"THE FREEDOM . . . OF THE PRESS," FROM 1791 TO 1868 TO NOW—FREEDOM FOR THE PRESS AS AN INDUSTRY, OR THE PRESS AS A TECHNOLOGY?

Eugene Volokh[*]

I. INTRODUCTION

"[T]he freedom . . . of the press" specially protects the *press as an industry*, which is to say newspapers, television stations, and the like—so argue some judges and scholars.[1] "The Press Clause singles out the press as an institution entitled to special protection under the umbrella of the First Amendment."[2] And this argument is made in many contexts: election-related speech, libel law, the journalist's privilege, access to government property, and more.

The four *Citizens United v. FEC* dissenters, for instance, asserted that "[t]he text and history" of the Free Press Clause "suggest[] why one type of corporation, those that are part of the press, might be able to claim special First Amendment status."[3] Therefore, the dissenters argued, restrictions on the Free Speech Clause rights of non-press entities can be upheld without threatening the special Free Press Clause rights of the institutional press.[4]

Likewise, Justice Stewart famously argued that the Free Press Clause should be read as specially protecting the press-as-industry, because "[t]he primary purpose of the constitutional guarantee of free press was . . . to create a fourth institution outside the Government as an additional check on the three official branches."[5] Justice Powell likewise reasoned, referring to the press-as-industry, that "[t]he Constitution specifically selected the press . . . to play an important role in the discussion of public affairs."[6]

Justice Douglas similarly argued that professional journalists are constitutionally entitled to a privilege not to testify about their sources, because the

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[*] Gary T. Schwartz Professor of Law, UCLA School of Law (volokh@law.ucla.edu). Thanks to Stuart Banner, Michael Kent Curtis, David Forte, Philip Hamburger, Jason C. Miller, Renée Lerner, Saikrishna Prakash, David Rabban, Clyde Spillenger, and Steve Yeazell for their help.

[1] One could equally say "press as occupation," "press as trade," or "press as institution."

[2] Paul Horwitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*, 54 UCLA L. REV. 1497, 1505 (2007); *see also* Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. REV. __, 2 (forthcoming 2011).

[3] 130 S. Ct. 876, 952 n.57 (2010) (Stevens, J., dissenting). *See also id.* ("we learn from [the Free Press Clause] that the drafters of the First Amendment did draw distinctions—explicit distinctions—between types of 'speakers,' or speech outlets or forms").

[4] 130 S. Ct. at 951.

[5] Potter Stewart, *"Or of the Press"*, 26 HASTINGS L.J. 631, 634 (1975); *see also* Timothy B. Dyk, *Newsgathering, Press Access, and the First Amendment*, 44 STAN. L. REV. 927, 931 (1992) (endorsing Justice Stewart's historical claim).

[6] Saxbe v. Washington Post Co., 417 U.S. 843, 863 (1974) (Powell, J., dissenting).

press-as-industry "has a preferred position in our constitutional scheme."[7] And some lower courts have indeed concluded that some First Amendment constitutional protections apply only to the institutional press.[8]

Sometimes, this argument is used to support lesser protection for non-institutional-press speakers than is already given to institutional-press speakers. At other times, it is used to support greater protection for institutional-press speakers than they already get. The argument in such cases is that this greater protection can be limited to institutional-press speakers, and so will undermine rival government interests less than it would have if the greater protection had to be extended to all speakers.

But other judges and scholars argue that "the freedom . . . of the press" does not protect the press as industry, but rather protects everyone's use of the printing *press* (or its modern equivalents) *as a technology*.[9] People or organizations who want to occasionally rent the technology, for instance by buying newspaper space, broadcast time, or the services of a printing company, are just as protected as newspaper publishers or broadcasters.[10]

The *Citizens United* majority, for instance, held that "the institutional press" has no "constitutional privilege beyond that of other speakers."[11] Three concurring Justices buttressed this with an explicit discussion of the constitutional text.[12] Likewise, Justice Brennan often argued against treating media and nonmedia libel defendants differently for First Amendment purposes.[13]

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[7] Branzburg v. Hayes, 408 U.S. 665, 721 (1972) (Douglas, J., dissenting).

[8] *See infra* some of the cases cited in Parts V.C.1 (as to a journalist's privilege), V.C.2 (as to libel law), and V.C.4 (as to media access to government and private property).

[9] I speak here of communication technology that today serves the role the printing press did in the 1700s, not just of the printing press as such. "'[P]ress,' the word for what was then the sole means of broad dissemination of ideas and news," should "be used to describe the freedom to communicate with a large, unseen audience" even using new technologies that were not known to the Framers. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 800 n.5 (1978) (Burger, C.J., concurring). The printing press itself was understood during the Framing era as a technological innovation, and rights were understood as being adaptable to technological innovations. *See* HAYTER, *infra* note 56, at 3–4; HOLT, *infra* note 58, at 51–52.

[10] Alternatively, one could conclude that people who rent such space become members of the press-as-industry for that occasion. But then the results would be the same as under the press-as-technology view, because anyone who uses the press as technology on occasion would be treated the same as members of the press-as-industry.

[11] 130 S. Ct. at 905 ("We have consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers.") (internal quotation marks omitted). *See infra* Parts V.B.2–V.B.6 (collecting many Supreme Court cases that so hold).

[12] 130 S. Ct. at 928 n.6 (Scalia, J., concurring).

[13] *See infra* note 248 (collecting such quotes from Justice Brennan and others); *see also* cases cited *infra* note 266 (collecting recent lower court cases rejecting special protection for the press as industry); David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 446–47 (2002) (arguing against such special protection).

Under this approach, the First Amendment rights of the institutional press and of other speakers rise and fall together. Sometimes, this approach is used to support protection for non-institutional-press speakers, and to resist calls for lowering that protection below the level offered to institutional-press speakers. At other times, it is used to rebut demands for greater protection: Extending such protection to all speakers, the argument would go, would excessively undermine rival government interests. And allowing such protection only to the institutional press would improperly give the institutional press special rights.[14]

And both sides in the debate often appeal at least partly to the text and to its presumed original meaning. The words "the press" in the First Amendment must mean the institutional press, says one side. The words must mean press technology, says the other. Who's right? *Citizens United* is unlikely to have settled the question, given how sharply the four dissenters and many outside commentators have disagreed with the majority.

This Article seeks to answer this question, by looking at the "history" pointed to by Justice Stevens's *Citizens United* dissent, and the light that history sheds on the "text" and (to use Justice Stewart's word) the Framers' "purpose." Part II will look at evidence from the Framing and the surrounding decades that helps show how the text was likely understood around the time that it was written. And it turns out the text was likely understood as fitting the press-as-technology model—as securing a right of every person to use communications technology, not just a right belonging to members of the publishing industry.

Various sources support this conclusion, including fourteen cases from 1784 to 1840 that treated the freedom of the press as extending equally to all people who used press technology, and not just to members of the press-as-industry.[15] (To my knowledge, these cases have not been discussed before in this context.) Each of the sources standing alone may not be dispositive. But put together, they point powerfully towards the press-as-technology reading, under which all users of mass communication technology have the same freedom of the press rights.

Part III turns to how the "freedom . . . of the press" was understood around 1868, when the Fourteenth Amendment was ratified. Much recent scholarship has plausibly suggested that an originalist analysis of Bill of Rights provisions applied to the states via the Fourteenth Amendment should consider the original understanding as of 1868 in addition to 1791.[16] And it

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[14] *See, e.g.*, cases cited *infra* Part V.B.2.

[15] *See* Part II.E.

[16] *See, e.g.*, Akhil Reed Amar, *Heller, HLR, and Holistic Legal Reasoning*, 122 HARV. L. REV. 145, 175–77 (2008); Sanford Levinson, *Superb History, Dubious Constitutional and Political Theory: Comments on Uviller and Merkel, the Militia and the Right to Arms*, 12 WM. &

turns out that around 1868, it was even clearer that the "freedom . . . of the press" secured a right to use the press-as-technology, with no special protection for the press-as-industry. Part IV offers evidence that this remained true from 1880 to 1930.

Part V then looks at how the "freedom . . . of the press" has been understood by the Supreme Court and by lower courts since 1931, the first year that the Court struck down government action on First Amendment grounds. Throughout that time, it turns out, the press-as-technology view has been dominant, and it continues to be dominant today. Many Supreme Court cases have officially endorsed this view. No Supreme Court case has rejected this view (though some cases have suggested the question remains open). In fact, the first lower court decisions I could find rejecting the press-as-technology view did not appeared until the 1970s.[17]

None of the evidence I describe specifically deals with corporations, the particular speakers involved in *Citizens United*. But it does show that the institutional media (in whatever form) and other people and organizations (in whatever form) have historically been seen as on par for purposes of "the freedom . . . of the press" as it was originally understood. The constitutional protections offered to the institutional media have long been understood—in the early Republic, around 1868, from 1868 to 1970, and by the great bulk of cases since 1970 as well—as being no greater than those offered to others.

Finally, Part VI says a few words about what effect this should have on how the Free Press Clause should be interpreted. Of course, text, original meaning, tradition, and precedent have never been the Supreme Court's sole guides. But any calls for specially protecting the press-as-industry have to look to sources other than text, original meaning, tradition, and precedent for support.

II. EVIDENCE FROM THE FRAMING ERA, UNTIL 1840

A. A Right of "Every Freeman"

1. Cases, treatises, and constitutions

Early formulations of the freedom of the press spoke of it as a right of every "freeman," "citizen," or "individual." They often set forth narrow substantive views of "the freedom of the press." But, whatever the scope of the right, it belonged to everyone (or at least all free citizens).

Blackstone, for instance, wrote in 1765 that "*Every freeman* has an undoubted right to lay what sentiments he pleases before the public: to forbid

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MARY BILL RTS. J. 315, 326–29 (2004); Stephen A. Siegel, *Injunctions for Defamation, Juries, and the Clarifying Lens of 1868*, 56 BUFF. L. REV. 655, 659–63 (2008).

[17] *See infra* Part V.C.

this, is to destroy the freedom of the press . . . ."[18] Jean-Louis De Lolme, an author widely cited by 1780s American writers, wrote that "*Every subject* in England has not only a right to present petitions, to the King, or the Houses of Parliament; but he has a right also to lay his complaints and observations before the Public, by the means of an open press."[19]

State supreme courts in 1788 and 1781 likewise described the liberty of the press as "permitting *every man* to publish his opinions,"[20] and as meaning that "*the citizen* has a right to publish his sentiments upon all political, as well as moral and literary subjects."[21] Justice Iredell described the liberty of the press in 1799 as meaning that "*Every freeman* has an undoubted right to lay what sentiments he pleases before the public" (quoting Blackstone).[22] St. George Tucker, in 1803, defined the "freedom of the press" as meaning that, "*Every individual*, certainly, has a right to speak, or publish, his sentiments on the measures of government."[23]

Several early state constitutions echoed this as well, providing that "*Every citizen* may freely speak, write and print on any subject, being responsible for the abuse of that liberty."[24] Likewise, Justice Story, who wrote in 1833 but who had learned the law in the decade following the enactment of the Bill of Rights, described the First Amendment as providing that "*every man* shall have a right to speak, write, and print his opinions upon any subject whatsoever, without any prior restraint, so always, that he does not injure any

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[18] 4 WILLIAM BLACKSTONE, COMMENTARIES *151 (emphasis added); *see also* David Lange, *The Speech and Press Clauses*, 23 UCLA L. REV. 77, 99 (1975) (drawing a similar inference from the Blackstone formulation)

[19] J. L. DE LOLME, THE CONSTITUTION OF ENGLAND 280 (London, T. Spilsbury 1775) (emphasis added). De Lolme is tied for the third most cited writer (behind Blackstone and Montesquieu, and tied with Trenchard & Gordon of Cato's Letters and Cesare Beccaria) on Donald Lutz's list of the most-cited authors in 1780s American political writing. Donald S. Lutz, *The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought*, 78 AM. POL. SCI. REV. 189, 193 (1984).

[20] Respublica v. Oswald, 1 U.S. (1 Dall.) 319, 325 (Pa. 1788) (emphasis added).

[21] Commonwealth v. Freeman, HERALD OF FREEDOM (BOSTON), Mar. 18, 1791, at 5 (emphasis added).

[22] Case of Fries, 9 F. Cas. 826, 839 (C.C. D. Pa. 1799) (emphasis added) (grand jury charge).

[23] 2 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES app. 28 (Philadelphia, W.Y. Birch & A. Small 1803) (emphasis added).

[24] *E.g.*, PA. CONST. of 1790, art. IX, § 7 (emphasis added); *see also, e.g.*, KY. CONST. of 1792, art. XII, §§ 7, 8; DEL. CONST. of 1792, art. I, § 5; Sovchik v. Roberts, 2001 WL 490015, *3 n.1 (Ohio Ct. App. May 9) (interpreting similar provision in Ohio Constitution and concluding that "the plain language of the constitutional provision '[e]very citizen' cannot reasonably be construed as applying only to members of the media"), *quoted approvingly by* Wampler v. Higgins, 752 N.E.2d 962, 972 (Ohio 2001).

other person . . . or attempt to subvert the government."[25] These references to a right of "every citizen," "every man," "every individual," and "every freeman" appear to refer to every person's right to use printing technology. They are much less consistent with the notion that the right gave special protection to the few men who were members of a particular industry.

Some early state constitutions mentioned both the "every citizen" phrase and, separately, the "liberty of the speech or of the press."[26] But, as the Pennsylvania Constitution of 1776 shows, these formulations did not describe separate rights: The Pennsylvania text read, "That the people have a right to freedom of speech, and of writing, and publishing their sentiments; therefore the freedom of the press ought not to be restrained,"[27] which suggests that the freedom of the press was a restatement of the right of "the people" to publish.

Early cases (such as the 1803 *Runkle v. Meyer*[28]) likewise said that the "liberty of the press" was equivalent to the provision that "every citizen may freely speak, write and print on any subject." And St. George Tucker, Chancellor Kent, and Justice Joseph Story likewise treated the First Amendment word phrase "freedom of the speech, and of the press" as interchangeable with the state constitutional provisions that "every citizen may freely speak, write, and publish his sentiments."[29]

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[25] 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 732–33 (Boston, Hilliard, Gray, & Co. 1833) (emphasis added). Noah Webster's influential 1828 American dictionary likewise defined "*liberty of the press*" as "the free right of publishing books, pamphlets, or papers without previous restraint; or the unrestrained right which every citizen enjoys of publishing his thoughts and opinions, subject only to punishment for publishing what is pernicious to morals or to the peace of the state." 2 NOAH WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (New York, S. Converse 1828).

[26] *E.g.*, N.Y. CONST. of 1821, art. VII, § 8 ("Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press."); CONN. CONST. of 1818, art. I, §§ 5, 6 (nearly identical).

[27] PA. CONST. of 1776, decl. of rts., § 11; *see also* Parts II.E.1.e, II.E.1.d, and II.E.2.b (discussing three cases decided by New York courts within a few years of the enactment of N.Y. CONST. of 1821, art. VII, § 8, all taking the press-as-technology view).

[28] 3 Yeates 518 (Penn. 1803).

[29] 2 TUCKER, *supra* note 23, at app. 11–14; 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 12–14 (New York, O. Halsted 1827); 3 STORY, *supra* note 25, at 732–33. These treatises have often been accepted by the Justices as evidence of the original meaning of the Constitution. *See, e.g.*, U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 799 (1995).

The sources discussed in the text also suggest that the change from Madison's proposed constitutional amendment—"the people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable," 1 ANN. CONG. 434 (June 8, 1789)—to the briefer "Congress shall make no law . . . abridging the freedom of speech, or of the press" was not understood as affecting the substance of the protection. The freedom of speech or of the press

2. The structure of the Framing-era newspaper industry

The view that "freedom of the press" covers "every citizen," even people who aren't members of the publishing industry, also makes sense given how many important authors of the time were not members of that industry.

Newspapers of the era were small enterprises, with few (if any) employees.[30] Woodward and Bernstein were many decades in the future; Framing-era newspapers did not do sustained investigative journalism.[31]

And while those newspapers doubtless contributed facts and opinions to public debate, some of the most important such contributions in newspapers came from people who were not publishers, printers, editors, or their employees—Madison's, Hamilton's, and Jay's *Federalist* essays are a classic example.[32] "[N]ot a few of the country editors . . . depended for what literary work their vocation demanded upon the assistance of friends who liked being 'contributors to the press' without fee."[33]

It seems unlikely that the Framers would have secured a special right limited to this small industry, an industry that included only part of the major contributors to public debate. And this is especially so given that the industry excluded some of most the powerful and wealthy contributors, such as the politicians and planters who wrote so much of the important material that was published. Some of the political leaders of the era—famously, the young Benjamin Franklin, but also politicians such as Representative Matthew Lyon (one of the targets of a Sedition Act prosecution)—were indeed newspapermen. But those were rare exceptions.

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was seen as equivalent to the people's "right to speak, to write, or to publish their sentiments."

[30] *See, e.g.*, FREDERIC HUDSON, THE HISTORY OF JOURNALISM IN THE UNITED STATES, FROM 1690 TO 1872, at 136 (New York, Harper & Bros. 1873) (noting that printers and editors of the era lacked a "staff of paid writers"); FRANK LUTHER MOTT, AMERICAN JOURNALISM: A HISTORY OF NEWSPAPERS IN THE UNITED STATES THROUGH 250 YEARS, 1690 TO 1940, at 115–16 (1941) (noting that the publisher of the first American daily newspaper "did all the work on his paper himself during at least part of [1783–84], even to selling it on the street").

[31] "The concept of press as journalism cannot claim a historical pedigree. When the First Amendment was written, journalism as we know it did not exist. The press in the eighteenth century was a trade of printers, not journalists." Anderson, *supra* note 13, at 446–47.

[32] *See, e.g.*, PAULINE MAIER, RATIFICATION 70–95 (2010) (discussing the writings about whether to ratify the Constitution, which were largely written by people who were not professional printers); *id.* at 74 (describing difficulty that anti-Federalist writers had in getting their material published in Pennsylvania, and noting that Pennsylvania printer Eleazer Oswald published the materials without endorsing them as his own opinions).

[33] MOTT, *supra* note 30, at 162; DONALD H. STEWART, THE OPPOSITION PRESS OF THE FEDERALIST PERIOD 20 (1969) (stating, referring to American newspapers of that era generally, that "[s]ubscribers' pens provided a large proportion of the items in these gazettes," mostly "discuss[ing] political subjects").

Political elites sometimes secure rights for themselves. They sometimes secure rights for the whole public. But it seems unlikely that they would have secured rights for a class of tradesmen who were generally poorer and less powerful than the elites, and would have denied those rights to themselves and to people of their class.

To be sure, the Framers praised newspapers, sometimes extravagantly so; consider Jefferson's statement that, "were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter."[34] But Jefferson spoke of newspapers, not newspapermen: There is no reason to think his praise—or the Free Press Clause—was limited to newspapers as a means for propagating only the editors' views, and that it excluded newspapers as a means of propagating the views of authors who weren't part of the press-as-industry but who occasionally submitted their articles for publication.

It's theoretically conceivable, I suppose, that a right of "every person" to publish using the press might refer only to the right of every person to buy a printing press and to start printing using that press, or perhaps to start a regular newspaper published on someone else's press. Once he bought the press or started a newspaper, the theory would go, what he published with it would be protected by the freedom of the press. But until then, the freedom of the press did not cover any article he submitted to a newspaper, or any leaflet that he paid a printer to print.

But this strikes me as a very odd understanding of the "undoubted right" of "[e]very freeman" "to lay what sentiments he pleases before the public." Buying a press and hiring a printer to operate it—or starting a newspaper and hiring an editor—was an expensive and cumbersome means of laying your sentiments before the public.

And indeed even rich and influential American politicians did not take such steps. If they wanted to publish something, they would submit it to a newspaper (for a famous example, consider Madison's, Hamilton's, and Jay's *Federalist*), or help pay for its publication as a pamphlet (as Hamilton did for the second edition of the *Federalist*, and as Thomas Paine did for *Common Sense*).[35]

Again, one can imagine a notion of the "undoubted right" of "[e]very freeman" to lay his sentiments before the public under which those publications were not seen as protected by the author's freedom of the press—so that authors who really wanted such protection (say, against a libel lawsuit, libel

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[34] Thomas Jefferson, Letter to Col. Edward Carrington, Jan. 16, 1787, *in* 2 MEMOIRS, CORRESPONDENCE, AND PRIVATE PAPERS OF THOMAS JEFFERSON 84, 85 (London, Botson & Palmer 1829).

