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FREEDOM FOR THE PRESS AS AN INDUSTRY,  
OR FOR THE PRESS AS A TECHNOLOGY?  
FROM THE FRAMING TO TODAY

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INTRODUCTION

“[T]he freedom . . . of the press”<sup>1</sup> specially protects the *press as an industry*,<sup>2</sup> which is to say newspapers, television stations, and the like—so have argued some judges and scholars, such as the *Citizens United v. FEC* dissenters<sup>3</sup> and Justices Stewart,<sup>4</sup> Powell,<sup>5</sup> and Douglas.<sup>6</sup> This ar-

<sup>1</sup> U.S. CONST. amend. I.

<sup>2</sup> One could equally say “press as an occupation,” “press as a trade,” or “press as an institution.”

<sup>3</sup> The dissent argued that “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,” and that “[t]he text and history” of the Free Press Clause thus “suggest[] why one type of corporation, those that are part of the press, might be able to claim special First Amendment status.” 130 S. Ct. 876, 951 n.57 (2010) (Stevens, J., dissenting). Based on this, the dissent concluded that restrictions on the Free Speech Clause rights of nonpress entities can thus be upheld without threatening the special Free Press Clause rights of the institutional press. *Id.*

<sup>4</sup> See Potter Stewart, “*Or of the Press*,” 26 HASTINGS L.J. 631, 634 (1975) (arguing 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 a free press was . . . to create a fourth institution outside the Government as an additional check on the three official branches”).

<sup>5</sup> See *Saxbe v. Wash. Post Co.*, 417 U.S. 843, 863 (1974) (Powell, J., dissenting) (assuming a press-as-industry premise in arguing that “[t]he Constitution specifically selected the press . . . to play an important role in the discussion of public affairs” (internal quotation marks omitted)).

<sup>6</sup> See *Branzburg v. Hayes*, 408 U.S. 665, 721 (1972) (Douglas, J., dissenting) (arguing that professional journalists are constitutionally entitled to a privilege not to testify about their sources because the press-as-industry “has a preferred position in our constitutional scheme”); see also Timothy B. Dyk, *Newsgathering, Press Access, and the First Amendment*, 44 STAN. L. REV. 927, 931-32 (1992) (endorsing Justice Stewart’s historical

gument is made in many contexts: election-related speech, libel law, the journalist's privilege, access to government property, and more. Some lower courts have indeed concluded that some First Amendment constitutional protections apply only to the institutional press, and not to book authors, political advertisers, writers of letters to the editor, professors who post material on their websites, or people who are interviewed by newspaper reporters.<sup>7</sup>

Sometimes, this argument is used to support weaker 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 the latter set of cases is that the greater protection can be limited to institutional-press speakers, and so will undermine rival government interests less than if the greater protection were extended to all speakers.

But other judges and scholars—including the *Citizens United* majority<sup>8</sup> and Justice Brennan<sup>9</sup>—have argued that the “freedom . . . of the press” does not protect the press-as-industry, but rather protects everyone's use of the printing *press* (and its modern equivalents) *as a technology*.<sup>10</sup> People or organizations who occasionally rent the tech-

claim); Paul Horwitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*, 54 UCLA L. REV. 1497, 1505 (2007) (“The Press Clause singles out the press as an institution entitled to special protection under the umbrella of the First Amendment.”); Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. REV. 1025, 1027-29 (2011) (taking a similar view).

<sup>7</sup> For a discussion of these cases, which involve the journalist's privilege, libel law, and media access to government and private property, see *infra* Sections VII.A-B and D.

<sup>8</sup> 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)); *id.* at 928 n.6 (Scalia, J., concurring) (buttressing this claim with a discussion of the text of the Free Press Clause). For additional Supreme Court cases so holding, see *infra* Section VI.B.

<sup>9</sup> See *infra* note 303 (collecting such quotes from Justice Brennan and others arguing against treating media and nonmedia libel defendants differently for First Amendment purposes); see also cases cited *infra* note 321 (collecting recent lower court cases rejecting special protection for the press-as-industry); see also David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 446-47 (2002) (“To the generation of the Framers of the First Amendment, ‘the press’ meant ‘the printing press.’ It referred less to a journalistic enterprise than to the technology of printing and the opportunities for communication that the technology created. ‘Freedom of the press’ referred to the freedom of the people to publish their views, rather than the freedom of journalists to pursue their craft.”).

<sup>10</sup> I speak here of communications technologies that today serve the role the printing press did in the 1700s, not just of the printing press as such. “It is not strange that ‘press,’ the word for what was then the sole means of broad dissemination of ideas and news, would 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).

nology, for instance by buying newspaper space, broadcast time, or the services of a printing company, are just as protected as newspaper publishers or broadcasters.<sup>11</sup>

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 goes, would excessively undermine rival government interests—yet allowing such protection only for the institutional press would improperly give the institutional press special rights.<sup>12</sup>

Both sides in the debate often appeal at least partly to the constitutional text and 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-as-technology, says the other. *Citizens United* is unlikely to settle the question, given how sharply the four dissenters and many outside commentators have disagreed with the majority. So who is right? What light does the “history” referred to by the *Citizens United* dissent shed on the “text”<sup>13</sup> and the Framers’ “purpose”?<sup>14</sup>

The answer, it turns out, is that people during the Framing era likely understood the text as fitting the press-as-technology model—as securing the right of every person to use communications technology, and not just securing a right belonging exclusively to members of the publishing industry. The text was likely not understood as treating the press-as-industry differently from other people who wanted to rent or borrow the press-as-technology on an occasional basis.

Parts I, II, and III set forth the evidence on this subject from the Framing era and the surrounding decades. Part I discusses, among other things, early reference works and state constitutions that de-

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The printing press itself was understood during the Framing era as a technological innovation, and existing rights were understood as being adaptable to technological innovations. See THOMAS HAYTER, AN ESSAY ON THE LIBERTY OF THE PRESS CHIEFLY AS IT REFLECTS PERSONAL SLANDER 3-4 (London, J. Raymond 1754); FRANCIS LUDLOW HOLT, THE LAW OF LIBEL 38-39 (photo. reprint 1978) (1812).

<sup>11</sup> Alternatively, one could conclude that people who rent such access become members of the press-as-industry for those occasions. But then the results would be the same as under the press-as-technology view, because anyone who occasionally uses the press as a technology would be treated the same as members of the press-as-industry.

<sup>12</sup> See, e.g., cases cited *infra* Section VI.B.

<sup>13</sup> See *supra* note 3.

<sup>14</sup> See Stewart, *supra* note 4, at 634.

scribed the freedom of the press as a right of “every freeman,” “every man,” or “every citizen.” This right was generally seen as the right to publish using mass technology, as opposed to the freedom of speech, which was seen at the time as focusing more on in-person speech.

Part II discusses the Framing-era understanding that the freedom of the press extended to authors of books and pamphlets—authors who were generally not members of the press-as-industry,<sup>15</sup> though they did use the press as technology. Part III goes on to discuss fifteen 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. 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 toward the press-as-technology reading, under which all users of mass communications technologies have the same freedom of the press.

Part IV turns to how the “freedom . . . of the press” was understood around 1868, when the Fourteenth Amendment was ratified. Much recent scholarship has suggested that originalist analyses of Bill of Rights provisions applied to the states via the Fourteenth Amendment should consider the original understanding as of 1868 in addition to that of 1791.<sup>16</sup> And it 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 V offers evidence that this remained true from 1880 to 1930.

Part VI then looks at how the Supreme Court has understood “freedom . . . of the press” since 1931, the first year that the Court struck down government action on First Amendment grounds. Throughout that time, the press-as-technology view has continued to be dominant. 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.

Part VII turns to how the “freedom . . . of the press” has been understood by lower courts since 1931, and concludes that the press-as-technology view has been dominant there as well. The first lower court decisions I could find adopting the press-as-industry view did not

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<sup>15</sup> See *infra* Section II.A.

<sup>16</sup> 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. & MARY BILL RTS. J. 315, 327-30 (2004) (book review); Stephen A. Siegel, *Injunctions for Defamation, Juries, and the Clarifying Lens of 1868*, 56 BUFF. L. REV. 655, 659-63 (2008).

appear until the 1970s. Even since then, only a handful of cases have adopted such a view, and many more have rejected it. (The press-as-industry cases that this Part identifies could also be helpful as test cases for any future work that discusses the policy advantages and disadvantages of the press-as-industry model.)

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 has historically been seen as the equal of other people and organizations for purposes of the “freedom . . . of the press.” The constitutional protections offered to the institutional media have long been understood—in the early republic, around 1868, from 1868 to 1970, and in the great bulk of cases since 1970 as well—as being no greater than those offered to others.

Finally, the Conclusion briefly discusses what effect this analysis should have on the Court’s interpretation of the Free Press Clause. 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.

## I. EVIDENCE FROM AROUND THE FRAMING: THE FREEDOM OF THE PRESS AS A RIGHT OF “EVERY FREEMAN”

### A. *Cases, Treatises, and Constitutions*

Early formulations of the freedom of the press spoke of it as a right of every “freeman,” “citizen,” or “individual.” These formulations 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 1769 that “[e]very freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press.”<sup>17</sup> Jean-Louis de Lolme, an author widely cited by 1780s American writers, likewise wrote in his chapter on “Liberty of the Press” that “[e]very 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

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<sup>17</sup> 4 WILLIAM BLACKSTONE, COMMENTARIES \*151 (emphasis added); see also David Lange, *The Speech and Press Clauses*, 23 UCLA L. REV. 77, 99 (1975) (“The emphasis in ‘freedom of the press’ was upon unrestrained dissemination of thought and the right belonged not merely to ‘the press’ but to ‘every free man.’”).

observations before the Public, by the means of an open press.”<sup>18</sup> The right to present petitions, of course, was not limited to the press as an industry, but really did belong to “[e]very subject.” De Lolme’s explanation suggests that the right to speak to the public via “an open press” likewise extended to all subjects, whether or not they used the printing press for a living.

State supreme courts in 1788 and 1791 similarly described the liberty of the press as “permitting *every man* to publish his opinions,”<sup>19</sup> and as meaning that “*the citizen* has a right to publish his sentiments upon all political, as well as moral and literary subjects.”<sup>20</sup> Justice Iredell described the liberty of the press in 1799 as meaning that “[e]very *freeman* has an undoubted right to lay what sentiments he pleases before the public.”<sup>21</sup> St. George Tucker, in 1803, defined the “freedom of the press” as meaning that “[e]very *individual*, certainly, has a right to speak, or publish, his sentiments on the measures of government.”<sup>22</sup>

Several early state constitutions echoed this as well, providing that “[e]very *citizen* may freely speak, write and print on any subject, being responsible for the abuse of that liberty.”<sup>23</sup> Likewise, Justice Story, who

<sup>18</sup> J. L. DE LOLME, *THE CONSTITUTION OF ENGLAND* 280 (London, T. Spilsbury 1775) (emphasis added). De Lolme is tied for third on Donald Lutz’s list of the most-cited authors in 1780s American political writing, behind Blackstone and Montesquieu, and tied with Cesare Beccaria and with Trenchard and Gordon of *Cato’s Letters*. Donald S. Lutz, *The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought*, 78 AM. POL. SCI. REV. 189, 193 (1984).

<sup>19</sup> *Respublica v. Oswald*, 1 Dall. 319, 325 (Pa. 1788) (emphasis added).

<sup>20</sup> *Commonwealth v. Freeman*, *HERALD OF FREEDOM* (Boston), Mar. 18, 1791, at 5 (Mass. 1791) (emphasis added).

<sup>21</sup> *In re Fries*, 9 F. Cas. 826, 839 (Iredell, Circuit Justice, C.C.D. Pa. 1799) (No. 5126) (grand jury charge) (emphasis added) (quoting 4 WILLIAM BLACKSTONE, *COMMENTARIES* \*151).

<sup>22</sup> 2 BLACKSTONE’S *COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA* app. 28 (St. George Tucker ed., Philadelphia, William Young Birch & Abraham Small 1803) [hereinafter TUCKER] (emphasis added).

<sup>23</sup> PA. CONST. of 1790, art. IX, § 7 (emphasis added); see also, e.g., DEL. CONST. of 1792, art. I, § 5 (“The press shall be free to every citizen, who undertakes to examine the official conduct of men acting in a public capacity; and any citizen may print on any subject, being responsible for the abuse of that liberty.”); KY. CONST. of 1792, art. XII, § 7 (“[P]rinting presses shall be free to every person who undertakes to examine the proceedings of the Legislature or any branch of Government . . . and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty.”); *Sovchik v. Roberts*, No. 3090-M, 2001 WL 490015, at \*3 n.1 (Ohio Ct. App. May 9, 2001) (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 in *Wampler v. Higgins*, 752 N.E.2d 962, 972 (Ohio 2001).

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 other person . . . or attempt to subvert the government.”<sup>24</sup> These references to a right of “every freeman,” “every man,” “every citizen,” and “every individual” 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 speech, or of the press,”<sup>25</sup> 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,”<sup>26</sup> which suggests that the freedom of the press was a re-statement of the right of “the people” to publish.

Early cases, such as the 1803 *Runkle v. Meyer* decision, likewise treat the “liberty of the press” as equivalent to the provision that “every citizen may freely speak, write and print on any subject.”<sup>27</sup> And St.

<sup>24</sup> 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 732 (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) (under “press”). Another definition in the same dictionary, listed under “liberty,” was much the same: “freedom from any restriction on the power to publish books; the free power of publishing what one pleases, subject only to punishment for abusing the privilege, or publishing what is mischievous to the public or injurious to individuals.” *Id.*

<sup>25</sup> See, e.g., CONN. CONST. of 1818, art. 1, §§ 5–6 (protecting the right of “[e]very citizen [to] write and publish his sentiment on all subjects” and prohibiting any law from “curtail[ing] or restrain[ing] the liberty of speech or of the press”); N.Y. CONST. of 1821, art. 7, § VIII (“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.”).

<sup>26</sup> PA. CONST. of 1776, ch. I, para. XII. For a discussion of three New York court cases that were decided within a few years of the enactment of article 7, section VIII of the New York Constitution of 1821 and take the press-as-technology view, see *infra* subsections III.B.3-4 and III.C.2.

<sup>27</sup> See 3 Yeates 518, 519 (Pa. 1803) (quoting the Pennsylvania Constitution’s statement that “every citizen may freely speak, write and print on any subject” in explaining what the court saw as the proper understanding of “liberty of the press”).

George Tucker, Chancellor Kent, and Justice Joseph Story all treated the First Amendment 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.”<sup>28</sup>

### B. *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 or no employees.<sup>29</sup> Woodward and Bernstein were many decades in the future; Framing-era newspapers didn’t do sustained investigative journalism.<sup>30</sup>

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, Hamilton, and Jay’s *The Federal-*

<sup>28</sup> 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 14 (New York, O. Halsted 1827); see also 3 STORY, *supra* note 24, at 732-33; 2 TUCKER, *supra* note 22, app. 11-14. The Justices have often accepted these treatises 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); Harmelin v. Michigan, 501 U.S. 957, 977, 982 (1991) (Scalia, J., joined by Rehnquist, C.J.); Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 29 (1991) (Scalia, J., concurring in the judgment).

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 ANNALS OF CONG. 434 (1789) (Joseph Gales ed., 1834)—to the briefer First Amendment language (“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 was seen as equivalent to the people’s right to speak, to write, or to publish their sentiments.

<sup>29</sup> See, e.g., FREDERIC HUDSON, 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) (describing how the publisher of the first American daily newspaper “[u]ndoubtedly . . . did all the work on his paper himself during at least part of [1783-1784], even . . . selling it on the street”).

<sup>30</sup> See Anderson, *supra* note 9, at 446-47 (“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.”).

ist essays are a classic example.<sup>31</sup> “[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.”<sup>32</sup>

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. This is especially so given that some of the most powerful and wealthy contributors, such as the politicians and planters who wrote so much of the important published material, weren’t part of the industry. Some eighteenth-century American political figures—such as the young Benjamin Franklin and Representative Matthew Lyon, one of the targets of a Sedition Act prosecution—were indeed newspapermen, but they were rare exceptions.

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. Rather, as William Livingston—who later became a governor of New Jersey and a delegate to the Constitutional Convention—wrote in his 1753 essay titled *Of the Use, Abuse, and Liberty of the Press*, one of the great benefits provided by “the Art of Printing” and “the Invention of the Press” is that “the Press” could be used by “Writers of every Character and Genius,” including “[t]he Patriot,” “[t]he Divine” (i.e., the clergyman), “the Philosopher, the Moralist, the Lawyer, and Men of every other Profession and Character, whose Sentiments may be diffused with the greatest Ease and Dispatch.”<sup>33</sup>

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

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<sup>31</sup> Nor were these statements necessarily endorsed by the newspaper publishers to the point that they could be seen as an expression of the publishers’ own views. See, e.g., PAULINE MAIER, *RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788*, at 70-75 (2010) (describing the public pressures that kept many anti-Federalist essays from being published, and describing how some tried to counteract those pressures by publishing the materials without endorsing them as their own opinions).

<sup>32</sup> MOTT, *supra* note 29, at 162; see also DONALD H. STEWART, *THE OPPOSITION PRESS OF THE FEDERALIST PERIOD* 20 (1969) (stating, in reference 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”).

<sup>33</sup> William Livingston, *Of the Use, Abuse, and Liberty of the Press*, INDEP. REFLECTOR, Aug. 30, 1753, *reprinted in* THE INDEPENDENT REFLECTOR 336, 336-37 (Milton M. Klein ed., 1963).

newspapers without a government, I should not hesitate a moment to prefer the latter."<sup>34</sup> But Jefferson spoke of newspapers, not newspapermen. There is no reason to think his praise, or the Free Press Clause, 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 that a right of "every person" to publish using the press might refer only to the right of every person—including Livingston's clergyman, philosopher, moralist, or lawyer—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 a person buys the press or starts a newspaper, the theory would go, what the person publishes with it would be protected by the freedom of the press. But until then, the freedom of the press does not cover any article the person submits to a newspaper, or any leaflet that the person pays a printer to print.

This, though, seems like an odd understanding of the "undoubted right" of "[e]very freeman" "to lay what sentiments he pleases before the public."<sup>35</sup> 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.

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, Hamilton, and Jay's *The 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*).<sup>36</sup>

Again, one can imagine a notion of the "undoubted right" of "[e]very freeman" "to lay what sentiments he pleases 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 (for instance, against a libel lawsuit, libel prosecution, or injunction) had to buy their own presses or start their own newspapers, which they almost never did. But the cases, commentaries, and

<sup>34</sup> Letter from Thomas Jefferson to Colonel Edward Carrington (Jan. 16, 1787), in 2 MEMOIRS, CORRESPONDENCE, AND PRIVATE PAPERS OF THOMAS JEFFERSON 84, 85 (Thomas Jefferson Randolph ed., London, Henry Colburn & Richard Bentley 1829).

<sup>35</sup> See *supra* note 17.

<sup>36</sup> See *infra* note 69. 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.

Framing-era practice do not suggest that anyone at the time had such an odd understanding of what “[e]very freeman[’s]” “right” meant.

### C. *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 include 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.”<sup>37</sup> 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 [im]proved way invented by human ingenuity in the form of the press.”<sup>38</sup> He likewise describes the “liberty of the press” as “what is necessarily included in its equivalent and progressive terms, thinking, speaking, and writing,”<sup>39</sup> as “one of the forms of the liberty of speech and communication,”<sup>40</sup> and later in the book as “[t]he natural liberty of the people” to engage in “opinion, . . . inquiry, and . . . discussion” about Parliament.<sup>41</sup> And Holt 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.”<sup>42</sup> 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), in which the author 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 lib-*

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<sup>37</sup> HOLT, *supra* note 10, at 36.

<sup>38</sup> *Id.* at 38 (emphasis added). The original reads “the more approved,” but the author must have meant “the more improved,” and the 1816 revision makes that correction. FRANCIS LUDLOW HOLT, *THE LAW OF LIBEL* 51 (London, J. Butterworth et al. 2d ed. 1816).

<sup>39</sup> HOLT, *supra* note 10, at 37.

<sup>40</sup> *Id.* at 45.

<sup>41</sup> *Id.* at 128.

<sup>42</sup> *Id.* at 46-47.

*erty 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.<sup>43</sup>

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.<sup>44</sup> 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, I think they do not overcome the evidence of the other sources mentioned earlier in this Part, coupled with the sources discussed below.<sup>45</sup>

#### D. *The Grammatical Structure of “the Freedom of Speech, or of the Press”*

The grammatical structure of the First Amendment likewise suggests that the freedom was the freedom “of every freeman” or “every citizen” *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.”<sup>46</sup> 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 the faculty of speech.

<sup>43</sup> 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. Iverson 10th ed. 1843) (citing N.Y. CONST. of 1822, art. 7, § VIII). Another edition says, with regard to the Ohio Constitution, that “*the liberty of speech and of the press*” is the right “to speak, write, or print upon any subject, as he thinks proper . . . . The word *press* here signifies the business of printing and publishing; hence liberty of the press is the right to publish books and papers without restraint.” ANDREW W. YOUNG, *FIRST LESSONS IN CIVIL GOVERNMENT: INCLUDING A COMPREHENSIVE VIEW OF THE GOVERNMENT OF THE STATE OF OHIO* 139 (Cleveland, M.C. Younglove 1848) (citing OHIO CONST. of 1802, art. VIII, § 6).

