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The Constitutional Exceptionalism of Religion and the Press

Amanda Shanor

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.[1]

The text of the First Amendment explicitly protects two foundational social institutions: religion and the press.[2] Since 2021, however, the Supreme Court has increasingly granted one of these two institutions – religion – a status of heightened constitutional privilege. In a series of cases, the justices have extended what commentators have dubbed "most favored nation" status to religious organizations and activities.[3] As a practical matter, this means that in any given circumstance, the government may not treat religious groups and activities less favorably than it treats the best-treated secular group or activity. For example, if a COVID-era regulation prohibited indoor gatherings of more than ten people but exempted grocery stores, under this line of reasoning the government must give the same exemption to houses of worship. The Court has, moreover, required this privileged treatment of religion regardless of whether the government's justification for the exemption applies or is relevant to the religious actor or activity.

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[1] U.S. Const. amend. I.

[2] Civic groups that provide institutional organization of assemblies and petitions might be understood as an implied third.

[3] Douglas Laycock is credited with inventing the most-favored-nation idea, though he opposes some of its later instantiations. Andrew Koppelman, *The Increasingly Dangerous Variants of the 'Most-Favored-Nation' Theory of Religious Liberty*, 108 Iowa L. Rev. 2237, 2242 (2023) ("MFN was invented by Professor Douglas Laycock"); Douglas Laycock, *The Remnants of Free Exercise*, 1990 Sup. Ct. Rev. 1, 49 (1990) (arguing "that religion [should] get something analogous to most-favored nation status. Religious speech should be treated as well as political speech, religious land uses should be treated as well as any other land use of comparable intensity, and so forth.")

This approach has been a sea change in religion law. Under late twentieth- and early twenty-first-century precedents, religion was deliberately treated as *un*exceptional, largely due to countervailing Establishment Clause concerns.[4] These cases dictated that the government was not only prohibited from favoring one religion over another but also could not favor religion over secular institutions or interest. Indeed, to avoid the entanglement of government and religion, the Court often permitted the government to treat religion *less* favorably – say, by providing government funding to pursue secular but not religious education.[5] That presumption has now flipped. Today, religion enjoys exceptional status.

In contrast, current law treats the other First Amendment institution – the press – as wholly unexceptional. However the press is defined – from newspapers to television to bloggers in pajamas to professional journalists[6] – it receives no greater constitutional protections than any other speaker. The Court has essentially read the Press Clause out of the Constitution, voiding its specific textual commitment, despite the absence of any countervailing constitutional provision parallel to the Establishment Clause. Until religion law's recent exceptional turn, the law's treatment of religion and the press were in some sense parallel. Recently, they have diverged, as press law has not kept pace with changes in religion law.

In this chapter, I argue that the press should be treated at least as constitutionally exceptional as religion, and I explore what such press exceptionalism might mean in practice.

In addition to both being named in the constitutional text, the press and religion share important sociological similarities. Both promote core components of the freedom of belief through *institutional* organization – religion protects self-determination of faith, while the press safeguards democratic self-determination. History also supports interpreting protections for religion and the press in parallel, as do the text of the First Amendment and Bill of Rights when read as a whole. Like much of the Bill of Rights, the First Amendment aims to protect forms of *organized* action, belief, and dissent – in religion, in the press, and in assembly – that could counter the power of the newly established federal government. In light of the Court's recent changes to religion law, courts and scholars should embrace a reading of the First Amendment that treats the press as the constitutionally exceptional institution that it is.[7]

[4] Locke v. Davey, 540 U.S. 712, 718–19 (2004); *id.* at 718–19 ("[T]he Establishment Clause and the Free Exercise Clause[] are frequently in tension.... [T]here are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause.").

[5] 540 U.S. 712.

[6] *See* Richard L. 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: Democracy, Law, and the News in Changing Times 271 (RonNell Andersen Jones & Sonja R. West eds., 2025).

[7] As discussed below, there are good reasons to treat the press at least as constitutionally exceptional as religion, if not more so, because there is no countervailing clause with respect

To identify how press exceptionalism should be organized, it is important to bear in mind that while the First Amendment's protections for religion and the press are structurally and functionally similar, they protect related but distinct values and institutions. The religion clauses ensure the institutional prerequisites of freedom of faith; the Press Clause protects the institutional prerequisites of democracy. For this reason, courts should shape press laws' exceptionalism around the role of the press as a democratic institution, focusing on how it uniquely supports and focuses informed public discourse, government accountability, and the robust exchange of ideas essential to self-governance.

