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Lies, Damned Lies, and Journalism: Why Journalists Are Failing to Vindicate First Amendment Values and How a New Definition of “The Press” Can Help

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Abstract

This article identifies a specific problem – journalists who fail to provide the public with the accurate information needed to foster informed public opinion – and offers a specific solution: defining “the press” to provide protections and prestige only to those whose work actually advances First Amendment values.

American journalistic norms facilitate lying by politicians, candidates for office, and other public figures. Because many journalists are committed to the ideal of balance over truth, they are often incapable of calling out lies. Instead, they create a false equivalence by suggesting there are two sides to every argument. I call this the “balance trap” problem—journalism that insists on presenting, without comment, two sides to every story, even when one side is demonstrably false. Politicians and other public figures are able to exploit this reality by making false statements with impunity, secure in the knowledge that journalists will not expose their deceptions.

Scholars like Robert C. Post, Paul Horwitz, Mark Tushnet and others have recently focused on the questions of whether false statements contain constitutional value and when false statements may be regulated by the government. Although Post’s recent book, Democracy, Expertise, and Academic Freedom: A First Amendment Jurisprudence for the Modern State, does not focus on the problem of false statements disseminated by journalists, his concept of democratic competence is especially relevant to the balance trap problem. By extending press membership only to those journalists whose work advances First Amendment values of truth and democratic competence, we can move toward having a press corps that truly informs the public by providing accurate information and exposing false statements by elected officials and other public figures. This approach does not depend on suppressing any speech: by turning to the Press Clause, it is possible to advance democratic competence simply by redefining the press, meaning that only competent journalists will receive the status and protections associated with press membership, while other journalists will be free to practice balance trap journalism but will be denied press

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Changing the way journalists do their work depends on a new definition of the press. Other scholars have defined the press in institutional (Horwitz, Frederick Schauer) or functional (Sonja West) terms, but, while these definitions identify a number of important considerations, each deals far too often in abstractions, failing to consider the work journalists are actually doing and whether their work merits press status. As a result, each definition is both over- and under-inclusive, providing press membership to balance trap journalists and denying press membership to some journalists who recognize and reject the balance trap approach.

This article does something new by describing a definition of the press that is based on specific examples of work journalists are doing, and proposing a way to assess whether this work advances First Amendment values of truth and democratic competence. In addition, while other scholars who believe that members of the press deserve specific protection seek to establish the basis for that protection solely or mainly through courts or legislatures, this article does something new by identifying a central role for journalists themselves in the process.

Ultimately, the goal of this article is to give meaning to Oliver Wendell Holmes’s assertion that “the real justification of a rule of law is that it helps to bring about a social end which we desire.” Replacing balance trap journalism with journalism that gives Americans the accurate information they need to make informed decisions is a highly desirable social end. If we want to have a better press corps, we must begin with a definition of the press that has the potential to solve the balance trap problem by recognizing as members of the press only those journalists whose work truly advances First Amendment values.

Introduction

What happens when elected officials or candidates for office make false claims about a matter of public interest? In theory, journalists will expose these lies and politicians will pay a price for deception.¹ In practice, something quite different now happens in the United States. Instead of exposing lies, journalists help to legitimize them through an approach that insists on

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¹ See New York Times Co. v. United States, 403 U.S. 713, 717 (1971) (Black, J., concurring) (“In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government.”)
“treating both sides of the argument equally [even] when one is demonstrably false”.²

Journalists are reluctant to call a lie a lie, as they fear this will make them look biased.³ They feel more comfortable with “he said, she said” coverage that simply describes what has been said without comment, leaving it to the public to decide who is right.⁴ The result is that a false equivalency can be created with regard to any matter of debate. As Paul Krugman puts it, “if one party declared that the earth was flat, the headlines would read “Views Differ on Shape of Planet.”⁵ Thomas Mann and Norman Ornstein observe that “[n]o lie is too extreme to be published, aired, and repeated, with little or no repercussion for its perpetrator.”⁶

The danger is that people will not be able to separate fact from fiction on matters of public interest, “that public discourse will end up with more falsity than truth, and that some of

² Rem Rieder, Reporting to Conclusions, American Journalism Review, June/July 2011, http://www.ajr.org/article.asp?id=5010 (accessed June 22, 2012). See also THOMAS E. MANN AND NORMAN J. ORNSTEIN, IT’S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM, 186 (2012) (“Reporters and editors seek safe ground by giving equal time to opposing groups and arguments and crafting news stories that convey an impression that the two sides are equally implicated.”)


⁶ MANN AND ORNSTEIN, supra note ___ at 62.
this falsity will be positively toxic.”

Public discourse, which Robert Post defines as “the forms of communication constitutionally deemed necessary for formation of public opinion”, is polluted when it is flooded with misinformation. When public opinion itself is based on false information provided by journalists, democratic self-government is undermined, since “government action [in a democracy] is tethered to public opinion[].”

The question, however, is whether the First Amendment leaves any room to address the problem I call the “balance trap” – journalism that insists on presenting, without comment, two sides to every story, even when one side is demonstrably false. Traditionally, the First

7 Paul Horowitz, The First Amendment’s Epistemological Problem, 87 WASH. L. REV. 445, 472 (2012); see also Frederick Schauer, Facts and the First Amendment, 57 UCLA. L. REV. 897, 919 (2010) (noting “increasing acceptance of patent factual falsity”); MANN AND ORNSTEIN, supra note ___ at 62 (“The audiences that hear [lies] repeatedly believe [them].”) Horwitz believes that “Schauer’s concern [that the public will accept false statements] may be overstated[]” because the American public is increasingly well-educated and intelligent. Horwitz, The First Amendment’s Epistemological Problem, 87 WASH. L. REV. at 472. However, intelligence and education may not allow the public to separate truth from falsehood when each is presented as equally plausible, as I discuss in section __, infra.


9 See MANN AND ORNSTEIN, supra note ___ at 66 (“In the new age and the new culture, the negative and false charges are made rapidly and are hard to counter or erase. They also make rational discourse in campaigns and in Congress more difficult and vastly more expensive.”)

10 See POST, supra, note ___ at 95 (“A people without knowledge is a people without power or sovereignty. To preserve the self-government of the people, we must preserve their access to knowledge.”); see also Wieman v. Updegraff, 344 U.S. 183, 196 (Frankfurter, J., concurring) (“That our democracy ultimately rests on public opinion is a platitude of speech but not a commonplace in action. Public opinion is the ultimate reliance of our society only if it be disciplined and responsible.”)

11 POST, supra, note ___ at 19.

12 See Schauer, Facts and the First Amendment, supra, note ___ at 919 (suggesting that the “First Amendment can…do very little to solve [the problem of widespread factual falsity].”)
Amendment has “done little to prevent the problem of widespread factual falsity.”\textsuperscript{13} In fact, 
“First Amendment theory and doctrine [has failed] to fully reckon with the role of facts, or 
‘knowledge’ more generally, within public discourse.”\textsuperscript{14} This is not surprising—
the United States has a free speech tradition that government cannot be trusted “to decide which 
ideas are true and which are false”\textsuperscript{15} and, therefore, the First Amendment’s Speech Clause 
requires viewpoint neutrality.\textsuperscript{16} Americans’ skepticism that government can be 
trusted to separate false ideas from true ones also applies “to propositions of fact.”\textsuperscript{17} The 
Speech Clause “does not permit restriction of noncommercial and nondefamatory factual falsity in 
the public sphere” and, given that such false speech cannot be prohibited, it is not clear whether 
anything “might be done to deal with th[e] seemingly increasing problem of public and influential 
factual falsity.”\textsuperscript{18} The idea of using the First Amendment and the courts to prohibit 
false public statements has largely been taboo.\textsuperscript{19}

\textsuperscript{13} Schauer, \textit{Facts and the First Amendment}, \textit{supra}, note ___ at 919. \textit{See also} United States \textit{v.} 
Alvarez, 567 U.S. ___ (2012) (slip op., at 5) (“Absent from those few categories where the law 
allows content-based restrictions of speech is any general exception to the First Amendment for 
[suppressing or punishing] false statements.”)

\textsuperscript{14} Horwitz, \textit{The First Amendment’s Epistemological Problem}, \textit{supra}, note___ at 472.

\textsuperscript{15} Schauer, \textit{Facts and the First Amendment}, \textit{supra}, note __ at 916.

\textsuperscript{16} \textit{See} \textit{Post, supra} note ___ at 9 (“deep and fundamental First Amendment doctrines…impose a 
‘requirement of viewpoint neutrality’ on regulations of speech and…apply ‘the most exacting 
scrutiny to regulations that suppress, disadvantage, or impose differential burdens on speech 
because of its content’.”) (internal citations omitted).

\textsuperscript{17} Schauer, \textit{Facts and the First Amendment}, \textit{supra}, note ___ at 916.

\textsuperscript{18} Schauer, \textit{Facts and the First Amendment}, \textit{supra}, note __ at 917.

\textsuperscript{19} Schauer, \textit{Facts and the First Amendment}, \textit{supra}, note ___ at 915 (“the general weight of the 
American free speech tradition is such as to keep these matters [of regulating public non-
commercial factual falsity] beyond the reach of constitutionally permissible regulation.”) \textit{See}
Despite the assumption that the First Amendment requires neutrality with regard to questions of truth and falsity,²⁰ a number of scholars have recently “focused on…the constitutional status and social value of false statements of fact…the constitutional value of true factual statements…and the relationship between First Amendment law and the institutions in which knowledge is produced and verified.”²¹ Paul Horwitz observes that “[s]everal scholars…basically agree that false statements lack epistemic²² and/or social value.”²³ Mark Tushnet concludes that “when all is said and done, there really is no social value in the dissemination of falsehood, particularly knowing falsehood. If we can curb it without damage to

also Horwitz, The First Amendment’s Epistemological Problem, supra, note __ at 467 (“[A recent Supreme Court decision] suggest[s] that the First Amendment generally forecloses weighing the value of false speech at all.) (the decision is United States v. Stevens, 559 U.S. ___, 130 S.Ct. 1577 (2010).) In its past term, the Supreme Court invalidated statutory provisions in the Stolen Valor Act that had been used to convict respondent for lying about having received the Congressional Medal of Honor. United States v. Alvarez, 567 U.S. ___ (2012) (slip op., at 3). The Court found the statutory provisions to be a content-based suppression of speech. However, the Court left open the possibility that the Act could be amended to punish false claims of having received military decorations or medals “made to effect a fraud or secure moneys or other valuable considerations.” Id. at 11.

²⁰ This assumption may, of course, be incorrect. Schauer observes “nearly all of the components that have made up our free speech tradition, in the United States and abroad…have had very little to say about the relationship between freedom of speech and questions of demonstrable fact.” Facts and the First Amendment, supra, note __ at 907. The free speech tradition that false statements are protected is rooted in a desire to protect debatable opinions, not demonstrably false statements of fact. Id. at 904-905. But see Alvarez, supra note ____ (invalidating conviction of respondent who lied about having received the Congressional Medal of Honor as content-based suppression of speech).

²¹ Horwitz, The First Amendment’s Epistemological Problem, supra, note__ at 462;

²² I.e. value relating to knowledge.

²³ Horwitz, The First Amendment’s Epistemological Problem, supra, note__ at 468. See also Alvarez, supra note ____ (Alito, J., dissenting at 8) (“Time and again, this Court has recognized that as a general matter false factual statements possess no intrinsic First Amendment value). But see Alvarez, supra note ____ (slip op., at 6-7) (rejecting argument that false statements cannot be protected by the Speech Clause though acknowledging at 9 that “[s]ome false speech may be prohibited even if analogous true speech could not.”)
other social values—including of course other statements covered by the First Amendment—we should.”

Robert Post asserts that “even as courts hold that ‘under the First Amendment there is no such thing as a false idea’, they also permit the state to regulate the publication of false facts, even within public discourse.” These scholars suggest that truth itself is a First Amendment value, although they leave open the question of how this value can be advanced without suppressing speech.

Horwitz, Tushnet, Post, and other scholars are concerned with the question of whether false statements in public discourse may be punished. While scholars may reject the notion that false statements contribute to the search for knowledge or have other social value, they may still be reluctant to punish “even deliberately false speech”. In other words, scholars believe

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25 POST, supra note ___ at 29.

26 See also William P. Marshall, In Defense of the Search for Truth as a First Amendment Justification, 30 GA. L. REV. 1, 3 (1995) (“the search for truth provides a unifying theory of both the Speech and the Religion Clauses and that it remains a viable First Amendment justification despite the philosophical attack on the intelligibility of the notion of truth.”)

27 For instance, Horwitz and Tushnet both discuss the constitutionality of the Stolen Valor Act, 18 U.S.C. sec. 704, which provides criminal penalties for people who falsely represent that they have been awarded military decorations or medals. See Horwitz, The First Amendment’s Epistemological Problem, supra, note ___ at 457-462; Tushnet, supra note ___ at 4-10. The provisions of the Act at issue in the case they discussed, United States v. Alvarez, were invalidated by the Supreme Court. See Alvarez, supra note ____. Post discusses the extent to which government may punish citizens for making false statements in public discourse. POST, supra note ___ at 29-30. However, for speech outside public discourse, Post writes that constitutional requirements do not apply and state regulation is more readily justified. Id. at 34.

28 See Horwitz, The First Amendment’s Epistemological Problem, supra, note ___ at 457-469.
that false statements may poison public discourse, but are not sure what can be done about this. As Frederick Schauer puts it, “public and influential factual falsity” is a problem, but “[t]here is no easy answer to th[e] question” of how to solve it. This article offers a solution to this dilemma – how to reduce false statements and “enhance public discourse” without suppressing speech – in the specific context of journalism. To put it more plainly, this article suggests a way to use the First Amendment to advance truth and ensure that the public receives accurate information without suppressing speech. The proposed solution depends on focusing on the First Amendment’s Press Clause rather than the Speech Clause.

This article identifies a specific problem – journalists who fail to provide the public with the accurate information needed to foster informed public opinion – and offers a specific solution: defining “the press” to provide protections and prestige only to those whose work

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29 See e.g. Horwitz, The First Amendment’s Epistemological Problem, supra, note __ at 472.

30 Schauer, Facts and the First Amendment, supra, note __ at 917; see also Horwitz, The First Amendment’s Epistemological Problem, supra, note __ at 473 (“If a central goal of the First Amendment is to improve the quantity and quality of knowledge in our society, but First Amendment doctrine is mostly disabled from suppressing false facts and does not necessarily protect true ones, is there anything left in our doctrine that can help us enhance public discourse, by increasing our knowledge or reducing the number of falsehoods in circulation?”) Horwitz considers some possible answers to his question, but ultimately concludes that there are “few answers to the First Amendment’s epistemological problem [and] [i]t may be more important for now to ask the right questions than to supply an answer…we still face a large and important set of unanswered questions about the relationship between truth, falsity, freedom of speech, and the production and protection of knowledge.” Id. at 486.

31 Horwitz, The First Amendment’s Epistemological Problem, supra, note__ at 473.

32 I use the term “journalists” to refer to anyone who disseminates information about newsworthy events to the public, whether or not that information is accurate, including those who follow the balance trap model. Not all journalists necessarily qualify as members of the press. See ___, infra, defining criteria for press membership.
actually advances First Amendment values. Journalists may very well do valuable work advancing such values in a number of ways, but this article will focus on one particular First Amendment value that bona fide members of the press can vindicate -- informing the public by providing accurate information and exposing false statements of facts by elected officials or other public figures. Robert C. Post describes this as “democratic competence” which “refers to the cognitive empowerment of persons within public discourse, which in part depends on their access to disciplinary knowledge.” In this context, bona fide members of the press can advance First Amendment values by “[e]quipping people to understand and evaluate concepts in public discourse”. To put it more simply, bona fide members of the press can advance the First Amendment value of truth by providing the public with accurate information and rejecting the

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33 The ultimate goal is to give meaning to Oliver Wendell Holmes’s assertion that “the real justification of a rule of law is that it helps to bring about a social end which we desire.” Oliver Wendell Holmes, Jr., Law in Science and Science in Law, 12 HARV. L. REV. 443, 460 (1899). My goal in writing this paper is to develop a definition of the press that will help advance First Amendment values of truth and democratic competence, which is a fancy way of saying that the goal is to ensure that Americans are provided with the accurate information they need to make informed decisions about matters of political debate. See Post, supra, note ___ at 33-34 (defining democratic competence, which is explained in more detail at __, infra).

34 See RonNell Andersen Jones, Litigation, Legislation and Democracy in a Post-Newspaper America, 68 WASH & LEE. L. REV 557, 570-571 (2011) (arguing that “newsgathering and the attendant provision of public affairs reporting is only one piece of what newspapers have done to preserve, stabilize, and advance our democracy” and citing work “newspapers and newspaper organizations” have done to “instigat[e], enforce[e], coordinat[e], and finance[e] legal change” as other examples of actions that advance democratic values. Jones asserts, for instance, that newspapers have been “the major force behind the adoption of open-meetings acts and open-records laws” as well as the Freedom of Information Act.)

35 Post, supra, note ___ at 33-34. Post does not himself argue that democratic competence is a reason to support protections for the press. See Blocher, supra, note ___ at 439. However, Joseph Blocher concludes that “the press, like academia, should receive First Amendment protection under the principle of democratic competence[]” because the press plays an important role in “the dissemination and occasional creation of expert knowledge”. Blocher, supra note ___ at 440.

36 Blocher, supra note ___ at 435.
currently widespread journalistic practice that values false balance over truth. In fact, as Stephen Vladeck recently observed, Post’s concept of democratic competence “could well provide the missing theoretical justification for reinvigorating the First Amendment’s Press Clause.”

This article does something new by using Post’s work as the foundation for developing a new definition of the press that is based on specific examples of work journalists are doing, and proposing a way to assess whether this work advances First Amendment values of truth and democratic competence. In addition, while other scholars who believe that members of the press deserve specific protections seek to establish the basis for those protections solely through courts or legislatures, this article does something new by identifying a central role for journalists themselves in the process.

I. Toward a New Definition of “The Press”

A. Why We Need a New Definition of the Press

This article will show that by giving specific meaning to the First Amendment’s Press Clause, only those journalists whose work truly advances First Amendment values will receive


38 Scholars and judges may be reluctant to define who is and is not a bona fide member of the press. See David A. Anderson, Freedom of the Press, 80 TEX. L. REV. 429, 505 (2002) (observing that people will disagree about the desired functions of the press); Sonja R. West Awakening the Press Clause, 58 UCLA L. REV. 1025, 1029 (2011) (“To many jurists and scholars, the thought of identifying who constitutes the press reeks of government favoritism toward a privileged few and discrimination against other, less favored speakers.”); First Nat’l Bank of Boston v. Bellotti, 435 U.S. 765, 802 (1978) (Burger, C.J., concurring) (“the very task of including some entities within the "institutional press' while excluding others ... is reminiscent of the abhorred licensing system of Tudor and Stuart England - a system the First Amendment was intended to ban from this country.”) This article offers a way around these problems by looking to journalists themselves to set standards that will determine who is and is not a bona fide member of the press.
the legal protections and prestige that come with being recognized as bona fide members of the press.\textsuperscript{39} When bona fide members of the press are distinguished from journalists and other speakers who are not entitled to Press Clause protections,\textsuperscript{40} the public can separate competent press coverage from journalism that does not vindicate First Amendment values.\textsuperscript{41} Journalists will have an incentive to do work that advances First Amendment values: if they do not, they will be not be identified as members of the press and they will not receive specific constitutional protection.