[35] *See infra* note 63. In the early Republic, a few politicians helped fund partisan newspapers. But this was done by only a few political leaders, and I have seen no reason to think that it was done to get the politicians special protections against legal liability.

prosecution, or injunction) had to buy their own presses or start their own newspapers, which they almost never did. But the cases, commentaries, and actual Framing-era practice do not suggest that anyone at the time had such an odd understanding of what "[e]very freeman['s]" "right" meant.

3. The (possibly) dissenting sources

I have found only two early sources that could be read as supporting a view that the liberty of the press might belong only to printers or newspaper publishers, though both includes language that points in both directions.

The first source is Francis Ludlow Holt's *The Law of Libel* (1812), which says that "[t]he liberty of the press" "is only one of the personal rights of the printer."[36] But other parts of the same chapter suggest that Holt viewed the right as belonging to authors—including ones who aren't printers or their employees—and not just printers.

Two pages later, Holt defines "[t]he liberty of the press" as "the personal liberty of *the writer* to express his thoughts in the more improved way invented by human ingenuity in the form of the press."[37] He likewise describes the "liberty of the press" as "what is necessarily included in its equivalent and progressive terms, thinking, speaking, and writing,"[38] as "one of the forms of the liberty of speech and communication,"[39] and later in the book as "[t]he natural liberty of the people" to engage in "opinion, . . . inquiry, and . . . discussion" about Parliament.[40] And he notes that "with a very few exceptions, whatever any one has a right both to think and to speak, he has likewise a consequential right to print and to publish."[41] This seems more consistent with all speakers' and writers' right to express their views using the press-as-technology, rather than with a right limited to the few people who are members of the press-as-industry.

The second source is a civics schoolbook called *First Lessons in Civil Government* (1843), which writes, with regard to the New York Constitution,

> The section which remains to be noticed, is that which secures to all the right "freely to speak, write, and publish their sentiments;" that is, *the liberty of speech and of the press.* A *press* is a machine for printing; but the word is also used to signify the business of printing and publishing; hence liberty of the press is the free right to publish books or papers without restraint.[42]

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[36] FRANCIS LUDLOW HOLT, THE LAW OF LIBEL 49 (London, J. Butterworth 1812).

[37] *Id.* at 51 (emphasis added).

[38] *Id.* at 50.

[39] *Id.* at 58.

[40] *Id.* at 123.

[41] *Id.* at 60.

[42] ANDREW W. YOUNG, FIRST LESSONS IN CIVIL GOVERNMENT: INCLUDING A COMPREHENSIVE VIEW OF THE GOVERNMENT OF THE STATE OF NEW-YORK 155 (Auburn, N.Y, H. & J.C. Ivison 1843).

This too is ambiguous. The first sentence speaks of a right of "all," and the "free right to publish books or papers" could be read as a right of all, since "publishing" was a general term for what authors did and not just for what printers did.[43] But the "business of printing and publishing" clause suggests that the right is limited to those in the press-as-industry.

Yet however one reads these two sources, they do not suffice, I think, to overcome the evidence of the other sources mentioned earlier in this Part, coupled with the sources discussed below.

B. Grammatical Structure

The grammatical structure of the First Amendment likewise suggests that the freedom was the freedom *to use* the press-as-technology, and not a freedom *belonging* to the press-as-industry.

As Justice Scalia pointed out in *Citizens United*, the shared words "freedom of" in the phrase "the freedom of speech, or of the press" are most reasonably understood as playing the same role for both "speech" and "press."[44] "The freedom of speech" is freedom to engage in an activity, much like "freedom of movement" or "freedom of religion." In particular, it is the freedom to use a particular faculty (speech). This suggests that "freedom of the press" is likewise freedom to engage in an activity by using the faculty of the printing press.

This is supported by sources that discuss the "freedom *in the use* of the press." Thus, James Madison, in his 1798 *Report on the Virginia Resolutions*, wrote that American law provided "a different degree of freedom, in the use of the press" than English law did.[45] The Massachusetts response to the Virginia resolutions replied that the "freedom of the press" "is a security for the rational use and not the abuse of the press."[46] And St. George Tucker's influential 1803 work spoke, in the discussion of the freedom of the press, of "[w]hoever makes use of the press as the vehicle of his sentiments on any subjects."[47] The freedom of the press was "freedom in the use of the press," much as freedom of speech was freedom in the use of speech.

Likewise, Madison's *Report* also quoted a phrase from Virginia's ratifying convention: "We the Delegates of the People of Virginia . . . declare and make known . . . that among other essential rights the liberty of Conscience and of

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[43] *See* Eugene Volokh, *Symbolic Expression and the Original Meaning of the First Amendment*, 97 GEO. L.J. 1057, 1081–82 (2009).

[44] 130 S. Ct. at 928 n.6 (Scalia, J., concurring); Edward Lee, *Freedom of the Press 2.0*, 42 GA. L. REV. 309, 345–46 (2008).

[45] 4 ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 570 (Philadelphia, J.B. Lippincott Co. 1836) (saying this in the middle of a discussion of the First Amendment); Lee, *supra* note 44, at 342.

[46] 4 ELLIOT'S DEBATES, *supra* note 45, at 535.

[47] 2 TUCKER, *supra* note 23, at app. 29.

the Press cannot be cancelled abridged restrained or modified by any authority of the United States."[48] Again, the phrase "the liberty of" is seen as applying equally to "Conscience" and "the Press." Here too this suggests that, just as the liberty of conscience was seen during that era as each person's freedom to worship or to think and speak as he wishes on religious matters,[49] so the liberty of the press is likewise each person's freedom to publish.[50]

Of course, "freedom of" might also sometimes be used in the possessive sense, to refer to the freedom of a particular group. One might, for instance, speak of "the freedom of Americans to speak,"[51] or "the freedom of Catholics to practice their religion."

But writers generally don't yoke together two such different meanings with the same words: It would be odd for "the freedom of" in "the freedom of speech, or of the press" to be used to mean one thing as to the first part of the phrase (everyone's freedom to use the faculty of speech) and a different thing as to the second part (the freedom belonging to a particular group, the press-as-industry). And, as the sources mentioned in Part II.A suggest, the First Amendment was in fact not read in this odd way—the freedom of the press was understood as the freedom of everyone to publish, just as the freedom of speech was the freedom of everyone to speak.

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[48] 3 ELLIOT'S DEBATES, *supra* note 45, at 591 (quoted in 4 ELLIOT'S DEBATES, *supra* note 45, at 576).

[49] HORTENSIUS [GEORGE HAY], AN ESSAY ON THE LIBERTY OF THE PRESS 25 (Philadelphia, Aurora 1799) (defining the constitutional "freedom of religion" "to mean the power uncontrouled by law of professing and publishing any opinion on religious topics, which any individual may choose to profess or publish, and of supporting these opinions by any statements he may think proper to make"); N.Y. CONST. OF 1777, art. XXXVII (treating "liberty of conscience" as a synonym for "the free exercise and enjoyment of religious profession and worship").

[50] "Freedom of the press" was also sometimes yoked with "licentiousness of the press"; but "licentiousness of the press" was understood as including publications by people who were using the press-as-technology, and not just by members of the press-as-industry. Thus, for instance, Judge Mansfield's oft-quoted statement that "[t]he *liberty of the press* consists in printing without any previous license, subject to the consequences of law" while "[t]he *licentiousness* of the press is *Pandora*'s box, the source of every evil" came in his opinion justifying the conviction of a clergyman who had published a pamphlet using the press-as-technology, but who was not a member of the press-as-industry. *See* 21 How. St. Tr. 847, 1040 (K.B. 1784); *infra* Part II.E.1.a (discussing the case). Likewise, Judge Chase's statement that the Sedition Act was "a law to check this licentiousness of the press" came in charging the jury in Thomas Cooper's trial for publishing a leaflet, *see infra* Part II.E.1.b, not a newspaper article. Cato's Letters likewise argued that oppressors "have been loud in their complaints against freedom of speech, and the licence of the press; and always restrained, or endeavoured to restrain, both. In consequence of this, they have brow-beaten writers, punished them violently, and against law, and burnt their works." 1 JOHN TRENCHARD & THOMAS GORDON, CATO'S LETTERS 101 (London, W. Wilkins et al. 1737). This is a reference to the alleged licentiousness of books (books being more commonly burned than newspapers) used as a reason to punish writers of books, and isn't limited to the alleged licentiousness of the institutional press.

[51] *E.g.*, Nike, Inc. v. Kasky, 539 U.S. 654, 667 (2003) (Breyer, J., dissenting).

C. Responding to the Redundancy Objection

The freedom of the press-as-technology, of course, was not seen as redundant of the freedom of speech protected by the other half of the phrase.[52] St. George Tucker, for instance, discussed the freedom of speech as focusing on the spoken word, and the freedom of the press focusing on the printed:

> The best speech can not be heard, by any great number of persons. The best speech may be misunderstood, misrepresented, and imperfectly remembered by those who are present. To all the rest of mankind, it is, as if it had never been. The best speech must also be short for the investigation of any subject of an intricate nature, or even a plain one, if it be of more than ordinary length. The best speech then must be altogether inadequate to the due exercise of the censorial power, by the people. The only adequate supplementary aid for these defects, is the absolute freedom of the press.[53]

Likewise, George Hay (who was soon to become a U.S. Attorney, and later a federal judge) wrote in 1799 that "freedom of speech means, in the construction of the Constitution, the privilege of speaking any thing without control" and "the words freedom of the press, which form a part of the same sentence, mean the privilege of printing any thing without controul."[54] Massachusetts Attorney General James Sullivan (1801) similarly treated "the freedom of speech" as referring to "utter[ing], in words spoken," and "the freedom of the press" as referring to "print[ing] and publish[ing]."[55]

And this captured an understanding that was broadly expressed during the surrounding decades. Bishop Thomas Hayter, writing in 1754, described the "Liberty of the Press" as applying the traditionally recognized "Use and Liberty of Speech"[56] to "Printing," an activity that Hayter described as "only a more extensive and improved Kind of Speech." (Hayter's work was known and quoted in Revolutionary era America.[57]) Francis Holt (1812) defined the liberty of the press as "the personal liberty of the writer to express his thoughts in the more improved way invented by human ingenuity in the form

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[52] Justice Stewart argued that the Free Press Clause should be read as protecting the press-as-industry since otherwise it would be a "constitutional redundancy." Stewart, *supra* note 3, at 633; see also West, *supra* note 2, at 2–3.

[53] 2 TUCKER, *supra* note 23, at app. 17. Tucker suggested that other material—such as pictures, symbolic expression, and writing—would be protected as well. *See* Volokh, *supra* note 43, at 1076–77; text accompanying note 29 (gathering sources that show the "freedom of speech, or of the press" was seen as synonymous with a right to "speak, write, and publish"). But since in-person speech and printing were the most common subjects of suppression, and of debates about constitutional protection, Tucker naturally focused on those two matters.

[54] HORTENSIUS, *supra* note 49, at 25.

[55] IMPARTIAL CITIZEN [JAMES SULLIVAN], A DISSERTATION UPON THE CONSTITUTIONAL FREEDOM OF THE PRESS IN THE UNITED STATES OF AMERICA 10 (Boston, David Carlisle 1801).

[56] THOMAS HAYTER, AN ESSAY ON THE LIBERTY OF THE PRESS (London, J. Raymond 1754).

[57] *See, e.g.*, VA. GAZ., May 18, 1776, at 1; PENN. PACKET, Nov. 12, 1785, at 2; CONN. J., Jan. 4, 1786, at 1; MASS. GAZ., Jan. 30, 1786, at 1.

of the press."[58] William Rawle (1825) characterized "[t]he press" as "a vehicle of the freedom of speech. The art of printing illuminates the world, by a rapid dissemination of what would otherwise be slowly communicated and partially understood."[59]

Without the freedom of the press, the freedom of speech might have been seen as not covering printing, which could be said as posing dangers that ordinary "speech" did not. Indeed, in the centuries before the Framing, the ability to use the press-as-technology was especially targeted by governments, who found it to be especially dangerous. The free press guarantees made clear that this potentially dangerous technology was protected alongside direct in-person communications.[60]

Of course, over the last several decades, the phrase "freedom of speech" has often been used to mean something like "freedom of expression," and to encompass all means of communication. This might have stemmed partly from technological change. New media of communication such as radio, films, television, and the Internet may fit more naturally in lay English within the term "speech" rather than "press." And once some mass communication technologies are labeled "speech" it becomes easier to label their traditional print equivalent as "speech" as well.

The broadening of the phrase "freedom of speech" might also have been aided by the success of the "freedom of the press" clause in assuring protection for the press-as-technology.[61] Once constitutional law subjects spoken and printed communication to the same legal rules, with no extra constraint on the press, it becomes easier to use a common label to refer to the common protection.

But the canon against interpreting legal writings in a way that makes one clause redundant of another rests on the notion that the authors and ratifiers of those writings would not have written something that was redundant *under their understanding*. And under the late 1700s understanding, the freedom of the press-as-technology was not at all redundant of the freedom of speech.

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[58] FRANCIS LUDLOW HOLT, THE LAW OF LIBEL 51 (London, J. Butterworth 1812); Lee, *supra* note 44, at 344–45.

[59] WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF AMERICA (Philadelphia, H.C. Carey & I. Lea 1825).

[60] *See* William Van Alstyne, *The Hazards to the Press of Claiming a "Preferred Position"*, 28 HASTINGS L.J. 761, 769 n.10 (1977); Anthony Lewis, *A Preferred Position for Journalism?*, 7 HOFSTRA L. REV. 595, 599 (1979).

[61] *Cf.* Anderson, *supra* note 13, at 458 ("At the time [early free press] cases were decided, the existence of a press clause may have been crucial.").

D. The Freedom of the Press and Books and Pamphlets

Any limitation of "the freedom of the press" to the press-as-industry is especially unlikely given the then-existing understanding of that freedom as protecting books and pamphlets alongside newspapers.

1. The non-press-as-industry status of many book and pamphlet authors

Books and pamphlets of that era were written largely not by members of the institutional press, but by scientists, philosophers, planters, ministers, politicians, and ordinary citizens. In the words of Benjamin Rush—a leading American physician and intellectual—writing in 1790, "Our authors and scholars are generally men of business and make their literary pursuits subservient to their interests. . . . Men, who are philosophers or poets, without other pursuits, had better end their days in an old country."[62]

Some books of the era were funded by printers who were members of the press-as-industry. Others were funded by authors themselves,[63] by ideological groups,[64] or by "subscribers" who paid up front for the book before the book was printed, thus supporting the cost of production.[65] Some were likely

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[62] BENJAMIN RUSH, ESSAYS, LITERARY, MORAL AND PHILOSOPHICAL 190 (Philadelphia, Thomas & William Bradford, 1806); *see also* ROLLO G. SILVER, THE AMERICAN PRINTER 1787–1825, at 97 ("[p]rinted authors were of necessity amateurs with some dependable [outside] income").

[63] SILVER, *supra* note 62, at 98; CHARLES A. MADISON, BOOK PUBLISHING IN AMERICA 6 (1966).

Examples of such self-published works include Thomas Paine's *Common Sense* (1776) and his first work, *Case of the Officers of Excise* (1772), which was self-published while when he was working as an excise officer; Jeremy Belknap's *The History of New-Hampshire* (1784), one of the earliest works of serious history in America; the first printing of the *Federalist* in book form (1788), more than half paid for by Hamilton; and Tunis Wortman's early work on the freedom of the press (1800). Bill Henderson, *Independent Publishing: Today and Yesterday*, 421 ANN. AM. ACAD. POLI. SCI. 93, 95 (1975) (discussing Paine); JEREMY BELKNAP, THE HISTORY OF NEW-HAMPSHIRE title page (Philadelphia, Robert Aitken 1784); George B. Kirsch, *Jeremy Belknap: Man of Letters in the Young Republic*, 54 NEW ENG. Q. 33, 33 (1981) (noting that Belknap, a minister, "is considered to be one of late eighteenth-century New England's cultural leaders"); MAIER, *supra* note 32, at 84 (discussing the *Federalist*); TUNIS WORTMAN, TREATISE, CONCERNING POLITICAL ENQUIRY, AND THE LIBERTY OF THE PRESS title page (New York, George Forman 1800). The notation "printed for the author," seen on Belknap's and Wortman's title pages, meant the book was published at the author's expense. Keith Maslen, *Printing for the Author: From the Bowyer Printing Ledgers, 1710–1775*, series 5-27 LIBRARY 302 (1972).

[64] *See, e.g.*, CASES ADJUDGED IN THE SUPREME COURT OF NEW JERSEY; RELATIVE TO THE MANUMISSION OF NEGROES AND OTHERS HOLDEN IN BONDAGE (Burlington, Isaac Neale 1794) (printed for the New-Jersey Society for Promoting the Abolition of Slavery).

[65] *See, e.g.*, JOEL BARLOW, THE VISION OF COLUMBUS pages following 258 (Hartford, Hudson & Goodwin 1787) (listing subscribers); 1 JOHN TEBBEL, A HISTORY OF BOOK PUBLISHING IN THE UNITED STATES, at 113, 116, 133, 158–60 (1972) (discussing 18th century subscription publishing in America); HANNAH ADDAMS, A MEMOIR OF MISS HANNAH ADAMS, WRITTEN BY

published with hope of profit, and others chiefly out of a desire to spread ideas. But in any of these categories, the books were largely written by people outside the press-as-industry.

Such authors were outside the "art or business of printing and publishing," to quote the 1828 Noah Webster definition of "press" that would most closely fit the press-as-industry model.[66] They did not fit within the "press" in the sense of "[n]ewspapers, journals, and periodical literature collectively," to quote the definition that *Oxford English Dictionary* gives for the "press-as-industry" sense of "press."[67]

They would not have fit within the definition that seems to be used by the (few) modern decisions that adopt a "press-as-industry" view of the First Amendment.[68] In a sense, such authors were much like a modern businessman writing and distributing a book[69] or funding a video program:[70] They rented facilities and services from printers, but they were not in the printing business themselves. Yet books and pamphlets, which were predominantly written by such authors, were routinely understood to be covered by the "freedom of the press," which suggests that this liberty was understood as not being limited to the press-as-industry.

To be sure, one could define such authors as part of "the press," on the grounds that they use the press to communicate, even if they don't own presses or make a living from presses. But that would be adopting the press-as-technology model. Book authors' relationship to "the press" was in essence the same as the relationship of the authors of occasional newspaper articles, or people who bought advertising space in newspapers (as in the cases discussed in Part II.E.1.e below). They used the press-as-technology, by borrowing or renting space on printing presses owned by people who were indeed members of press-as-industry.

HERSELF 20–21 (Boston, Gray & Bowen 1832) (describing the 1791 publication of the second edition of Adams' dictionary of religions as being funded partly by subscriptions and partly by the printer).

[66] *See infra* note 86 and accompanying text.

[67] *See infra* note 88 and accompanying text.

[68] *Cf., e.g.*, *infra* note 263 (discussing *People v. LeGrand*); *infra* note 274 (discussing *Lassiter v. Lassiter*); *infra* note 310 (citing *AIG/U.S. News*); Matera v. Superior Court, 825 P.2d 971, 973 (Ariz. Ct. App. 1992) (interpreting a state statutory privilege for members of the "media" as "intended to apply to persons who gather and disseminate news on an ongoing basis as part of the organized, traditional, mass media").

[69] *See supra* note 68.

[70] *See, e.g.*, AO 2004-30 (Citizens United) (FEC) (discussed *infra* notes 312–313). I analogize here to a hypothetical individual speaker, not a corporation; to what extent the First Amendment protects corporate speech, whether by newspapers or by the public, is a story for another day. This Article focuses on the separate question of whether "the freedom . . . of the press" protects newspapers, magazines, and the like—whether corporations or not—more than it protects other organizations, again whether corporations or not.