12.1 THE GAP BETWEEN THE EXCEPTIONAL TREATMENT OF RELIGION AND THE PRESS

12.1.1 *The Advent of Religious Exceptionalism*

In the 1990 case of *Employment Division v. Smith*, the Supreme Court held that the Constitution does not require exemptions to generally applicable laws for religious actors. The Court explained that because of the wide diversity of religious beliefs in the country, "we cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order."[8] Under *Smith*, courts should apply only rational basis review (which is highly deferential to the government) to generally applicable laws that incidentally burden religion. Shortly thereafter, the Court clarified that *Smith* applies only to neutral, generally applicable laws, not laws that "discriminate[] against some or all religious beliefs or regulate[] or prohibit[] conduct because it is undertaken for religious reasons."[9]

to the press as there is with respect to religion in the Establishment Clause. I bracket the question of whether recent religion law exemptions are correct. For reasons I articulate elsewhere, I do not believe that the freedoms of speech or association generally support exemptions from public accommodations or employment antidiscrimination laws. *See, e.g.*, Amanda Shanor & Sarah E. Light, *Greenwashing and the First Amendment*, 122 COLUM. L. REV. 2033 (2022); Amanda Shanor, *LGBTQ+ Need Not Apply*, REG. REV. (June 21, 2021), https://www.theregreview.org/2021/06/21/shanor-lgbtq-need-not-apply/; Amanda Shanor & Sarah E. Light, *Anti-Woke Capitalism, the First Amendment, and the Decline of Libertarianism*, 118 NW. UNIV. L. REV. 347 (2023); Br. for First Amendment Scholars as *Amici Curiae*, 303 Creative LLC v. Elenis, 600 U.S. 570 (2023), https://www.supremecourt.gov/DocketPDF/21/21-476/234114/20220819171031826_Creative_Amicus_Brief_SCOTUS.pdf.

[8] Emp. Div., Dept. of Hum. Res. of Or. v. Smith, 494 U.S. 882, 888 (1990); *id.* at 879 ("[T]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"); *see also generally* Gillette v. United States, *supra*, 401 U.S. at 461 ("Our cases do not at their farthest reach support the proposition that a stance of conscientious opposition relieves an objector from any colliding duty fixed by a democratic government.").

[9] Church of the Lukumi Babalu Aye v. Hialeah, 508 U.S. 520, 532 (1993); *see also* Boerne (*Lukumi* applies to laws with "the object of stifling or punishing free exercise").

Both religious conservatives and liberals concerned about the disparate impact on minority religions have long criticized the Court's decision in *Smith*.[10] The recent turnover of the Court's membership, which established a solid 6-3 conservative supermajority that includes several members holding deep religious commitments, led many to speculate that *Smith*'s days were numbered.[11] Although the Court has not (yet) overruled *Smith*, in a series of cases it has adopted increasingly low thresholds for triggering religious exemptions. Collectively, these latest decisions have so dramatically expanded protections for religious actors that they have, in practical terms, nearly flipped *Smith*'s holding without formally overturning the precedent.

In the 2021 case *Tandon v. Newsom*, which Jim Oleske calls "the most important free exercise decision since [*Smith*],"[12] a majority of the Court formally adopted, for the first time, the most-favored-nation theory of religious exemptions.[13] Decided on the "shadow docket"[14] by summary order without briefing or argument, *Tandon* blocked California's COVID-related restrictions on in-home gatherings. The Court held that because the state permitted some secular businesses, such as grocery stores, to bring together more than three families, a three-family limit on in-home gatherings for any purpose, including religious ones, violated the Free Exercise Clause. The Court stated that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise."[15]

Several months later, the Court extended and elaborated on *Tandon*'s most-favored-nation approach in *Fulton v. City of Philadelphia*.[16] *Fulton* involved a challenge brought by Catholic Social Services to Philadelphia's requirement that

[10] *See, e.g.*, Laycock, *supra* note 3, at, 4, 50 (arguing that "oppressive laws may be enacted through hostility, sheer indifference, or ignorance of minority faiths" and that "[e]xemptions for secular interests without exemptions for religious practice reflect a hostile indifference to religion.").

