12-23-2005

Or of the [Blog]

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"Or of the [Blog]" †

By Paul Horwitz*

"Weblogging will drive a powerful new form of amateur journalism as millions of Net users . . . take on the role of columnist, reporter, analyst and publisher while fashioning their own personal broadcasting networks."

-- J.D. Lasica[1]

"Isn't blogging basically for angry, semi-employed losers who are too untalented or too lazy to get real jobs in journalism?"

-- Garry Trudeau[2]

"None of the above."

-- Countless multiple choice tests

I. INTRODUCTION

Close to 70 years ago, Chief Justice Hughes, writing for the Court in *Lovell v. Griffin*,[3] noted that "[t]he liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. . . .The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion."[4] A mere 40 years ago, Mr. Justice Black observed that "[t]he Constitution specifically selected the press,

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† *Cf.* Potter Stewart, "Or of the Press," 26 Hastings L.J. 631 (1975).

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1 J.D. Lasica, "Blogging as a Form of Journalism," Online Journalism Rev., May 24, 2001, *available at* http://www.ojr.org/ojr/workplace/1017958873.php (last visited Dec. 13, 2005).

2 Garry Trudeau, *Doonesbury*, July 3, 2005, *available at* http://www.doonesbury.com/strip/dailydose/index.html?uc_full_date=20050703 (last visited Dec. 13, 2005).

3 303 U.S. 444 (1938).

4 *Id.* at 452.

which includes not only newspapers, books and magazines, but also humble leaflets and circulars, to play an important role in the discussion of public affairs."[5] Those Justices surely were looking back to our long tradition of "lonely pamphleteer[s],"[6] for they could not possibly have foreseen what was coming down the pike.

I am talking, of course, about the rise of blogs and the blogosphere.[7] We are witnessing an explosion in the number of blogs. While the estimated number of blogs varies greatly, one blog-tracking site boasts that it is currently tracking 23.1 *million* sites.[8] Many of those sites are moribund, but other blogs are regularly updated. Nor are these blogs all simply collections of travel photos or diary entries read by only a few friends or relatives. Many blogs offer up-to-the-minute reflections on current affairs, and the most popular of these can receive tens of thousands of visits per day.[9] One survey suggests that "by the end of 2004[,] 32 million Americans were blog readers."[10]

Beyond the numbers, we have also witnessed a growth in the importance and influence of blogs. Whether or not their impact has been or will be revolutionary, as some claim,[11] it is certainly true that

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5 *Mills v. Alabama*, 384 U.S. 214, 219 (1966) (citations omitted).

6 *Branzburg v. Hayes*, 408 U.S. 665, 704 (1972); *see also Lovell*, 303 U.S. at 452 ("[Pamphlets] have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine in our own history abundantly attest."). *Cf. Talley v. California,* 362 U.S. 60, 64-65 (1960) (discussing, more specifically, the historical importance of "[a]nonymous pamphlets, leaflets, [and] brochures").

7 Although I assume readers of this Symposium are familiar with what blogs are, a standard working definition of a weblog, or "blog," is "an online publication with regular posts, presented in reverse chronological order." Wikipedia, *Blog*, *available at* http://en.wikipedia.org/wiki/Blog (last visited Dec. 15, 2005). "Blogosphere" is "the collective term encompassing all weblogs or blogs as a community or social network." Wikipedia, *Blogosphere*, *available at* http://en.wikipedia.org/wiki/Blogosphere (last visited Dec. 15, 2005).

8 *See* Technorati, *About Technorati*, *available at* http://www.technorati.com/about (last visited Dec. 15, 2005).

9 *See, e.g.,* The Truth Laid Bear, *Ecotraffic*, *available at* http://www.truthlaidbear.com/TrafficRanking.php (last visited Dec. 15, 2005) (tracking site visits to some of the most popular blog sites).

10 Pew Internet & American Life Project, Data Memo: *The State of blogging* (Jan. 2005), *available at* http://www.pewinternet.org/pdfs/PIP_blogging_data.pdf (last visited Dec. 15, 2005).

11 *See* Hugh Hewitt, *Blog: Understanding the Information Reformation That's Changing Your World* 47-59 (2005) (calling the present moment "a

blogs have assumed a growing role in breaking news, or in calling attention to existing news stories in a way that may have a significant real-world impact.[12] Although blogs are most often thought of as supplements to existing news media, existing in some form of symbiotic relationship with them,[13] the more evangelical proponents of blogs, and detractors of the so-called "mainstream media,"[14] have suggested that blogs are in fact displacing traditional forms of gathering and disseminating the news.[15] More mildly, Richard Posner has written that blogs pose a "grave[ ] challenge to the journalistic establishment."[16] Given the novelty of the phenomenon, we may take these claims with a grain of salt. Still, it is fair to say that blogs bid fair to unsettle the easy dominance of the conventional news media. We might say that the rise of the blog represents the realization of the full promise of the "lonely pamphleteer."[17]

As they mature and are given increasing prominence, blogs are also beginning to face a number of pressing legal questions.[18]

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revolution in communication technology" and likening the rise of the blogosphere to the Protestant Reformation).

[12] *See, e.g., id.* at 7-45.

[13] *See, e.g.,* Larry Ribstein, *Initial Reflections on the Law and Economics of Blogging*, Ill. L. & Econ. Working Papers Ser., Working Paper No. LE05-008, Draft of Sept. 21, 2005, at 11, *available at* http:ssrn.com/abstract=700961.

[14] *See* Wikipedia, *Mainstream media*, *available at* http://en.wikipedia.org/wiki/Mainstream_media (last visited Dec. 15, 2005) (noting the popularity of the term "MSM," short for mainstream media, with "right-leaning authors" whose use of the term is meant to "imply[ ] that the majority of mass media sources is dominated by leftist powers which are furthering their own agenda"); Franklin Foer, *TRB: Bad News*, The New Republic, Dec. 26, 2005, at 6 (cataloguing liberal bloggers' criticisms of the "MSM").

[15] *See* Jack Shafer, *Blog Overkill: The danger of hyping a good thing into the ground*, Slate, Jan. 26, 2005, *available at* http://www.slate.com/id/2112621 (reporting skeptically on the claims of participants at a conference on blogging and journalism that "blogs [are] the destroyers of mainstream media").

[16] Richard A. Posner, *Bad News*, N.Y. Times, July 31, 2005, at s. 7, p. 1.

[17] *Branzburg*, 408 U.S. at 704.

[18] I will discuss only questions arising under United States law, although obviously the legal issues facing blogs and other forms of online communication transcend legal jurisdictions and often center precisely on the difficulty of communicating across multiple jurisdictions at the same time. *See, e.g.,* Peter P. Swire, *Elephants and Mice Revisited: Law and Choice of Law on the Internet*, 153 U. Pa. L. Rev. 1975, 1983, 1997-98 (2005) (identifying online disputes implicating First Amendment interests as one set of issues that may defy efforts to harmonize interjurisdictional law affecting the Internet).

What liability should an anonymous poster face for a defamatory comment on a blog, and how easy should it be for a plaintiff to strip that poster's anonymity?[19] What access should a blogger enjoy to press credentials?[20] Are bloggers entitled to claim either constitutional or statutory privileges to maintain the confidentiality of sources?[21] And should they receive the same exemptions that mainstream media do from election law requirements?[22] Some of these questions directly implicate constitutional rights, while others are founded on statutory privileges; but all of them resound with broader First Amendment concerns.

It is therefore a good time to think about the legal status of blogs, and the legal issues they raise. In this contribution, I want to think specifically about the relationship between blogs and the Press Clause of the First Amendment. Bloggers and others are already engaged in an ongoing conversation about whether some or all bloggers are journalists, and in what sense.[23] From there, it is a short step to the question I ask here: Are blogs part of "the press" for purposes of the Press Clause? Should we think of them in these terms? And if we do, what legal consequences does this move carry both for blogs and for the press – and for our understanding of the Press Clause itself?

In a sense, these questions might seem at best quixotic, at worst pointless. It is now widely accepted that the Press Clause is about as useful as the vermiform appendix. As Frederick Schauer writes, "existing First Amendment doctrine renders the Press Clause redundant and thus irrelevant, with the institutional press being

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19 *See, e.g., Doe v. Cahill*, 884 A.2d 451 (Del. 2005).

20 *See, e.g., Schreibman v. Holmes*, 1997 U.S. Dist. LEXIS 12584 (D.C.C. 1997), *aff'd*, 203 F.3d 53 (D.C. Cir. 1999), *discussed in* David A. Anderson, *Freedom of the Press*, 80 Tex. L. Rev. 429, 434 (2002). *Cf.* Matthew Klam, *Fear and Laptops on the Campaign Trail*, N.Y. Times Mag., Sept. 26, 2004, at 43.