2. Specific references to the freedom of "the press" as covering books and pamphlets

As I noted, books were clearly seen as covered by the liberty of the press. David Hume's *History of England*, for instance, said this to describe the 1694 expiration of the statute that required a license to print:

> The liberty of the press did not even commence with the revolution [of 1689]. It was not till 1694 that the restraints were taken off; to the great displeasure of the king and his ministers, who, seeing nowhere, in any government, during present or past ages, any example of such unlimited freedom, doubted much of its salutary effects; and probably thought, that no books or writings would ever so much improve the general understanding of men, as to render it safe to intrust them with an indulgence so easily abused.[71]

Likewise, in his 1741 *Liberty of the Press*, Hume noted that "[w]e need not dread from" "the liberty of the press" "any such ill consequences as followed from the harangues of the popular demagogues of Athens and tribunes of Rome," because "[a] man reads a book or pamphlet alone and coolly" rather than surrounded by a mob that may inflame him.[72] Likewise, in 1788, James Iredell—then a defender of the proposed Constitution, who two years later would be appointed a Justice of the Supreme Court—spoke of the liberty of the press as including books:

> The liberty of the press is always a grand topic for declamation, but the future Congress will have no other authority over this than to secure to authors for a limited time an exclusive privilege of publishing their works. This authority has been long exercised in England, where the press is as free as among ourselves or in any country in the world; and surely such an encouragement to genius is no restraint on the liberty of the press, since men are allowed to publish what they please of their own, and so far as this may be deemed a restraint upon others it is certainly a reasonable one . . . . If the Congress should exercise any other power over the press than this, they will do it without any warrant from this constitution, and must answer for it as for any other act of tyranny.[73]

Copyright law at the time covered books, maps, and charts, but not newspapers.[74] To talk about copyright law as even potentially related—however benignly—to the freedom of the press suggests that the freedom of the press was seen as applicable to books.

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[71] 8 DAVID HUME, HISTORY OF ENGLAND 331–32 (London, T. Cadell 1782) (originally published 1754–62); *see also* Lewis, *supra* note 60, at 597–98.

[72] DAVID HUME, ESSAYS AND TREATISES ON SEVERAL SUBJECTS 15 (Edinburgh, R. Fleming & A. Allison 1741).

[73] *Answers to Mr. Mason's Objections to the New Constitution Recommended by the Late Convention at Philadelphia*, in 2 LIFE AND CORRESPONDENCE OF JAMES IREDELL 186, 207 (Griffith J. McRee ed., New York, D. Appleton & Co. 1857).

[74] *See, e.g.*, Copyright Act of 1790, 1 Stat. 124 (1790); Clayton v. Stone, 5 F. Cas. 999, 1003 (C.C. S.D.N.Y. 1829) (holding that copyright law did not cover newspapers). Newspapers weren't protected by copyright until 1909. 2 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 3:60 (2010).

Judge Alexander Addison's 1799 grand jury charge similarly stated that "the freedom of the press consists in this, that any man may, without the consent of any other, print any book or writing whatever, being . . . liable to punishment, if he injure an individual or the public."[75] A law "that no book should be printed without permission from a certain officer," Addison said in the same charge, "would be a law abridging the liberty of the press."[76] St. George Tucker, in 1803, echoed Hume in writing that the expiration of the licensing of printers in 1694 "established the freedom of the press in England," partly by freeing the printing and distribution of books.[77]

3. Freedom of the press as extending to literary, religious, and scientific works

Many leading sources of that era also spoke of the liberty of the press as extending to literary, religious, and scientific writings, which were often (probably much more often than not) published by people who did not do journalism or printing for a living. Hume's *Of the Liberty of the Press*, for instance, discussed "the liberty of the press, by which all the learning, wit, and genius of the nation may be employed on the side of freedom and everyone be animated to its defense."[78] The Continental Congress's 1774 *Letter to the Inhabitants of Quebec* discusses "[t]he importance" of "the freedom of the press" as consisting in part of "the advancement of truth, science, morality, and arts," as well as of politics.[79] Nor was this an original view at the time; the French philosopher Helvetius (who was well known to the Framing generation[80]) similarly wrote that "It is to contradiction, and consequently to the liberty of the press, that physics owed its improvements. Had this liberty never subsisted, how many errors, consecrated by time, would be cited as incontestible axioms! What is here said of physics is applicable to morality and politics."[81]

Justice Iredell expressed the same view in a 1799 grand jury charge: "The liberty of the press . . . has converted barbarous nations into civilized ones—

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[75] *Id.* at 279 (Pa. Cty. Ct. 1799) (second page numbering).

[76] Alexander Addison, *Remarks on the Late Insurrection, Grand Jury Charge*, Add. 282 (Pa. Cty. Ct. 1799) (second page numbering).

[77] 1 TUCKER, *supra* note 23, at 298.

[78] Hume, *supra* note 72, at 14.

[79] Continental Congress, Appeal to the Inhabitants of Quebec (Oct. 26, 1774), *in* 1 JOURNALS OF THE CONTINENTAL CONGRESS 108, 110 (1774).

[80] *See, e.g.*, Letter to Col. William Duane, Sept. 16, 1810, in 5 THE WRITINGS OF THOMAS JEFFERSON 538, 539 (H.A. Washington ed. Washington, Taylor & Maury 1853); COLUMBIAN PATRIOT [MERCY OTIS WARREN], OBSERVATIONS ON THE NEW CONSTITUTION, AND ON THE FEDERAL AND STATE CONVENTIONS 4 & n.* (Boston 1788).

[81] 2 HELVETIUS, A TREATISE ON MAN, HIS INTELLECTUAL FACULTIES AND HIS EDUCATION 319 (London, 1777); 2 HELVETIUS, DE L'HOMME, DE SES FACULTÉS INTELLECTUELLES ET DE SON ÉDUCATION 270 (London, Typographical Society 1773).

taught science to rear its head—enlarged the capacity—increased the comforts of private life—and, leading the banners of freedom, has extended her sway where her very name was unknown.[82] Likewise, James Madison's 1799 *Address of the General Assembly to the People of the Commonwealth of Virginia* stated—in the middle of the discussion of "the freedom . . . of the press" and the First Amendment—that "it is to the press mankind are indebted for having dispelled the clouds which long encompassed religion, for disclosing her genuine lustre, and disseminating her salutary doctrines."[83]

Yet science, religion, morality, the arts, and civilization were at least as likely (and probably more likely) to have been advanced by works written by people who were scientists, theologians, philosophers, or artists, not journalists or printers. It seems hard to imagine that Hume, Iredell, Madison, and the Continental Congress were speaking of a freedom of the press that extended only to newspapermen and excluded the Newtons, Luthers, Humes, Lockes, Jeffersons, and Madisons of the world.

E. Cases from 1784 to 1840

Fourteen early cases also show that early courts and lawyers understood the freedom of the press as extending to authors regardless of whether they were members of the press-as-industry. Though the American cases follow the drafting of the First Amendment by one to five decades, they are entirely consistent with the 1700s evidence discussed above. I have seen no reason to think there was some change from a press-as-industry understanding in the 1700s to a press-as-technology understanding as shown in those cases.

If anything, the common definition of "press" was *more* clearly focused on the press-as-technology in the late 1700s than it was in the 1820s and 1830s. The only possibly relevant definition of "press" in Samuel Johnson's 1755–56 dictionary referred just to the printing press;[84] the same is true of the 1790 edition,[85] and of Noah Webster's 1806 *A Compendious Dictionary of the English Language*, published in America.[86] Noah Webster's 1828 dictionary, on

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[82] Case of Fries, 9 F. Cas. 826, 838 (C.C. D. Pa. 1799).

[83] 4 JAMES MADISON, LETTERS AND OTHER WRITINGS OF JAMES MADISON 509, 511 (Philadelphia, J.B. Lippincott & Co. 1865).

[84] 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London, W. Strahan 1755–56) (entry for "press"). Johnson's was "for well over a century . . . without peer as the most authoritative dictionary in English." SIDNEY I. LANDAU, DICTIONARIES: THE ART AND CRAFT OF LEXICOGRAPHY 56 (1984).

[85] 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (9th ed. London, J.F. & C. Rivington et al. 1790) (entry for "press").

[86] NOAH WEBSTER, A COMPENDIOUS DICTIONARY OF THE ENGLISH LANGUAGE (Hartford, Sidney's Press 1806). The first American dictionary, SAMUEL JOHNSON, JR., A SCHOOL DICTIONARY (New Haven, Edward O'Brien 1797) (not by the famous Samuel Johnson), is short, and has no entry for "press" or "liberty of the press"; neither do two of the leading English law dictionaries of the era, 2 RICHARD BURN, A NEW LAW DICTIONARY (London, A. Stra-

the other hand, included both the technology and the industry as possible meanings of "press" (though it specifically defined the "liberty of the press" as a right of "every citizen" and as including the right to publish "books" and "pamphlets").[87] Likewise, the Oxford English Dictionary reports that the press-as-industry definition was just developing in the late 1700s and early 1800s, giving this as definition 3d of "[the] press":[88]

> Newspapers, journals, and periodical literature collectively. . . .
>
> This use of the word appears to have originated in phrases such as the liberty of the press, to write for the press, to silence the press, etc., in which 'press' originally had sense 3c [The printing press in operation, the work or function of the press; the art or practice of printing], but was gradually taken to mean the products of the printing press. Quotations before 1820[1] reflect the transition between these senses.

Yet despite that, the 1820s and 1830s cases continued to treat "the freedom of the press" as being everyone's freedom to use the technology. If such a meaning was accepted in the 1820s and 1830s, it would have been even more certainly accepted in 1791, when the alternative meaning of "press" to refer to the industry was just beginning to emerge.

1. Discussions of the freedom of the press as protecting non-press-as-industry writers

Eleven cases involved "freedom of the press" (or "liberty of the press") being expressly used to discuss people who were not members of the press-as-industry—not printers, newspaper publishers, or editors, but people who wrote newspaper ads, letters or other submissions to the editor, pamphlets, or books. Sometimes the authors won and sometimes they lost; the freedom of the press, even when it was implicated, was often not seen as providing particularly broad protection. But in all these cases, the lawyers and the judges

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han & W. Woodfall 1792); 2 TIMOTHY CUNNINGHAM, A NEW AND COMPLETE LAW-DICTIONARY (3d ed. London, J.F. & C. Rivington 1783). The third law dictionary, GILES JACOB, A NEW LAW DICTIONARY (10th ed. London, A. Strahan & W. Woodfall 1782), lists "press, *(Liberty of the)*" but simply cites back to Blackstone, and adds the passage "The printers of the public papers, should for ever recollect the motto LIBERTAS SINE LICENTIA, or they who doubtless wish well to that principal bulwark of our constitution, may, tho' without design, ultimately prove its greatest enemies." The instruction to "printers to the public papers" suggests that their misbehavior was seen as a serious threat to the liberty of the press; but it does not assert that the liberty belonged only to such printers, especially given Blackstone's discussion of this as a liberty of "every freeman." The first American law dictionary, JOHN BOUVIER, A LAW DICTIONARY (Philadelphia, T. & J.W. Johnson 1839), does not define "press," but defines "liberty of the press" without shedding light on the question before us, 2 *id.* at 42.

[87] WEBSTER, *supra* note 25. Webster's leading rival, JOSEPH EMERSON WORCESTER, A COMPREHENSIVE PRONOUNCING AND EXPLANATORY DICTIONARY 243 (Boston, Hillard, Gray, et al. 1830), contained shorter entries, and included "an instrument for . . . printing" as the only relevant definition of "press." *See* LANDAU, *supra* note 84, at 56 (listing Worcester as Webster's chief American rival).

[88] Oxford English Dictionary, http://oed.com (entry for "press").

were willing to discuss the non-press-as-industry defendants' rights under the freedom of the press. And no-one is recorded as arguing that the defendants lacked such rights because they were not members of the press-as-industry.

I include here three English cases as well as eight American cases, because American judges and lawyers understood them as being relevant to American constitutional law. Justice Story's *Commentaries on the Constitution of the United States*, to give just one example, refers to only five cases in the "liberty of the press" section, and two of them are English (the *Dean of St. Asaph's Case* and *Burdett*, both discussed below).[89] The American freedom of the press was often seen as broader than the common-law English definition,[90] but I've seen no sources suggesting that it was in any way seen as narrower. And, as the discussion below shows, the English cases are entirely consistent with the American cases on the question that we're discussing.

a. *Rex v. Shipley* (*Dean of St. Asaph's Case*) (1784)

In the English case *Rex v. Shipley*,[91] William Shipley, a minister who held the position of Dean of St. Asaph Cathedral, was prosecuted for seditious libel for reprinting a pamphlet. (The pamphlet itself was also written by someone who was not a journalist or printer, William Jones, a lawyer and judge.[92]) Thomas Erskine defended Shipley, arguing that the liberty of the press meant the jury had to determine whether the pamphlet was indeed libelous[93]—an argument that assumed the liberty covered Shipley, who was not a member of the press-as-industry.

Lord Mansfield's opinion in *Shipley* rejected Erskine's argument, and followed the then-orthodox English rule that the judge would decide whether the publication was libelous.[94] But Mansfield did not suggest that the liberty of the press was limited to members of the press-as-industry, which would have categorically excluded Shipley. Rather, Mansfield wrote (echoing Blackstone) that, "The liberty of the press consists in printing without any previous licence, subject to the consequences of law."[95] Under this view, all publications—including by non-press-as-industry authors such as the defendant—were protected only from prior restraints, and all could be punished by the law of seditious libel.

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[89] 3 STORY, *supra* note 25, §§ 1874–1886, at 731–44; *id.* at 737 & nn.1 & 3 (referring to the two English cases); *id.* at 742 n.1 (referring to three American cases).

[90] *See, e.g.*, 4 ELLIOT'S DEBATES, *supra* note 45, at 569–70 (Madison's *Report on the Virginia Resolutions*).

[91] 21 How. St. Tr. 847 (K.B. 1784).

[92] *Id.* at 847.

[93] *Id.* at 900, 903, 924, 1005, 1023.

[94] *Id.* at 1035, 1040.

[95] *Id.* at 1040.

And Erskine's defense was known and approved of in America. Both the case and Erskine's arguments were cited extensively in *People v. Croswell*, the leading 1804 New York case that dealt with whether truth was a defense in libel cases.[96] Erskine's position was quoted by the defense in the 1806 case *United States v. Smith and Ogden*;[97] the reference was to the role of the jury generally, and not to free speech in particular, but the detailed quotation of Erskine's speech to the jury suggests that the speech was known and respected in early America. Later, Justice Story mentioned the "celebrated defense of Mr. Erskine, on the trial of the Dean of St. Asaph" in the freedom of the press section of his 1833 *Commentaries on the Constitution*.[98]

The quotations gave no hint that Erskine's use of the liberty of the press to defend a churchman rather than a newspaperman was at all questionable. Rather, they seem consistent with the American understanding of the right's being a right of "every citizen."

b. *United States v. Cooper* (1800)

One of the leading cases under the Sedition Act of 1798 involved the prosecution of Thomas Cooper for publishing a one-page handbill criticizing President Adams. At the time of the trial, Cooper was not a member of the institutional press. He had edited the *Northumberland Gazette* for two months, but that task had ended four months before the leaflet was distributed.[99] Moreover, his publication was a leaflet that was unrelated to his past editorial tasks.[100]

Yet the trial was seen as implicating the freedom of the press. In response to the argument that his handbill diminished the confidence of the people in

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[96] People v. Croswell, 3 Johns. Cas. 337, 405, 408 (N.Y. Sup. 1804) (Lewis, C.J.) (citing Erskine's arguments); *id.* at 371–72 (Kent, J.) (likewise); *id.* at 371 (Kent, J.) (discussing *Shipley*); *id.* at 341 (noting that the trial judge had cited *Shipley* to the jury); *id.* at 351 (arguments of the prosecution) (citing *Shipley*). A 1797 U.S. Attorney General opinion likewise quoted *Shipley*, though focusing only on Lord Mansfield's opinion. Libellous Publications, 1 U.S. Op. Atty. Gen. 71 (1797).

[97] THE TRIALS OF WILLIAM S. SMITH, AND SAMUEL G. OGDEN, FOR MISDEMEANOURS 177 (New York, I. Riley & Co. 1807).

[98] 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1879 n.3 (Boston, Hilliard, Gray, & Co. 1833); *see also* BENJAMIN L. OLIVER, THE RIGHTS OF AN AMERICAN CITIZEN 325 n.* (Boston, Marsh, Capen & Lyon 1832).

[99] DUMAS MALONE, THE PUBLIC LIFE OF THOMAS COOPER 1783–1839, at 91, 105 (AMS Press 1979) (1926).

[100] For a modern perspective on this, see, *e.g.*, FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 250–51 (1986), holding that even an organization that publishes a regular newsletter isn't entitled to the election law "press exemption" for a different publication that the organization distributes through other channels. *See also* Henry v. Halliburton, 690 S.W.2d 775, 781 (Mo. 1985) (holding that even a newsletter publisher should be treated as a nonmedia defendant when he sends an article himself to specific people, rather than just publishing it in his regular newsletter).

the government, Cooper argued to the jury that this confidence should be earned, and not "exacted by the guarded provisions of Sedition Laws, by attacks on the Freedom of the Press, by prosecutions, pains, and penalties on those which boldly express the truth." He went on to say that "in the present state of affairs, the Press is open to those who will praise, while the threats of the Law hang over those who blame the conduct of the men in power."[101] Later, complaining about the court's requiring him to produce certain original documents to support his defense (a difficulty peculiar to this particular trial, rather than to all Sedition Act prosecutions), he argued that such requirements "would be an engine of oppression sufficiently powerful to establish a perfect despotism over the press."[102]

And Justice Samuel Chase's charge to the jury seems to support the notion that the prosecution involved "the press," which in context must have meant use of the press-as-technology and not the press-as-industry. Seditious libel prosecutions, Chase argued, were important because

> A republican government can only be destroyed in two ways; the introduction of luxury, and the licentiousness of the press. This latter is the more slow but more certain means of bringing about the destruction of the government. The legislature of this country knowing this maximum, has thought to pass a law to check this licentiousness of the press—by a clause it is enacted (reads the second section of the sedition law).[103]

Others also characterized Cooper's prosecution as involving "the freedom of the press." John Thomson echoed Cooper's assertions that his prosecution violated the freedom of the press, in *An Enquiry, Concerning the Liberty, and Licentiousness of the Press*:

> What was James Thomson Callender pros[e]cuted for at Richmond? For publishing his opinions through the medium of the Press. What was Charles Holt, the Editor of the New-London Bee, prosecuted for? Because he published the opinions of another person. What was Thomas Cooper prosecuted for? For publishing his opinions through the same mode of communication:—viz. the *Press*. . . . [T]he Constitution has been violated, both by the Sedition law under which they were convicted, and by the prosecutions themselves.[104]

The following year, John Wood's *History of the Administration of John Adams* likewise stated that,

> The prosecutions of Lyon and Callender, of Cooper and Holt, are the best commentary upon the Sedition law. The names of these gentlemen will be quoted in support of the liberty of the press, and of the tyranny of Mr. Adams, when the la-

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[101] THOMAS COOPER, AN ACCOUNT OF THE TRIAL OF THOMAS COOPER 19 (Philadelphia, John Bioren 1800).

[102] *Id.* at 35.

[103] *Id.* at 42–43.

[104] JOHN THOMSON, AN ENQUIRY, CONCERNING THE LIBERTY, AND LICENTIOUSNESS OF THE PRESS 25 (New York, Johnson & Stryker 1801).

> bored arguments of Paterson and Peters, of Iredell, Addison and Chase, are no longer remembered.[105]

Lyon, Callender, and Holt, who published their libels in the newspapers they edited, were being discussed the same way as Cooper, who had a handbill printed for him.

c. Impeachment of Justice Chase (1805)

Five years later, Justice Chase found himself as a defendant in an impeachment proceeding. The House prosecution was arguing that Justice Chase had misbehaved in criticizing the Administration from the bench.[106]

In the course of this, one of the managers of the prosecution, Congressman John Randolph—the leader of the House Democratic-Republicans and the House spokesman for President Jefferson[107]—noted that his only objection was to "the prostitution of the bench of justice to the purposes of an hustings," and "declaim[ing] on [political topics] from his seat of office." Randolph stressed that was not objecting to any extrajudicial publications that Chase might produce: "Let him speak and write and publish as he pleases. This is his right in common with his fellow citizens. The press is free."[108] Thus, Chase—not a member of the press-as-industry—was seen as being free to, "in common with his fellow citizens," "publish as he pleases" using the "free" "press."

Unlike in the other cases in this subsection, the only statement about the "press" in this case came from an advocate, not from a judge. But Randolph had little to gain by using a controversial definition of "free" "press," or by trying to broaden the liberty of the press beyond its established boundaries. Indeed, he had something to lose, since using a controversial definition would have made his argument less persuasive. His willingness as an advocate to refer to Chase as having the right to use the "free" "press" suggests that he knew his audience would accept the argument.

d. People v. Judah (1823)

In *People v. Judah*,[109] Samuel Judah, the apparently 19-year-old author of a self-published[110] book-length poem called *Gotham and the Gothamites*, was

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[105] JOHN WOOD, THE HISTORY OF THE ADMINISTRATION OF JOHN ADAMS, ESQ. 221 (New York, 1802).