[11] Thomas Berg & Douglas Laycock, *Protecting Free Exercise Under* Smith *and After* Smith, SCOTUSBLOG (Jun. 19, 2021), https://www.scotusblog.com/2021/06/protecting-free-exercise-under-smith-and-after-smith/ (observing that as of June, 2021, "five justices [have] said that *Smith* was mistaken, and there may be more."); Fulton v. City of Philadelphia, 593 U.S. 522, 545 (2021) (Alito, J., joined by Thomas & Gorsuch, JJ., concurring) (calling for the Court to revisit *Smith*); *id.* at 543 (Barrett, J., joined by Kavanaugh, J., concurring) (finding "textual and structural arguments against *Smith* . . . more compelling").

[12] Jim Oleske, *Tandon Steals Fulton's Thunder: The Most Important Free Exercise Decision Since 1990*, SCOTUSBLOG (April 15, 2021), https://www.scotusblog.com/2021/04/tandon-steals-fultons-thunder-the-most-important-free-exercise-decision-since-1990/.

[13] Tandon v. Newsom, 593 U.S. 61 (2021); Oleske, *supra* note 12.

[14] William Baude, *Forward: The Supreme Court's Shadow Docket*, 9 N.Y.U. J. L. & LIBERTY 1 (2015); Stephen I. Vladeck, *The Supreme Court Is Making New Law in the Shadows*, N.Y. TIMES (Apr. 15, 2021), https://www.nytimes.com/2021/04/15/opinion/supreme-court-religion-orders.html.

[15] *Tandon*, *supra* note 13, at 62.

[16] Fulton v. City of Philadelphia, 593 U.S. 522 (2021).

those who contract with the city to provide foster care placement services commit not to discriminate against certain classes, including LGBTQ+ couples. While explicitly declining to overturn *Smith*,[17] the Court held that because Philadelphia's foster care contracts included a "system of individual exemptions" available "at the sole discretion of the Commissioner," the city's antidiscrimination rule was not generally applicable. For that reason, strict scrutiny, rather than *Smith's* rational basis review, applied, and in the Court's view, Philadelphia had not sufficiently justified its refusal to grant Catholic Social Services an accommodation allowing it to refuse to serve LGBTQ+ couples.[18]

Many commentators have argued that the Court's adoption of the most-favored-nation theory of religious exemptions marks a radical change in religion law – and one with far-reaching consequences.[19] Douglas Laycock, the originator of the theory, has observed that "if a law with even a few secular exceptions isn't neutral

[17] Citing the need for a "more nuanced" approach, Justice Barrett filed a concurrence joined in full by Justice Kavanaugh and in part by Justice Breyer, in which all three disputed the "prevailing assumption" that, if *Smith* were overruled, strict scrutiny would apply to all generally applicable laws burdening religion. *Id*. at 543.

[18] *Fulton*, *supra* note 16.