\textsuperscript{39}See Joseph Blocher, Public Discourse, Expert Knowledge, and the Press 87 WASH. L. REV. 409, 429-430 (2012) (“Perhaps “journalists” are only entitled to First Amendment protection when and to the degree they respect the norms and rules of the discipline.”) I would add that protection should only be provided when those norms and rules are themselves valuable.

\textsuperscript{40}Speakers and journalists not entitled to Press Clause protection can still receive constitutional protection under the Speech Clause. See West, supra note ___ at 1034-35. They may also potentially receive nonconstitutional e.g. statutory protections, though this article will argue that any protections tied to press membership should be reserved for bona fide members of the press.

\textsuperscript{41}See Randall P. Bezanson, Whither Freedom of the Press?, 97 IOWA L. REV. 1259, 1260 (2012); Blocher, Public Discourse, Expert Knowledge, and the Press, supra note ___ at 434 (“without an account of why and how people in public discourse will be able to separate truth and expert knowledge from falsehood and chicanery…the basic premise that expert knowledge will inform participatory democracy will fail.” This is not to say that truth will naturally and inevitably win out if journalists give the public accurate information. See Frederick Schauer, Facts and the First Amendment, 57 UCLA. L. REV. 897, 909 (2010) (people do not always act rationally and are influenced by numerous factors other than “the truth of a proposition” when deciding “which propositions [to]…accept.”); see also Howard Kurtz, Death Panels Smite Journalism, Washington Post, Aug. 24, 2009 (arguing that death panel myth “refused to die” even after journalists debunked it). However, by rewarding journalists who do provide accurate information to the public, as this article suggests, we can at least attempt to provide a sounder foundation for public discourse. Perhaps more importantly, elected officials and public figures who know that journalists will actively debunk and expose false claims of fact may be less likely to make demonstrably false assertions. See Ezra Klein, When Jim DeMint Hated Your Freedom, Washington Post Wonk Blog, May 6, 2011 (“It’s important that people realize how fake many of the policy arguments that go on in [Washington, D.C.] really are, and that the media is there to call out politicians who continually move the goalposts. Because if there are no referees on the field, anything can be made to sound like a policy argument, and it’s very hard for voters to tell when the players are being straight with them.”) Under the current framework, characterized by the balance trap model of reporting, elected officials and public figures rightly conclude that they can make false claims with impunity, knowing that most journalists will simply pass their assertions on to the public without comment.
and statutory protections provided to the press. However, if they fail to qualify for press status, their work will not be suppressed or prohibited: free speech protections will allow them to disseminate misleading stories that create a false equivalence between fact and fiction.\footnote{This article does not argue that journalists who are not bona fide members of the press are entitled to no legal protections. Their work would still be protected by the Speech Clause; they could, of course, continue to publish and distribute what they write. See West, supra note ___ at 1034-35 (Speech Clause protects right to disseminate speech). However, this article argues that journalists who do not qualify as bona fide members of the press would not receive specific protections associated with the Press Clause or with statutes aimed at protecting the press, and they would not receive the prestige associated with press membership.}

Other scholars seeking to define the Press Clause\footnote{Not all scholars agree that the Press Clause ought to have meaning that is separate and distinct from the Speech Clause. See e.g. Anderson, supra note ___ at 526-527. However, this approach would have the bizarre result of rendering the Press Clause “mere surplusage”. See West, supra note ___ at 1028, quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803). I agree with West’s conclusion that the better approach is to give the Press Clause specific and distinct meaning.} have alternatively concluded that it ought to protect either the “institutional press”\footnote{See Schauer, Institutional First Amendment, supra note ___; Horwitz, Or of the [Blog], supra note ___} or individuals who perform important press functions (e.g. gathering and disseminating news).\footnote{See West, supra note __.} Their work identifies a number of important problems, though gaps and unexplored questions remain. Most significantly for purposes of this article, the existing scholarship deals far too often in abstractions, failing to examine what journalists are actually doing and why or even whether their work merits special\footnote{See West, supra note __.} legal protection.

\textit{By “special” legal protection, I do not mean preferential or privileged protection—I simply mean specific, different protection afforded to journalists who qualify as members of the press. See West, supra note ___ at 1046 (“a prominent part of the backlash against adopting an independent interpretation of the Press Clause both on and off the bench is the perception that doing so would necessitate giving the press "special rights." First Amendment scholar and press advocate Floyd Abrams has challenged framing the debate as "whether the press is entitled to "more' first amendment protection than others," instead of as whether "the press, however}
protection. The existing ways of defining the press do nothing to address, or even to acknowledge, the balance trap problem that plagues American journalism in the 21st century. A new definition of the press can help address this problem.

B. What’s Wrong With Journalism, and How to Find a Better Approach: The Balance Trap and Stenographic Journalism

In order to move toward the goal of a press corps that provides the public with the accurate information it needs to “distinguish good ideas from bad ones”47, it is necessary to consider the current state of journalism: what are journalists doing right, what are they doing wrong, and how can we develop a definition of the press that favors those who get it right.48 Journalists fall short when they grant respectability to demonstrably false claims—either through what I call the “balance trap”49 or what Glenn Greenwald describes as the related “stenographer model”50 or “officials say” journalism.51

Journalists who fall into the balance trap create a problem of false equivalency by presenting a false statement of fact alongside the truth without comment, suggesting that each defined, [is] entitled to any different treatment because it is the "press." (internal citations omitted).

47 POST, supra note ___ at 34.

48 This is discussed in more detail in section ____, which addresses specific examples of what it means for journalists to get it “right” or “wrong”.

49 Paul Krugman similarly describes this as “the cult of balance.” http://krugman.blogs.nytimes.com/2011/07/26/the-cult-that-is-destroying-america/


claim may have merit although, in reality, only one claim is factually correct.\textsuperscript{52} For example, a PBS Newshour story on climate change reported that climate change “skeptics remain unconvinced [that humans are causing global warming]”, offering in response only the tepid observation that these “views are challenged by scientific evidence.”\textsuperscript{53} In reality, “there is now an overwhelming scientific consensus that global warming is indeed happening and humans are contributing to it.”\textsuperscript{54} Balance trap coverage like the PBS story on climate change creates the impression that there are two sides to every matter of political debate.\textsuperscript{55} The problem, of course,

\begin{itemize}
  \item \textsuperscript{52}http://www.salon.com/2011/11/24/bob_schieffer_ron_paul_and_journalistic_objectivity/singlet
  on/ (“The overarching rule of “journalistic objectivity” is that a journalist must never resolve any part of a dispute between the Democratic and the Republican Parties, even when one side is blatantly lying. They must instead confine themselves only to mindlessly describing what each side claims and leave it at that.”)
  \item \textsuperscript{55}See Vladeck, supra note ___ at 539 (observing that we live “[i]n an age where every controversial issue is often framed as just another debate with two sides”.)
\end{itemize}
is that there aren’t always two sides to each story: some claims are demonstrably false. It is not biased to say so, it is simply describing reality.

The stenography or “officials say” problem is a similar one: journalists “uncritically writing down what people say and then leaving it at that”. Stephen Colbert parodied this method of journalism at the 2006 White House Correspondents’ Dinner:

Here’s how it works. The President makes decisions. He’s the decider. The press secretary announces those decisions, and you people of the press type those decisions down. Make, announce, type. Just put ‘em through a spell check and go home. Get to know your family again. Make love to your wife. Write that novel you got kicking around in your head. You know, the one about the intrepid Washington reporter with the courage to stand up to the administration? You know, fiction!

Greenwald somewhat less colorfully describes “officials say” journalism as a “standard template of American [journalism]…[in which journalists] typically state as fact what are nothing more than official assertions, and then append on to the end of the paragraph the rote phrase “officials say”.

Greenwald criticizes this practice for “convert[ing] media institutions

56 See Schauer, Facts and the First Amendment, supra note ___ at 897-898. See also Leonard Pitts, Jr., In Calling Out Mubarak’s Lies, CNN’s Anderson Cooper Reported the Truth, Miami Herald, Feb. 18, 2011, http://www.mcclatchydc.com/2011/02/18/108842/commentary-in-calling-out-mubaraks.html (accessed June 22, 2012) (Criticizing the balance trap approach: “Though the axiom says that there are two sides to every story, that is not always the case. What was the other side of World War II? The civil-rights movement? Watergate?”) and MANN AND ORNSTEIN, supra note ___ at 194 (“A prominent Washington Post reporter sanctimoniously told us that the Post is dedicated to presenting both sides of the story. In our view, the Post and other important media should report the truth.”)

57 In fact, exposing false claims by pointing to the truth is recognized by the Supreme Court as the preferred approach. See Alvarez, supra note ___ at 15 (“The remedy for speech that is false is speech that is true.”)

58 Greenwald, Arthur Brisbane and Selective Stenography, supra note ___.


60 Greenwald, “Officials Say” Journalism, supra note __.
into little more than glorified press release outlets for the U.S. government and military.” 61
“Officials say” journalism gives the public the incorrect impression that “[false] government claims a[re] verified fact…[that have] been checked and confirmed by an independent media arbiter.” 62

“Officials say” journalism presents the same fundamental problem as balance trap journalism: it can provide the public with false or misleading information. “Officials say” journalism is arguably more problematic—where balance trap journalism gives false claims the veneer of respectability, “officials say” journalism “converts government claims into journalistic fact.” 63 Like balance trap journalism, “officials say” journalism is not worthy of Press Clause protections or prestige.

The balance trap and the stenography/”officials say” problem are closely related—each is a misguided effort to achieve objectivity that ends up granting respectability or legitimacy to any claim an elected official or public figure cares to make, no matter whether it is true or not. Some journalists, to their credit, recognize, avoid, and reject the balance trap and stenography problem, calling out lies and exposing false claims when they are made. This article proposes recognizing only these journalists as bona fide members of the press. Their work will receive the protections and prestige associated with press membership.

The ultimate goal of creating this new model is to improve the quality of information that Americans receive so that the American project of democratic self-government is itself

61 Greenwald, “Officials Say” Journalism, supra note ___.

62 Greenwald, “Officials Say” Journalism, supra note ___.

63 Greenwald, “Officials Say” Journalism, supra note ___.

16
Paul Horwitz asks, “If a central goal of the First Amendment is to improve the quantity and quality of knowledge in our society, but First Amendment doctrine is mostly disabled from suppressing false facts and does not necessarily protect true ones, is there anything left in our doctrine that can help us enhance public discourse by increasing our knowledge or reducing the number of falsehoods in circulation?”

This article proposes a way to answer Horwitz’s question by developing a new definition of the press. This can be done without suppressing any speech—journalists and other speakers will remain free to disseminate false claims, but only those journalists who expose false claims and give the public the information it needs to separate truth from fiction will qualify for press membership.

C. The Problem of Defining the Press: Existing Models and a New Definition

The Constitution plays a central role in creating the foundation for a press corps that can serve First Amendment values: it provides the starting point for analysis and discussion through

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64 See Saxbe v. Washington Post Co., 417 U.S. 843, 863 (1974) (Powell, J., dissenting) (“[The press] is the means by which people receive that free flow of information and ideas essential to intelligent self-government.”) I agree that this is a normative description of the role the press can and should play, but it does not describe the actual work many journalists currently do, some of which is discussed in section ____, infra.

65 Horwitz, The First Amendment’s Epistemological Problem, supra note ___ at 473.

66 This article specifically focuses on journalism; Horwitz notes that Robert Post offers an answer that addresses these problems in a broader First Amendment context. Horwitz, The First Amendment’s Epistemological Problem, supra note ___ at 473, citing Post, Democracy, Expertise, and Academic Freedom, supra note ____ Post’s approach does not discuss the specific problems I focus on here in the context of journalism and the Press Clause.

67 Cf. Vladeck, supra note __ at 535, expressing concern that “[d]emocratic competence…might …empower the government (and perhaps other disciplinary practices) with stronger countervailing arguments justifying the suppression of speech in cases in which the First Amendment would otherwise apply…” My approach to defining the press advances democratic competence without suppressing any speech, as discussed passim.
the very idea that members of the press ought to receive special protections. However, the Constitution\footnote{It is well worth noting that the Constitution is not the only available avenue for press protections—statutory and other protections have been and can be provided. See Anderson, \textit{supra} note \underline{___} at 432 (“Nonconstitutional sources of special protection for the press are far more numerous [than constitutional protections]. The press gets preferential access to legislative chambers, executive news conferences, trials, war zones, disaster scenes, prisons, and executions. State and local statutes protect the press from otherwise legal police searches. More than half of the states have "shield laws" creating "reporters' privileges" that are sometimes broader than the First Amendment version of that privilege. The press is exempted from some securities regulations and campaign-expenditure limitations. A federal statute exempts certain newspapers from antitrust laws. Some retraction statutes create defenses that are only available to newspapers. Newspapers and magazines get special postal rates. Broadcasters get free use of spectrum that other types of users must pay for.”)} does not provide specific guidelines for determining who or what “the press” is.\footnote{In addition, original intent or original meaning analysis does not provide clear answers. See West, \textit{supra} note \underline{___} at 1040 (“Virtually all who have studied the issue have conceded that the original meaning of the two clauses is not obvious.”)} Section \underline{___}, \textit{infra}, describes a framework for giving “the press” a specific definition that allows us to differentiate bona fide members of the press from those who do not truly inform the public. Members of the press would receive constitutional and statutory protections, as well as prestige associated with their recognized status. The courts should play a role in making this system work, although they are not the only necessary actors. Journalists would themselves play essential roles in giving the Press Clause real world meaning that honors bona fide press members whose work clears the debris away from political debate so that discussion can begin with the facts themselves.

Getting to the end point of having a press corps that vindicates democratic values begins with the text of the Press Clause itself, a clause that has often been ignored by the courts. In recent years, a number of scholars have observed that the courts have failed to give distinct
meaning to the Press Clause. In practice, the Press Clause has generally been given no meaning independent of the Speech Clause—the Supreme Court has “dismissed the [Press] Clause as a constitutional redundancy.” In an effort to remedy this problem, scholars have looked for ways to breathe life into the Press Clause by assigning it some specific, unique meaning. This is a worthy task, and I credit these scholars for taking on an important matter. However, while their efforts promise to develop a framework that will achieve the essential task of protecting members of the press whose work vindicates First Amendment values, that promise has not yet been fulfilled and each effort to give meaning to the Press Clause has left important questions unresolved. Section __, infra, will build on earlier work to show how a more precise definition of the Press Clause can better reflect the reality of what journalists do (and do not do) and can point a way to improved press coverage that gives Americans the information we need to make informed decisions.

Scholars who look to give the Press Clause distinct meaning have offered alternative ways to define “the press” — either through an institutional or a functional approach. Although it is tempting to see an either/or choice here, I believe that there are useful elements in each approach, and my own proposed definition, discussed in section __ infra, builds on ideas presented by each of these approaches. Each existing proposed definition addresses important problems and identifies worthy goals, and I do not mean to dismiss either out of hand. However, my approach will offer suggestions for filling in gaps in each existing model — most centrally, by providing a way to base a definition of the press on work journalists are actually doing (and not

70 See Schauer, Horwitz, West, Blocher __

Before I present my own model for defining the press, I will explain how the existing institutional and functional models have been described.

1. The Institutional Model and Its Flaws

Frederick Schauer urges courts to think of the First Amendment, including the Press Clause, from an institutional perspective because institutions are a central part of modern life in advanced societies.\textsuperscript{72} He argues that judges who are indifferent to the reality of varied institutions will reach conclusions that incongruously apply a “one size fits all” test to both professional journalists and the public at large when determining, for instance, who gets access to courtrooms or other government facilities.\textsuperscript{73} Schauer criticizes courts for failing “to distinguish media from nonmedia, [or] individual speakers from magazine publishers”.\textsuperscript{74} His central premise is that some institutions deserve First Amendment protections while other institutions (or, it seems, individuals not affiliated with institutions) do not, and recognizing this principle will lead to better judicial decisions.

For Schauer, the institutional approach is beneficial because it allows courts to provide protections to those “existing social institutions [that] in general, even if not in every particular, serve functions that the First Amendment deems especially important”.\textsuperscript{75} It would also be

\textsuperscript{72} Frederick Schauer, \textit{Towards an Institutional First Amendment}, 89 MINN. L. REV. 1256, 1259 (2005) (“advanced societies are experiencing a growing institutional self-reproduction and consequent institutional differentiation.”)

\textsuperscript{73} Schauer, \textit{Institutional First Amendment, supra} note ___ at 1262.

\textsuperscript{74} Schauer, \textit{Institutional First Amendment, supra} note ___ at 1264.

\textsuperscript{75} Schauer, \textit{Institutional First Amendment, supra} note ___ at 1274. “For all of these [First Amendment] institutions, the argument would be that the virtues of special autonomy - special immunity from regulation - would in the large serve important purposes of inquiry and knowledge acquisition, and that those purposes are not only socially valuable, but also have their
beneficial because it would streamline judicial analysis: rather than having to apply the Press Clause to specific conduct, courts could simply ask “whether the conduct at issue was or was not the conduct of [a First Amendment] institution[].”76 Applying this approach, it seems certain that reporters for established newspapers and magazines would uniformly receive protection by virtue of their association with a recognized First Amendment institution, but bloggers or online writers unassociated with the institutional print press probably would not.77

Schauer’s analysis promises a rewarding payoff: defining an institutional press would allow the courts to give the Press Clause specific meaning that would vindicate First Amendment values—for instance, “checking government abuse” or “providing a forum for democratic deliberation”—and that would apply only to deserving institutions actually advancing such values.78 Since the Press Clause would no longer broadly apply to “the lone pamphleteer, the blogger, and the full-time reporter for the New York Times” alike (an approach which has

natural (or at least most comfortable) home within the boundaries of the First Amendment.” Id. Schauer refers here to colleges, universities, and libraries, but he adds that “we might imagine a conceptually similar treatment for the institutional press.” Id. at 1275.

76 Schauer, Institutional First Amendment, supra note ___ at 1274. This would not mean that First Amendment institutions would have “absolute immunity” for “every action”—they would be entitled to “substantial legal autonomy” with respect to “properly made” decisions in their area of competence and expertise. Horwitz, The First Amendment’s Epistemological Problem, 87 Wash. L. Rev. 445, 485 (2012). For instance, “A [university] dean’s decision to approve or veto a tenure vote” would be entitled to judicial deference as “an academic decision that falls squarely within the infrastructural role of the university.” Id. at 486. The same dean’s “arbitrary decision to shoot trespassers on sight”, by contrast, “does not call for institutional autonomy or judicial deference.” Id.

77 See Schauer, Institutional First Amendment, supra note ___ at 1278. (“contemporary bloggers and others are perhaps right to be worried that such lines would be drawn to their disadvantage.”) Or, if they did receive protections as a First Amendment institution, online writers not associated with an established print publication would likely receive a lower level of protection than print journalists. See Paul Horwitz, Or of the [Blog], 11 Nexus J. Op. 45, 60-61 (2006).

