

The Future of Press Freedom

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The American press is facing a perilous moment. A confluence of economic, cultural, technological, and political shifts has abruptly upended our longstanding sense of how the news media operates. Suddenly, it seems, these sweeping changes have realigned the traditional relationships between and among democracy, news-gathering, and press freedom, prompting new questions about what it means to value and support a free press in the United States.

Throughout the twentieth century, judges and scholars routinely praised journalists for fulfilling key societal roles.¹ In our modern sociopolitical and media environments, however, journalism is undergoing rapid transformation. Government officials are increasingly targeting the news media directly in calculated attacks aimed at undercutting its legitimacy. At the same time, traditional news outlets are vanishing before our eyes, leaving an information vacuum that other communicators – like social media influencers, corporate agents, and purveyors of political propaganda – are rushing to fill. The rise of artificial intelligence introduces additional complexity, blurring the lines between human-created and machine-generated content. Alongside these current stressors, there is an emerging reckoning with the industry's past failures to represent many voices and perspectives of marginalized groups during the era once hailed as journalism's glory days, underscoring the need for a more inclusive press. This radically changing media ecosystem requires us to revisit first principles. It raises hard but vital questions about which functions of the press are essential to a healthy democracy, why these functions matter, who is fulfilling them, and, crucially, what legal and policy protections are necessary to safeguard them.

¹ RonNell Andersen Jones & Sonja West, *The Disappearing Freedom of the Press*, 79 WASH. & LEE L. REV. 1377 (2022); RonNell Andersen Jones, *The Dangers of Press Clause Dicta*, 48 GA. L. REV. 705 (2014); Sonja R. West, *The Stealth Press Clause*, 48 GA. L. REV. 729 (2014).

It is, to be sure, a tricky moment to be talking about “the press.” At this time of radical change, as “the press” in its twentieth century form hemorrhages resources, credibility, and its once-ubiquitous reach, many feel tempted to abandon any effort to breathe meaning and substance into press-specific rights – to throw up our collective hands and announce that law and policy simply cannot protect this role.² Recent data show that the U.S. Supreme Court may be on its way to abandoning the concept of freedom of the press altogether.³ Yet American democracy continues to need the press *functions* even as the media landscape in which they are performed evolves. Indeed, as both figurative and literal attacks on these roles intensify⁴ and as reliable access to shared facts dwindles, we must work even more urgently to craft legal doctrine that will identify and protect these roles in enduring ways. Rather than fixating on who is the press, our focus should be on what can be done to ensure a future for the press function.

This volume unites nearly thirty of the nation’s leading legal and media studies scholars to launch this crucial conversation. They bring to the discussion deep expertise in law, journalism, communications theory, education, technology, history, and political science. By examining the challenges to press freedom through these multidisciplinary lenses, they offer fresh insights into the obstacles and opportunities that lie ahead for this fundamental pillar of democracy.

² See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 326 (2010) (“We must decline to draw, and then redraw, constitutional lines based on the particular media or technology used to disseminate political speech from a particular speaker.”); *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 80 (1978) (Burger, C.J., concurring) (arguing that “[t]he very task of including some entities within the ‘institutional press’ while excluding others, whether undertaken by legislature, court, or administrative agency, is reminiscent of the abhorred licensing system of Tudor and Stuart England – a system the First Amendment was intended to ban from this country.”); see also Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. REV. 1025, 1026–29 (2011) (discussing the definitional problem).

³ See generally RonNell Andersen Jones & Sonja R. West, *The U.S. Supreme Court’s Characterizations of the Press: An Empirical Study*, 100 N.C. L. REV. 375 (2022).