[19] Note, *Pandora's Box of Religious Exemptions*, 136 Harv. L. Rev. 1178 (2023); Koppelman, *supra* note 3, 108 Iowa L. Rev. 2237 (2023); Stephen I. Vladeck, *The Most-Favored Right: COVID, the Supreme Court, and the (New) Free Exercise Clause*, 15 N.Y.U. J.L. & LIBERTY 699, 734 (2022); Oleske, *supra* note 12; Cary Coglianese & Daniel E. Walters, *A Trojan Horse from the Court's Conservatives?*, Reg. Rev. (June 21, 2021), https://www.theregreview.org/2021/06/21/coglianese-walters-trojan-horse-from-courts-conservatives/; Shanor, *supra* note 7. There is a broader literature on the most-favored-nation theory of religious exemptions. *See* Zalman Rothschild, *Individualized Exemptions, Vaccine Mandates, and the New Free Exercise Clause*, 131 Yale L.J.F. 1106 (2022); Mark Storslee, *The COVID-19 Church-Closure Cases and the Free Exercise of Religion*, 37 J.L. & Religion 72 (2022); Nelson Tebbe, *The Principle and Politics of Equal Value*, 121 Colum. L. Rev. 2397 (2021); Josh Blackman, *The "Essential" Free Exercise Clause*, 4 Harv. J.L. & Pub. Pol'y 637 (2021); Ira C. Lupu & Robert W. Tuttle, *The Radical Uncertainty of Free Exercise Principles: A Comment on Fulton v. City of Philadelphia*, 5 Am. Const. Soc'y Sup. Ct. Rev. 221 (2021); Zalman Rothschild, *Free Exercise's Lingering Ambiguity*, 11 Calif. L. Rev. Online 282 (2020); James M. Oleske, *Free Exerciee (Dis)Honesty*, 2019 Wisc. L. Rev. 689 (2019); Douglas Laycock & Steven T. Collis, *Generally Applicable Law & the Free Exercise of Religion*, 95 Neb. L. Rev. 1 (2016); James M. Oleske, Jr., *Lukumi at Twenty: A Legacy of Uncertainty for Religious Liberty and Animal Welfare Laws*, 19 Animal L. 295 (2013); Christopher C. Lund, *A Matter of Constitutional Luck: The General Applicability Requirement in Free Exercise Jurisprudence*, 26 Harv. J.L. & Pub. Pol'y 627 (2003); Alan Brownstein, *Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality*, 18 J.L. & Pol. 119 (2002); Vikram David Amar & Alan E. Brownstein, *"Most Favored-Nation" ("MFN") Style Reasoning in Free Exercise Viewed Through the Lens of Constitutional Equality*, Justia (May 21, 2021), https://verdict.justia.com/2021/05/21/most-favored-nation-mfn-style-reasoning-in-free-exercise-viewed-through-the-lens-of-constitutional-equality; Vikram David Amar & Alan E. Brownstein, *Exploring the Meaning of and Problems with the Supreme Court's (Apparent) Adoption of a "Most Favored Nation" Approach To Protecting Religious Liberty Under the Free Exercise Clause*, Justia (Apr. 30, 2021), https://verdict.justia.com/2021/04/30/exploring-the-meaning-of-and-problems-with-the-supreme-courts-apparent-adoption-of-a-most-favored-nation-approach-to-protecting-religious-liberty-under-the-free-exercise-c.

and generally applicable, then not many laws are."[20] And Cary Coglianese and Daniel Walters have argued that *Fulton* "opened the barn door for anyone with religious objections to escape from their duty to obey vast swaths of the law," because "provisions explicitly authorizing exceptions to otherwise seemingly general rules" are "rife throughout the law."[21] Without overruling *Smith*, *Fulton* and *Tandon* dramatically limited the contexts in which it applies.

The Roberts Court has expanded religious exceptionalism in other ways as well. It recently made it easier for employees to obtain religious accommodations at work under Title VII of the Civil Rights Act of 1964.[22] It broadened the contexts in which religious employers no longer need to follow workplace antidiscrimination laws.[23] It interpreted the Free Exercise Clause as requiring states to fund sectarian schools and programs if they fund nonsectarian ones.[24] And it protected a public school football coach from discipline for praying at midfield after games.[25]

Taken together, these shifts represent a revolution in religion law. In the eyes of the current Supreme Court, Derek Black has argued, religious rights are assuming "something of a superstatus"[26] in which the Court "seems to treat religious activity as preferred over all other activities, including the exercise of other fundamental rights." The Court has placed "free exercise rights at the top of a hierarchy of protected rights; free exercise can never be treated worse, but can be treated better, than other fundamentally protected activities."[27] Religion, in other words, has become constitutionally exceptional.

12.1.2 *The Currently Unexceptional Press*

By contrast, under current law, the press is constitutionally unexceptional. In *Citizens United v. Federal Election Commission*, the Court asserted that it has "consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers,"[28] that "there is no precedent supporting laws that attempt to distinguish between corporations which are deemed

[20] Douglas Laycock, *The Broader Implications of Masterpiece Cakeshop*, 2019 BYU L. Rev. 167 (2019).
[21] Coglianese & Walters, *supra* note 19.
[22] Groff v. DeJoy, 600 U.S. 447 (2023). *See also* Bostock v. Clayton County, 590 U.S. 644 (2020) (suggesting a religious exemption might apply to religious employers who object to employing LGBTQ+ employees).
[23] Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 565 U.S. 171 (2012); Our Lady of Guadalupe School v. Morrissey-Berru, 140 S.Ct. 2049 (2020).
[24] Carson v. Makin, 596 U.S. 767 (2022); Trinity Lutheran v. Comer, 582 U.S. 449 (2017).
[25] Kennedy v. Bremerton School District, 597 U.S. 507 (2022).
[26] Derek W. Black, *When Religion and Public-Education Mission Collide*, 132 Yale L.J.F. 559, 593, 596 (2022), https://www.yalelawjournal.org/pdf/F7.BlackFinalDraftWEB_gstabjb1.pdf.
[27] Amar & Brownstein, *"Most Favored-Nation" ("MFN") Style Reasoning*, *supra* note 19.
[28] 558 U.S. 310, 352 (2010) (quoting Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 691 (1990) (Scalia, J. dissenting)).