<sup>44</sup> See Eugene Volokh, *Symbolic Expression and the Original Meaning of the First Amendment*, 97 GEO. L.J. 1057, 1081-82 (2009) (explaining the Framing-era understanding that “publishing” meant communicating something to the public).

<sup>45</sup> See *infra* Parts II and III.

<sup>46</sup> See *Citizens United v. FEC*, 130 S. Ct. 876, 928 n.6 (2010) (Scalia, J., concurring) (arguing that “no one” thought the First Amendment meant “everyone’s right to speak or the institutional press’s right to publish”); Edward Lee, *Freedom of the Press 2.0*, 42 GA. L. REV. 309, 345-46 (2008) (“The construction makes it likely that the Framers meant ‘of speech’ and ‘of the press’ to be interpreted in a parallel manner.”).

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 1800 *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.<sup>47</sup> 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.”<sup>48</sup> St. George Tucker’s influential 1803 work, in discussing the freedom of the press, spoke of “[w]hoever makes use of the press as the vehicle of his sentiments on any subjects.”<sup>49</sup> 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 the press cannot be cancelled, abridged, restrained or modified by any authority of the United States.”<sup>50</sup> 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 wished on religious matters,<sup>51</sup> so the liberty of the press meant each person’s freedom to publish.<sup>52</sup>

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<sup>47</sup> JAMES MADISON, REPORT ON THE VIRGINIA RESOLUTIONS TO THE HOUSE OF DELEGATES (1800), reprinted in 4 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 546, 570 (Jonathan Elliot ed., Philadelphia, J.B. Lippincott Co. 2d ed. 1891) [hereinafter ELLIOT’S DEBATES]; see also Lee, *supra* note 46, at 342 (“The inclusion of the word ‘use’ in . . . ‘freedom in the use of the press’ makes it unmistakably clear that Madison . . . w[as] referring to the machine of the printing press.”).

<sup>48</sup> Reply of the Legislature to Resolutions of the State of Virginia, ch. 119, 1798 Gen. Court, Jan. Sess. (Mass. 1799), 1798–1799 Mass. Acts 257, 260, reprinted in 4 ELLIOT’S DEBATES, *supra* note 47, at 533, 535.

<sup>49</sup> 2 TUCKER, *supra* note 22, app. 29.

<sup>50</sup> MADISON, *supra* note 47, at 576 (quoting Form of Ratification, 1788 Ratifying Convention (Va. 1788), reprinted in 3 ELLIOT’S DEBATES, *supra* note 47, at 656).

<sup>51</sup> See N.Y. CONST. of 1777, art. XXXVIII (treating “liberty of conscience” as synonymous with “the free exercise and enjoyment of religious profession and worship”); HORTENSIVS [GEORGE HAY], AN ESSAY ON THE LIBERTY OF THE PRESS 41 (Philadelphia, The Aurora Office 1799) (defining the constitutional “freedom of religion” “to mean the power uncontrolled by law of professing and publishing any opinions on religious topics, which any individual may choose to profess or publish, and of supporting those opinions by any statements he may think proper to make”). George Hay was appointed U.S. Attorney for the District of Virginia in 1803 and eventually finished his career

Of course, “freedom of” is also sometimes 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,”<sup>53</sup> or “the freedom of Catholics to practice their religion.”<sup>54</sup>

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 mean one thing in the first part of the phrase (i.e., everyone’s freedom to use the faculty of speech) and a different thing in the second part (i.e., the freedom belonging to a particular group, the press-as-industry).<sup>55</sup> And as the sources mentioned in Part III suggest, the First Amendment was 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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as a federal judge. *Biographical Directory of Federal Judges: Hay, George*, FED. JUD. CENTER, <http://www.fjc.gov/servlet/nGetInfo?jid=1006> (last visited Nov. 15, 2011).

<sup>52</sup> “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. *R v. Shipley (The Dean of St. Asaph’s Case)*, (1784) 99 Eng. Rep. 774 (K.B.) 824; 4 Dougl. 73, 170; *see also infra* subsection III.A.1. 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, not a newspaper article. *United States v. Cooper*, 25 F. Cas. 631, 639 (Chase, Circuit Justice, C.C.D. Pa. 1800) (No. 14,865); *see also infra* subsection III.B.1. *Cato’s Letters* similarly 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* 101-02 (London, W. Wilkins et al. 4th ed. 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.

<sup>53</sup> *E.g.*, *Nike, Inc. v. Kasky*, 539 U.S. 654, 667 (2003) (Breyer, J., dissenting).

<sup>54</sup> *E.g.*, James Lowell Underwood, *The Dawn of Religious Freedom in South Carolina: The Journey from Limited Tolerance to Constitutional Right*, 54 S.C. L. REV. 111, 151 (2002).

<sup>55</sup> *See* Saikrishna Prakash, *Our Three Commerce Clauses and the Presumption of Intrasentence Uniformity*, 55 ARK. L. REV. 1149, 1150 (2003) (“Absent some very strong reason to the contrary, we should conclude that a word or phrase in a particular clause or sentence has the same meaning throughout the clause or sentence.”).

### E. *Responding to the Redundancy Objection*

The freedom of the press-as-technology, of course, was not seen as redundant of the freedom of speech.<sup>56</sup> St. George Tucker, for instance, discussed the freedom of speech as focusing on the spoken word and the freedom of the press as focusing on the printed:

The best speech cannot 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.<sup>57</sup>

Likewise, George Hay, who later became a U.S. Attorney and 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 control.”<sup>58</sup> 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].”<sup>59</sup>

And these sources 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

<sup>56</sup> 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 4, at 633-34; *see also* West, *supra* note 6, at 1040-41 (likewise).

<sup>57</sup> 2 TUCKER, *supra* note 22, app. 17. Tucker suggested that other material—such as pictures, symbolic expression, and writing—would be protected as well. *Id.* at 11-14; *see also* sources cited *supra* note 28. 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.

<sup>58</sup> HORTENSIUS, *supra* note 51, at 40-41.

<sup>59</sup> AN IMPARTIAL CITIZEN [JAMES SULLIVAN], A DISSERTATION UPON THE CONSTITUTIONAL FREEDOM OF THE PRESS IN THE UNITED STATES OF AMERICA 17 (Boston, David Carlisle 1801). Sullivan used those phrases in ridiculing an overexpansive view of the First Amendment, in which the freedom of the press was read as entirely unlimited; he was arguing for the freedom as being limited to examination of public matters, and not to personal slanders. But in the process he was treating “freedom of speech” as referring to the freedom to use spoken words, to whatever extent that might be properly limited, and the “freedom of the press” as referring to the freedom to use printing technology.

traditionally recognized “Use and Liberty of Speech” to “Printing,” an activity that Hayter described as “only a more extensive and improved Kind of Speech.”<sup>60</sup> Hayter’s work was known and quoted in Revolutionary-era America.<sup>61</sup>

Similarly, William Bollan (1766) described “printing” as “a species of writing invented for the more expeditious multiplication of copies,” and asserted that “freedom or restraint of speech and writing upon public affairs have generally been concomitant”; because of this, Bollan argued, “restraints of writing” were likely to erode the “liberty of speech” and not only of writing, and “those who desire to preserve the [liberty of speech] ought by all means to take due care of the [freedom of writing].”<sup>62</sup> And Bollan used “liberty of the press” and “the freedom of writing” (in a context suggesting printing) interchangeably.<sup>63</sup>

Later, Francis Holt (1812) defined the liberty of the press as “the personal liberty of the writer to express his thoughts in the more [im]proved way invented by human ingenuity in the form of the press.”<sup>64</sup> William Rawle (1825) likewise characterized “[t]he press” as “a vehicle of the freedom of speech,” adding that “[t]he art of printing illuminates the world, by a rapid dissemination of what would otherwise be slowly communicated and partially understood.”<sup>65</sup>

Without the freedom of the press, the freedom of speech might not have been viewed as covering printing, given that printing posed dangers that ordinary “speech” did not. Indeed, in the centuries before the Framing, governments tried to specifically constrain the use of the press-as-technology because they found it to be especially dangerous. The free press guarantees made clear that this potential-

<sup>60</sup> HAYTER, *supra* note 10, at 8.

<sup>61</sup> See, e.g., Civis, Letter to the Editor, VA. GAZETTE, May 18, 1776, at 1 (“Printing is a more extensive and improved kind of speech.”); Letter to the Editor, PA. PACKET & DAILY ADVERTISER, Nov. 12, 1785, at 2 (same); *London*, Nov. 7, MASS. GAZETTE, Jan. 30, 1786, at 1 (same); *London*, Oct. 29, CONN. J., Jan. 4, 1786, at 1 (same).

<sup>62</sup> WILLIAM BOLLAN, THE FREEDOM OF SPEECH AND WRITING UPON PUBLIC AFFAIRS, CONSIDERED 3-4 (London, S. Baker 1766). Bollan was “a distinguished Massachusetts lawyer who served the colony as its advocate general and then as its agent in England, [and] earned John Adams’ praise as ‘a faithful friend of America.’” FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON 83 (Leonard W. Levy ed., 1966). Bollan’s work was quoted in American free press debates shortly before the Revolution. *Id.* at 84.

<sup>63</sup> BOLLAN, *supra* note 62, at 137.

<sup>64</sup> HOLT, *supra* note 10, at 38; see also Lee, *supra* note 46, at 344-45 (quoting *id.*).

<sup>65</sup> WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 119 (Philadelphia, H.C. Carey & I. Lea 1825).

ly dangerous technology was protected alongside direct in-person communications.<sup>66</sup>

Of course, over the last several decades, the phrase “freedom of speech” has often been used to mean “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 “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.<sup>67</sup> Once constitutional law applies the same legal rules to spoken and printed communication, 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 wouldn’t 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.

## II. EVIDENCE FROM AROUND THE FRAMING: THE FREEDOM OF THE PRESS COVERING AUTHORS OF BOOKS AND PAMPHLETS

Any Framing-era understanding limiting the “freedom of the press” to the press-as-industry is especially unlikely, given the then-existing understanding that the freedom protected books and pamphlets alongside newspapers.

### A. *The Non-Press-as-Industry Status of Many Book and Pamphlet Authors*

Books and pamphlets of that era were written largely by scientists, philosophers, planters, ministers, politicians, and ordinary citizens, ra-

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<sup>66</sup> See Anthony Lewis, *A Preferred Position for Journalism?*, 7 HOFSTRA L. REV. 595, 599-600 (1979) (so arguing); William W. Van Alstyne, *The Hazards to the Press of Claiming a “Preferred Position,”* 28 HASTINGS L.J. 761, 769 n.16 (1977) (likewise).

<sup>67</sup> Cf. David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 458 (1983) (explaining that when the Court’s early First Amendment “cases were decided, the existence of a press clause may have been crucial”).

ther than by members of the institutional press. 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.”<sup>68</sup>

Some books of the era were funded by printers who were members of the press-as-industry. Others were funded by authors themselves,<sup>69</sup> by ideological groups,<sup>70</sup> or by “subscribers” who supported the cost of production by paying the printer up front for printing the book.<sup>71</sup> Some books were likely published with hope of profit, and others chiefly out

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<sup>68</sup> BENJAMIN RUSH, *ESSAYS, LITERARY, MORAL AND PHILOSOPHICAL* 190 (Philadelphia, Thomas & William Bradford 2d ed. 1806); see also ROLLO G. SILVER, *THE AMERICAN PRINTER, 1787–1825*, at 97 (1967) (“Printed authors were of necessity amateurs with some dependable [outside] income.”).

<sup>69</sup> See CHARLES A. MADISON, *BOOK PUBLISHING IN AMERICA* 6 (1966) (“Until publishing was well developed in the early decades of the 19th century, an American author customarily brought out his books at his own [financial] risk.”); SILVER, *supra* note 68, at 98 (“Often an author considered publication a sufficient reward and he risked his own funds to achieve it.”). Thus, for instance, Thomas Paine self-published *Common Sense* (1776) and his first work, *Case of the Officers of Excise* (1772). See Bill Henderson, *Independent Publishing: Today and Yesterday*, 421 *ANNALS AM. ACAD. POL. & SOC. SCI.* 93, 95-96 (1975). Jeremy Belknap’s *The History of New-Hampshire* (1784), one of the earliest works of serious history in America, was also self-published. See JEREMY BELKNAP, *THE HISTORY OF NEW-HAMPSHIRE*, at tit. page (Philadelphia, Robert Aitken 1784) (indicating that the book was “printed for the author”); George B. Kirsch, *Jeremy Belknap: Man of Letters in the Young Republic*, 54 *NEW ENG. Q.* 33, 35-36 (1981) (describing Belknap’s efforts to self-publish his history, and noting the significance of Belknap’s work). Alexander Hamilton paid more than half of the cost of the first printing of *The Federalist* in book form. See MAIER, *supra* note 31, at 84. And Tunis Wortman’s early work on the freedom of the press was likewise self-published. See TUNIS WORTMAN, *A TREATISE, CONCERNING POLITICAL ENQUIRY, AND THE LIBERTY OF THE PRESS*, at tit. page (photo. reprint 1970) (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*, [5 Ser. 27] *THE LIBR.* 302, 305 (1972).

<sup>70</sup> See, e.g., *CASES ADJUDGED IN THE SUPREME COURT OF NEW JERSEY; RELATIVE TO THE MANUMISSION OF NEGROES AND OTHERS HOLDEN IN BONDAGE*, at tit. page (Burlington, Isaac Neale 1794) (“Printed for ‘The New-Jersey Society for Promoting the Abolition of Slavery.’”).

<sup>71</sup> See, e.g., HANNAH ADAMS & HANNAH FARNHAM SAWYER LEE, *A MEMOIR OF MISS HANNAH ADAMS* 19-21 (Boston, Gray & Bowen 1832) (describing the 1791 publication of the second edition of Adams’s dictionary of religions as funded partly by subscriptions and partly by the printer); JOEL BARLOW, *THE VISION OF COLUMBUS* 259-70 (Hartford, Hudson & Goodwin 1787) (listing the book’s many subscribers); 1 JOHN TEBBEL, *A HISTORY OF BOOK PUBLISHING IN THE UNITED STATES* 113, 116, 133, 158-60 (1972) (discussing eighteenth century subscription publishing in America).

of a desire to spread ideas. But in each of these categories, people outside the press-as-industry wrote many of these books.

Such authors were outside the “art or business of printing and publishing,” to quote the 1828 Noah Webster definition of “press” that most closely fits the press-as-industry model.<sup>72</sup> They did not fit within the “press” in the sense of “[n]ewspapers, journals, and periodical literature collectively,” to quote the comparable definition from the *Oxford English Dictionary*.<sup>73</sup> They likewise would not have fit within the “press” as understood by the few modern decisions that adopt a press-as-industry view of the First Amendment.<sup>74</sup>

Such authors were akin to a modern businessman writing and distributing a book<sup>75</sup> or funding a video program:<sup>76</sup> 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 encompassing more than just the press-as-industry.

To be sure, one could define such authors as part of “the press” on the grounds that they used the press to communicate, even if they didn’t own presses or make a living from presses. But that would be the same as adopting the press-as-technology model. Book authors’ relationship to “the press” was in essence the same as the relationship of the modern authors of occasional newspaper articles to the newspaper owners, or the relationship of modern advertisers to the newspaper owners.<sup>77</sup> All such authors used the press-as-technology by bor-

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<sup>72</sup> See 2 WEBSTER, *supra* note 24 (under “press”).

<sup>73</sup> First Definition of “Press,” OXFORD ENG. DICTIONARY ONLINE (Sept. 2011), <http://www.oed.com/view/Entry/150765>.

<sup>74</sup> See, e.g., *infra* notes 318-19, 333, 380 and accompanying text; see also *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”).

<sup>75</sup> See *infra* note 380 (discussing the view of some FEC commissioners that book authors aren’t entitled to the “media exemption” from campaign finance law).

<sup>76</sup> See, e.g., *Citizens United*, Advisory Opinion 2004-30, at 2-3 (Fed. Election Comm’n Sept. 10, 2004); see also *infra* notes 382-33. 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.

<sup>77</sup> See, for example, *People v. Judah*, discussed *infra* subsection III.B.3.

rowing or renting space on printing presses from members of the press-as-industry.

B. *Specific References to the Freedom of the Press  
as Covering Books and Pamphlets*

Around the Framing, books were clearly seen as covered by the liberty of the press. David Hume's *The 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 entrust them with an indulgence so easily abused.<sup>78</sup>

Likewise, in his 1741 essay *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.<sup>79</sup> Similarly, in 1788, James Iredell—then a defender of the proposed Constitution and a soon-to-be Supreme Court Justice—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

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<sup>78</sup> 8 DAVID HUME, *THE HISTORY OF ENGLAND* 332 (London, T. Cadell 1782) (1754–1762); see also Lewis, *supra* note 66, at 597-98 (“Those who called for ‘freedom of the press’ in the seventeenth and eighteenth centuries had in mind books and pamphlets and all kinds of occasional literature as much as newspapers.”).

<sup>79</sup> DAVID HUME, *ESSAYS, MORAL AND POLITICAL* 15 (Edinburgh, R. Fleming & A. Allison 1761). As to pamphlets and other short publications, see *infra* notes 136-37 and accompanying text.

this constitution, and must answer for it as for any other act of tyranny.<sup>80</sup>

Copyright law at the time covered books, maps, and charts, but not newspapers.<sup>81</sup> 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.

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.”<sup>82</sup> 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.”<sup>83</sup> And 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.<sup>84</sup>

### C. *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 engage in 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 employ’d on the side of [freedom] and everyone be animated to its Defence.”<sup>85</sup> The Continental Congress’s 1774 *Letter to the Inhabitants of Quebec* discussed the importance of the freedom of the press as con-

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<sup>80</sup> JAMES IREDELL, ANSWERS TO MR. MASON’S OBJECTIONS TO THE NEW CONSTITUTION RECOMMENDED BY THE LATE CONVENTION AT PHILADELPHIA, *reprinted in* 2 LIFE AND CORRESPONDENCE OF JAMES IREDELL 186, 207-08 (Griffith J. McRee ed., New York, D. Appleton & Co. 1858).

<sup>81</sup> See Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124, 124 (1790) (repealed 1802); see also *Clayton v. Stone*, 5 F. Cas. 999, 1003 (Thompson, Circuit Justice, C.C.S.D.N.Y. 1829) (No. 2872) (“We are . . . of opinion that [a newspaper] is not a book, the copyright to which can be secured under the act of congress.”). Copyright law didn’t protect newspapers until 1909. See 2 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 3:60, at 3-172 n.2 (2010).

<sup>82</sup> ALEXANDER ADDISON, CHARGES TO GRAND JURIES OF THE COUNTIES OF THE FIFTH CIRCUIT, IN THE STATE OF PENNSYLVANIA 279 (Washington, John Colerick 1800).

<sup>83</sup> *Id.* at 282.

<sup>84</sup> 1 TUCKER, *supra* note 22, app. 298.

<sup>85</sup> HUME, *supra* note 79, at 14.

sisting in part of “the advancement of truth, science, morality, and arts,” as well as of politics.<sup>86</sup> Nor was this an original view at the time; the French philosopher Helvetius, who was well known to the Framing generation,<sup>87</sup> similarly wrote that “[i]t is to contradiction, and consequently to the liberty of the press, that physics owes 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.”<sup>88</sup>

Justice Iredell expressed the same view in a 1799 grand jury charge: “The liberty of the press . . . has converted barbarous nations into civilized ones—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.”<sup>89</sup> 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 “liberty . . . of the press”—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.”<sup>90</sup>

Yet science, religion, morality, the arts, and civilization were mostly 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 about a freedom of the press that extended only to newspapermen and excluded the Newtons, Luthers, Humes, Lockes, Jeffersons, and Madisons of the world.

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<sup>86</sup> Letter from the Continental Congress to the Inhabitants of the Providence of Quebec (Oct. 26, 1774), in 1 JOURNALS OF CONTINENTAL CONGRESS 1774–1789, at 105, 108 (1904).

<sup>87</sup> See, e.g., A COLUMBIAN PATRIOT [MERCY OTIS WARREN], OBSERVATIONS ON THE NEW CONSTITUTION, AND ON THE FEDERAL AND STATE CONVENTIONS 2 (Boston, n. pub. 1788) (quoting Helvetius); Letter from Thomas Jefferson to Colonel William Duane (Sept. 16, 1810) (same), in 5 THE WRITINGS OF THOMAS JEFFERSON 538, 539 (H.A. Washington ed., Washington, Taylor & Maury 1853).

<sup>88</sup> 2 HELVETIUS, A TREATISE ON MAN, HIS INTELLECTUAL FACULTIES AND HIS EDUCATION 319 (W. Hooper ed. & trans., London, B. Law & G. Robinson 1777) (translating 2 HELVETIUS, DE L’HOMME, DE SES FACULTÉS INTELLECTUELLES, ET DE SON ÉDUCATION (London, La Société Typographique 1773)).

<sup>89</sup> *In re Fries*, 9 F. Cas. 826, 838 (Iredell, Circuit Justice, C.C.D. Pa. 1799) (No. 5124).

<sup>90</sup> James Madison, *Address of the General Assembly to the People of the Commonwealth of Virginia* (Jan. 23, 1799), in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 509, 511 (Philadelphia, J.B. Lippincott & Co. 1865).