⁴ See generally *Quick Facts*, U.S. PRESS FREEDOM TRACKER, <https://pressfreedomtracker.us/> (last visited July 9, 2024); RonNell Andersen Jones & Sonja R. West, *The Fragility of the Free American Press*, 112 NW. U. L. REV. 567–72 (2017) (discussing former President Donald Trump’s attacks on the press); see, e.g., *Pulitzer Prize-Winning Photojournalist Shoved to the Ground by LAPD*, U.S. PRESS FREEDOM TRACKER (May 31, 2020), <https://pressfreedomtracker.us/all-incidents/pulitzer-prize-winning-photojournalist-shoved-ground-lapd/>; Marc Tracy & Rachel Abrams, *Police Target Journalists as Trump Blames ‘Lamestream Media’ for Protests*, N.Y. TIMES (June 1, 2020), <https://www.nytimes.com/2020/06/01/business/media/reporters-protests-george-floyd.html>; Katie Shepherd, *This Portland Journalist Has Been Gassed and Shoved by Federal Officers. She’s Only 17*, WASH. POST (July 23, 2020, 6:32 AM), <https://www.washingtonpost.com/nation/2020/07/23/portland-protests-teenage-reporter/>; Courtney Douglas, *Amid Black Lives Matter Protests, A Crushing Moment for Journalists Facing Record Attacks, Arrests at the Hands of Law Enforcement*, REPS. COMM. (Sept. 4, 2020), <https://www.rcfp.org/black-lives-matter-press-freedom/>; Clare Duffy, *Journalist Partially Blinded While Covering Protests: There’s No Way They Could Have Mistaken Me for Anything but Press*, CNN (June 14, 2020), <https://www.cnn.com/2020/06/14/media/linda-tirado-reliable/index.html>.

From the collective insights of these scholars emerge five crucial themes. Each marks a significant step forward in a space that has not previously received sufficient attention, laying the foundation for a new era of press freedom scholarship.

1.1 DEMOCRACY AND THE PRESS FUNCTION

One thing is clear: We cannot effectively protect something we do not fully understand. Thus, we must more carefully theorize and articulate the role the press function plays in democratic society.

In recent years, political and governmental actors have launched an unprecedented wave of attacks on the press, dramatically reshaping the boundaries of acceptable discourse when it comes to the characterization and treatment of working journalists. By branding the press as “fake news,”⁵ threatening governmental action against dissident outlets,⁶ applauding the use of force against reporters,⁷ and restricting the access the press has to important people and events,⁸ these actors are shifting the public tone. Today’s newsgatherers face harassment, threats, violence, and arrests. They increasingly struggle to do the work of bearing witness to our most urgent scenes. Perhaps unsurprisingly, the international press freedom ranking of the United States has plummeted over the past decade.⁹

⁵ See, e.g., Roy S. Guterman, Opinion, *After Four Damaging Years, Biden Must Restore Press Freedom*, SYRACUSE.COM (Dec. 10, 2020, 10:00 AM), <https://www.syracuse.com/opinion/2020/12/after-4-damaging-years-biden-must-restore-press-freedom-roy-s-guterman.html> (cataloguing Donald Trump’s use of this and other terms disparaging the press during his presidency).

⁶ See, e.g., Jordan Weissman, *Donald Trump Wants to Get Revenge on Jeff Bezos by Messing with Amazon’s Taxes*, SLATE: MONEYBOX (Mar. 28, 2018, 3:04 PM), <https://slate.com/business/2018/03/donald-trump-wants-to-get-revenge-on-jeff-bezos-by-messing-with-amazons-taxes.html>; Mathew Yglesias, *Donald Trump Threatens Amazon as Payback for Washington Post Articles He Doesn’t Like*, VOX (May 13, 2016), <https://www.vox.com/2016/5/13/11669850/donald-trump-threatens-amazon>; Alex Pfeiffer, *Source: Trump Doesn’t Back the Time Warner and AT&T Merger If Zucker Still Heads CNN*, DAILY CALLER (July 6, 2017), <http://dailycaller.com/2017/07/06/source-trump-doesnt-back-the-time-warner-and-att-merger-if-zucker-still-heads-cnn/>; see also Sonja R. West, *Presidential Attacks on the Press*, 83 MO. L. REV. 915, 917 (2018) (detailing how President Trump used “the power of his presidency in an attempt to punish or silence press organizations that displease[d] him” during his first term.)

⁷ See, e.g., Brett Samuels, *Trump Mocks Reporters Who Were Roughed Up by Police During Protests*, THE HILL (Sept. 22, 2020), <https://thehill.com/homenews/media/517713-trump-mocks-reporters-who-were-roughed-up-by-police-during-protests> (quoting President Donald Trump describing excessive police force against reporters as a “beautiful sight”).

