, and of not neglecting whatever is happening in the world that is most important. If they screw these up, they apologize. News organizations lay many hands other than the principal author's on the material they publish, which improves the expression and provides a check against purely personal blind spots. This too is resource-intensive.

It breaks my heart to see all of the above, as violated as it regularly is in the breach, dismissed as merely "corporate," or overidentified with a few spectacular mistakes, and therefore happily replaceable by unorganized, distributed citizen journalism. Corporations that no longer exist – Knight Ridder, Times Mirror, Time Inc., all of whose grand headquarters towers now stand with the Newseum as Ozymandias-like monuments to vanished confidence – produced a great deal of excellent and valuable journalism. These institutions in particular have not been replaced, and in general it isn't easy to reconstitute the advantages that come with a large and varied institution after it's gone. (Imagine the disappearance of the university where you work.)

I know from experience that news organizations don't have to be huge or corporate-owned to hew to the better values of professional journalism. When I was twenty-four, I went to work for *Texas Monthly* in Austin, a magazine then five years old, independently owned, started by people in their twenties and thirties with no journalistic experience. The magazine paid for me to go on the road and do extensive original reporting for every story. The aforementioned David Anderson read everything I wrote and returned it with legal suggestions; he was one of two first-rate lawyers who vetted every story (the other, R. James George, was a former Supreme Court clerk, in private practice). There were also editors, copy-editors, fact-checkers (who would regularly go out in the field and re-interview the people I had interviewed, to make sure I had gotten it right), and photographers. All this happened because there was an established professional ethos that upstarts like us could tap into. And we succeeded partly because we did stories that, at the time, the established Texas newspapers were too cautious or unimaginative to do themselves.

There is a case to be made against all professions. They have the aspect of self-protection from economic or intellectual competition. They force the discourse in their fields into narrowed paths. They close ranks against critics. They resist external regulation. They lack diversity. They don't offer full transparency about their activities to the people they serve. What makes the professions we have worth having, despite these flaws, is a series of venerable rationales. Profes-

sions usually operate in the market economy, but their members are supposed to hold most dear a set of values that are separate from the pure economic motive, such as (in the case of journalism) public service. Professionals have special skills that empower them to operate in unusual situations, often crises, in ways that benefit others. "Objectivity" is a highly contentious word these days, so I'll use a term from sociologist Everett Hughes to describe the professional mindset: "detachment," meaning that the way you conduct yourself when practicing your profession is meaningfully different – more empowered in some ways, more restrained in others – from the way you would ordinarily conduct yourself simply as yourself.

In some professions, the practitioners have individual or institutional clients who have limited information about the fields in which they are seeking professional help, and who therefore need to be protected from the risk of real harm. That logic would apply to doctors, or to architects. Another rationale is that the competent practice of a profession requires the acquisition of a body of specialized knowledge and of techniques particular to the profession – that professionals must inform practice with theory. This would be the reason that law and academe are professions. Another is that members of the profession have confidential relationships with their clients that need legal protection. That would apply to members of the clergy.

For journalists, professionalization would have the same disadvantages as in other professions, but the speech clause of the First Amendment – standing for the principle of unrestricted public discourse – gives these disadvantages a special force. For the sake of argument, though, what would be the advantage of journalism's becoming a profession, with the First Amendment's press clause being the legal justification for that? The traditional rationale is that professional status could endow journalists with formal privileges, with the expectation that having these would enable journalism to perform its public-service mission more fully. I would add to this my own prediction that some standard of professionalism will be necessary to justify a variety of public policies aimed at helping news organizations, and to determine which organizations will benefit from those policies. A more profound (and surely controversial) rationale would be to ensure that journalists have a set of capabilities that go above and beyond merely the ability to perform the work of a newsroom, and would push that work in the direction of better fulfilling journalism's social obligations.

I have been working as a journalist for fifty years, and as an educator of journalists for twenty years. I know both worlds well enough to know that many of my colleagues in journalism don't think there's anything that could be characterized as "academic" that would be pertinent to working in a newsroom. They're wrong. In journalism, as in every other profession, there ought to be an intimate and unbreakable connection between practicing as a professional and what a uni-

versity education in the profession can provide. The connection in some other professions can be understood as purely logistic: I'm not allowed to set myself up in medical practice without a degree or a license. For journalism, it can't be that – I don't envision a world in which the door to self-admission into journalistic practice ever closes. That means the case has to be made purely on its conceptual merits.

Professional education should not be pure practical training, properly accomplished by replicating what goes on in an entry-level job. Unfortunately, that has been the dominant construct in journalism education for more than a century, and it has gained force with the steep decline in newsroom employment: if newsrooms no longer have the resources to operate in-house apprenticeship systems, journalism schools can step into the breach.

But think about what goes on in professional schools in other fields. They treat practice not simply as a set of skills to be mastered, but as a body of evidence from which to make inferences about better ways of performing the profession's mission, which can then be taught to practitioners in training so they will do a better job than their predecessors. They identify a body of knowledge and a set of distinctive intellectual methods that future practitioners should acquire. They confer something of the history of the profession and of its relationship to the other parts of society that make up the context for professional practice. They teach professional ethics. They blend a measure of academic learning with a measure of professional doing.