21 *See, e.g., Apple Computer, Inc. v. Doe 1*, 33 Media L. Rep. 1449 (Cal. Super. Ct. 2005); *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964, 979-80 (D.C. Cir. 2005) (Sentelle, J., concurring); Linda L. Berger, *Shielding the Unmedia: Using the Process of Journalism to Protect the Journalist's Privilege in an Infinite Universe of Publication*, 39 Hous. L. Rev. 1371 (2003).

22 *See* Richard L. Hasen, *Lessons from the Clash Between Campaign Finance Laws and the Blogosphere*, __ Nexus L.J. __ (2006).

23 For an introduction to this dialogue, see Nieman Reports, *Journalist's Trade: Weblogs and Journalism*, Fall 2003, at 59-98 (collection of contributions discussing various aspects of the relationship between blogs and journalism).

treated simply as another speaker."[24] Even those few perquisites that have attached to the press, such as the qualified reporter's privilege, have lost some of the constitutional moorings that lower courts were willing to give them in wake of the Court's confused ruling in *Branzburg*.[25] In a recent article, David Anderson has suggested that "the demise of the press as a legally preferred institution," whether constitutionally or under statute, "is quite possible and perhaps even probable."[26] If any heavy lifting in the protection of blogs is likely to be done either by the Speech Clause or by legislative grace, why turn to this unfortunate redundancy of a constitutional provision?

I think there are good reasons to do so. Thirty years after Justice Stewart provocatively suggested that "[t]he publishing business is . . . the only organized private business that is given explicit constitutional protection,"[27] we have arrived at a moment in which the lines between old and new media are so blurred that the very idea of "established news media"[28] may seem antique. But I want to suggest that the secondhand status of the Press Clause should again nevertheless be open to reexamination. Thinking about this question in light of the rise of the blog raises a number of important questions. After all, among the problems with the initial push to give some meaning to the Press Clause were questions of defining the

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[24] Frederick Schauer, *Towards an Institutional First Amendment*, 89 Minn. L. Rev. 1256, 1257 (2005) (citing, *inter alia*, *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 795-802 (1978) (Burger, C.J., concurring); *Branzburg*, 408 U.S. at 704-05).

[25] *See, e.g., In re Grand Jury Subpoena*, 397 F.3d at 970 ("Unquestionably, the Supreme Court decided in *Branzburg* that there is no First Amendment privilege protecting journalists from appearing before a grand jury or from testifying before a grand jury or otherwise providing evidence to a grand jury regardless of any confidence promised by the reporter to any source. The Highest Court has spoken and never revisited the question. Without doubt, that is the end of the matter."); *McKevitt v. Pallasch*, 339 F.3d 530, 531-33 (7th Cir. 2003) (Posner, J.) (casting doubt on lower courts' use of *Branzburg* to support a constitutionally derived qualified privilege for reporters). *But see New York Times Co. v. Gonzales*, 382 F. Supp. 2d 457 (S.D.N.Y. 2005) (concluding that the Second Circuit recognizes "a qualified First Amendment privilege . . . that protects reporters from compelled disclosure of confidential sources").

[26] Anderson, *supra* note __, at 435.

[27] Potter Stewart, "Or of the Press," 26 Hastings L.J. 631, 633 (1975).

[28] *Id.* at 631.

press and of elitism.[29] If only some people get to be "the press," how can we determine who is entitled to claim that mantle, and how can we justify according them special privileges? On the other hand, if anyone can now be "the press,"[30] won't any "special" protections simply be watered down to nothing? These are difficult questions. But they are worth asking at this moment. The Press Clause may yet have important things to tell us about our understanding of the Constitution and its relationship to the real world of speech.

What follows is decidedly a preliminary look at the relationship between blogs and the Press Clause. I will provide few definitive answers. Rather, I want to explore several ways that we might think about the Press Clause, and about the role of blogs within the Press Clause. Thinking about the relationship between blogs and the Press Clause offers an opportunity to think anew about these issues. It requires us to consider a series of important distinctions: between the Speech Clause and the Press Clause; between the "free press" and "open press" models of the Press Clause; between *being* "the press" and fulfilling the *functions* of "the press"; and between thinking of the Press Clause as a functional protection and thinking of it in broader *institutional* terms. It is on that last note that I will suggest a possible avenue for thinking about the Press Clause in the future – although, as we will see, the presence of blogs may require us to take a different institutional turn than that recommended by Justice Stewart in his famous article.

II. "FREE PRESS" AND "OPEN PRESS"

We might begin looking for illumination on the future of blogs and the Press Clause by looking back to our past. Much has been written on the question of what, precisely, the Press Clause was meant to do, and whether it actually signaled that the framers of the Constitution intended to provide any meaningful independent

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[29] *See, e.g.,* Anthony Lewis, *A Preferred Position for Journalism?*, 7 Hofstra L. Rev. 505, 626-27 (1979); David Lange, *The Speech and Press Clauses*, 23 UCLA L. Rev. 77 (1975).

[30] *See* W. Lance Bennett, *The Twilight of Mass Media News: Markets, Citizenship, Technology, and the Future of Journalism*, *in Freeing the Press: The First Amendment in Action* at 111, 112 (Timothy E. Cook ed. 2005) ("Today, anyone with a computer or a mobile phone is a potential reporter and publisher.").

protection for the press.[31] It is possible that the Press Clause singled out the press by name only because it had been subjected to official restrictions that were unique to the press and inapplicable to individual speakers.[32] Or perhaps the Framers simply used the terms interchangeably, with little thought for any distinct meaning the Speech and Press Clauses might hold.[33] Those arguments might not suffice to settle the question. I think they do not. With Professor Nimmer, I believe that "[i]t is what [the Framers] *said*, and not necessarily what they meant, that in the last analysis may be determinative"[34] – and what they *said* was that speech and press merited separate consideration. Still, looking at the historical understanding and development of "the press" may help us think more clearly about the purposes and uses of the Press Clause today.[35]

Recent work in this area may in fact shed some light on current thinking about the Press Clause in the age of the blog. Drawing on the historical work of Robert W.T. Martin,[36] some scholars have discerned *two* traditions at work in the history of law and the press in America.[37] One is the idea of a "free press" – the

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[31] *See, e.g.,* Leonard Levy, *Emergence of a Free Press* (1985) (arguing that freedom of press primarily simply meant that press enjoyed immunity from prior restraint); *Bellotti*, 435 U.S. at 798-801 (Burger, C.J., concurring) (arguing that the history of the Press Clause "does not suggest that the authors contemplated a 'special' or 'institutional' privilege"); Lange, *supra* note __, at 88-99 (same); *but see* David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. Rev. 455 (1983) (arguing that the history suggests that the Press Clause did have some independent significance).

[32] *See, e.g., Bellotti*, 435 U.S. at 800-01 (Burger, C.J., concurring); Lange, *supra* note __, at 94-96; Lewis, *supra* note __, at 599.

[33] *See, e.g.,* Lange, *supra* note __, at 88; Melville B. Nimmer, *Introduction—Is Freedom of the Press A Redundancy: What Does it Add To Freedom of Speech?*, 26 Hastings L.J. 639, 640-41 (1975); *but see* Anderson, *supra* note __, at 487 ("Freedom of the press was neither equated with nor viewed as a derivative of freedom of speech").

[34] Nimmer, *supra* note __, at 641 (emphasis added).

[35] *Cf.* Paul Horwitz, *The Past, Tense: The History of Crisis – and the Crisis of History – in Constitutional Theory*, 61 Alb. L. Rev. 459 (1997) (discussing the uses of history in constitutional law and theory).

[36] *See* Robert W.T. Martin, *The Free and Open Press: The Founding of American Democratic Press Liberty, 1640-1800* (2001).