78 See Schauer, Institutional First Amendment, supra note ___ at 1275.
meant, in practice, that the Press Clause offered no specific protections to anyone), it could now be given distinct meaning.\textsuperscript{79}

However, Schauer’s approach leaves behind a number of unresolved problems. Ironically, although Schauer offers the institutional approach to the First Amendment, including the Press Clause, as a way to bring legal analysis more in line with how the real world works,\textsuperscript{80} his analysis sidesteps some basic real world questions: do the institutions that he champions actually perform valuable functions that merit specific protection? If so, which ones, and why? Schauer provides a framework that could help answer these questions: “We first locate some value that the First Amendment treats, or should treat, as particularly important. Then we investigate whether that value is situated significantly within and thus disproportionately served by some existing social institution whose identity and boundaries are at least moderately identifiable.”\textsuperscript{81} But Schauer does not apply his test to any specific institutions or activities and he does not discuss any specific examples of worthy (or unworthy) journalism.\textsuperscript{82} In section \underline{___}, this article adapts Schauer’s test to help determine which specific journalists (as opposed to existing institutions) are currently vindicating First Amendment values through their work.

\textsuperscript{79} See Schauer, \textit{Institutional First Amendment}, supra note \underline{___} at 1272.

\textsuperscript{80} See Schauer, \textit{Institutional First Amendment}, supra note \underline{___} at 1259-60 (urging courts to resist “institutional blindness” that ignores the central role institutions play in advanced modern societies).

\textsuperscript{81} Schauer, \textit{Institutional First Amendment}, supra note \underline{___} at 1275.

\textsuperscript{82} This is not a criticism, merely an observation—Schauer notes that his work was intended to be preliminary: “I have not here attempted to say very much about what an institutional approach to the First Amendment would look like, and perhaps this Article should be understood as an argument for why the seeming arguments against an institutional approach should be deemed inadequate.” \textsuperscript{82} Schauer, \textit{Institutional First Amendment}, supra note \underline{___} at 1279. See also Frederick Schauer, \textit{Institutions As Legal and Constitutional Categories}, 54 UCLA. L. REV. 1747, 1764 (2007).
These individuals—regardless of their existing institutional affiliation, or lack thereof—deserve the protections and prestige associated with press membership.\textsuperscript{83}

In addition, the institutional approach Schauer suggests will almost certainly be both over-inclusive and under-inclusive. If journalists are defined as members of the press simply by virtue of working for a recognized institutional press outlet, some (perhaps many) of these journalists will receive protections and status even though their actual work is not deserving.\textsuperscript{84} On the other hand, there will be some (perhaps many) deserving journalists who are not recognized as members of the press merely because they are not affiliated with a recognized First Amendment institution. Indeed, Schauer acknowledges these problems, though he believes they are outweighed by the benefits associated with the institutional approach.\textsuperscript{85}

Moreover, Schauer

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{83} It is possible to define my model as a modified institutional approach. Rather than defining press membership based on affiliations journalists have with existing institutions (e.g. all reporters for the New York Times receive protection), my approach could be seen as creating a press corps that could qualify as a new First Amendment institution. I am more interested in the question of which individuals qualify for press membership and believe, for the reasons discussed in this article, that an institutional approach defining press membership based on a journalist’s affiliation with an existing institution will not solve the balance trap problem I discuss. In fact, an institutional approach that defines press membership based on affiliation with existing institutions (e.g. newspapers, magazines) will reward many journalists who follow the balance trap model. However, this article is not meant to be a wholesale rejection of the institutional model, and I do not believe my approach is irreconcilable with that model—it may simply be a modification of it.
\item \textsuperscript{84} See pp. ___ - ____, discussing reporting for well-recognized news outlets that does not advance First Amendment values. (examples of balance trap reporting); see also Joseph Blocher, \textit{Public Discourse, Expert Knowledge, and the Press} 87 \textit{WASH. L. REV.} 409, 429 (2012) (“extending First Amendment protection to particular forms of communication traditionally employed by the institutional press could exacerbate problems of over- and under-breadth. The characteristic media associated with the press—newspapers and magazines, among others—often convey information that is not in any real sense a matter of public discourse.”)
\item \textsuperscript{85} See Schauer, \textit{Institutional First Amendment, supra} note ___ at 1274. (“a recast First Amendment could more consciously treat these institutions in rulelike fashion, \textbf{with the institutions serving as under-and overinclusive, but not spurious markers of deeper}
\end{itemize}
\end{footnotesize}
suggests that a certain “looseness” is inevitable.\textsuperscript{86} Perhaps that is so—what human system can be perfect? Human imperfection notwithstanding, this article will advance the idea that it is possible to be more precise than Schauer suggests without giving up the benefits of a meaningful Press Clause that corresponds to the real world we live in. By focusing on individuals rather than existing institutions, we can address the problems of over- and under-inclusiveness, as suggested in section \textsuperscript{87}.

\begin{quote}
background First Amendment values. Like a speed limit sign that moves the inquiry from dangerous driving to whether the driver was or was not driving in excess of the posted speed, a First Amendment doctrine that embodied the same approach to institutions would analogize certain institutions to rules. An institutional First Amendment would thus move the inquiry away from direct application of the underlying values of the First Amendment to the conduct at issue and towards the mediating determination of whether the conduct at issue was or was not the conduct of one of these institutions.”) (emphasis added). See also Frederick Schauer, \textit{Institutions As Legal and Constitutional Categories}, 54 UCLA. L. REV. 1747, 1764 (2007) (“To grant special protection to the institutional press under the Press Clause of the First Amendment, for example, is not to deny that there will be unfortunate applications of that protection that a more particularized or contextual approach might avoid. No plausible definition of the institutional press is going to exclude from that category - and the protections it might putatively deliver - the National Enquirer, for example, and its more down-market equivalents. And a putative positive constitutional right of journalistic access emanating from such protection is as likely to be availed of by Geraldo Rivera as by Bob Woodward or Linda Greenhouse. Nevertheless, it may still be the case that granting protection to all who fit the definition of the institution will, despite the overinclusiveness of the category, be more effective in serving some value than will be applying the value directly to individual cases.”)
\end{quote}

\textsuperscript{86} Schauer, \textit{Institutional First Amendment, supra} note \textsuperscript{___} at 1278-79.

\textsuperscript{87} A defender of the institutional approach might argue that this is precisely why an institutional approach is needed: case-by-case analysis designed to test which individuals qualify for press status is simply impracticable—and courts are hesitant to do such work. See e.g. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 802 (1978) (Burger, C.J., concurring). My suspicion is that much of this concern has to do with the assumption that \textit{judges} would have to perform this laborious, case-by-case analysis. This article offers an alternative: journalists themselves would often perform the initial task of identifying bona fide members of the press. See section \textsuperscript{___}. This would spare judges the difficult, even “painful” task of subjective, case-by-case analysis. \textit{See West, supra} note \textsuperscript{___} at 1029.
Like Schauer, Paul Horwitz endorses an institutional approach to the First Amendment, including the Press Clause and identifies a number of benefits to be gained from the institutional approach: (1) it can bring legal doctrine more in line with “the complex real world”; (2) it gives deserving institutions the power of self-governance, allowing those institutions “that play a substantial role in contributing to the world of public discourse that the First Amendment seeks to promote and preserve[]” to shape their own internal “norms and practices”; (3) “it may avoid being either overprotective or underprotective of any given institution”; (4) it gives courts a way to avoid the uncomfortable and difficult task of determining which categories of journalists qualify for specific protection; and (5) it ensures that the Press Clause receives distinct meaning that provides “press speakers [with] different rights than individual speakers.”

Each of the goals Horwitz identifies is desirable, but each can be achieved without taking an institutional approach to the Press Clause—in fact, in some cases, the existing institutional


89 Horwitz, Or of the [Blog], supra note ____ at 55, see also Id at 57: “[The institutional approach] 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. It is far more attuned to the actual speech-and press-oriented social practices the First Amendment serves to promote.”

90 Horwitz, Or of the [Blog], supra note ____ at 56-57.

91 Horwitz, Or of the [Blog], supra note ____ at 57.

92 Horwitz, Or of the [Blog], supra note ____ at 57.

93 See Horwitz, Or of the [Blog], supra note ____ at 55.
approach makes it more difficult to achieve these goals than the alternative approach I put forward in section ___. As with Schauer’s approach, while Horwitz’s institutional approach rightly seeks to take the real world into account, it at times relies on generalizations and abstractions. For instance, in considering whether and how to deal with blogs as a First Amendment institution, Horwitz asserts that “the established news media typically operate subject to a set of ethical and professional norms” while blogs, and bloggers, do not. But do these norms in fact produce work that vindicates First Amendment values? Not all norms are beneficial—this article will suggest that the balance trap is itself a norm, but it is not one that produces work worthy of specific press-related protection. It is necessary to consider specific work in order to reach conclusions about its value. If the goal is to develop an approach that is based on “actual functions and practices…that merit recognition [under the First Amendment]”, then it is essential to examine those actual functions and practices in some detail. Like Schauer, Horwitz does not address specific examples of journalism that does and does not deserve protection. Moreover, Horwitz’s generalization—that established (print) journalists work one way, bloggers another—is certain to be both over- and under-inclusive. Some

94 Paul Horwitz, Universities as First Amendment Institutions: Some Easy Answers and Hard Questions, 54 U.C.L.A. L. Rev. 1497, 1512 (2007) (“A First Amendment doctrine built from the ground up around the values and practices of existing First Amendment institutions…offers a way of thinking about the First Amendment that responds to the differentiation that is apparent in the real world between different kinds of speech institutions …”)

95 Horwitz, Or of the [Blog], supra note ____ at 59.

96 See Section ___, infra (discussing specific examples of journalism—both good and bad).

97 See Horwitz, Or of the [Blog], supra note ____ at 56.

98 Horwitz argues that the institutional approach “may avoid being either overprotective or underprotective of any given institution.” Or of the [Blog], supra note ____ at 57 (emphasis added). My point is that it will, unavoidably, be both over and underprotective of individual
individual print journalists who do not merit press status will receive it, while some bloggers who do deserve protection will not.99

Horwitz identifies two additional and important benefits that can flow from an institutional approach: (1) judicial deference to self-governance by the press and (2) assigning specific and distinct meaning to the Press Clause so that it is not a legal nullity crowded out by the Speech Clause.100 With regard to the first goal, if self-governance by the press is desirable (and I agree that it is101), there is a way to move further in this direction. On the second point, the institutional model is neither the only nor the best way to give specific meaning to the Press journalists. That is something the institutional approach is likely to accept as an inevitable problem that is outweighed by the benefits of the institutional approach. See ___, supra (discussing what Schauer says about this).

99 Horwitz suggests that as “norms develop[] in and around the blogosphere”, blogs may “develop[] an institutional framework that may collectively do much of the verification, correction, and trust-establishing work that established news media institutions do individually.” Or of the [Blog], supra note ____ at 60. If this occurs, Horwitz, suggests, then blogs, collectively, might qualify as a First Amendment institution, although blogs would not necessarily be treated with the same respect as traditional print journalism. Id. at 61 (“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.”) (emphasis added). Cf. Blocher, Public Discourse, Expert Knowledge, and the Press, supra note ____ at 429 (“a focus on traditional media would fail to capture many modern means of maintaining the public sphere. In the recent democratic revolutions across the Middle East, for example, social media such as Twitter—“traditional” only in the loosest sense of the term—effectively functioned as the press.”)

100 Horwitz, Or of the [Blog], supra note ____ at 55-56.

101 See Paul Horwitz, Three Faces of Deference, 83 NOTRE DAME L. REV. 1061, 1085 (2008) (asserting that “courts defer to other institutions when they believe that those institutions know more than the courts do about some set of issues, such that it makes sense to allow the views of the knowledgeable authority to substitute for the courts’ own judgment.”) See also Schauer, Facts and the First Amendment, supra note ____ at 919 (suggesting that private actors, as opposed to First Amendment regulation, have the potential to address the problem of “increasingly widespread public acceptance of consequential (and thus dangerous) factual falsity.”)
Clause, and in light of other problems with the institutional approach (at least as it currently stands), the approach discussed in section ___ is a preferable alternative.

Although Horwitz urges courts to “defer to institution[al] capacity for self-governance”, in his model, it is still the courts that identify which existing institutions are deserving of what level of deference and protection.\textsuperscript{102} This article suggests a different, less court-centered approach.\textsuperscript{103} Journalists would play a central role in defining the press corps. In order for this to work effectively, journalistic norms would have to change in ways that I discuss in section ___. Courts and legislators would defer to these determinations when possible\textsuperscript{104} and ensure that individuals identified as bona fide members of the press receive specific constitutional and statutory protections extended to the press as such. In addition to giving the press itself more room for self-governance, this approach would reduce the concern judges may have about determining which individual journalists are and are not worthy of protection.\textsuperscript{105}

Finally, the institutional approach is not the only way to give the Press Clause unique meaning. An alternative approach discussed in section ___, \textit{infra}, is based in part on what

\textsuperscript{102} Horwitz, \textit{Or of the [Blog]}, \textit{supra} note ___ at 56. (“Under this approach, the Court would identify those institutions that merit recognition as First Amendment institutions. 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 respective spheres of autonomy.”) (emphasis added).

\textsuperscript{103} It would be possible simply to make this press-centered approach part of the institutional model, but, for the reasons given here, other problems with the institutional approach suggest the need for an alternative framework.

\textsuperscript{104} In some cases, journalists appearing before courts will not have been evaluated or identified by their peers as bona fide members of the press (or not). In these cases, courts would perform the initial task of determining whether these journalists merit press status.

\textsuperscript{105} West, \textit{Awakening the Press Clause}, \textit{supra} note ___ at 29; Paul Horwitz, \textit{Three Faces of Deference}, \textit{83 Notre Dame. L. Rev.} 1061, 1063-1064 (2008).

28
Horwitz describes as a “functional approach” to defining “the press”. In contrast with an institutional approach, a functional approach would provide “some form of heightened protection…for individuals or institutions when they engage in activities that meet some definition of the practice of journalism.” This is a promising alternative, as it would hold all would-be members of the press to the same standard—print journalists associated with a recognized First Amendment institution would not get a free pass and online writers not associated with any institution would not automatically be downgraded.

Horwitz ultimately rejects the functional approach, in large part because he concludes it does not “accurately describe the unique features and promises of [] separate institution[s] [e.g. blogs and the traditional press].” Horwitz also worries that the functional approach raises a “definitional problem…What is journalism, exactly? And which aspects of journalism - editorial judgment, newsgathering, or something else - deserve special protection.” These are valid concerns—ultimately, however, this article concludes that a functional approach to defining “the press” is a preferable alternative to the existing institutional approach, although the functional approach needs to be refined and modified in order to fully achieve its potential, as discussed in section ___.

106 Horwitz, Or of the [Blog], supra note ____ at 56.
107 Horwitz, Or of the [Blog], supra note ____ at 51 (emphasis added).
108 Horwitz, Or of the [Blog], supra note ____ at 54.
109 Horwitz, Or of the [Blog], supra note ____ at 53.
110 Though Horwitz himself does not see the definitional concerns as “carry[ing] too much weight.” Or of the [Blog], supra note ____ at 54. His main objection to the functional approach is that it does not take into account institutional differences. Id.
2. West’s Functional Model

Sonja West sees more promise in a functional approach\textsuperscript{111} than Horwitz does, though she shares some concerns identified by the institutional model. West agrees with Horwitz and Schauer that it is a problem for the courts to have rendered the Press Clause a “constitutional redundancy”, giving it no separate meaning from the Speech Clause.\textsuperscript{112} She charges that it “is problematic on several levels” to fail to give the Press Clause independent meaning.\textsuperscript{113} First, it makes no sense as a matter of textual analysis—all things in the Constitution must mean something, but refusing to give the Press Clause distinct meaning renders it “mere surplusage.”\textsuperscript{114} In addition, failing to specifically define the Press Clause means failing to protect “reporters who, as members of the press, endeavor to inform the public and to check the government.”\textsuperscript{115}

West observes, like Schauer and Horwitz, that one way to explain why the courts have declined to give the Press Clause distinct meaning is that it is not an easy task to define “the press”.\textsuperscript{116} She agrees that it is important not to have a definition of the press that is overinclusive—if everyone who disseminates information is defined as “the press”, then the

\textsuperscript{111} West distinguishes her approach from functional approaches others have offered. \textit{Awakening the Press Clause}, supra note ___ at 1054-1055.

\textsuperscript{112} West, \textit{Awakening the Press Clause}, supra note ___ at 1027-1028

\textsuperscript{113} West, \textit{Awakening the Press Clause}, supra note ___ at 1028.

\textsuperscript{114} West, \textit{Awakening the Press Clause}, supra note ___ at 1028, quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803).

\textsuperscript{115} West, \textit{Awakening the Press Clause}, supra note ___ at 1028-1029.

\textsuperscript{116} West, \textit{Awakening the Press Clause}, supra note ___ at 1029; 1047-1048.
Press Clause becomes meaningless.\textsuperscript{117} Instead of the institutional approach,\textsuperscript{118} however, West offers a functional approach\textsuperscript{119} as a way to give the Press Clause meaning, defining members of the press as “[individual] journalists [who] are repeat players who gather and disseminate news in a planned and consistent manner.”\textsuperscript{120} West asserts that, as repeat players, these journalists can be held accountable by the public, as well as by “professional or industry norms.”\textsuperscript{121} This is designed to be a narrow definition of the press—neither the public at large nor “the occasional public commentator” will qualify for constitutional or statutory press protections.\textsuperscript{122} However, unlike the institutional approach, West’s framework leaves open the possibility that an individual “not associated with an established media outlet…may gain recognition as a member of the press over time if she publishes regularly and builds a consistent audience.”\textsuperscript{123}

While Horwitz cautions that a functional approach raises a difficult definitional problem—what is “the press”?\textsuperscript{124}—West insists that this is “a workable problem”\textsuperscript{125} if one can

\textsuperscript{117} West, \textit{Awakening the Press Clause}, supra note ___ at 1056-1057.

\textsuperscript{118} West suggests that the institutional approach may be underinclusive. \textit{Awakening the Press Clause}, supra note ___ at 1063-1064. It can also be overinclusive, as discussed supra at ___.

\textsuperscript{119} West, \textit{Awakening the Press Clause}, supra note ___ at 1068-1069 (“the most promising avenue is to focus on the unique functions of the press qua press…by examining those functions that a free press fulfills in our democracy that are different from the values served by our speech freedoms, we can close in on a meaningful definition.”)

\textsuperscript{120} West, \textit{Awakening the Press Clause}, supra note ___ at 1061.

\textsuperscript{121} West, \textit{Awakening the Press Clause}, supra note ___ at 1061.

\textsuperscript{122} West, \textit{Awakening the Press Clause}, supra note ___ at 1067.

\textsuperscript{123} West, \textit{Awakening the Press Clause}, supra note ___ at 1067.

\textsuperscript{124} Horwitz, \textit{Or of the [Blog]}, supra note ____ at 53.

\textsuperscript{125} West, \textit{Awakening the Press Clause}, supra note ___ at 1061.
identify “unique functions of the press”\textsuperscript{126} She describes two unique press functions as (1) “gather[ing] and convey[ing] information to the public about newsworthy matters” and (2) “serv[ing] as a check on the government by conveying information to the voters about "what [their] Government is up to."\textsuperscript{127} However, she offers the caveat that her definitional efforts are not intended to be the last word, noting that “I make no pretense of settling the definitional question”\textsuperscript{128} and “[r]easonable minds can debate how to define [the press]”.\textsuperscript{129}

West’s definition of the press, though admittedly preliminary\textsuperscript{130}, offers some significant potential benefits and a starting point for further exploration, although there are also some problems that need to be addressed. On the plus side, by moving toward a definition of the press that promises to reject abstraction and begin with the specific work journalists do, while avoiding both over- and under-inclusiveness,\textsuperscript{131} West addresses some of the problems associated with the institutional model. On closer examination, however, while a functional definition of the press does have the potential to achieve these aims,\textsuperscript{132} West’s model, as currently designed, does not yet fulfill its potential.

