

NEWSGATHERING, AUTONOMY, AND THE SPECIAL-RIGHTS  
APOCRYPHA: SUPREME COURT AND MEDIA LITIGANT  
CONCEPTIONS OF PRESS FREEDOM

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INTRODUCTION

A few weeks after the U.S. Supreme Court's 1979 decision in *Herbert v. Lando*,<sup>1</sup> in which the Court refused to prohibit libel plaintiffs from inquiring about journalists' editorial processes,<sup>2</sup> Justice William Brennan delivered his renowned address at Rutgers University in which he proposed two models for evaluating free-press cases.<sup>3</sup> Brennan's speech immediately entered the pantheon of First Amendment theory, but it was just as remarkable for its cold critique of the news media and their advocates whom Brennan flayed for their hyperbolic responses to some of the Court's press rulings. He scoffed at a *Los Angeles Times* editorial suggesting that *Herbert* would lead to "Orwellian invasion[s] of the mind,"<sup>4</sup> and he chided Jack Landau, then head of the Reporters Committee for Freedom of the Press, for his overheated claim that *Herbert* would destroy the press's "last constitutional shred of . . . editorial privacy and independence from the government."<sup>5</sup> Brennan was an unlikely critic of the press,<sup>6</sup> but he was just

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1 441 U.S. 153 (1979).

2 *Id.* at 160 (holding that it would be unreasonable to prohibit plaintiffs from inquiring about what the defendant knew and discussed prior to publication because libel plaintiffs must prove that the defendant acted with some degree of fault).

3 William J. Brennan, Jr., Assoc. Justice, U.S. Supreme Court, Newhouse Dedication Address (Oct. 17, 1979), in 5 MEDIA L. REP. 1837, 1838 (1980) ("Under one model—which I call the 'speech' model—the press requires and is accorded the absolute protection of the First Amendment. In the other model—I call it the 'structural' model—the press' interests may conflict with other societal interests and adjustment of the conflict on occasion favors the competing claim.").

4 *Id.* at 1841 (quoting Assoc. Press, *Editors, Broadcasters Warn of 'Chilling Effect' of Court Ruling*, L.A. TIMES, Apr. 19, 1979, at B16).

5 *Id.* (quoting TIMES PICAYUNE (New Orleans), Apr. 20, 1979, at 18). Brennan argued that by permitting libel plaintiffs to inquire into the editorial decision-making of a news organization, the Court was not subjecting journalists to unreasonable examination. In-

one of a chorus of people<sup>7</sup> who had begun to warn journalists that their overzealous self-advocacy was eroding the support they had cultivated in the years following Watergate<sup>8</sup> and that by arrogantly staking out an elite social position for themselves and demanding a set of “special . . . rights” not possessed by the public generally, they were courting a backlash.<sup>9</sup>

Three decades later, the charge of media arrogance and exceptionalism is still at the core of the contemporary American press critique. The news media remain the targets of reprobation in part because the public perceives them as demanding a unique set of legal protections.<sup>10</sup> This is particularly true in the context of the reporter’s privilege<sup>11</sup> and the debates over the proposed federal shield law,<sup>12</sup> in

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quiries into a defendant’s state of mind or intent are common in other areas of the law, Brennan noted, and to say that journalists should be immune from such inquiries is to suggest that their minds are “somehow special, and cannot be impinged for any purpose.” *Id.* Nevertheless, Brennan appreciated that those kinds of inquiries presented some risks. He therefore dissented in *Herbert* to emphasize that while journalists should not be immune from these inquiries, some qualified protection is necessary to minimize the potential for excessive intervention. *Herbert*, 441 U.S. at 183 (Brennan, J., dissenting).

6 Brennan was a reliable supporter of the rights of the press and was the author of the Court’s opinion in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), which is widely regarded as the Court’s most important First Amendment ruling. The *Sullivan* Court held that as part of their prima facie libel claims, public official plaintiffs must prove, by clear and convincing evidence, that the defendant acted “with actual malice—that is, with knowledge that [their publication] was false or with reckless disregard [for the truth].” *Id.* at 279–80.

7 See *infra* notes 59–60 and accompanying text.

8 See David A. Jones, *Why Americans Don’t Trust the Media: A Preliminary Analysis*, 9 HARV. INT’L J. PRESS/POL. 60, 61 (2004) (noting that national surveys showed high public support for the press throughout the 1970s).

9 See William W. Van Alstyne, Comment, *The Hazards to the Press of Claiming a “Preferred Position,”* 28 HASTINGS L.J. 761, 768 (1977).

10 See, e.g., Ryan Pitts, *Readers Speak: Journalists in Jail, Federal Shield Law*, POYNTER ONLINE, July 23, 2005, [http://www.poynter.org/content/content\\_view.asp?id=85751](http://www.poynter.org/content/content_view.asp?id=85751) (addressing public opinion about the reporter’s privilege and quoting several respondents, such as Keith Pennock, who said, “Last time I checked reporters are not a special class of citizen afforded different rights and privileges than the rest of us.”).

11 Generally speaking, the reporter’s privilege allows journalists to refuse to comply with certain subpoenas seeking their testimony or work product. Some form of the privilege is recognized in most federal jurisdictions, either as a matter of constitutional law, common law, or administrative procedure. See *infra* note 18.

12 In 2007, the U.S. House of Representatives passed a bill (Free Flow of Information Act of 2007, H.R. 2102, 110th Cong. (1st Sess. 2007)) that would establish a federal shield law, but the Senate did not vote on its version of the bill (Free Flow of Information Act of 2007, S. 1267, 110th Cong. (1st Sess. 2007)) before Congress adjourned.

which journalists' pleas are frequently dismissed as attempts to position themselves as "a priestly class above everybody else."<sup>13</sup>

This press-public divide has been a central feature of First Amendment litigation over the past thirty five years as the courts have moved beyond issues of expressive freedom. Since *Branzburg v. Hayes*<sup>14</sup> in 1972, the paramount free-press battles have been less about the dissemination of information than its acquisition.<sup>15</sup> In both state and federal courts, journalists have sought recognition of rights of access to government records and places,<sup>16</sup> protection against certain civil

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13 *The McLaughlin Group* (PBS television broadcast Sept. 1–2, 2007), transcript available at <http://www.mclaughlin.com/library/transcript.htm?id=613>. The "priestly class" characterization has been a favorite among critics of the reporter's privilege. See, e.g., Howard Kurtz, *Contempt & Praise for Reporter: Facing Jail, Judith Miller Gains Support for Stance*, WASH. POST, Feb. 17, 2005, at C1 (quoting the *National Review's* Jonah Goldberg as saying, "journalists consider themselves 'a priestly class' that doesn't have to play by the rules governing ordinary citizens"); Scott MacKay, *Plame Takes on Bush Policies in Speech*, PROVIDENCE J., Dec. 5, 2007, at B1 (quoting Valerie (Plame) Wilson as saying, "Journalists are not a priestly class"). A quarter-century ago, former publisher William Rusher painted the same portrait. "I object," Rusher wrote, "to journalists being regarded as a sort of creeping priesthood, characterized by special powers and limitations—en route, presumably, to celibacy." *Bulger v. Boston Cmty. Media Council* (1976) (Rusher, J., concurring), in *IN THE PUBLIC INTEREST III* 380 (1979).