[37] *See* Timothy E. Cook, *Freeing the Presses: An Introductory Essay*, in Cook, *supra* note __, at 1 [hereafter Cook, *Introductory Essay*]; Charles E. Clark, *The Press the Founders Knew*, in *id.*, at 33; Diana Owen, *"New Media" and Contemporary Interpretations of Freedom of the Press*, in *id.*, at 139.

idea that "the press should be free of state intervention so as to engage in criticism of government and thereby defend public liberty."[38] The press in this conception should operate as an independent, autonomous institution carrying out a "watchdog" function as a monitor of government.[39] This is essentially the model Justice Stewart drew on when he argued that the Press Clause was meant "to create a fourth institution outside the Government as an additional check on the three official branches."[40]

The other tradition is that of the "open press." This is the idea that "all individuals have a right to disseminate their viewpoints for general consideration."[41] On this view, a free press means nothing more than that "all people should have the opportunity to articulate their views for popular consideration."[42] The press is not an expert and autonomous watchdog scrutinizing government action. Rather, it is simply a vehicle for the dissemination of ideas and a forum for "uninhibited, robust and wide-open" debate.[43]

These competing conceptions of "the press" may cash out in different and interesting ways. Understanding the Press Clause from the perspective of the "free press" model leads to a more specific and specialized understanding of the role of the press within the Press Clause. It suggests, as Justice Stewart wrote, that the clause safeguards a uniquely structural role for the press as a monitor of the conduct of public officials.[44] This conception of the Press Clause could serve as the source of a richer, more positive set of protections for the press. To the extent the press serves a structural role as a check on the "official branches" of government,[45] it is but a small step – though not an inevitable one[46] – to argue that the Press Clause

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38 Cook, *Introductory Essay*, *supra* note __, at 8.

39 *Id.* at 5.

40 Stewart, *supra* note __, at 634.

41 Cook, *Introductory Essay*, *supra* note __, at 8.

42 Owen, *supra* note __, at 142.

43 *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

44 *See* Stewart, *supra* note __, at 633.

45 *Id.* at 634.

46 *See, e.g., Zurcher v. Stanford Daily*, 436 U.S. 547 (1978) (rejecting the claim that newspapers were subject to any special immunity from a search authorized by a properly drawn search warrant); *Houtchins v. KQED, Inc.*, 438 U.S. 1 (1978) (rejecting a press claim of special access to a jail to report on prison conditions).

provides some degree of privileges[47] and immunities[48] for the press. At the same time, the free press model raises the definitional concerns I have already noted, and gives rise to the charge that the Constitution should create no privileged institutions.[49] And to the extent that the free press model is based squarely on the press's function as a watchdog of government, it offers little direct basis for institutional protections for the press when it discusses issues other than public affairs. (The Speech Clause, of course, could pick up the slack there; but it might not do so in any institutionally oriented fashion.)

The "open press" model avoids these problems. It is less likely to be limited in orientation to press discussions of public affairs; and because the model "conveys the right to free expression to individuals, rather than to an institution,"[50] it does not face the same problems of definition or elitism. But neither does it do the same degree of work that the free press model potentially could. To the extent that the free press model simply acknowledges the right of "all individuals" to "disseminate their viewpoints,"[51] it is unlikely to say anything about reporters' privileges, press access, or any other positive rights of the press. The open press model thus does seem to invite the charge of earlier writers on the Press Clause that it risks becoming redundant in light of the work already done by the Speech Clause.[52] Indeed, the open press model may at times even be suggestive of additional limits on the press: if one generalizes from the notion that the open press model entailed the willingness of publishers to offer up to the public any views that were presented to

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47 *See, e.g., Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 596 n.2 (1980) (Brennan, J., concurring in the judgment) ("[T]he institutional press is the likely, and fitting, chief beneficiary of a right of access" to court proceedings). Citing examples like this one, Professor Anderson observes that "[t]he First Amendment right of access to courtrooms is framed as a right of public access, but as a practical matter that is more likely to mean press access." Anderson, *supra* note __, at 431 (quotation and citation omitted).

48 *See id.* at 431 n.8 (noting the substantial number of lower federal courts and state courts that have recognized a constitutional qualified reporters' privilege).

49 *See* note __, supra.

50 Owen, *supra* note __, at 142.

51 Cook, *Introductory Essay*, *supra* note __, at 8.

52 *See, e.g.,* Nimmer, *supra* note __.

them,[53] then the open press model lends support to the view, rejected thus far by the Court, that newspapers ought to be required to make their pages available to a broad range of contending views, just as broadcasters may constitutionally be required to do so.[54]

A good deal of evidence suggests that citizens in the founding era would have understood the "press" protected by the Press Clause according to something like the open press model. If by the free press model we mean something like the model of an "organized, expert" body capable of conducting "scrutiny of government,"[55] then few if any of the newspapers extant during the pre-Revolutionary and Revolutionary periods met these criteria.[56] Although the press evolved during the Revolutionary era and afterwards, its evolution was less toward the development of an expert and autonomous institution than it was in the direction of an aggressively partisan press, beholden to the Revolutionary and party interests each newspaper served.[57] The development of an understanding of "the press" more closely aligned with our own modern understanding of journalism – reasonably expert, autonomous, disinterested, governed by professional norms and dedicated to its watchdog function – would not occur until the 1830s, at the earliest, and perhaps as late as the early 20th century.[58]

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[53] *See* Cook, *Introductory Essay*, *supra* note __, at 8 (quoting Benjamin Franklin, *An Apology for Printers*, *in The Political Thought of Benjamin Franklin* at 20, 21-22 (Ralph L. Ketcham ed. 1965) (1731) ("Printers are educated in the Belief, that when Men differ in Opinion, both Sides ought equally to have the Advantage of being heard by the Publick . . . . Hence they chearfully serve all contending Writers that pay them well, without regarding on which side they are of the Question in Dispute."); *see also id.* at 8 ("'The press was open to each individual's sentiments only because another individual's private property – a printer's press and his newspaper – was thought of as a communal good, something the printer was beholden to make available to the community as the primary institution of an expanding public sphere.'") (quoting Martin, *supra* note __, at 163).

[54] *Compare Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (upholding the Fairness Doctrine), *with Miami Herald v. Tornillo*, 418 U.S. 241 (1974) (rejecting the application of a right of reply statute to a newspaper). For discussion, see Owen M. Fiss, *The Irony of Free Speech* 50-83 (1996).

[55] Stewart, *supra* note __, at 634.

[56] *See* Clark, *supra* note __, at 46-47.

[57] *See id.* at 40-45.

[58] *See id.* at 40 ("The 'organized press,' to the extent that it *was* organized before the Revolutionary era, was meant to facilitate the business and the craft of printing. . . not the practice of journalism"); David S. Allen, *The Institutional Press and Professionalization: Defining the Press Clause in Journalist's Privilege*

So the historical evidence suggests the Framers would have thought of the press primarily in terms of the open press model. But we must be careful not to overstate this conclusion. While the press was far from having become Justice Stewart's professional watchdog, the Revolutionary and post-Revolutionary eras did see the increasing development of norms of autonomy and the rise of newspaper editors who were "becoming seriously engaged in political reporting and in presenting to [their] readership, the citizenry, a systematic account of government."[59] Even at the outset of this nation's constitutionalization of press freedom, in other words, the concept of a free and institutional press serving a watchdog function, with all that this concept entails, was in the air.[60] It was thus no accident that the state constitution adopted by Pennsylvania in 1776 recognized both the open press concept *and* the free press concept.[61]

Taken as a whole, this history suggests that there may indeed be a home for blogs in the Press Clause, if we view that provision according to the open press model.[62] In their current state, many blogs resemble in many respects the passionate, partisan,[63] largely amateur and often anonymous collection of printers and writers who

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Cases, 34 Free Speech Y.B. 49, 50 (1996) (discussing the professionalization of the press in American history).

[59] Clark, *supra* note __, at 47.

[60] *See* Paul Starr, *The Creation of the Media: Political Origins of Modern Communications* 75-76 (2004).

[61] Cook, *Introductory Essay*, *supra* note __, at 7.

[62] This argument might be linked to Jack Balkin's argument that digital technologies give rise to an understanding of free speech that focuses on its role in creating and maintaining a "democratic culture," in which everyone "has a fair chance to participate in the production of culture, and in the development of the ideas and meanings that constitute them an the communities and subcommunities to which they belong." Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. Rev. 1, 4 (2004). Professor Balkin's view of the relationship between digital forms of expression, such as blogs, and democratic culture seems to me to echo the open press tradition I have described. *See also* J.D. Lasica, *Blogs and Journalism Need Each Other,* Nieman Reports, Fall 2003, at 70, 71 (treating blogs as part of "an emerging new media ecosystem – a network of ideas").

[63] In this Symposium, Professor Hasen offers some examples of political bloggers who either did work on the side for particular political candidates or were directly paid to use their blogs in support of one candidate and against another. *See* Hasen, *supra* note __, manuscript at 5-6 & n.7, 11 & n.16.

were at work during the founding era.[64] To the extent the blogosphere resembles the press of the founding era, it may then be natural to suggest that our thoughts concerning the constitutional status of and protection for blogs should stem as much from the Press Clause as from the Speech Clause. Moreover, we may protect blogs under an open press model of the Press Clause without incurring at least some of the risks that that model entails. In particular, the nature of blogs obviates the concern that an open press model may fuel calls for forced access to another's "press."[65] Given the inexpensive nature of blogging,[66] we can ensure a diversity of views without having to treat any blog as a public good that may be forced to offer space to individuals with contrary views.