to be exempt as media corporations and those which are not," and that such a distinction would raise constitutional concern as speaker-based discrimination.[29] As Sonja West describes,

> Under th[is] nondiscrimination view, the Press Clause does not function as an active protector of the press, allowing (and perhaps demanding) government efforts that enable the news media to do their job. Rather, proponents of this view see the Press Clause as an obstacle to government regulations that grant special privileges to select speakers including the news media. The right it secures, they argue, is simply the right of all speakers to be treated equally in their ability to publish speech.[30]

Eugene Volokh is a proponent of this nondiscrimination view. He construes the Constitution's mention of "the press" as "protect[ing] everyone's use of the printing *press* (and its modern equivalents) *as a technology*," rather than as a specialized industry or a social institution.[31]

12.2 THE PRESS AS A SOCIAL INSTITUTION ANALOGOUS TO RELIGION

The press should be understood as analogous not to other speakers but to religion. Just as religion is not just any type of belief system through which we can acquire values, morals, or ideas of right and wrong, the press is not just any speaker.[32] Both the press and religion fill fundamental societal roles as institutions that organize people into communities of common interests, beliefs, and purposes. These

[29] *Id*. at 352–53 ("[E]ven assuming the most doubtful proposition that a news organization has a right to speak when others do not, the exemption would allow a conglomerate that owns both a media business and an unrelated business to influence or control the media in order to advance its overall business interest. At the same time, some other corporation, with an identical business interest but no media outlet in its ownership structure, would be forbidden to speak or inform the public about the same issue. This differential treatment cannot be squared with the First Amendment.").

[30] Sonja West, *Favoring the Press*, 106 CALIF L. REV. 91, 93–94 (2018).

[31] Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 U. PA. L. REV. 459, 462 (2012).

[32] Prominent constitutional thinkers, including Justice Potter Stewart, Floyd Abrams, Vince Blasi, and Sonja West, have argued that "the press is 'different' from 'everyone'; that it is, in a variety of circumstances, entitled to constitutional treatment distinct from that generally afforded those who exercise their freedom of expression." Floyd Abrams, *The Press Is Different: Reflections on Justice Stewart and the Autonomous Press*, 7 HOFSTRA L. REV. 563, 564 (1979); Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. BAR FOUND. RSCH. J. 521 (1977); Sonja R. West, *Press Exceptionalism*, 127 HARV. L. REV. 2434 (2014); Potter Stewart, *"Or of the Press,"*26 HASTINGS L.J. 631 (1975); *Citizens United* at 431 n.57 (Stevens, J., concurring in part and dissenting in part); West, *supra* note 30, at 100 ("In other words, whether or not the Speech Clause allows for identity-based distinctions, the Press Clause is a clear endorsement of speaker categorization when it comes to the press. The Press Clause tells us that the government historically has, can, and sometimes must treat the press differently than other types of speakers.").

institutions not only structure and communicate ideas and values but also guide the attention and action of their followers. The press and religion are institutions that allow individuals to unite into groups with similar purposes, where they can accomplish common goals, meet challenges, and create meaning and community. Critically, both institutions provide essential platforms through which people can organize to oppose ideas, laws, or values with which they disagree.

It is important to recall that when the Bill of Rights was adopted, its rights applied only against the federal government, not the states.[33] As a result, the Bill of Rights juxtaposed the people and the states with the federal government, a contrast most explicitly seen in the Ninth and Tenth Amendments. The Bill of Rights protected the self-determination and resistance of the people as organized into self-determining bodies, including states and religious orders. This served a dual purpose: It protected the autonomy of subnational communities while also providing bulwarks against excessive federal power. The First Amendment protected both subnationally established religions and subnational republican governance.