14 408 U.S. 665 (1972). *Branzburg* considered whether journalists have First Amendment protection against grand jury subpoenas seeking testimony about their confidential sources. The Court majority refused to recognize a privilege, but the decisive fifth vote was supplied by Justice Lewis Powell, who wrote separately to suggest that there might be situations in which shielding reporters is warranted. *Id.* at 710 (Powell, J., concurring) ("In short, the courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection."). Powell suggested that courts take a case-by-case approach to assessing privilege claims. *Id.*

15 From the early 1930s through the early 1970s, the Court's press cases dealt almost exclusively with the constitutionality of direct government restraints on expression. See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (libel); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974) (compelled speech); *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971) (prior restraints); *Time, Inc. v. Hill*, 385 U.S. 374 (1966) (privacy); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (libel); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931) (prior restraints). In the three decades since *Branzburg*, the Court has turned more of its attention to autonomy and newsgathering issues. See, e.g., *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991) (protection against enforcement of generally applicable laws); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (access to courts); *Herbert v. Lando*, 441 U.S. 153 (1979) (protection against inquiries regarding editorial processes); *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978) (access to prisons); *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978) (protection against newsroom searches).

16 See, e.g., *Richmond Newspapers*, 448 U.S. at 555 (seeking recognition of a First Amendment right of access to criminal trials); *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589 (1978) (seeking access to judicial records); *Saxbe v. Wash. Post Co.*, 417 U.S. 843 (1974) (seeking recognition of a First Amendment right of access to federal prisons).

and criminal penalties triggered by their newsgathering activity,<sup>17</sup> and protection against government interference with their source relationships,<sup>18</sup> among other things.<sup>19</sup> They have also fought for statutory protection from both Congress and state legislatures, particularly on those issues, and in those jurisdictions, where the courts have been less solicitous. Despite some important successes,<sup>20</sup> many of these efforts have been derailed by judges and lawmakers who bristle at the idea of endowing journalists with additional immunities, particularly when more than one-third of Americans say the press already has “too much freedom.”<sup>21</sup>

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17 See, e.g., *United States v. Matthews*, 209 F.3d 338 (4th Cir. 2000) (holding that the First Amendment does not protect journalists when they engage in illegal conduct); *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999) (holding that journalists enjoy no special immunity from tort claims arising out of their newsgathering behavior).

18 Because *Branzburg* was essentially a 4.5 to 4.5 decision, see discussion *supra* note 14, lower federal courts were free to recognize a privilege in cases dissimilar to those at issue in *Branzburg*. As a result, several circuits have recognized at least a qualified privilege. See *In re Madden*, 151 F.3d 125 (3d Cir. 1998); *United States v. Smith*, 135 F.3d 963 (5th Cir. 1998); *Shoen v. Shoen*, 5 F.3d 1289 (9th Cir. 1993); *In re Shain*, 978 F.2d 850 (4th Cir. 1992); *United States v. LaRouche Campaign*, 841 F.2d 1176 (1st Cir. 1988); *von Bulow v. von Bulow*, 811 F.2d 136 (2d Cir. 1987); *United States v. Caporale*, 806 F.2d 1487 (11th Cir. 1986). Two circuits have explicitly rejected the privilege. See *McKevitt v. Pallasch*, 339 F.3d 530 (7th Cir. 2003); *In re Grand Jury Proceedings*, 810 F.2d 580 (6th Cir. 1987). Other courts have recognized varying levels of protection under the First Amendment, state constitutions, state or federal common law, or state and federal administrative procedures. In addition, thirty-three states and the District of Columbia have enacted shield laws that provide explicit statutory protection. See generally Reporters Comm. for Freedom of the Press, *Privilege Compendium*, <http://www.rcfp.org/privilege/index.php> (last visited Jan. 15, 2009). Congress has also considered, but has not yet passed, a federal shield law. See *supra* note 12.

19 See, e.g., *Cohen*, 501 U.S. at 665 (rejecting journalists' pleas for First Amendment protection against a civil promissory estoppel suit arising out of the journalists' breach of confidentiality agreements with source).

20 The most notable are the press victories in a line of court-access cases in the 1980s. See *Press-Enter. v. Super. Ct.*, 478 U.S. 1, 10 (1986) (recognizing right of access to transcripts of preliminary hearings in criminal cases); *Press-Enter. v. Super. Ct.*, 464 U.S. 501, 510 (1984) (recognizing right of access to voir dire in criminal cases); *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 610–11 (1982) (striking down state law that peremptorily closed courtrooms in which minors would be testifying in sexual assault cases); *Richmond Newspapers*, 448 U.S. at 580 (recognizing First Amendment right to attend criminal trials). Also significant are journalists' successes in reporter's privilege cases in the lower federal courts. See *supra* note 18.

21 First Amendment Center, '07 Survey Shows Americans' Views Mixed on Basic Freedoms, (Sept. 24, 2007), <http://www.firstamendmentcenter.org/news.aspx?id=19031> (noting that 34% of respondents say the press has “too much” freedom, 50% say it has about the right amount of freedom, and only 13% say it has “too little” freedom). In this annual survey, those saying the press has “too much” freedom peaked at 53% in 1999. *Id.*

There are three key assumptions that have long pervaded these critiques and that have misdirected many of the judicial, scholarly, and popular assessments. One is that the press has, in fact, sought to secure for itself a special menu of legal protections.<sup>22</sup> The second is that the Supreme Court and the media litigants have proposed diametric frameworks—both theoretical and doctrinal—for the resolution of free-press controversies, particularly those relating to news-gathering. And the third is that the Court has largely settled the core questions surrounding the rights of the press, making these subsequent legal maneuvers by journalists all the more gratuitous.<sup>23</sup> Each of these assumptions is substantially false, and each continues to play a role in undermining the rights of *all* people to gather and disseminate news.

This Article addresses the validity of these assumptions by examining the briefs<sup>24</sup> filed by media litigants in First Amendment cases brought before the Supreme Court between the 1971–72 term and the 2006–07 term, as well as the opinions of the Court (majority, concurring, and dissenting) in those cases.<sup>25</sup> This Article seeks to validate, refute, or clarify longstanding beliefs about the Court’s rulings and rationales by evaluating eighty of its media cases. It also provides the first systematic evaluation of the aims and tactics of the media litigants, along with the frameworks they advanced in their briefs to the Court in these cases. This is useful not only to satisfy historical curiosities, but also to inform the ongoing public and judicial debates over the scope of press freedom and the right to gather news.<sup>26</sup> These debates are as robust as ever,<sup>27</sup> but they will not be productive if they are oriented around specious assumptions about the Court’s free-press jurisprudence. And to the extent that the participants misun-

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22 See, e.g., Adam Liptak, *Courts Grow Increasingly Skeptical of Any Special Protections for the Press*, N.Y. TIMES, June 28, 2005, at A16.