Thus, blogs find a natural home in the open press model of the Press Clause. But, for two related reasons, we should hesitate before settling on this model. First, as I have already suggested, if the open press model is largely about the protection of "uninhibited, robust and wide-open" debate,[67] then the Press Clause does not do anything that the Speech Clause does not already do; we are back to the redundancy problem. Second, however mixed the success of the advocates of a free press model of the Press Clause may have been,[68] we should not be too swift to trade in that understanding of the Press Clause, with its more vigorous protection for the newsgathering process, for a model that sacrifices that vigor for the sake of the

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64 *See, e.g.,* Ribstein, *supra* note __, at 7-8 ("The original bloggers mainly sought to make observations, often about personal or political matters. Political blogs were spurred by the coincidence of the invention of blogging technologies and the 2004 presidential election, which elicited strong views on both sides."); Jane E. Kirtley, *Bloggers and Their First Amendment Protection*, Nieman Reports, Fall 2003, at 95, 95 ("[M]any of the intensely personal and highly opinionated Weblogs proliferating on the Internet inhabit a world apart from the sometimes-dreary realm of meticulously sourced and fact-checked traditional journalism."). Evidence of the intensely personal, as opposed to disinterested, nature of many blogs can also be found in a study suggesting that conservative and liberal blogs tended to link more to like-minded blogs than to blogs with a different political orientation, and that each tended to focus on their own sets of articles and issues. *See* Ribstein, *supra* note __, at 14.

65 *See supra* notes 53-54 and accompanying text.

66 *See* Ribstein, *supra* note __, at 3.

67 *New York Times*, 376 U.S. at 270.

68 *See supra* notes 24-25 and accompanying text.

universality of the right.[69] The institutional press captured in the free press model, and in Justice Stewart's argument for the Press Clause as a structural guarantee, continues to fulfill important functions in our society.[70] Even when that model has failed as a constitutional argument, it continues to support arguments in favor of a host of non-constitutional privileges that the press enjoys, and which help it to fulfill its vital news-gathering function.[71] We ought to be reluctant to trade in this understanding of the Press Clause too quickly.[72] Our first cut at understanding the relationship between blogs and the Press Clause is thus not completely satisfying.

III. BLOGS, "THE PRESS," AND "JOURNALISM": A FUNCTIONAL APPROACH

We have seen that one potential understanding of the Press Clause is that it helps to ensure "organized, expert scrutiny of government" by granting substantial protection to the press as a sort of fourth branch of government.[73] This understanding of the Press Clause serves an important social value but is less accommodating to the often disorganized and inexpert nature of blogs. Is there a way to preserve this socially valuable understanding of the Press Clause without slighting the role that blogs may play under this provision?

The answer, I think, is yes, and it raises the second of the distinctions I want to draw in this contribution – the distinction between *being* "the press" and doing the *work* of the press. The usual understanding of "expert scrutiny of government," and of the watchdog model more generally, is that it involves, not a *status*, but an *activity*: it involves skilled newsgathering, interviewing, ferreting out of facts, investigative reporting – in short, that set of activities we call "journalism." If that is so, we should not think of the constitutional status of blogs in terms of a contest between blogs and

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69 *Cf.* Philip Hamburger, *More is Less*, 90 Va. L. Rev. 835 (2004) (discussing the dynamic relationship between the scope of a right and the degree of access to that right).

70 For what I would consider an exemplary instance of the press's fulfillment of this function, see James Risen and Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. Times, Dec. 16, 2005, at A1.

71 *See* Anderson, *supra* note __, at 430-32, 528.

72 *See id.* at 529-30.

73 Stewart, *supra* note __, at 634.

the mainstream media.[74] Rather, we might think about the Press Clause, or various statutes that protect the press, as offering protection to certain *functions* that may be performed by either blogs *or* the established institutional press. We could think in terms of constitutional or non-constitutional protection for the *function* of journalism.[75]

This way of thinking about the Press Clause assumes that some form of heightened protection ought to be available for individuals or institutions based on whether they meet some definition of the practice of journalism. For example, we might say that an individual who "is involved in a process that is intended to generate and disseminate truthful information to the public on a regular basis" is a journalist, and ought to be able to claim whatever protections flow from the Press Clause, or from any non-constitutional sources of protection for the newsgathering process.[76] Or we might conclude that any person may claim some set of privileges where he or she is engaged in investigative reporting, gathering news, and doing so with the present intention to disseminate the news to the public.[77]

In a variety of obvious and non-obvious ways, this functional approach to the understanding of those protections afforded to "the press," whether by the Constitution or by various statutes, is already a common feature in the law. For example, a number of courts have used versions of this functional approach when examining claims of constitutional or statutory qualified privilege by such individuals as a person who gathered information for personal use and later decided to use that information to write a book,[78] an investigative reporter

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[74] *See, e.g.,* Ribstein, *supra* note __, at 18-19.

[75] *See* Robert D. Sack, *Reflections on the Wrong Question: Special Constitutional Privilege for the Institutional Press*, 7 Hofstra L. Rev. 629, 629 (1979) ("Even if the 'institutional press' as such is not separately protected under the first amendment, all citizens exercising the press *function*, including, but not limited to, journalists employed by the 'institutional press,' warrant such protection.") (emphasis in original).

[76] Berger, *supra* note __, at 1411.

[77] *See* Clay Calvert, *And You Call Yourself a Journalist?: Wrestling with a Definition of "Journalist" in the Law*, 103 Dick. L. Rev. 411, 426 (1999) (summarizing *In re Madden*, 151 F.3d 125, 131 (3d Cir. 1998)).

[78] *See von Bulow ex rel. Auersperg v. von Bulow*, 811 F.2d 136 (2d Cir. 1987).

who deliberately set out to gather information for a book,[79] and the producer of taped commentaries for a 900 number controlled by the World Championship Wrestling organization.[80] Legal academics have proposed a slew of similar approaches.[81] And, of course, the states that have adopted statutory reporters' privileges have relied, at least in part, on functional definitions when drafting those statutory protections.[82] To the shield statutes we could also add a variety of federal and state statutes dealing with questions of press access to information or to government proceedings, freedom from intrusive searches, and other privileges or immunities.[83] But this functional understanding of the press is present in the law in ways that may be less apparent, as well. Thus, Randall Bezanson has argued persuasively that many courts, when examining the contours of constitutional protection for the press in libel cases, have asked whether the press actor in question was exercising editorial judgment, defined as the "independent choice of information and opinion of current value, directed to public need, and born of non-self-interested purposes."[84]

Depending on how one defines the function of journalism, this functional understanding of the Press Clause could obviously protect blogs as well as the more established and recognized press. A popular question asked in blogging circles has been whether blogging is journalism.[85] Often, the answer is a fairly blunt "no."[86]

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79 *See Shoen v. Shoen*, 5 F.3d 1289 (9th Cir. 1993).

80 *See in re Madden*, 151 F.3d 125.

81 *See, e.g.,* Berger, *supra* note __; Calvert, *supra* note __; Jennifer Elrod, *Protecting Journalists From Compelled Disclosure: A Proposal for a Federal Statute*, 7 N.Y.U. J. Legis. & Pub. Pol'y 115 (2003-2004); Laurence B. Alexander, *Looking Out for the Watchdogs: A Legislative Proposal Limiting the Newsgathering Privilege to Journalists in the Greatest Need of Protection for Sources and Information*, 20 Yale L. & Pol'y Rev. 97 (2002).

82 *See, e.g.,* Berger, *supra* note __, at 1392-96.

83 *See* Anderson, *supra* note __, at 445, 486-89.

84 Randall P. Bezanson, *The Developing Law of Editorial Judgment*, 78 Neb. L. Rev. 754 (1999).

85 *See, e.g.,* Jay Rosen, *Brain Food for BloggerCon*, April 16, 2004, *available at* http://journalism.nyu.edu/pubzone/weblogs/pressthink/2004/04/16/con_prelude_p.html (last visited Nov. 18, 2005).

86 *See, e.g., id.* ("Blogging is not journalism."); Paul Andrews, *Is Blogging Journalism?*, Nieman Reports, Fall 2003, at 63, 63 ("[I]t is fair to say that the vast majority of blogging does not qualify as journalism.").