### III. EVIDENCE FROM THE FRAMING AND THE EARLY REPUBLIC: CASES FROM 1784 TO 1840

Fifteen early cases also show that courts and lawyers during the early years of the Republic 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 1755–1756 dictionary referred just to the printing press;<sup>91</sup> the same was true of the 1790 edition<sup>92</sup> and of Noah Webster’s 1806 *A Compendious Dictionary of the English Language*, published in America.<sup>93</sup> Noah Webster’s 1828 dictionary, on the other hand, included both the technology and the industry as possible meanings of

<sup>91</sup> See 2 SAMUEL JOHNSON, *A DICTIONARY OF THE ENGLISH LANGUAGE* (London, W. Strahan 2d ed. 1756) (defining “press” as “[t]he instrument by which books are printed”). 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).

<sup>92</sup> See 2 SAMUEL JOHNSON, *A DICTIONARY OF THE ENGLISH LANGUAGE* (London, J.F. & C. Rivington et al. 9th ed. 1790) (defining “press” as “[t]he instrument by which books are printed”).

<sup>93</sup> See NOAH WEBSTER, *A COMPENDIOUS DICTIONARY OF THE ENGLISH LANGUAGE* 235 (Hartford, Sidney’s Press 1806) (defining “press” as an “instrument used for printing”). The first American dictionary is short and has no entry for “press” or “liberty of the press.” See SAMUEL JOHNSON, JR., *A SCHOOL DICTIONARY* 114, 142 (New Haven, Edward O’Brien n.d.) (the author is not the more famous Samuel Johnson). Neither do two of the leading English law dictionaries of the era. See 2 RICHARD BURN, *A NEW LAW DICTIONARY* (London, A. Strahan & W. Woodfall 1792); 2 TIMOTHY CUNNINGHAM, *A NEW AND COMPLETE LAW-DICTIONARY* (London, J.F. & C. Rivington 3d ed. 1783). A third major law dictionary 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.” GILES JACOB, *A NEW LAW DICTIONARY* 3 (London, W. Strahan & W. Woodfall 10th ed. 1782). The instruction to “printers of 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 does not define “press,” but defines “liberty of the press” without shedding light on the question before us. JOHN BOUVIER, *A LAW DICTIONARY* 42 (Philadelphia, T. & J.W. Johnson 1839).

“press” (though the dictionary specifically defined the “liberty of the press” as a right of “every citizen” and as including the right to publish “books” and “pamphlets”).<sup>94</sup> 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 3(d) of “press”:

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 reflect the transition between these senses.<sup>95</sup>

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

A. *Discussions of the Freedom of the Press as Protecting  
Non-Press-as-Industry Writers (England)*

Twelve of the fifteen cases I discuss involve “freedom of the press” or “liberty of the press” being expressly discussed with regard to the rights of people who were not members of the press-as-industry. These were not printers, newspaper publishers, or editors, but rather people who wrote books, pamphlets, newspaper ads, or letters and other submissions to the editor.

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 were willing to discuss the non-press-as-industry defendants’ rights under the freedom of the press. And there is no record of anyone arguing that the defendants lacked such rights because they were not members of the press-as-industry.

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<sup>94</sup> WEBSTER, *supra* note 24 (under “press”). The main rival of Webster’s dictionary contained shorter entries and included “an instrument for . . . printing” as the only relevant definition of “press.” JOSEPH EMERSON WORCESTER, A COMPREHENSIVE PRONOUNCING AND EXPLANATORY DICTIONARY OF THE ENGLISH LANGUAGE 243 (Boston, Hillard et al. 1830); *see also* LANDAU, *supra* note 91, at 56 (listing Worcester as Webster’s chief American rival).

<sup>95</sup> First Definition of “Press,” *supra* note 73.

Of these twelve cases, three are English, but I include them because American judges and lawyers understood them as being relevant to American constitutional law—both as evidence of the English “liberty of the press” as inherited by Americans at the Framing, and as influences on post-Framing American legal developments. 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).<sup>96</sup>

The American freedom of the press was often seen as broader than the English common law definition,<sup>97</sup> but I haven’t seen sources suggesting that it was seen as narrower. And, as the discussion below shows, the English cases are entirely consistent with the American cases on the question that we are discussing.

### 1. *Rex v. Shipley (Dean of St. Asaph’s Case)* (1784)

William Shipley, a minister who held the position of Dean of St. Asaph Cathedral, was prosecuted in 1784 for seditious libel for reprinting a pamphlet.<sup>98</sup> (The pamphlet itself was also written by someone who was not a journalist or printer, William Jones, a lawyer and judge.)<sup>99</sup> Thomas Erskine defended Shipley, arguing that the liberty of the press meant the jury had to determine whether the pamphlet was indeed libelous<sup>100</sup>—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.<sup>101</sup> 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.

<sup>96</sup> 3 STORY, *supra* note 24, §§ 1879–1883, at 737 & nn.1 & 3, 742 n.1.

<sup>97</sup> See, e.g., MADISON, *supra* note 47, at 569-70 (“Th[e constitutional] security of the freedom of the press requires that it should be exempt, not only from previous restraint of the executive, as in Great Britain, but from legislative restraint also . . .”).

<sup>98</sup> R v. Shipley (*The Dean of St. Asaph’s Case*), (1784) 21 How. St. Tr. 847 (K.B.) 847-58.

<sup>99</sup> *Id.* at 876-77.

<sup>100</sup> *Id.* at 900, 903, 924, 1005, 1023. This was the same argument made by Andrew Hamilton on behalf of John Peter Zenger in 1735 in New York. R v. Zenger (N.Y. Sup. Ct. 1735) (statement of defense counsel Andrew Hamilton), *reprinted in* JOHN PETER ZENGER, A BRIEF NARRATIVE OF THE CASE AND TRYAL OF JOHN PETER ZENGER, PRINTER OF THE NEW-YORK WEEKLY JOURNAL 29-30 (Boston, Thomas Fleet 1738).

<sup>101</sup> 21 How. St. Tr. at 1035, 1040.

Rather, Mansfield wrote (echoing Blackstone) that “[t]he liberty of the press consists in printing without any previous licence, subject to the consequences of law.”<sup>102</sup> Under this view, all publications—including those by non-press-as-industry authors such as Shipley—were protected only from prior restraints, and all could be punished by the law of seditious libel.

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.<sup>103</sup> Erskine’s position was quoted by the defense in the 1806 case *United States v. Smith*;<sup>104</sup> though the reference was to the role of the jury generally, and not to free speech in particular, 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*.<sup>105</sup>

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.”

## 2. *Rex v. Rowan* (1794)

Archibald Hamilton Rowan was an Irish radical politician and one of the leaders of the Society of United Irishmen. The Society published a 1500-word broadside, titled “An Address to the Volunteers of

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<sup>102</sup> *Id.* at 1040.

<sup>103</sup> See 3 Johns. Cas. 337, 341, 351 (N.Y. Sup. Ct. 1804) (2-2 decision) (noting that the trial court cited *Shipley* to the jury and the prosecution relied on it in defending the judgment on appeal); *id.* at 371-72 (opinion of Kent, J.) (discussing *Shipley*); *id.* at 405, 408 (opinion of Lewis, C.J.) (citing Erskine’s arguments). A 1797 U.S. Attorney General opinion likewise quoted *Shipley*, though focusing only on Lord Mansfield’s opinion. Libellous Publ’ns, 1 Op. Att’y Gen. 71, 72 (1797).

<sup>104</sup> *United States v. Smith* (C.C.D.N.Y. 1806), reprinted in THOMAS LLOYD, THE TRIALS OF WILLIAM S. SMITH, AND SAMUEL G. OGDEN, FOR MISDEMEANOURS 177 (New York, I. Riley & Co. 1807).

<sup>105</sup> 3 STORY, *supra* note 24, § 1879, at 737 n.3; see also BENJAMIN L. OLIVER, THE RIGHTS OF AN AMERICAN CITIZEN 325 (Boston, Marsh, Capen & Lyon 1832) (noting that Erskine’s “argument on the trial of the Dean of St. Asaph . . . is now the settled law of the land” in both the United States and England).

Ireland"; Rowan distributed it, which led to his being prosecuted for seditious libel.<sup>106</sup>

Rowan was a politician, not an editor or a printer.<sup>107</sup> Nonetheless, both the prosecutors and the defense counsel, John Philpot Curran, told the jury that the case touched on the "freedom of the press" or the "liberty of the press";<sup>108</sup> their disagreement was about whether Rowan's actions were an abuse of the freedom, and thus punishable.<sup>109</sup> As in *Shipley*, the liberty of the press was apparently seen as applying to all, not just to members of the press-as-industry.

Rowan's case was well publicized in America. A full-length report of the trial was reprinted in New York,<sup>110</sup> and advertised both there and in Baltimore.<sup>111</sup> The trial was discussed in newspapers,<sup>112</sup> as was Rowan's imprisonment and escape.<sup>113</sup> Shortly after his escape, Rowan fled to America,<sup>114</sup> where he received some attention from fellow

<sup>106</sup> R v. Rowan, (1794) 22 How. St. Tr. 1033 (K.B.) 1034-37.

<sup>107</sup> See, e.g., ARCHIBALD HAMILTON ROWAN, AUTOBIOGRAPHY 147 (Dublin, Thomas Tegg & Co. 1840) (discussing Rowan's entry into Irish politics).

<sup>108</sup> See *Rowan*, 22 How. St. Tr. at 1069, 1087-88 (statement of defense counsel); *id.* at 1105-06 (statement of prosecutor); *id.* at 1157 (statement of Solicitor General).

<sup>109</sup> *Id.* at 1069-70 (statement of defense counsel).

<sup>110</sup> See REPORT OF THE TRIAL OF ARCHIBALD HAMILTON ROWAN, ESQ. (New York, Thiebout & O'Brien 1794) (1794). The Dublin printing is labeled "printed for Archibald Hamilton Rowan," which reflects the fact that Rowan was not the printer, but just a politician who paid a printer to have the report printed. REPORT OF THE TRIAL OF ARCHIBALD HAMILTON ROWAN, ESQ., at tit. page (Dublin, Archibald Hamilton Rowan 1794); see also *supra* note 69 (discussing the meaning of notations that a book was published for the author).

<sup>111</sup> See Advertisement, N.Y. DAILY GAZETTE, May 31, 1794, at 3; Advertisement, DIARY (New York), June 18, 1794, at 3 (same); Advertisement, BALT. DAILY INTELLIGENCER, June 30, 1794, at 3.

<sup>112</sup> See *Miscellany: Sketch of the Trial of Arch. Hamilton Rowan, Esq.*, THE MERCURY (Boston), May 30, 1794, at 1 (describing the trial); *Sketch of the Trial of Arch. Hamilton Rowan, Esq.*, N.Y. DAILY GAZETTE, May 19, 1794, supp. 1 (reporting, among other things, the defense lawyer's speech that discussed the freedom of the press); see also John B. Duckett, *An Oration on the Liberty of the Press*, FED. INTELLIGENCER & BALT. DAILY GAZETTE, Dec. 6, 1794, at 2 (mentioning Rowan's case as an example of the "insatiable cruelty" of judges who fail to properly protect the liberty of the press).

<sup>113</sup> See *War Expences of Prussia*, DUNLAP & CLAYPOOLE'S AM. DAILY ADVERTISER (Philadelphia), June 2, 1794, at 3 (condemning the alleged conditions of Rowan's confinement); see also *A Proclamation*, AM. MINERVA (New York), July 2, 1794, at 2 (reporting on the reward offered by British authorities for information leading to Rowan's recapture); *Particulars of the Escape of Archibald Hamilton Rowan*, GAZETTE U.S. (Philadelphia), July 5, 1794, at 2 (reporting on Rowan's escape).

<sup>114</sup> See ROWAN, *supra* note 107, at 280 (describing Rowan's arrival in Philadelphia).

democrats<sup>115</sup> and became an acquaintance of Thomas Jefferson.<sup>116</sup> The case was remembered in later years as well: Curran's speech in Rowan's defense, which included discussion of the liberty of the press, was reprinted in America in separate collections, in 1805, 1807, and 1811,<sup>117</sup> and the Rowan trial was mentioned by prosecutor William Wirt in Aaron Burr's 1808 trial for treason.<sup>118</sup>

### 3. *Rex v. Burdett* (1820)

*Rex v. Burdett*<sup>119</sup> stemmed from a letter to the editor<sup>120</sup> written by Sir Francis Burdett, a nobleman and reformist politician rather than a printer or journalist. Though Burdett was not a member of the press-as-industry, the presiding judge referred to the "liberty of the press" four times in his opinion,<sup>121</sup> and twice in his instructions to the jury.<sup>122</sup> 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."<sup>123</sup> The prosecutor mentioned the "liberty of the press" as well.<sup>124</sup>

*Burdett* was well-known in America. It was cited as to "liberty of the press" in Chancellor Kent's 1827 *Commentaries on American Law*<sup>125</sup> and

<sup>115</sup> See PETER PORCUPINE [WILLIAM COBBETT], THE DEMOCRATIC JUDGE: OR THE EQUAL LIBERTY OF THE PRESS 78 (Philadelphia, William Cobbett 1798) (detailing Rowan's warm welcome with "many cheers").

<sup>116</sup> See 2 GEORGE TUCKER, THE LIFE OF THOMAS JEFFERSON 39 (London, Charles Knight & Co. 1837) (summarizing the communication between Rowan and Jefferson); Letter from Thomas Jefferson to A.H. Rowan (Sept. 26, 1798) (offering support to Rowan and outlining rights available in the United States), in 3 MEMOIRS, CORRESPONDENCE, AND PRIVATE PAPERS OF THOMAS JEFFERSON, *supra* note 34, at 408-09.

<sup>117</sup> See FORENSIC ELOQUENCE: SKETCHES OF TRIALS IN IRELAND FOR HIGH TREASON, ETC. 1 (Baltimore, G. Douglas 2d ed. 1805); 3 NATHANIEL CHAPMAN, SELECT SPEECHES, FORENSICK AND PARLIAMENTARY 153-93 (Philadelphia, B.B. Hopkins, & Co. 1807); 1 SPEECHES OF JOHN PHILPOT CURRAN, ESQ. 64-104 (New York, I. Riley 1811).

<sup>118</sup> 1 DAVID ROBERTSON, REPORTS OF THE TRIALS OF COLONEL AARON BURR 402 (Philadelphia, Hopkins & Earle 1808).

<sup>119</sup> *R v. Burdett*, (1820) 106 Eng. Rep. 873 (K.B.); 4 B. & Ald. 95.

<sup>120</sup> 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, 10-11 (London, John Fairburn 1820).

<sup>121</sup> *Burdett*, 106 Eng. Rep. at 887-88; 4 B. & Ald. at 132. 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.* at 888; 4 B. & Ald. at 133.

<sup>122</sup> FAIRBURN'S EDITION OF THE TRIAL OF SIR F. BURDETT, *supra* note 120, at 37-38.

<sup>123</sup> *Burdett*, 106 Eng. Rep. at 887; 4 B. & Ald. at 132 (emphasis added).

<sup>124</sup> FAIRBURN'S EDITION OF THE TRIAL OF SIR F. BURDETT, *supra* note 120, at 9.

<sup>125</sup> 2 KENT, *supra* note 28, at 15.

in Joseph Story's 1833 *Commentaries on the Constitution*,<sup>126</sup> as to venue in libel cases in *Commonwealth v. Blanding* (1825),<sup>127</sup> and in a general note on libel law following *People v. Simons* (1823).<sup>128</sup>

B. *Discussions of the Freedom of the Press as Protecting Non-Press-as-Industry Writers (America)*

1. *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.<sup>129</sup> 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.<sup>130</sup> Moreover, the leaflet that led to his prosecution was unrelated to his past editorial tasks.<sup>131</sup>

Yet the trial was seen as implicating the freedom of the press. In response to the argument that his leaflet diminished the confidence of the people in 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."<sup>132</sup> 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."<sup>133</sup> Lat-

<sup>126</sup> 3 STORY, *supra* note 24, §§ 1878–1879, at 737 nn.1 & 3.

<sup>127</sup> 20 Mass. (3 Pick.) 304, 311 (1825); *see also* *Commonwealth v. Child*, 30 Mass. (13 Pick.) 198, 200 (1832) (noting that the Attorney General cited *Burdett*).

<sup>128</sup> 1 Wheel. Cr. Cas. 339, 359 (N.Y. Ct. Spec. Sess. 1823).

<sup>129</sup> *See* Eugene Volokh, *Thomas Cooper, Early American Public Intellectual*, 4 N.Y.U. J.L. & LIBERTY 372, 376-77 (2009) (describing Cooper's libel prosecution).

<sup>130</sup> DUMAS MALONE, *THE PUBLIC LIFE OF THOMAS COOPER 1783–1839*, at 91, 105 (1926); *see also* THOMAS COOPER, *POLITICAL ESSAYS*, at preface, 4, 31-32 (Northumberland, Andrew Kennedy 1799) (corroborating the dates in Malone's report).

<sup>131</sup> For a modern perspective on this, *see*, for example, *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 250-51 (1986), which held 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 to specific people, rather than just publishing it in his regular newsletter).

<sup>132</sup> *United States v. Cooper* (Chase, Circuit Justice, C.C.D. Pa. 1800), *reprinted in* THOMAS COOPER, *AN ACCOUNT OF THE TRIAL OF THOMAS COOPER OF NORTHUMBERLAND* 19 (Philadelphia, John Bioren 1800).

<sup>133</sup> *Id.*

er, complaining about the court's requiring him to produce certain original documents to support his defense, he argued that such requirements "would be an engine of oppression of itself sufficiently powerful to establish a perfect despotism over the press."<sup>134</sup>

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 proper because

[a] republican government can only be destroyed in two ways; the introduction of luxury, or the licentiousness of the press. This latter is the more slow but most sure and certain means of bringing about the destruction of the government. The legislature of this country knowing this maxim, has thought proper to pass a law to check this licentiousness of the press—by a clause in that law it is enacted (reads the second section of the sedition law).<sup>135</sup>

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.<sup>136</sup>

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

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

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<sup>134</sup> *Id.* at 35. This difficulty was peculiar to this trial, rather than to all Sedition Act prosecutions; Cooper thus wasn't complaining about what the Sedition Act did in other prosecutions (which indeed mostly targeted press-as-industry speakers), but rather was asserting his own rights as a user of "the press."

<sup>135</sup> *Id.* at 42-43.

<sup>136</sup> JOHN THOMSON, AN ENQUIRY, CONCERNING THE LIBERTY, AND LICENTIOUSNESS OF THE PRESS, AND THE UNCONTRIBUTABLE NATURE OF THE HUMAN MIND 25 (New York, Johnson & Striker 1801).

Mr. Adams, when the labored arguments of Paterson and Peters, of Iredell, Addison and Chase, are no longer remembered.<sup>137</sup>

Thompson and Wood discussed Cooper, who had a leaflet printed for him, the same way they discussed Lyon, Callender, and Holt, who published their libels in the newspapers they edited.

## 2. Impeachment of Justice Chase (1805)

Five years later, Justice Chase found himself as a defendant in an impeachment proceeding. The House prosecution argued that Justice Chase had misbehaved in criticizing the administration from the bench.<sup>138</sup>

In the course of the trial, one of the managers of the prosecution, Congressman John Randolph—the leader of the House Democratic-Republicans<sup>139</sup>—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.”<sup>140</sup> Randolph stressed that he 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.” 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.”<sup>141</sup>

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.

<sup>137</sup> JOHN WOOD, *THE HISTORY OF THE ADMINISTRATION OF JOHN ADAMS, ESQ.* 221 (New York, n. pub. 1802).

<sup>138</sup> See 1 TRIAL OF SAMUEL CHASE 123 (Washington, Samuel H. Smith 1805).

<sup>139</sup> See HENRY ADAMS, JOHN RANDOLPH 55 (Boston & New York, Houghton, Mifflin & Co. 1898) (describing the close working relationship between President Jefferson and John Randolph).

<sup>140</sup> 1 TRIAL OF SAMUEL CHASE, *supra* note 138, at 123.

<sup>141</sup> *Id.*

3. *People v. Judah* (1823)

In *People v. Judah*,<sup>142</sup> Samuel Judah, the apparently nineteen-year-old author of a self-published,<sup>143</sup> book-length poem called *Gotham and the Gothamites*, was prosecuted for libeling various noted New Yorkers in the poem.<sup>144</sup> Though the defendant had written and published some plays,<sup>145</sup> the category “playwright” 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<sup>146</sup> and published as a sideline to trying to get their plays staged.<sup>147</sup> 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 Judah had been seen as a professional book author, it’s not clear that this would have made him a member of the press-as-industry.<sup>148</sup>

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

<sup>142</sup> 2 Wheel. Cr. Cas. 26 (N.Y. Gen. Sess. Ct. 1823).

<sup>143</sup> See SAMUEL B.H. JUDAH, *GOthAM AND THE GOthAMITES*, at tit. page (New York, S. King 1823) (indicating that the book was “published for the author”); *supra* note 69 (discussing the meaning of “published for the author”).

<sup>144</sup> I say “apparently” because defense counsel asserted that Judah was nineteen, 2 Wheel. Cr. Cas. at 32, and the court said that Judah was “under age,” *id.* at 41, which suggests that the court was accepting defense counsel’s assertion. There is some uncertainty, though, about whether Judah was nineteen or twenty-four. See 1 JACOB RADNER MARCUS, *UNITED STATES JEWRY: 1776–1985*, at 460 (1989).