⁸ See, e.g., *The Latest: EPA Bars AP, CNN from Summit on Contaminants*, ASSOCIATED PRESS (May 22, 2018), <https://apnews.com/d799f4e096cc42cf99a01b02d1e0688>; Callum Borchers, *White House Blocks CNN, New York Times from Press Briefing Hours After Trump Slams Media*, WASH. POST (Feb. 24, 2017, 4:10 PM), <https://www.washingtonpost.com/news/the-fix/wp/2017/02/24/white-house-blocks-cnn-new-york-times-from-press-briefing-hours-after-trump-slams-media>.

⁹ See *World Press Freedom Index 2024*, REPS. WITHOUT BORDERS, <https://rsf.org/en/index> (last visited July 9, 2024) (showing the United States falling to 55th in the world, behind both Chile and Ivory Coast).

We must more carefully probe the relationship between a healthy press and a healthy democracy and think seriously about what these dynamics teach us about the most urgent components of our efforts to craft sustainable press-protective doctrines. The press fulfills several distinct and identifiable constitutional roles – including, as Robert Post explores, contributing to public discourse, distributing democracy-enhancing information, checking government and the powerful, and creating a public sphere.¹⁰ Each of these roles illuminates a different aspect of the constitutional meaning of “the press” and points to a different array of rights that ought to accrue.¹¹ By scrutinizing these roles and identifying threats to them when they emerge, we can more effectively safeguard the future of press freedom.

This effort also requires us to recognize how the press provides an important link between the First Amendment’s democratic values and its truth-seeking goals, enhancing the marketplace of ideas during a time of heightened dysfunction. As anti-democratic forces exploit our increasingly oversaturated and underinformed community dialogue, we need to take seriously the increasingly complicated relationship between press freedom, violence, and public discourse.¹² Because, as Joseph Blocher notes, “if a democracy cannot establish the boundaries of violence, then violence will end up establishing the boundaries of democracy – including the freedom of the press.”¹³

Notably, this work will also demand that press advocates engage in a more rigorous examination of journalism’s role in a pluralistic society and of our responsibilities as citizens in our communications ecosystem. Gregory Magarian cautions that we must tussle not only with the tensions between objectivity and subjectivity but also with the competing pressures of institutionalism and populism.¹⁴ This process may require us to more fully reconceptualize citizenship in an era in which professional journalism plays a significantly diminished role in directly shaping our local news and information environment.¹⁵ Nik Usher suggests that we identify the unique roles of professional journalism as a civic institution and then fill the gaps that remain in our public discourse by fostering the expectation that individual community members will more actively facilitate the circulation of reliable civic information within communities.¹⁶

¹⁰ Robert Post, *The Press and American Democracy*, in *THE FUTURE OF PRESS FREEDOM: DEMOCRACY, LAW, AND THE NEWS IN CHANGING TIMES* 17 (RonNell Andersen Jones & Sonja R. West eds. 2025) [hereinafter *THE FUTURE OF PRESS FREEDOM*].

¹¹ *Id.*

¹² Joseph Blocher, “Murder the Media”: *Press Freedom, Violence, and the Public Sphere*, in *THE FUTURE OF PRESS FREEDOM*, *supra* note 10, at 54.

¹³ *Id.*

¹⁴ Gregory P. Magarian, *Political Tensions and the Democratic Press*, in *THE FUTURE OF PRESS FREEDOM*, *supra* note 10, at 28.

¹⁵ Nik Usher, *Post-Newspaper Democracy and the Rise of Communicative Citizenship: The Good Citizen as Communicator*, in *THE FUTURE OF PRESS FREEDOM*, *supra* note 10, at 38.

¹⁶ *Id.*

Ultimately, our efforts to protect and nurture the press function must evolve alongside our understanding of its multifaceted role in democracy, including adapting to the challenges of our changing times while preserving the core values that make a free press indispensable to a thriving democratic society.

1.2 EVOLVING THREATS TO THE PRESS FUNCTION

The once relatively stable world of journalism now faces tectonic disruptions. Scholars are beginning to highlight the ways that we are reshaping not only how news is produced and consumed but also the very nature of the press's relationship with society. The new threats emerging from these shifts are unlike any experienced in the past. Charting their contours is essential to preserving the press's freedom and its role in democracy.