\textsuperscript{126} West, \textit{Awakening the Press Clause}, supra note ___ at 1068-1070.

\textsuperscript{127} West, \textit{Awakening the Press Clause}, supra note ___ at 1069-1070 (citation omitted).

\textsuperscript{128} West, \textit{Awakening the Press Clause}, supra note ___ at 1068.

\textsuperscript{129} West, \textit{Awakening the Press Clause}, supra note ___ at 1061.

\textsuperscript{130} West, \textit{Awakening the Press Clause}, supra note ___ at 1061 (“promulgating the ultimate definition [of the press] is outside the scope of this Article”).

\textsuperscript{131} West, \textit{Awakening the Press Clause}, supra note ___ at 1061.

\textsuperscript{132} See section ___, infra.
While West aims to make her definition of the press “narrower, and thus more meaningful”\textsuperscript{133}, her definition remains overly broad. As noted, under West’s model, one could qualify as a member of the press by “gather[ing] and convey[ing] information to the public about newsworthy matters”\textsuperscript{134} or by conveying information to the voters about "what [their] Government is up to[]",\textsuperscript{135} especially when such information is provided by “journalists [who] are repeat players who gather and disseminate news in a planned and consistent manner.”\textsuperscript{136} This is the kind of work that has the potential to vindicate First Amendment values, but only if the definition is made more precise. West’s model is overly inclusive—there are many ways to regularly provide information to the public about newsworthy matters or what government is doing, but not all are worthy of protection—for instance, under her definition, a mouthpiece or propagandist for the government could qualify as a member of the press as long as he or she regularly reported on newsworthy matters.

This is undoubtedly not what West had in mind as journalism worthy of protection.\textsuperscript{137} The problem is that West’s model provides no way to make judgments as to what specific kind of reporting advances First Amendment values. As long as it fits into a broad general category, information about “newsworthy matters” or what government is doing, especially when

\textsuperscript{133} West, *Awakening the Press Clause*, supra note ___ at 1061.

\textsuperscript{134} West, *Awakening the Press Clause*, supra note ___ at 1069.

\textsuperscript{135} West, *Awakening the Press Clause*, supra note ___ at 1069-1070 (citation omitted).

\textsuperscript{136} West, *Awakening the Press Clause*, supra note ___ at 1061.

\textsuperscript{137} West, *Awakening the Press Clause*, supra note ___ at 1058 ("It makes practical sense to give certain rights and privileges only to those [members of the press] who have demonstrated that they are more likely to use these protections responsibly and for the public good rather than to give similar rights to anyone with a computer.")
delivered by repeat players, will qualify for protection. That would seem to allow protection for a daily television news program or newspaper column that simply reports, without comment, the government’s version of events. In other words, a journalist practicing the balance trap approach would qualify as a member of the press, even if he or she did nothing more than produce, without comment or quibble, stories based on false government talking points. 138 Such stories could very well be “newsworthy”, as long as they relate to events of interest to the public, even though they would provide the public with misinformation. West would counter that, so long as such reports appear regularly, journalists can be held accountable by the public or by professional norms. 139 However, if the public is not given enough information to allow it to distinguish truth from fiction, and if professional norms value the balance trap approach as a legitimate, or even a preferred form of journalism, then these checks will fail—as they have under our current system.

It is much easier to criticize than it is to build, and my point is not to dismiss West’s important work, it is simply to suggest that her definition could benefit from more precision. Some rhetorical questions can help focus the inquiry. Are all “newsworthy” stories equally valuable to the public, even if they are reported in a way that gives the public false or misleading information about significant events? How can we separate valuable press coverage of newsworthy events from work that looks like serious reporting but, in fact, is not? Is it enough for would-be members of the press to report on what government is doing, even when that means

138 (briefly explain video news releases)
http://www.democracynow.org/2005/3/14/state_propaganda_how_government_agencies_produc e
and

http://www.buzzfeed.com/hastingselliott/senate-to-consider-propaganda-amendment-this-wee-69ow
and
http://www.salon.com/2012/05/22/rep_smith_on_his_controversial_bills/singleton/

139 West, Awakening the Press Clause, supra note ___ at 1061.
simply serving as a conduit for the government to describe its actions to the public through its own chosen narrative?

The solution is to make the functional definition more precise and to ground it in specific examples of work that journalists do, as discussed in sections ___ and ___. This is another layer that can be added to West’s analysis. Her model puts forth a definition of the press without providing specific examples of good and bad journalism—of work that would qualify a journalist for press membership, and work that would not. The institutional model is missing the same piece, as discussed supra at ___, and this article attempts to fill in the gap by taking the next step of analyzing specific examples of journalism that should and should not qualify for protection.  

Finally, West’s model, like the institutional model, is too court- or legislature-centered. In her analysis, it will be judges and legislators who flesh out the definition of the press. As mentioned, this article will offer a new approach, giving journalists themselves the opportunity to define an improved press corps, subject to limited court review.

3. A New Way to Define The Press

140 See section ___, infra.

141 West, Awakening the Press Clause, supra note ___ at 1069 (“Through a proper analysis of the unique functions of the press qua press, the Court can identify characteristics that avoid the disconcerting conformity and favoritism of the elite while still allowing us to recognize and benefit from the press’s knowledge, skills, and dedication.); at 1058 (“It therefore appears that if judges must choose between granting these rights to everyone or no one, they will choose no one.); at 1061 (“the Court is capable of crafting a usable, albeit imperfect, definition [of the press]); emphasis added; see also West, Awakening the Press Clause, supra note ___ at 1062-1068 (discussing ways in which legislatures have defined the press).

142 Since many journalists currently embrace the balance trap as a norm, building a better press corps will depend on changes to journalistic norms. I provide some suggestions as to how these changed can be accomplished in section __.
Although, as discussed, the existing institutional and functional models for defining the press have flaws, they also provide some useful starting points for developing an alternative definition. Each model has the laudable goal of giving distinct meaning to the Press Clause. The institutional model promises to bring legal doctrine more in line with “the complex real world”; and to give press the power of self-governance. West’s functional model aims at a definition of the press that is sufficiently narrow to give the Press Clause real meaning and is based on unique functions the press performs. However, each model has trouble fulfilling these highly desirable goals. The institutional model relies on abstractions and generalizations and produces a definition of the press that it both over- and under-inclusive. West’s model promises a narrow definition of the press, but remains overly broad.

Most importantly, as discussed supra in section ___, each of the existing models for defining the press fails to consider the actual work journalists do. The institutional model generally assumes that existing institutions—for example, newspapers, magazines—are doing

143 Horwitz, Or of the [Blog], supra note ____ at 55, see also Id at 57: “[The institutional approach] 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. It is far more attuned to the actual speech-and press-oriented social practices the First Amendment serves to promote.”

144 Horwitz, Or of the [Blog], supra note ____ at 56-57.

work worthy of protection. West’s functional model defines worthwhile press functions so broadly that balance trap journalism would qualify for protection. What’s needed is a definition of the press that is based on the valuable work journalists actually do, or should do. My definition of the press is aimed at protecting only those journalists whose work advances First Amendment values. Successfully articulating and applying this definition depends on (1) identifying specific First Amendment values that competent journalism can advance and (2) identifying specific examples of journalism that does, and does not, advance these values.

(a) Rejecting the Balance Trap Approach

As Schauer, Horwitz, West, and others have observed, there are important, even essential, reasons to give independent meaning to the Press Clause. Most centrally, by doing so, we can give status to members of the press who vindicate First Amendment values—for instance, journalists whose work informs “competent democratic citizens.” This work would give Americans the information they need to separate truth from fiction, to recognize when a public figure is saying something which is simply not correct. The problem, however, is that many of the journalists who we might reflexively think of as candidates for press corps membership – for example, reporters for respected national newspapers -- do not actually do such work. In covering public debate, journalists often fall into the “balance trap” – specific examples of how this plays out are discussed in section __, infra.

146 See POST, supra note ___ at 88 (observing that Justice Felix “Frankfurter argue[d] that democracy can succeed only if persons are educated to become competent democratic citizens.”)
The balance trap model is appealing because it seems to satisfy journalistic aspirations to objectivity and neutrality. But, as suggested in the opening paragraph of this article, there are not always two sides to every story and there are not always two roughly equivalent ways to understand reality. When reporters follow the balance trap model, they create a false equivalency that incorrectly suggests to readers that each side of the “debate” has a fair point to make and choosing between the two positions is simply a subjective decision. Politicians can skillfully exploit the balance trap model by taking positions that are factually incorrect, resting assured that reporters will dutifully pass their incorrect statements along to the public without comment. In

147 See Jay Rosen, So whaddya think: should we put truthtelling back up there at number one? PressThink, Jan. 12, 2012, http://pressthink.org/2012/01/so-whaddaya-think-should-we-put-truthtelling-back-up-there-at-number-one/ (“Something happened in our press over the last 40 years or so that never got acknowledged and to this day would be denied by a majority of newsroom professionals. Somewhere along the way, truthtelling was surpassed by other priorities the mainstream press felt a stronger duty to. These include such things as “maintaining objectivity,” “not imposing a judgment,” “refusing to take sides” and sticking to what I have called the View from Nowhere. …[T]he drift of professional practice over time was to bracket or suspend sharp questions of truth and falsehood in order to avoid charges of bias, or excessive editorializing. Journalists felt better, safer, on firmer professional ground—more like pros—when they stopped short of reporting substantially untrue statements as false. One way to describe it (and I believe this is the correct way) is that truthtelling moved down the list of newsroom priorities. Other things now ranked ahead of it.”) (emphasis in original) (accessed July 13, 2012); see also Jay Rosen, The Twisted Psychology of Bloggers vs. Journalists, PressThink, March 12, 2011, http://pressthink.org/2011/03/the-psychology-of-bloggers-vs-journalists-my-talk-at-south-by-southwest/ (“Voice is something you learn to take out of your work if you want to succeed in the modern newsroom. You are supposed to sacrifice and learn to report the story without attitude or bias creeping in.”) (accessed July 12, 2012). The balance trap model is so powerful that the New York Times public editor wondered whether the Times should be a “truth vigilante”—in other words, should it “news reporters” have “the freedom to call out what [they] think[] is a lie[]”, to “challenge [incorrect statements of] ‘facts’ that are asserted by the newsmakers they write about.” Arthur S. Brisbane, Should The Times Be a Truth Vigilante?, New York Times, Jan. 12, 2012, http://publiceditor.blogs.nytimes.com/2012/01/12/should-the-times-be-a-truth-vigilante/ (accessed July 12, 2012); but see Greenwald, Arthur Brisbane and Selective Stenography, supra note ___ (describing Brisbane’s question as “basically the equivalent of pondering in a medical journal whether doctors should treat diseases, or asking in a law review article whether lawyers should defend the legal interests of their clients…reporting facts that conflict with public claims…is one of the defining functions of journalism, at least in theory.”)
some instances, this can also or alternatively be described as the “stenographic” model of reporting: rather than informing the public when an elected official or some other public figure is lying, journalists simply “report” what the official said, without identifying clear inaccuracies. My definition of the press is designed to address this problem, which none of the existing models fully addresses: how to provide press status only for journalists whose work advances First Amendment values.

(b) Press Membership Depends on Advancing First Amendment Values: Post’s Principle of Democratic Competence and the Press Clause

As noted, although he does not explain how his framework should be applied, Frederick Schauer provides a way to move toward a more useful definition of the press: “We first locate some value that the First Amendment treats, or should treat, as particularly important. Then we investigate whether that value is situated significantly within and thus disproportionately served by some existing social institution [or individual] whose identity and boundaries are at least moderately identifiable.” I will adapt Schauer’s test in developing a new definition of the press. Those institutions—or, in my model, individuals—advancing such a value would be defined as bona fide members of the press. The first step is to identify First Amendment values that the press can vindicate. Then, I will consider how we can determine which would-be members of the press actually advance these values in their work.

In his recently published book, *Democracy, Expertise, and Academic Freedom: A First Amendment Jurisprudence for the Modern State*, Robert Post argues that “the function of First Amendment Jurisprudence for the Modern State*
Amendment doctrine is to protect First Amendment values”.\textsuperscript{149} Post identifies two First Amendment values that are especially relevant to public opinion and self-government: (1) democratic legitimation, which is vindicated when people “who are permitted the opportunity to make public opinion responsive to their own subjective, personal views...come to regard themselves as the potential authors of the laws that bind them[\textsuperscript{150} and (2) democratic competence, which provides “the cognitive empowerment of persons within public discourse\textsuperscript{151}, [and] in part depends on their access to disciplinary knowledge.”\textsuperscript{152} Post observes that these values appear to be in tension. While democratic legitimation “precludes content discrimination”\textsuperscript{153} because everyone must have the equal opportunity to attempt to shape public opinion,\textsuperscript{154} democratic competence \textbf{requires} content discrimination that separates truth from fiction.\textsuperscript{155} Democratic legitimation demands that “[f]ools and savants alike are equally entitled to address the public”,\textsuperscript{156} but democratic competence demands that self-government proceeds from “factual truth”.\textsuperscript{157}

\textsuperscript{149} See generally, POST, supra note ___ at 77.

\textsuperscript{150} POST, supra, note ___ at 27-28.

\textsuperscript{151} As noted supra at __, by “public discourse”, Post means “the forms of communication constitutionally deemed necessary for formation of public opinion”. POST, supra, note ___ at 15.

\textsuperscript{152} POST, supra, note ___ at 34.

\textsuperscript{153} POST, supra, note ___ at 25.

\textsuperscript{154} See POST, supra, note ___ at 22.

\textsuperscript{155} POST, supra, note ___ at 25.

\textsuperscript{156} POST, supra, note ___ at 28.

\textsuperscript{157} POST, supra, note ___ at 29 (internal citation omitted).
Post suggests that truth itself is a First Amendment value, noting that “there is no constitutional value in false statements of fact” and acknowledging that “courts...permit the state to regulate the publication of false facts, even within public discourse.” However, he concludes that “within public discourse the value of democratic legitimation enjoys lexical priority [over truth and democratic competence].” In other words, false statements made in public discourse are generally protected speech—content discrimination is subordinated to the interest of allowing everyone to make his or her case in an effort to shape public opinion. Consequently, even though “an educated and informed public opinion will more intelligently and effectively supervise the government[]”, courts are reluctant to permit regulation of factual misstatements unless there is proof of “some guilty state of mind, like negligence or the deliberate intent to mislead.”

Since the state is generally prohibited from setting standards for accuracy in public discourse that would allow the public to rely on factual statements, “[w]ithin public discourse, the message of the First Amendment is caveat emptor.” As a result, “[m]embers of the general public can rely on expert pronouncements within public discourse only at their peril.” This includes journalism—the First Amendment bars government from suppressing factually...

159 POST, supra, note ___ at 29.
160 POST, supra, note ___ at 34.
161 POST, supra, note ___ at 35.
162 POST, supra, note ___ at 30. And even when such proof exists, courts may still be reluctant to permit suppression of factual misstatements. See Alvarez, supra note ___.
163 POST, supra, note ___ at 31.
164 POST, supra, note ___ at 44.
incorrect speech, and the state would have no grounds for “regulating the New York Times if the newspaper were inclined to editorialize that the moon is made of green cheese”\footnote{165}.

Post’s analysis concludes that First Amendment doctrine simply does not leave room for the state to enforce exacting standards for truth in public discourse. Accordingly, for Post, the only way to protect the creation of expert knowledge and verifiable truth produced by that knowledge is outside public discourse—in the university classroom, for example, where the professor-student relationship “constitute[s] a professional relationship, analogous to the relationship between a lawyer and her clients.”\footnote{166} Because students can reasonably rely on the accuracy of information conveyed to them by their professors, their professors can “properly…be[] held accountable for the professional competence of [their] lectures.”\footnote{167} This contrasts with newspaper readers who rely on the accuracy of information in the New York Times at their own risk.

While Post may be correct to conclude that the First Amendment would prevent suppression of factually incorrect claims in newspapers or other news outlets—even one as outlandish as the hypothetical assertion that the moon is made of green cheese—he does not consider\footnote{168} the possibility of vindicating First Amendment values of truth and democratic competence in another way, one that does not require suppressing speech. It is, in fact, possible

\footnote{165}{
\textit{POST}, \textit{supra}, note \__ at 67.}

\footnote{166}{
\textit{POST}, \textit{supra}, note \__ at 69.}

\footnote{167}{
\textit{POST}, \textit{supra}, note \__ at 69.}

\footnote{168}{
Perhaps because this was simply beyond the scope of his book.}
to advance the First Amendment value of truth in public discourse without suppressing any speech by turning to the Press Clause instead of the Speech Clause.\footnote{Post speaks generally of “the First Amendment” when he refers to protections for journalism: “the First Amendment would prohibit government from regulating the New York Times if the newspaper were inclined to editorialize that the moon is made of green cheese”. POST, \textit{supra}, note ___ at 67. To be more precise, the Speech Clause would prohibit such regulation. See West, \textit{supra} note ___ at 1031-1032 (“All speakers, whether deemed members of the press or not, retain their strong rights of expression, which include a right not to be subjected to government regulation based on the content of their speech.”). I argue that the Press Clause should not protect such editorializing—journalists who disseminate factually incorrect statements may be protected under the Speech Clause, but such work should not qualify for Press Clause protection.}

The solution to the problem Post suggests – how to advance truth and democratic competence in public discourse without suppressing speech – can be resolved by turning to the First Amendment’s Press Clause. Post rightly points out that access to accurate facts is necessary for informed public opinion, but too quickly concludes that there is nothing to be done about plainly false statements published in newspapers.\footnote{POST, \textit{supra}, note ___ at 44 (“Biologists can with impunity write editorials in the New York Times that are such poor science that they would constitute grounds for denying tenure within a university. Members of the general public can rely on expert pronouncements within public discourse only at their peril. Such pronouncements are ultimately subject to political rather than legal accountability.”); see also id. at 67 (“the First Amendment would prohibit government from regulating the New York Times if the newspaper were inclined to editorialize that the moon is made of green cheese”).} That may be correct if one considers government suppression of false statements to be the only way to ensure public access to accurate news stories. The Press Clause, however, points the way to other options.

By using the Press Clause rather than the Speech Clause to address the problem of journalists disseminating false information, we can find a solution that does not depend on suppressing speech. Only journalists who reject the balance trap and provide the public with accurate information are worthy of press status because only these journalists are advancing First
Amendment values of truth and democratic competence. Journalists who disseminate false information without comment advance no First Amendment value.\textsuperscript{171} Therefore, under the test I have adapted from Schauer, their work is simply not worthy of Press Clause protection and prestige.\textsuperscript{172}

(c) A New Definition of the Press to Recognize Journalism that Advances First Amendment Values of Truth and Democratic Competence

I have identified First Amendment values “that the First Amendment treats…as particularly important”\textsuperscript{173} and that members of the press can advance—truth and democratic competence, in other words, providing the public with accurate information about matters of public interest. The next task, continuing to adapt Schauer’s test, is to “investigate whether that value is situated significantly within and thus disproportionately served by some existing social institution [or individual] whose identity and boundaries are at least moderately identifiable.”\textsuperscript{174} In other words, which individual journalists (if any) do work that actually contributes to democratic competence by helping to build “accurate and informed public opinion”? Although Post’s discussion does not consider this specific problem, much of what he has to say about vindicating the value of democratic competence can be applied to the problem of identifying journalists whose work merits Press Clause protection.