[106] 1 TRIAL OF SAMUEL CHASE 123 (Washington, Samuel H. Smith 1805).

[107] HENRY ADAMS, JOHN RANDOLPH 55 (Boston, Houghton, Mifflin & Co. 1883).

[108] *Id.*

[109] 2 Wheeler's Crim. Cas. 26 (N.Y. Rec. Ct. 1823).

[110] *See* SAMUEL B.H. JUDAH, GOTHAM AND THE GOTHAMITES title page (New York, 1823); *supra* note 63 (discussing meaning of "published for the author").

prosecuted for libeling various noted New Yorkers in the poem.[111] Though defendant had written and published some plays, such a job category would likely not have been considered part of the press-as-industry. Playwrights of the era chiefly wrote as a sideline to their normal occupations,[112] and published as a sideline to trying to get their plays staged.[113] Nor is it likely that *Gotham and the Gothamites* itself, a self-published poem mocking local notables, would have been a viable commercial venture for the author. Moreover, even if he were seen as a professional book author, it's not clear that this would have made him a member of "the press" as industry.[114]

Yet the court thought it necessary to instruct the jury about the liberty of the press, though stressing that such liberty was limited to examining the character of candidates for public office and did not include "invad[ing] the sanctity of private repose."[115] Likewise, when pronouncing sentence, the court again mentioned the liberty of the press, but reasoned that the punishment imposed on Judah did not violate the liberty because his libels were an abuse of the liberty.[116]

e. Rex v. Burnett (1820), People v. Simons & Wheaton (1823), Commonwealth v. Blanding (1825), Case of Austin (1835), Commonwealth v. Thomson (1839), and Taylor v. Delavan (1840)

These six cases all involved materials submitted to newspapers—as a paid ad, as a letter to the editor, or as a similar submission—by people who were not publishers, editors, or employees of the newspaper.

1. The English case *Rex v. Burdett*[117] stemmed from a letter to the editor[118] written by Sir Francis Burdett, a nobleman and reformist politician ra-

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[111] I say apparently 19-year-old because defense counsel asserted that he was 19, *id.* at 32, and the court said that Judah was "under age," *id.* at 41, which suggests that it was accepting defense counsel's assertion. There is some uncertainty about whether Judah was 19 or 24. *See* 1 JACOB MARCUS, UNITED STATES JEWRY: 1776–1985, at 460 (1989).

[112] *See* Gary A. Richardson, *Plays and Playwrights: 1800–1865*, in 1 THE CAMBRIDGE HISTORY OF AMERICAN THEATRE 250, 251–52 (Don B. Wilmeth & Christopher Bigsby, eds. 1998).

[113] *See id.* at 254 (concluding that printing one's play wasn't likely to make money, because then-existing copyright law wouldn't block rival productions of a play and theater managers could therefore stage a published play without compensating the playwright); ARTHUR HOBSON QUINN, A HISTORY OF THE AMERICAN DRAMA: FROM THE BEGINNING TO THE CIVIL WAR 161 (2d ed. 1943) (reporting that playwrights made little money from their plays, and what money they made generally came not from publishing but from the proceeds of a special third-night performance designated for the playwright's benefit).

[114] The few modern cases that take a press-as-industry view of the freedom of the press, and that consider whether book authors qualify as members of the press-as-industry, conclude that they do not so qualify. *See supra* note 68.

[115] 2 Wheeler's Crim. Cas. at 34.

[116] *Id.* at 36.

[117] 106 Eng. Rep. 873 (K.B. 1820).

ther than a printer or editor. Though Burdett was not a member of the press-as-industry, Judge Best referred to the "liberty of the press" four times in the opinion,[119] and twice in his instructions to the jury.[120] The judge's opinion also stressed that "the liberty of the press" means that "*every man* ought to be permitted to instruct his fellow subjects."[121] The prosecutor mentioned the "liberty of the press" as well.[122]

Burdett was well-known in America. It was cited as to "liberty of the press" in Chancellor Kent's 1827 *Commentaries on American Law* and in the Joseph Story's 1833 *Commentaries on the Constitution*,[123] as to venue in libel cases in *Commonwealth v. Blanding*,[124] and in a general note on libel law following *People v. Simons & Wheaton*.[125]

2. *People v. Simons & Wheaton* involved a newspaper advertisement bought by defendants, businessmen who accused two other businessmen of being insolvent.[126] Defendants were prosecuted for criminal libel, and appealed to the liberty of the press secured by the New York Constitution's Bill of Rights.[127] The prosecution responded by acknowledging the applicability of the constitutional provision, but arguing that the provision was limited to "publication . . . made with good motives, and for justifiable ends."[128] The court instructed the jury about the constitutional provision, echoing the prosecution's point.[129] The jury acquitted.[130]

The reporter's note following *Simons & Wheaton* was consistent with the court's implicit assumption that businessmen buying an advertisement were protected by the "liberty of the press." "In this country," the note said, "*every man* may publish temperate investigations of the nature and forms of government."[131] "It has always been a favourite privilege of the American *citizen*"

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[118] *See* FAIRBURN'S EDITION OF THE TRIAL OF SIR F. BURDETT, ON A CHARGE OF A SEDITIOUS LIBEL AGAINST HIS MAJESTY'S GOVERNMENT 2–3, 10 (London, John Fairburn 1820).

[119] 106 Eng. Rep. at 887–88. As in some of the other cases discussed in this section, the judge concluded that the liberty of the press was limited, and extended only to statements made "with temper and moderation" rather than "vituperation." *Id.*

[120] FAIRBURN'S EDITION OF THE TRIAL OF SIR F. BURDETT, *supra* note 118, at 37–38.

[121] 106 Eng. Rep. at 887 (emphasis added).

[122] *Id.* at 9.

[123] 2 KENT, *supra* note 29, at 15; 3 STORY, *supra* note 25, at 737–38 nn.1 & 3.

[124] *See, e.g.*, 3 Pick. 304, 311 (Mass. 1825).

[125] 1 Wheeler's Crim. Cas. 339, 359 (N.Y. Rec. Ct. 1823).

[126] *Id.*

[127] *Id.* at 349.

[128] *Id.* at 350.

[129] *Id.* at 353.

[130] *Id.* at 354.

[131] *Id.* at 355 (emphasis added).

(a "right . . . guaranteed to us by the constitution") "to investigate the tendency of public measures, and the character and conduct of public men."[132]

3. In *Commonwealth v. Blanding*, James Blanding—a farmer and the city clerk[133]—was convicted of libeling someone by submitting an item for publication in a newspaper.[134] The appellate court rejected Blanding's freedom of the press argument, but only because it concluded that libels weren't covered by the freedom of the press, and because the freedom of the press was only a freedom from prior restraint: "The liberty of the press was to be unrestrained, but he who used it was to be responsible in case of its abuse; like the right to keep fire arms, which does not protect him who uses them for annoyance or destruction."[135]

4. *Case of Austin* reversed the disbarment of several lawyers who had submitted to a newspaper an open letter urging a judge to resign.[136] The Pennsylvania Supreme Court concluded that the letter—which the newspaper indeed published—was not libelous, and that a lawyer can't be disciplined for nonlibelous "scrutiny into the official conduct of the judges."[137]

In the course of reaching this conclusion, the court stated that the possibility of professional discipline for libel does not "impinge on the liberty of the press,"[138] because "the conduct of a judge, like that of every other functionary, is a legitimate subject of scrutiny, and where the public good is the aim, such scrutiny is as open to an attorney of his court as to any other citizen." A lawyer, the court noted, could be held liable for such scrutiny only if he speaks from a bad motive—the then-accepted test for protection under the liberty of the press, which was commonly used in newspaper cases.[139] The non-press-as-industry publishers in this case were seen as being on the same footing with respect to "the liberty of the press" as press-as-industry publishers were.

5. In *Commonwealth v. Thomson*, Thomson—an herbalist who claimed to have invented a new system for treating diseases—placed an advertisement in a newspaper denouncing as an impostor another doctor who was claiming to practice the same system.[140] Thomson was prosecuted for libel, and his

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[132] *Id.* (emphasis added).

[133] 3 J.H. BEERS & CO., REPRESENTATIVE MEN AND OLD FAMILIES OF SOUTHEASTERN MASSACHUSETTS 1314–15 (1912).

[134] 20 Mass. (3 Pick.) 304, 304 (Mass. 1825).

[135] *Id.* at 314.

[136] 5 Rawle 191 (Pa. 1835).

[137] *Id.* at 205.

[138] *Id.*

[139] "The liberty of the press consists in publishing the truth, from *good motives* and for *justifiable ends* . . . ." Respublica v. Dennie, 4 Yeates 267, 270 (Pa. 1805).

[140] REPORT OF THE TRIAL OF DR. SAMUEL THOMSON (Boston, Henry P. Lewis 1839) (reporting proceedings before the Boston Municipal Court).

lawyers argued that he was protected by the liberty of the press.[141] The judge's instructions to the jury mentioned the liberty of the press, but stated that libel law did not violate that liberty.[142] The jury convicted.[143]

6. The *Taylor v. Delavan* defendant was a temperance activist who submitted an item for publication in a newspaper,[144] alleging that a local brewer was using dirty water to brew his beer. The brewer sued for libel. The judge's instruction to the jury noted that "The law affords to every citizen the free use of the press to publish for the information or protection of the public," but that the law "restrains this liberty by requiring an adherence to truth."[145] The jury acquitted.[146]

f. Brandreth v. Lance (1839)

Brandreth v. Lance[147] was the first American court decision striking down an injunction as an unconstitutional interference with the freedom of the press. Lance was a business rival of Brandreth's, who commissioned a man named Trust to write an allegedly libelous biography of Brandreth, and contracted with Hodges (a printer) to publish it. Brandreth asked for, and got, an injunction barring businessman Lance, writer Trust, and printer Hodges from publishing the biography. The New York Chancery Court held that the injunction violated the liberty of the press, and nothing in the court's opinion suggested that the liberty of the press was a right that belonged only to printer Hodges; the injunction was dissolved as to all defendants, including Trust and Lance.

g. Summary

All these cases suggest that the "the freedom of the press" was seen as applicable not just to newspapermen, but also to ministers, politicians, businessmen, physicians, and others. One or another of the cases might be seen as an anomaly (for instance, because a particular defendant might have been viewed by the court as being closely enough linked to the press). But put together, the cases suggest that the press-as-technology model was widely accepted, and that there was nothing controversial about discussing the freedom of the press as belonging to people who were not members of the press-as-industry.

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[141] *Id.* at 40–41.

[142] *Id.* at 46.

[143] *Id.* at 48.

[144] A REPORT OF THE TRIAL OF THE CAUSE OF JOHN TAYLOR VS. EDWARD C. DELEVAN, PROSECUTED FOR AN ALLEGED LIBEL (Albany, Hoffman, White & Visscher 1840) (reporting on a New York case).

[145] *Id.* at 45.

[146] *Id.* at 48.

[147] 8 Paige Ch. 24 (N.Y. Ch. 1839).

2. Cases involving newspaper defendants

Three more cases involved newspaper editors as defendants, but in a context that shed light on the broader definition of the freedom of the press.

a. People v. Buckingham (1822)

People v. Buckingham[148] concluded that the liberty of the press secured to a defendant the right to introduce the truth of the statement as evidence that he published with a good motive. In the process, the judge discussed what "the press" means:

> What is the press?
>
> It is an instrument;—an instrument of great moral and intellectual efficacy.
>
> The liberty of the press, therefore, is nothing more than the liberty of a moral and intellectual being, (that is—of a moral agent) to use that particular instrument. . . .
>
> If A. thrust B. through with a sword, and he dies, A. has used an instrument over which he had power; whether in that he was guilty of an act of licentiousness, for which he is obnoxious to punishment, or merely exercised an authorized liberty, for which he shall go free, depends not upon the fact, or the effect, but upon the motive and end, which induced the thrust. . . .
>
> . . .
>
> [I]f the liberty to use the press depended, like the liberty to use every other instrument, upon the quality of the motive and the end; . . . then the right to give the truth in evidence would follow necessarily and of course.
>
> . . .
>
> Is there any thing in the nature of the instrument, called the press, which makes the liberty of a moral agent to use it, different from his liberty to use any other instrument? . . .
>
> In other words, Is it possible, that in a free country, under a Constitution which declares the liberty of the press is essential to the security of freedom, and that it ought not to be restrained; is it possible, that it is not the right of every citizen to use the press for a good motive and justifiable end? . . .
>
> In the opinion of this Court this right is inherent in every citizen under our Constitution, and a Court of Justice have no more right to deny to a person charged with a malicious use of the press, the liberty to show that its use was, in the particular case, for a good motive, and a justifiable end, than it has a right to deny to a man indicted for murder, the liberty to show that he gave the blow a purpose which the law justifies.[149]

The liberty of the press, according to the court, is a right belonging to "each citizen" to use the press as an "instrument"—an instrument in the

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[148] TRIAL: COMMONWEALTH VS. J.T. BUCKINGHAM, ON AN INDICTMENT FOR LIBEL (Boston, New-England Galaxy 1822).

[149] *Id.* at 9, 11, 13–14.

same sense as a "sword" is an instrument.[150] This suggests that the press was indeed seen as a technology that "every citizen" had a right to use, and not as an industry whose members alone had a right to publish.

b. Dexter v. Spear (1825) and Root v. King (1827)

Finally, two cases expressly stressed that printers and editors had precisely the same rights under the freedom of the press as other writers did. Thus, in *Dexter v. Spear*, Justice Story wrote that, "The liberty of speech and the liberty of the press do not authorize malicious and injurious defamation. There can be no right in printers, any more than in other persons, to do wrong."[151] Similarly, *Root v. King* stated that, under the state constitution's "liberty of the press," newspaper editors have no "other rights than such as are common to all."[152]

As the cases suggest, lawyers for newspapers had indeed begun to make arguments for special protection for the press-as-industry.[153] But the arguments were consistently rejected.

III. THE UNDERSTANDING AROUND 1868

By the years surrounding the ratification of the Fourteenth Amendment, the freedom of the press-as-technology understanding was even more clearly established. To begin with, a long line of cases expressly held—as did *Dexter v. Spear* and *Root v. King* in the 1820s—that the institutional press had no greater rights than anyone else. Thus, *Aldrich v. Press Printing Co.* (1864) held, "The press does not possess any immunities, not shared by every indi-

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[150] One might view the "press" in the sense of the collective industry of newspaper publishing as an "instrument" in the hands of a politician; but one would not view it as an instrument in the hands of a particular newspaper publisher. The "press" as a publisher's instrument is likely the printing press. *See, e.g.*, Beebe v. State, 6 Ind. 501, 515 (1855) (noting that under the Indiana Constitution's free press clause, libel could lead to "loss, by forfeiture, of the particular press made the instrument of 'abuse' [of the right to speak, write or print, freely, on any subject whatever]"), *overruled in part on other grounds by* Schmitt v. F.W. Cook Brewing Co., 187 Ind. 623 (1918); HOLT, *supra* note 319, at 49 (chapter on "Liberty of the Press") ("When we have termed the press a new and enlarged [newly discovered] instrument of publication, whether of good or evil, we have, in fact, pointed out that part of its nature which defense and circumscribes the law which attaches to it."); THOMAS STARKIE, A TREATISE ON THE LAW OF SLANDER AND LIBEL 163 (London, W. Clarke & Sons 1813) ("The pencil of the caricaturist is frequently an instrument of ridicule more powerful than the press . . . ."); 1 THOMAS STARKIE, A TREATISE ON THE LAW OF SLANDER AND LIBEL 142 (1st American ed., New York, G. Lamson 1826) (same).

[151] 7 F. Cas. 624 (C.C. D.R.I. 1825).

[152] 7 Cow. 613, 628 (N.Y. Sup. 1827).

[153] *See also* Hotchkiss v. Oliphant, 2 Hill 510 (N.Y. Sup. Ct. 1842) (noting such an argument, though apparently made as an argument about the common law rule, not about constitutional protection).

vidual."[154] *Sheckell v. Jackson* (1852) likewise upheld a jury instruction that stated,

> [I]t has been urged upon you that conductors of the public press are entitled to peculiar indulgence, and have especial rights and privileges. The law recognizes no such peculiar rights, privileges, or claims to indulgence. They have no rights but such as are common to all. They have just the same rights that the rest of the community have, and no more.[155]

Smart v. Blanchard (1860),[156] *Palmer v. City of Concord* (1868),[157] *Atkins v. Johnson* (1870),[158] *People v. Storey* (1875),[159] *Johnson v. St. Louis Dispatch Co.* (1877),[160] *Sweeney v. Baker* (1878),[161] *Barnes v. Campbell* (1879),[162] and *Delaware State, Fire & Marine Ins. Co. v. Croasdale* (1880)[163] echoed this.

So did leading treatises and other reference works. Thomas Cooley's *Constitutional Limitations* noted, in the section on "liberty of speech and of the press," that "the authorities have generally held the publisher of a paper to the same rigid responsibility with any other person who makes injurious

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[154] 9 Minn. 133, 138 (1864).

[155] 64 Mass. (10 Cush.) 25, 26–27 (1852); *see also* Stone v. Cooper, 2 Denio 293 (N.Y. Sup. 1845) (taking the same view).

[156] 42 N.H. 137 (1860) ("The conductor of a public press has the same rights to publish information that others have, and no more. He has no peculiar rights or special privileges or claims to indulgence.").

[157] 48 N.H. 211, 216 (1868) ("Conductors of the public press have no rights but such as are common to all.").

[158] 43 Vt. 78, 82 (1870) ("The publisher of a newspaper has no more right [under the 'freedom of the press'] to publish a libel upon an individual, than he or any other man has to make a slanderous proclamation by word of mouth.").

[159] Opinion of Judge Williams in *People v. Storey* (Cook Cty., Ill., Crim. Ct.), quoted in 1 JAMES A. MORGAN, THE LAW OF LITERATURE 266, 271, 275–76 (New York, James Cockcroft & Co. 1875) ("Editors must understand that their rights are the same, and no greater, than other citizens, and their responsibilities no less.").

[160] 65 Mo. 539 (1877) (stating that "The press should not, and under our constitution cannot, be muzzled," but going on to say that "'[a] newspaper proprietor . . . is liable for what he publishes in the same manner as any other individual'" (quoting TOWNSHEND, *supra* note 165)).

[161] 13 W. Va. 158, 182 (1878) (quoting *Sheckell*, though citing it by the wrong name), *overruled on other grounds but reaffirmed on this point*, Swearingen v. Parkersburg Sentinel Co., 26 S.E.2d 209, 215 (W. Va. 1943).

[162] 59 N.H. 128, 128–29 (1879) ("They [professional publishers of news] have the same right to give information that others have, and no more.").

[163] 6 Houst. (Del.) 181 (Del. Super. Ct. 1880) ("Every man has the right, guaranteed to him by the constitution, to print upon any subject, being responsible for the abuse of that liberty . . . . This law applies to publishers and editors as well as to other individuals, and they have no privilege in this State not common to everybody else.").

communications."[164] Townshend's *Treatise on the Wrongs Called Slander and Libel* (1868) likewise noted, in the section on "freedom of the press," that, "independently of certain statutory provisions," "the law recognizes no distinction in principle between a publication by the proprietor of a newspaper and a publication by any other individual";[165] "[a] newspaper proprietor . . . is liable for what he publishes in the same manner as any other individual."[166] Morgan's *Law of Literature* (1875) noted, "[A] writer for a newspaper" "stands in the same light precisely as other men; he is in no way privileged. . . . [T]he freedom of the press is, when rightly understood, commensurate and identical with the freedom of the individual, and nothing more."[167]

The one partial exception to this pattern appeared in the "Liberty of the Press" discussion in Cooley's 1879 *Treatise on the Law of Torts*, which suggested (without citation) that it "is not clear" "whether the conductor of a public journal has any privilege above others in publishing."[168] But even that treatise stated that "the freedom of the press implies . . . a right in *all persons* to publish what they may see fit, being responsible for the abuse of the right,"[169] and that "[t]he privilege of the press is not confined to those who publish newspapers and other serials, but extends to all who make use of it to place information before the public."[170]

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[164] THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 455 (Boston, Little, Brown 1868).

[165] JOHN TOWNSHEND, A TREATISE ON THE WRONGS CALLED SLANDER AND LIBEL § 252, at 343 (New York, Baker, Voorhis & Co. 1868).