Journalism today faces a complex array of problems extending far beyond the traditional press freedom issue of government censorship. Primary among them, as Lyrissa Lidsky notes, may be an erosion of public trust in the news media, driven by the “declining cultural investment in the sustained and systematic gathering of high-quality news.”¹⁷ This unprecedented crisis of legitimacy for the press, she notes, is not easily fixable through any one doctrine but must be a centerpiece of all of our conversations about the press's future. Indeed, understanding what Lili Levi describes as an “evolving mosaic of threats”¹⁸ – institutional, journalistic, legal, technological, and audience-based – requires complex and comprehensive thinking on the issue. Never before has the risk calculation for press freedom had so many moving parts, and never has it been so urgent to consider all of them in conjunction with each other.

More broadly, we face the very real threat that old jurisprudence simply has not kept pace with new communications realities. Traditional free speech and press doctrines are proving inadequate for addressing the challenges posed by the modern communications landscape. As Erwin Chemerinsky notes, the unprecedented speed of information dissemination, the blurred lines between publishers and platforms, and the amplification of both beneficial and harmful speech¹⁹ all necessitate a reevaluation of our doctrinal frameworks to better meet the moment.

These issues will only intensify as artificial intelligence reshapes the very nature of journalism and information creation. The advent of Generative AI (GenAI), in particular, presents profound implications for traditional press freedom norms.

¹⁷ Lyrissa Lidsky, *Defamation Law and the Crumbling Legitimacy of the Fourth Estate*, in *THE FUTURE OF PRESS FREEDOM*, *supra* note 10, at 101.

¹⁸ Lili Levi, *Countering the Mosaic of Threats to Press Functions*, in *THE FUTURE OF PRESS FREEDOM*, *supra* note 10, at 79.

¹⁹ Erwin Chemerinsky, *Fitting a Square Peg into a Round Hole: Why Traditional Free Press Doctrines Fail in Dealing with Newer Media*, in *THE FUTURE OF PRESS FREEDOM*, *supra* note 10, at 67.

Mike Ananny explores this phenomenon through the lens of press self-correction, arguing that GenAI may compromise press autonomy.²⁰ He proposes a “recursive press freedom” model to ensure that technological advancements enhance rather than undermine the press.²¹ Technological innovations are not just impacting the tools of journalism but fundamentally altering the press function itself, requiring us to acknowledge emerging dangers and explore new conceptual frameworks for combatting them.

Underlying these modern threats is the systemic danger that the public will underappreciate the unique value of the press. Our current discourse too often fails to adequately convey to both public and judicial audiences the full scope of what journalism contributes to a democracy and how vital it is that we sustain a free and independent press.²² In response, Erin Carroll advocates for a strategic shift in rhetoric in which we employ more positive, benefit-oriented language when discussing the press.²³ We can no longer assume that the public understands and appreciates the work the press does; instead, we must actively cultivate this awareness through carefully considered communication that highlights journalism’s indispensable worth.

Addressing these interrelated threats requires a holistic approach that recognizes press freedom’s dynamic nature. Efforts to rebuild public trust and ensure recognition and support for the press’s vital role must buttress any wider strategies to safeguard journalism’s crucial work in democracy.

1.3 LEGAL PROTECTION FOR THE PRESS FUNCTION

Armed with this better understanding of the press function, and emerging threats to it, press-freedom advocates must work to ensure there is sufficient constitutional and statutory protection of it.

Courts and legislatures have struggled in the past with the question of whether speakers and publishers performing the press function need legal protections beyond those available to all speakers.²⁴ As local journalism fades and reporters increasingly come under attack, the need for these safeguards becomes clearer – as do the losses to accountability and transparency that come from doctrinal homogeneity without any press exceptionalism.²⁵ Establishing these safeguards requires work at both a broad level, erecting scaffolding to help us think about the place the press should

²⁰ Mike Ananny, *Recursive Press Freedom as the Capacity to Control and Learn from Mistakes*, in *THE FUTURE OF PRESS FREEDOM*, *supra* note 10, at 128.

²¹ *Id.*

²² Erin Carroll, *Press Benefits and the Public Imagination*, in *THE FUTURE OF PRESS FREEDOM*, *supra* note 10, at 116.

²³ *Id.*

²⁴ See West, *supra* note 2, at 1035–41.