\textsuperscript{171} Post, supra, note ___ at 29 (“there is no constitutional value in false statements of fact.”) (quoting Gertz, 418 U.S. at 340).

\textsuperscript{172} See Schauer, Institutional First Amendment, supra note ___ at 1275; see also West, supra note ___ at 1068 (definition of press should be based on “those functions that a free press fulfills in our democracy that are different from the values served by our speech freedoms”).

\textsuperscript{173} See Schauer, Institutional First Amendment, supra note ___ at 1275.

\textsuperscript{174} See Schauer, Institutional First Amendment, supra note ___ at 1275.
Post identifies “important lessons [to be drawn] from commercial speech doctrine.”

Although he does not make this connection himself, some of these lessons can be applied by analogy to the problem of journalists who disseminate false information to the public without comment. Post asserts that the fact that courts permit government suppression of misleading commercial speech “demonstrates that entrenched First Amendment standards do indeed protect the flow of information so as to enhance the quality of public decision-making.”

The state is justified in “engag[ing] in content discrimination to regulate and suppress the circulation of misleading [commercial] speech” because “the constitutional value of commercial speech lies in the information that it carries.” Although Post would caution against directly applying these principles to journalism because journalism is “speech within public discourse” while commercial speech is not, his observations are highly applicable to the balance trap problem.

Since, like commercial speech, journalism has constitutional value because of the information it carries, only reporting that provides accurate information to the public deserves recognition as bona fide press activity. Giving press status to journalists whose work conveys reliable, rather than misleading, information to the public serves the value of democratic

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175 Post, supra, note __ at 42.

176 See Vladeck, supra note ___ at 533 (“‘democratic competence’ could well provide the missing theoretical justification for reinvigorating the First Amendment’s Press Clause”.)

177 Post, supra, note __ at 42.

178 Post, supra, note __ at 41.

179 See Post, supra, note __ at 41-42
competence. This approach aims to improve “the flow of accurate information to the public and so actually advance the constitutional purpose of public education.”

Post might respond that journalism must first further the value of democratic legitimation, which depends on “the equal right of every speaker to participate in the formation of public opinion.” However, since we are not talking about suppressing any speech, there is no problem in requiring that journalism receiving Press Clause protections and prestige advances democratic competence. Under my approach, journalists would not be prohibited from disseminating false information to the public—they would be free to do this, they simply would not receive Press Clause protection for such work. The Speech Clause is not implicated as no speech is suppressed.

There is an additional reason why concerns about regulating the dissemination of misleading information do not apply to the problem of separating competent journalism from journalism not worthy of Press Clause protections—journalists are not acting as citizens exercising their “equal right…to participate in the formation of public opinion.” Journalists can be compared to other professionals Post discusses—university professors or lawyers, for example. As clients and students are “entitled to rely on the truth and accuracy of a

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180 See Post, supra, note ___ at 42.

181 POST, supra, note __ at 41.

182 See West, supra note ___ at 1028 (Speech Clause protects “freedoms to publish and to disseminate speech”).

183 POST, supra, note ___ at 41.
professional’s judgment[]”

184, the public is entitled, or ought to be entitled, to rely on the truth and accuracy of reporting. Members of the public should be able to reasonably assume that reporting they read, see, or hear presents accurate information—in fact, there is no other sufficient reason to extend Press Clause protections to journalism.

If members of the press merit Press Clause protections and prestige because they advance First Amendment values of truth and democratic competence, then their work should be judged accordingly. Post asserts that “the right question to ask about a teacher [who seeks protection under the principle of academic freedom] is whether he is competent.”

186 I would ask a similar question in the context of defining the Press Clause—the right question to ask about a journalist seeking protection under the Press Clause is whether he or she provides the public with accurate information that advances First Amendment values. Like teachers or lawyers, journalists ought to be “held accountable for the[ir] professional competence” and for the same reasons—

184 Post, supra, note ___ at 41; see also id. at 69 (“[a university professor’s] relationship to the students in his classroom constitute[s] a professional relationship, analogous to the relationship between a lawyer and her clients.”)

185 But cf. Post supra note ___ at 23 (“Within public discourse…the First Amendment ascribes autonomy equally to speakers and to their audience, so that the rule of caveat emptor applies. A member of the general public who foolishly removes his silver fillings upon reading a dentist’s book is held responsible for his own bad decision.”) and at 44 (“Members of the general public can rely on expert pronouncements within public discourse only at their peril.”) But Post’s analysis proceeds under the Speech Clause, not the Press Clause: there may be good reason to afford speech protections to journalists who disseminate false information to the public, and I do not argue otherwise. However, that is a separate question from the question of whether to extend Press Clause protections and status to such journalists.


187 Post, supra, note ___ at 69.
because their relationship with their readers, listeners or viewers justifies public faith in the information journalists disseminate.

I can now set forth a specific definition of the press. Journalists can qualify\(^\text{188}\) for press status if (1) they regularly disseminate factually accurate information to the public about newsworthy matters, including “facts that conflict with public claims”\(^\text{189}\) while (2) rejecting the balance trap or stenographic style, or other approaches that incorrectly provide the public with a sense of false equivalence on matters where there is a clear distinction between what is true and what is false.\(^\text{190}\) Journalists who do this kind of work are vindicating First Amendment values of truth and democratic competence. This definition is fairly abstract and is best understood by considering specific examples of journalism that would and would not qualify for Press Clause protections and prestige. Section __, infra provides these specific examples. First, it is important to explain the specifics of implementing this new definition of the press—how this definition can be used to create a journalistic norm that advances First Amendment values.

\(^{188}\) As noted, there may be additional ways journalists can qualify for press status. My definition focuses on separating balance trap journalism from journalism worthy of press status, but there may be other work journalism does that has nothing to do with the presence or absence of the balance trap and merits Press Clause protections and status for other reasons.

\(^{189}\) See Greenwald, Arthur Brisbane and Selective Stenography, supra note ___. (“reporting facts that conflict with public claims…is one of the defining functions of journalism, at least in theory.”);

\(^{190}\) Note that this definition builds on the one offered by Sonja West—that press status should be available to journalists who “gather[] and convey[] information to the public about newsworthy matters”. West, supra note ___ at 1069. My definition is different than West’s in that it expressly rejects balance trap style journalism that would qualify for press status under West’s definition.
(d) Implementing the New Definition of the Press: Journalists Take the Lead in Building a Better Press Corps191

Having concluded that only journalists whose work advances First Amendment values of truth and democratic competence deserve press status, the next problem is: how do we implement this new definition of the press? How, in practice, will bona fide members of the press be separated from journalists not deserving of Press Clause protections? Other scholars look primarily to the courts to implement their proposed definitions of “the press” and give the Press Clause meaning.192 In my model, the courts play an important, but supporting role in giving meaning to the Press Clause. Journalists themselves will take the lead in building a new definition of the press.193 This will vindicate the goal of self-governance identified by Paul

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192 See West, supra note ___ at 1048-1049 (“in order for the Press Clause to have the independent weight it merits, the courts must give the term "press" a meaningfully narrow definition.”) (emphasis added) and at 1069-1070 (discussing ways in which courts can apply West’s proposed definition of the press); Horwitz, Or of the [Blog], supra note ____ at 56-62 (discussing ways in which courts can use institutional approach to First Amendment as a basis for defining the Press Clause—though Horwitz would have courts defer to some decisions made by First Amendment institutions).

193 It could be argued that Paul Horwitz takes a similar approach when he urges courts to defer to those First Amendment institutions that merit Press Clause protections. Horwitz, Or of the [Blog], supra note ____ at 56-62. However, Horwitz’s approach still assigns the courts a more central role than I would, as he concludes that it is up to the courts to differentiate between those who are and are not worthy of Press Clause protections. Id. at 61-62. In my approach, journalists themselves initially and explicitly identify bona fide members of the press and the courts play only a supporting role in determining whether or not to defer to these determinations.
Horwitz\textsuperscript{194} and will obviate, in at least some cases, the need for courts to make initial case-by-case determinations as to who qualifies for press corps status.\textsuperscript{195}

Ideally, I would suggest an approach that allows an initial group of journalists who have demonstrated their understanding and rejection of the balance trap model to identify other bona fide members of the press on a case by case basis. In practice, it is difficult to see how this could be done, given that, according to the U.S. Bureau of Labor Statistics, there were close to 60,000 “reporters, correspondents, and broadcast news analysts” working in the United States as of 2010.\textsuperscript{196} Assuming that the extremely labor-intensive project of evaluating the body of work of tens of thousands of journalists is simply not feasible, I would propose this alternative: journalists who recognize the balance trap problem could use awards, prestige and peer praise

\begin{footnotesize}
\footnote{194 Horwitz, \textit{Or of the [Blog]}, supra note ____ at 56-57.}
\footnote{195 Cf. West supra note ___ at 1029 (“To many jurists and scholars, the thought of identifying who constitutes the press reeks of government favoritism toward a privileged few and discrimination against other, less favored speakers.”)}
\end{footnotesize}
and criticism to develop a new journalistic norm\(^{197}\) that favors accurate coverage over the balance trap or stenographic models.\(^{198}\)

David Anderson observes that “[j]ournalism…is largely a self-rewarding and self-perpetuating profession.”\(^{199}\) Most journalists do not earn a great deal of money\(^{200}\) and, “as a consequence, “journalism is staffed largely by people who have rejected economic reward as their principal motivation. The rewards they seek come from their peers and their superiors, not the audience or the market.”\(^{201}\) Anderson’s observations suggest that peer responses can have a powerful effect in changing journalistic norms: journalists ought to praise work that advances First Amendment values and criticize work that follows balance trap or stenographic norms. Some critics already do this—for instance, Rem Rieder, Jay Rosen, Marty Kaplan, James Fallows, and Glenn Greenwald.\(^{202}\) More should follow their lead, and those who recognize the

\(^{197}\) In some cases, it would also be important to have legislators defer to the decisions made by journalists that I discuss here since “[t]he press pass, the press gallery, the press room, the press office…the press bus or plane, and the press pool are usually created by some form of law - statute, regulation, rule, or policy.” See Anderson, supra note ___ at 430.

\(^{198}\) Of course, some journalists already reject the balance trap and stenographic models, but, as discussed in section ____, infra, these models are powerful norms for many journalists today, and they need to be challenged and discredited if journalists are to vindicate First Amendment values of truth and democratic competence.

\(^{199}\) Anderson, supra note ___ at 475.


\(^{201}\) Anderson, supra note ___ at 475.

\(^{202}\) See e.g. Rem Rieder, Reporting to Conclusions, supra note ____; Rem Rieder, Calling a Lie a Lie, American Journalism Review, supra note ____; Jay Rosen, NPR Tries to Get its Pressthink Right, PressThink, Feb. 26, 2012, http://presstthink.org/2012/02/npr-tries-to-get-its-pressthink-
problems of the balance trap ought to coordinate their efforts and develop a strategic plan to improve journalistic norms. They might, for instance, create awards\(^{203}\) for journalists whose work advances First Amendment values as well as anti-awards or “awards of shame” designed to expose journalists who follow the balance trap model.\(^{204}\)

There are also, of course, a number of existing prestigious honors that journalists already seek—Pulitzer Prizes, Emmy Awards, Nieman Fellowships, Society of Professional Journalists Awards, White House Correspondents’ Association Awards.\(^{205}\) The criteria for making these awards could be specifically crafted to reward journalists whose work advances First Amendment values and to rule out journalists whose work follows balance trap or stenographic norms.

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\(^{203}\) At least one of these critics, Marty Kaplan, is already associated with an organization that gives awards to journalists. Kaplan is director of the Norman Lear Center at USC’s Annenberg School for Communication and Journalism. The Lear Center presents biennial Walter Cronkite Awards for Excellence in Television Political Journalism. [http://www.cronkiteaward.org/the-2013-awards.html](http://www.cronkiteaward.org/the-2013-awards.html) (accessed July 11, 2012). This could be a starting point, although these awards seem to be limited to television journalists.

\(^{204}\) See Anderson, *supra* note ___ at 476 (“just as surely as it recognizes its heroes, journalism punishes those who violate its norms.”)

\(^{205}\) See Anderson, *supra* note ___ at 475.
Journalists also derive status from special access to the powerful—for example, through membership in the White House and congressional press corps. The Standing Committee of Correspondents issues congressional press passes, which are also required for journalists who seek White House accreditation. These press credentials are awarded to “full-time, paid correspondent who require[] on-site access to congressional members and staff…[and are] employed by a news organization.” Under the existing guidelines, a journalist whose work faithfully follows balance trap norms would still be perfectly able to receive access to cover Congress and the White House as long as he or she met the Committee’s other requirements. These guidelines ought to be changed: only journalists whose work advances First Amendment values should qualify for this special access and status. This would not require any government action or interference: the Standing Committee of Correspondents is composed of journalists selected by members of the congressional press corps. I would propose a similar method for selecting journalists who participate in “press pool” coverage of Presidents and presidential


208 United States Senate Daily Press Gallery, Standing Committee of Correspondents, Articles of Procedures Governing the Standing Committee of Correspondents Elections, http://www.senate.gov/galleries/daily/standing2.htm (accessed July 11, 2012). Of course a kind of “chicken and egg” problem presents itself: if one needs a committee to select bona fide members of the press corps, but that committee must be selected by the press corps itself, which comes first? I would suggest that journalists with recognized bona fides on the question of balance trap coverage—people like Rieder, Kaplan, Greenwald, Fallows and Rosen—select an initial Committee to accredit members of the congressional press corps. Once an initial press corps has been established, that press corps could elect future members of the Committee.
candidates,\textsuperscript{209} for providing presidential debate credentials to journalists and for choosing moderators for presidential and other political debates.\textsuperscript{210} Finally, it could be worthwhile to consider creating a title assigned to bona fide members of the press—I would suggest “MP” for member of the press, but obviously that could create some confusion.\textsuperscript{211} Using a title would confer status and would also allow the public to readily identify bona fide members of the press.

Since, as Anderson notes, “[l]evel of recognition in journalism come principally through advancement within the profession”,\textsuperscript{212} it is possible that these proposed actions and changes could help discredit the balance trap norm by rewarding journalists whose work advances First Amendment values, or by incentivizing news outlets to improve their standards.\textsuperscript{213} In fact, there

\textsuperscript{209} Need note explaining how press pool works—see e.g. http://tpmdc.talkingpointsmemo.com/2012/07/whca-daily-caller-munro.php and http://www.huffingtonpost.com/2012/05/02/romney-campaign-media-press-pool_n_1472610.html


\textsuperscript{211} “MP” is already used, most notably, to refer to Military Police or a Member of Parliament.

\textsuperscript{212} Anderson, \textit{supra} note ___ at 475.

\textsuperscript{213} If these ideas do not produce change, then other approaches should be tried. I do not consider this to be an exhaustive accounting of all the ways in which journalists themselves might help create a better press corps. My suggestions are intended to provide a starting point for further discussion. It would be essential to solicit additional ideas from journalists like Rieder, Rosen, Kaplan, Fallows, and Greenwald. As I suggest, these journalists and others like them who
is at least circumstantial evidence that one of these actions, peer criticism, can have an effect. Jay Rosen criticized NPR’s “he said, she said” approach to reporting for creating a false sense of balance—in other words, for falling into the balance trap.\textsuperscript{214} NPR ultimately created a new ethics handbook that, in Rosen’s views seemed to “speak directly to [his past criticisms]…[of] NPR.”\textsuperscript{215} The new handbook included these declarations: “Our goal is not to please those whom we report on or to produce stories that create the appearance of balance, but to seek the truth.” and “our primary consideration when presenting the news is that we are fair to the truth. If our sources try to mislead us or put a false spin on the information they give us, we tell our audience. If the balance of evidence in a matter of controversy weighs heavily on one side, we acknowledge it in our reports.”\textsuperscript{216}

It is important to note two caveats: (1) it is not clear that Rosen’s criticisms of NPR directly or solely led to these changes\textsuperscript{217} and (2) the fact that NPR created a new ethics handbook recognize and understand the balance trap problem ought to coordinate their efforts and discuss possible solutions to the problem.

\textsuperscript{214} Jay Rosen, \textit{We Have No Idea Who’s Right: Criticizing “he said, she said” journalism at NPR}, PressThink, Sept. 15, 2011, \url{http://pressthink.org/2011/09/we-have-no-idea-whos-right-criticizing-he-said-she-said-journalism-at-npr/} (defining and explaining “he said, she said” journalism) (accessed July 12, 2012).


\textsuperscript{216} NPR Ethics handbook, \url{http://ethics.npr.org/} (accessed July 12, 2012).

\textsuperscript{217} NPR may have been responding to other or additional criticism—although, either way, this would support the hypothesis that peer criticism has the ability to change journalistic norms. See Mallary Jean Tenore, \textit{NPR introduces new ethics handbook, appoints standards and practices editor}, Poynter.org, Feb. 24, 2012, \url{http://www.poynter.org/latest-news/top-stories/164223/npr-introduces-new-ethics-handbook-appoints-standards-and-practices-editor/} (“NPR began working on the 72-page handbook shortly after Ellen Weiss, vice president of news, fired news analyst Juan Williams for remarks he made about Muslims on “The O’Reilly Factor.” The October 2010 dismissal led NPR’s Board of Directors to conduct a formal review of what happened. A couple [of] months after the incident, which generated widespread criticism, Weiss resigned.
claiming, in Rosen’s words, to reject “the worst excesses of ‘he said, she said’ journalism”\(^{218}\), does not necessarily mean that NPR’s journalists are faithful to the new handbook’s vision. One would have to confirm that work done by specific journalists at NPR now rejects the balance trap approach in order to conclude that the changes have had an actual effect.

Judges and courts would also play an important role by applying my proposed definition to determine which journalists qualify for press membership. When possible, judges should defer to initial determinations made by journalists themselves. For instance, if the changes I suggest are implemented, with awards and press credentials assigned only to those journalists whose work advances First Amendment values, and not to journalists whose work depends on the balance trap and/or stenographic approach, then judges should endorse the results of these processes.\(^{219}\) For journalists who have received awards or press credentials based on the conclusion of other journalists that they are advancing First Amendment values, the judicial role should be limited to confirming whether the decision was made based on an appropriate definition of the press—in other words, that the awards or press credentials were given to journalists because of a conclusion by their peers that their work advances First Amendment values of truth and democratic competence and rejects the balance trap and stenographic norms. When journalists who have not been recognized as bona fide members of the press by their peers


\(^{219}\) If journalists continue to follow norms that undermine First Amendment values—e.g. balance trap style reporting—then courts should not defer to judgments that such work is worthy of press status.
(because they have not received awards or accreditation) appear before the courts, courts should apply my proposed definition of the press in the first instance. Journalists whose work advances First Amendment values of truth and democratic competence would receive Press Clause protections, journalists whose work reflects balance trap or stenographic approaches would not.220

Press membership provides specific benefits, both tangible and intangible, legal and otherwise (that is to say, benefits not dependent on constitutional or statutory protections). The most important benefits may not depend on specific legal protections. Journalists who receive the approval of their peers, as evidenced by awards and/or accreditation, will enjoy the prestige associated with their status as well as access to important newsmaking events221 and the prospect of career advancement. However, for some journalists, an important benefit of press status will be the attendant legal protections that courts can enforce.222 Journalists whose press membership is confirmed by courts would be in a position to receive specific legal protections and benefits, including (a) protection from prosecution if they refuse to testify about confidential sources; (b) protection from prosecution for methods necessary to conduct undercover reporting; and (c)

220 Some might question whether judges are capable of identifying bona fide members of the press by applying this test. As Scott Moss has noted in a different context, “[c]ontrary to the premise that judges cannot handle cases in fields in which they lack expertise, judges always adjudicate cases in fields alien to them, including ‘accounting partnerships; administrative law judgeships; law enforcement; engineering; computer programming; and hard sciences such as chemistry.’” Scott Moss, Students and Workers and Prisoners – Oh, My! A Cautionary Note About Excessive Institutional Tailoring of First Amendment Doctrine, 54 UCLA. L. REV. 1635, 1666-1667 (2007);

221 Journalists with congressional or White House press passes gain prestige and access, as do journalists who are accredited to cover presidential debates or are selected to moderate political debates.