[166] *Id.* Earlier, Townshend says that, "Whatever else may be intended by the phrase 'freedom of the press,' or 'liberty of the press,' it means the freedom or liberty of those who conduct the press," and in particular freedom from the requirement of a license to print. *Id.* at 437. But the more specific statements quoted in the text make clear that Townshend is recognizing that "those who conduct the press" had the same legal right as "any other individual" under the "freedom of the press."

[167] MORGAN, *supra* note 159, at 410.

[168] THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS 217 (Chicago, Callaghan & Co. 1879).

[169] *Id.* (emphasis added).

[170] *Id.* at 219. TIMOTHY W. GLEASON, THE WATCHDOG CONCEPT: THE PRESS AND THE COURTS IN NINETEENTH-CENTURY AMERICA 67 (1990), quotes *Detroit Daily Post Co. v. McArthur*, 16 Mich. 447, 451 (1868), as saying, "[a] special protection for newspapers within the common law was necessary," but this appears to be an error. No such passage is present in the cited case; and the purported quote doesn't seem like an accurate summary of the case, either. The court opinion concludes only that punitive damages are unavailable when a publisher took suitable care to avoid publishing libels written by others, including by hiring "competent editors," *id.* at 454. This appears to be much the same rule that some courts applied to other employers, who were not held liable in punitive damages for the actions of their employees unless the employers were aware of the employees' negligent habits, or failed to properly supervise them. *See* THOMAS G. SHEARMAN & AMASA A. REDFIELD, A TREATISE ON THE LAW OF NEGLIGENCE 655 (New York, Baker, Voorhis & Co. 1869). And two

Some of these sources spoke of the press-as-industry as having no special rights generally, while others noted this specifically in the context of libel law. But it's not surprising that many of these assertions were made in libel cases. Freedom of the press arguments in the 1800s were most commonly made in libel cases; libel law was probably the main restriction on publication. And there were credible arguments for giving newspapers some special exemption from the severest aspects of libel law. As the "Freedom of the Press" section of Townshend's *Slander and Libel* treatise noted, with sympathy,

> As respects newspapers, it is argued that the exigencies of the business of a newspaper editor demand a larger amount of freedom; that circumstances do not permit editors the opportunity to verify the truth prior to publication, of all they feel called upon to publish, and that they should not be responsible for the truth of what they publish.[171]

But despite the presence and plausibility of these arguments, the cases kept saying (in Townshend's words): "A newspaper proprietor . . . is liable for what he publishes in the same manner as any other individual."[172]

Some other cases spoke of the liberty of the press in cases where the speaker was not a member of the institutional press. *Life Ass'n of America v. Boogher* (1876) held, as *Brandreth v. Lance* had held, that a court would violate "the liberty of the press" by enjoining publications by a businessman

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decades later, the Michigan Supreme Court actually held unconstitutional a statute that limited presumed and punitive damages for publications in newspapers, on the grounds that the statute violated the constitutional right to protect reputation, and that "the public press occupies no better ground than private persons publishing the same libelous matter, and, so far as actual circulation is concerned." Park v. Detroit Free Press Co., 40 N.W. 731, 733–34 (Mich. 1888).

Likewise, *Wilson v. Fitch*, 41 Cal. 363 (1871), cited by GLEASON, *supra*, at 73–74, didn't appear to extend any special protection to newspapers. The court did state that, "The public interest, and a due regard to the freedom of the press, demands that its conductors should not be mulcted in punitive damages for publications on subjects of public interest, made from laudable motives, after due inquiry as to the truth of the facts stated, and in the honest belief that they were true." 41 Cal. at 384. But punitive damages were generally available in libel cases only when the jury found the defendant acted from "ill-will" (which would not be a "laudable motive[]"), TOWNSHEND, *supra* note 165, at § 290; and absence of an "honest belief that [defendant's statements] were true" would itself be evidence of 'ill-will," *id.* at § 388 n.1. The court thus seemed to be applying to newspapers only the same protection against punitive damages that the law generally gave libel defendants. And a later California decision, *Gilman v. McClatchy*, 44 P.2d 241, 243 (Cal. 1896), treated *Wilson* as consisted with the view that a reporter "has no more right" to convey allegedly defamatory material "than has a person not connected with a newspaper" (quoting *McAllister v. Detroit Free Press Co.*, 43 N.W. 431, 437 (Mich. 1889)).

[171] TOWNSHEND, *supra* note 165, at 439; *see also* Hotchkiss v. Oliphant, 2 Hill 510, (N.Y. Sup. Ct. 1842) (noting that the lawyer for the defendant newspaper editor had made a similar argument).

[172] *Id.*

that criticized another business.[173] *Fisher v. Patterson*, like many of the cases from 1784 to 1840, mentioned the liberty of the press in a case that involved a defendant who was apparently a businessman and a politician, not a newspaperman, though the court concluded that the liberty did not substantively extend to libels.[174]

Finally, Thomas Cooley, the leading American constitutional commentary of the second half of the nineteenth century,[175] wrote in 1880 that "Books, pamphlets, circulars, &c. are . . . as much within [the liberty of the press] as the periodical issues."[176] This too shows that the liberty extended to material that was generally not written by full-time newspaper and magazine writers, and (at least in the case of circulars) was often not even funded by people who were part of the press-as-industry.

The rule thus had not changed from the early Republic to the Ratification era: "The press" in "the freedom . . . of the press" was seen as referring to the press-as-technology, not to the press-as-industry.

IV. 1881 TO 1930

By 1881, the view that the press-as-industry has no special constitutional rights had become firmly entrenched orthodoxy, an orthodoxy that continued for the next fifty years. Consider, for instance, *Coleman v. MacLennan* (1908), the case that first recognized something like an "actual malice" test for speech about public officials, and that was later cited prominently for this proposition by *New York Times, Inc. v. Sullivan*:[177]

> Section 11 of the Bill of Rights sets off the inviolability of liberty of the press from the right of all persons freely to speak, write, or publish their sentiments on all subjects, and this fact has given rise to claims on the part of newspaper publishers of special privileges not enjoyed in common by all. . . . So far [such claims] have been rejected by the courts, and the present consensus of judicial opinion is that the press has the same rights as an individual, and no more.[178]

Likewise, two decades earlier, *Negley v. Farrow* held that "[t]he liberty of the press guaranteed by the Constitution is a right belonging to every one,

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[173] 3 Mo. App. 173, 180 (1876); *see Suit Against the Life Association of America*, 1 INS. L.J. 239 (1871) (reporting that Boogher was a trustee of the Association).

[174] 14 Ohio 418, 426–27 (1846); NELSON W. EVANS & EMMONS B. STIVERS, A HISTORY OF ADAMS COUNTY, OHIO 260–61 (West Union, Ohio, E.B. Stivers 1900) (describing John Fisher as a politician and a businessman, not a newspaperman).

[175] *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 616 (2008) (describing Cooley as the "most famous" of the "late-19th-century legal scholar[s]"); Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 225 (1995) (referring to "the great constitutional scholar Thomas Cooley").

[176] THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 282 (Boston, Little, Brown & Co. 1880).

[177] 376 U.S. 254, 280–82 (1964).

[178] 98 P. 281, 286 (Kan. 1908).

whether proprietor of a newspaper or not."[179] And these were just two of the many cases to acknowledge the press-as-technology view during the last decades of the nineteenth century[180] and during the start of the twentieth.[181]

Reference works of the era echoed this: "It is well settled that a newspaper or other printed publication has, as such, no peculiar privilege in commenting on matters of public interest. It has no greater privilege with respect to such comment than has any private person."[182] "The 'liberty of the press,' as the law no stands, is only a more extensive and improved use of the liberty of speech which prevailed before printing became general, and . . . belong[s] to every one, whether the conductor of a newspaper or not . . . ."[183]

"The usual constitutional guaranty of the 'freedom of the press' . . . is intended simply to secure to the conductors of the press the same rights and immunities, and such only, as are enjoyed by the public at large."[184] "[The] liberty of the press" "has never been held to mean that the publisher of a newspaper shall be any less responsible than any other person would be for publishing otherwise the same libelous matter"; "[t]he contrary rule has been affirmed by the courts of this country and England with great uniformity."[185]

V. THE MODERN FIRST AMENDMENT ERA: 1931 TO NOW

A. Three Models

The first Supreme Court decisions striking down government action under the First Amendment came in 1931.[186] Within the following decade, the Court adopted the press-as-technology view of the Free Press Clause, and the Court's decisions since then have continued to adhere to that view.

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[179] 60 Md. 158 (1883).

[180] *See, e.g.*, Pratt v. Pioneer Press, 14 N.W. 62, 63 (Minn. 1882); Banner Pub. Co. v. State, 84 Tenn. 176 (1885); Bronson v. Bruce, 26 N.W. 671, 672 (Mich. 1886); Regensperger v. Kiefer, 7 A. 284, 285 (Pa. 1887) (approvingly quoting jury instructions); Park v. Detroit Free Press Co., 40 N.W. 731, 733–34 (Mich. 1888); McAllister v. Detroit Free Press Co., 43 N.W. 431, 437 (Mich. 1889); Riley v. Lee, 11 S.W. 713, 714–15 (Ky. App. 1889); Kahn v. Cincinnati Times-Star, 10 Ohio Dec. 59 (Ohio Super. Ct. 1890); Commonwealth v. Murphy, 8 Pa. C.C. 399 (Pa. Quar. Sess. 1890).

[181] *See, e.g.*, State *ex inf.* Crow v. Shepherd, 76 S.W. 79, 94 (Mo. 1903); Williams v. Hicks Printing Co., 150 N.W. 183, 188 (Wisc. 1914); Fitch v. Daily News Pub. Co., 217 N.W. 947, 948 (Neb. 1928); Streeter v. Emmons County Farmers' Press, 222 N.W. 455, 457 (N.D. 1928).

[182] Comment on Matter of Public Interest as Libel or Slander, Ann. Cas. 1917B, at 409, 417.

[183] 18 THE AMERICAN AND ENGLISH ENCYCLOPÆDIA OF LAW 1051 (David S. Garland & Lucius P. McGehee eds., 2d ed. Northport, Edward Thompson Co. 1901).

[184] 17 RULING CASE LAW § 95, at 349 (Rochester, Lawyers Co-operative Pub. Co. 1917).

[185] WEST PUBLISHING, JUDICIAL AND STATUTORY DEFINITIONS OF WORDS AND PHRASES 7706 (St. Paul, West Publishing 1905).

[186] Near v. Minnesota, 283 U.S. 697 (1931); Stromberg v. California, 238 U.S. 539 (1931).

But since 1970, the matter—especially in lower courts—has been a bit more complex; and to explain that complexity, it's helpful to identify three possible approaches to the question:

1. Under the "all speakers equal" view, communicators are treated the same whether or not they use mass communications. "The freedom of speech, or of the press," the theory goes, provides the same protection for the rights to "speak," "write," and "print."[187]
2. Under the "mass communications more protected" view, the Free Press Clause provides special protection to all users of the press-as-technology.
3. Under the "press-as-industry more protected" view, the Free Press Clause provides special protection to the institutional press.

The first two approaches both fit the press-as-technology model. (The historical origin of the difference between the first two is largely outside the scope of this article.[188] I mention the first two models separately only because understanding the difference helps understand some of the court decisions discussed below.) The third is of course the press-as-industry model.

So here then is what has happened.

B. The Supreme Court: "All Speakers Equal"

1. Generally

The Court's decisions since 1931 generally take the "all speakers equal" view. The one possible exception comes in Justice Powell's influential concurrence in *Branzburg v. Hayes* (1972), which has been read by some lower courts as adopting a "mass communications more protected" approach.

Many of the post-1931 cases do sometimes refer to the concerns and rights of "newspapers" and "the media." Consider, for instance, the passage in *New York Times Co. v. Sullivan* statement that says, "Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive."[189]

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[187] *See supra* text accompanying notes 25 and 24.

[188] I couldn't find enough historical evidence to speak confidently about the "all speakers equal" vs. "mass communications specially protected" question. For evidence suggesting that the freedom of the press was likely seen as quite different from the freedom of speech, see Anderson, *supra* note 13. For evidence suggesting that the two were seen as providing essentially the same protections, though one for printing and the other for speaking, see Lange, *supra* note 18; United States v. Sheldon, 5 Blume Sup. Ct. Trans. 337 (Mich. Terr. 1829); sources cited *supra* Part II.C.

[189] 376 U.S. 254, 278 (1964); *see also, e.g.*, Old Dominion Branch No. 496 v. Austin, 418 U.S. 264, 292 (1974) (characterizing an earlier labor law case as "adopt[ing] as a rule of labor law pre-emption the constitutional standard of media liability for defamation originally enunciated for libel actions by public officials in *New York Times Co. [v. Sullivan]*"); Gertz v.

But this seems to stem just from courts' tendency to focus on the facts of the cases before them. Thus, for instance, within about a year of *New York Times Co. v. Sullivan*, the Court applied the *New York Times* holding to two non-newspaper defendants—a district attorney who made allegedly libelous statements at a press conference,[190] and to an arrestee who was sued for sending an allegedly libelous letter to a sheriff and sending an allegedly libelous press release to the wire services.[191]

This is why the analysis below looks at the aggregate holdings of the cases, and at the specific discussions of the all-speakers-equal vs. mass-communications-more-protected vs. press-as-industry-more-protected question. And looking at these, the Court's general adoption of the "all speakers equal" model becomes clear (again, with the possible exception of Justice Powell's *Branzburg v. Hayes* concurrence).

2. The "general laws" cases

The Court's first case on the subject was *Associated Press v. NLRB* (1937). The AP argued that the Free Press Clause secured a right to fire writers and editors for any reason, including labor union membership (which the AP thought could lead to bias in reporting news), notwithstanding federal labor law. The Court disagreed, holding that the press-as-industry has no special rights under the Free Press Clause: "The publisher of a newspaper has no special immunity from the application of general laws."[192]

The Court has repeated this in cases involving the Fair Labor Standards Act, antitrust law, and more.[193] In *Branzburg v. Hayes* (1972), for instance, the majority rejected a newsgatherer's privilege, adopting the "all speakers are equal"—and equally unprotected—approach. Part of the reason was the Court's unwillingness to give an industry special protection:

> The administration of a constitutional newsman's privilege would present practical and conceptual difficulties of a high order. Sooner or later, it would be necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods.
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> Freedom of the press is a "fundamental personal right" which "is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. . .

Robert Welch, Inc., 418 U.S. 323, 347 (1974) (stating that the Court's decision "shields the press and broadcast media from the rigors of strict liability for defamation").

[190] Garrison v. Louisiana, 379 U.S. 64 (1964).

[191] Henry v. Collins, 380 U.S. 356 (1965); *see* Henry v. Collins, 158 So. 2d 28 (Miss. 1963) (describing the facts).

[192] 301 U.S. 103, 132 (1937).

[193] Mabee v. White Plains Pub. Co., 327 U.S. 178 (1946); Associated Press v. United States, 326 U. S. 1 (1945); Citizen Publishing Co. v. United States, 394 U. S. 131, 139 (1969).

> . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." *Lovell* v. *Griffin,* 303 U.S. 444, 450, 452 (1938). See also *Mills* v. *Alabama,* 384 U.S. 214, 219 (1966); *Murdock* v. *Pennsylvania,* 319 U.S. 105, 111 (1943). The informative function asserted by representatives of the organized press in the present cases is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists. Almost any author may quite accurately assert that he is contributing to the flow of information to the public, that he relies on confidential sources of information, and that these sources will be silenced if he is forced to make disclosures before a grand jury.[194]

Justice Powell's three-paragraph concurrence seemed open to a privilege, though only a relatively weak one—Justice Powell did not endorse Justice Douglas's proposed absolute privilege, or Justice Stewart's proposed qualified privilege that could only be overcome by a showing of necessity to serve a compelling government interest. And the concurrence did speak of the rights of "newsmen."[195] But it did not go into any detail about whether "newsman" meant simply someone who worked for a newspaper (or perhaps, more narrowly, someone who worked on the news side rather than the opinion side), or whether it included someone who gathered the news (or information more broadly) just for one project, or only occasionally.

Moreover, Justice Powell signed on to the majority's opinion, which rejected the "press-as-industry specially protected" model. The concurrence apparently disagreed with the majority's categorical rejection of any newsgatherer's privilege; but nothing in the concurrence is inconsistent with the majority's embrace of the *Lovell* principle that the press-as-industry has no more constitutional rights than other would-be users of mass communications technology. And, as Part V.C.1 will discuss, nearly all lower court cases have either dismissed Justice Powell's opinion as merely a concurrence, or have read it as a "mass communications specially protected" doctrine rather than a "press-as-industry specially protected" doctrine.

Finally, and most recently, in *Cohen v. Cowles Media Co.* (1991), the Court rejected a newspaper's attempt to use the First Amendment as a defense to a

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[194] 408 U.S. 665, 703 (1972) (paragraph break added). In *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978), the Court likewise rejected a claim of special press immunity from search warrants. Only Justice Stewart, joined by Justice Marshall, would have adopted what appears to be a "press-as-industry specially protected" model. *Id.* at 571–72 (Stewart, J., dissenting). Justice Powell's concurrence suggested that "independent values protected by the First Amendment" should be considered in deciding whether a warrant should be issued, *id.* at 570 (Powell, J., concurring), but it's not clear whether he would have limited this to press-as-industry First Amendment interests. *Cf.* Stanford v. Texas, 379 U.S. 476 (1965) (cited by the *Zurcher* majority, 436 U.S. at 564. which Justice Powell joined) (holding, in a case not involving the press-as-industry, that the particularity requirement of the Warrant Clause should be read more strictly when the search was for "books, records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings and other written instruments concerning the Communist Party of Texas," 379 U.S. at 485–86).

[195] *Id.* at 709–10 (Powell, J., concurring).

promissory estoppel lawsuit brought by a source whose name was published after the newspaper promised him anonymity. "[G]enerally applicable laws," the Court held, "do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news."[196]

The Court has long been willing to give *speakers generally* some exemptions from generally applicable laws. This is especially so when the laws end up applying to speakers because of the content of their speech—for instance, when a breach of the peace prosecution, an intentional infliction of emotional distress lawsuit, an interference with business relation claim, or an antitrust claim is based on the message that the speaker conveyed.[197] But within this category of speakers, neither members of the press as industry nor users of the press as technology have gotten more protection than other speakers.

3. The literature distribution cases

Lovell v. City of Griffin (1938) expressly held that the freedom of the press extends beyond the press-as-industry:

> The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest. The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.[198]

The city's brief argued that nothing in the record suggested "that the appellant is a member of the press or that an ordinance abridging the freedom of the press would apply to her."[199] But it cited no cases supporting the view that the freedom of the press protected only "member[s] of the press," I suspect because no such cases were available.

Lovell was reaffirmed in *Schneider v. State* (1939),[200] *Martin v. City of Struthers* (1943),[201] and *Jamison v. Texas* (1943),[202] in which the Court cited the Free Press Clause in striking down ordinances that limited the distribution of handbills, circulars, and advertisements—ordinances that, unlike the

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[196] 501 U.S. 663, 669 (1991). Three of the four dissenters expressly agreed on this point. *Id.* at 674 (Blackmun, J., joined by Marshall and Souter, JJ., dissenting) ("Necessarily, the First Amendment protection [against promissory estoppel liability for revealing the name of a source] afforded respondents would be equally available to nonmedia defendants."). The fourth dissenter, Justice O'Connor, expressed no opinion on it.

[197] *See* Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1287–93 (2005) (citing pre-2005 cases); Snyder v. Phelps, 131 S. Ct. 1207 (2010).

[198] 303 U.S. 444, 452 (1938).

[199] Brief of Appellee in *Lovell v. City of Griffin*, 303 U.S. 444 (1938), at 12.

[200] 308 U.S. 147, 160–62, 164 (1939).

[201] 319 U.S. 141, 142 (1943).

[202] 318 U.S. 313, 314 (1943).

ordinance in *Lovell*, didn't even apply to typical newspapers or magazines. In *Schneider* and *Martin*, the Court spoke both of the freedom of the press and of the freedom of speech, but in *Jamison* it spoke of the freedom of the press alone.

Moreover, at around the same time the Court decided these cases, it also applied the same rules to speakers who weren't using mass communications technology at all—speakers on the street, picketers, and the like.[203] Put together, these cases thus embrace the "all speakers equal" view, and certainly reject the "press-as-industry specially protected" view.