23 See Michael Battle, *No Special Privilege*, USA TODAY, June 22, 2006, at A12 (“The law is clear. The U.S. Supreme Court declined to interpret the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy.” (internal quotation marks omitted)); see also Steve Chapman, *The News Media vs. The Innocent*, CHI. TRIB., Mar. 27, 2008 (calling journalists who invoke the reporter’s privilege “slow learners about the obligations they share with their fellow citizens” for defying the court).

24 In all cases before the Court, both petitioners and respondents must file a brief outlining their case and explaining why the Court should rule in their favor.

25 For more on the criteria applied to the selection of cases, see *infra* Part II.

26 Indeed, the two are intertwined in the sense that the flawed conventional wisdom continues to shape the way the public perceives the press’s claims.

27 For example, the *Journal of Mass Media Ethics* devoted its entire Fall 2007 issue to this question. See also JAY ROSEN, WHAT ARE JOURNALISTS FOR? (2001); Gina Barton, *What Is a Jour-na-list?*, QUILL MAG., May 2002, at 10.

derstand the objectives and arguments of the media litigants, any potential points of concurrence will likely be lost in the fog of anti-press rhetoric.

The broader aim of this Article is to provide fodder for those who hope to establish some theoretical and doctrinal congruity in this area of law.<sup>28</sup> This has to start with a clear understanding of the Court's decisions and the principles that animate them, and it can also be advanced by reexamining the arguments of the media litigants to see if they provide a more cogent construction.

The results of this analysis show, among other things, that the media litigants have not sought recognition of special rights or proposed a framework that distinguishes between mainstream and more peripheral media. Indeed, they have been more diligent than the Court in avoiding references and arguments that separate speech and press and that imply the need for unusual scrutiny of restraints targeting media defendants. The litigants have also more consistently championed an "egalitarian"<sup>29</sup> conception of the press that recognizes the ability and right of all citizens to seek and disseminate news. The Court, meanwhile, has misconceived the nature of special rights, it has falsely accused the media litigants of seeking such rights, and it has relied on a conventional conception of the press that belies the "lonely pamphleteer" archetype it idealized in *Branzburg v. Hayes*.<sup>30</sup>

Part I of this Article provides an overview of the central arguments made by those opposed to recognition of expansive press and news-gathering rights, and it also addresses the consequences of those critiques. Part II describes the key research questions and explains the rationale for the selection of cases and briefs examined here. Part III presents the results of the analyses of the Court's opinions and media litigant briefs. Part IV contains the conclusions and recommendations.

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28 C. Edwin Baker makes the same plea suggesting that, in the absence of normative clarity, the courts will inevitably produce conflicting decisions. See C. Edwin Baker, *The Independent Significance of the Press Clause under Existing Law*, 35 HOFSTRA L. REV. 955, 1024 (2007) ("The Court and the law should get it right!").

29 Erik Ugland & Jennifer Henderson, *Who Is a Journalist and Why Does it Matter? Distinguishing the Legal and Ethical Arguments*, 22 J. MASS MEDIA ETHICS 241, 246-47 (2007) (distinguishing an egalitarian model of the press from an expert model of the press); see also *infra* note 93 and accompanying text.

30 408 U.S. 665, 704 (1972) ("[L]iberty 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 . . .").

## I. CONTEMPORARY AND HISTORICAL CONTEXT

The law of newsgathering is a patchwork of conflicting case law,<sup>31</sup> appended by an assortment of statutes that, in some cases, provide journalists with special dispensations.<sup>32</sup> The absence of uniformity is partly a consequence of the infirmities in the Supreme Court's First Amendment jurisprudence and its indefinite rulings in free-press cases<sup>33</sup>; more immediately, it is the result of the lower courts' willingness to supply their own doctrine,<sup>34</sup> and of journalists' persistence in lobbying for legislative accommodations.<sup>35</sup>

This fractured legal landscape mirrors, and is partly the product of, the broader divisions between the press and the courts. Each has some legitimate grievances against the other, but each is also occasionally guilty of mischaracterizing the other's honest efforts. Some journalists are quick to demonize those who doubt their need for protection and to catastrophize the effects of unfavorable court rulings.<sup>36</sup> At the same time, judges and public critics too often misperceive journalists' legal claims as acts of self-aggrandizement rather than as sincere attempts to vindicate the rights of all citizens to be, as the Framers put it, "bulwarks of liberty."<sup>37</sup>

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<sup>31</sup> See generally Erik Ugland, *Demarcating the Right to Gather News: A Sequential Interpretation of the First Amendment*, 3 DUKE J. CONST. L. & PUB. POL'Y 101 (2008).

<sup>32</sup> See *infra* note 35.

<sup>33</sup> See *infra* Parts III.A.1, III.B.1, III.C.1.

<sup>34</sup> The law of reporter's privilege, for example, is defined as much by federal circuit court decisions—many of which recognize some protection for reporters' sources and work product—as it is by the Court's opinion in *Branzburg*. See *supra* note 18.

<sup>35</sup> In addition to the dozens of state shield laws that have been passed in the wake of *Branzburg*, see *supra* note 18, journalists have: (1) secured protections against some news room searches, e.g., Privacy Protection Act, 42 U.S.C. § 2000aa(a) (2000); (2) successfully lobbied for retraction statutes that limit plaintiff's libel suits targeting media defendants, e.g., WIS. STAT. § 895.05 (2008); and (3) secured exemptions from some of the fees normally charged for records requests under state and federal open records statutes, e.g., The Freedom of Information Act, 5 U.S.C. § 552(a)(4)(A)(ii) (2006) (“[F]ees shall be limited to reasonable standard charges . . . when records are not sought for commercial use and the request is made by . . . a representative of the news media . . .”).

<sup>36</sup> See, e.g., Cathy Packer, Op-Ed., *What Became of the First Amendment?*, NEWS & OBSERVER, Oct. 25, 2007, at A11 (calling the spate of journalist subpoenas “the most vicious and calculated attack on the free press in America since the Nixon administration”); see also Jack Shafer, *First Amendment Chicken Little*, SLATE, Dec. 17, 2004, <http://www.slate.com/id/=2111206/> (criticizing *Washington Post* columnist E.J. Dionne and others for overreacting to journalist subpoenas).