222 As noted, supra note __, legislators will also play a role.
access to government information.\textsuperscript{223} Journalists who continue to follow the balance trap or stenographic approach will be denied prestige, status, legal protections, and the respect of their peers.

D. How Can We Know Which Journalists Qualify as Bona Fide Members of the Press and Which Do Not? Specific Case Studies.

We now have a definition of the press that we can use to determine which individual journalists deserve the protections and prestige associated with membership in the press corps: we will ask whether they do work that advances democratic competence by helping to build “accurate and informed public opinion.”\textsuperscript{224} This is an approach that embraces the “idea that reporters should be in the business of testing claims for accuracy and finding out the truth, rather than allowing politicians to make outrageous statements as long as they are ‘balanced’ by quotes from their political opponents.”\textsuperscript{225} The next step is to apply this model to specific work journalists are doing in order to provide specific examples of the kind of work that vindicates First Amendment values and the kind that does not.

1. How the Balance Trap Norm Makes it Poor Form to Call Out a Dictator for Lying

Paul Horwitz has suggested that “the established news media” are worthy of press protections because they “typically operate subject to a set of ethical and professional norms”.\textsuperscript{226} The unanswered question, however, is whether these norms produce journalism that is worthy of

\textsuperscript{223} See West, \textit{supra} note ___ at 1043-1046 (listing “rights and protections” associated with a “dynamic Press Clause”).

\textsuperscript{224} See \textit{POST}, \textit{supra} note ___ at 35.


\textsuperscript{226} Horwitz, \textit{Or of the [Blog]}, \textit{supra} note ____ at 59.
Press Clause protections and status. The balance trap is a norm respected by many journalists, but those who take this approach do not merit press status. Journalists who strictly adhere to the ideal of balance are incapable of providing accurate information to the public, as their approach prevents them from calling out lies – even the lies of a dictator on his way out of power.

On February 9, 2011, as Egyptian dictator Hosni Mubarak clung to power in the face of growing protest, Anderson Cooper told CNN viewers that he would devote “the entire hour to debunking the lies the Egyptian regime continues to try to spread about what is really happening there”. Point by point, Cooper proceeded to expose the government’s deceptions. Although the Mubarak regime blamed protesters for creating crisis, Cooper observed that it was the government, not protesters, that had “shut[] the banks, shut[] the trains, tr[ied] to shut the Internet.” While Egypt’s foreign minister claimed a state of emergency could not be lifted because of the protesters, Cooper reminded viewers that Mubarak had kept a state of emergency in place since he came to power 30 years earlier, long before the protests began. The Egyptian government claimed 11 people had died, but reports from Human Rights Watch based on “canvassing hospitals” put the death toll at closer to 300. Mubarak blamed protesters for provoking confrontation by “throw[ing] fire on oil”, and other government officials said foreigners were behind the protests, or claimed that protesters were being paid to wage phony resistance against the regime. Cooper noted that the government was responding to the protests with violence and that the protesters were Egyptians who were genuinely angry at living under authoritarian rule and wanted Mubarak to surrender power. Cooper, who covered the revolution from Egypt, described having witnessed “peaceful protesters attacked by uniformed police and
then by mobs[]” and concluded that “having seen the truth, it is our obligation, I believe, to continue to bear witness to it. For the people in this square, every day now is life and death.”  

The next day, February 10, 2011, Cooper again told CNN viewers that Mubarak was lying by claiming that foreign interference was behind the protests. Cooper called this a last-ditch effort by Mubarak to appeal to Egyptian nationalism, redirecting public anger toward other countries and away from his government. Cooper described these as “the lies of a regime [that is] trying to stay in power.” He emphasized again that, while Mubarak blamed the protesters for creating a crisis, it was the government that had “shut[] down the banks, shut[] down the internet service, shut[] down the trains.” Cooper noted that for 30 years Mubarak had offered a false choice to Egyptians: either his rule would continue or there would be chaos. In that context, government actions to shut down basic services were clearly an effort to create a sense of crisis that would lead Egyptians to accept Mubarak’s rule as the only alternative to anarchy.

Although Cooper had identified and explained demonstrably false statements made by Mubarak and his regime, while also providing context to CNN viewers to help them understand the strategy behind these deceptions, journalists criticized Cooper for what they saw as his subjective reporting. James Rainey chided Cooper for “channeling comic (and now U.S. Sen.) Al Franken’s 2003 book, ‘Lies and the Lying Liars Who Tell Them.’” For Rainey, the problem was not that Cooper was wrong to identify Mubarak and his subordinates as liars—it was that Cooper “heaped the pejorative on Egypt’s leaders 14 times in a[n] [hour].” Rainey’s objections

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were more stylistic than substantive—he conceded that “it’s hard to find fault with what Cooper had to say, though it did begin to sound a little one-note after about the sixth or seventh ‘liar, liar.’”

The thrust of Rainey’s criticism was that Cooper was wrong to stray from what Rainey defined as “mainstream American news” norms. By using such direct language to call out the Mubarak regimes lies, Cooper risked sounding more like an “opinion-mak[er]” than a reporter. Rainey speculated that this might be part of a conscious decision Cooper had made “in recent months” to move away from “traditional he-said/she-said reporting” and “adopt the more commentary-heavy approach of [CNN’s] higher-rated competitors, Fox and MSNBC.” Oddly, (and perhaps as his own nod to the balance trap style) Rainey ended his piece by quoting a journalism professor, Marc Cooper, who rejected Rainey’s criticisms. Professor Cooper said he had “no problem with [Anderson Cooper’s] point-of-view reporting because it was fully substantiated and accurate… I applaud its honesty, even if motivated by commercial concerns.” Professor Cooper’s only concern was that Anderson Cooper should also apply the same approach to American leaders, considering “[h]ow refreshing it would be to see that same piercing candor directed at American politicians when they overtly lie.”

Like Rainey, other critics objected to Cooper’s coverage on stylistic grounds, while simultaneously agreeing that Cooper was correct to describe the Mubarak regime’s statements as lies. Liz Trotta called Cooper’s reporting “shocking”, charging him with making editorial

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230 Rainey, *supra* note ___. Note that Marc Cooper is not related to Anderson Cooper.
comments. Even though Trotta, like Rainey, conceded that “[Mubarak’s statements] may be lies and probably were”, she concluded that “it's not in [Cooper’s] purview to say so.” CNN’s Howard Kurtz asked Christopher Dickey whether Cooper should “be taking sides on this kind of story?” Dickey agreed with Kurtz’s suggestion that there was something untoward about Cooper’s reporting, but excused it on the grounds that “part of the soul of [Cooper’s] show is to take sides and be passionate and come across as someone who's reasonable, but committed to a certain vision of the story.” Dickey’s assessment suggested that Cooper’s reporting was not properly objective and only belonged in an editorial context—although, Dickey admitted, “I don't think lies is an exaggerated word to use in this context. I mean, when you have a head of a state who's telling one untruth after another and they are certifiable, and then we come into the situation where he really is lying not only to the country but probably to himself. I think Anderson can be forgiven for using that word in that context.”

These criticisms show how the current balance trap and stenography models operate as journalistic norms that disrupt the flow of accurate information to the public. Strikingly, none of Cooper’s critics questioned the accuracy of his commentary in any way—each agreed that Mubarak was, in fact, lying. Their attempt to mark Cooper’s coverage as out of bounds had to


do with his departure from balance trap/stenography norms. In their view, by forthrightly describing lies as lies, Cooper was “taking sides” and departing from objectivity. One problem, of course, is that by policing Cooper’s coverage in this way, these critics were reinforcing the balance trap and stenography norms—especially for journalists who are less well-established than Cooper. Rather than facing criticism from their peers, journalists might conclude that it would be safer to follow the “traditional he-said/she-said reporting” model Rainey alluded to, or, alternatively, simply to stenographically report Mubarak’s claims without comment.

Some commentators, to their credit, challenged these criticisms of Cooper’s work. Rem Rieder praised Cooper for rejecting the balance trap approach. Rieder approvingly quoted Larry Platt, editor of the Philadelphia News, who instructed his staff to “report the hell out of our city, in keeping with the highest standards of accuracy and fairness, but you should also not be afraid to have a point of view about what you report. Our pages should never be home to ‘he said/she said’ neutrality. Instead, you will be explicit adjudicators of factual disputes, and you’ll be free to draw conclusions from your reporting.” Rieder suggested that Cooper’s work rightly followed Platt’s model rather than the balance trap, and Rieder rejected critics who accused Cooper of “taking sides”. For Rieder, Cooper was right to abandon a norm that required journalists to create “a false equivalency” by “treat[ing] everything equally.” Rather than settling for an “on the one hand, on the other hand” approach, Cooper, to his credit, exposed “demonstrably false” statements and fairly “drew conclusions from his reporting.” Ultimately, “[a]ll Cooper did was accurate: The regime did lie. Yet they question whether it was journalistically ethical [for Cooper] to say it.”

234 Rainey, supra note ___.

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tell the truth.” Rieder considered Cooper’s work an encouraging sign, with a “potential payoff [that] is huge, for the news organization, the reader--and democracy.”  

Glenn Greenwald charged that Cooper’s critics “have this exactly backwards[]” when they accuse Cooper of “depart[ing] from journalistic objectivity”. Greenwald argued that “[i]dentifying lies told by powerful political leaders — and describing them as such — is what good journalists do, by definition.” In Greenwald’s view, Cooper was being objective when he described “factually false statements as false….the only ‘side’ [he] [was] taking [was] with facts, with the truth.” The real failure occurs when journalists “treat lies told by powerful political officials as though they’re viable, reasonable interpretations of subjective questions.” For Greenwald, the debate over Cooper’s coverage exposed an important failure of American journalism. The balance trap and stenography norms tell journalists it is “not [their] role” to “point[[] out the lies of powerful political leaders”. Cooper’s coverage properly rejected this norm.

Greenwald rightly observes that the debate over Cooper’s decision to describe Mubarak’s lies as lies exposes a division between journalism that is and is not worthy of protection. If we want journalists who provide Americans with the accurate information that will “[e]quip[] people to understand and evaluate concepts in public discourse”, then we must aim to establish Cooper’s approach as the norm while reject the existing norm, the false equivalence or balance

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237 Blocher, supra note ___ at 435.
trap model. Journalists who qualify as bona fide members of the press must demonstrate that they understand why this is an important distinction, why Cooper is right and his critics are wrong, and they must demonstrate their ability to apply this critical approach in all of their coverage—not just when it comes to the lies of foreign dictators. This goal can be advanced by adopting the definition of the press set forward by this paper. Cooper’s work would be embraced as a model, while his critics’ work would not merit press status.

Like Marc Cooper, Greenwald hopes Anderson Cooper and others will not limit this approach to coverage of foreign dictators, but will expose deceptions by American leaders as well. Unfortunately, this does not always happen. Journalists often follow the “officials say” model in reporting on claims by the Obama administration, especially in the context of national security. For instance, the Obama administration decided to “count[] all military-age males in a [drone] strike zone as combatants…unless there is explicit intelligence posthumously proving them innocent.”

Although some former intelligence officials charged that this policy relies on “guilt by association” and produces “deceptive estimates of civilian casualties[]”, American news outlets uncritically report Obama administration claims that strikes killed a specific number of “militants”, without explaining that the official definition of “militant” could

\[\text{\footnotesize\textsuperscript{238}}\text{Greenwald, Journalists angry over the commission of journalism, supra note __}.\]

\[\text{\footnotesize\textsuperscript{239}}\text{See section __, supra.}\]


\[\text{\footnotesize\textsuperscript{241}}\text{Becker and Shane, Secret “Kill List”, supra note __ at 4.}\]
include civilian noncombatants. This work is not deserving of press status, although under the existing institutional and functional models, it would qualify.

The controversy over Anderson Cooper’s decision to describe frankly the Mubarak regime’s lies as lies provides specific evidence of a problem in American journalism, and a way to solve it. Cooper’s approach vindicates First Amendment values by providing the public with accurate information, and provides a model that ought to be used in reporting on false statements made by foreign and American officials alike. Cooper’s critics demonstrate the persistence of journalistic norms standing in the way of journalism that vindicates First Amendment values. The existing models for defining the press offer no way to distinguish between these different approaches and would end up classifying all of them as worthy of Press Clause protection. In contrast, my proposed definition of the press would classify Cooper’s work as worthy of Press Clause protections, but not his critics’ work. Journalists who persist in enforcing the balance trap or stenography norms would not merit press membership.

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242 Glenn Greenwald, Deliberate Media Propaganda, June 2, 2012, http://www.salon.com/2012/06/02/deliberate_media_propaganda/ (accessed June 29, 2012). Not all American news outlets follow this stenographic or “officials say” report; as noted, the New York Times explained the Obama administration’s definition of combatants. See Becker and Shane, Secret “Kill List”, supra note ___ at 3-4. In addition, while “the mainstream US media is consistently failing to report when civilians are credibly reported killed…media internationally do so [i.e. journalists outside the United States report on civilian casualties caused by U.S. drone strikes].” Greenwald, Deliberate Media Propaganda, quoting Chris Woods, senior reporter with Bureau of Investigative Journalism.

243 It is worth reminding that journalists who accurately explain the Obama administration’s definition of “militants” are not choosing sides or exhibiting anti-Obama bias. They are simply providing accurate information to the public that allows Americans to make sense of government claims about the results of drone strikes and who is killed by them. The public can then decide what to do based on this information—perhaps it will be outraged by the administration’s deception, perhaps it will conclude that the deception is justified.
The ultimate goal is to encourage journalism that provides the public with accurate information and to discourage, or at least refuse to privilege, journalism that stands in the way of vindicating First Amendment values of truth and democratic competence. The next section identifies additional specific examples to show why the balance trap norm is a persistent problem and why journalism of this type does not merit Press Clause protections or prestige.

2. Reporting on Reaction to a Lie Rather than the Lie Itself: A Mitt Romney Ad

In November 2011, Republican presidential candidate Mitt Romney ran his first television commercial, a spot that criticized President Obama’s stewardship of the economy. The ad begins with footage of candidate Obama in 2008 promising to fix the broken economy. Text appearing on the screen, superimposed over the Obama footage, accuses President Obama of failing to deliver on his promises and ultimately presiding over “the greatest jobs crisis since the Great Depression”, “record home foreclosures”, and “record national debt.” Then, we hear Obama say “if we keep talking about the economy, we’re going to lose.”

Someone watching the ad would reasonably conclude that President Obama made the quoted statement after taking office—that “if we keep talking about the economy, we’re going to lose.” Obama makes the statement about twenty seconds into the ad, after we’ve seen footage of candidate Obama making campaign promises and graphics claiming he failed to deliver on them. The ad also creates the clear impression—regardless of when he made this statement—that Obama was talking about himself—that the “we” who will lose by talking about the economy is his administration or his presidential campaign.

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In fact, candidate Obama made the quoted statement in 2008, and he was referring not to himself, but to his opponent at the time, Sen. John McCain. The full Obama statement was “Senator McCain's campaign actually said, and I quote, 'if we keep talking about the economy, we're going to lose.'”245 The Romney ad provided none of this context and gave no indication that Obama was quoting someone else.

The Romney ad was obviously misleading. It created the false impression that President Obama, having run on promises to fix the broken U.S. economy, conceded, after he failed to keep his promise, that he would lose his re-election campaign unless he could distract attention from the economy. While some journalists correctly described the Romney ad as misleading, others took a “he said/she said” approach to reporting on the ad.

Michael Shear of the New York Times wrote an article on November 22, 2011 with the headline “Democrats Cry Foul Over New Romney Ad.”246 The headline itself suggested that there was a debatable controversy here—that Democrats, not surprisingly, were unhappy with the ad, but it was not objectively deceptive. The body of Shear’s article underlined this point, reporting in its lead paragraph that “Democrats reacted ferociously on Tuesday to Mitt Romney’s first campaign commercial, which they said distorted comments by Barack Obama to make it look as if he was running away from his record on the economy.”247 Although Shear


247 Id. (emphasis added).
acknowledged that the Romney ad had “[l]eft out…the context for Obama’s remark”, Shear avoided passing judgment on the ad’s ultimate legitimacy, instead focusing on what he described as a “back and forth” between Democratic and Republican officials, with Democrats describing Romney as “deceitful and dishonest” and Republicans calling the Democrats’ response “hysterical” and accusing the Obama campaign of “routinely lying about Mr. Obama’s record.”

Shear summarized his conclusions without commenting on the ad’s accuracy: the ad had “generat[ed] controversy” and indicated that “Mr. Romney’s campaign was looking beyond the primary to a fight against Mr. Obama”. He concluded his article by quoting the subject line of an email the Romney campaign sent to reporters: “Game on.” The implication was that the presidential race was beginning in earnest, both sides would be hurling accusations back and forth, and this was simply an example of the political hardball that characterizes presidential election campaigns.

Shear was not the only journalist to focus more on reaction to the ad than the deceptiveness of the ad itself. Online coverage by Politico chose this headline: “Jujitsu: Using Obama’s Words Against Him.”

Though it noted that the clip did not include the context showing Obama was in fact quoting McCain, Politico’s post described the misleading Obama statement as “the buzziest part of the ad”. In the same vein as the New York Times article, the

248 Id.

249 Id.

250 Id.


252 Id.
Politico piece described a back and forth between an Obama spokesperson who called the ad “deceitful and dishonest” and a Romney spokesperson who warned that “President Obama will have to confront the promises made by candidate Obama.” Politico concluded that “[t]he Romney campaign is delighted to fight with Democrats over whether the ad should have included the McCain context.”