4. The communicative tort cases

The results of the Supreme Court's communicative tort cases seem to be most consistent with the "all speakers equal" approach (though they might also be reconciled with the "mass communications specially protected" approach). In *New York Times Co. v. Sullivan* (1964), Sullivan sued both the *New York Times* and several ministers who signed the advertisement that criticized him. And the Court reversed the verdict against both the newspaper and the signers, applying the same "actual malice" rule to both.

In the process, the Court seemed to suggest that this identical rule stemmed from two different sources: the Free Press Clause as to newspapers, and the Free Speech Clause as to the signers:

> That the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold. Any other conclusion would discourage newspapers from carrying "editorial advertisements" of this type, and so might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities—*who wish to exercise their freedom of speech even though they are not members of the press.* Cf. *Lovell* v. *Griffin*, 303 U. S. 444, 452; *Schneider* v. *State*, 308 U. S. 147, 164.[204]

Though *Lovell* asserted the Free Press Clause rights of pamphleteering and leafleting defendants who were not "members of the press," *Sullivan* characterized such rights as being the "freedom of speech," not the "freedom of the press." It's not clear what to make of this, since in the last half century the Court has tended to use "freedom of speech" broadly. But in any event, the bottom line was that the signers—who were trying to use mass media communication but weren't themselves newspaper owners or writers—were given the benefit of precisely the same constitutional rule as the newspaper.

The same principle was applied in *Garrison v. Louisiana* (1964).[205] Garrison, a district attorney, held a press conference at which he issued a state-

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[203] *See, e.g.*, Cantwell v. State of Connecticut, 310 U.S. 296 (1940); Hague v. CIO, 307 U.S. 496 (1938).

[204] New York Times, Inc. v. Sullivan, 376 U.S. 254, 266 (1964) (emphasis added).

[205] 379 U.S. 64 (1964).

ment condemning several judges; he was then prosecuted for criminal libel. The Court applied the *New York Times Co. v. Sullivan* rule, albeit speaking of the "freedom of speech." One could have characterized Garrison as trying to exercise the "freedom of the press," because he was trying to convey his views through the press (though filtered by the reporters who wrote the actual stories). But the freedom of speech probably sounded like a more natural home for the right involved here, and in any event nothing turned on the label: The Free Speech Clause rule that protected Garrison was identical to the Free Press Clause that protected the *New York Times*.

Likewise, in *Henry v. Collins* (1965), the Court applied the *New York Times* rule to an arrestee who issued a statement—sent to the sheriff and to wire services[206]—alleging that his arrest stemmed from a "diabolical plot."[207] In *St. Amant v. Thompson* (1968), the Court applied the *New York Times* rule to a politician who was sued for libel based on a statement he read on a televised program.[208] The Court didn't say in either of the cases whether the decisions were based on the Free Speech Clause or the Free Press Clause, likely because that made no difference. And *McDonald v. Smith* (1985),[209] which held that the Petition Clause provided the same protection against libel lawsuits in petitions to the government as did cases such as *Garrison* and *New York Times*, further reinforced the notion that the rules are the same under all the expression-related clauses of the First Amendment.

Cohen v. Cowles Media (1991) reinforced this, by holding that the press-as-industry gets no exemption from laws that don't single out the press,[210] and by citing a communicative tort case, *Zacchini v. Scripps Howard*,[211] as an example of this principle. The opinion cited *Zacchini* for the proposition that "[t]he press, like others interested in publishing" was bound by copyright law,[212] but *Zacchini* itself involved the right of publicity tort. So the Court believes that the press-as-industry gets no exemptions from communicative torts, such as copyright infringement and likely the right of publicity.[213]

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[206] 158 So. 2d 28, 30 (Miss. 1963).

[207] 380 U.S. 356 (1965).

[208] 390 U.S. 727 (1968).

[209] 472 U.S. 479 (1985).

[210] 501 U.S. 663, 669 (1991). For more on why *Cohen v. Cowles Media* is properly read as discussing laws that apply equally to the press and to other speakers, see Volokh, *supra* note 197, at 1294–97.

[211] Zacchini v. Scripps-Howard Broadcasting Co., 433 U. S. 562, 576–79 (1977).

[212] 501 U.S. at 669.

[213] "[C]opyright infringement . . . is often characterized as a tort," Brayton Purcell LLP v. Recordon & Recordon, 606 F.3d 1124, 1128 (9th Cir. 2010), though its origin is statutory. Copyright infringement is the copyright analog of trespass—an interference with the property owner's exclusive rights. And *Zacchini* itself treated copyright infringement as a close analog to the right of publicity tort.

Bartnicki v. Vopper (2000) likewise held that the First Amendment equally protected a radio broadcaster and the person who communicated the allegedly actionable material to the broadcaster.[214] *Bartnicki* arose under federal statutes that banned both the interception of cellular phone conversations and the further republication by others of such intercepted conversations. Some unknown person intercepted a conversation in which union leaders appeared to be discussing possible violent attacks on management. That tape was left in the mailbox of Jack Yocum—"the head of a local taxpayers' organization" and the political adversary of the union—and Yocum delivered it to radio show host Frederick Vopper. The union leaders sued both Yocum and Vopper.

The Court concluded that the ban on republishing was trumped by the First Amendment, at least on the facts of the case. In the process, it stated, "The only question is whether the application of these statutes in such circumstances violates the First Amendment," and dropped a footnote saying, "In answering this question, we draw no distinction between the media respondents and Yocum. See, *e.g., New York Times Co.* v. *Sullivan,* 376 U. S. 254, 265–266 (1964); *First Nat. Bank of Boston* v. *Bellotti,* 435 U. S. 765, 777 (1978)."[215] The first citation is to the passage in *New York Times* that I quoted above, in which the Court notes that "persons who do not themselves have access to publishing facilities" are equally protected by the First Amendment. The second is to the passage in *First National Bank of Boston v. Bellotti* in which the Court held that "The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual."

Finally, *Snyder v. Phelps* (2011) held that picketers near a funeral had a First Amendment defense to a lawsuit for intentional infliction of emotional distress.[216] The prior precedent on the subject, *Hustler Magazine, Inc. v. Falwell*,[217] involved a media defendant, but *Snyder* followed and extended *Hustler* without any suggestion that the picketers merited less protection than the professional publisher in *Hustler*. The Court did not expressly discuss whether media defendants should be treated differently from speakers who are not members of the press as industry, and who are not directly using the channels of mass communication (except insofar as they are hoping for media coverage). But the Court's firm acceptance of the analogy to *Hustler* is consistent with the other cases cited in this section.

The Court thus has not accepted the "press-as-industry specially protected" view in communicative torts cases. And it also seems—though the

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[214] 532 U.S. 514, 525 & n.8 (2000).

[215] *Id.*

[216] 131 S. Ct. 1207 (2011).

[217] 485 U.S. 46 (1988).

matter is less clear—that it has taken the "all speakers equal" view rather than the "mass communications specially protected" view.

1. The Court has announced the same rules interchangeably under the Free Speech Clause and the Free Press Clause. This suggests the rules apply to non-mass-communications speakers exercising their Free Speech Clause rights (say, a hypothetical Garrison or Yocum who is making accusations only to his political allies) as much as to speakers who are exercising their Free Speech Clause rights by speaking to the media. Whatever mass communications vs. non-mass communications distinction the Free Press Clause might draw, no-one has suggested that the Free Speech Clause embodies that distinction.

2. *McDonald v. Smith* took the view that the Petition Clause rules are the same as under the Free Speech Clause and the Free Press Clause. Speech in most petitions to the government is *not* an attempt to engage in mass communications—the petition in *McDonald* itself was a letter to the President. If such non-mass-communications speech to the government is protected by the Petition Clause, and the First Amendment rules are the same under the three clauses, then non-mass-communications speech to others is also protected by the Free Speech Clause.

3. One libel case did involve speech that was not intended for mass communications technology; this was *Dun & Bradstreet v. Greenmoss Builders* (1985),[218] in which the Court held that a credit report sent out to six subscribers was less protected than speech on matters of "public concern." But while the Court held that the limited audience for the speech did suggest that the speech was less likely to be of "public concern," the Court expressly declined to adopt the media-nonmedia distinction accepted by the lower court. Indeed, five Justices (Justice White in his concurrence, and Justices Brennan, Marshall, Blackmun, and Stevens in dissent) specifically repudiated the distinction.[219]

Moreover, the test that the Court adopted, under which full constitutional protection applied only to speech on a matter of "public concern," stemmed from a case in which some non-mass-communications speech *was* found to be of "public concern"—*Connick v. Myers* (1983), in which a government employee's questions to coworkers about supervisors' alleged illegal pressure to work on political campaigns were found to be of "public concern."[220] *Connick* itself characterized an earlier case, *Givhan v. Western Line Independent*

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[218] 472 U.S. 749 (1985) (Powell, J., writing for three Justices, but in an opinion endorsed as to its bottom line by a majority).

[219] *See infra* note 248.

[220] Connick v. Myers, 461 U. S. 138, 149 (1983). *Connick* was expressly relied on by *Dun & Bradstreet*, 472 U.S. at 759, 760, 762. Other speech in *Connick* was found not to be of public concern, but only because it was seen as motivated solely by the speaker's personal employment dispute with her employer.

School District (1979),[221] as involving speech on a matter of "public concern," even though that speech consisted solely of an employee's statement to her employer. And shortly after *Dun & Bradstreet*, *Rankin v. McPherson* (1987) held that an employee's statement to a coworker was speech on a matter of "public concern."[222]

5. The campaign speech cases

Campaign finance laws have restricted various kinds of election-related speech, including corporate speech,[223] all speech that costs more than $1000,[224] and speech coordinated with a candidate.[225] Newspapers and magazines, of course, routinely engage in such speech, but so-called "media exemptions" to campaign finance laws have excluded the press-as-industry from such restrictions.[226] The Supreme Court has thus never had to directly consider a case in which the press-as-industry sought a *constitutional* entitlement to such exemptions.

But in *Citizens United v. FEC* (2010), the Court did specifically reject the "press-as-industry specially protected" model.[227] The majority argued that if restrictions on corporate expression about campaigns were constitutional, then newspapers—which are mostly owned by corporations—could likewise be restricted. The dissent suggested that this need not be so, because newspapers and similar publications might still have Free Press Clause rights that other corporations that wanted to publish material did not have.[228] Not so, the majority responded: "[T]he institutional press" has no "constitutional privilege beyond that of other speakers,"[229] so any restrictions that could constitutionally be imposed on nonmedia corporations could likewise be imposed on media corporations.

And though *Citizens United* overruled portions of *McConnell v. FEC* (2003) and *Austin v. Michigan Chamber of Commerce* (1990), those earlier

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[221] 439 U.S. 410 (1979).

[222] 483 U.S. 378 (1987).

[223] *See* Citizens United v. FEC, 130 S. Ct. 876 (2010) (invalidating such a restriction).

[224] *See* Buckley v. Valeo, 424 U.S. 1, 39 (1976) (invalidating such a restriction).

[225] *See id.* at 46–47 (discussing such a restriction).

[226] *See, e.g.*, Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 666–67 (1990) (quoting the state election law as exempting any "expenditure by a broadcasting station, newspaper, magazine, or other periodical or publication for any news story, commentary, or editorial in support of or opposition to a candidate for elective office . . . in the regular course of publication or broadcasting"); 2 U.S.C. § 431(9)(B)(i) (exempting expenditures for the production of "any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate").

[227] 130 S. Ct. 876 (2010).

[228] *Id.* at 952 n.57 (Stevens, J., dissenting).

[229] *Id.* at 905.

cases were not inconsistent with *Citizens United* on this point. *McConnell* said nothing about the matter. *Austin* noted that "the press' unique societal role may not entitle the press to greater protection under the Constitution," and held only that a media exemption was constitutionally *permissible*, not that it was constitutionally *mandatory*.[230]

In the process, *Austin* cited *First National Bank of Boston v. Bellotti* (1978), another campaign speech case that rejected the "suggestion that communication by corporate members of the institutional press is entitled to greater constitutional protection than the same communication by [nonmedia corporations]."[231] Three of the four dissenters in *First National Bank* agreed with the majority on this point, concluding that "the First Amendment does not immunize media corporations any more than other types of corporations from restrictions upon electoral contributions and expenditures," including expenditures for conveying their views about the election.[232]

In the Court's first campaign finance speech case, *United States v. Congress of Industrial Organizations* (1948), a four-Justice concurrence in the result—written by Justice Rutledge, and joined by Justices Black, Douglas, and Murphy—likewise rejected the "press-as-industry specially protected" model. In *CIO*, a union challenged a federal ban on the use of corporate and union funds for election-related speech. The majority interpreted the statute narrowly, as excluding union-owned newspapers. But the concurring Justices would have gone further and invalidated the statute, because occasional publications by organizations that didn't publish newspapers were entitled to the same constitutional protection as regular publications:

> I know of nothing in the Amendment's policy or history which turns or permits turning the applicability of its protections upon the difference between regular and merely casual or occasional distributions. Indeed pamphleteering was a common mode of exercising freedom of the press before and at the time of the Amendment's adoption. It cannot have been intended to tolerate exclusion of this form of exercising that freedom.[233]

The majority's conclusion that the statute did not cover the CIO's speech made it unnecessary for the majority to respond to this argument.

Finally, there has been no indication from the Court that it would accept even the "mass communications specially protected" model of the Free Press Clause; in fact, *McConnell v. FEC* (2003) quickly rejected this model,[234] af-

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[230] 494 U.S. 652, 668 (1990).

[231] 435 U.S. 765, 782 n.18 (1978).

[232] *Id.* at 808 n.8 (White, J., dissenting, joined by Brennan & Marshall, JJ.).

[233] United States v. CIO, 335 U.S. 106, 155 (1948) (Rutledge, J., concurring in the judgment).

[234] 540 U.S. 93, 209 n.89 (2003).

firming the district court's more detailed rejection.[235] And it seems unlikely that the Justices would treat the spending of $10,000 to print and mail campaign literature as constitutionally different from the spending of $10,000 to organize a political rally.[236]

6. The access to government facilities cases

In *Pell v. Procunier*, the Court likewise adopted the "all speakers equal" view as to access to government facilities. Three "professional journalists" sought the right to interview prison inmates face-to-face, but the Court disagreed:

> "It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally. . . . Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded." *Branzburg* v. *Hayes, supra,* at 684-685. Similarly, newsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public.
>
> The First and Fourteenth Amendments bar government from interfering in any way with a free press. The Constitution does not, however, require government to accord the press special access to information not shared by members of the public generally. [237]

Saxbe v. Washington Post Co., decided the same day, took the same view.[238] Even Justice Powell's dissent, joined by Justices Brennan and Marshall, expressly said,

> [N]either any news organization nor reporters as individuals have constitutional rights superior to those enjoyed by ordinary citizens. The guarantees of the First Amendment broadly secure the rights of every citizen; they do not create special privileges for particular groups or individuals. For me, at least, it is clear that persons who become journalists acquire thereby no special immunity from governmental regulation. To this extent I agree with the majority.[239]

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[235] A Congressman, an advocacy group, and some other plaintiffs in *McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C. 2003), *aff'd in relevant part*, 540 U.S. 93 (2003), *overruled as to other matters*, Citizens United v. FEC, 130 S. Ct. 876 (2010), argued that they were entitled to Free Press Clause protection, on a press-as-technology theory. But the district court took an "all-speakers-equal" view, and concluded that the Free Press Clause provided no more protection for mass communications speakers than does the Free Speech Clause, and that the reasoning of *Buckley v. Valeo*, 424 U.S. 1 (1976), allows some restrictions on both Free Speech Clause and Free Press Clause rights as to campaign-related speech. *Id.* at 234–36.

[236] The Court's campaign finance cases have all discussed the First Amendment generally (with occasional references to the freedom of speech). *See, e.g.*, *Buckley* (mentioning the First Amendment 109 times, and the "freedom of speech" and "free speech" only 12 times put together).

[237] 417 U.S. 817, 833 (1974).

[238] 417 U.S. 843, 850 (1974) ("[N]ewsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public.") (quoting *Pell v. Procunier*).

[239] *Id.* at 857 (Powell, J., dissenting).

Justice Douglas, dissenting in *Pell* and *Saxbe* disagreed, arguing that "the press" is "the institution which '[t]he Constitution specifically selected. . . to play an important role in the discussion of public affairs,'" and that it stood on a different footing from the public when it came to access.[240] But the majority did not accept this view; and even though Justices Brennan and Marshall joined Douglas's dissent, their views are hard to pin down on this—they also joined Justice Powell's dissent in *Saxbe*, which contradicted Douglas's view on this point.

A majority of the Justices in *Houchins v. KQED, Inc.* (1978) accepted the *Pell v. Procunier* view in rejecting a claimed right of access to prisons for videorecording purposes. Three of the seven participating Justices asserted that the press has no extra First Amendment rights beyond those held by the public at large.[241] Three more cited the similar language from *Pell v. Procunier*, and did not contradict it.[242] Only Justice Stewart, concurring in the judgment, concluded that the media should have the right to videorecord conditions even if the public generally lacked that right.[243]

Finally, in *Richmond Newspapers, Inc. v. Virginia* (1980), which held that the First Amendment generally prohibited closure of trials, Justice Brennan's concurrence in the judgment (joined by Justice Marshall) expressly noted that the question "whether the media should enjoy greater access rights than the general public" was not raised in the case.[244] But the majority in *Nixon v. Warner Communications, Inc.* (1978) had generally answered the question "no," holding that "The First Amendment generally grants the press no right to information about a trial superior to that of the general public."[245] (*Nixon* involved a claim right to make copies of tape recordings introduced at a criminal trial.) And before that, *Estes v. Texas* (1964) stated that "All [journalists] are entitled to the same rights [of access to trials] as the general public."[246]

7. The footnotes

So it seems that the Court is likely following the "all speakers equal" approach, and is definitely not following the "special protection for the press as industry" approach. Still, from 1979 to 1990, footnotes in five majority opinions have expressly reserved the question whether "nonmedia defendant[s]"

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[240] 417 U.S. at 841 (Douglas, J., dissenting, joined by Brennan & Marshall, JJ.).

[241] 438 U.S. 1, 11 (1978) (Burger, C.J., joined by White & Rehnquist, JJ.).

[242] *Id.* at 27–28 (Stevens, J., joined by Brennan & Powell, JJ., dissenting). The dissent's view was that the policy unconstitutionally interfered with access to information about the prison, both for the press and the public more generally. *Id.* at 28–30.

[243] *Id.* at 16 (Stewart, J., concurring in the judgment).

[244] 448 U.S. 555, 586 n.2 (1980) (Brennan, J., concurring in the judgment).

[245] 435 U.S. 589, 609 (1978). Justices Brennan and Marshall dissented in *Nixon*, but none of the dissenters discussed the First Amendment question

[246] 381 U.S. 532, 540 (1964) (dictum).

were unprotected by parts of the Court's emerging libel caselaw,[247] even though a majority of the Justices who sat on the Court during that era—Justices Brennan, Marshall, Blackmun, Stevens, and White—on various occasions answered "no" to that question, in separate opinions.[248] This has helped signal to lower courts that the question remains open. And a few lower courts have taken answered the question "yes," both after the footnotes began and before.

C. The Lower Court Cases

From the 1930s to the 1960s, lower court cases often repeated that the institutional press had no special First Amendment rights, whether generally,[249] with regard to libel law,[250] the duty to testify notwithstanding a promise of confidentiality made to a source,[251] access to trials,[252] and access to government documents.[253]

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[247] Babbitt v. United Farm Workers Nat. Union, 442 U.S. 289, 309 n.16 (1979); Hutchinson v. Proxmire, 443 U.S. 111, 133 n.16 (1979); Bose Corp. v. Consumers Union, 466 U.S. 485, 492 n.8 (1984); Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 779 n.4 (1986); Milkovich v. Lorain Journal Co., 497 U.S. 1, 20 n.6 (1990). Likewise, Chief Justice Burger noted that "the Court has not yet squarely resolved whether the Press Clause confers upon the 'institutional press' any freedom from government restraint not enjoyed by all others," *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 798 (1977) (Burger, C.J., concurring), though he argued that the Press Clause does not confer any such special protection.