But a functional approach to the Press Clause suggests that this is just another instance of asking the wrong question,[87] or at least of asking it too broadly and bluntly. It now seems safer to say, not that all blogs are a form of journalism, or that blogging is never journalism, but that "some Weblogs are doing journalism, at least part of the time."[88] At the very least, when a blogger engages in fact-gathering for purposes of public dissemination of newsworthy information, that blogger can be seen as having engaged in an act of journalism that is worthy of some constitutional or statutory protection.

A functional understanding of the Press Clause, or of the myriad statutory protections that fulfill the potential of the Press Clause, thus would provide a measure of protection to blogs when they are actively engaged in those core activities that we think of as constituting journalism. The medium by which that journalism is disseminated to the public matters far less than the fact that an individual has deliberately gathered and disseminated newsworthy facts.[89]

Some observations about this approach are in order. First, it should be noted that a number of current statutory protections for journalism partake of institutional elements that would leave blogs unprotected even if they were engaged in journalism.[90] For example, California's shield law requires the person claiming the protection of the law to be "connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire service;"[91] and New York's statute provides protection only to regular employees of news organizations or those who are "otherwise professionally affiliated for gain or livelihood" with news organizations.[92] Leaving aside the difficult question whether the Press Clause or some other constitutional provision *requires* the

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87 *See* Sack, *supra* note __.

88 Rebecca Blood, *Weblogs and Journalism: Do They Connect?*, Nieman Reports, Fall 2003, at 61, 61.

89 *See, e.g., Shoen*, 5 F.3d at 1293 ("What makes journalism journalism is not its format but its content."). We might modify this statement to say that what matters is not format but content and purpose.

90 *See* Robert D. Lystad & Malena F. Barzilai, *Reporter's Privilege: Legislative and Regulatory Developments*, *in* Media Law Resource Center, *Bulletin: White Paper on the Reporter's Privilege* 83, 95-101 (2004).

91 Cal. Const. art. 1, § 2(b); Cal. Evid. Code § 1070(a).

92 N.Y. Civ. Rights Law § 79-h.

protection of bloggers, a functional approach certainly recommends that states reexamine their shield laws with bloggers in mind.

Second, I have assumed that the functional approach is most important for those constitutional or non-constitutional protections that involve positive claims that a blogger should be entitled to privileges or immunities – the right not to be compelled to reveal one's sources or to resist searches, the right of access to government records or proceedings, and so forth – that the traditional press have, one way or another, been able to claim. As such, I have assumed a fairly narrow compass for the functional approach, one that would simply leave out the primary activity of most blogs (and many newspapers, for that matter) – "shaping, filtering, commenting, contextualizing, and disseminating . . . the news reports that others have produced."[93] That does not mean that such blogs are simply left out in the cold, however; they may still rely on the protections offered by the Speech Clause.

Is the functional approach, then, a better way of understanding both the Press Clause and the role of blogs within the Press Clause? Certainly it is true that this approach protects much of what is at the core of journalism: not merely first-person observation, but the gathering of facts from a variety of sources for the purposes of public dissemination of important information. And because it is available to anyone who engages in journalism, and not simply those individuals who are employed by recognized and established news media, this approach gets rid of any concerns about elitism.[94]

At the same time, I don't think we should be wholly satisfied with it. First, the functional approach may avoid one definitional problem – are blogs journalism? – only to replace it with a far more difficult one: what *is* journalism, exactly? And which *aspects* of journalism – editorial judgment, newsgathering, or something else – deserve special protection? It is not enough to say that "[i]f what the press *does* receives sufficient protection, who the 'institutional press'

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[93] Rebecca Blood, *A Few Thoughts on Journalism and What Can Weblogs Do About It*, April 15, 2004, *available at* http://www.rebeccablood.net/essays/what_is_journalism.html (last visited Nov. 18, 2005).

[94] *See, e.g.,* Lewis, *supra* note __, at 626-27.

is becomes important";[95] that response simply raises the question of what it is that the press *does* that we consider worthy of protection. Once we decide that certain journalistic functions merit heightened protection, whether under the Press Clause or under a statute, then a definitional problem is simply inevitable. And if, once, it was true that "a court [or a legislature] ha[d] little difficulty knowing a journalist when it [saw] one,"[96] I think it is safe to say that adding blogs to the mix complicates the situation considerably. Furthermore, because blogs rarely involve the kinds of internal controls that govern in the newsroom – in particular, the restraining force of professional norms of reporting the presence of layers of editors, the time for reflection provided by (usually) non-instantaneous communication, and the simple cost of establishing a newspaper or other news medium – there may be more reasons to worry that bloggers will invoke the legal protections offered to journalists for purely opportunistic reasons.[97]

These objections should not carry much *too* much weight. If one believes that the newsgathering function merits added protection, the definitional problems and the threat of opportunism must simply be counted as part of the inevitable but necessary cost of seeing those additional protections into being. Beyond this, however, something still seems lacking in the functional approach. Focusing on function alone hardly seems to capture all the ways in which the news media, old or new, contribute to our social discourse. It seems a thin conception of the ways in which mainstream media form a part of the fabric of our social life simply to suggest that they add some store of new facts to what we knew already. It does not describe, in Professor Balkin's words, the ways in which old media form part of the ongoing conversation that makes up our "democratic culture."[98] And if that is true as to conventional media, it is doubly true of blogs, whose value consists primarily of their role as "*participatory* media,"[99] and which have quickly formed their own unique part in our cultural conversation. A functional approach to the role of the blogosphere within the Press Clause does not seem to engage its real

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[95] Sack, *supra* note __, at 632-33 (emphasis in original).

[96] Floyd Abrams, *The Press* Is *Different: Reflections on Justice Stewart and the Autonomous Press*, 7 Hofstra L. Rev. 563, 580 (1979).

[97] *Cf.* Eugene Volokh, *You Can Blog, but You Can't Hide*, N.Y. Times, Dec. 2, 2004, at A39.

[98] Balkin. *supra* note __.

[99] Blood, *supra* note __ [web piece].

role, which is only secondarily about "journalism" and far more about its status as a "miniature public sphere of its own."[100]

A functional approach to the role of blogs within the Press Clause thus helps to isolate some of the most socially valuable aspects of the journalistic enterprise, and to protect those aspects of journalism in both their online and offline aspects. But it seems to lack the descriptive power to capture all the reasons why we value and protect "the press," old and new. And its failure to differentiate between the old and new media has the virtue of protecting both blogs and the traditional press, but only at the cost of failing to accurately describe the unique features and promises of each separate institution.

IV. STEWART *REDUX*: A NEW INSTITUTIONAL APPROACH

So I return to the inspiration for the title of this contribution: Justice Stewart's provocative suggestion that we think of the Press Clause as "a *structural* provision of the Constitution" that protects "the institutional autonomy of the press."[101] We might conclude that Stewart's institutional vision of the Press Clause is now a non-starter. The Court certainly has never signed on to anything like a fully fledged version of Stewart's description of the Press Clause, and one would think it would be even more untenable now that "anyone with a computer or a mobile phone is a potential reporter and publisher."[102] But despite the assumption that Justice Stewart's institutional autonomy version of the Press Clause died aborning, there may be more life in it than one would expect.

In this last section, I want to build on Justice Stewart's foundation, and argue in favor of an *institutional* vision of the Press Clause. Notwithstanding the many criticisms that have been heaped

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[100] A. Michael Froomkin, *Habermas@Discourse.net: Toward A Critical Theory of Cyberspace*, 116 Harv. L. Rev. 749, 860 (2003); *see also* Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 Duke L.J. 855, 893-96 (2000).

[101] Stewart, *supra* note __, at 633, 634 (emphasis in original).

[102] Banning, *supra* note __, at 112.

on his suggestion,[103] I will suggest that an institutional understanding of the Press Clause can be a normatively attractive approach. Moreover, I will argue that it is also a more descriptively accurate account of what actually happens in First Amendment doctrine than is generally supposed. Under an institutional approach to the First Amendment, it is not out of the question that blogs, despite their evident variety, can and should find some degree of protection in the Press Clause as an autonomous "press "institution in their own right.