As a whole, the First Amendment can be understood as privileging the protection of various forms of *organized* self-determination and dissent: in religion, in the press, and in assembly.[34] At the time of the founding, prior to the emergence of major political parties, the press and religion stood out as two of the most vital social institutions through which the people could stand up to more powerful actors. (Notably, the Second Amendment's protection of organized militias served a similar purpose.[35]) Seen through this lens, the First Amendment's parallel textual protection for "religion" and "the press" is a reflection of their similar social roles in fostering self-organization, self-determination, and self-protection.[36]

If religion is to be treated exceptionally, the press should be as well. In fact, there is justification for treating the press *more* exceptionally than religion. According to the constitutional text, the right to freely exercise one's religion must be balanced against the countervailing concerns of the Establishment Clause, which safeguards

[33] Most state constitutions protected the freedom of the press. David A. Anderson, *The Origins of the Press Clause*, 30 U.C.L.A. L. Rev. 455, 487 (1983). James Madison proposed another press clause that provided that "No State Shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases," but it was not adopted. *Id.* at 483–84. Cf. Jud Campbell, *Natural Rights and the First Amendment*, 127 Yale L. J. 246 (2017) (discussing founding-era natural law conceptions of the freedoms of speech and the press). It was not until the first half of the twentieth century the freedoms of speech and religion were incorporated against the states. Gitlow v. New York, 268 U.S. 652 (1925); Cantwell v. Connecticut, 310 U.S. 296 (1940).

[34] *See generally* Burt Neuborne, Madison's Music (2015).

[35] Prior to District of Columbia v. Heller, 554 U.S. 570 (2008), the Second Amendment was widely viewed as extending only that far as well.

[36] This argument resonates with but is distinct from David Anderson's argument that the "case for constitutional protection of the press rests on its role as an organizer of democratic dialogue." David Anderson, *The Press and Democratic Dialogue*, 127 Harv. L. Rev. F. 8 (2014), https://harvardlawreview.org/forum/vol-127/the-press-and-democratic-dialogue/.

against governmental support for, favoritism of, or entanglement with religion. Yet the First Amendment's guarantee of a free press does not include a similar competing interest. At the very least, the exceptionalism of the press should be elevated to that of current religion law.

While the societal roles of religion and the press are similar, their specific purposes are not.[37] The Constitution protects the press as a *democratic* institution. Democracies depend on forms of discourse and shared reality. They require elements of a shared world – shared facts, shared concern, and shared focus – which form the basis and the possibility of collective action through governance.[38] It is for this reason that the First Amendment is "the guardian of our democracy."[39] The history of the origins of the Press Clause excavated by David Anderson supports this view.[40] As he points out, on the eve of the Revolutionary War, the Continental Congress explained the need for "the freedom of the press":

> The importance of this consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, in its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated, into more honourable and just modes of conducting affairs.[41]

Anderson elaborates that while the continental charters did not protect press freedoms, by the founding, most state constitutions did – explicitly as protectors of self-government:

> The first press clauses were written in response to a resolution of the Second Continental Congress, calling upon the states to repudiate the authority of the crown and establish their own governments. These press clauses were produced not merely as salutary additions to an existing order, but as part of the urgent process of establishing "such government as shall, in the opinion of the representatives of the people, best conduce to the happiness and safety of their constituents in particular, and America in general."[42]

The advent of press clauses during the Revolution and their adoption both in the federal and most early state constitutions demonstrates the perceived importance of the press to self-government.

[37] *See* Sonja R. West, *First Amendment Neighbors*, 66 Ala. L. Rev. 357, 372–73 (2014).

[38] Prior to the rise of politically polarized media, a handful of mainline broadcast news channels created a relatively shared space of belief about facts in the world.

[39] Brown v. Hartlage, 456 U.S. 45, 60 (1982).

[40] Anderson, *supra* note 33, at 464.

[41] *Id*. at 463–64 (quoting *Address to the Inhabitants of Quebec* (1774), in Bernard Schwartz, The Bill of Rights: A Documentary History 223 (1971)).

[42] *Id*. at 489 (quoting Schwartz, *supra*, at 229); *see id*. at 490 ("Throughout the formative period, the focus of discussion was on the role of the press in relation to the government.").

While religion and the press were adopted as parallel institutional bulwarks both of freedom and self-determination and against tyranny, the press serves a distinctly democratic purpose. For this reason, though the press and religion should be treated as institutional analogs for constitutional purposes, the doctrine should treat the press as exceptional in ways that reflect its organizing purpose to facilitate self-governance.

12.3 THE PRESS AS AN EXCEPTIONAL DEMOCRATIC INSTITUTION

What would be the practical result if the press was treated as exceptional in ways oriented around its constitutional purpose? What would "most-favored-nation status" mean for the press – that is, for the press to receive equivalently favorable treatment as religion does under current law?