A number of other journalists followed the balance trap approach taken by the New York Times and Politico, reporting about the ad as a subject of back and forth controversy in a way that obscured the ad’s deceptiveness. A CNN post headlined “Democrats say new Romney ad

253 Id.

254 In addition to the pieces discussed here, see also Maggie Haberman, Who Wins this Round?, Politico.com, Nov, 22, 2011 http://www.politico.com/news/stories/1111/68946.html (accessed June 21, 2012) (concluding that reaction to the ad showed “Each side is making their future case clear — the Democrats are calling ‘liar’ in the same way they will in a general election, and the Romney campaign is saying it was a deliberate misstatement intended to show the ‘tables have turned.’ If nothing else, the ad was clearly intended as a signal of the bare-knuckled race Romney would run in a general.); Alexander Burns, White House: Mitt Romney ad shows ‘blatant dishonesty’, Politico.com, Nov, 22, 2011 http://www.politico.com/news/stories/1111/68938.html (“The Romney campaign recognized — and acknowledged upfront—that their commercial selectively clipped the president's words for dramatic effect. The result is that we're sort of seeing a microcosm of what a general election fight between Romney and Obama might look like, with Romney leveling explosive attacks on Obama's economic record, and the president working to disqualify Romney as a liar.”); Ashley Parker, Romney’s First Television Ad Attacks Obama on Economy. The New York Times Caucus Blogs, Nov, 21, 2011, http://thecaucus.blogs.nytimes.com/2011/11/21/romney-previews-his-first-television-ad/ (accessed June 22, 2011) (“As soon as the ad was broadcast…the Romney campaign sent out an e-mail defending its use of Mr. Obama’s quote...‘Three years ago, candidate Barack Obama mocked his opponent’s campaign for saying ‘if we keep talking about the economy, we’re going to lose,’ said Gail Gitcho, Mr. Romney’s communications director, in an e-mail statement. ‘Now, President Obama’s campaign is desperate not to talk about the economy. Their strategy is to wage a personal campaign – or ‘kill Romney.’ It is a campaign of distraction.’ Ms. Gitcho added that ‘the tables have turned,’ and implied that the line Mr.
distorts Obama’s words” reported that, on the one hand, the Obama campaign said the ad took
comments out of context, while, on the other hand, the Romney campaign claimed it “used the
line intentionally.”

USA Today posted an online piece headlined “Democrats say Romney TV
ad is misleading” that took the same he said/she said approach, dutifully repeating the Obama
campaign’s criticism of the ad and the Romney campaign’s defense, but refusing to adjudicate
the controversy, concluding that “[w]hat’s clear is this ad and accompanying activities today in
New Hampshire signal a new phase in Romney's White House bid, in which the former
Massachusetts governor attacks Obama even harder than he's been doing all year.”

The implication is that it’s not clear which campaign is right about the ad. The Blaze.com ran a post

The Blaze piece described the Romney campaign’s defense of the ad, that it was merely turning

Obama once used against Mr. McCain could now be leveled against Mr. Obama himself.”

(emphasis added); Jon Ward, Obama Campaign Blasts First Romney’s First TV Ad as
‘Deceitful’, Huffington Post.com, Nov. 21, 2011,

255 Paul Steinhauser, Democrats say new Romney ad distorts Obama’s words, CNN political
romney-ad-distorts-obamas-words By reporting that the Romney campaign said it had used
Obama’s words “intentionally”, the CNN piece gave the impression that there was some
legitimate reason to present Obama’s truncated statement out of context. In addition, by
reporting the Romney campaign’s defense of the ad without comment, the CNN piece helped
distract readers from the central point: that the ad had deceptively presented only part of
Obama’s comment, out of context, in order to make it seem that Obama was talking about his
own campaign’s need to avoid talking about the economy.

256 Catalina Camia, Democrats say Romney TV ad is misleading, USA Today.com, Nov. 22,

Obama’s tactics against him, as “a fair point” and the post’s final sentence asks readers: “[w]hat do you think?”. A poll at the bottom allowed readers to vote on whether the ad was misleading or not, and results showed 60% of readers believed the Romney campaign’s explanation for the ad “made sense.”

Most of the pieces that took a balance trap approach to covering the ad used strikingly similar headlines that framed coverage in he said/she said terms suggesting criticism of the ad’s accuracy was itself partisan: “Democrats Cry Foul…”, “Democrats Say”. Although journalists noted that Obama’s statement had been taken out of context, by focusing attention on each campaign’s position regarding the ad and refusing to reach any ultimate conclusion as to who was right, the stories suggested that there was a genuine debate here, each side had a point, and readers would ultimately have to make their own subjective determination about the ad’s accuracy. None of this reporting should qualify as bona fide press coverage. This is not work that advances democratic competence by helping to build “accurate and informed public opinion.” Instead, these pieces mislead readers by creating the false impression that the

258 Id.

259 Id.

260 Arianna Huffington complained that, as a result of this coverage, “[i]nstead of a national conversation about what sort of person would approve such an ad, what we mostly got was just another "he said/she said" episode. The Obama camp attacked the ad, and the Romney camp responded.” Mitt Romney Brazenly Lies and the Media Lets Him Slide, Huffington Post.com, Nov. 28, 2011, http://www.huffingtonpost.com/arianna-huffington/mitt-romney-ad_b_1117288.html (accessed June 21, 2012).

261 As noted, the post at Blaze.com did this most explicitly by ending its story by posing the question to readers: “[w]hat do you think” and including a poll that asked readers to weigh in on the question “Is the Romney ad misleading”? Seidl, supra note ___.

262 See POST, supra note ___ at 35.
Romney campaign ad included a claim that was a matter of genuine debate. Perhaps President Obama could be seen as afraid to talk about the economy, perhaps not, but there was nothing objectively dishonest about the ad. This coverage buried the central point: the Romney ad conveyed the false message that President Obama had conceded he could not win re-election if he talked about the economy.

Most if not all of the reporters who wrote the pieces discussed above would qualify as members of the press under either Schauer and Horwitz’s institutional approach or West’s functional definition. Under the institutional approach, journalists writing for established outlets like the New York Times, USA Today, and CNN would qualify by virtue of their institutional affiliations. Journalists associated with Politico would likely also be protected under the institutional model. Under West’s functional definition, all of these journalists would qualify as members of the press since they were “gather[ing] and convey[ing] information to the public about newsworthy matters”. This would lead to an absurd result: journalism that frustrates First Amendment values would receive Press Clause protections and prestige.

Under my definition of the press, none of these journalists would qualify as members of the press since their work failed to advance First Amendment values of truth and democratic competence. While the pieces described above would not qualify as bona fide press work.

263 Horwitz notes that blogs may qualify for Press Clause protection—moreover, Politico has a print component and its website might not be categorized as “blog” but simply Politico’s online feature. See ___.

264 West, Awakening the Press Clause, supra note ___ at 1069-1070 (citation omitted).

265 As noted, this is not to say these stories should be suppressed or prohibited in any way—simply that the journalists writing these stories should not qualify as bona fide members of the press based on this work.
other journalists demonstrated how to cover the Romney ad in a way that informed the public and advanced First Amendment values. These pieces explained why the ad was indisputably misleading and also explained why journalists who took a “balanced” approach to covering the ad were failing to advance First Amendment values. By extending press corps membership only to this second group of journalists, whose work is discussed in the paragraphs that follow, we can reward journalism that vindicate First Amendment values and make clear that journalism falling short of these standards is not worthy of press status.

Ryan Lizza of the New Yorker asked, “[w]hy didn’t reporters call Romney a liar”?266 Lizza expressly rejected balance trap coverage, endorsing the “idea that reporters should be in the business of testing claims for accuracy and finding out the truth, rather than allowing politicians to make outrageous statements as long as they are “balanced” by quotes from their political opponents.”267 In this case, the Romney campaign had “put out something that is demonstrably false”. Lizza criticized journalists who “reported [on the ad] as a clever tactic by the Romney camp to spark a debate about the ad’s accuracy that will serve to highlight its overall message that Obama has been a failure.”268 By focusing on “campaign…spin” that presented dueling arguments from the Romney and Obama camps, balance trap journalists distracted


267 Id.

268 Lizza specifically singled out the James Hohmann post at Politico.com, discussed supra at __, as an example of this flawed approach.
attention from the central point: that the Romney campaign had “falsely attributed” a statement to Obama.269

Similarly, Alex Pareene wrote at Salon.com that journalists’ “phony objectivity” had “muddle[d] another easy call.”270 The ad was “objectively[] dishonest” but, for some journalists “[t]he news, apparently, is that Democrats have asserted that the ad contains a distortion. Are they correct? Who knows!”271 Instead of clearly informing readers of the ad’s dishonesty, balance trap journalists presented coverage centered on “he said-she said quotes from ‘both sides[]’”, providing readers with “contradictory information” and leaving it to the readers to sort out the truth.272

Rem Rieder agreed with Pareene, writing that the Romney ad contained “a completely cynical distortion of the president's remark. It's an incredibly cynical piece of political mischief. It needs to be called out.”273 Rieder applauded journalists like Arianna Huffington, Jake Tapper, and Eugene Robinson who exposed the ad’s deception, but he agreed with Huffington that “with some notable exceptions, the media punted [by failing to describe the ad as dishonest].”274 Like

269 Id.


271 Id.

272 Id.


Pareene, Rieder criticized “he-said, she-said coverage” as evidence that journalists were “squeamish about reaching conclusions.”275 Rieder urged journalists to “point[] out [when] the facts make clear that she is right and he is wrong”, arguing that this is perfectly appropriate “as long as it’s completely fact-driven and has nothing to do with personal or institutional bias.”276 In other words, objective journalists ought to forthrightly call out lies by any and all elected officials or public figures. Journalists wrongly believe that doing so will make them look biased. In fact, objectivity requires journalists to hold all parties to the same standards, but it does not require them to withhold judgment—“when a situation is clear-cut, that should be pointed out. And not just in fact-checking columns, but in hard news stories as well.”277 In fact, failing to describe dishonesty forthrightly “is to do a disservice to the truth.”278

When journalists adopt a “balanced” approach to reporting on factually incorrect or unsupported statements, they create an incentive for politicians and other public figures to make any statement they like, even if it has absolutely zero factual support. The Romney ad discussed here is just one example.279 More recently, Senate majority leader Harry Reid (R-NV) claimed

275 Id.

276 Id.

277 Id. Rieder praised factchecking operations like PolitiFact and factcheck.org, but emphasized that even “hard news stories” were obligated to expose clear dishonesty, rather than seeking refuge in balance trap coverage. Id. Politifact concluded that the Romney ad “distort[ed] Obama’s words, which have been taken out of context in a ridiculously misleading way. We rate the Romney ad’s portrayal of Obama’s 2008 comments Pants on Fire [i.e. a clear lie].” http://www.politifact.com/truth-o-meter/statements/2011/nov/22/mitt-romney/mitt-romney-says-obama-said-if-we-keep-talking-abo/ (accessed June 21, 2012).

278 Rieder Calling a Lie a Lie, supra note __.

279 A more recent Romney campaign video suggests that Obama told business owners “you didn’t build that”—in other words, that business owners had not built their own businesses. The Romney video, like the ad discussed in this section, depends on taking another Obama statement
that an unnamed person told him Romney did not pay any taxes for ten years.\textsuperscript{280} Reid will not name his source so it is currently impossible to determine whether this claim is credible.\textsuperscript{281} Journalists predictably went into balance trap mode in reporting on Reid’s unsupported assertions. Rachel Weiner of the Washington Post reported Reid’s claim, as well as the Romney campaign’s outraged response, and noted that Reid has “a history of saying controversial things” but added that “his accusation is not an off-hand remark or an accident, or Reid wouldn’t be repeating it so often. He clearly sees an upside in making these claims — whether he has some proof, is trying to goad Romney into releasing the returns, or is just taking advantage of the fact that the Republican won’t prove him wrong.”\textsuperscript{282} Similarly, Steve Tetreault of the Las Vegas Review-Journal covered Reid’s claim in he said, she said style, reporting Reid’s charge, the Romney campaign’s denial, and observing, without resolving the dispute that “[i]f nothing else, out of context. \textit{See} Steve Benen, \textit{When Wrenching Quotes from Context is the Game Plan}, The Maddow Blog, July 19, 2012, \url{http://maddowblog.msnbc.com/_news/2012/07/19/12833771-when-wrenching-quotes-from-context-is-the-game-plan?lite} (accessed August 6, 2012); \textit{see also} David Taintor, \textit{How the ‘You Didn’t Build That’ Canard Went from Right-Wing Blogs to Mitt Romney’s Mouth}, Talking Points Memo, July 18, 2012, \url{http://2012.talkingpointsmemo.com/2012/07/obama-romney-fox-news.php} (accessed August 6, 2012).


\textsuperscript{281} Reid argues that Romney could resolve the question by releasing tax returns, but that still would not tell us whether Reid had, in fact, spoken with anyone who claimed Romney did not pay taxes.

Reid’s remarks could be entered onto a list of other head-turning comments he has made over the years.  

Like many of the journalists who took a balance trap approach to reporting on the Romney ad, Weiner and Tetreault refused to take sides in a matter crying out for a referee. Instead of emphasizing that Reid has pointed to no specific support for his claim and making clear that, for all we know, Reid has simply invented the story and never talked to anyone who told him that Romney had failed to pay taxes, Weiner, Tetreault, and other journalists adopted he said, she said coverage. As with coverage of the Romney ad, some journalists refused to play along, making clear that Reid had offered no evidence to support his claim and that this was the central piece of the story. Anderson Cooper told CNN viewers that “[e]xtraordinary allegations require extraordinary proof, or frankly any kind of proof…Senator Harry Reid [has provided neither].” Linda Feldmann of the Christian Science Monitor observed that “At best, Reid is repeating an assertion for which he has provided no backup. He has not revealed the identity of the investor in Romney’s former company, nor has he explained the specifics of what this investor has allegedly seen or how this person would have access to Romney’s personal tax

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Jon Stewart ran a segment on the Daily Show entitled “You, Harry Reid, Are (Really, Really) Terrible.”

3. How the Balance Trap Norm Stands in the Way of Describing Reality When One Political Party is Extreme.

A journalist who describes the Romney ad as dishonest or Reid’s claim as completely unsubstantiated is not guilty of bias, as long as he or she takes the same approach to covering similar statements made by other public figures. In fact, this is an important way to know whether a journalist deserves recognition as a bona fide member of the press. Journalists who expose lies made by one political party but take a balance trap approach to lies made by the other major party do not merit press protections and prestige. As we saw from discussion supra at ___, the stenography and balance trap models make journalists reluctant, even uncomfortable, to call out deception by a specific leader or party, due to concerns that this will appear biased. The general result is that the public is less likely to get accurate information.

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287 The Daily Show With Jon Stewart, [http://www.thedailyshow.com/watch/wed-august-1-2012/you--harry-reid--are-terrible](http://www.thedailyshow.com/watch/wed-august-1-2012/you--harry-reid--are-terrible), August 1, 2012. The fact that Jon Stewart, a comedian, is one of the few to explain why Reid’s claim cannot be taken seriously, may not be very comforting.

288 See Rieder, *supra* note ___ (“pointing out that the facts make clear that [a public figure is lying] has often been seen as a violation of the sacred oath of objectivity. In fact, it's not – as long as it's completely fact-driven and has nothing to do with personal or institutional bias. If Barack Obama or Ron Paul or Dennis Kucinich released an ad as outrageous as Romney's, he also would need to get the "Pants on Fire" designation.”)

289 This is not to say that journalists must ensure that they call out exactly as many lies on both sides—that would itself be an example of balance trap coverage. The point is to apply a uniform standard—if one party or one public figure lies more than another, coverage reflecting that reality is not biased.
(a) Of Gridlock and Hostage-Taking

The balance trap style is particularly unsuited to dealing with the problem of extremism. What happens if one of the two major American political parties has simply come unmoored, “ideologically extreme…scornful of compromise, unpersuaded by conventional understanding of facts, evidence, and science…and dismissive of the legitimacy of its political opposition…”290

The balance trap model would insist on rigid equivalency and reject the possibility of accurately describing this reality: for those who prize balance over accuracy, none of the two major parties can ever be described as extreme, the claims of each party must be taken seriously and presented as legitimate, regardless of whether this is, in fact, accurate.

In their recent book, *It’s Even Worse Than it Looks: How the American Constitutional System Collided With the New Politics of Extremism*, Thomas E. Mann and Norman J. Ornstein describe a Republican Party that has become dangerously extreme. They conclude that the party’s extremism is a central cause of political dysfunction in the United States.291 Their conclusions make a lot of journalists (and academics292) uncomfortable.293 However, if the

290 *MANN AND ORNSTEIN*, supra, note ___ at 103.

291 *MANN AND ORNSTEIN*, supra note ___ at 185 (“the Republican Party has become the insurgent outlier in American politics and as such contributes disproportionately to its dysfunction.”) *See also* Thomas E. Mann and Norman J. Ornstein, *Let’s just say it: The Republicans are the problem*, Washington Post, April 27, 2012, [http://www.washingtonpost.com/opinions/lets-just-say-it-the-republicans-are-the-problem/2012/04/27/gIQAxCVUiT_print.html](http://www.washingtonpost.com/opinions/lets-just-say-it-the-republicans-are-the-problem/2012/04/27/gIQAxCVUiT_print.html) (accessed July 6, 2012) (“We have been studying Washington politics and Congress for more than 40 years, and never have we seen them this dysfunctional. In our past writings, we have criticized both parties when we believed it was warranted. Today, however, we have no choice but to acknowledge that the core of the problem lies with the Republican Party. The GOP has become an insurgent outlier in American politics…When one party moves this far from the mainstream, it makes it nearly impossible for the political system to deal constructively with the country’s challenges.”)

292 *See MANN AND ORNSTEIN*, supra note ___ at 103 (“journalists and scholars often brush aside or whitewash [the extremism of the Republican Party] in a quest for ‘balance’…”). I felt these pressures myself as I wrote this article, especially this section. *See* id. at 186 (“It is, of course, awkward and uncomfortable, even seemingly unprofessional, to attribute a disproportionate
public is to have access to accurate information, then the reality Mann and Ornstein describe must be conveyed to the public. In fact, Mann and Ornstein blame “the failure of the media…to capture the real drivers of [political dysfunction]” as part of the problem. They identify the balance trap as a prime culprit, observing that “[i]t is traditional that those in the American media intent on showing their lack of bias frequently report to their viewers and readers that both sides are equally guilty of partisan misbehavior.” The problem, Mann and Ornstein point out, is that “reality is very different. The center of gravity within the Republican Party has shifted sharply to the right. Its legendary moderate legislators…are virtually extinct”.

My goal is not to launch a partisan attack. However, I recognize that the balance trap is not an acceptable way to deal with discomfort caused by describing facts that may paint one party in a bad light. As Mann and Ornstein describe in their book, journalists have failed to provide Americans with the facts necessary to make sense of the debt limit crisis and gridlock in Congress. These journalists should not be rewarded for sticking doggedly to a norm that distorts reality by creates false equivalency between truth and fiction. My goal is to create a definition of the press that rewards journalists who advance First Amendment values of truth and democratic competence. I would be falling into the balance trap myself if I shrank from the task of describing how and why journalists have often failed to get the story about the debt limit crisis and congressional gridlock right. My analysis says nothing about the underlying policy goals of either party and, on this point, journalists are right not to take sides. Reporters should not describe policy differences over government spending as inherently “right” or “wrong”—and they need not describe political tactics as either “right” or “wrong”. However, they ought to provide the public with the facts it needs to understand the debate.

In fact, many news outlets, including leading national newspapers, decided simply not to write news articles about Mann and Ornstein’s book, despite the fact that the two authors “are well-respected centrist congressional experts who are often cited by the media”. Media Matters for America Report: Who? Media Turns its Back on Experts Who Blame GOP for Political Gridlock, May 18, 2012, http://mediamatters.org/research/201205180007 (accessed July 6, 2012).

MANN AND ORNSTEIN, supra note ___ at xiii.

MANN AND ORNSTEIN, supra note ___ at 5.