In making this argument, I leave much open for future discussion. It is certainly not clear at this point what the precise scope and nature of the protection blogs might enjoy under an institutional approach to the Press Clause would be; and it is not necessarily the case that blogs ought to enjoy precisely the same degree of protection that the established news media would enjoy in their own right under an institutional approach to the Press Clause. Instead, I will argue that the established press and the blogosphere should each be protected largely according to the internal norms – evolving norms, in the case of the blogosphere – that govern each of these "First Amendment institutions."[104]

We might start by stepping back from the Press Clause and thinking about First Amendment doctrine more generally.[105] Frederick Schauer has argued, persuasively in my view, that the current state of the doctrine might be characterized as one of institutional agnosticism.[106] Its general reluctance to invest the Press Clause with any content that might suggest press speakers have different rights than individual speakers is but one example. In its Free Exercise jurisprudence, it has also moved away from a willingness to privilege religious conduct against generally applicable government rules.[107] More generally, its focus on content-neutrality and content-discrimination "has become the

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[103] *See, e.g., Bellotti*, 435 U.S. at 795-802 (1978) (Burger, C.J., concurring); Lewis, *supra* note __; Lange, *supra* note __; Steven Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 UCLA L. Rev. 915 (1978); William W. Van Alstyne, *The Hazards to the Press of Claiming a Preferred Position,"* 28 Hastings L.J. 761 (1977).

[104] *See generally* Paul Horwitz, Grutter*'s First Amendment*, 46 B.C. L. Rev. 460, 563-90 (2005); Schauer, *supra* note __.

[105] *See* Horwitz, *supra* note __, at 563-66.

[106] Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 Harv. L. Rev. 84, 120 (1998).

[107] *See Employment Div. v. Smith*, 494 U.S. 872 (1990).

cornerstone of [its] First Amendment jurisprudence,"[108] and it has applied this approach and its exceptions without regard, usually, for the specific medium or context in which the speech at issue occurs.[109]

Sound reasons support this approach.[110] But the cost of this institutionally agnostic approach is that the Court is forced to fit the complex real world in which speech occurs roughly onto the Procrustean bed of its First Amendment doctrine, to draw myriad exceptions, or simply to distort the existing doctrine.[111] The result is a doctrine that is rife with "vague definitions, marginally (at best) useful three- and four-part tests, and slippery and hard to apply categories" – a "not-all-that-bad" doctrine[112] that, at its worst, approaches incoherence.[113]

As I have argued elsewhere, we might take another approach.[114] Rather than build First Amendment doctrine from the top down, crafting general rules that apply imperfectly across a range of situations, the courts might begin with the recognition that a "number of existing social institutions" – such as the press, universities, religious associations, libraries, and perhaps others – "serve functions that the First Amendment deems especially important."[115] Building on this foundation, the courts could "construct First Amendment doctrine in response to the actual functions and practices" of those institutions that merit recognition as "First Amendment institutions."[116]

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108 Steven J. Heyman, *Spheres of Autonomy: Reforming the Content Neutrality Doctrine in First Amendment Jurisprudence*, 10 Wm. & Mary Bill of Rts. J. 647, 650 (2002).

109 *See* Schauer, *supra* note __, at 1261-62.

110 *See, e.g.,* Dale Carpenter, *The Value of Institutions and the Values of Free Speech*, 89 Minn. L. Rev. 1407 (2005).

111 *See* Horwitz, *supra* note __, at 566.

112 Schauer, *supra* note __, at 1278.

113 *See generally* Robert Post, *Recuperating First Amendment Doctrine*, 47 Stan. L. Rev. 1249 (1995).

114 *See* Horwitz, *supra* note __.

115 Schauer, *supra* note __, at 1274.

116 *See* Horwitz, *supra* note __, at 569.

Under this approach, the Court would identify those institutions that merit recognition as First Amendment institutions.[117] Those institutions would then be granted significant presumptive autonomy to act, and the courts would defer substantially to actions taken by those institutions within their spheres of autonomy. The courts might go further and recognize instances in which the social value served by some First Amendment institution counsels privileges or immunities, such as some degree of protection for reporters' ability to maintain the confidentiality of their sources, that might not be available to other speakers.[118] The courts might, in short, value First Amendment institutions *as institutions*, and accord them substantial autonomy to act within that institutional framework.

In advocating this institutional approach to the First Amendment, I am not championing the equivalent of an absolute constitutional immunity for First Amendment institutions, nor am I courting anarchy. That a First Amendment institution might have substantial autonomy to act does not mean it would not be obliged to act within some set of "constitutionally prescribed limits."[119] This approach does entail granting a substantial degree of self-governance to those institutions that play a substantial role in contributing to the world of public discourse that the First Amendment aims to promote and preserve. But my point is precisely that these institutions are already substantially *self*-governing institutions: they operate in accordance with an often detailed and highly constraining set of *internal* norms that govern the bounds of appropriate behavior within different First Amendment institutions. I am thus simply suggesting that courts should, in the first instance, defer to those institutions' capacity for self-governance rather than attempt to impose an ill-fitting doctrinal framework based on the idea that one set of First Amendment rules can and should apply to the radically different social institutions in which speech takes place. To the extent it is necessary to build some set of "constitutionally prescribed limits"

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[117] Even critics of an institutional First Amendment approach acknowledge that this call for the identification of particular First Amendment institutions does not present an insuperable obstacle to the project. *See* Carpenter, *supra* note __, at 1408 ("[T]he fact that a First Amendment theory calls for line drawing is not a sufficient objection to that theory. Line drawing is both inevitable and desirable in First Amendment doctrine."); *see also* Schauer, *supra* note __, at 1260.

[118] *See generally* Horwitz, *supra* note __, at 571-74; Schauer, *supra* note __, at 1274-75.

[119] *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003).

around the behavior of those institutions, the courts should build from the bottom up, taking their cue from the norms and practices of the institution in question and from the social values served by that institution. Thus, the court might ask of a First Amendment institution's action in a particular case, not whether it comports with some universal First Amendment rule, but whether it falls within the boundaries of behavior broadly consistent with the norms and practices of that institution, and whether those norms and practices serve the First Amendment values that are advanced by the role of that institution within the broader society.[120]

A First Amendment doctrine built from the ground up around the value and practices of existing "First Amendment institutions" has a number of qualities that ought to be normatively attractive. Not least, it offers a way of thinking about the First Amendment that actually responds to the differentiation that is apparent in the real world between different kinds of speech institutions – the different contexts in which speech occurs, the internalized norms of conduct that constrain the speakers in each institution, and the social values served by the kinds of speech that are central to different kinds of institutions.[121] It is far more attuned to the actual speech- and press-oriented social practices the First Amendment was designed to promote. It thus avoids the doctrinal incoherence that is inevitable when courts attempt to fashion a First Amendment doctrine that tries, and fails, to be all things to all kinds of speakers and speech situations.

Moreover, because it is willing to engage in some institutional differentiation rather than fashion generally applicable rules, the institutional approach to the First Amendment may be better suited to protecting the full range of speech and speech-related activities engaged in by different First Amendment institutions, and more conscious of the limits of those institutions. In other words, it

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120 *See* Horwitz, *supra* note __, at 578-79 (suggesting that courts "lay down a general procedural requirement – for example, is this a legitimate academic decision, or is this task properly within the role of a library, or is this an exercise of professional journalistic discretion? – while permitting the institutions substantial latitude to operate within these minimal standards").

121 *Cf.* Post, *supra* note __, at 1280 (First Amendment doctrine should be "refashion[ed] . . . to foster a lucid comprehension of the constitutional values implicit in discrete forms of social order").

may avoid being either overprotective or underprotective of any given institution.[122] The law of reporters' privileges may offer one such example.[123] Although many lower courts and state legislatures protect reporters from divulging the identity of their sources, the Supreme Court could not find a majority to firmly back this position, in part due to the "practical and conceptual difficulties" inherent in the inevitable question whether particular "categories of newsmen qualified for the privilege."[124] This unwillingness to engage in any institutional differentiation between the press and other speech institutions, however, may result in a less vigorous protection for newsgathering than is enjoyed in other legal systems, which have found on both statutory *and* constitutional grounds that reporters are entitled to such a privilege.[125]

If readers concede that this vision carries some attractive qualities, the objection still may be made that urging the Supreme Court to shift so radically from its current approach to First Amendment doctrine is unrealistic. But that objection is, I think, unfounded. In fact, in a variety of ways, the Court already acknowledges the unique value of a variety of traditional speech institutions, the press not least among them.[126] This tendency is perhaps most apparent in the cases involving the law of government speech, in which the Court has shaped its doctrine according to whether the government speaker is acting as a library,[127] a journalist,[128] or an arts funder.[129] It is also apparent in the Court's

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122 *See* Schauer, *supra* note __, at 1270-73.

123 *See id.* at 1270-71.

124 *Branzburg*, 408 U.S. at 704.

125 *See* Floyd Abrams & Peter Hawkes, *Protection of Jounalists' Sources Under Foreign and International Law*, *in* Media Law Resource Center, *Bulletin: White Paper on the Reporter's Privilege* 183 (2004).

126 *See infra* notes __-__ and accompanying text.