<sup>145</sup> See, e.g., SAMUEL B.H. JUDAH, *THE MOUNTAIN TORRENT* (New York, Thomas Longworth 1820); SAMUEL B.H. JUDAH, *ODOFRIEDE* (New York, Wiley & Halsted 1822); SAMUEL B.H. JUDAH, *THE ROSE OF ARRAGON* (New York, S. King 2d ed. 1822); SAMUEL B.H. JUDAH, *A TALE OF LEXINGTON* (New York, Dramatic Repository 1823).

<sup>146</sup> See Gary A. Richardson, *Plays and Playwrights: 1800–1865* (“[P]laywriting as a profession arguably did not exist in early nineteenth-century America.”), in 1 *THE CAMBRIDGE HISTORY OF AMERICAN THEATRE* 250, 251–52 (Don B. Wilmeth & Christopher Bigsby eds., 1998).

<sup>147</sup> See 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 special third-night performances designated for their benefit); Richardson, *supra* note 146, 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).

<sup>148</sup> 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 cases cited *supra* note 74.

include “invad[ing] the sanctity of private repose.”<sup>149</sup> 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.<sup>150</sup>

4. *People v. Simons*, *Commonwealth v. Blanding*, *In re Austin*,  
*Commonwealth v. Thomson*, and *Taylor v. Delavan*

These five 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.

a. *People v. Simons* (1823)

*People v. Simons* involved a newspaper advertisement bought by defendants, businessmen who accused two other businessmen of being insolvent.<sup>151</sup> Defendants were prosecuted for criminal libel, and appealed to the liberty of the press secured by the New York Constitution’s Bill of Rights.<sup>152</sup> The prosecution acknowledged the applicability of the constitutional provision, but argued that the provision was limited to “publication . . . made with good motives, and for justifiable ends.”<sup>153</sup> The court instructed the jury about the constitutional provision, echoing the prosecution’s point.<sup>154</sup> The jury acquitted.<sup>155</sup>

The reporter’s note following *Simons* 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.”<sup>156</sup> “It has always been a favourite privilege of the American citizen” (a “right . . . guaranteed to us by the constitution”) “to investigate the tendency of public measures, and the character and conduct of public men.”<sup>157</sup>

<sup>149</sup> 2 Wheel. Cr. Cas. at 34.

<sup>150</sup> *Id.* at 36.

<sup>151</sup> *People v. Simons*, 1 Wheel. Cr. Cas. 339, 340 (N.Y. Ct. Gen. Sess. 1823).

<sup>152</sup> *Id.* at 349.

<sup>153</sup> *Id.* at 350.

<sup>154</sup> *Id.* at 353.

<sup>155</sup> *Id.* at 354.

<sup>156</sup> *Id.* at 355 (emphasis added).

<sup>157</sup> *Id.* (emphasis added).

b. *Commonwealth v. Blanding* (1825)

In *Commonwealth v. Blanding*, James Blanding—a farmer and the city clerk<sup>158</sup>—was convicted of libeling someone by submitting an item for publication in a newspaper.<sup>159</sup> 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.”<sup>160</sup>

c. *In re Austin* (1835)

The court in *In re Austin* reversed the disbarment of several lawyers who had submitted to a newspaper an open letter urging a judge to resign.<sup>161</sup> The Pennsylvania Supreme Court concluded that a lawyer may be disciplined for “scrutiny into the official conduct of the judges”<sup>162</sup> only when such scrutiny was libelous, which at the time was seen as turning on the author’s motive.<sup>163</sup> And “when thus limited” to libel, the court concluded, the possibility of “professional responsibility for libel” does not “impinge on the liberty of the press,”<sup>164</sup> precisely because everyone, lawyer or not, could be legally punished for libel. The non-press-as-industry lawyer authors in this case were thus seen as potentially protected by “the liberty of the press” on precisely the same terms as others were.

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<sup>158</sup> See 3 REPRESENTATIVE MEN AND OLD FAMILIES OF SOUTHEASTERN MASSACHUSETTS 1314-15 (1912).

<sup>159</sup> See 20 Mass. (3 Pick.) 304, 304 (1825).

<sup>160</sup> *Id.* at 314.

<sup>161</sup> *In re Austin*, 5 Rawle 191, 208 (Pa. 1835).

<sup>162</sup> *Id.* at 205.

<sup>163</sup> Compare *id.* (“It is the motive therefore that makes an invasion of the judge’s rights a breach of professional fidelity . . .”), with *Respublica v. Dennie*, 4 Yeates 267, 270 (Pa. 1805) (holding, in a newspaper case, that “[t]he liberty of the press consists in publishing the truth, from *good motives* and for *justifiable ends*” (quoting *New York v. Crosswell*, 3 Johns. Cas. 337, 352 (N.Y. Sup. Ct. 1804) (statement of defense counsel Alexander Hamilton))).

<sup>164</sup> *In re Austin*, 5 Rawle at 205.

d. *Commonwealth v. Thomson (1839)*

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.<sup>165</sup> Thomson was prosecuted for libel, and his lawyers argued that he was protected by the liberty of the press.<sup>166</sup> The judge’s instructions to the jury mentioned the liberty of the press, but stated that libel law did not violate that liberty.<sup>167</sup> The jury convicted.<sup>168</sup>

e. *Taylor v. Delavan (1840)*

The defendant in *Taylor v. Delavan* was a temperance activist who submitted an item for publication in a newspaper,<sup>169</sup> alleging that a local brewer was using dirty water to brew his beer. The brewer sued for libel. The judge’s instructions 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 also “restrains this liberty by requiring an adherence to truth.”<sup>170</sup> The jury acquitted.<sup>171</sup>

5. *Brandreth v. Lance (1839)*

*Brandreth v. Lance*<sup>172</sup> was the first American court decision to strike down an injunction as an unconstitutional interference with the freedom of the press. Lance was a business rival of Brandreth, who commissioned a man named Trust to write an allegedly libelous biography of Brandreth and then contracted with a printer named Hodges to publish it. Brandreth asked for, and got, an injunction barring busi-

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<sup>165</sup> See *Commonwealth v. Thomson* (Boston Mun. Ct. 1839), reprinted in REPORT OF THE TRIAL OF DR. SAMUEL THOMSON 3-5 (Boston, Henry P. Lewis 1839). In the 1830s, two publications, the *Thomsonian Recorder* and the *Thomsonian Manual*, publicized Thomson’s theories and were at various times endorsed by Thomson; but neither was edited or published by Thomson. See JOHN S. HALLER JR., THE PEOPLE’S DOCTORS: SAMUEL THOMSON AND THE AMERICAN BOTANICAL MOVEMENT, 1790–1860, at 107-10, 215 (2000). In any event, neither publication is mentioned in the case.

<sup>166</sup> *Thomson*, supra note 165, at 40-41.

<sup>167</sup> *Id.* at 46.

<sup>168</sup> *Id.* at 48.

<sup>169</sup> *Taylor v. Delavan* (N.Y. Cir. Ct. 1840), reprinted in A REPORT OF THE TRIAL OF THE CAUSE OF JOHN TAYLOR VS. EDWARD C. DELAVAN, PROSECUTED FOR AN ALLEGED LIBEL 6-7 (Albany, Hoffman, White & Visscher 1840).

<sup>170</sup> *Id.* at 45.

<sup>171</sup> *Id.* at 48.

<sup>172</sup> 8 Paige Ch. 24, 26 (N.Y. Ch. 1839).

nessman Lance, writer Trust, and printer Hodges from publishing the biography.<sup>173</sup> The New York Chancery Court reversed, holding that the injunction violated the liberty of the press.<sup>174</sup> 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.<sup>175</sup>

## 6. Summary

All these cases suggest that 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, these 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 weren't members of the press-as-industry.

### C. *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.

#### 1. *Commonwealth v. Buckingham* (1822)

*Commonwealth v. Buckingham* 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, and therefore the accused wouldn't be guilty of libel.<sup>176</sup> In the process, the judge discussed what “the press” meant:

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

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<sup>173</sup> *Id.* at 24-25.

<sup>174</sup> *Id.* at 27.

<sup>175</sup> *Id.* at 28.

<sup>176</sup> *Commonwealth v. Buckingham* (Boston Mun. Ct. 1822), *reprinted in* TRIAL: COMMONWEALTH VS. J.T. BUCKINGHAM, ON AN INDICTMENT FOR LIBEL 13 (Boston, J.T. Buckingham 4th ed. 1830).

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 ha[s] 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 for a purpose which the law justifies.<sup>177</sup>

The liberty of the press, according to the court, was a right belonging to “each citizen” to use the press as an “instrument”—an instrument in the same sense that a “sword” is an instrument.<sup>178</sup> This

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<sup>177</sup> *Id.* at 11-13.

<sup>178</sup> 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

reasoning 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.

## 2. *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 (riding circuit) wrote that “[t]he 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.”<sup>179</sup> 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.”<sup>180</sup>

As the cases suggest, lawyers for newspapers had by the 1820s indeed begun to make arguments for special protection for the press-as-industry.<sup>181</sup> But these arguments were consistently rejected.

## IV. THE UNDERSTANDING AROUND THE RATIFICATION OF THE FOURTEENTH AMENDMENT

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 pos-

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right to speak, write or print, freely, on any subject whatsoever), *overruled in part on other grounds* by *Schmitt v. F.W. Cook Brewing Co.*, 120 N.E. 19, 21 (Ind. 1918); HOLT, *supra* note 10, at 49-50 (characterizing the “press,” in the discussion of “liberty of the press,” as a “newly discovered instrument,” and stating that “[w]hen we have termed the press a new and enlarged instrument of publication, whether of good or evil, we have, in fact, pointed out that part of its nature which defines and circumscribes the law which attaches to it”); THOMAS STARKIE, A TREATISE ON THE LAW OF SLANDER, LIBEL, SCANDALUM MAGNATUM, AND FALSE RUMOURS 163 (London, W. Clarke & Sons 1813) (“The pencil of the caricaturist is frequently an instrument of ridicule more powerful than the press . . . .”); THOMAS STARKIE, A TREATISE ON THE LAW OF SLANDER, LIBEL, SCANDALUM MAGNATUM, AND FALSE RUMOURS 142 (Edward D. Ingraham ed., New York, George Lamson 1st Am. ed. 1826) (same).

<sup>179</sup> 7 F. Cas. 624, 624-25 (Story, Circuit Justice, C.C.D.R.I. 1825) (No. 3867).

<sup>180</sup> 7 Cow. 613, 628 (N.Y. Sup. Ct. 1827).

<sup>181</sup> *See, e.g.*, *Hotchkiss v. Oliphant*, 2 Hill 510, 513 (N.Y. Sup. Ct. 1842) (acknowledging such an argument about the common law rule, though not about the constitutional protection).

sess any immunities, not shared by every individual.”<sup>182</sup> *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.<sup>183</sup>

*Smart v. Blanchard* (1860),<sup>184</sup> *Palmer v. City of Concord* (1868),<sup>185</sup> *Atkins v. Johnson* (1870),<sup>186</sup> *People v. Storey* (1875),<sup>187</sup> *Johnson v. St. Louis Dispatch Co.* (1877),<sup>188</sup> *Sweeney v. Baker* (1878),<sup>189</sup> *Barnes v. Campbell* (1879),<sup>190</sup> and *Delaware State Fire & Marine Ins. Co. v. Croasdale* (1880)<sup>191</sup> all echoed this position.

<sup>182</sup> 9 Minn. 123, 129 (1864).

<sup>183</sup> 64 Mass. (10 Cush.) 25, 26-27 (1852); see also *Stone v. Cooper*, 2 Denio 293, 304 (N.Y. Sup. Ct. 1845) (“[Libel law] is quite consistent with that freedom of speech and of the press which all regard as sacred and inviolable. Public journalists have no peculiar exemption from the general rules of law on this subject, and are liable for injurious publications in precisely the same cases in which individuals in other professions or employments would be.”).

<sup>184</sup> See 42 N.H. 137, 151 (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.”).

<sup>185</sup> See 48 N.H. 211, 216 (1868) (“Conductors of the public press have no rights but such as are common to all.” (citing *Sheckell*, 64 Mass. (10 Cush.) at 26-27)).

<sup>186</sup> See 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, tha[n] he or any other man has to make a slanderous proclamation by word of mouth.”).

<sup>187</sup> See *People v. Storey* (Cook Cnty. Crim. Ct. 1875) (“Editors must understand that their rights are the same, and no greater, than other citizens, and their responsibilities no less.”), as reprinted in 1 JAMES APPLETON MORGAN, *THE LAW OF LITERATURE* 271, 275-76 (New York, James Cockcroft & Co. 1875), *rev’d on other grounds*, 79 Ill. 45 (1875).

<sup>188</sup> See 65 Mo. 539, 541-42 (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 JOHN TOWNSHEND, *A TREATISE ON THE WRONGS CALLED SLANDER AND LIBEL* § 252, at 343 (New York, Baker, Voorhis & Co. 1868))).

<sup>189</sup> See 13 W. Va. 158, 182 (1878) (quoting *Sheckell*, 64 Mass. (10 Cush.) at 26-27, though citing it by the wrong name), *overruled on other grounds* by *Bailey v. Charleston Mail Ass’n*, 27 S.E.2d 837 (W. Va. 1943), but *reaffirmed on this point* by *Swearingen v. Parkersburg Sentinel Co.*, 26 S.E.2d 209 (W. Va. 1943).

<sup>190</sup> See 59 N.H. 128, 128-29 (1879) (“[P]rofessional publishers of news . . . have the same right to give information that others have, and no more.” (citing *Sheckell*, 64 Mass. (10 Cush.) 25)).

<sup>191</sup> See 11 Del. (6 Houst.) 181, 210 (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

So did leading treatises and other reference works. Thomas Cooley's *A Treatise on the Constitutional Limitations* (1868) 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 communications."<sup>192</sup> Townshend's *A 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. A newspaper proprietor . . . is liable for what he publishes in the same manner as any other individual."<sup>193</sup> 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."<sup>194</sup>

The one partial exception to this pattern appeared in the "Liberty of the Press" discussion in Cooley's *Treatise on the Law of Torts* (1879), which suggested (without citation) that it "is not so clear" "whether the conductor of a public journal has any privilege above others in publishing."<sup>195</sup> 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"<sup>196</sup> 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."<sup>197</sup>

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as to other individuals, and they have no privilege in this State not common to everybody else.").

<sup>192</sup> 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 & Co. 1868).

<sup>193</sup> TOWNSHEND, *supra* note 188, § 252, at 343. Earlier, Townshend says that "[w]hatever 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 342. 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."

<sup>194</sup> 2 MORGAN, *supra* note 187, at 410.

<sup>195</sup> THOMAS M. COOLEY, *A TREATISE ON THE LAW OF TORTS* 217 (Chicago, Callaghan & Co. 1879).

<sup>196</sup> *Id.* (emphasis added).

<sup>197</sup> *Id.* at 219. A 1990 book quotes *Detroit Daily Post Co. v. McArthur*, 16 Mich. 447 (1868), as saying, "A special protection for newspapers within the common law was

Some of the sources mentioned in this Section 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,

[A]s 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

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necessary," but this appears to be an error. TIMOTHY W. GLEASON, *THE WATCHDOG CONCEPT: THE PRESS AND THE COURTS IN NINETEENTH-CENTURY AMERICA* 67 (1990). No such passage is present in the cited case, and the purported quote does not 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." 16 Mich. at 454. This seems 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 generally THOMAS G. SHEARMAN & AMASA A. REDFIELD, *A TREATISE ON THE LAW OF NEGLIGENCE* § 601, at 655 (New York, Baker, Voorhis & Co. 1869). And two 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." *Park v. Detroit Free Press Co.*, 40 N.W. 731, 734 (Mich. 1888).

Likewise, *Wilson v. Fitch*, 41 Cal. 363 (1871), which the 1990 book cited, GLEASON, *supra*, at 73-74, did not appear to extend any special protection to newspapers. The court did state,

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.

*Id.* at 383. 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 188, § 290, at 382; and absence of an "honest belief that [defendant's statements] were true" would itself be evidence of "ill-will," *id.* § 388, at 475-76. The court thus seemed to be applying to newspapers only the same protection against punitive damages that the law generally gave libel defendants. A later California decision treated *Wilson* as consistent with the view that a reporter "has no more right" to convey allegedly defamatory material "than has a person not connected with a newspaper." *Gilman v. McClatchy*, 44 P. 241, 243 (Cal. 1896) (quoting *McAllister v. Free Detroit Press Co.*, 43 N.W. 431, 437 (Mich. 1889)).

should not be responsible for the truth of what they publish.<sup>198</sup>

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."<sup>199</sup>

Some other cases spoke of the liberty of the press in cases where the speaker was not a member of the institutional press. In 1876, *Life Ass'n of America v. Boogher* held, just as *Brandreth v. Lance* had held, that it would violate "the freedom of the press or of speech"—"the right to speak, write, or print, . . . secured to every one" by the state constitution—for a court to enjoin publications and oral statements by a businessman that criticized another business.<sup>200</sup> In 1846, *Fisher v. Patterson*, like many of the earlier 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.<sup>201</sup>

Finally, Thomas Cooley, the leading American constitutional commentator of the second half of the nineteenth century,<sup>202</sup> wrote in 1880 that "[b]ooks, pamphlets, circulars, &c. are . . . as much within [the freedom of the press] as the periodical issues."<sup>203</sup> This too shows that the liberty of the press extended to material that was generally not written by full-time newspaper and magazine writers and—at least in the case of circulars—to material that was often not funded by members of the press-as-industry.

The rule thus had not changed from the early Republic to the Ratification era: "the press" in "[t]he freedom . . . of the press" was

<sup>198</sup> TOWNSHEND, *supra* note 188, § 252, at 343; *see also* Hotchkiss v. Oliphant, 2 Hill 510, 513 (N.Y. Sup. Ct. 1842) (noting that the defendant had argued for special privilege as a newspaper editor, but rejecting that argument).

<sup>199</sup> TOWNSHEND, *supra* note 188, § 252 at 343.

<sup>200</sup> 3 Mo. App. 173, 180 (1876); *see also* *Suit Against the Life Association of America*, 1 INS. L.J. 239, 239 (1871) (reporting that Boogher was "a trustee of the Life Association of America, and one of the oldest policy holders in the company").

<sup>201</sup> *Fisher v. Patterson*, 14 Ohio 418, 426-27 (1846); *see also* NELSON W. EVANS & EMMONS B. STIVERS, A HISTORY OF ADAMS COUNTY, OHIO 260-61 (1900) (describing John Fisher as a politician, judge, and businessman who was "fond of contributing political articles to newspapers," but not suggesting that he ever owned or operated a newspaper).

<sup>202</sup> *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").

<sup>203</sup> THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 282 (Boston, Little, Brown & Co. 1880).

seen as referring to the press-as-technology, not to the press-as-industry.

### V. THE UNDERSTANDING FROM 1881 TO 1930

By 1881, the view that the press-as-industry has no special constitutional rights had become a firmly entrenched orthodoxy that would continue for the next fifty years and beyond. 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 Co. v. Sullivan*.<sup>204</sup>

Section 11 of the [Kansas] 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.<sup>205</sup>

Likewise, *Negley v. Farrow* (1883) held that “[t]he liberty of the press guaranteed by the Constitution is a right belonging to every one, whether proprietor of a newspaper or not.”<sup>206</sup> And these were just two of the many cases to acknowledge the press-as-technology view during the last decades of the nineteenth century<sup>207</sup> and during the start of the twentieth.<sup>208</sup>

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<sup>204</sup> 376 U.S. 254, 280-82 (1964).

<sup>205</sup> 98 P. 281, 286 (Kan. 1908).

<sup>206</sup> 60 Md. 158, 176 (1883).

<sup>207</sup> See, e.g., *Riley v. Lee*, 11 S.W. 713, 714 (Ky. 1889) (“By the provisions of the United States and the state constitutions guarantying the ‘freedom of the press’ it was simply intended to secure to the conductors of the press the same rights and immunities that are enjoyed by the public at large.”); *Park v. Detroit Free Press Co.*, 40 N.W. 731, 734 (Mich. 1888) (“[T]he public press occupies no better ground than private persons publishing the same libelous matter . . . .”); *Bronson v. Bruce*, 26 N.W. 671, 672 (Mich. 1886) (“The law makes no distinction between the newspaper publisher and any private person who may publish an article in a newspaper or other printed form.”); *Pratt v. Pioneer Press*, 14 N.W. 62, 63 (Minn. 1882) (“[I]n the publication of news, or in criticising men and things, the publisher of a newspaper has no privileges or immunities not possessed by any citizen.”); *Kahn v. Cincinnati Times-Star*, 10 Ohio Dec. 599, 603 (Super. Ct. Cincinnati 1890) (“The publisher of a newspaper has exactly the same [constitutional] rights and [is] responsible to exactly the same extent for the abuse of that right as any other citizen.”); *Regensperger v. Kiefer*, 7 A. 284, 285 (Pa. 1887) (“The publisher or proprietor of a newspaper stands before a Court and before a jury like any other man.” (quoting jury instructions)); *Commonwealth v. Murphy*, 8 Pa. C. 399, 405 (Pa. Quarter Sess. 1890) (stating that the constitutional free press pro-

Reference works of the era echoed this press-as-technology view, explaining that newspapers had the same freedoms of speech as private citizens. For instance, one 1917 work noted that “[i]t 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.”<sup>209</sup> Similarly, a 1901 encyclopedia described the freedom of the press as “only a more extensive and improved use of the liberty of speech which prevailed before printing became general, and is the right belonging to every one, whether the conductor of a newspaper or not.”<sup>210</sup> And a 1905 reference work noted that newspapers are treated the same as other speakers when it comes to freedom of the press claims in libel cases, and that this view “has been affirmed by the courts of this country and England with great uniformity.”<sup>211</sup>

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vision “does not give to newspapers, as such, any privileges or rights which are not given to every citizen of the state. . . . There is no distinction between newspapers as a privileged class, and other citizens as enjoying inferior rights”); *Banner Publ’g Co. v. State*, 84 Tenn. 176, 183-84 (1885) (concluding that, with reference to the state constitutional provision for liberty of the press, “the conductor of a public journal has . . . no more rights than the private citizen”).