<sup>37</sup> This phrase was commonly repeated by patriot printers and was included in James Madison's first draft of the First Amendment. See David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 478 (1983). The phrase was originally drawn from Cato's Letters. See John Trenchard & Thomas Gordon, *Of Freedom of Speech: That the Same is Inseparable from Publick Liberty*, in 1 CATO'S LETTERS; OR ESSAYS ON LIBERTY, CIVIL AND

It is certainly reasonable for judges to be concerned about bestowing special protections on the press. Doing so could disrupt the “ethos of equality”<sup>38</sup> that pervades the Constitution, and it could initiate some doctrinal creep toward the unsteady world of situational balancing. Journalists, meanwhile, have their own valid concerns. Their constitutional and statutory protections are increasingly fragile—some say “under assault”<sup>39</sup>—in a post-September 11th environment in which judges have shown impatience with many rights-based claims.<sup>40</sup> In just the past few years, dozens of journalists have been subpoenaed in civil and criminal cases,<sup>41</sup> several have been held in contempt,<sup>42</sup> and a few have been sent to jail for refusing to expose their confidential sources.<sup>43</sup>

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RELIGIOUS, AND OTHER IMPORTANT SUBJECTS 96, 100 (1733) (“Freedom of Speech is the great Bulwark of Liberty; they prosper and die together . . .”).

38 See Ugland, *supra* note 31, at 149.

39 See, e.g., Jessica Meyers, *Fighting Like Tigers: A Conference Explores How to Protect Sources in a Hostile Legal and Political Climate*, AM. JOURNALISM REV., June/July 2006, at 58 (“The journalist-source relationship so essential to investigative reporting has come under assault.”).

40 For a series of reports concerning the way judges have handled rights-based claims, see Reporters Comm. for Freedom of the Press, Secret Justice, <http://rcfp.org/secretjustice/> (last visited Jan. 15, 2009).

41 *New York Times* reporter James Risen was recently subpoenaed by a grand jury to identify confidential sources for his book *State of War*. See Philip Shenon, *Times Reporter Subpoenaed Over Source for Book Chapter*, N.Y. TIMES, Feb. 1, 2008, at A17. Risen is just one of dozens who have been subpoenaed in the past few years. Fifteen reporters have been subpoenaed in the Privacy Act suit filed by Dr. Steven Hatfill who claims the government falsely accused him of being behind the anthrax attacks in New York and Washington, D.C., five reporters have been subpoenaed in the grand jury investigation of the BALCO laboratory, and eight reporters have been subpoenaed in the ongoing federal investigation into illegal leaks at the White House. For a more complete account of these and other cases, see Reporters Comm. for Freedom of the Press, Shields and Subpoenas: The Reporter’s Privilege in Federal Courts, [http://www.rcfp.org/shields\\_and\\_subpoenas.html#number](http://www.rcfp.org/shields_and_subpoenas.html#number) (last visited Jan. 15, 2009).

42 Most recently, U.S. District Court Judge Reggie Walton held former *USA Today* reporter Toni Locy in contempt for refusing to identify her confidential sources in Dr. Steven Hatfill’s Privacy Act suit. Torsten Ove, *Ex-Reporter Put in Tough Spot in Fight Over Sources*, PITTSBURGH POST-GAZETTE, Mar. 16, 2008, at A1.

43 Video blogger Josh Wolf spent more than seven months in jail (the longest time ever served by a journalist in a contempt case) for refusing to comply with a subpoena seeking his testimony and video footage about a violent protest that he had covered. His attempts to quash the subpoena failed and his appeal was denied on September 8, 2006. *In re Grand Jury Subpoena*, 201 F. App’x 430 (9th Cir. 2006). Wolf was released after reaching an agreement with prosecutors to post his video footage on his Weblog. Reporters Comm. for Freedom of the Press, *Blogger Released from Prison*, Apr. 4, 2007, <http://rcfp.org/news/2007/0404-con-blogge.html>. Former *New York Times* reporter Judith Miller spent eighty-five days in jail in 2005 for refusing to identify the source who leaked the name of undercover CIA agent, Valerie (Plame) Wilson, to her. Her appeal of the contempt charge was rejected. *In re Grand Jury Subpoena*, 397 F.3d 964 (D.C. Cir. 2005). Television reporter Jim Taricani was confined at home for six months for refusing

In other cases, journalists have had their phone records seized<sup>44</sup> or their mail confiscated.<sup>45</sup> Journalists have been denied access to places and records that have traditionally been part of their reportorial domains,<sup>46</sup> and they still have no significant protection against civil suits targeting their newsgathering activity.<sup>47</sup>

Journalists' efforts to preserve or restore these protections have been met with suspicion from citizen-critics,<sup>48</sup> judges,<sup>49</sup> lawyers,<sup>50</sup> politicians,<sup>51</sup> constitutional scholars,<sup>52</sup> and even some journalists.<sup>53</sup> Vet-

to identify a confidential source in a story he produced about government corruption. William Ketter, *Law Might Be Bad News for Press Freedom*, JOURNAL-GAZETTE (Fort Wayne, Ind.), July 17, 2008, at 11A. And in 2001–2002, freelance author Vanessa Leggett was held in contempt and served 168 days in jail for refusing to turn over tapes of interviews she had conducted with witnesses whom prosecutors believed had information relevant to a murder investigation. Reporters Comm. for Freedom of the Press, *Vanessa Leggett Released from Jail after 168 Days* (Jan. 4, 2002), [http://www.rcfp.org/news/releases/view.php?2002\\_01\\_04\\_vlreleas.txt](http://www.rcfp.org/news/releases/view.php?2002_01_04_vlreleas.txt).

44 In 2004, U.S. Attorney Patrick Fitzgerald seized the phone records of two *New York Times* reporters in order to learn the identities of their confidential sources. *N.Y. Times Co. v. Gonzalez*, 459 F.3d 160, 165 (2d Cir. 2006). The reporters' challenge to the seizure was subsequently rejected. *Id.* at 174. More recently, police in St. Paul seized the cell phone records of KMSP-TV (Minneapolis) reporter Tom Lyden in order to uncover the identity of one of his sources. Mara H. Gottfried, *Police Return Reporter's Records*, ST. PAUL PIONEER PRESS, Dec. 19, 2007.

45 In 2003, a package sent by one Associated Press reporter in the Philippines to a co-worker in the United States was intercepted and confiscated by the FBI, even though the seized document was from a public record. Associated Press, *FBI Returns Lab Report to News Service*, May 11, 2003, available at <http://www.firstamendmentcenter.org/news.aspx?id=11455>.

46 For example, reporters are barred from Dover Air Force Base, where the bodies of American troops killed abroad are returned to the United States. See Brian Faler, *Rules Change on Seeing Troops' Remains Return: Families May See Caskets' Removal from Planes*, WASH. POST, June 24, 2004, at A18 (noting that while this policy went into effect in 1991, it was not consistently enforced until after the start of the Iraq War).

47 The most significant case in this area is *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999), holding that journalists are not protected from civil claims, such as fraud or trespass, triggered by their newsgathering activity, even though they are protected against damage awards related to their subsequent publication or broadcast.