127 *See United States v. American Library Ass'n*, 539 U.S. 194, 203-06 (2003) (examining the application of a conditional funding requirement that libraries install filtering software in light of the "traditional missions" of libraries, and suggesting that traditional public forum principles were "out of place in the context of this case").

128 *See Arkansas Educ. Television Commission v. Forbes*, 532 U.S. 666, 672-74 (1998) (departing from public forum analysis in light of the public broadcaster's exercise of journalistic editorial discretion in excluding candidates from a political debate).

129 *See Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998) (holding that traditional principles of content neutrality were out of place where the government was making content distinctions in its role as an arts funding body).

hesitant but ongoing recognition that universities operate under principles of academic freedom that require them to have some constitutionally grounded autonomy to make educational decisions, even in the face of countervailing constitutional principles such as that of non-discrimination.[130] And it is arguable that these cases can be seen as part of a broader trend on the Court of recognizing and protecting the autonomy of a variety of intermediary institutions that serve a vital social and structural role in our society.[131]

If we think of the First Amendment in institutional terms, the Press Clause is obviously the most natural, most textually rooted place to find some form of institutional autonomy for what we might label the conventional working press. Here, too, we may see some traces of institutionally oriented thinking in the Court's treatment of the press. Although it is true that the Court has refused to explicitly grant the press any institutional autonomy, underneath the surface the picture is a little different. Most famously, although a splintered Court ultimately rejected the claim of a constitutionally grounded reporter's privilege in *Branzburg*, a plurality of the Court in that case did say, "Nor is it suggested [here] that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated."[132] The Court has also repeatedly suggested that in evaluating cases involving the press, it will erect a sphere of autonomy around the press's performance of some of its key functions, such as editing.[133] Finally, although the protections of *New York Times v. Sullivan* and its progeny may also apply to non-media speakers,[134] it is clear that

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130 *See Grutter*, 539 U.S. 306; *see generally* Horwitz, *supra* note __.

131 *See* John O. McGinnis, *Reviving Tocqeville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 Cal. L. Rev. 485 (2002); Richard W. Garnett, *The Story of Henry Adams's Soul: Education and the Expression of Associations*, 85 Minn. L. Rev. 1841 (2001); Horwitz, *supra* note __, at 560-62.

132 *Branzburg*, 408 U.S. at 681; *see also id.* at 709 (Powell, J., concurring) (journalists enjoy "constitutional rights with respect to the gathering of news or in safeguarding their sources").

133 *See, e.g., Tornillo*, 418 U.S. at 258; *CBS v. Democratic Nat'l Committee*, 412 U.S. 94, 124-25 (1973).

134 *See Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc.*, 472 U.S. 749 (1985) (applying standard in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), to non-traditional media defendant, but resting its decision on the nature of the speech involved rather than the nature of the defendant); *see also Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 779 n.6 (1986) ("Nor need we consider what standards would apply if the plaintiff sues a nonmedia defendant"); *cf. Milkovich v. Lorain*

the constitutional rules governing defamation actions involving public figures or matters of public concern were crafted with the press in mind.[135] In sum, in a variety of ways, the Court's treatment of issues involving the press has both informed and, more importantly, been informed by a series of norms and principles that emerge from the nature of the press as an institution.

Linking these findings to the broader point of this section, we might take from this discussion the possibility that the Court could – and should – become more self-conscious about using the Press Clause to grant some degree of institutional autonomy to the press. While that autonomy naturally must be subject to some set of "constitutionally prescribed [outer] limits,"[136] in shaping those limits the Court might turn substantially to the press's own norms of self-governance for guidance.

This brings us back to blogs, the subject of this Symposium. In thinking about the relationship between blogs and the law, we might take the institutional approach to the First Amendment as our starting point. Blogs can be thought of as a kind of emerging First Amendment institution. More particularly, they can be viewed as an especially visible and well-crystallized example of a broader developing speech institution: the unique environment that is public discourse in cyberspace.[137] Once we think of blogs as a First Amendment institution, we might ask whether the Press Clause, recognizing the blogosphere as a unique form of "press," could accord the blogosphere a similar form of institutional autonomy, and create some breathing space for the formation and evolution of this new institutional form of public discourse.

Jounral Co., 497 U.S. 1, 20 n.6 (1990) (reserving judgment on whether the rule in that case, involving statements of opinion relating to matters of public concern, applies to non-media defendants).

[135] *See, e.g.,* Bezanson, *supra* note __, at 742-48; Bezanson, *supra* note __, at 853-57 (noting the ways in which courts in defamation actions, focusing on the exercise of editorial judgment, ask whether "the challenged publication decision [was] animated by the purposes that underlie the free press guarantee – the independent choice of current information and opinion of value to the public"); *cf.* Lee C. Bollinger, *Images of a Free Press* 20 (1991) ("Since *New York Times v. Sullivan*, therefore, there has arisen a jurisprudence of and for the press.").

[136] *Grutter,* 539 U.S. at 328.

[137] *See, e.g.,* Froomkin, *supra* note __; Lidsky, *supra* note __; Lasica, *supra* note __.

Conceiving of blogs as a type of First Amendment institution, entitled to substantial autonomy as an institution, raises some difficult questions about the scope of autonomy blogs should enjoy. In particular, notwithstanding the disdain for the professionalized print and broadcast press that is so common in the blogosphere,[138] there are good reasons to believe that the institutional structure of the established news media makes them better suited for some degree of legally granted, constitutionally grounded institutional autonomy than blogs might be. The established news media typically operate subject to a set of ethical and professional norms, made explicit in a host of ethical codes and, more importantly, absorbed by individual journalists in a deeply embedded sense of professional identity that shapes and constrains their actions.[139] Indeed, it may be the case that those internal norms are a far better predictor of the nature and limits of press behavior than any norms that could be imposed from the top down by the courts.[140]

In addition, mainstream news media are subject to a variety of constraints that emerge from the editing process and the simple fact of their corporate and hierarchical structure.[141] Blogs, on the other hand, are written by individuals or small groups, and postings are typically transmitted without editing (and, sometimes, without any evidence of the slightest second thought – and I speak from

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[138] *See supra* notes 14-15 and accompanying text.

[139] For a critical but ultimately favorable discussion of the role of ethical codes in shaping responsible reporting, see Blake D. Morant, *The Endemic Reality of Media Ethics and Self-Restraint*, 19 Notre Dame J.L. Ethics & Pub. Pol'y 595 (2005).

[140] *See* Frederick Schauer, *On the Relationship Between Press Law and Press Content*, *in* Cook, ed., *supra* note __, at 51 (arguing that "numerous . . . economic, sociological, institutional, cultural, and psychological factors . . . may far more than the law determine press content"). Schauer draws from this conclusion that possibility that we might revise libel law to shift "the cost of a free press" back to publishers, or to provide a publicly subsidized form of libel insurance. *Id.* at 63-64. Alternatively, however, we could draw the conclusion that if press norms are so inelastic, and *if* the press serve a valuable social function when they aggressively report and publish the news, then we ought to be trying to conform press laws to press *conduct*, as I have suggested above.

[141] *See* Posner, *supra* note __.

personal experience here). Nor are many bloggers enamored of the idea of a bloggers' code of ethics.[142]

To raise these questions does not mean that blogs should not receive any institutional protection under the Press Clause, however. Rather, these questions simply lead us to the answer that an institutionally differentiated First Amendment would naturally suggest: that an institutional approach to blogs under the Press Clause should attempt to draw the contours of blogs' institutional autonomy in a way that is appropriate to blogs *as an institution*. On this view, it would be an error to characterize blogs as "a new form of journalism,"[143] and attempt to draw institutional protections that simply ape whatever institutional protections the conventional press are entitled to. Instead, we should ask what protections are necessary given the purpose, value, and nature of blogs as an institution.

If we consider blogs from this institutional perspective, the first thing that is apparent is that blogs form a *collective* institution. Although it may make sense to think of newspapers as singular, if similar, entities, it makes less sense to think of blogs as isolated speech instruments. We might say, grandiosely, that there are no blogs – there is only the blogosphere. Blogging ultimately is a collective enterprise, and must be understood as part of the distinctly collective and participatory public discourse that is speech in cyberspace.[144]

Viewed in this light, there is much to be said for the idea that blogs *do* enjoy the kind of institutional framework that makes it less dangerous for courts to cede a considerable degree of autonomy to them.[145] Typically, we rely on newspapers to correct their own errors; we thus emphasize, through libel law, the importance of newspapers' acting according to the proper institutional norms:

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142 *See* Ribstein, *supra* note __, at 17 n.35 (citing Ann Althouse, *We Don't Need Your Code of Ethics*, *available at* http://althouse.blogspot.com/2005/05/we-dont-need-your-code-of-ethics.html).