²⁵ See Sonja R. West, *Press Exceptionalism*, 127 HARV. L. REV. 2434, 2446–47 (2014).

occupy in rights-based frameworks,²⁶ and in narrower ways, honing in on specific legal sub-doctrines that must be fortified for the work of the press to continue.

One clear focus should be advocating for a reinvigorated Press Clause that can more reliably protect the press function. Helen Norton proposes that courts view Press Clause claims through the lens of “negative theory.”²⁷ This approach is “rooted in distrust of the government’s self-interested efforts to punish and thus silence the press” and “has long offered an important tool for understanding the Press Clause.”²⁸ By adopting this perspective, courts could develop a more robust shield against government retaliation, informing both their choices of legal rules and the application of those rules.

Another useful step toward persuading the courts of press freedom’s status as a fundamental right may be to look to the evolving jurisprudence surrounding religious freedom. There, the Court has increasingly recognized a heightened level of constitutional protection, often described by commentators as “Most Favored Nation” status. Amanda Shanor explores this concept, arguing that granting the press a similar status would ensure that journalists receive, at a minimum, the same exemptions from generally applicable laws that are afforded to any other entities.²⁹ This approach would safeguard the ability of press actors to serve as public proxies, allowing them to remain present at crucial events, protect confidential sources, and access government records – all essential components of their role in fostering transparency and accountability. In light of the Court’s recent recognition of a special role for religious freedom, we should seize the opportunity to advocate for equal or greater protection of press freedom as part of this broader conversation of First Amendment expansionism.

State constitutions, which often contain provisions explicitly safeguarding the press’s unique role, present an additional promising avenue for bolstering press protections. Christina Koningisor’s research reveals that the text, drafting histories, and interpretive precedents of these state clauses offer press freedom advocates a wealth of resources.³⁰ These state-level provisions can also serve as compelling models for expanding federal protections under the First Amendment, potentially influencing the evolution of national press freedom jurisprudence. This dual-track approach – leveraging state constitutions while simultaneously informing federal

²⁶ See Sonja R. West, *The Majoritarian Press Clause*, 2020 U. CHI. LEGAL F. 311, 314 (2020) (suggesting the Press Clause be interpreted through the lens of “safeguarding our collective, majoritarian right to a republican form of government.”).

²⁷ Helen Norton, *Reinvigorating the Press Clause Through Negative Theory*, in *THE FUTURE OF PRESS FREEDOM*, *supra* note 10, at 162.

²⁸ *Id.*

²⁹ Amanda Shanor, *The Constitutional Exceptionalism of Religion and the Press*, in *THE FUTURE OF PRESS FREEDOM*, *supra* note 10, at 170.

³⁰ Christina Koningisor, *The Other Press Clauses*, in *THE FUTURE OF PRESS FREEDOM*, *supra* note 10, at 182.

interpretation – could provide a more immediate and comprehensive framework for press protection.

Beyond these sweeping methodologies, the press freedom crisis further demands that we pay urgent attention to specific statutory and common law protections for performers of the press function. Critical areas include the law of access to government information, where Margaret Kwoka's work advocating for major structural reforms to the Freedom of Information Act will be foundational.³¹ Similarly, we may need to reevaluate the legal doctrines that govern undercover investigations. Alan Chen's in-depth research into the *Food Lion* case illustrates how current laws potentially chill vital public-serving reporting.³² And even long-established press protections, such as the doctrine emerging from *New York Times Co. v. Sullivan*, now need reinforcement and renewed justification. Samantha Barbas warns that if *Sullivan*'s current opponents succeed in weakening these protections, "it would become substantially riskier for speakers, including the press, to comment on public affairs."³³ To advance the press freedom agenda, we must highlight how these doctrines have enhanced newsgathering and how their erosion would impoverish public discourse.

1.4 IDENTIFYING PERFORMERS OF THE PRESS FUNCTION

Identifying performers of the press function in our new media landscape has become one of the most persistent challenges in safeguarding press freedom. This task, once relatively straightforward, has grown increasingly complex as the public now routinely consumes information from diverse sources – including social media influencers, bloggers, and citizen journalists – alongside traditional media outlets. Still, in many cases, we must identify those who are fulfilling the press function in order to protect them.