48 See *supra* note 10.

49 See, e.g., *McKevitt v. Pallasch*, 339 F.3d 530, 533 (7th Cir. 2003) ("We do not see why there need to be *special criteria* merely because the possessor of the documents or other evidence sought is a journalist." (emphasis added)).

50 See *supra* note 23.

51 See, e.g., Elizabeth Williamson, *House Passes Bill to Protect Confidentiality of Reporters' Sources*, WASH. POST, Oct. 17, 2007, at A3 ("Rep. Lamar Smith (Tex.), ranking Republican on the House Judiciary Committee, opposed the [federal shield bill], echoing Justice Department concerns that 'this legislation will impede its efforts to conduct its investigations and prosecute criminals' and adding: 'No one should be above the law, not even the press.'").

52 See, e.g., Randall D. Eliason, *Leakers, Bloggers, and Fourth Estate Inmates: The Misguided Pursuit of a Reporter's Privilege*, 24 CARDOZO ARTS & ENT. L.J. 385, 386 (2007) (questioning the

eran *New York Times* reporter Anthony Lewis is a longtime opponent of reporter's privilege and says its recognition would only "add[] to the already evident public feeling that the press thinks it is entitled to special treatment."<sup>54</sup> He added at a 2007 meeting of media lawyers that "[j]ournalists shouldn't act [as if] their rights are always superior to those of others."<sup>55</sup> The critics have reserved their most biting attacks for those journalists who have gone to jail to protect their sources. University of Chicago law professor Geoffrey Stone accuses these reporters of seeking martyrdom: "It is undoubtedly great drama. But where does a reporter get off insisting that he is above the law, the Congress, the Supreme Court, and the Constitution?"<sup>56</sup>

These comments are typical in that they assume the law is clear, which it is not,<sup>57</sup> and that journalists have in fact sought truly special rights, which, for the most part, they have not.<sup>58</sup> Nevertheless, these arguments have been repeated ad nauseam for decades. Twenty-eight years ago, constitutional scholar Ronald Dworkin accused the press of viewing the First Amendment as "a kind of private charter, and attack[ing] more or less automatically every refusal of the courts to find some further protection in that charter."<sup>59</sup> And in 1979, former *National Review* publisher, William Rusher complained about what he called a "brand-new bid by an aggressive and highly politicalized press for privileges and immunities which it has never previously had, which it neither needs nor deserves, and which it would be dangerous to confer upon it."<sup>60</sup> Arguments like these were sometimes

"social utility" of reporter's privilege); Kara A. Larsen, Note, *The Demise of the First Amendment-Based Reporter's Privilege: Why this Current Trend Should Not Surprise the Media*, 37 CONN. L. REV. 1235 (2005) (examining the evolution of reporter's privilege).

53 See, e.g., Anthony Lewis, *Privilege & the Press*, N.Y. REV. BOOKS, July 14, 2005 (reviewing FLOYD ABRAMS, *SPEAKING FREELY: TRIALS OF THE FIRST AMENDMENT* (2005)) (arguing that the press should only have qualified privilege, not absolute privilege).

54 *Id.* Lewis made this same basic argument about the lack of public support for the press being "constitutionally unique" three decades ago. Anthony Lewis, *A Preferred Position for Journalism?*, 7 HOFSTRA L. REV. 595, 609 (1979).

55 Anthony Lewis, Address at the Communications Law Conference of the Practising Law Institute (Nov. 8, 2007).

56 Paul McMasters & Geoffrey R. Stone, *Debate Club: Do Journalists Need a Better Shield?*, LEGAL AFFAIRS, Dec. 6, 2004, [http://www.legalaffairs.org/webexclusive/dc\\_printerfriendly.msp?id=21](http://www.legalaffairs.org/webexclusive/dc_printerfriendly.msp?id=21).

57 There are many people who still contend, for example, that *Branzburg* settled the question of reporter's privilege. See *supra* note 23.

58 See *infra* Part III.B.2.

59 Ronald Dworkin, *Is the Press Losing the First Amendment?*, N.Y. REV. BOOKS, Dec. 4, 1980, at 49.

60 William Rusher, *Statement on the Press and the Courts*, in NATIONAL NEWS COUNCIL, IN THE PUBLIC INTEREST II 353 (1979).

aimed less at individual journalists than at advocacy groups like the Reporters Committee for Freedom of the Press,<sup>61</sup> but it was often assumed that they shared the same vision.<sup>62</sup> Indeed, the notion still persists that journalists are a kind of united brotherhood of professionals who all read from the same script on press freedom.

Some critics have focused their attacks on mainstream or traditional journalists whom they accuse of trying to appropriate the First Amendment for their own purposes while denying it to those who lack their professional pedigree.<sup>63</sup> Certainly some journalists have sought to distinguish their practices and standards from those of other communicators,<sup>64</sup> but it is uncommon for them to suggest that the First Amendment be construed to provide additional protections to those in the higher echelons of their field.<sup>65</sup> Nevertheless, the abiding assumption since *Branzburg* has been that the institutional media have sought special rights for themselves, and that in order to secure those protections, they have constructed “novel and strained interpretations of [the] First and Fourteenth Amendments to the Constitution.”<sup>66</sup> The most significant of these is the notion that the Speech Clause<sup>67</sup> and Press Clause<sup>68</sup> be interpreted as having constitutionally discrete meanings. Justice Potter Stewart is the intellectual architect of this framework, which he outlined in a 1975 speech at

61 Indeed, Brennan’s Rutgers address seems to target press advocates as much as journalists themselves. *See supra* note 3.

62 Media lawyer Cameron DeVore said “[t]he Reporters Committee [under Jack Landau] was strident and sometimes off-putting to owners, and its legal ideas were not always in tune with the attorneys it called upon.” Floyd J. McKay, *First Amendment Guerillas: Formative Years of the Reporters Committee for Freedom of the Press*, JOURNALISM & COMM. MONOGRAPHS, Autumn 2004, at 107, 125. Jane Kirtley, Landau’s successor, added: “It wasn’t so much that we were troubled by Jack expressing an opinion, a point of view; the problem was that in some quarters he was perceived to speak for the media.” *Id.* at 132.

63 Matt Welch, *Why Does Old Media Trash the New?*, ONLINE JOURNALISM REV., June 24, 1998, <http://www.ojr.org/ojr/ethics/1017968389.php> (discussing the views of mainstream media towards Internet-based media).

64 *See* Clarence Page, *Who’s a Journalist?*, ONLINE NEWS HOUR, June 7, 2005, [http://www.pbs.org/newshour/essays/jan-june05/page\\_6-7.html](http://www.pbs.org/newshour/essays/jan-june05/page_6-7.html) (discussing who constitutes a journalist).