143 *See* Ribstein, *id.* at 3.

144 *See* Beth S. Noveck & David R. Johnson, *Society's Software*, 74 Fordham L. Rev. 469, 469 (2005) ("In an era of computer networks and peer production technologies, we increasingly produce both democracy and culture collectively. The group, not the individual, is the central speech actor").

145 *See* Ribstein, *supra* note __, at 14 ("[T]he relevant perspective from which to analyze regulation of blogging is the universe of blogs rather than an individual blog.").

reporting and editing without actual malice, and with the sound exercise of editorial judgment.[146] Blogs' correction practices are not singular but collective: errors are exposed and corrected through the exposure of mistakes and the airing of corrective views on many, many other blogs.[147] And whatever bloggers may say about not wanting a code of ethics to be imposed on them, it should be apparent to anyone who has engaged in sustained blogging that an organic set of norms and practices *has* evolved, and continues to evolve, in the blogosphere. Bloggers already seek to conform to a wide variety of relevant norms: norms in favor of linking to other sites; norms in favor of linking to the newspaper article or other source that forms the subject of, and that supports (or refutes) the arguments made by, the blogger in a given post; norms in favor of correcting or disputing errors that have been pointed out by others; and norms in favor of allowing commenters, who also serve as error-correcting agents.[148] Corresponding to these norms is an evolving set of norms that govern *readers'* expectations on the blogosphere: norms that suggest that certain sites may be more trustworthy than others, and that assertions made on any one site ought not be completely credited unless and until they have been verified elsewhere.[149]

In sum, the norms developing in and around the blogosphere – both bloggers' norms and readers' norms – suggest the development of an institutional framework that may collectively do much of the verification, correction, and trust-establishing work that established news media institutions do individually. And these conclusions lead us to some tentative thoughts about what an institutional First Amendment approach to blogs under the Press Clause might look like. Certainly it would entail the same assumption I have urged should govern the treatment of the established press under the Press Clause: that they should be given

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146 *See* Bezanson, *supra* note __.

147 *See* Posner, *supra* note __ (noting the collective nature of error correction in the blogosphere and suggesting that "the blogosphere as a whole has a better error-correction machinery than the conventional media do"); Ribstein, *supra* note __, at 14.

148 *See, e.g.,* Ribstein, *id.* at 4-6.

149 *See, e.g., Cahill*, 884 A.2d at 466 ("[A] reasonable person reading a newspaper in print or online . . . can assume that the statements are factually based and researched. This is not the case when the statements are made on blogs or in chat rooms.").

substantial institutional autonomy by the courts. But the shape of that autonomy, built from the ground up based on what we know of social discourse in the blogosphere, might be different.

For example, with respect to defamation law, it might make sense to shape legal doctrine that recognizes the collective environment in which speech and the correction of errors takes place in the blogosphere. I do not mean by this that individual blogs would be utterly immune from liability for defamation simply because of the fact that errors might be corrected elsewhere in the blogosphere. We might, for instance, give greater or lesser immunity to individual blogs depending on how much they actually make *use* of this collective error-correcting mechanism: the degree to which they link to the sources they cite, the degree to which they track back to other sites, the degree to which they allow commentary, the degree to which they respond to others' efforts to correct them, the degree to which they actually acknowledge and correct errors, and so forth.

It is not clear how more positive protections, such as rights of access or rights against the compelled disclosure of sources, should fare under an institutional First Amendment treatment of blogs. It is obviously impossible to grant, say, press credentials to every blog that might request them. But it is also the case that most blogs still rely on original reporting supplied primarily by the established news media.[150] So it might be the case that a blogger's claim of constitutional access rights under the Press Clause would fail on *institutional* grounds. For similar reasons, it is not clear how we should treat bloggers' claims of a constitutionally grounded privilege of nondisclosure of sources. But the age of the blogger-journalist is still young, and we should look to the norms and practices that develop in considering this question over the long term.

Would an institutional understanding of blogs' place under the Press Clause offer any payoff for blogs, or for our understanding of First Amendment doctrine? I think it would. Certainly much of the law that would result from an explicitly institutional approach to the First Amendment and blogs would resemble existing law. That has less to do, however, with the sufficiency of existing doctrine, and more to do with the fact that the existing doctrine already contorts

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[150] *See* Posner, *supra* note __ (noting that "bloggers are parasitical on the conventional media" with respect to the gathering of information).

itself in an effort to respond to the nature and value of different speech institutions.[151] An institutional approach would simply permit courts to do explicitly, transparently, and self-consciously what they already do implicitly and clumsily.

Moreover, because an institutionally differentiated understanding of the role of blogs would not simply attempt to import the law of the established press wholesale into this very different medium, it would ease the fear that if everyone is treated as "the press," any rights granted under the Press Clause will be so diluted as to be meaningless.[152] Rather, it would be clear that the Press Clause protects more than one institution, and that the content of the rights pertaining to each must vary according to the nature and practices of each institution. Thinking of blogs on an institutional level would also encourage courts to pay attention to such issues as blogs' treatment under the election laws[153] and how they should be treated for purposes of taxation.[154]

Most importantly, an institutional approach to the treatment of blogs under the Press Clause would encourage courts to more self-consciously consider blogs in *context*: to give blogs substantial autonomy to act, while monitoring the development of norms of behavior in the blogosphere and encouraging blogs to develop rules of conduct that deter the worst of the social ills that might emerge from the blogosphere. It would encourage courts to develop a constitutional law of blogging that allows the relevant legal norms to emerge from those cultural norms that the blogs develop themselves. In this way, our constitutional law, whether with respect to blogs or with respect to the press, universities, and other First Amendment institutions, will be the product of an organic dialogue about legal,

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151 *See supra* notes __-__ and accompanying text; *see also* David McGowan, *Approximately Speech*, 89 Minn. L. Rev. 1416, 1432 (2005) (suggesting that judges implicitly pay attention to institutions when conducting conventional free speech analysis).

152 *See supra* note __ and accompanying text.

153 *See* Hasen, *supra* note __.

154 *Cf. Leathers v. Medlock*, 499 U.S. 439 (1991) (examining issues surrounding taxation of the established press); *Ark. Writers' Project v. Ragland*, 481 U.S. 221 (1987) (same); *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575 (1983) (same).

constitutional, and cultural norms both inside and outside of the courts.[155]

V. CONCLUSION

In this contribution, I have offered three ways of looking at the status of blogs under the Press Clause of the First Amendment – and, not incidentally, three ways of looking at the Press Clause itself. The first approach distinguishes between the "free press" and "open press" models of the Press Clause. Following this approach, if we acknowledge the historical roots of the open press model in our Press Clause and revive an open press-oriented understanding of that clause, would make room for blogs within the Press Clause; but it would do so at the cost of any meaningful content for rights enjoyed by blogs – or anyone else – under the Press Clause. The second approach would focus instead on a functional understanding of the Press Clause; it would focus more on *doing* "journalism" than on *who* qualifies as "the press." This approach may do a better job of protecting some of the conduct we value most in journalism, and it would have the added virtue of protecting that conduct whether it is undertaken by journalists working for the established press or by blogger-journalists. But it raises definitional concerns of its own, and in any event it does not seem to fully and richly capture all that we value in either the established press or the blogosphere.

The third approach – an institutional understanding of the Press Clause, and of the First Amendment generally – is perhaps the most controversial approach. In some ways, it seems to require us to make the biggest leap from existing doctrine. It requires hard thinking about the nature of the Press Clause; it requires us to cede autonomy to private institutions, a move that many people are sure to resist; and it requires us to do so not only for the established press alone, but for new institutions such as blogs and the blogosphere. In other ways, though, we might think of the conceptual leap required here as being not so great in the final analysis; after all, an institutional understanding of the Press Clause simply reflects the lived reality of our speech institutions.

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[155] *See generally* Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 Harv. L. Rev. 4 (2003) (discussing the relationship between constitutional law and constitutional culture).

In many respects, I want to suggest in conclusion, the institutional approach is also the most promising and intriguing way to think about the legal status of blogs, and about the meaning of the Press Clause and the First Amendment. However distant his own proposal ultimately may be from mine, and notwithstanding the fact that he stood at a temporal midpoint between the dimly remembered "lonely pamphleteer" of our past[156] and the as-yet-unforeseen rise of the blogger, Justice Stewart's seminal article on the Press Clause may still carry lessons for us thirty years later.

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156 *Branzburg*, 408 U.S. at 704.