In the past, "the press" was generally recognizable in both public perception and legal contexts. It primarily consisted of established newspapers, magazines, radio stations, and television networks. The journalists who worked for these entities typically had formal training and credentials. Press outlets had clear organizational frameworks and a widely understood gatekeeping role. The digital revolution, however, has blurred these once-distinct boundaries.

Despite this diversification, it is worth remembering that identifying "the press" today is not as daunting as it is often portrayed. We are not starting from scratch. Richard Hasen's empirical study, for example, shows that many government

³¹ Margaret Kwoka, *Returning FOIA to the Press*, in *THE FUTURE OF PRESS FREEDOM*, *supra* note 10, at 257.

³² Alan Chen, *The Long Shadow of Food Lion*, in *THE FUTURE OF PRESS FREEDOM*, *supra* note 10, at 210.

³³ Samantha Barbas, *The Enduring Significance of New York Times Co. v. Sullivan*, in *THE FUTURE OF PRESS FREEDOM*, *supra* note 10, at 256.

agencies continue to share a common working definition of the press function that emphasizes core features like a commitment to factual reporting, regular news production, and adherence to journalistic ethics.³⁴ Coming to understand the traditional press's role as what Vicki Jackson has termed a "knowledge institution"³⁵ – and contrasting it with other knowledge institutions, like universities, that are also now facing both intense pressure and intense change – may further hone our sense of who is performing this work in our new media ecosystem.

But that ecosystem is unquestionably changing at breakneck speed. Consequently, any approach we develop to identify who is doing the work of the press must be flexible enough to adapt alongside advances in communication technology. Scholars are also warning us about pitfalls we must avoid in this process lest we develop identification frameworks that are ineffective or inequitable. As Amy Gajda's analysis of the common-law and privacy-tort contexts cautions, an overly expansive definition may ultimately become an ineffective one because "backlash against the actions of fringe actors who are eager to justify their behaviors as newsworthy lead to scalebacks that remove constitutionally valuable protections from those who are actually performing the press function."³⁶ Importantly, our reimagining of the press function must address historical shortcomings and reflect the diversity of our society. Meredith Clark's concept of "reparative journalism"³⁷ maps a plan for using this moment to cultivate a more inclusive press function, striving to remedy past exclusions of marginalized voices and educate future journalists about the multifaceted nature of their profession.

It is also not the case that the best route to protecting press freedom is only through press-exceptionalist approaches. Rather, there may be times when broader legal reforms will yield greater benefits. While the press plays a unique and vital role in our democracy, crafting legal exceptions solely for members of "the press" might sometimes be ineffectual – and even counterproductive – to our overall goals. Even with nominal special protections for members of the press, for example, our expansive criminal laws still enable law enforcement to investigate, monitor, and potentially punish press actors.³⁸ Instead, as Hannah Bloch-Wehba explores, in certain circumstances it may be more helpful to provide more robust expressive freedom for

³⁴ Rick Hasen, *From Bloggers in Pajamas to The Gateway Pundit: How Government Entities Do and Should Identify Professional Journalists for Access and Protection*, in *THE FUTURE OF PRESS FREEDOM*, *supra* note 10, at 271.

³⁵ Vicki C. Jackson, *Journalism and Academic: Knowledge Institutions Buttressing Constitutional Democracy*, in *THE FUTURE OF PRESS FREEDOM*, *supra* note 10, at 325.

³⁶ Amy Gajda, *A Professional Wrestler, Privacy, and the Meaning of News*, in *THE FUTURE OF PRESS FREEDOM*, *supra* note 10, at 308.

³⁷ Meredith Clark, *Reconstructing the First Amendment: Teaching Disenfranchised Perspectives on Press Freedom*, in *THE FUTURE OF PRESS FREEDOM*, *supra* note 10, at 309.

³⁸ Hannah Bloch-Wehba, *Policing Press Freedom*, in *THE FUTURE OF PRESS FREEDOM*, *supra* note 10, at 346.

all individuals. By curbing law enforcement overreach, we may be able to offer more effective protection for everyone, including performers of the press function.³⁹

Ultimately, our approach to identifying performers of the press function must be nimble enough to adapt to technological changes, inclusive enough to represent diverse voices, and nuanced enough to be effective. By crafting such a framework, we can better safeguard the press's crucial role in fostering an informed citizenry and holding power to account, even as the nature of journalism continues to evolve.