65 Indeed, many mainstream journalists also operate blogs, and many full-time bloggers once worked for traditional news organizations. *See* Jessi Hempel, *Are Bloggers Journalists?*, BUSINESSWEEK, Mar. 7, 2005, [http://www.businessweek.com/technology/content/mar2005/tc2005037\\_7877\\_tc024.htm](http://www.businessweek.com/technology/content/mar2005/tc2005037_7877_tc024.htm).

66 William Rusher, *supra* note 60, at 360. Rusher added that journalists are “embarking on a new and fateful course . . . to distinguish the media from the people as a whole. In doing so, they run a grave risk of alienating the public permanently.” *Id.*

67 U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech . . .”).

68 *Id.* (“Congress shall make no law . . . abridging the freedom of . . . the press . . .”).

Yale Law School.<sup>69</sup> Stewart, who dissented in *Branzburg*,<sup>70</sup> argued that while the Speech Clause protects the rights of all citizens to freely express themselves, the Press Clause is a “structural provision” that protects “the institutional autonomy of the press,” which encompasses its confidential relationships with sources, among other things.<sup>71</sup>

This construction of the First Amendment was widely criticized.<sup>72</sup> But many critics have incorrectly assumed that those seeking to preserve or augment press freedoms have drawn their inspiration from Stewart; that they have used his model as the theoretical foundation for their legal arguments before the courts, and, perhaps most importantly, that they have embraced Stewart’s narrow definition of “the press,” which encompassed only the “daily newspapers and other established news media.”<sup>73</sup> The remainder of this Article shows that none of these claims has any validity with respect to the arguments made by the litigants in their briefs, and that the Court itself, by repeatedly and inappropriately using the *special-rights* aspersion to discredit the media litigants’ claims, has probably contributed as much as any party to the persistent misunderstandings about the litigants’ aims and the legitimacy of their constitutional arguments. The Court’s own free-press jurisprudence, meanwhile, is ambiguous and contradictory and provides a far less stable model for resolving free-press controversies than the one reflected in the litigants’ briefs.

## II. CENTRAL QUESTIONS AND SCOPE OF ANALYSIS

There are three general questions that have defined this debate since *Branzburg* and that are still constitutionally salient: (1) Does the Press Clause have a meaning independent of the Speech Clause? (2) Does the Constitution endow journalists, “the press,” or subsets of

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<sup>69</sup> Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631 (1975).

<sup>70</sup> *Branzburg v. Hayes*, 408 U.S. 665, 743 (1972) (Stewart, J., dissenting) (arguing that before a journalist could be made to comply with a subpoena, the government ought to be forced to: “(1) show . . . probable cause to believe that the newsman has information that is clearly relevant to a specific probable violation of law; (2) demonstrate that the information sought cannot be obtained by alternative means . . . ; and (3) demonstrate a compelling and overriding interest in the information.” (footnote omitted)).

<sup>71</sup> Stewart, *supra* note 69, at 633–34 (emphasis omitted).

<sup>72</sup> See, e.g., Lewis, *supra* note 53, at 597 (disagreeing with the notion of a preferred status for journalists); Robert D. Sack, *Reflections on the Wrong Question: Special Constitutional Privilege for the Institutional Press*, 7 HOFSTRA L. REV. 629, 629 (1979) (arguing that the “ultimate question” is “whether the press’ legal protection is adequate to enable it to perform its role properly”); Van Alstyne, *supra* note 9, at 769 (arguing that the Free Press Clause only gives the press equal freedom of speech protection as an individual).

<sup>73</sup> Stewart, *supra* note 69, at 631.

these entities, with special rights not possessed by the public generally? And (3) Who is a journalist and what is “the press”? There is still some misunderstanding about the Court’s responses to these questions, not to mention some dissatisfaction with its answers. Meanwhile, the arguments presented by the media litigants have never been systematically studied but are important to examine, both to assess the validity of the criticisms that have been aimed at them, and to mine for insights in the ongoing effort to construct a constitutionally sound framework for defining the scope of press freedom and the right to gather news.<sup>74</sup>

The findings and analysis are presented below in three subsections corresponding to the general questions above. The first section looks at whether the Court or media litigants have made references to particular clauses of the First Amendment and whether they concluded (or proposed, in the case of the litigants) that the Speech and Press Clauses be interpreted independently. The second section looks at whether the Court has provided different levels of freedom to particular groups or media and whether the media litigants have sought separate treatment. And the last section looks at how the Court and litigants have defined the press—either explicitly or by virtue of either the characteristics they emphasize as being journalistic or the labels they attach to different media.

This Article is focused on the “media” or “press” cases decided by the Supreme Court between 1971–72 and 2006–07. In selecting the cases, a Westlaw search was conducted of all Supreme Court cases in which the phrases “freedom of the press,” “free press,” “press freedom,” “speech and press” or “speech or press” appeared in the case syllabus, digest, or headnotes. A second search was conducted for all Supreme Court cases reprinted in the *Media Law Reporter*.<sup>75</sup> These lists were cross-checked against each other and the combined list was cross-checked against lists used by other scholars in previous studies.<sup>76</sup>

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74 It should be noted that the media litigants’ briefs are not pristine expressions of constitutional argument. They are written, in part, with tactical goals in mind. Nevertheless, litigants still do occasionally propose novel theories and challenge hardened orthodoxies in their efforts to persuade the Court. In any case, the point of this study is to evaluate assumptions about the arguments made in the briefs, irrespective of the arguments journalists or their advocates have made in other contexts.

75 This is a case reporter in which nearly all decisions relating to the law of the mass media are published.

76 These include ELIZABETH BLANKS HINDMAN, RIGHTS VS. RESPONSIBILITIES: THE SUPREME COURT AND THE MEDIA at app. (1997), and Thomas Alphonse Schwartz, A Reconceptualization of the First Amendment: The Burger Court and Freedom of the Press, 1969–1980

Applying these search criteria yielded a list of 212 cases. This list was narrowed by eliminating cases that did not involve a media litigant. "Media" was defined broadly to encompass any medium used for communicating to a mass audience. This included traditional outlets, such as radio, television, newspapers, and magazines, but also underground publications, cable television, and the Internet. Not every litigant whose speech was expressed through a medium was considered a media litigant, however. Cases involving demonstrators using placards or engaging in acts of symbolic speech were not included,<sup>77</sup> nor were cases involving obscenity or commercial speech.<sup>78</sup> Also eliminated were cases in which the Court issued only a memorandum opinion,<sup>79</sup> or in which no free speech or press issue was presented.<sup>80</sup> Applying these criteria yielded a final list of eighty cases, with an equal number of media briefs.<sup>81</sup>

### III. FINDINGS AND ANALYSIS

This Part contains summaries and analyses of the court opinions and media litigant briefs, with each subsection addressing one of the three core questions noted above. Collectively, they also provide a basis for evaluating some of the common assumptions noted at the outset of the Article<sup>82</sup> that have been made by critics of the media's efforts to secure legal protections.