<sup>208</sup> See, e.g., *State ex rel. Crow v. Shepherd*, 76 S.W. 79, 94 (Mo. 1903) (stating, in the discussion of “the liberty of the press,” “It is no new claim that newspapers have a greater privilege than the ordinary citizen. This is a grave error.”); *Fitch v. Daily News Publ’g Co.*, 217 N.W. 947, 948 (Neb. 1928) (“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.” (quoting 17 RULING CASE LAW § 95, at 349-50 (William M. McKinney & Burdett A. Rich eds., 1917))); *Streeter v. Emmons Cnty. Farmers’ Press*, 222 N.W. 455, 457 (N.D. 1928) (concluding that “[n]ewspapers . . . have no greater privilege [under libel law] than private individuals,” when it comes to the dividing line between “license” and “liberty of the press” (citing 17 RULING CASE LAW, *supra*, § 95, at 349)); *Williams v. Hicks Printing Co.*, 150 N.W. 183, 188 (Wis. 1914) (stating that “[t]he law as to what is within the field of conditional privilege . . . applies to newspapers as well as to individuals” because “[t]he freedom of the press has never been . . . extended so as to accord to [newspapers] special rights to injure or destroy human character by libelous publications”).

<sup>209</sup> Annotation, *Comment on Matter of Public Interest as Libel or Slander*, 1917B ANNOTATED CASES AM. & ENG. 409, 417 (William M. McKinney & H. Noyes Greene eds., 1917); see also 17 RULING CASE LAW, *supra* note 208, § 95, at 349-50 (“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.”).

<sup>210</sup> 18 THE AMERICAN AND ENGLISH ENCYCLOPÆDIA OF LAW 1051 (David S. Garland & Lucius P. McGehee eds., 2d ed. 1901); see also *McAllister v. Detroit Free Press Co.*, 43 N.W. 431, 437 (Mich. 1889) (repeating this idea almost verbatim); HAYTER, *supra* note 10, at 8 (similarly explaining, in 1754, that “[p]rinting is only a more extensive and improved Kind of Speech”); see also *supra* text accompanying note 60.

<sup>211</sup> 8 JUDICIAL AND STATUTORY DEFINITIONS OF WORDS AND PHRASES 7706 (1905).

## VI. THE MODERN FIRST AMENDMENT ERA: 1931 TO NOW IN THE SUPREME COURT

### A. *Three Models*

The first Supreme Court decisions striking down government action under the First Amendment came in 1931.<sup>212</sup> 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 stuck to that view.

But since 1970, this state of the law has been cast into some doubt. Though the Court's majority holdings have solidly supported the press-as-technology view, some dicta in the opinions have suggested that the Court might be open to the press-as-industry view in at least some cases. And a few lower court decisions have indeed adopted a press-as-industry position as to some First Amendment questions.

To accurately summarize the disagreements among the courts—and the continuing dominance of the press-as-technology view, despite those disagreements—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.”<sup>213</sup>
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-specially-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 distinction between the first two ap-

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<sup>212</sup> See *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 701-02, 722-23 (1931); *Stromberg v. California*, 283 U.S. 359, 369 (1931). *Fiske v. Kansas*, the other possible candidate for the first such decision, rested on the conclusion that the Due Process Clause was violated because there wasn't adequate evidence to convict the speaker under the statute. 274 U.S. 380, 387 (1927). *Stromberg* and *Near*, on the other hand, expressly relied on the freedom of speech and the freedom of the press.

<sup>213</sup> See *supra* text accompanying notes 23-24.

proaches is outside the scope of this Article.<sup>214</sup> I mention them separately only because understanding the difference helps explain some of the court decisions discussed below.) The third approach is, of course, the press-as-industry model.

Here, then, is what has happened.

## B. *The Supreme Court: "All Speakers Equal"*

### I. Generally

As discussed below, 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),<sup>215</sup> 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* 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."<sup>216</sup> 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 *Sullivan*, the Court applied its holding to two non-newspaper defendants—a district attorney who made allegedly libelous statements at a press conference,<sup>217</sup> and an arrestee who was sued for sending an allegedly libelous letter to a sheriff and an alleg-

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<sup>214</sup> For evidence suggesting that the freedom of the press was seen as quite different from the freedom of speech, see generally Anderson, *supra* note 67, at 521-27. For evidence suggesting that the two were seen as providing essentially the same protections, though one covered printing and the other speaking, see *United States v. Sheldon*, 5 Blume Sup. Ct. Trans. 337, 346 (Mich. 1829), which stated that "[t]he constitution of the United States places the freedom of speech and of the press upon the same footing," Lange, *supra* note 17, at 88-99, and sources cited *supra* Section I.E.

<sup>215</sup> 408 U.S. 665, 709-10 (1972).

<sup>216</sup> 376 U.S. 254, 278 (1964); see also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 348 (1974) (stating that the Court's decision "shields the press and broadcast media from the rigors of strict liability for defamation"); *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]*").

<sup>217</sup> *Garrison v. Louisiana*, 379 U.S. 64, 64-67 (1964).

edly libelous press release to the wire services.<sup>218</sup> The references to newspaper speech, then, may simply describe the speech involved in each case, rather than limiting the constitutional protection just to newspapers.

Because of this, 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-specially-protected question. And such a focus makes clear the Court's general adoption of the all-speakers-equal model (again, with the possible exception of Justice Powell's *Branzburg v. Hayes* concurrence).

## 2. The "Generally Applicable Laws" Cases

The Court's first case on whether the press-as-industry had special constitutional rights was *Associated Press v. NLRB* (1937).<sup>219</sup> The Associated Press 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.<sup>220</sup> The Court disagreed, holding that "[t]he publisher of a newspaper has no special immunity from the application of general laws."<sup>221</sup>

The Court has repeated this rejection of the press-as-industry-specially-protected model in cases involving many subjects, including the Fair Labor Standards Act, antitrust law, and others.<sup>222</sup> In *Branzburg v. Hayes* (1972), for instance, the majority rejected a newsgatherer's privilege, adopting the all-speakers-equal—and equally unprotected—approach.<sup>223</sup> The Court's decision was partly motivated by its unwillingness to give special constitutional protection to a particular industry:

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<sup>218</sup> See *Henry v. Collins*, 158 So. 2d 28, 30-31 (Miss. 1963), *rev'd per curiam*, 380 U.S. 356 (1965).

<sup>219</sup> 301 U.S. 103 (1937).

<sup>220</sup> *Id.* at 115-17.

<sup>221</sup> *Id.* at 132.

<sup>222</sup> See, e.g., *Citizen Publ'g Co. v. United States*, 394 U.S. 131, 139 (1969) (stating that the press receives no special treatment under the First Amendment with respect to the antitrust laws); *Mabee v. White Plains Publ'g Co.*, 327 U.S. 178, 184 (1946) (stating, in the labor context, that the press "has no special immunity from laws applicable to business in general"); *Associated Press v. United States*, 326 U.S. 1, 20 (1945) (stating that the press receives no special treatment under the First Amendment with respect to the antitrust laws).

<sup>223</sup> See 408 U.S. 665, 689-93 (1972) ("We are asked to create another [privilege] by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do.").

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. . . .

Freedom of the press is a "fundamental personal right" which "is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." *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.<sup>224</sup>

Justice Powell's three-paragraph concurrence in *Branzburg*, which was open to a relatively weak newsgatherer's privilege,<sup>225</sup> did implicitly reject the all-speakers-equal approach. Under Justice Powell's approach, a person who gathers information for future mass communication would get a privilege of some unspecified force. But a person who gathers information just to convey it to business partners or friends would presumably not be entitled to a privilege, since allowing the privilege to apply so broadly would eviscerate the general duty to testify.

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<sup>224</sup> *Id.* at 703-05. In *Zurcher v. Stanford Daily*, the Court likewise rejected a claim of special press immunity from search warrants. 436 U.S. 547, 565-67 (1978). Only Justice Stewart, joined by Justice Marshall, would have adopted what appears to be a press-as-industry-specially-protected model. See *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 Justice Powell might well have been referring to First Amendment interests of speakers generally, and not just of the press-as-industry. Indeed, the *Zurcher* majority, which Justice Powell joined, cited an earlier nonpress opinion which determined that the particularity 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." *Stanford v. Texas*, 379 U.S. 476, 485-86 (1965), quoted in *Zurcher*, 436 U.S. at 564.

<sup>225</sup> See *Branzburg*, 665 U.S. at 709-10 (Powell, J., concurring). Justice Powell did not endorse the proposed absolute privilege urged by Justice Douglas's dissent, nor the proposed qualified privilege urged by Justice Stewart's dissent, which could only be overcome by a showing of necessity to serve a compelling government interest. *Id.*

Nonetheless, Justice Powell's concurrence is probably most reasonably read as following the mass-communications-more-protected model rather than the press-as-industry-specially-protected model. Justice Powell joined the majority's opinion, which rejected the press-as-industry model. And though Justice Powell's concurrence spoke of the rights of "newsmen,"<sup>226</sup> it didn't go into any detail about whether "newsmen" meant simply someone who worked for a newspaper or whether the term also included someone who gathered the news for just one project or occasional projects. Indeed, as Section VII.A will discuss, nearly all lower court cases have either dismissed Justice Powell's opinion as merely a concurrence, or have read it as endorsing the mass-communications-specially-protected approach rather than the press-as-industry-specially-protected" approach.

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 promissory estoppel suit brought by a source whose name was published despite the newspaper's promise of anonymity.<sup>227</sup> "[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."<sup>228</sup>

The Court has long been willing to give *speakers generally* some exemptions from "generally applicable laws." This is especially true 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 relations claim, or an antitrust claim is based on the content of the speaker's message.<sup>229</sup> But within this category of speakers, neither members of the press-as-industry nor users of the press-as-technology have received more protection than other speakers.

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<sup>226</sup> *Id.*

<sup>227</sup> 501 U.S. 663, 665-66 (1991).

<sup>228</sup> *Id.* at 669. Three of the four dissenters expressly agreed on this point. *See id.* at 673 (Blackmun, J., joined by Marshall & Souter, JJ., dissenting) (stating that "[n]ecessarily, 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 the issue.

<sup>229</sup> 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 examples of such cases); *see also* Snyder v. Phelps, 131 S. Ct. 1207, 1219 (2011) (applying this principle to a lawsuit for intentional infliction of emotional distress).

### 3. The Literature Distribution Cases

The Court has likewise rejected the press-as-industry view in the cases dealing with people prosecuted for handing out printed material. The first such case, *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.<sup>230</sup>

And *Lovell* was reaffirmed in *Schneider v. State* (1939),<sup>231</sup> *Martin v. City of Struthers* (1943),<sup>232</sup> and *Jamison v. Texas* (1943),<sup>233</sup> 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 *Lovell* ordinance, didn't even apply to typical newspapers or magazines. In *Schneider* and *Martin*, the Court discussed both the freedom of the press and the freedom of speech, but in *Jamison* it mentioned only the freedom of the press.

Moreover, at around the time the Court decided these cases, it also applied the same rules to speakers who weren't using mass communications technology at all—door-to-door canvassers, picketers, speakers in public places, and the like.<sup>234</sup> Put together, these cases thus embrace the all-speakers-equal view, and 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

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<sup>230</sup> 303 U.S. 444, 452 (1938). The city's brief had 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." Brief of Appellee at 12, *Lovell*, 303 U.S. 444 (No. 391). But the brief cited no precedents supporting the view that the freedom of the press protected only "member[s] of the press"—I suspect because no such precedents were available.

<sup>231</sup> 308 U.S. 147, 160-64 (1939).

<sup>232</sup> 319 U.S. 141, 143 (1943).

<sup>233</sup> 318 U.S. 413, 416 (1943).

<sup>234</sup> See, e.g., *Cantwell v. Connecticut*, 310 U.S. 296, 311 (1940) (door-to-door canvassing); *Thornhill v. Alabama*, 310 U.S. 88, 101-02 (1940) (picketing); *Hague v. CIO*, 307 U.S. 496, 512-14 (1939) (speeches in public places and in privately owned halls).

might also be reconciled with the mass-communications-more-protected approach. In *New York Times Co. v. Sullivan* (1964), Sullivan sued over an advertisement that criticized him, naming both the *New York Times*, which published the advertisement, and several ministers who signed it.<sup>235</sup> The Court reversed the verdict against both the newspaper and the signers, applying the same “actual malice” rule to both.<sup>236</sup>

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.<sup>237</sup>

Though *Lovell* had asserted the Free Press Clause rights of pamphleteering and leafleting defendants who were not “members of the press,” *Sullivan* recharacterized such rights as being the “freedom of speech,” not the “freedom of the press.”

But it’s not clear what to make of the particular label that the Court used for the rights involved, since in the last half century the Court has tended to use “freedom of speech” broadly. And in any event, the bottom line was that the signers of the *New York Times* advertisement—who were communicating through the mass media 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).<sup>238</sup> Garrison, a district attorney, was prosecuted for criminal libel because of his statement at a press conference condemning several judges.<sup>239</sup> The Court held that Garrison was entitled to the protection of the *Sullivan* “actual malice” rule, without being influenced by Garrison’s not being a member of the press-as-industry.

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<sup>235</sup> 376 U.S. 254, 256 (1964).

<sup>236</sup> *Id.* at 283-84.

<sup>237</sup> *Id.* at 266 (emphasis added) (select citations omitted).

<sup>238</sup> 379 U.S. 64 (1964).

<sup>239</sup> *Id.* at 64-65.

The *Garrison* decision did speak of the “freedom of expression,”<sup>240</sup> rather than the “freedom of the press.” But though Garrison could have been seen as exercising the “freedom of the press”—he was trying to convey his views through the press, though filtered by the reporters who wrote the actual stories—the broader “freedom of expression” likely seemed to be a more natural label 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 *Sullivan* rule to an arrestee who issued a statement—sent to the sheriff and to wire services<sup>241</sup>—alleging that his arrest stemmed from a “diabolical plot.”<sup>242</sup> In *St. Amant v. Thompson* (1968), the Court applied the *Sullivan* rule to a politician who was sued for libel based on a statement he read on a televised program.<sup>243</sup> The Court didn’t indicate in either case whether the decisions were based on the Free Speech Clause or the Free Press Clause, likely because it made no difference. And *McDonald v. Smith* (1985) further reinforced the notion that the rules are the same under all the expression-related clauses of the First Amendment, by holding that the Petition Clause provided the same protection against libel lawsuits in petitions to the government as did cases such as *Garrison* and *Sullivan*.<sup>244</sup>

*Cohen v. Cowles Media Co.* (1991) echoed this view by holding that the press-as-industry gets no exemption from laws that don’t single out the press<sup>245</sup> and by citing a communicative tort case, *Zacchini v. Scripps-Howard Broadcasting Co.*, as an example of this principle.<sup>246</sup> The opinion cited *Zacchini* for the proposition that “[t]he press, like others interested in publishing,” is bound by copyright law.<sup>247</sup> It thus appears that the Court believes that the press-as-industry gets no exemptions

<sup>240</sup> *Id.* at 75.

<sup>241</sup> 158 So. 2d 28, 30 (Miss. 1963), *rev’d per curiam*, 380 U.S. 356 (1965).

<sup>242</sup> 380 U.S. at 356.

<sup>243</sup> 390 U.S. 727, 728, 733 (1968).

<sup>244</sup> 472 U.S. 479, 485 (1985).

<sup>245</sup> 501 U.S. 663, 669 (1991). For more on why *Cohen v. Cowles Media Co.* is properly read as discussing laws that apply equally to the press and to other speakers, see Volokh, *supra* note 229, at 1294-97.

<sup>246</sup> 501 U.S. at 669 (quoting *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576-79 (1977)).

<sup>247</sup> *Id.*

from communicative torts generally—not just libel, but also copyright infringement, and likely, as in *Zacchini* itself, the right of publicity.<sup>248</sup>

*Bartnicki v. Vopper* (2000) likewise held that the First Amendment equally protected a radio broadcaster and the person who gave him allegedly actionable material.<sup>249</sup> *Bartnicki* arose under federal statutes that banned both the interception of cellular phone conversations and the willful dissemination of such conversations, including dissemination by people who were unconnected to the person who did the interception.<sup>250</sup> An unknown person had intercepted a conversation in which local teachers' union leaders seemed to be discussing possible violent attacks on school board members.<sup>251</sup> That tape was left in the mailbox of Jack Yocum—"the head of a local taxpayers' organization" and a political foe of the union—and Yocum delivered it to radio show host Frederick Vopper.<sup>252</sup> The union leaders sued both Yocum and Vopper.<sup>253</sup>

The Court concluded that the First Amendment trumped the ban on dissemination, at least on the facts of the case.<sup>254</sup> But in the process of deciding the First Amendment question, the Court stressed that it "dr[ew] no distinction between the media respondents and Yocum."<sup>255</sup> The first citation the Court gave in support of this statement was to the passage from *New York Times Co. v. Sullivan* mentioned above, which noted that "persons who do not themselves have access to publishing facilities" are protected by the First Amendment when they pay others for access to their media platforms.<sup>256</sup> The Court's second citation was to a passage in *First National Bank of Boston v. Bellotti* in which the Court held that "[t]he inherent worth of the speech in terms of its capacity for informing the public does not de-

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<sup>248</sup> See *Brayton Purcell LLP v. Recordon & Recordon*, 606 F.3d 1124, 1128 (9th Cir. 2010) (observing that "copyright infringement . . . is often characterized as a tort," and treating it as such (citation omitted)). Copyright infringement is the intellectual property analog of trespass—an interference with a property owner's exclusive rights. And in *Zacchini*, the Court treated copyright infringement as analogous to the right of publicity tort. See 433 U.S. at 567.

<sup>249</sup> 532 U.S. 514, 525 n.8 (2001).

<sup>250</sup> *Id.* at 523-24.

<sup>251</sup> *Id.* at 518-19.

<sup>252</sup> *Id.* at 519.

<sup>253</sup> *Id.*

<sup>254</sup> *Id.* at 535.

<sup>255</sup> *Id.* at 525 & n.8.

<sup>256</sup> 376 U.S. 254, 266 (1964).

pend upon the identity of its source, whether corporation, association, union, or individual.”<sup>257</sup>

Finally, *Snyder v. Phelps* (2011) held that picketers near a funeral had a First Amendment defense to the tort of intentional infliction of emotional distress.<sup>258</sup> The foremost precedent on the subject, *Hustler Magazine, Inc. v. Falwell*,<sup>259</sup> involved a media defendant, but *Snyder* followed and extended *Hustler*’s reasoning without any suggestion that the picketers merited less protection than the professional publisher in *Hustler*. The *Snyder* Court didn’t expressly discuss whether media defendants should be treated differently from speakers—such as the picketers in *Snyder* itself—who are neither members of the press-as-industry nor directly using channels of mass communication (except insofar as they are hoping for media coverage). But the Court’s firm acceptance of the analogy between *Snyder* and *Hustler* is consistent with the press-as-technology view adopted by 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 matter is less clear—that it has taken the all-speakers-equal view rather than the mass-communications-more-protected view.

First, the cases above show that the Court considers the same rules to apply interchangeably under both the Free Speech Clause and the Free Press Clause. This suggests that these rules apply to speakers in non-mass-communications settings 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 distinction the Free Press Clause might or might not draw between mass communications and other communications, there’s no indication that the Free Speech Clause could embody such a distinction.

Second, the Court in *McDonald v. Smith* (1985) took the view that the Petition Clause rules are the same as those applicable under both the Free Speech Clause and the Free Press Clause.<sup>260</sup> Speech in most petitions to the government is *not* an attempt to engage in mass communications; for instance, the petitions in *McDonald* were letters to the President.<sup>261</sup> If such non-mass-communications speech to the gov-

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<sup>257</sup> 435 U.S. 765, 777 (1978).

<sup>258</sup> 131 S. Ct. 1207, 1220 (2011).

<sup>259</sup> See 485 U.S. 46, 47-48 (1988).

<sup>260</sup> 472 U.S. 479, 485 (1985).

<sup>261</sup> *Id.* at 480.

ernment is protected by the Petition Clause, and the First Amendment rules are the same under all three clauses, then non-mass-communications speech to others should also be protected by the Free Speech Clause.