[248] Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 781 (1985) (Brennan, J., joined by Marshall, Blackmun, and Stevens, JJ., dissenting) (concluding that the proposed distinction between "media" defendants and others is "irreconcilable with the fundamental First Amendment principle that '[t]he inherent worth of . . . speech in terms of its capacity for informing the public does not depend upon the identity of the source, whether corporation, association, union, or individual'"); *id.* at 773 (White, J., concurring in the judgment) ("I agree with Justice Brennan that the First Amendment gives no more protection to the press in defamation suits than it does to others exercising their freedom of speech."); *Hepps*, 475 U.S. at 780 (Brennan, J., joined by Blackmun, J., concurring) (repeating Justice Brennan's statement in *Dun & Bradstreet* on the subject); *Milkovich*, 497 U.S. at 24 n.2 (Brennan, J., joined by Marshall, J.) (repeating Justice Brennan's statement in *Hepps*); *see also* Cohen v. Cowles Media Co., 501 U.S. 663, 674 (1991) (Blackmun, J., joined by Marshall and Souter, JJ., dissenting) ("Necessarily, the First Amendment protection [against promissory estoppel liability for revealing the name of a source] afforded respondents would be equally available to nonmedia defendants."). In *Dun & Bradstreet*, the other four Justices expressed no opinion on the issue; the dissent and Justice White discussed it because the lower court and the parties had done so.

[249] *See, e.g.*, Layne v. Tribune Co., 146 So. 234, 238 (Fla. 1933); Curry v. Journal Pub. Co., 68 P.2d 168, 174–775 (N.M. 1937), *overruled on other grounds*, Ramirez v. Armstrong, 673 P.2d 822 (N.M. 1983).

[250] *See, e.g.*, Swearingen v. Parkersburg Sentinel Co., 26 S.E.2d 209, 215 (W. Va. 1943); Leers v. Green, 131 A.2d 781, 788–89 (N.J. 1957).

[251] *See, e.g.*, State v. Buchanan, 436 P.2d 729, 731 (Ore. 1968). *Rumely v. United States*, 197 F.2d 166 (D.C. Cir. 1952), *aff'd on other grounds*, 345 U.S. 41 (1953), concluded that a publisher had a right to refuse to reveal to the House Select Committee on Lobbying Activities the names of his customers; but the court's reasoning rested on anonymous speech prin-

When, then, did the "press-as-industry specially protected" decisions (and the "mass communications specially protected" decisions) first arise, and how common have they been? Answering this might be both historically interesting and practically useful for determining just how firmly rooted—or not—these models have become. And seeing cases that have adopted the models, especially the "press-as-industry specially protected" model, might provide helpful test cases for future discussions of whether the models are wise (though the substance of such future discussions is outside the scope of this Article).

The answer, as best I can tell, is that the first cases departing from the "all speakers equal" model came only in the 1970s. Moreover, the "press-as-industry specially protected" cases end up being just a handful, by my count only about a dozen. And during that era, many lower court cases continued to follow the "all speakers equal" model.[254]

1. The newsgatherer's privilege

As I noted, Justice Powell's concurrence in *Branzburg v. Hayes* implicitly rejected the "all-speakers-equal" approach. A person who gathers information just to convey it to business partners or friends wouldn't get a privilege (or else the general duty to testify would be eviscerated). But a person who gathers information for future mass communication would get some privilege of some unspecified force. And the first court decision that I could find that rejected the "all-speakers-equal" model—the district court decision in *Caldwell v. United States* (1970), reversed by the Supreme Court in *Branzburg v. Hayes*[255]—was a newsgatherer's privilege decision.

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ciples that applied beyond just the press-as-industry, and would have equally covered nonprofessional distributors of leaflets or pamphlets. The opinion repeatedly spoke equally about "books, pamphlets and other writings," 197 F.2d at 173, 174, and about the protection of attempts to influence public opinion—an activity that has long been engaged in by people outside the press-as-industry.

[252] *See, e.g.*, Kirstowsky v. Superior Court, 300 P.2d 163, 169 (Cal. Ct. App. 1956); United Press Associations v. Valente, 308 N.Y. 71, 84 (1954).

[253] *See, e.g.*, Grand Forks Herald, Inc. v. Lyons, 101 N.W.2d 543, 547 (N.D. 1960); Trimble v. Johnston, 173 F. Supp. 651, 655–56 (D.D.C. 1959).

[254] *See, e.g.*, *infra* note 256 (citing cases rejecting a journalist's privilege); *infra* note 266 (citing cases rejecting a media/nonmedia distinction in libel cases).

[255] 311 F. Supp. 358, 360 (N.D. Cal. 1970). *Garland v. Torre*, 259 F.2d 545 (2d Cir. 1958), written by then-Judge Stewart shortly before he was appointed to the Supreme Court, noted "that we are not dealing here with the use of the judicial process to force a wholesale disclosure of a newspaper's confidential sources of news, nor with a case where the identity of the news source is of doubtful relevance or materiality," *id.* at 549–50, which seems to imply that a privilege might be available if the news source is indeed "of doubtful relevance or materiality." But this is at most a suggestion; the opinion never said outright that such a privilege was available, and noted in a footnote two cases "to the effect that a journalist's professional status does not entitle him to sources of news inaccessible to others," *id.* at 548 n.4.

But both *Caldwell* and Justice Powell's concurrence in *Branzburg* didn't decide whether the privilege would follow the "mass communications specially protected" model or the "press-as-industry specially protected" model. Lower court cases that have considered the matter have nearly unanimously rejected the "press-as-industry specially protected," either because they reject any First Amendment newsgatherer's privilege (reasoning that Justice Powell's concurrence doesn't undercut the majority opinion[256]), or because they apply it to non-press-as-industry newsgatherers.

Thus, the First, Second, Third, Ninth, and Tenth Circuits, the Minnesota Supreme Court, and several district courts have held that would-be book authors,[257] professors doing possible research for a future article,[258] a film student and a professor trying to produce a documentary film,[259] a political candidate,[260] and political advocacy groups[261] were all potentially eligible for the privilege on the same terms as ordinary journalists. The threshold requirement seems to be that the newsgatherer, "at the inception of the investigatory process, had the intent to disseminate to the public the information obtained through the investigation."[262] The newsgatherer need not be a member of the press-as-industry.

The only newsgatherer's privilege case I could find that might be read as endorsing the "press-as-industry specially protected" view is *People v. LeGrand*, a 1979 New York intermediate appeals court case.[263] The *LeGrand*

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[256] *See, e.g.*, *In re* Grand Jury Subpoena, 438 F.3d 1141, 1148 (D.C. Cir. 2006); *In re* Grand Jury Proceedings, 810 F.2d 580, 585 (6th Cir. 1987); McKevitt v. Pallasch, 339 F.3d 530, 532 (7th Cir. 2003); Matter of Farber, 394 A.2d 330, 334 (N.J. 1978).

[257] Von Bulow v. von Bulow, 811 F.2d 136, 143 (2d Cir. 1987); Shoen v. Shoen, 5 F.3d 1289, 1293 (9th Cir. 1993); Ayala v. Ayers, 668 F. Supp. 2d 1248, 1250 (S.D. Cal. 2009); United States v. Hubbard, 493 F. Supp. 202 (D.D.C. 1979); *see also In re* Madden, 151 F.3d 125, 128–31 (3d Cir. 1998) (endorsing *Shoen* and *von Bulow*, though finding them inapplicable to the particular case).

[258] Cusumano v. Microsoft Corp., 162 F.3d 708 (1st Cir. 1998); *see also* United States v. Doe, 332 F. Supp. 938, 941 (D. Mass. 1971) (concluding that academic should be treated the same way as journalists, and citing *Lovell v. City of Griffin*, but concluding that the privilege was inapplicable for other reasons).

[259] Silkwood v. Kerr-McGee Corp., 563 F.2d 433, 436–37 (10th Cir. 1977) (citing *Lovell*).

[260] *In re* Charges of Unprofessional Conduct Involving File No. 17139, 720 N.W.2d 807, 816 (Minn. 2006).

[261] Builders Ass'n of Greater Chicago v. County of Cook, 1998 WL 111702, at *4–5 (N.D. Ill. Mar. 12); and Schiller v. City of New York, 245 F.R.D. 112, 118–20 (S.D.N.Y. 2007).

[262] 811 F.2d 136, 143 (2d Cir. 1987).

[263] I set aside the lower court decisions in *Stanford Daily v. Zurcher*, 353 F. Supp. 124 (N.D. Cal. 1972), *aff'd*, 550 F.2d 464 (9th Cir. 1977), *rev'd*, 436 U.S. 547 (1978), because they were reversed, and because it wasn't clear which model they were adopting. The question was whether searches of newspaper premises violated the Fourth Amendment, so the courts had no occasion to decide whether they would have reached the same result as to the search of a would-be book author's office, or of the office of a person or organization that created non-mass-communications speech (such as picketing or in-person speeches). And while the

court rejected a newsgatherer's privilege claim by someone who was researching a book about a mafia family, reasoning that:

> Under these facts, I conclude that the author's interest in protecting the confidential information is manifestly less compelling than that of a journalist or newsman. To report the news and remain valuable to their employer and the public, professional journalists must constantly cultivate sources of information. Newsmen must also maintain their credibility and trustworthiness as repositories of confidential information.
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> However, appellant, like most authors, is an independent contractor whose success invariably depends more on the researching of public and private documents, other treatises, and background interviews, rather than on confidential rapport with his sources of information. Thus, his contacts with confidential sources, being minimal vis-a-vis those of an investigative journalist, would be far less likely to have any impact on the free flow of information which the First Amendment is designed to protect.
>
> The court defers comment at this time with respect to some future situation in which an author's role would be clearly that of an investigative journalist whose work product will be published in book form.[264]

The court thus distinguished "professional journalist[s]" from those who are only one-time authors, and thus endorsed the "press-as-industry specially protected" approach. But this is the only such case that I could find.

State statutes—whether related to newsgatherer's privileges, retractions in libel cases, campaign finance law, or other subjects—often do single out the institutional media, and sometimes even just some segments of that media.[265] But such line drawing is part of what legislators do. When the broad constitutional language "freedom . . . of the press" is involved, courts deciding journalist's privilege cases have been unwilling to draw such lines that would distinguish the press-as-industry from other newsgatherers.

2. Communicative torts

Many communicative torts decisions in the lower courts have continued to follow the "all speakers equal" model.[266] And most of the lower court cases

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district court did reject the view "that newspapers, reporters and photographers have no greater Fourth Amendment protections than other citizens," it spoke more broadly of the principle that "The First Amendment is not superfluous," 353 F. Supp. at 134—not that the Free Press Clause is not superfluous—and cited, among other cases, *NAACP v. Alabama*, 357 U.S. 449 (1958), which protected an organization that was not part of the press-as-industry.

[264] 67 A.D.2d 446, 454–55 (N.Y. App. Div. 1979), *overruled by statute on other matters, as recognized in* Sullivan v. Hurley, 167 Misc. 2d 534 (1995).

[265] *See, e.g.*, DEL. CODE ANN. tit. 10, § 4320.

[266] *See, e.g.*, Flamm v. American Ass'n of University Women, 201 F.3d 144, 149 (2d Cir. 2000); Avins v. White, 627 F.2d 637, 649 (3rd Cir. 1980); Snyder v. Phelps, 580 F.3d 206, 219 n.13 (4th Cir. 2009), *aff'd*, 131 S. Ct. 1207 (2011); *In re* IBP Confidential Business Docs. Litig., 797 F.2d 632, 642 (8th Cir. 1986); Garcia v. Board of Ed. of Socorro Consol. School Dist., 777 F.2d 1403, 1410 (10th Cir. 1985); Davis v. Schuchat, 510 F.2d 731, 734 (D.C. Cir. 1975); Doe v. Alaska Superior Court, 721 P.2d 617, 628 (Alaska 1986); Antwerp Diamond Exch. of

that have departed from this approach have done so with regard to speech that was never intended for mass dissemination: credit reports,[267] employer references related to ex-employees,[268] people talking to their coworkers, supervisors, or neighbors,[269] and the like. So though such cases often say they are drawing a media/nonmedia distinction, their results could be consistent with the "mass communications specially protected" view, and not just the "press-as-industry specially protected" view.

Indeed, some cases that reject the "all speakers equally" model expressly hold that people who speak through the media—for instance, through letters to the editor, as people interviewed for news stories, and the like—should be as protected as the media, even if their non-mass-communications speech would be less protected. That fits well with the "mass communications specially protected" view.[270]

Am., Inc. v. Better Business Bureau, Inc., 637 P.2d 733 (Ariz. 1981); Miller v. Nestande, 192 Cal. App. 3d 191, 200 n.7 (1987); Moss v. Stockard, 580 A.2d 1011, 1022 n.2 (D.C. 1990); Nodar v. Galbreath, 462 So. 2d 803 (Fla. 1984); Rodriguez v. Nishiki, 653 P.2d 1145, 1149–50 (Haw. 1982); Kennedy v. Sheriff of East Baton Rouge, 935 So. 2d 669, 677–78 (La. 2006); Jacron Sales Co. v. Sindorf, 350 A.2d 688 (Md. 1976); Shaari v. Harvard Student Agencies, Inc., 691 N.E.2d 925, 928–29 (Mass. 1998); Henry v. Halliburton, 690 S.W.2d 775, 784 (Mo. 1985); Williams v. Pasma, 656 P.2d 212, 215–16 (Mont. 1982); Wheeler v. Nebraska State Bar Ass'n, 508 N.W.2d 917, 921 (Neb. 1993); Berkery v. Estate of Stuart, 988 A.2d 1201, 1208 (N.J. Super. Ct. App. Div. 2010); Poorbaugh v. Mullen, 653 P.2d 511, 520 (N.M. Ct. App. 1982); Gross v. New York Times Co., 281 A.D.2d 299, 300 (N.Y. App. Div. 2001) (endorsing *Hammerhead Enterps., Inc. v. Brezenoff*, 551 F. Supp. 1360, 1369 (S.D.N.Y. 1982), which contains a more detailed First Amendment discussion); Wampler v. Higgins, 752 N.E.2d 962, 972 (Ohio 2001); DeCarvalho v. DaSilva, 414 A.2d 806, 813 (R.I. 1980); Trigg v. Lakeway Publishers, Inc., 720 S.W.2d 69, 75 (Tenn. Ct. App. 1986); Casso v. Brand, 776 S.W.2d 551, 554 (Tex. 1989); Long v. Egnor, 346 S.E.2d 778, 783 (W. Va. 1986); *see also* RESTATEMENT (SECOND) OF TORTS § 580B cmt. e.

[267] *E.g.*, Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc., 461 A.2d 414, 417–18 (Vt. 1983), *aff'd on other grounds*, 472 U.S. 749 (1985); Grove v. Dun & Bradstreet, Inc., 438 F.2d 433, 437 (3d Cir. 1971).

[268] *E.g.*, Vinson v. Linn-Mar Community School Dist., 360 N.W.2d 108, 118 (Iowa 1984); Stuempges v. Parke, Davis & Co., 297 N.W.2d 252, 258 (Minn. 1980); Berg v. Consolidated Freightways, Inc., 421 A.2d 831, 502 (Pa. Super. Ct. 1980); Calero v. Del Chemical Corp., 228 N.W.2d 737, 745–46 (Wis. 1975).

[269] *E.g.*, Schmoer v. Smidt, 113 Cal. App. 3d 828, 834 (1980), *disapproved*, Miller v. Nestande, 192 Cal. App. 3d 191, 200 n.7 (1987); Williams v. Continental Airlines, Inc., 943 P.2d 10, 18 (Colo. Ct. App. 1996); Battista v. United Illuminating Co., 523 A.2d 1356, 1361 n.5 (Conn. Ct. App. 1987); Columbia Sussex Corp., Inc. v. Hay, 627 S.W.2d 270, 277 (Ky. Ct. App. 1981).

[270] *E.g.*, Richie v. Paramount Pictures Corp., 544 N.W.2d 21, 26 n.5 (Minn. 1996) ("Because Tatone's communication utilized the television media, we place her in the same legal position . . . as we place [the media defendants]."); Pollnow v. Poughkeepsie Newspapers, Inc., 107 A.D.2d 10, 16 (N.Y. App. Div. 1985) ("Whatever may be the rule with respect to purely private defamations having no nexus to the public media, we conclude, as have virtually all state and lower Federal Courts passing on the issue, that a nonmedia individual defendant who utilizes a public medium for the publication of matter deemed defamatory

I could find only a handful of cases that hold that ordinary citizens get less First Amendment protection than press-as-industry speakers would, even when the ordinary citizens are communicating to the public. Most of the cases denied non-media defendants the benefit of the *Gertz v. Robert Welch* prohibition on awards of presumed damages in the absence of a showing of "actual malice." If a case involves a different First Amendment doctrine, I will so note.

1. *Advertisements and letters to the editor*: *Fleming v. Moore* concluded that a real estate developer who bought a newspaper ad to criticize a citizen opponent of the development was a "non-media defendant."[271] (This sort of speaker would be the analog of the signers of the ad in *New York Times Co. v. Sullivan*, if Sullivan had been a private figure.) *Wheeler v. Green* held the same as to a race horse owner who sent a letter to the editor of a horse racing newsletter, alleging that a horse trainer had behaved unethically.[272] *Johnson v. Clark* held the same about the author of a letter to the editor of a newspaper, who was complaining about a lawyer's alleged mishandling of the man's uncle's large estate.[273]

2. *Books and authors' own Web sites*: *Lassiter v. Lassiter* concluded that an ex-wife who self-published a book (using a Web site that specializes in such printing services) accusing her ex-husband of physical abuse and adultery was a non-media defendant.[274] This particular speech probably could have

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should be accorded the same constitutional privilege as the medium itself."); Metabolife Int'l, Inc. v. Wornick, 72 F. Supp. 2d 1160, 1175 n.21 (S.D. Cal. 1999) (similar); *see also* Dairy Stores, Inc. v. Sentinel Pub. Co., Inc., 465 A.2d 953, 962–63 (N.J. Super. Ct. 1983) (reaching a similar result, though chiefly because of journalists' right to gather news from non-press-as-industry speakers, and the public's right to hear such speakers).

[271] 275 S.E.2d 632 (Va. 1981). Fleming was a real estate developer who was trying to develop a tract; Moore was a neighbor (a university professor) who spoke out against the application at local Planning Commission and Board of Supervisors meetings. Fleming responded by buying an ad in two local newspapers captioned "RACISM," which asserted that Moore (who was white) opposed the development because it would likely have many black residents.

In this particular case, the court held that even presumed damages were unavailable as a matter of state law, because the statement wasn't actionable *per se* (i.e., didn't accuse the plaintiff of a crime, or of conduct that is incompatible with proper performance of his business or profession). *Id.* at 636–67. But the broader holding was that presumed damages could be awarded in some libel cases (those that fit the state-law libel *per se* rules) brought by private figure plaintiffs against nonmedia defendants, even without a showing of "actual malice."

[272] 593 P.2d 777, 781–82, 787–89 (Ore. 1979). The court held that punitive damages were foreclosed by the Oregon Constitution. *Id.* at 119.

[273] 484 F. Supp. 2d 1242, 1250–51, 1254 (M.D. Fla. 2007). The court did not cite *Gertz* directly, or discuss the First Amendment, but simply discussed Florida law.

[274] 456 F. Supp. 2d 876, 881 (E.D. Ky. 2006) (holding inapplicable the *Gertz* prohibition on strict liability), *aff'd*, 280 Fed. Appx. 503 (6th Cir. 2008).

been found to not be on a matter of public concern,[275] which might have led to the same result without creating a separate rule for non-press-as-industry speakers. But the court made no such finding, relying instead on the non-media status of the defendant. Likewise, *Ben-Tech Indus. Automation v. Oakland University* treated a professor as a "non-media defendant" with regard to material posted on his Web site.[276]

3. *Quoted statements to the media*: Five cases held that people who spoke to the media did not have the full First Amendment protection that the media itself had, even though the speakers were themselves expressing their views by using mass communications technology. *Stokes v. CBS Inc.* so held with regard to on-camera interviews with a police detective investigating a case, interviews "built around the statements of" the detective.[277] *Denny v. Mertz* so held with regard to a defendant's statement to a reporter about why the defendant—the CEO of a large company—fired plaintiff, his general counsel.[278]

Guilbeaux v. Times of Acadiana, Inc. so held as to one casino developer's statements to a newspaper (which were in turn quoted extensively in the newspaper) about another casino developer. *Kanaga v. Gannett Co., Inc.* so held as to a patient's statements to the media (initiated by the patient herself) accusing a doctor of recommending unnecessary hysterectomies.[279] And *Landrum v. Board of Commissioners* suggested that the First Amendment barriers to tort recoveries for disclosure of allegedly private facts (there, that

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[275] *See, e.g.*, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761 n.7 (1985) (giving a false claim that a neighbor is a "whore" as an example of speech on matters of purely private concern).

[276] 2005 WL 50131, *6 & n.9, *7 (Mich. App. Jan. 11). The professor had posted a student paper as an example for other students, and the student paper contained defamatory allegations. But the court's conclusion rested not on this, but simply on the view that the First Amendment libel rules are for press-as-industry defendants alone.