MANN AND ORNSTEIN, supra note ___ at 51-52.
Mann and Ornstein describe a dysfunctional American political system that has been run off the tracks by the Republican Party’s “politics of partisan confrontation, parliamentary-style maneuvering, and hostage taking\(^{297}\) [that] has been building since the 1970s [and] has become far more the norm than the exception since Barack Obama’s election [in 2008].\(^{298}\) The Democrats are not blameless, but the Republicans bear the brunt of responsibility for political dysfunction and gridlock—in fact, part of their strategy, as originally imagined by former Speaker of the House Newt Gingrich (R-GA), has been to “under[\!]mine basic public trust in Congress and government, reducing the institution’s credibility over a long period."\(^{299}\) The idea was that “[b]y sabotaging the reputation of an institution of government, the [Republican] party that is programmatically against government would come out the relative winner.”\(^{300}\)

In recent years, especially since the 2008 election, this strategy culminated in what Mann and Ornstein call the politics of “hostage taking”—demands for painful concessions as the price of agreeing to measures both sides understand are necessary. Mann and Ornstein identify the debt limit crisis of 2011 as the tipping point that “underscores how out of whack American politics and policy have become.”\(^{301}\) Republicans suggested they were willing to “take[\ldots]”

\(^{297}\) By “hostage taking”, Mann and Ornstein refer to the tactic of holding up important legislation by making extreme demands based on the assumption that the opposing party will give in to these demands rather than allow a breakdown in negotiation to produce some extremely harmful result (e.g. default on U.S. debt). \textit{Mann and Ornstein, supra} note ___ at 3-30, 82-84.

\(^{298}\) \textit{Mann and Ornstein, supra} note ___ at 81.

\(^{299}\) \textit{Mann and Ornstein, supra} note ___ at 43.


\(^{301}\) \textit{Mann and Ornstein, supra} note ___ at 3.
down” America’s credit rating and default on the federal government’s debt obligations unless their demands for “radical policy change” were met.\footnote{MANN AND ORNSTEIN, supra note \____ at 4, 9.} When the crisis was (at least temporarily) resolved, Senate minority leader Mitch McConnell (R-KY) observed that “some of our members may have thought the default issue was a hostage you might take a chance at shooting. Most of us didn’t think that. What we did learn is this—it’s a hostage worth ransoming.”\footnote{MANN AND ORNSTEIN, supra note \____ at 25, quoting Washington Post, “In debt deal, the triumph of the old Washington,” August 8, 2011, http://www.washingtonpost.com/politics/in-debt-deal-the-triumph-of-the-old-washington/2011/08/02/gfQARSFqI_story_1.html (accessed July 6, 2012).}

Mann and Ornstein explain that Republicans have employed the same “hostage-taking” strategy in other contexts, including “emergency disaster-relief spending” and “reauthorization of the [Federal Aviation Administration].”\footnote{MANN AND ORNSTEIN, supra note \____ at 82.} They made “nonnegotiable demands” the price of agreeing to this legislation, forcing dangerous standoffs and sometimes causing “collateral damage…that hurt large numbers of Americans.”\footnote{MANN AND ORNSTEIN, supra note \____ at 82-84.}

In a similar fashion, Senate Republicans have used the filibuster and holds\footnote{A hold is “an individual senator’s notification to the leadership in writing that he or she will object to consideration of a bill or nomination.” MANN AND ORNSTEIN, supra note \____ at 84-85.} to stall legislation and nominations.\footnote{MANN AND ORNSTEIN, supra note \____ at 84-91.} In the past, filibusters were “a tool of last resort, used only in rare cases when a minority with a strong belief on an issue of major importance attempts to bring
the process to a screeching halt to focus public attention on its grievances.”

In recent years, and “especially since Obama’s inauguration in 2009, the filibuster is more often a stealth weapon, which minority Republicans use not to highlight an important national issue but to delay and obstruct quietly on nearly all matters, including routine and widely supported ones.”

Again, Democrats are not blameless—they have contributed to the problem by “mov[ing] preemptively to cut off delays by invoking cloture…prior to any negotiations with the minority over the terms of debate”.

However, Mann and Ornstein describe the Republicans’ “pervasive use of the filibuster” as unprecedented, and they observe that Republicans have “mounted…filibusters” even against bills that enjoyed nearly unanimous support and ultimately were passed by margins of 90-5 or better. The objective is not to derail objectionable legislation but simply to cause “weeks of delay”—filibustering uncontroversial legislation can cause “[a] bill that should have zipped through in a day or two at most [to take] four weeks, including seven days of floor time, to be enacted.”

In reporting on this political landscape, journalists need not, and should not, conclude that the Republican Party’s tactics are inherently repugnant or illegitimate. That is a decision for the public to make, and Americans might well conclude that these tactics are justified -- for instance, if one believes that government is out of control and dangerous, then one might applaud

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308 MANN AND ORNSTEIN, supra note ___ at 88.
309 MANN AND ORNSTEIN, supra note ___ at 88.
310 MANN AND ORNSTEIN, supra note ___ at 88.
311 MANN AND ORNSTEIN, supra note ___ at 88.
312 MANN AND ORNSTEIN, supra note ___ at 90-91.
313 MANN AND ORNSTEIN, supra note ___ at 90.
the Republican Party’s tactics.314 However, journalists do have a responsibility to provide the public with the information it needs to reach informed conclusions about political debate. In this context, that means explaining that Republicans have adopted a specific strategy that depends on gridlock and obstruction as a way to advance their goals.315 Instead, many journalists have used the balance trap method in reporting on the debt ceiling debate and congressional gridlock, creating the impression that both major parties share equal blame for political dysfunction.

During the summer of 2011, as the United States moved close to defaulting on its debt obligations, journalists frequently reported on the debt ceiling debate in balance trap terms. A July 27, 2011 USA Today article described the debate as simply “Washington’s latest stalemate”, and an example of what it generically described as “Washington’s political brinkmanship”, suggesting this was a standard conflict flowing from “partisan passions” on both sides.316 The USA Today article consisted mainly of quotes from “person on the street” interviews conveying a sense that both parties were to blame for the standoff. A retired economist in New Orleans was quoted as saying “I’m sick of it…They’re playing games…they

314 See James Fallows, ‘False Equivalence’ Reaches Onionesque Heights, but in a Real Paper, The Atlantic, Oct. 15, 2011, http://www.theatlantic.com/politics/archive/2011/10/false-equivalence-reaches-onionesque-heights-but-in-a-real-paper/246754/ (accessed July 6, 2012). Fallows, addressing the problem of journalists’ failure to provide context necessary to understand use of the filibuster, observed that “You can consider this strategy brilliant and nation-saving, if you are a Republican. You can consider it destructive and nation-wrecking, if you are a Democrat. You can view it as just what the Founders had in mind, as Justice Scalia asserted recently at an Atlantic forum. You can view it as another step down the road to collapse, since the Democrats would have no reason not to turn the same nihilist approach against the next Republican administration…You can even argue that it’s stimulated or justified by various tactics that Democrats have used. But you shouldn’t pretend that it doesn’t exist.” Id.

315 See MANN AND ORNSTEIN, supra note ___ at 194-195

can’t come to an agreement.” A woman from Louisville was described as “expressing disappointment with all sides.” Although another woman asserted that Republicans had been “hijacked” by the Tea Party, the article balanced out this charge by noting the same woman was “disappointed with the congressional leadership of both parties.” Some of the people who were interviewed pointed to efforts by “political people trying to make political points instead of govern”, but the article did not make clear whether this charge was directed at any one party. In fact, there was no commentary offered on any of the quotes taken from the person on the street interviews—nothing to indicate whether those who were interviewed were justified in finding both parties at fault. In the absence of any commentary, a reasonable reader would conclude that there is reason to believe both parties were to blame. This conclusion is supported by the article’s reporting, again without comment, that “[t]he president and the Republican speaker of the House, John Boehner of Ohio, both have appealed to the public and accused the other side of refusing to come to a deal.”

The USA Today article contains none of the background necessary to understand the debate — (1) that raising the debt limit is not a “rare event”[]; (2) that, “[s]ince the debt limit simply accommodates debt that has already been incurred, raising it should, in theory, be perfunctory[]”; (3) that, as a rule, when “the government needed to raise the debt ceiling, the key actors in Washington, including presidents and congressional leaders, knew that almost nobody—until now—had any intention of precipitating a default[]”; (4) that what was different in the summer of 2011 was that Republicans, especially those associated with the Tea Party, were threatening to “take the country down via default”. Without this background, readers of

317 Id.

318 MANN AND ORNSTEIN, supra note ___ at 5-6, 26.
the USA Today article would reasonably conclude that each party had dug in its heels and shared responsibility for the standoff.

Like the USA Today reporters, other journalists and news outlets provided balance trap coverage reinforcing the false narrative that typical Washington partisanship was to blame for the fight over raising the debt limit. Charles Riley wrote an article for CNN Money describing a “continuing impasse, with each party sketching out their[ sic] own plans and showing little common ground.”319 The Washington Post described the crisis as “boil[ing] down to [a] tale of two men”—President Obama and Speaker of the House John Boehner—suggesting again that this was simply a partisan battle, or perhaps a clash of personalities.320 Reuters described the debate as “acrimonious political stalemate” reflecting “political gridlock” without attributing the causes of stalemate or gridlock to any one party.321 A New York Times front page headline read “Challenge to a Budget Deal: Selling it to Democrats”, suggesting that Democrats, not Republicans, stood in the way of resolution.322


Even as the debt limit saga played out, Jonathan Chait criticized this method of balance trap reporting for “blurring…reality.” Chait complained about reporters who used generic terms to suggest both parties were to blame for the standoff—for instance, reporters who vaguely asserted that “politicians in Washington” failed to understand the risks associated with not raising the debt limit. Chait observed, as Mann and Ornstein later did in their book, that the key to understanding what was happening depended on realizing that “[i]t was the Republican Party’s idea to turn the debt ceiling vote from a symbolic opportunity for the opposition party to posture against deficits into a high-stakes negotiation over budget policy.” He observed that it was only “Republican… elected officials who were dismissing the dangers of failing to lift the debt ceiling”. Chait acknowledged that his seemed to be “a partisan account”, but added that “it's completely true.” He argued that balance trap style reporting suggesting both parties were equally to blame for the standoff allowed “Republicans [to] play[] debt ceiling chicken” with impunity. Republicans astutely recognized “that the blame for a debt default will be aimed at the diffuse ‘politicians in Washington,’”. Chait hypothesized that Republicans might change their approach “[i]f faced with the threat of specific, partisan blame for such a fiasco”.323

(b) When Majority Support for Legislation is a Failure: Reporting on Use of the Filibuster

Mann and Ornstein cite evidence that “senators have distorted a [filibuster] practice designed for rare use—to let a minority of any sort have its say in matters of great national significance—to serve other purposes [including]…rank obstruction…to make everything look


contentious and messy so that voters will react against the majority”. The “sixty-vote hurdle” required to end debate and break filibusters has come to be seen “as routine”, even though “[t]he framers [of the Constitution] certainly didn’t intend that” and Senate practice has not historically required a 60 vote supermajority as a matter of course. Republican senators have used the filibuster more and more often, especially since 2009, even on noncontroversial legislative matters in the hopes that resulting delay and gridlock will be blamed on the Democrats who control the majority in the Senate and occupy the executive branch.

This strategy only works if journalists go along with it by declining to provide the context necessary for the public to understand what is going on. As it turns out, that’s exactly what they’ve done. Journalists routinely report on a measure “fail[ing]” even when it gets more Yes than No votes, because the sixty-vote threshold has been “routinized”. For instance, the Daily Beast reported “Obama Loses Big on Jobs Bill”, even though a majority of senators voted for the American Jobs Act. The Daily Beast described this majority vote in favor of the bill as a

324 MANN AND ORNSTEIN, supra note ___ at 90.

325 See MANN AND ORNSTEIN, supra note ___ at 195.

326 See MANN AND ORNSTEIN, supra note ___ at 88.


328 Patricia Murphy, Obama Loses Big on Jobs Bill, The Daily Beast, Oct. 11, 2011, http://www.thedailybeast.com/articles/2011/10/11/obama-loses-major-battle-as-his-jobs-bill-splits-senate-democrats.html (accessed July 6, 2012). Murphy reported 52 votes in support of the measure, although it seems that there were only, at most, 51 votes in support of the measure i.e. to end debate. See U.S. Senate roll call votes, 112th Congress, 1st session, Oct. 11, 2011, American Jobs Act, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=112&session=1&vote=00160 (showing 50 votes for cloture motion to end debate and move to a final vote on the bill and 49 votes against cloture, with Senate majority leader Reid voting no for procedural reasons) (accessed July 12, 2012). However, either way, there was majority support
“sound defeat[]” of the legislation.329 A Washington Post article headlined “Senate has become a chamber of failure” described a 50-49 vote in favor of legislation as one example of this failure and described the sixty-vote threshold as simply the standard requirement “to do anything big” in the Senate.330 The Post article failed to explain that “requiring 60 votes for everything is new, and it is overwhelmingly a Republican tactic.”331 Instead, as James Fallows observed, the Post suggested that “partisanship and extremism ‘on both sides’ was bogging the Senate down.”332

This style of journalism produces head-scratching headlines like “Senate defeats Democrats’ Measure to Kill of ‘Big Oil’ tax breaks, 51-47”333 and “Buffett Rule Fails in Senate, 51-45” (with the 51 votes favoring the legislation voted on in each case).334 A casual reader

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329 Id.

330 Id.


333 Fallows, Chronicles of False Equivalency, supra note ___.


might think these were typos—how did votes with majority support lose? The text of these articles does not provide readers with the information needed to understand the context that what allow them to make sense of what happened, saying only that 60 votes were needed to advance the bill.

James Fallows criticizes this kind of coverage as helping to “routiniz[e] the once-rare requirement for a 60-vote Senate "supermajority" into an obstacle for every nomination and every bill”. He suggests an alternative approach: if a bill enjoys majority support but is filibustered, headlines could report that the bill was “blocked…in [a] procedural move”. This “would help offset the mounting mis-impression that the Constitution dictates a 60-vote margin for getting anything done.” Fallows notes that some journalists do take this approach—for instance, the Cincinnati Enquirer ran a headline “Senate Republicans vote to kill jobs bill” for an Associated Press story reporting on the same vote that the New York Times, Washington Post, and Daily Beast described as failing to muster a required sixty votes. Mann and Ornstein similarly suggest that journalists ought to “[s]top lending legitimacy to Senate

336 Fallows, A Modest Proposal, supra note __, see also MANN AND ORNSTEIN, supra note ___ at 195.

337 Fallows, A Modest Proposal, supra note __.

338 Fallows, A Modest Proposal, supra note __.

filibusters by treating a sixty-vote hurdle as routine.”\textsuperscript{340} In the same vein as Fallows, they suggest that when a filibuster is used to defeat a bill or derail a nomination, journalists should report that “the bill or person was blocked \textit{despite} majority support, by the use of a filibuster.”\textsuperscript{341} This will inform the public that “[i]t was not Congress that blocked [the measure]—it was one political party through the filibuster.”\textsuperscript{342}

Mann and Ornstein urge journalists to reject the balance trap by “help[ing] [their] readers, listeners and viewers recognize and understand asymmetric polarization [i.e. that the Republican Party has shifted further to the right than the Democratic Party has moved to the left].”\textsuperscript{343} They bluntly advise journalists that “[a] balanced treatment of an unbalanced phenomenon is a distortion of reality and a disservice to your consumers.”\textsuperscript{344} They are right, but it will take more than gentle “unsolicited advice” to journalists to effect change. The solution to the problem that Mann and Ornstein identify when it comes to journalistic failure to explain the extremism of today’s Republican Party is found in the new definition of the press described in this paper. By conditioning press membership on a journalist’s ability to recognize and break free of the balance trap, we can move toward a press corps that gives the public the information it needs to make sense of the political world it is charged with governing.

\textsuperscript{340} Mann and Ornstein, \textit{supra} note ___ at 195.
\textsuperscript{341} Mann and Ornstein, \textit{supra} note ___ at 195 (emphasis in original).
\textsuperscript{342} Id.
\textsuperscript{343} Mann and Ornstein, \textit{supra} note ___ at 194.
\textsuperscript{344} Mann and Ornstein, \textit{supra} note ___ at 194.
Conclusion

This article is certainly not intended as the final word. Some open or unresolved questions remain. First, and most importantly, how can journalists who recognize the balance trap problem persuade their peers who do not that this is, in fact, a problem? I have suggested a number of ideas—for instance, conditioning eligibility for awards and press credentials on a journalist’s demonstrated ability to reject the balance trap in their work. My hope is that peer criticism and praise can create a new journalistic norm built on my proposed definition of the press so that only those journalists whose work advances First Amendment values of truth and democratic competence receive the status and protections attached to press membership.

However, the crucial first step, of course, is getting a critical mass of journalists to endorse this new norm and reject the balance trap approach. As discussed, some journalists already recognize the problem and criticize their peers when they fall into the balance trap. However, the balance trap approach remains the prevailing norm. Changing that will take work, to say the least. As I suggest, that should begin with journalists and critics of journalism themselves—those, like Rem Rieder, Jay Rosen, Glenn Greenwald, Marty Kaplan, James Fallows and others who understand the problem and have been writing about it. I hope that this article will provide impetus for them to coordinate their efforts and develop a strategy for change, and I am indebted to their perceptive and essential work in describing and criticizing the balance trap problem. By providing a way to understand the balance trap problem as a failure of journalists to do work that merits Press Clause status and protections, I also hope that I have built on their work and found a new way to think about the problem and move toward a solution.

345 These are ones I have identified, or readers commenting on drafts of this article have identified. I hope others will identify additional questions.
Assuming that some of the suggestions that I make can lead to the changes I propose, there will be some specific logistical problems. For instance, can journalists whose work sometimes, but not always, follows the balance trap or stenographic model merit press status? My own view is that they should not—that press membership should be reserved for those who understand and consistently reject false equivalence in their work. That doesn’t mean that “redemption” is impossible, but my view is that journalists must establish a consistent body of work that advances First Amendment values of truth and democratic competence before they earn press membership. Journalists and critics like Rieder, Rosen, Greenwald, Kaplan, Fallows, and others may have other views, and I do not presume to have the last word here, or on any of the matters I address.

Although judges and legislators play a supporting role in implementing my proposed definition of the press, their role is an important one, and it will also be necessary to convince them that this new definition is the best way to give meaning to a central part of the First Amendment that, for more than 200 years, has remained essentially a constitutional nullity.

Ultimately, the goal of this article is to give meaning to Oliver Wendell Holmes’s assertion that “the real justification of a rule of law is that it helps to bring about a social end which we desire.”\(^{346}\) Frederick Schauer, Paul Horwitz, and Sonja West have astutely recognized that it is important to give distinct meaning to the Press Clause. My observation is that it is important not to lose sight of why this matters. It is only useful to give the Press Clause distinct meaning if it brings about a desirable social end, as Holmes suggests. Replacing balance trap journalism with journalism that gives Americans the accurate information they need to make informed decisions is a highly desirable social end. If we develop a definition of the press that

\(^{346}\) Oliver Wendell Holmes, Jr., *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 460 (1899).
gives press membership to journalists whose work reflects the balance trap norm, then we have not achieved a desirable social end. Schauer’s, Horwitz’s, and West’s definitions of the press all leave room in the press corps for balance trap journalists. My definition of the press does not. If we want to have a better press corps, we must begin with a definition of the press that has the potential to solve the balance trap problem by recognizing only members of the press whose work truly advances First Amendment values.

\[347\] See DeLong, supra note __.