1.5 SUPPORTING THE PRESS FUNCTION

Finally, these discussions must grapple with the practical reality that the commercial model that long sustained the news industry has collapsed. Internet platforms have siphoned off the legacy media's readers, advertisers, and profits, leading to widespread newsroom closures and cutbacks. How Americans consume their news has also undergone a radical shift. Increasingly, it is computer algorithms – not news editors – that dictate which stories make their way to readers' eyes. In many communities, no one is left to perform shared, traditional press roles or to advocate for government transparency.

The future of press freedom, therefore, may require policies that actively support, rather than merely protect, the press function. While nonprofit, philanthropic, and public-subsidy models show promise, we must also explore more inventive approaches. Martha Minow emphasizes that saving the news in the digital age, especially at the local level, “require[s] innovation, persistence, and care.”⁴⁰ Christina Koningisor and Jacob Noti-Victor propose leveraging creative combinations of intellectual property protections and other government incentives, mirroring “innovation policy pluralism” that has successfully spurred other socially valuable services.⁴¹ This blend of government regulation and free-market forces could yield more effective options for sustaining public-serving journalism.

More ambitious proposals advocate for positive-rights approaches that guarantee news production and distribution, echoing practices in other modern democracies. Wesley Lowery proposes a federal trust modeled on the National Science Foundation to fund local media outlets,⁴² while Victor Pickard calls for a “universal public service journalism” model.⁴³ Both are rooted in a belief that freedom of the press rings hollow if no one remains to adequately serve the public's right to know.

³⁹ *Id.*

⁴⁰ Martha Minow, *Are We Saving the News?*, in *THE FUTURE OF PRESS FREEDOM*, *supra* note 10, at 485.

⁴¹ Christina Koningisor & Jacob Noti-Victor, *Innovation Policy and the Press*, in *THE FUTURE OF PRESS FREEDOM*, *supra* note 10, at 437.

⁴² Wesley Lowery, *The Right to Know*, in *THE FUTURE OF PRESS FREEDOM*, *supra* note 10, at 373.

⁴³ Victor Pickard, *Legal Foundations for Non-Reformist Media Reforms: A Positive-Rights Paradigm for Guaranteeing a Universal Press System*, in *THE FUTURE OF PRESS FREEDOM*, *supra* note 10, at 415.

These strategies, however, raise practical and constitutional challenges, including ensuring diverse coverage and maintaining editorial independence from government influence and partisan capture. Heidi Kitrosser's "anti-distortion" principle offers a promising framework for dealing with these challenges, drawing on existing jurisprudence to prevent conditions on subsidized speech that would compromise its integrity and independence.⁴⁴ Clearing such doctrinal barriers will be crucial in shaping the future of American press freedom.

Indeed, if constitutional obstacles are raised against these efforts, it may be the Constitution itself that provides the solution. In her book *Saving the News*, Martha Minow argued that the future of press freedom will require recognition that "government inaction can also jeopardize constitutional guarantees."⁴⁵ When news infrastructure crumbles in communities, when attention-grabbing distractions overwhelm readers, and when accountability mechanisms fail, we must revisit the Constitution's fundamental principles. Today, Minow argues, the duty to take action to safeguard the press remains strong.⁴⁶ The First Amendment, far from being a barrier to press-supporting interventions, might mandate them. This view of press freedom opens up rich new terrain for scholars and jurists to reimagine the government's role in preserving a vibrant free press.

Launching these conversations, which weigh competing values in a society desperately in need of high-quality news, is a core component of the effort to stave off authoritarianism and shore up healthy self-rule. There is a lot of work to be done. But important voices are now exploring both the role of news in safeguarding democracy and the role of the law in safeguarding the news. Now is the time to turn attention to the future of press freedom and to build doctrine that guarantees the press function continues to be performed in our rapidly changing political and media terrain.

⁴⁴ Heidi Kitrosser, *Distorting the Press*, in *THE FUTURE OF PRESS FREEDOM*, *supra* note 10, at 391.

⁴⁵ MARTHA MINOW, *SAVING THE NEWS: WHY THE CONSTITUTION CALLS FOR GOVERNMENT ACTION TO PRESERVE FREEDOM OF SPEECH* (2021).

⁴⁶ Minow, *supra* note 40, at 466; *see also* Pickard, *supra* note 43, at 415.