The defendant didn't raise and the court didn't discuss a possible defense under 47 U.S.C. § 230, which has been held to immunize online speakers from liability when they choose to pass along material provided by others. *See, e.g.*, Batzel v. Smith, 333 F.3d 1018 (9th Cir. 2003).

[277] 25 F. Supp. 2d 992, 1000 (D. Minn. 1998). The exact effect of the defendant's status as non-media wasn't entirely clear, but it seems to have been that the defendant could be held liable for compensatory damages, even without a showing of negligence, so long as he acted out of "actual ill-will or a design causelessly and wantonly to injure plaintiff." *Id.* at 1002. The court specifically held that "on [the] issue of damages, private parties 'utiliz[ing] the television media' are placed 'in the same legal position' as media defendants," *id.* at 1003 (quoting *Richie*, 544 N.W.2d at 26 n.5 (Minn. 1996)).

[278] Denny v. Mertz, 318 N.W.2d 141 (Wisc. 1982).

[279] 687 A.2d 173, 181–82 (Del. 1996).

a police officer failed a marijuana test) did not apply to nonmedia defendants who had conveyed the information to newspapers.[280]

4. *Nonmedia defendants generally:* The Florida Supreme Court's standard jury instructions expressly put the burden of proving truth on nonmedia defendants,[281] even though *Philadelphia Newspapers, Inc. v. Hepps* required that the burden of proving falsehood be placed on plaintiffs, in cases involving matters of public concern and media defendants.[282] And the comments to the instructions seem to treat "media defendant" as meaning "a member of the press or broadcast media,"[283] which suggests that the court was endorsing the "press-as-industry specially protected" view.

Finally, *Senna v. Florimont* concluded that the inquiry into whether speech is on a matter of public concern for First Amendment libel law purposes should have a separate subprong for media defendants: If a statement is "published by a media or media-related defendant, a news story concerning public health and safety, a highly regulated industry, or allegations of criminal or consumer fraud or a substantial regulatory violation will, by definition, involve a matter of public interest or concern."[284] But it seems very likely that any item published through mass communications technology—whether by the media or otherwise—about those subjects would indeed be found to be on a matter of public concern.[285] The court's one example of non-public-concern speech, which was also the speech at issue in the case itself, was commercial speech, which is generally a less protected category of speech.[286] So it seems unlikely that the media/non-media distinction would in practice play a significant role under the *Senna* rule.

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[280] 685 So.2d 382 (La. App. 1996) (so holding as to the heightened summary judgment standard for libel cases announced in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986)).

[281] *In re* Standard Jury Instructions in Civil Cases (Civil Cases 89-1), 575 So.2d 194, 198–200 (Fla. 1991) (instruction MI 4.3).

[282] 475 U.S. 767, 775-76 (1986).

[283] 575 So. 2d at 199–200.

[284] 958 A.2d 427, 444 (N.J. 2008).

[285] Indeed, *Senna* specifically said that "speech concerning significant risks to public health and safety" would always qualify as being on a matter of public concern. *Id.*

[286] *Id.* In fact, the Third Circuit—in which New Jersey is located—has held that traditional First Amendment libel analysis doesn't apply to cases brought based on commercial advertisements. U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia, 898 F.2d 914, 931–33 (3d Cir. 1990). Another case from the Third Circuit, *Fanelle v. Lo-Jack Corp.*, 2000 WL 1801270 (E.D. Pa. Dec. 7), likewise held that "in defamation cases involving commercial speech by non-media defendants about private individuals, even when that speech touches on matters of public concern, the speech is not entitled to elevated levels of First Amendment protection, and therefore proof of falsity [under *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986)] is not required." *Id.* at *7.

3. Antidiscrimination law

Four dissenters in *Associated Press v. NLRB* (1937) took the view that the Free Press Clause secured the AP's right to refuse to employ union members as writers.[287] And the Washington Supreme Court's 1997 decision in *Nelson v. McClatchy Newspapers* seemed to follow that dissent.[288]

Washington state law bars employers from discriminating against employees based on their political activities. *Nelson* accepted a newspaper's First Amendment defense to a lawsuit brought under that law, in a case where a newspaper demoted a reporter for violating the newspaper's policy barring "high profile political activity" by its reporters; the court held that the newspaper had a First Amendment right to "editorial control," including control over who would write for its newspaper. *AP v. NLRB*, the court held, was limited to "the [National Labor Relations Act] and union activity."[289]

But it's not clear whether the decision falls in the "all speakers equal" category, the "mass communications specially protected" category, or the "press-as-industry specially protected" category. Though the decision often speaks of "free press" rights, it also speaks often of "free speech rights" and of "First Amendment" rights. The main precedent it relies on, *Miami Herald Co. v. Tornillo*,[290] though a newspaper case, has been equally applied to non-mass-communications speech such as a business's right to choose what to include in its mailings[291] and a parade organizer's right to choose what floats to include.[292] And the logic of the court's opinion would equally apply to, for instance, a political campaign's or political advocacy group's choice of employees who would give speeches on behalf of the group.

In fact, today the strongest precedent for securing some First Amendment exemption from antidiscrimination laws is a nonmedia case—*Boy Scouts of America v. Dale*, which held that the Boy Scouts had a First Amendment right to bar gays from being scoutmasters.[293] Scoutmasters' job, the Court

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[287] *See supra* Part V.B.2.

[288] Nelson v. McClatchy Newspapers, 936 P.2d 1123 (Wash. 1997).

[289] *Id.* at 1125, 1131, 1132.

[290] 418 U.S. 241 (1974).

[291] Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal., 475 U.S. 1, 11 (1986) (plurality) ("The concerns that caused us to invalidate the compelled access rule in *Tornillo* apply to appellant as well as to the institutional press. See *First National Bank of Boston* v. *Bellotti*, 435 U. S. at 782–784. Cf. *Lovell* v. *Griffin*, 303 U. S., at 452.") (footnote omitted). Justice Marshall's concurrence in the judgment did not disagree with the majority on this. *Id.* at 21–26.

[292] Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 515, 557, 575 (1995).

[293] 530 U.S. 640 (2000). Cases holding, under the Free Exercise Clause, that religious organizations have a right to discriminate in choice of clergy might also offer an analogy, though more distant because they do not directly involve "the freedom of the speech, or of the press." *See, e.g.*, EEOC v. Catholic Univ. of Am., 83 F.3d 455, 462 (D.C. Cir. 1996); *see also*

noted, is to "inculcate . . . values," "both expressly and by example,"[294] and because the Boy Scouts were opposed to homosexuality, allowing openly gay scoutmasters would interfere with the Scouts' ability to spread their message. The Court thus seems committed to protecting, to some extent, the rights of speaking organizations to control their message by choosing who speaks on their behalf—the right that the newspaper was asserting in *Nelson*. Likewise, the three other lower court cases recognizing First Amendment exemptions from antidiscrimination laws involved speakers who were not part of the press-as-industry: KKK parade organizers[295] and Nation of Islam organizers of single-sex lectures.[296]

It's not clear whether *Boy Scouts* and the lower court cases would extend to employment discrimination, in which people's careers are at stake, rather than just to selection of group members, volunteers, marchers, and audience members. But *Boy Scouts* and the other cases show that speaking organizations are likely to have at least as strong a First Amendment right to discriminate as do printing organizations. Following *Boy Scouts*, then, any cases that track *Nelson* are likely to fit the "all-speakers-equal" mold.[297]

4. Access to government operations and government and private property

The few lower court cases that I have found that discuss whether the press is constitutionally entitled to special access to government operations generally follow the Court's "all speakers equal" holdings.[298] Many courts do choose to provide special access to the media, whether television or print.[299]

Employment Division v. Smith, 494 U.S. 872, 882 (1990) (suggesting that Free Exercise Clause might mandate exemptions from generally applicable laws if it is linked with a freedom of association claim).

[294] *Id.* at 650.

[295] Invisible Empire of the Knights of the KKK v. Mayor, 700 F. Supp. 281 (D. Md. 1988).

[296] City of Cleveland v. Nation of Islam, 922 F. Supp. 56 (N.D. Ohio 1995); Donaldson v. Farrakhan, 762 N.E. 2d 835 (Mass. 2002).

[297] I have found no post-*Nelson* case so far that tracks *Nelson* in allowing newspapers—or other speakers—to discriminate in choice of employees.

[298] *See, e.g.*, Putnam Pit, Inc. v. City of Cookeville, 221 F.3d 834, 840 (6th Cir. 2000) (holding that journalist had no greater rights of access under the First Amendment to city parking ticket records than did the public, because " "[t]he First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally," quoting *Branzburg*); Belo Broadcasting Corp., 654 F.2d 423, 428 (5th Cir. 1981) (concluding, notwithstanding Justice Brennan's suggestion in *Richmond Newspapers* that the press might have special constitutional access rights, that "the press enjoys no constitutional right of physical access to courtroom exhibits"); Zenith Radio Corp. v. Matsushita Elec. Indus. Co., Ltd., 529 F. Supp. 866, 902 n.70 (E.D. Pa. 1981) (stating, in discussing a claimed right "to copy video and audio tapes that had been received as exhibits in a public criminal trial," that "Under the First Amendment, the press enjoys no greater access rights than the public generally.")

[299] Likewise, some legislatures have chosen to provide the institutional media with special access to other places, such as crime scenes. *See, e.g.*, CAL. PENAL CODE § 409.5.

But they generally do not hold that the press-as-industry have a *constitutional* right to such preferential treatment.[300]

I could find only four possible exceptions, all from 1971 to 1981. *Freedman v. New Jersey State Police* held, interpreting the New Jersey Constitution's Free Press Clause that the media—including a university student newspaper—have a right to go into farm worker camps, even when they are owned by the farm owners, notwithstanding the property owners' objections.[301] *People v. Rewald* held the same under the First Amendment, citing *Marsh v. Alabama*.[302] And *Allen v. Combined Communications* spoke generally of the need to protect newsgathering, though it held only that a "reporter" faced by a trespass claim should be immune from trespass law if two elements are met: (1) the reporter was unaware that he was trespassing, and (2) the property owner suffered no "damage as a result of the trespass."[303]

It's not clear, though, whether these cases necessarily involve a preference for the press-as-industry. *Marsh*, in particular, upheld Jehovah's Witnesses' right to distribute religious pamphlets in a company town—not obviously a press-as-industry activity—and might well extend to non-press-as-industry speakers and even to speakers who just want to speak face-to-face. Indeed, *Cohen v. Cowles Media Co.* later made clear that the press-as-industry gets no special exemption from generally applicable laws, which would presumably include trespass laws.[304] Any special First Amendment right to go on private property to speak must therefore stem from the general rights of all speakers, not the special rights of the press.

Finally, *State v. Lashinsky* took a more expressly "press-as-industry specially protected" view, stating that in various newsgathering contexts "the reporter stands apart from the ordinary citizen," though it rejected the access-to-crime-scene claim raised in that particular case.[305] But these are the only cases that I have found that provide reporters with such extra rights; even in New Jersey (home of *Freedman* and *Lashinsky*), these cases

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[300] *See, e.g.*, Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505, 520–22 (4th Cir. 1999).

[301] 343 A.2d 148, 151 (N.J. Super. Ct. App. Div. 1975).

[302] 318 N.Y.S. 2d 40 (N.Y. County Ct. 1971) (citing 326 U.S. 501 (1946)).

[303] 7 Med. L. Rptr. 2417, 2420 (D. Colo. 1981). *Garrett v. Estelle*, 424 F. Supp. 468 (N.D. Tex. 1977), held that the media had a right to videorecord an execution, but the decision was reversed on appeal, 556 F.2d 1274, 1278 (5th Cir. 1977) (citing *Pell v. Procunier* and *Saxbe v. Washington Post Co.* for the proposition that "The Constitution does not . . . require government to accord the press special access to information not shared by members of the public generally.").

[304] 501 U.S. 663, 669 (1991) (expressly stating that "[t]he press may not with impunity break and enter an office or dwelling to gather news," but using reasoning that would apply to other trespasses as well).

[305] 404 A.2d 1121, 1128 (N.J. 1979).

have not seemed to produce further special constitutional treatment for the press-as-industry.[306]

5. Campaign speech restrictions

As Part V.B.5 mentioned, the existence of the media exemption to most campaign finance laws has made it unnecessary for courts to decide whether the media is constitutionally entitled to the exemption. Still, at least two lower court decisions have adopted the "all speakers equal" position. The district court decision in *McConnell v. FEC* upheld certain campaign speech restrictions on the grounds that the Free Press Clause and Free Speech Clause provide equivalent constitutional protection.[307] And the Kentucky Court of Appeals struck down certain campaign speech restrictions on similar grounds, reasoning that a bar association had the same right as a newspaper to publish judicial candidate endorsements, because "the freedom of the press and freedom of speech" belong to all.[308]

The Federal Election Commission does seem to view the federal election law's media exemption—which is limited to broadcasting and periodicals,[309] and thus excludes books,[310] occasional newsletters,[311] and occasionally produced documentaries[312]—as tracking a First Amendment mandate. Implicitly, then, the FEC appears to be taking a "press-as-industry specially protected" view of the First Amendment.[313] But I could find no court decision that agreed with the FEC on this.

VI. CONCLUSIONS

The historical evidence, then, points powerfully in one direction: Throughout American history, the dominant understanding of the Free Press Clause

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[306] *See, e.g.*, *In re* Attorney General's "Directive on Exit Polling: Media and Non-Partisan Public Interest Groups," 981 A.2d 64, 80 n.13 (N.J. 2009) (rejecting one such proposed extension); State v. Cantor, 534 A.2d 83, 85–86 (N.J. Super. Ct. App. Div. 1987) (likewise).

[307] *See supra* note 235.

[308] Kentucky Registry of Election Finance v. Louisville Bar Assn', 579 S.W.2d 622, 627 (Ky. Ct. App. 1979).

[309] *See supra* note 226.

[310] AO 1987-08 (AIG/U.S. News), at 5 (FEC).

[311] AO 1989-28 (MRLC), at *6 (FEC); AO 1988-22 (Republican Associates), at *3 (FEC).

[312] AO 2004-30 (Citizens United) (FEC). The opinion stressed that Citizens United "does not regularly produce documentaries or pay to broadcast them on television" (Citizens United had asked for an advisory opinion about whether it could pay to broadcast a new documentary) and that "Citizens United has produced only two documentaries since its founding in 1988, . . . neither of which it paid to broadcast on television." *Id.* at *6. A later opinion, AO 2010-08 (Citizens United), at *5 (FEC) held that Citizens United was covered by the media exemption because it had by then produced more documentaries.

[313] *See, e.g.*, AO 2010-08 (Citizens United), at *3–*5 (FEC); AO 2003-34 (Viacom), at *3 (FEC).

(and its state constitutional analogs) has followed the press-as-technology model. This was likely the original meaning of the First Amendment. It was pretty certainly the understanding when the Fourteenth Amendment was ratified. It was the largely unchallenged orthodoxy until about 1970.

Since 1970, a few lower court decisions have adopted the press-as-industry model. But this has been a distinctly minority view. Supreme Court majority opinions have continued to provide equal treatment to speakers without regard to whether they are members of the press as industry. And while several opinions have noted that the question remains open, the bulk of the precedents point towards equal treatment for all speakers—or at least to equal treatment for all who use mass communications technologies, whether or not they are members of the press as industry.

This can help us interpret the Free Press Clause, to the extent we focus on its "purpose,"[314] its "history,"[315] the long-term traditions of the American legal system,[316] and precedent. It also suggests how we should interpret the Clause to the extent we focus on the "text."[317] Appeals to the text that the Framers ratified are naturally affected by what that text meant when it was ratified. "[T]ext and meaning ultimately are inseparable; to understand what the Framers said, we inevitably seek to discover what they meant."[318] Even Justices who do not broadly endorse originalism accept that original meaning evidence may be *relevant* to interpreting ambiguous legal phrases, even if it is not dispositive.[319]

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[314] *See supra* text accompanying note 5.

[315] *See supra* text accompanying note 3. The more conservative Justices have of course long stressed the significance of the historical understanding of constitutional provisions, including in free speech cases. *Citizens United*, 130 S. Ct. at 925–29 (2010) (Scalia, J., concurring, joined by Alito & Thomas, JJ.); Morse v. Frederick, 551 U.S. 393, 410 (2007) (Thomas, J., concurring); Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 424 n.9 (2000) (Thomas, J., dissenting, joined by Scalia, J.); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 358–59 (1995) (Thomas, J., concurring in the judgment).

[316] *See* United States v. Stevens, 130 S. Ct. 1577, 1584–85 (2010) (stressing, in an opinion joined by all the Justices except Justice Alito, the importance of "'histor[y] and tradition[]'" in determining whether a particular exception to First Amendment protection should be recognized); Eugene Volokh, *Implementing the Right To Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1450–51 (2009) (discussing Justice Scalia's occasional focus on post-Framing traditions, including in First Amendment cases); Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) (likewise focusing on traditions, though specifically in the context of recognizing unenumerated rights).

[317] *See supra* text accompanying note 3.

[318] Anderson, *supra* note 13, at 462.

[319] *See, e.g.*, *Citizens United*, 130 S. Ct. at 952 (Stevens, J., dissenting, joined by Breyer, Ginsburg & Sotomayor, JJ.); Davis v. FEC, 128 S. Ct. 2759, 2778 (2008) (Stevens, J., concurring in part and dissenting in part); Randall v. Sorrell, 548 U.S. 230, 274, 280-281 (2006) (Stevens, J., dissenting); Stogner v. California, 539 U.S. 607, 626 (2003) (Breyer, J., writing for the majority); U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995) (Stevens, J., writ-

And this is especially so when one is arguing based on the supposed literal meaning of an ambiguous text. By way of analogy, consider the Seventh Amendment, which secures the right to civil jury trial in "Suits at common law." "Suits at common law" could refer to claims brought under Anglo-American law as opposed to civil law; claims brought under judge-made law as opposed to statutory law; or claims that have been historically decided by courts of law as opposed to equity or admiralty.

We resolve that ambiguity not by adopting the meaning most commonly used today—probably judge-made law as opposed to statutory law—but rather by looking to how the ambiguous phrase was originally understood (claims of a sort historically decided by courts of law, back when law, equity, and admiralty courts were separate).[320] So it is with "the press." If we want to make an argument that rests on that ambiguous text, we should consider which of the possible meanings the text was originally understood to have.

Of course, the Supreme Court has never limited itself just to historical sources. Justices remain free to decide for themselves what they think best serves the values that they see as protected by constitutional provisions.[321] The point of this Article is simply to say that an argument for a press-as-industry interpretation of the Free Press Clause must rely on something other than original meaning, text, purpose, tradition, or precedent.

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ing for the majority); Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 583–84 (1983) (O'Connor, J., writing for the majority).

[320] *See, e.g.*, Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 447 (1830) (looking to Framing-era history in deciding that, "[t]he phrase 'common law,' found in this clause, is used in contradistinction to equity, and admiralty, and maritime jurisprudence"); *see also* Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 445 (1996) (referring back to *Parsons*); Curtis v. Loether, 415 U.S. 189, 193 (1974) (same).

[321] Many scholars have discussed this question of First Amendment theory, and I have nothing new to add to it. For some articles supporting the "press-as-industry specially protected" view, see, *e.g.*, Dyk, *supra* note 4; Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256 (2005); Stewart, *supra* note 5; West, *supra* note 2; Glen S. Dresser, Note, *First Amendment Protection Against Libel Actions: Distinguishing Media and Non-Media Defendants*, 47 S. CAL. L. REV. 902 (1974). For some articles supporting the "mass communications specially protected" view, see John J. Watkins & Charles W. Schwartz, *Gertz and the Common Law of Defamation*, 15 TEX. TECH. L. REV. 823 (1984); Robert D. Sack, *Reflections on the Wrong Question: Special Constitutional Privilege for the Institutional Press*, 7 HOFSTRA L. REV. 629 (1979) (though perhaps limited to those who publish "regularly," *id.* at 633). For some articles supporting the "all speakers equal" view, see Anderson, *supra* note 13; Arlen W. Langvardt, *Media Defendants, Public Concerns, and Public Plaintiffs*, 49 U. PITT. L. REV. 91 (1987); Lange, *supra* note 18; Lewis, *supra* note 60; David W. Robertson, *Defamation and the First Amendment*, 54 TEX. L. REV. 199 (1976); Steven Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 UCLA L. REV. 915 (1978); Van Alstyne, *supra* note 60.