Third, one of the Supreme Court's libel cases, *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.* (1985), did involve speech that wasn't intended for mass communications technology.<sup>262</sup> The *Dun & Bradstreet* Court held that a credit report sent out to five subscribers was less protected than speech on matters of "public concern."<sup>263</sup> But while Justice Powell's opinion concluded that the limited audience for the speech suggested that the speech was less likely to be of "public concern"—and the other Justices in the majority presumably agreed on this score—the Court expressly declined to adopt the media/nonmedia distinction the Vermont Supreme Court adopted below.<sup>264</sup> Indeed, five Justices (Justice White in his concurrence, and Justices Brennan, Marshall, Blackmun, and Stevens in dissent) specifically repudiated such a distinction.<sup>265</sup>

Moreover, the test that the Court adopted, which only applies full constitutional protection to speech on matters 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).<sup>266</sup> In *Connick*, a government employee's question to coworkers about whether supervisors illegally pressured employees to work on political campaigns was deemed to raise issues of "public concern."<sup>267</sup> *Connick* itself characterized an earlier case, *Givhan v. Western Line Consolidated School District* (1979),<sup>268</sup> as involving speech on a matter of "public

<sup>262</sup> See 472 U.S. 749, 751 (1985) (Powell, J., plurality opinion) (noting that the communication at issue was a "confidential" credit report).

<sup>263</sup> *Id.* at 763; see also *id.* at 764 (Burger, C.J., concurring in the judgment) (agreeing with Justice Powell on this point); *id.* at 774 (White, J., concurring in the judgment) (same).

<sup>264</sup> *Id.* at 753, 762 (Powell, J., plurality opinion).

<sup>265</sup> See *id.* at 781 (Brennan, J., joined by Marshall, Blackmun, & Stevens, JJ., dissenting) (arguing that "[s]uch a distinction 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 its source'" (alteration in original) (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978))).

<sup>266</sup> 461 U.S. 138, 147-49 (1983).

<sup>267</sup> *Id.* The *Dun & Bradstreet* plurality expressly relied on *Connick* in reaching its holding. 472 U.S. at 759-61. Other speech in *Connick* was found not to be of public concern, but only because it was seen as motivated merely by the speaker's personal employment dispute with her employer. 461 U.S. at 148-49.

<sup>268</sup> 439 U.S. 410 (1979).

concern,” even though that speech consisted solely of an employee’s statement to her employer.<sup>269</sup> And two years after *Dun & Bradstreet, Rankin v. McPherson* (1987) held that a county employee’s statement to a coworker qualified as speech on a matter of “public concern.”<sup>270</sup>

So on balance, *Dun & Bradstreet, McDonald*, and the other cases cited above suggest that the Court is taking the all-speakers-equal view of the First Amendment. And the cases certainly do not support the press-as-industry-specially-protected view.

## 5. The Campaign Speech Cases

Campaign finance laws have restricted various kinds of election-related speech, including corporate speech,<sup>271</sup> speech that costs more than \$1000,<sup>272</sup> and speech coordinated with a candidate.<sup>273</sup> 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.<sup>274</sup> The Supreme Court has thus never considered a case in which the press-as-industry directly sought a *constitutional* entitlement to exemptions from campaign finance law.

But in *Citizens United v. FEC* (2010), the Court did specifically reject the press-as-industry-specially-protected model.<sup>275</sup> The majority argued that if restrictions on corporate expression about candidates were constitutional, then newspapers—which are mostly owned by

<sup>269</sup> *Connick*, 461 U.S. at 146.

<sup>270</sup> 483 U.S. 378, 386-87 (1987).

<sup>271</sup> See *Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010) (invalidating such a restriction).

<sup>272</sup> See *Buckley v. Valeo*, 424 U.S. 1, 51 (1976) (per curiam) (invalidating such a restriction).

<sup>273</sup> See *id.* at 46-47 (discussing such a restriction).

<sup>274</sup> See, e.g., 2 U.S.C. § 431(9)(B)(i) (2006) (exempting from mandatory campaign disclosures 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”); *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 666-67 (1990) (describing a state election law that exempted 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” (alteration in original)).

<sup>275</sup> See 130 S. Ct. at 905-06 (“There is no precedent supporting laws that attempt to distinguish between corporations which are deemed to be exempt as media corporations and those which are not . . . . This differential treatment cannot be squared with the First Amendment.”).

corporations—could likewise be restricted.<sup>276</sup> The dissent suggested that this need not be so, since newspapers and similar publications might still have Free Press Clause rights that other corporations interested in publishing material did not have.<sup>277</sup> But the majority rejected this argument, instead deciding that “the institutional press” has no “constitutional privilege beyond that of other speakers”—so that any restrictions that could be constitutionally imposed on nonmedia corporations could likewise be imposed on media corporations.<sup>278</sup>

And though *Citizens United* overruled portions of *McConnell v. FEC* (2003)<sup>279</sup> and *Austin v. Michigan Chamber of Commerce* (1990),<sup>280</sup> those earlier cases were not inconsistent with *Citizens United* on this point. *McConnell* was silent on the issue.<sup>281</sup> *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*.<sup>282</sup>

In the process, the Court in *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.<sup>283</sup> Three of the four dissenters in *Bellotti* 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,” presumably including expenditures incurred to convey their views about the election.<sup>284</sup>

In the Court’s first campaign finance speech case, *United States v. CIO* (1948), a four-Justice concurrence—written by Justice Rutledge and joined by Justices Black, Douglas, and Murphy—likewise rejected the press-as-industry-specially-protected model.<sup>285</sup> In that case, the CIO challenged a federal ban on the use of corporate and union

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<sup>276</sup> *Id.* at 906.

<sup>277</sup> *Id.* at 951 n.57 (Stevens, J., dissenting).

<sup>278</sup> *Id.* at 905 (majority opinion) (quoting *Austin*, 494 U.S. at 691 (Scalia, J., dissenting)).

<sup>279</sup> 540 U.S. 93 (2003).

<sup>280</sup> 494 U.S. 652.

<sup>281</sup> *Citizens United*, 130 S. Ct. at 913.

<sup>282</sup> *Austin*, 494 U.S. at 668.

<sup>283</sup> 435 U.S. 765, 782 n.18 (1978).

<sup>284</sup> *Id.* at 808 n.8 (White, J., dissenting, joined by Brennan & Marshall, JJ.).

<sup>285</sup> 335 U.S. 106, 154-55 (1948) (Rutledge, J., concurring in the judgment).

funds for election-related speech.<sup>286</sup> The majority interpreted the statute narrowly, as excluding union-owned newspapers.<sup>287</sup> But the concurring Justices would have gone further and invalidated the statute altogether, holding as a general matter that sporadic publication by nonmedia organizations is 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.<sup>288</sup>

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 campaign speech cases that the Court would accept even the mass-communications-more-protected model of the Free Press Clause; in fact, *McConnell v. FEC* (2003) quickly rejected this model.<sup>289</sup> It seems unlikely that the Justices would treat spending \$10,000 to print and mail campaign literature as constitutionally different from spending \$10,000 to organize a political rally.<sup>290</sup>

<sup>286</sup> *Id.* at 108-09 (majority opinion).

<sup>287</sup> *Id.* at 123-24.

<sup>288</sup> *Id.* at 155 (Rutledge, J., concurring in the judgment).

<sup>289</sup> See 540 U.S. 93, 209 n.89 (2003). A Congressman, an advocacy group, and some other plaintiffs in *McConnell* argued at the district court level that they were entitled to Free Press Clause protection, on a press-as-technology theory. See *McConnell v. FEC*, 251 F. Supp. 2d 176, 233-34 & n.61 (D.D.C.) (per curiam), *aff'd in part*, 540 U.S. 93 (2003), *overruled in part as to other matters* by *Citizens United v. FEC*, 130 S. Ct. 876 (2010). 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* allows some restrictions on both Free Speech Clause and Free Press Clause rights as to campaign-related speech. *Id.* at 234-36. And the Supreme Court expressly agreed with the district court on this point. 540 U.S. at 209 n.89.

<sup>290</sup> 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 v. Valeo*, 424 U.S. 1 (1976) (mentioning the First Amendment 109 times, and the "freedom of speech" and "free speech" only thirteen times in total).

## 6. The Access to Government Facilities Cases

In *Pell v. Procunier* (1974), 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*, [408 U.S. 665, 684-85 (1972)]. 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.<sup>291</sup>

*Saxbe v. Washington Post Co.* (1974), decided the same day, took the same view.<sup>292</sup> 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.<sup>293</sup>

Justice Douglas, dissenting in *Pell* and *Saxbe*, disagreed, arguing in *Pell* 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 the press-as-industry stood on a different footing from the public when it came to access.<sup>294</sup> But the majority did not accept this view; and even though Justices Brennan and Marshall joined Douglas’s dissent, their views on this issue are hard to pin down—they

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<sup>291</sup> *Pell v. Procunier*, 417 U.S. 817, 833-34 (1974) (citation altered).

<sup>292</sup> 417 U.S. 843, 850 (1974); see also *id.* (“[N]ewsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public.” (quoting *Pell*, 417 U.S. at 834)).

<sup>293</sup> *Id.* at 857 (Powell, J., dissenting).

<sup>294</sup> 417 U.S. at 841 (Douglas, J., dissenting, joined by Brennan & Marshall, JJ.) (alteration in original) (citation omitted).

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) likewise accepted the *Pell* view in rejecting a claimed right of access to prisons for videorecording purposes.<sup>295</sup> Three of the seven participating Justices asserted that the press has no extra First Amendment rights beyond those held by the public at large.<sup>296</sup> Three more quoted similar language from *Pell*, without any suggestion that they disagreed with it.<sup>297</sup> Only Justice Stewart, concurring in the judgment, concluded that the media should have the right to videorecord prison conditions even if the general public lacked that right.<sup>298</sup>

Finally, in *Richmond Newspapers, Inc. v. Virginia* (1980), which held that the First Amendment generally prohibited the closure of trials, Justice Brennan's concurrence (joined by Justice Marshall) expressly noted that the case didn't raise the question "whether the media should enjoy greater access rights than the general public."<sup>299</sup> But the majority in *Nixon v. Warner Communications, Inc.* (1978) had answered the question in the negative, holding that "[t]he First Amendment generally grants the press no right to information about a trial superior to that of the general public."<sup>300</sup> And before *Nixon, Estes v. Texas* (1965) stated in dicta that "[a]ll [journalists] are entitled to the same rights [of access to trials] as the general public."<sup>301</sup>

## 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

<sup>295</sup> See 438 U.S. 1, 15-16 (1978) (plurality opinion).

<sup>296</sup> *Id.* at 11.

<sup>297</sup> *Id.* at 27-28 (Stevens, J., joined by Brennan & Powell, JJ., dissenting) (quoting *Pell*, 417 U.S. 834). The dissent's view was that the policy unconstitutionally interfered with access to information about the prison, both for the press and the public as a whole. *Id.* at 28-30.

<sup>298</sup> *Id.* at 16-17 (Stewart, J., concurring in the judgment) ("[T]erms of access that are reasonably imposed on individual members of the public may, if they impede effective reporting without sufficient justification, be unreasonable as applied to journalists . . .").

<sup>299</sup> 448 U.S. 555, 586 n.2 (1980) (Brennan, J., concurring in the judgment).

<sup>300</sup> 435 U.S. 589, 609 (1978); see also *id.* (denying a claimed right to make copies of tape recordings introduced at a criminal trial). Three Justices dissented in *Nixon*, but none of the dissenters discussed the First Amendment question. See *id.* at 611.

<sup>301</sup> 381 U.S. 532, 540 (1965).

majority opinions expressly reserved the question whether “nonmedia defendant[s]” were unprotected by parts of the Court’s emerging libel case law,<sup>302</sup> even though a majority of the Justices who sat on the Court during that era—Justices Brennan, Marshall, Blackmun, Stevens, and White—had, on various occasions, concluded that nonmedia defendants should be treated the same as media defendants.<sup>303</sup> This has signaled to lower courts that the question remains open. And a few lower courts have indeed applied the First Amendment differently to media and non-media defendants, both before 1979 and after.

## VII. THE PRESS-AS-INDUSTRY IN THE LOWER COURT CASES: 1970 TO NOW

From the 1930s to the 1960s, lower court cases often repeated that the institutional press had no special First Amendment rights, whether generally<sup>304</sup> or regarding libel law,<sup>305</sup> the duty to testify notwithstanding

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<sup>302</sup> See *Babbitt v. United Farm Workers Nat’l 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); *Phila. 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 “[t]he 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,” though he argued that the Free Press Clause should be read as not conferring any such special protection. *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 798-802 (1978) (Burger, C.J., concurring).

<sup>303</sup> See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 781 (1985) (Brennan, J., joined by Marshall, Blackmun, & Stevens, JJ., dissenting) (concluding that the proposed distinction between “media” and nonmedia defendants 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” (quoting *Bellotti*, 435 U.S. at 777)); *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.”); see also *Milkovich*, 497 U.S. at 23-24 n.2 (Brennan, J., joined by Marshall, J., dissenting) (repeating Justice Brennan’s position in *Dun & Bradstreet* on the subject); *Hepps*, 475 U.S. at 780 (Brennan, J., joined by Blackmun, J., concurring) (same); cf. *Cohen v. Cowles Media Co.*, 501 U.S. 663, 674 (1991) (Blackmun, J., joined by Marshall & 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. See 472 U.S. at 773-74 (White, J., concurring in the judgment); *id.* at 781 (Brennan, J., dissenting).

<sup>304</sup> See, e.g., *Curry v. Journal Publ’g Co.*, 68 P.2d 168, 174-75 (N.M. 1937) (stating, in the discussion of the “freedom of the press,” that “[a] publisher of a newspaper has the same rights, no more or less, than individuals, to speak, write, or publish his views and sentiments, and is subject to the same restrictions”), *overruled on other grounds by*

a promise of confidentiality made to a source,<sup>306</sup> access to trials,<sup>307</sup> or access to government documents.<sup>308</sup>

When, then, did the press-as-industry-specially-protected decisions (and the mass-communications-more-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 examining cases that have adopted these models, especially the press-as-industry-specially-protected model, may identify helpful test cases for future discussions of whether the models are wise.

The answer seems to be that the first cases departing from the all-speakers-equal model were decided in the 1970s. Moreover, even since the 1970s, there have only been about a dozen press-as-industry-

Ramirez v. Armstrong, 673 P.2d 822 (N.M. 1983); Layne v. Tribune Co., 146 So. 234, 238 (Fla. 1933) (concluding that the “constitutional guaranty of ‘freedom of the press’” “was simply intended to secure to the conductors of the press the same rights and immunities, and such rights and immunities only, as were enjoyed by the public at large”).

<sup>305</sup> See, e.g., Leers v. Green, 131 A.2d 781, 788-89 (N.J. 1957) (concluding that the American “freedom . . . of press” tracked the English rule that “the press and the public have the same right of fair comment,” a conclusion that in this case helped the nonmedia defendants get the same protection as the media defendants); Swearingen v. Parkersburg Sentinel Co., 26 S.E.2d 209, 215 (W. Va. 1943) (“The publisher of a newspaper has no greater privilege to publish defamatory matter than any other person.”).

<sup>306</sup> See, e.g., State v. Buchanan, 436 P.2d 729, 731 (Or. 1968) (“Indeed, it would be difficult to rationalize a rule that would create special constitutional rights for those possessing credentials as news gatherers which would not conflict with the equal-privileges and equal-protection concepts also found in the Constitution. Freedom of the press is a right which belongs to the public; it is not the private preserve of those who possess the implements of publishing.” (footnote omitted)). Another case from the 1950s, *Rumely v. United States*, concluded that a publisher had a right to refuse to reveal the names of his customers to the House Select Committee on Lobbying Activities; but the court’s reasoning rested on anonymous speech principles that applied beyond the press-as-industry and would have covered nonprofessional distributors of leaflets or pamphlets. 197 F.2d 166, 176 (D.C. Cir. 1952), *aff’d on other grounds*, 345 U.S. 41 (1953). The opinion repeatedly treated “books, pamphlets and other writings” equally, *id.* at 173, 174, and stressed the value of protecting attempts to influence public opinion—an activity in which nonmedia actors have long participated, *id.* at 175.

<sup>307</sup> See, e.g., *Kirstowsky v. Superior Court*, 300 P.2d 163, 169 (Cal. Ct. App. 1956) (“[M]embers of the press are in the same position as other members of the public and have no greater right to be present at court hearings than has any other member of the public,” and therefore “[t]he freedom of the press is in no way involved in this proceeding.”); *United Press Ass’n v. Valente*, 123 N.E.2d 777, 783 (N.Y. 1954) (“The fact that petitioners are in the business of disseminating news gives them no special right or privilege, not possessed by other members of the public.”).

<sup>308</sup> See, e.g., *Grand Forks Herald, Inc. v. Lyons*, 101 N.W.2d 543, 547 (N.D. 1960) (concluding that “the freedom of the press” gives “plaintiff as a newspaper . . . no greater right of inspection than that given to the public generally”); *Trimble v. Johnston*, 173 F. Supp. 651, 655-56 (D.D.C. 1959) (same).

especially-protected cases. Some of these cases seem to be motivated by some lower courts' unease with the First Amendment jurisprudence announced by the Court in recent decades—especially in libel cases—and are aimed at minimizing the scope of those protections. Other cases seem to be motivated by other lower courts' desire to extend First Amendment protections, especially in cases of press access to private property, but to do so in a limited way.

But whatever the motivation, the press-as-industry-specially-protected cases represent a minority view: most lower court cases have continued to follow the all-speakers-equal model.<sup>309</sup> Below, I discuss both the press-as-industry-specially-protected cases and the cases that reject this view, arranged by topic: (a) cases involving a newsgatherer's privilege; (b) cases involving communicative torts (chiefly libel); (c) cases involving claimed First Amendment exemptions from anti-discrimination laws; (d) cases involving a claimed First Amendment right to access government operations, government property, and private property; and (e) campaign speech cases.

#### A. *The Newsgatherer's Privilege*

The first decision rejecting the all-speakers-equal model—the district court decision in *In re Caldwell*,<sup>310</sup> which was largely reversed by the Supreme Court in *Branzburg v. Hayes*—was a newsgatherer's privilege decision. *Caldwell* did not determine whether the privilege would follow the mass-communications-more-protected model or the press-as-industry-specially-protected model. But lower court cases considering this issue have nearly unanimously rejected the press-as-industry-

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<sup>309</sup> See, for example, cases rejecting the journalist's privilege *infra* note 311 and cases rejecting a media/nonmedia distinction in libel cases *infra* note 321.

<sup>310</sup> See 311 F. Supp. 358, 360 (N.D. Cal.) (ruling that a journalist's testimony before a grand jury should not "reveal confidential associations that impinge upon the effective exercise of his First Amendment right to gather news for dissemination to the public through the press"), *vacated*, 434 F.2d 1081 (9th Cir. 1970), *rev'd sub nom.* *Branzburg v. Hayes*, 408 U.S. 665 (1972). *Garland v. Torre*, 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." 259 F.2d 545, 549-50 (2d Cir. 1958). This seems to suggest that a privilege might be available if the news source is indeed "of doubtful relevance or materiality," but 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 (citing *Tribune Review Pub. Co. v. Thomas*, 254 F.2d 883 (3d Cir. 1958); *Valente*, 123 N.E.2d 777).

specially-protected model: some reject any First Amendment newsgatherer's privilege, reasoning that Justice Powell's concurrence doesn't undercut the majority opinion,<sup>311</sup> and others accept the privilege but apply it equally to non-press-as-industry newsgatherers.

Thus, the First, Second, Third, Ninth, and Tenth Circuits, the Minnesota Supreme Court, and several district courts together have held that would-be book authors,<sup>312</sup> professors doing research for a possible future article,<sup>313</sup> a film student and a professor trying to produce a documentary film,<sup>314</sup> a political candidate,<sup>315</sup> and political advocacy groups<sup>316</sup> were all potentially eligible for the privilege on the same terms as ordinary journalists. The common 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."<sup>317</sup> The newsgatherer need not be a member of the press-as-industry.

The only newsgatherer's privilege case I could find that seemed to endorse the press-as-industry-specially-protected view is *People v. LeGrand*, a 1979 New York intermediate appeals court case.<sup>318</sup> The

<sup>311</sup> See, e.g., *In re Grand Jury Subpoena*, Judith Miller, 438 F.3d 1141, 1148 (D.C. Cir. 2006); *McKevitt v. Pallasch*, 339 F.3d 530, 531-32 (7th Cir. 2003); *In re Grand Jury Proceedings*, 810 F.2d 580, 585 (6th Cir. 1987); *In re Farber*, 394 A.2d 330, 334 (N.J. 1978).

<sup>312</sup> See *Ayala v. Ayers*, 668 F. Supp. 2d 1248, 1250 (S.D. Cal. 2009); *Shoen v. Shoen*, 5 F.3d 1289, 1293 (9th Cir. 1993); *von Bulow v. von Bulow*, 811 F.2d 136, 144 (2d Cir. 1987); *United States v. Hubbard*, 493 F. Supp. 202, 205 (D.D.C. 1979); see also *In re Madden*, 151 F.3d 125, 128-30 (3d Cir. 1998) (endorsing *Shoen* and *von Bulow*, though concluding that they were inapplicable to the case at hand).

<sup>313</sup> See *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 714-15 (1st Cir. 1998); see also *United States v. Doe*, 332 F. Supp. 938, 941 (D. Mass. 1971) (concluding that academics should be treated the same way as journalists, but deciding that the privilege was inapplicable for other reasons (citing *Lovell v. Griffin*, 303 U.S. 444, 452 (1938))).

<sup>314</sup> See *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 436-37 (10th Cir. 1977) (citing *Lovell*, 303 U.S. at 452).