Debates over the meaning of the Speech and Press Clauses of the First Amendment are often stymied by the parties' failure to clarify basic terms and assumptions. There are three essential models, however, that shape most assessments and that are used here to help frame this analysis. The first is an *expression model* in which the Speech and Press Clauses are read together as a collective statement about the freedom of all citizens to communicate, whether through speech

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(May 1981) (unpublished Ph.D. dissertation, Southern Illinois University) (on file with UMI Dissertation Service).

77 This was largely a pragmatic choice designed to produce a final list that was manageable but that did not exclude the most salient cases.

78 *See supra* note 77.

79 Memorandum opinions are official rulings on the merits of a case, but they are not accompanied by a written opinion outlining the Court's rationale.

80 The focus here is not on all legal conflicts involving media, but on those cases that shed light on the scope of speech and press freedom.

81 Occasionally, more than one media litigant was involved in a case and each party would contribute its own brief. In those cases, the brief written by the first-named media litigant was selected. Those briefs tend to be the most comprehensive, with the other briefs often augmenting and referencing them.

82 *See supra* notes 22–23 and accompanying text.

or through media, and in which all citizens have equal standing to invoke those protections. Under this model, the Press Clause has no meaning independent of the Speech Clause, and no protection is recognized for newsgathering or other non-expressive acts. The second is an *autonomy model* in which the Speech Clause is read as protecting free expression while the Press Clause is understood as a shield against more indirect usurpations of the independence of communicators.<sup>83</sup> This model provides at least some protection against, for example, government encroachments into newsrooms or interference with source relationships, and its protections are available to anyone who seeks to gather and report news. The third approach is a *special-rights model*, which parallels the autonomy model except that it reserves the Press Clause protections for those communicators who possess certain professional attributes or institutional affiliations.

#### A. *Speech Clause v. Press Clause*

The questions posed in this area were aimed at understanding what the textual basis has been for the parties' interpretations of the Speech and Press Clauses. Specifically, have they interpreted the clauses independently, or have they evaluated them as expressions of a single concept? And have the parties explicitly or implicitly endorsed the thesis proposed by Justice Stewart in "Or of the Press"?<sup>84</sup>

It is commonly asserted<sup>85</sup> that the Supreme Court has rejected Justice Stewart's argument that the Speech and Press Clauses were intended to be construed separately.<sup>86</sup> It is true that the Court has neither explicitly endorsed Stewart's thesis nor tied its rulings to the

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83 Another expression of this approach would be to say that the Speech and Press Clauses have no independent significance and they merely protect expression, but that in order to protect expression, one must also protect the autonomy of communicators from government actions that can intimidate, harass, or otherwise indirectly inhibit expressive activity.

84 See Stewart, *supra* note 69.

85 See Anthony L. Fargo, *The Journalist's Privilege for Nonconfidential Information in States Without Shield Laws*, 7 COMM. L. & POL'Y 241, 252-53 (2002) (observing that the Court's "majority noted that Congress was free to create a statutory privilege, and the states were free to recognize a privilege through statutes or through interpretations of their own constitutions").

86 See Baker, *supra* note 28, at 959 (arguing that, although the courts have not explicitly acknowledged such a distinction, an independent meaning for the Press Clause is implicit in their rulings and that, in any case, it provides a useful construct for resolving free-press controversies).

precise language of either clause.<sup>87</sup> But it is too much to say the Court's approach and Stewart's are wholly incongruent, at least without understanding more clearly what Stewart *meant*.

Stewart argued that to conjoin the Speech and Press Clauses would create a textual redundancy that the Framers did not intend.<sup>88</sup> He therefore proposed that the Speech Clause be read as a shield against government restraints of expression while the Press Clause be understood as a structural provision designed to protect the press in its institutional role as a watchdog of powerful interests.<sup>89</sup> So when the government compels reporters to divulge their confidential sources, for example, it pierces the autonomy of the press and impedes its "constitutional mission,"<sup>90</sup> whether or not there is any immediately measurable effect on its speech.

Stewart's Yale address seems to provide a blueprint for recognition of special press rights, but it is ambiguous enough to invite a narrower interpretation. For example, Stewart highlights cases like *New York Times Co. v. United States* (the Pentagon Papers case)<sup>91</sup> and *Miami Herald Publishing Co. v. Tornillo*<sup>92</sup> as exemplifying his theory. But those cases both involved direct government restraints of expression and can be explained by reference to speech principles alone. The only arguably special-rights case described by Stewart in his Yale address was *Branzburg*. But even the reporter's privilege (despite its unfortunate name) need not be construed as a special right. Those who conceive of it in those terms typically have in mind what Ugland and Henderson call an *expert* definition of the press—one in which "journalists are conceived of as a uniquely qualified and clearly identifiable collection of professionals who serve as agents of the public in the procurement and dissemination of news."<sup>93</sup> But most lower courts and legislatures have begun to move away from that definition and toward a more *egalitarian* definition of the press "in which all citizens are equally equipped and equally free to serve as newsgathering

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87 See *infra* Part III.A.1. Note, however, that during the middle part of the twentieth century, the Court did emphasize the Press Clause in some cases. See David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 448 (2002) (calling the period between the 1930s and the 1960s "the heyday of the Press Clause in the Supreme Court").

88 See Stewart, *supra* note 69, at 633.

89 *Id.*

90 *Branzburg v. Hayes*, 408 U.S. 665, 729 (1972) (Stewart, J., dissenting).

91 403 U.S. 713 (1971) (striking down an injunction prohibiting the *New York Times* from publishing classified documents obtained by a third party).

92 418 U.S. 241 (1974) (striking down a Florida statute giving political candidates a right to reply to their critics in any newspaper).

93 See Ugland & Henderson, *supra* note 29, at 246–47.

watchdogs.”<sup>94</sup> By protecting the underlying function rather than assigning those protections to a particular group, the special-rights problem is mitigated, if not eliminated.<sup>95</sup> And that is the only definition that seems to be practically and constitutionally workable in an era in which anyone can disseminate information to a mass audience.

Unfortunately, Stewart is not so easily saved by this construction because he began his Yale speech by saying he intended to address “the role of the *organized press*”<sup>96</sup> and he argued later that historically the press was understood as providing “*expert* scrutiny of government.”<sup>97</sup> Whether Stewart truly intended to limit Press Clause protection to the institutional media is not entirely clear, however, because his opinions on the Court show no evidence of a desire to confer special rights on the press<sup>98</sup> or to define the press in ways that discriminate between mainstream and more peripheral media.<sup>99</sup> So it could

94 *Id.* at 247.

95 *See infra* notes 150–52 and accompanying text.

96 Stewart, *supra* note 69, at 631 (emphasis added). Stewart later added that the press is “the only *organized private business* that is given explicit constitutional protection.” *Id.* at 633 (emphasis added).

97 *Id.* at 634 (emphasis added).