At a conceptual level, most-favored-nation status for the press could mean a number of things.[43] It could mean (1) that if a law makes an exception for another speaker, the press must also receive that exception. That is, if any speaker receives a privilege, the press must as well. Or it could mean (2) that the press can, and sometimes must, receive rights or privileges that others do not. Courts and scholars should embrace both principles to harmonize press and religion law.

Practically, most-favored-nation status for the press could, for example, require that representatives of the press, however defined,[44] have privileged access to governmental information – at least, as in the religion context, where access to that information is provided to any non-press private actor. This could include access to governmental institutions, such as jails, prisons, and other governmental buildings, as well as government documents, such as Office of Legal Counsel memos or records of closed-door legislative deliberations. The Press Clause could function as a sort of constitutionally grounded sunshine law, allowing the press to access, disseminate, and provide a basis for public action on governmental actions.[45] A First Amendment doctrine that embraced the exceptional role of the press might likewise protect a reporter's privilege not to disclose confidential sources or exempt the press from surveillance or searches in some contexts – at least as long as any non-press actor also had the same privilege, as, for example, an attorney might in the context of attorney-client privilege.

[43] *See* Koppelman, *supra* note 3 (analyzing different variants of MFN treatment in religion law and theory).

[44] A question that has vexed press law, and for some augurs in favor of its unexceptional treatment, is the difficulty in defining "the press." *See* Hasen, *supra* note 6 at 1 ("One of the potential impediments to having the government grant special access or protection to 'the press' is identifying who counts as a journalist."). Defining religion faces similar difficulties, but this fact has not so far been understood to justify denying it exceptional treatment.

[45] This might somewhat ameliorate the tendency of transparency laws to entrench economic interests, as David Pozen has found. David E. Pozen, *Transparency's Ideological Drift*, 128 YALE L.J. 100 (2018).

Most-favored-nation treatment for the press would also require the rejection of the current nondiscrimination theory of the press, which, as Sonja West has analyzed, prompted the Court in *Citizens United* to categorically extend First Amendment campaign expenditure rights to all corporations. Importantly, this could affect *other* areas of First Amendment law that currently depend on the equivalence of the press with all other speakers. Doctrine that recognized the exceptional status of the press could mean, for example, that campaign finance laws could limit non-press political expenditures more than press expenditures.

But press exceptionalism need not be constituted solely by negative rights against governmental action; it could require positive support for the press. Most importantly, it could mean constitutionally required funding for local news and public media. If a core purpose of the Press Clause is to disseminate shared facts and foster shared focus and concern – or, as the Continental Congress opined, "the advancement of truth, science, morality, and arts in general," the "diffusion of liberal sentiments on the administration of Government," "communication of thoughts" between citizens, and the "promotion of union among them, whereby" public officials can be embarrassed into "more honourable and just modes of conducting affairs"[46] – public funding of local journalism and public media could vitally advance that goal, particularly given the economic headwinds now facing the press.

First Amendment doctrine that embraced a most-favored-nation theory of the press might permit, or even require, market-structuring laws – such as antitrust, bankruptcy, or property rules – that facilitate and advance a flourishing press able to accomplish its constitutional purposes.[47] For example, press law might permit laws that require social media to pay news outlets. Or it might allow or require copyright rules that promote journalism, for example, by requiring artificial intelligence (AI) companies that rely on large language models trained on press creations to contribute to the support of local or public media as much or more than they are required to compensate non-press authors of training data.

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The First Amendment's Press Clause provides explicit constitutional protection for the press as a fundamental democracy-enabling institution, just as the religion clauses distinctively protect religion as a central institutional protector of self-determination in the realm of faith and conscience. Given the current Court's recent embrace of religious exceptionalism – providing religious actors most-favored-nation status – there should be a parallel recognition of press

[46] *Id.* at 463–64 (quoting *Address to the Inhabitants of Quebec* (1774), in Bernard Schwartz, The Bill of Rights: A Documentary History 223 (1971)).

[47] *See* Martha Minow, Saving the News: Why the Constitution Calls for Government Action to Preserve Freedom of Speech (2021).

exceptionalism. The text and history of the First Amendment, along with the structural role of the press in our constitutional system, support recognizing a special status for the press that is tailored to its democratic purpose. This press exceptionalism should permit, and may require, government action to promote a free and vibrant press that can foster the forms of discourse, shared knowledge, shared concern, and shared focus necessary for democratic self-governance.