<sup>315</sup> See *In re Charges of Unprofessional Conduct Involving File No. 17139*, 720 N.W.2d 807, 816 (Minn. 2006).

<sup>316</sup> See *Schiller v. City of New York*, 245 F.R.D. 112, 118-20 (S.D.N.Y. 2007); *Builders Ass'n of Greater Chi. v. Cnty. of Cook*, No. 96-1121, 1998 WL 111702, at \*4-5 (N.D. Ill. Mar. 12, 1998).

<sup>317</sup> *Von Bulow*, 811 F.2d at 143.

<sup>318</sup> I don't count the district court and court of appeals 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 isn't clear which model they adopted. The decisions addressed whether searches of newspaper premises violated the Fourth Amendment, *id.* at 125-26, so the courts had no occasion to decide whether they would have reached the same result as to the search of the office of a would-be book author or a creator of non-mass communications speech, such as pick-

*LeGrand* court rejected a newsgatherer's privilege claim raised by someone researching a book about a mafia family, reasoning:

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.

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.<sup>319</sup>

The court thus distinguished "professional journalist[s]" from those who are only one-time authors, endorsing the press-as-industry-specially-protected approach. But I know of no other newsgatherer's privilege cases that take this view.

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 certain segments of the media.<sup>320</sup> 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 distinguish the press-as-industry from other newsgatherers.

eting or in-person speeches. And while the district court did reject the view "that newspapers, reporters and photographers have no greater Fourth Amendment protections than other citizens," *id.* at 133-34, it spoke more broadly of the principle that "[t]he First Amendment is *not* superfluous," *id.* The court didn't argue that the Free Press Clause "is not superfluous," and thus that the Clause provides special protection to the press-as-industry that the rest of the First Amendment denies to other speakers. Indeed, the court 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. 353 F. Supp. at 134.

<sup>319</sup> *People v. LeGrand*, 415 N.Y.S.2d 252, 257-58 (N.Y. App. Div. 1979).

<sup>320</sup> *See, e.g.*, DEL. CODE ANN. tit. 10, § 4320(4) (West 1999) (defining reporter narrowly by requiring a large time commitment and future large-scale public dissemination of the work).

B. *Communicative Torts*

Many communicative torts decisions in the lower courts have continued to follow the all-speakers-equal model.<sup>321</sup> Moreover, most of the lower court cases that have departed from this approach have done so with regard to speech that was never intended for mass dissemination, such as credit reports,<sup>322</sup> employer references related to ex-employees,<sup>323</sup> complaints about a franchisee sent to a franchisor,<sup>324</sup> complaints sent to the government,<sup>325</sup> business responses to customer complaints,<sup>326</sup> people talking to their coworkers, supervisors, or neigh-

<sup>321</sup> See, e.g., *Snyder v. Phelps*, 580 F.3d 206, 219 n.13 (4th Cir. 2009), *aff'd*, 131 S. Ct. 1207 (2011); *Flamm v. Am. Ass'n of Univ. Women*, 201 F.3d 144, 149 (2d Cir. 2000); *In re IBP Confidential Bus. Docs. Litig.*, 797 F.2d 632, 642 (8th Cir. 1986); *Garcia v. Bd. of Educ.*, 777 F.2d 1403, 1410 (10th Cir. 1985); *Avin v. White*, 627 F.2d 637, 649 (3rd Cir. 1980); *Davis v. Schuchat*, 510 F.2d 731, 734 (D.C. Cir. 1975); *Doe v. Alaska Superior Ct.*, 721 P.2d 617, 628 (Alaska 1986); *Antwerp Diamond Exch. of Am. v. Better Bus. Bureau*, 637 P.2d 733, 734 (Ariz. 1981); *Miller v. Nestande*, 237 Cal. Rptr. 359, 364 n.7 (Cal. Ct. App. 1987); *Moss v. Stockard*, 580 A.2d 1011, 1022 n.23 (D.C. 1990); *Nodar v. Galbreath*, 462 So. 2d 803, 808 (Fla. 1984); *Rodriguez v. Nishiki*, 653 P.2d 1145, 1149-50 (Haw. 1982); *Kennedy v. Sheriff of E. Baton Rouge*, 935 So. 2d 669, 677-78 (La. 2006); *Jacron Sales Co. v. Sindorf*, 350 A.2d 688, 695 (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, 216-17 (Mont. 1982); *Wheeler v. Neb. 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. N.Y. Times Co.*, 724 N.Y.S.2d 16, 17 (N.Y. App. Div. 2001) (endorsing *Hammerhead Enters. 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*, 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 (1977).

<sup>322</sup> See, e.g., *Grove v. Dun & Bradstreet, Inc.*, 438 F.2d 433, 437 (3d Cir. 1971); *Greenmoss Builders v. Dun & Bradstreet, Inc.*, 461 A.2d 414, 417-18 (Vt. 1983), *aff'd on other grounds*, 472 U.S. 749 (1985), *but overruled in part on other grounds by* *Lent v. Huntoon*, 470 A.2d 1162 (Vt. 1983).

<sup>323</sup> See, e.g., *Vinson v. Linn-Mar Cmty. Sch. Dist.*, 360 N.W.2d 108, 118 (Iowa 1984); *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 258 (Minn. 1980); *Berg v. Cons. Freightways, Inc.*, 421 A.2d 831, 834 (Pa. Super. Ct. 1980); *Calero v. Del Chem. Corp.*, 228 N.W.2d 737, 745-46 (Wis. 1975).

<sup>324</sup> See, e.g., *Harley-Davidson Motorsports, Inc. v. Markley*, 568 P.2d 1359, 1362-65 (Or. 1977), *reaffirmed in* *Wheeler v. Green*, 593 P.2d 777 (Or. 1979).

<sup>325</sup> See, e.g., *Swengler v. ITT Corp. Electro-Optical Prods. Div.*, 993 F.2d 1063, 1071 n.5 (4th Cir. 1993). The court did not consider the possibility that such speech should have been fully protected by the Petition Clause, even if not by the Free Speech Clause.

<sup>326</sup> *Perry v. Cosgrove*, 464 So. 2d 664, 665 n.1 (Fla. Dist. Ct. App. 1985). *Perry* actually involved a newspaper and a newspaper editor as defendants, but the court concluded that their speech—sending a letter to a customer in response to a complaint—

bors,<sup>327</sup> 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-more-protected view, and not just the press-as-industry-specially-protected view.

Indeed, some cases rejecting the all-speakers-equal model expressly hold that nonmedia speakers should be as protected as the media when they speak through the media—for instance, through letters to the editor or as people interviewed for news stories. This perspective fits well within the mass-communications-more-protected view.<sup>328</sup>

I could find only a handful of cases holding 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 these cases deny nonmedia defendants the benefit of the prohibition—established by the Supreme Court’s holding in *Gertz v. Robert Welch, Inc.*—on awards of presumed damages in the absence of a showing of “actual malice.”<sup>329</sup>

was not as protected as speech intended for mass communication. *Id.* *Perry*’s reasoning seems inconsistent with *Nodar v. Galbreath*, which rejected the press-as-industry-specially-protected view. *See* *Nodar v. Galbreath*, 462 So. 2d 803, 808 (Fla. 1984) (“We believe . . . that the constitutionally protected right to discuss, comment upon, criticize, and debate . . . is extended not only to the organized media but to all persons.”). Since *Perry* doesn’t cite *Nodar*, it is possible that the parties and the court were unaware of *Nodar*, which was decided less than three months before the decision in *Perry*, and likely after the briefing in *Perry* was complete.

<sup>327</sup> *See, e.g.*, *Schomer v. Smidt*, 170 Cal. Rptr. 662, 665 (Cal. Ct. App. 1980), *disapproved by* *Miller v. Nestande*, 237 Cal. Rptr. 359 (Cal. Ct. App. 1987); *Williams v. Cont’l Airlines, Inc.*, 943 P.2d 10, 18 (Colo. App. 1996); *Battista v. United Illuminating Co.*, 523 A.2d 1356, 1361 n.5 (Conn. App. Ct. 1987); *Columbia Sussex Corp. v. Hay*, 627 S.W.2d 270, 277 (Ky. Ct. App. 1981).

<sup>328</sup> *See, e.g.*, *Metabolife Int’l, Inc. v. Wornick*, 72 F. Supp. 2d 1160, 1175 n.21 (S.D. Cal. 1999) (applying same standard to a nonmedia defendant doctor as to media defendants because the doctor’s statements were published through the media), *rev’d on other grounds*, 264 F.3d 832, 847 (9th Cir. 2001); *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*, 486 N.Y.S.2d 11, 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 should be accorded the same constitutional privilege as the medium itself.” (citation omitted)); *see also* *Dairy Stores, Inc. v. Sentinel Publ’g Co.*, 465 A.2d 953, 962-63 (N.J. Super. Ct. Law Div. 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).

<sup>329</sup> 418 U.S. 323, 348-50 (1974).

## 1. Political 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 a development project was a “non-media defendant,” and thus wasn’t protected under *Gertz*.<sup>330</sup> (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 racehorse owner who sent a letter to the editor of a horse racing newsletter, alleging that a horse trainer had behaved unethically.<sup>331</sup> Similarly, *Johnson v. Clark* denied *Gertz* protection to the author of a letter to the editor of a newspaper complaining about an attorney’s alleged mishandling of the estate of the author’s uncle.<sup>332</sup>

## 2. Books and Authors’ Own Websites

*Lassiter v. Lassiter* treated a self-published author—a woman who wrote a book accusing her ex-husband of physical abuse and adultery—as a nonmedia defendant, and held that only “media defendants” could assert First Amendment defenses to private figures’ defamation claims.<sup>333</sup> Because of this, the court concluded that the First

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<sup>330</sup> 275 S.E.2d 632, 638 (Va. 1981). Fleming was a real estate developer who was trying to develop a tract; Moore was a neighbor who spoke out against the application at local Planning Commission and Board of Supervisors meetings. *Id.* at 634. Fleming responded by buying a newspaper ad captioned “RACISM,” which asserted that Moore (who was white) opposed the development because it would likely have many black residents. *Id.* at 634 & n.3.

In this 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 conduct incompatible with proper performance of his 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.” *Id.*

<sup>331</sup> 593 P.2d 777, 784, 787-89 (Or. 1979). The court held that punitive damages in defamation cases were foreclosed by the Oregon Constitution, but allowed the recovery of presumed damages. *Id.* at 788-89.

<sup>332</sup> 484 F. Supp. 2d 1242, 1250-51, 1254 (M.D. Fla. 2007). *Johnson* didn’t cite *Gertz* directly, didn’t discuss the First Amendment, and didn’t cite the Florida Supreme Court’s opinion in *Nodar v. Galbreath*, which rejected any media/nonmedia distinction. See *Nodar v. Galbreath*, 462 So. 2d 803, 808 (Fla. 1984) (“If common-law remedies for defamation are to be constitutionally restricted [under *Gertz*] in actions against media defendants, they should also be restricted in actions against private, non-media speakers and publishers.”). Rather, *Johnson* relied on only two pre-*Gertz* cases and a post-*Gertz* Florida Court of Appeals case that didn’t discuss the media/nonmedia distinction.

<sup>333</sup> 456 F. Supp. 2d 876, 881 (E.D. Ky. 2006), *aff’d per curiam*, 280 Fed. App’x 503 (6th Cir. 2008).

Amendment did not bar holding the defendant strictly liable for false and defamatory factual assertions, notwithstanding the *Gertz v. Robert Welch, Inc.* rule that barred such strict liability in many cases.<sup>334</sup> Likewise, *Ben-Tech Industrial Automation v. Oakland University* treated a professor as a nonmedia defendant with regard to material posted on his website, and thus didn't apply the *Gertz* requirement that punitive and presumed damages be awarded only on a showing of "actual malice."<sup>335</sup>

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<sup>334</sup> The court ultimately concluded that the defendant's speech was either true or mere opinion and thus not actionable under Kentucky law. 456 F. Supp. 2d at 879, 882. The court might have reached the same First Amendment result—that strict liability might be allowed if the statements were proven to be false factual assertions—another way. The court concluded that the speech was "about a matter that is not of public interest," *id.* at 880, which is consistent with the plurality view in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 & n.7 (1985) (plurality opinion), which gave as an example of speech on matters of purely private concern a false claim that a neighbor is a "whore." *Dun & Bradstreet* in turn had held that speech on non-public-concern matters was not covered by the *Gertz* rule that presumed punitive damages could be awarded even in the absence of "actual malice." And the logic of *Dun & Bradstreet* may be read to suggest that statements that are not of "public concern" are likewise not covered by the *Gertz* prohibition on strict liability. Compare, e.g., *Sleem v. Yale Univ.*, 843 F. Supp. 57, 63-64 (M.D.N.C. 1993) (so interpreting *Gertz*), *Ross v. Bricker*, 770 F. Supp. 1038, 1043-44 (D.V.I. 1991) (suggesting that *Gertz* might be so interpreted), and *Pearce v. E.F. Hutton Grp., Inc.*, 664 F. Supp. 1490, 1505 n.21 (D.D.C. 1987) (likewise), with *L. Cohen & Co. v. Dun & Bradstreet, Inc.*, 629 F. Supp. 1425, 1431 (D. Conn. 1986) (suggesting the contrary). Nonetheless, this was not the reasoning that the *Lassiter* court used to decide that the First Amendment protections did not apply; rather, it limited those protections to "public officials and public figures and/or against media defendants."

<sup>335</sup> See No. 247471, 2005 WL 50131, \*6-7 & n.9 (Mich. Ct. App. Jan. 11, 2005) (concluding that "[t]he actual malice standard d[id] not apply," but rather a negligence standard did, since the case "involv[ed] a private plaintiff, a non-media defendant, and alleged defamatory statements regarding a private matter"). The court didn't cite *Gertz*, but its articulation of the First Amendment rules suggested that it was considering whether the *Gertz* rule was applicable here. The result might have been the same regardless of whether the defendant was a media defendant, because *Dun & Bradstreet*—which the court also didn't cite—had held that speech on "private matter[s]" was not covered by the *Gertz* rule. But I include the case in this Section because the court did rely on the defendant's status as a "non-media" entity.

The professor posted a student paper that happened to contain defamatory allegations as an example for other students, apparently without the intent of endorsing the allegations. This might conceivably be seen as speech that's not part of mass communications because it is addressed only to a small audience (even though it was theoretically available to everyone on the Internet). *Id.* at \*1. But the court didn't rely on any such argument, and instead simply stated that the First Amendment libel rules are for press-as-industry defendants alone. *Id.* at \*6 n.8.

The defendant didn't raise, see Brief on Appeal of Defendant-Appellee Donald O. Mayer, *Ben-Tech Indus. Automation*, No. 247471, 2005 WL 25531938, and the court didn't discuss a possible defense under 47 U.S.C. § 230, which has been held to im-

### 3. Quoted Statements to the Media

Five cases have 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 expressing their views through mass communications technology. *Stokes v. CBS, Inc.* so held with regard to on-camera interviews “built around the statements of” the defendant, a detective investigating a case.<sup>336</sup> *Denny v. Mertz* reached the same conclusion about a defendant’s statement to a reporter about why the defendant—the CEO of a large company—had fired the plaintiff, his general counsel.<sup>337</sup>

*Guilbeaux v. Times of Acadiana, Inc.* also came to the same conclusion regarding a casino developer’s statements to a newspaper about

munize online speakers from liability when they choose to post material provided by others. *See, e.g., Batzel v. Smith*, 333 F.3d 1018, 1031 (9th Cir. 2003) (holding that a listserv and website operator is immunized from liability for posting an allegedly defamatory email authored by a third party).

<sup>336</sup> 25 F. Supp. 2d 992, 1000-01 (D. Minn. 1998). The exact effect of the detective’s nonmedia status wasn’t entirely clear, but it seems to have been that the detective 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 (quoting *Bol v. Cole*, 561 N.W.2d 143, 149 (Minn. 1997)). The court specifically held that “on [the] issue of [presumed or punitive] damages, private parties ‘utiliz[ing] the television media’ are placed ‘in the same legal position’ as media defendants.” *Id.* at 1003 (third alteration in original) (quoting *Richie v. Paramount Picture Corp.*, 544 N.W.2d 21, 26 n.5 (Minn. 1996)).

Likewise, in *Obsidian Finance Group, LLC v. Cox*, No. 11-0057, 2011 WL 5999334 (D. Or. Nov. 30, 2011)—a case that came too late to be included in the text—the court concluded that a blogger who published a blog that was sharply critical of plaintiff was not a member of the “media,” and thus not entitled to the *Gertz* rule that “plaintiffs cannot recover damages without proof that defendant was at least negligent and may not recover presumed damages absent proof of ‘actual malice.’” *Id.* at \*5. In the court’s view, *Gertz* extended only to speakers as to whom there was some

evidence of (1) any education in journalism; (2) any credentials or proof of any affiliation with any recognized news entity; (3) proof of adherence to journalistic standards such as editing, fact-checking, or disclosures of conflicts of interest; (4) keeping notes of conversations and interviews conducted; (5) mutual understanding or agreement of confidentiality between the defendant and his/her sources; (6) creation of an independent product rather than assembling writings and postings of others; or (7) contacting “the other side” to get both sides of a story. Without evidence of this nature, defendant is not “media.”

*Id.*

<sup>337</sup> *See* 318 N.W.2d 141, 152-53 (Wisc. 1982) (“[W]e do not read *Gertz* as requiring that the protections provided therein apply to non-media defendants nor . . . do we consider it good public policy to so decide.”).

another casino developer.<sup>338</sup> *Kanaga v. Gannett Co.* held the same about a patient's statements to the media accusing a doctor of recommending unnecessary hysterectomies.<sup>339</sup> And *Landrum v. Board of Commissioners* suggested that any possible First Amendment barriers to tort lawsuits for disclosure of allegedly private facts (there, that a police officer had failed a marijuana test<sup>340</sup>) did not apply to a nonmedia defendant who had conveyed the information to newspapers.<sup>341</sup>

#### 4. Nonmedia Defendants Generally

The Florida Supreme Court's standard jury instructions expressly put the burden of proving truth on nonmedia defendants,<sup>342</sup> even though *Philadelphia Newspapers, Inc. v. Hepps* requires that the burden of proving falsehood be placed on plaintiffs in cases with media defendants involving matters of public concern.<sup>343</sup> The comments to the instructions seem to treat "media defendant"<sup>344</sup> as meaning "a member of the press or broadcast media,"<sup>345</sup> which suggests that the court was endorsing the press-as-industry-specially-protected view.

<sup>338</sup> 693 So. 2d 1183, 1188 (La. Ct. App. 1997) (citing *Sassone v. Elder*, 626 So. 2d 345, 351 (La. 1993)).

<sup>339</sup> 687 A.2d 173, 181-82 (Del. 1996). A later decision in the same case concluded that Kanaga was a nonmedia defendant despite her having written several articles in the past, and "her (unsuccessful) efforts to publish an article about [the incident giving rise to the libel lawsuit] in a magazine." No. 92C-12-182-JOH, 1998 WL 729585, at \*4 (Del. Super. Ct. July 10, 1998), *aff'd in part, rev'd in part*, 750 A.2d 1174 (Del. 2000).

<sup>340</sup> 685 So. 2d 382, 386 (La. Ct. App. 1996).

<sup>341</sup> *Id.* at 392 ("We reject the [Orleans Levee Board]'s argument that Mr. Landrum must show actual malice in order to recover from the [Board] for an invasion of privacy. While such a requirement has been discussed in cases involving media defendants, we find nothing in Louisiana law to suggest that a non-media defendant can only be liable for an invasion of privacy involving a falsehood." (citations omitted)).

<sup>342</sup> See *In re Standard Jury Instructions* (Civil Cases 89-1), 575 So. 2d 194, 197-200 (Fla. 1991) (per curiam). The court noted that "our approval for publication is not an adjudication on the merits of the form, substance, or correctness of the instructions nor an approval of the notes and comments of the committee. Any litigant, in an appropriate forum, may raise any issue in connection with their use." *Id.* at 195 (quoting *In re Standard Jury Instructions* (Civil Cases 88-2), 541 So. 2d 90, 90 (Fla. 1989) (per curiam)) (internal quotation marks omitted). Nonetheless, the court appears to suggest that the instructions are a sound statement of the law. See *id.* ("We . . . decline the invitation of respondents to remand to the Committee for reconsideration of the [legal issues] raised.").

<sup>343</sup> 475 U.S. 767, 775-77 (1986). The court in *Hepps* specifically noted that it was not deciding whether the same standard would apply to nonmedia defendants. *Id.* at 779 n.4.

<sup>344</sup> 575 So. 2d at 199-200.

<sup>345</sup> *Id.* at 195.

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 “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.”<sup>346</sup> But it seems very likely that any item published through mass communications technology about those subjects, whether by the media or otherwise, would indeed be found to be on a matter of public concern.<sup>347</sup> And the court gave commercial advertising—which is generally a less protected category of speech, and which was the speech at issue in the case itself—as one example of non-public-concern speech.<sup>348</sup> So it seems unlikely that the media/nonmedia distinction would in practice play a significant role under the *Senna* rule.