Journalism schools – which overall, to be clear, are overwhelmingly oriented toward undergraduate teaching and preparing their students to work in "communications" fields like advertising, marketing, and public relations, not toward graduate professional education for journalists – have been good at adopting some of these overall precepts of professional education, not so good at others. Their strengths are guiding students through producing their own journalism, teaching ethics, and acting as conveners, cheerleaders, and critics for practitioners. Ironically, since journalists are supposed to be people who can quickly figure out how the world works, their weaknesses are in finding a place in their teaching for things that lie outside of current newsroom practice. These might include skills like statistical and computational literacy and locating expertise on one's topic, conceptual material like scholarly critiques of journalism, and habits of mind like becoming aware of one's prior assumptions, developing and testing hypotheses, and learning to understand the changing world by means that go beyond just tracking the activities of leaders and the unfolding of events, into identifying underlying systems and structures. We have experimented with all of this at Columbia Journalism School, in ways that by now have demonstrated its fruitfulness in producing not academic media experts, but working reporters who are now producing work at journalism's highest levels.

Hardly anybody is suggesting that journalists be formally licensed in order to practice, so we don't have to settle once and for all the semantic question of whether journalism is a profession. Sociologist Elihu Katz suggested a few years ago that journalists aren't professionals, but applied scientists, usefully thought of in a pairing with meteorologists, because each field "tells about departures from the normal and threats to societal well-being."[12] The question is whether a clearer distinction between free speech and free press could be used not just to shore up journalism but to improve it, to make it more socially useful by raising its standards. This wouldn't entail suppressing anyone's speech – again, the difficult free speech questions that social media platforms present are not my subject in this essay – but it would entail creating a meaningful categorical distinction for journalists that would be the basis not just for legal privileges, but also for special policy and funding consideration.

The most obvious and most common objection to this idea is that putting government in charge of determining who is and isn't a legitimate journalist or news organization, in order to confer or deny privileges, is an unacceptably scary prospect. There are many current examples available from all over the world to show that it isn't wrong to worry about this. During what I've called the golden age of press law, the Supreme Court's decisions were libertarian in the sense that they gave the press more freedom from outside claims that would limit its autonomy. In those days, broadcast journalism was far more heavily regulated than it is today; at the height of the golden age, in 1969, in the case of *Red Lion Broadcasting v. FCC*, the Supreme Court ruled unanimously that for a federal regulatory agency, under the Fairness Doctrine, to require a local radio station to offer time to someone criticized on a broadcast was not a violation of the First Amendment. Four years later, Justice William O. Douglas, who had not voted in the *Red Lion* case, wrote a concurring opinion in another case in which he said it had been wrongly decided: "The Fairness Doctrine has no place in our First Amendment regime. It puts the head of the camel inside the tent and enables administration after administration to toy with TV or radio in order to serve its sordid or its benevolent ends."[13] Douglas's opinion was in line with the general antiregulatory mood that was stirring at the time, including among liberals, and sentiments like his were surely part of the background to the reluctance of Congress and the Supreme Court to create additional special protections for the press. The Fairness Doctrine was abolished in 1987.

One argument for regulating broadcast journalism but not print journalism was that broadcast journalism required government's presence as the referee of scarce and lucrative access to the spectrum. The advent of the internet obliterated that argument and opened the way for the complete deregulation and open access that reformers had been longing for. But now we see the disadvantages of that change, both in terms of what is now published and, just as important, what

is no longer published because of the economic effect that the internet-era market structure has had on news organizations. In this light, the half-century era of American broadcast regulation doesn't look so bad. Neither does government-involved public broadcasting, here and elsewhere. One could even argue (perversely, I know) that, back in the early days of broadcast regulation, government delivered the crucial push to private companies that led them to offer education and news programming, rather than just entertainment. And even after the deregulation of broadcasting, American governments at all levels continue to make distinctions among claimants to the title of journalist, for example, in granting access to legislative press galleries.

Journalism isn't unique among professions in being in danger of disastrous government interference or censorship. A common way of avoiding this danger – imperfect, like everything else in life, but roughly effective – is peer review. This means creating a body of government-appointed experts in the field who can then make specific and consequential decisions about a profession – for example about funding – on their own. Most of what we know about climate science is the result of government-funded research conducted at universities, even though climate change is an extremely difficult issue for government officials to deal with. Even in areas without formal peer review bodies that have decision-making power, government often shows respect for professional opinion. You may not like the current Supreme Court, but you can't argue that the Justices were not outstanding students at top law schools. In journalism, it's easy to imagine peer-review panels being created to serve as a meaningful layer between politicians and news organizations that were selected to benefit from the various policy ideas that may soon be enacted to strengthen journalism.

The advent of powerful social media platforms, unanticipated in the early days of the internet, has generated large questions about free speech – so large, perhaps, as to have obscured the devastating economic effects of the internet, and social media in particular, on the professional press. We might make the situation better by beefing up the distinction between the speech and press clauses of the First Amendment, as a way of giving press, as distinct from speech, favorable treatment that it badly needs. Social media platforms have made it obvious how different speech and press really are. The risk of treating free press, legally, as identical to free speech is that we'll wind up with a lot more speech and a lot less press. That is the path we are on now.

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ENDNOTES

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[5] Amendments Proposed by the Virginia Convention, the Sixteenth Amendment, June 27, 1788.

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[7] *Houchins v. KQED Inc.*, 438 U.S. 1, 17 (1978) (Potter Stewart, concurring).

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