### C. Antidiscrimination Law

Four dissenters in *Associated Press v. NLRB* (1937) took the view that the Free Press Clause secured the Associated Press’s right to refuse to employ union members as writers.<sup>349</sup> And the Washington Supreme Court’s 1997 decision in *Nelson v. McClatchy Newspapers, Inc.* seemed to follow that dissent.<sup>350</sup>

Washington state law bars employers from discriminating against employees based on their political activities.<sup>351</sup> The Tacoma-based

<sup>346</sup> 958 A.2d 427, 443-44 (N.J. 2008).

<sup>347</sup> Indeed, the court in *Senna* specifically stated that “speech concerning significant risks to public health and safety” would always qualify as involving a matter of public concern. *Id.* at 444.

<sup>348</sup> *Id.* In fact, the Third Circuit, which includes New Jersey, has held that traditional First Amendment libel analysis doesn’t apply to cases brought based on commercial advertisements. See *U.S. Healthcare, Inc. v. Blue Cross of Greater Phila.*, 898 F.2d 914, 931-33 (3d Cir. 1990). Another district court case out of the Third Circuit, *Fanelle v. Lojack Corp.*, 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 *Hepbs*] is not required.” 29 Med. L. Rep. 1513, 1521 (E.D. Pa. 2000).

<sup>349</sup> 301 U.S. 103, 136-41 (1937) (Sutherland, J., dissenting); see also *supra* subsection VI.B.2.

<sup>350</sup> See 936 P.2d 1123, 1128-33 (Wash. 1997) (holding that “editorial control is a necessary component of the free press and a state law infringing thereon will be unconstitutional as applied”).

<sup>351</sup> WASH. REV. CODE ANN. § 42.17.680 (West 2006).

*News Tribune* demoted a reporter for violating the newspaper's policy barring "high profile political activity" by its reporters, and the reporter sued.<sup>352</sup> The court concluded that the dismissal did violate the state statute, but the statute couldn't be applied in this case because it conflicted with the newspaper's First Amendment right to "editorial control," which included control over who would write for its newspaper.<sup>353</sup> *Associated Press v. NLRB*, the court held, was "limited to the [National Labor Relations Act] and union activity."<sup>354</sup>

But it's not clear whether the *Nelson* decision falls in the all-speakers-equal" category, the mass-communications-more-protected category, or the press-as-industry-specially-protected category. Though the decision often mentions "free press" rights, it also often refers to "free speech" rights and "First Amendment" rights. The main precedent it relies on, *Miami Herald Publishing Co. v. Tornillo*,<sup>355</sup> though a newspaper case, has been equally applied to non-press-as-industry speech, such as a business's right to choose what to include in its mailings,<sup>356</sup> and non-mass-communications speech, such as a parade organizer's right to choose the floats that appear in its parade.<sup>357</sup> And the logic of the *Tornillo* opinion would likewise apply to a political campaign's or political advocacy group's choice of employees who would give speeches on behalf of the organization.

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 of America has a First Amendment right to bar gays from being scoutmasters.<sup>358</sup> The job of a scoutmaster, the Court noted, is to "incul-

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<sup>352</sup> *Nelson*, 936 P.2d at 1125.

<sup>353</sup> *Id.* at 1131.

<sup>354</sup> *Id.* at 1132.

<sup>355</sup> See 418 U.S. 241, 258 (1974) (holding that a state statute granting a political candidate the right to answer a newspaper's criticism in print violates the First Amendment).

<sup>356</sup> See *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1, 11 (1986) (plurality opinion) ("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*, 425 U.S., at 782-84. Cf. *Lovell v. Griffin*, 303 U.S., at 452."). Justice Marshall's concurrence in the judgment did not note any disagreement with the plurality on this matter. *Id.* at 21-26.

<sup>357</sup> *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 575-76 (1995).

<sup>358</sup> 530 U.S. 640, 651 (2000). Cases holding that religious organizations have a right to discriminate in choice of clergy under the Free Exercise Clause 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,

cate . . . values . . . both expressly and by example,”<sup>359</sup> and because the organization opposes homosexuality, allowing openly gay scoutmasters would interfere with the Boy Scouts’ ability to convey its message.<sup>360</sup> The Court thus seems committed to protecting, to some extent, organizations’ right to control their message by choosing those who speak on their behalf—the same right the newspaper asserted 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: Ku Klux Klan parade organizers<sup>361</sup> and Nation of Islam organizers of single-sex lectures.<sup>362</sup>

It’s not clear whether the rulings in *Boy Scouts* and the lower court cases would extend to employment discrimination, in which people’s livelihoods are at stake, and not just to the 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 follow the all-speakers-equal model.<sup>363</sup>

#### D. Access to Government Operations and Government and Private Property

The lower court cases that discuss whether the press is constitutionally entitled to special access to government operations or to private property generally follow the Court’s all-speakers-equal holdings.<sup>364</sup> Many courts do provide special access to the media, whether

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461-63 (D.C. Cir. 1996) (holding that the Free Exercise Clause bars judicial review of a church’s employment decisions); *Young v. N. Ill. Conf. of United Methodist Church*, 21 F.3d 184, 187 (7th Cir. 1994) (same); *Scharon v. St. Luke’s Episcopal Presbyterian Hosps.*, 929 F.2d 360, 363 (8th Cir. 1991) (same); *Van Osdol v. Vogt*, 908 P.2d 1122, 1126-28 (Colo. 1996) (same); see also *Empl. Div. v. Smith*, 494 U.S. 872, 882 (1990) (suggesting that the Free Exercise Clause might mandate exemptions from generally applicable laws if it is linked with a freedom of association claim).

<sup>359</sup> *Boy Scouts*, 530 U.S. at 649-50.

<sup>360</sup> *Id.* at 653.

<sup>361</sup> *Invisible Empire of the Knights of the Ku Klux Klan v. Mayor of Thurmont*, 700 F. Supp. 281, 289-90 (D. Md. 1988).

<sup>362</sup> *City of Cleveland v. Nation of Islam*, 922 F. Supp. 56, 59 (N.D. Ohio 1995); *Donaldson v. Farrakhan*, 762 N.E.2d 835, 841 (Mass. 2002).

<sup>363</sup> I have found no post-*Nelson* case so far that tracks *Nelson* in allowing newspapers—or other speakers—to discriminate in choice of employees.

<sup>364</sup> See, e.g., *Putnam Pit, Inc. v. City of Cookeville*, 221 F.3d 834, 840 (6th Cir. 2000) (holding that journalists have no greater rights of access under the First Amendment to city parking ticket records than does the public because “[t]he First Amendment

television or print.<sup>365</sup> But they generally do not hold that the press-as-industry has a *constitutional* right to such preferential treatment.

I could find only four possible exceptions to this principle, all from 1971 to 1981, and all involving press exemptions from trespass law and from laws that limit access to crime scenes. Two are New Jersey appellate cases. First, in *Freedman v. New Jersey State Police*, the court interpreted the New Jersey Constitution's Free Press Clause to hold that reporters—including those from a university student newspaper—have a right to go into privately owned farmworker camps, notwithstanding the property owners' objections.<sup>366</sup> Second, the court in *State v. Lashinsky* stated that in various newsgathering contexts "the reporter stands apart from the ordinary citizen," though the court refused to grant access to a crime scene in that particular case.<sup>367</sup>

Two more are trial court cases from other jurisdictions. In *People v. Rewald*, a New York trial court decided that a newspaper reporter seeking access to a migrant labor camp had a First Amendment exemption from trespass law.<sup>368</sup> Likewise, the federal district court decision in *Allen v. Combined Communications* held that a "reporter" facing a trespass claim should be immune from trespass law if (1) the reporter

does not guarantee the press a constitutional right of special access to information not available to the public generally" (alteration in original) (quoting *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972)); *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 520-22 (4th Cir. 1999) (holding that journalists have no greater right than others to trespass on private property (citing *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991))); *Belo Broad. Corp. v. Clark*, 654 F.2d 423, 428 (5th Cir. 1981) (concluding that "the press enjoys no constitutional right of physical access to courtroom exhibits," notwithstanding Justice Brennan's suggestion in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 586 n.2 (1980) (Brennan, J., concurring in the judgment), that the press might have special constitutional access rights); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 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 "[u]nder the First Amendment, the press enjoys no greater access rights than the public generally"); *In re Attorney Gen.'s "Directive on Exit Polling: Media and Non-Partisan Public Interest Groups"*, 981 A.2d 64, 80 n.13 (N.J. 2009) (rejecting special access for the press to protected polling zones).

Likewise, some legislatures have chosen to provide the institutional media with special access to other places, such as disaster areas. See, e.g., CAL. PENAL CODE § 409.5(d) (West 1999).

<sup>365</sup> 343 A.2d 148, 151 (N.J. Super. Ct. Law Div. 1975). An earlier case, *State v. Shack*, suggested that this same result might be reached under state property law, 277 A.2d 369, 374 (N.J. 1971), but *Freedman* expressly relied on the New Jersey Constitution's Free Press Clause, 343 A.2d at 150.

<sup>366</sup> 404 A.2d 1121, 1128 (N.J. 1979) (quoting *In re Farber*, 394 A.2d 330, 350 (N.J. 1978) (Handler, J., dissenting)).

<sup>368</sup> 318 N.Y.S.2d 40, 45 (N.Y. Cnty. Ct. 1971).

was unaware that he was trespassing, and (2) the property owner suffered no “damage as a result of the trespass.”<sup>369</sup>

These holdings, though, are likely no longer sound—at least where the federal First Amendment is concerned—after *Cohen v. Cowles Media Co.*, which held that the press-as-industry gets no special exemption from generally applicable laws.<sup>370</sup> This equal treatment principle would presumably include trespass laws that bar unauthorized access to real property, given *Cohen’s* statements that “[t]he press may not with impunity break and enter an office or dwelling to gather news” and that the press gets no exemption from laws that bar unauthorized use of intellectual property.<sup>371</sup>

Moreover, *Marsh v. Alabama*, on which *Rewald* relied, upheld Jehovah’s Witnesses’ right to distribute religious pamphlets in a company town—not an activity obviously reserved to the press-as-industry—and may well extend to non-press-as-industry speakers.<sup>372</sup> Likewise, *Freedman* relied on an earlier New Jersey Supreme Court decision that carved out an exception from state trespass law not just for the press, but also for public interest lawyers who were trying to help farmworkers.<sup>373</sup> To the extent that *Freedman* constitutionalized this right of access for the press under the New Jersey Constitution’s Free Press Clause, its logic—coupled with the logic of the earlier decision—suggests the same rule might apply to other speakers under the New Jersey Constitution’s Free Speech Clause.

In any event, *Freedman*, *Lashinsky*, *Rewald*, and *Allen* are the only cases that I have found that can be read as taking the press-as-industry-specially-protected view. And even in New Jersey—the one jurisdiction in which such decisions were handed down by appellate courts—

<sup>369</sup> 7 Med. L. Rep. 2417, 2420 (D. Colo. 1981); see also *Garrett v. Estelle*, 424 F. Supp. 468, 471-72 (N.D. Tex.) (holding that the media had a right to videorecord an execution), *rev’d*, 556 F.2d 1274, 1278 (5th Cir. 1977) (“The Constitution does not . . . require government to accord the press special access to information not shared by members of the public generally.” (citing *Saxbe v. Wash. Post Co.*, 417 U.S. 843, 850 (1974); *Pell v. Procunier*, 417 U.S. 817, 834 (1974))).

<sup>370</sup> 501 U.S. 663, 669 (1991).

<sup>371</sup> *Id.* One could imagine different First Amendment rules for speakers’ claimed right of access to unenclosed land than for speakers’ access to others’ dwellings or offices. But *Cohen’s* point that the *press-as-industry* gets no special exemptions from generally applicable laws, compared to the rights of other speakers, applies equally to both kinds of trespass.

<sup>372</sup> 326 U.S. 501, 509-10 (1946).

<sup>373</sup> *State v. Shack*, 277 A.2d 369, 372-75 (N.J. 1971).

these cases have not seemed to produce further special constitutional treatment for the press-as-industry.<sup>374</sup>

### E. Campaign Speech Restrictions

As discussed above, statutory media exemptions from most campaign finance laws have made it unnecessary for courts to decide whether the media is constitutionally entitled to such an exemption.<sup>375</sup> Nonetheless, at least three lower court decisions have confronted the question, and all 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.<sup>376</sup> A federal district court held that a city campaign finance ordinance that lacked a media exemption could constitutionally be applied to the media.<sup>377</sup> And a Kentucky appellate court struck down certain campaign speech restrictions, 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.<sup>378</sup>

The Federal Election Commission, however, seems to view the federal election law media exemption—which is limited to broadcasting and periodicals<sup>379</sup> and thus excludes books,<sup>380</sup> occasional newslet-

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<sup>374</sup> See, e.g., *In re Attorney Gen.’s “Directive on Exit Polling: Media and Non-Partisan Public Interest Groups,”* 981 A.2d 64, 80 n.13 (N.J. 2009) (rejecting special access for the press to protected polling zones); *State v. Cantor*, 534 A.2d 83, 86 (N.J. Super. Ct. App. Div. 1987) (rejecting special right for the press to violate laws against impersonating public officials).

<sup>375</sup> See *supra* note 274 and accompanying text.

<sup>376</sup> *McConnell v. FEC*, 251 F. Supp. 2d 176, 236 (D.D.C.) (per curiam), *aff’d in part*, 540 U.S. 93 (2003), *overruled in part* by *Citizens United v. FEC*, 130 S. Ct. 876 (2010); see also *supra* note 289.

<sup>377</sup> *Olson v. City of Golden*, No. 07-1851, 2011 WL 3861433, at \*9-10 (D. Colo. Sept. 1, 2011) (holding that newspapers, like other speakers, had to comply with the ordinance’s disclosure requirements and that “[i]n the absence of a press exemption like that in the [Federal Election Campaign Act], a court simply applies the regulation to the publisher of a specific publication”).

<sup>378</sup> *Ky. Registry of Election Fin. v. Louisville Bar Ass’n*, 579 S.W.2d 622, 627 (Ky. Ct. App. 1979) (citing *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 802 (1978)).

<sup>379</sup> See *supra* note 274.

<sup>380</sup> See, e.g., *George Soros*, MUR 5642, Statement of Reasons of Chairman Robert D. Lenhard and Commissioner Ellen L. Weintraub, at 2 (Fed. Election Comm’n Dec. 31, 2007), available at <http://eqs.nictusa.com/eqsdocsMUR/29044223685.pdf> (describing proposed action against businessman George Soros for, among other things, printing and distributing a book containing statements opposing the reelection of George W. Bush and noting that the FEC general counsel—along with three commis-

ters,<sup>381</sup> and occasionally produced documentaries<sup>382</sup>—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.<sup>383</sup> But I could find no court decision that agreed with the FEC on this.

### CONCLUSION

The historical evidence points powerfully in one direction—throughout American history, the dominant understanding of the “freedom of the press” has followed the press-as-technology model. This was likely the original meaning of the First Amendment. It was almost certainly the understanding when the Fourteenth Amendment was ratified. It remained the largely unchallenged orthodoxy until about 1970.

Since 1970, a few lower courts have adopted the press-as-industry model, but this has been a decidedly minority view. The Supreme Court continues to provide equal treatment to speakers without re-

sioners—considered such book publishing as outside the federal election law media exemption); Am. Int’l Grp., Inc., Advisory Opinion 1987-8, at 5-6 (Fed. Election Comm’n May 4, 1987), *available at* <http://saos.nictusa.com/aodocs/1987-08.pdf> (advising that the media exemption does not apply to books).

<sup>381</sup> *See, e.g.*, Me. Right to Life Comm., Inc., Advisory Opinion 1989-28, at 6 (Fed. Election Comm’n Feb. 14, 1990), *available at* <http://saos.nictusa.com/aodocs/1989-28.pdf> (advising that the media exemption does not apply to occasionally published newsletters or nonprofit organizations); San Joaquin Valley Republican Assocs., Advisory Opinion 1988-22, at 3 (Fed. Election Comm’n July 5, 1988), *available at* <http://saos.nictusa.com/aodocs/1988-22.pdf> (advising that occasionally published newsletters do not qualify for the media exemption).

<sup>382</sup> *See, e.g.*, Citizens United, Advisory Opinion 2004-30, at 7 (Fed. Election Comm’n Sept. 10, 2004), *available at* <http://saos.nictusa.com/aodocs/2004-30.pdf> (stressing that Citizens United was not entitled to the media exemption because it “does not regularly produce documentaries or pay to broadcast them on television” and that “Citizens United has produced only two documentaries since its founding in 1988 . . . neither of which it paid to broadcast on television”). *But see* Citizens United, Advisory Opinion 2010-08, at 5 (Fed. Election Comm’n June 11, 2010), *available at* <http://saos.nictusa.com/aodocs/AO%202010-08.pdf> (advising that Citizens United was entitled to the media exemption because it had by then produced a sufficient number of documentaries).

<sup>383</sup> *See, e.g.*, Citizens United, Advisory Opinion 2010-08, at 3-5; Viacom, Inc., Advisory Opinion 2003-34, at 3 (Fed. Election Comm’n Dec. 19, 2003), *available at* <http://saos.nictusa.com/aodocs/2003-34.pdf>. The *Viacom* opinion did say that “[t]he Commission does not undertake a constitutional analysis in this advisory opinion,” but said this was so because “the press exemptions at 2 U.S.C. 431(9)(B)(i) and 434(f)(3)(B)(i), [are] themselves clearly drawn with the First Amendment in mind.” *Id.* at 4. This suggests that the FEC does itself see the First Amendment, like federal election law, as embodying the press-as-industry-specially-protected view.

gard to whether they are members of the press-as-industry. And though several Supreme Court opinions have noted that the question remains open, the bulk of the precedent points toward equal treatment for all speakers—or at least to equal treatment for all who use mass communications technology, whether or not they are members of the press-as-industry.

This evidence can prove valuable in interpreting the Free Press Clause, to the extent we focus on its “purpose,”<sup>384</sup> its “history,”<sup>385</sup> the long-term traditions of the American legal system,<sup>386</sup> and precedent. It also suggests how we should interpret the Clause to the extent we focus on the “text.”<sup>387</sup> 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.”<sup>388</sup> 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.<sup>389</sup>

And evidence of original meaning is especially valuable for assessing arguments based on the supposed literal meaning of an am-

<sup>384</sup> See *supra* text accompanying note 4.

<sup>385</sup> See *supra* Parts I-III. The more conservative Justices have of course long stressed the significance of the historical understanding of constitutional provisions, including the Free Speech Clause and the Free Press Clause. See, e.g., *Citizens United v. FEC*, 130 S. Ct. 876, 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).

<sup>386</sup> 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 considering “histor[y] and tradition[]” when determining whether a particular exception to First Amendment protection should be recognized (citation omitted)); *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) (focusing on the value of considering traditions in the context of recognizing unenumerated rights); 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).

<sup>387</sup> See *supra* note 3.

<sup>388</sup> Anderson, *supra* note 67, at 462.

<sup>389</sup> 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, 280-81 (2006) (Stevens, J., dissenting); *Stogner v. California*, 539 U.S. 607, 626 (2003) (Breyer, J., majority opinion); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 787-89 (1995) (Stevens, J., majority opinion); *Minn. Star & Tribune Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575, 583-84 (1983) (O’Connor, J., majority opinion).

biguous 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.

Our legal system resolves this type of ambiguity not by adopting the meaning most commonly used today—which is probably judge-made law as opposed to statutory law—but rather by considering 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).<sup>390</sup> The same reasoning applies to “the press.” Arguments based on an ambiguous text should consider which of the several possible meanings the text was originally understood to have.

Of course, the Supreme Court has never limited itself to analyzing constitutional provisions based solely on historical sources. Justices remain free to decide for themselves what they think best serves the values they deem protected by constitutional provisions.<sup>391</sup> The goal 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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<sup>390</sup> See, e.g., *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 446-47 (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 *Curtis v. Loether*, 415 U.S. 189, 193 (1974) (referring to the historical understanding of the Seventh Amendment as explained by the Court in *Parsons*); *Golden v. Kelsey-Hayes Co.*, 73 F.3d 648, 659 (6th Cir. 1996) (same).

<sup>391</sup> Many scholars have discussed this question of First Amendment theory, and I have nothing new to add to this debate. For articles supporting the press-as-industry-specially-protected view, see Dyk, *supra* note 6; Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256 (2005); Stewart, *supra* note 4; West, *supra* note 6; and Glen S. Dresser, Note, *First Amendment Protection Against Libel Actions: Distinguishing Media and Non-Media Defendants*, 47 S. CAL. L. REV. 902 (1974). For articles supporting the mass-communications-more-protected view, see Robert D. Sack, *Reflections on the Wrong Question: Special Constitutional Privilege for the Institutional Press*, 7 HOFSTRA L. REV. 629, 633 (1979), which is perhaps limited to those speakers who publish “regularly”; and John J. Watkins & Charles W. Schwartz, *Gertz and the Common Law of Defamation: Of Fault, Nonmedia Defendants and Conditional Privileges*, 15 TEX. TECH. L. REV. 823 (1984). For articles supporting the all-speakers-equal view, see Anderson, *supra* note 9; Arlen W. Langvardt, *Media Defendants, Public Concerns, and Public Plaintiffs: Toward Fashioning Order from Confusion in Defamation Law*, 49 U. PITT. L. REV. 91 (1987); Lange, *supra* note 17; Lewis, *supra* note 66; David W. Robertson, *Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.*, 54 TEX. L. REV. 199 (1976); Steven Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 UCLA L. REV. 915 (1978); and Van Alstyne, *supra* note 66.