98 Other than *Branzburg*, there were only two cases in which Stewart’s opinions could be construed as recognizing special rights, although they *need not* be interpreted that way. The first was *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978), in which Stewart argued in dissent that a police search of the offices of a college newspaper was unconstitutional. *Id.* at 571 (Stewart, J., dissenting) (“It seems to me self-evident that police searches of newspaper offices burden the freedom of the press.”). Much like his *Branzburg* dissent, Stewart’s opinion in *Zurcher* was rooted in the Press Clause and was built around an autonomy concept that was attentive to the more subtle ways in which government restrictions on non-expressive acts could collaterally damage expressive ones. *See id.* at 570–77. This could be construed as recognition of a special right in that Stewart was suggesting that the press status of the searched party would trigger the application of different constitutional standards. Indeed, he described *Zurcher* as a “press” case. *Id.* at 571. But it is not clear that Stewart had in mind a set of rights that would only flow to particular organizations, or if they would be available to any person or group serving a press function.

The other case was *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978), in which the Court upheld an interlocutory appeal, enjoining a news organization’s attempt to access a federal prison facility. Stewart wrote a concurring opinion insisting that even in providing the press with equal access to prisons, some special accommodation must be made for their use of newsgathering equipment. *Id.* at 17 (Stewart, J., concurring in 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 . . .”). But again, it is not clear that Stewart would have limited these protections to those in the mainstream media, or if anyone assuming that role and using those devices would be eligible. In the absence of such statements, one cannot characterize Stewart as an advocate of a special-rights model, at least not without trying to tie in the extrajudicial comments from his Yale speech.

99 Indeed, even his dissent in *Branzburg* is devoid of the kinds of references to the institutional media found in *Or of the Press*. Although Stewart, like the Court majority, uses the

be that his Yale speech simply reflected his assumption that in 1974 mainstream journalists were, for all practical purposes, the only people who would ever need these protections.

Although Stewart is perceived to be the key exemplar of the special-rights model and a constitutional pathfinder of sorts for the media litigants, his opinions on the Court actually fit comfortably within the autonomy model—a framework that the Court majority has itself embraced on occasion. In *Branzburg*, for example, the Court acknowledged that “news gathering is not without its First Amendment protections,”<sup>100</sup> and that “without some protection for seeking out the news, freedom of the press could be eviscerated.”<sup>101</sup> Similarly, in *Richmond Newspapers, Inc. v. Virginia*,<sup>102</sup> the Court held that the press and public have a First Amendment right to attend criminal trials, in part to ensure the fairness of those proceedings, but also to indulge the information-gathering interests of the attendees.<sup>103</sup> So the Court cannot be characterized as endorsing a pure expression model when it clearly conceives of the First Amendment as protecting some non-expressive activity. There are some clear differences between Stewart’s approach and the approach of the Court majority, but it is misleading to present them as entirely incompatible. The same can be said of the relationship between the Court and the media litigants.

### 1. U.S. Supreme Court

The Supreme Court has routinely acknowledged the importance of freedom of the press and has distinguished it from freedom of speech,<sup>104</sup> but it has not directly addressed Stewart’s thesis,<sup>105</sup> nor has it

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term “newsman,” which some might view as a reference to professional journalists, Stewart does not define the term, and he uses it interchangeably with the more generic term “reporter.” *Branzburg v. Hayes*, 408 U.S. 665, 725–52 (1972) (Stewart, J., dissenting).

<sup>100</sup> *Id.* at 707.

<sup>101</sup> *Id.* at 681. Although the Court has not defined the scope of the right to gather news, by acknowledging that the Speech and Press Clauses protect more than the mere expression or dissemination of information, the Court has accepted the legitimacy of the autonomy model, at least in some fashion.

<sup>102</sup> 448 U.S. 555 (1980).

<sup>103</sup> *Id.* at 575 (“In guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees.”).

<sup>104</sup> See *infra* Part III.C.1, discussing the Court’s repeated references to the press’s unique role as the public’s proxy.

<sup>105</sup> The Court referenced Stewart’s speech in two of its cases, but only for more general propositions. See *Minneapolis Star & Tribune Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575, 585 (1983) (referencing *Or of the Press* generally to support the proposition that the threat of taxes may operate as a censor to check critical comment by the press, undercut-

declared that the Press Clause has any meaning apart from the Speech Clause. Indeed, the phrase “Press Clause” appeared in only five of the cases examined here.<sup>106</sup> The only time the Court majority used it was in *McIntyre v. Ohio Elections Commission*, but only as part of a more general reference to both the “Speech and Press Clauses.”<sup>107</sup> The other four times, the phrase was used by concurring or dissenting Justices,<sup>108</sup> only one of whom, Chief Justice Burger, directly ad-

ting its role as a restraint on government); *Houchins v. KQED, Inc.*, 438 U.S. 1, 14–15 (1978) (quoting *Or of the Press* to reject the assertion that the public and the media have a First Amendment right to government information regarding jails and other public facilities). Stewart’s article is also cited favorably by the dissent in *Leathers v. Medlock*, 499 U.S. 439, 465 (1991) (Marshall, J., dissenting), and is referenced without discussion in *Dun and Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 783 n.8 (1985) (Brennan, J., dissenting), and *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 808 n.8 (1978) (White, J., dissenting).

- 106 References to the Speech Clause were also rare. In *Rosenberger v. University of Virginia*, 515 U.S. 819, 841 (1995), the Court held that student publications and other printed material are protected by the “Speech Clause of the First Amendment,” which, if true, would seem to either render the Press Clause a nullity or require an interpretation in which “press” connotes either non-expressive behavior (newsgathering) or a distinction between particular types of journalists. In *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 491 (1986), the Court noted that the media litigant’s “complaint alleged that [respondents] had violated the [media litigant’s rights under the] Free Speech Clause of the First Amendment.” And in *Bellotti*, 435 U.S. at 800 (Burger, C.J., concurring), Chief Justice Burger referred to the Speech Clause in the context of his argument differentiating it from the Press Clause. See *infra* notes 109–12 and accompanying text.
- 107 514 U.S. 334, 359 (1995) (“When interpreting the Free Speech and Press Clauses, we must be guided by their original meaning, for “[t]he Constitution is a written instrument.” (first alteration in original) (quoting *South Carolina v. United States*, 199 U.S. 437, 448 (1905))).
- 108 In *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992), Justice Kennedy’s concurrence makes general reference to the “Speech and Press Clauses” without discussing the distinctions between them. *Id.* at 694, 696, 703 (Kennedy, J., concurring in judgment). In *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978), Justice Powell, in a concurring opinion, implied that perhaps the Press Clause has a meaning independent of the Speech Clause but he did not elaborate. *Id.* at 568 (Powell, J., concurring) (“As I understand [Justice Stewart’s dissenting] opinion, it would read into the Fourth Amendment, as a new and *per se* exception, the rule that any search of an entity protected by the Press Clause of the First Amendment is unreasonable so long as a subpoena could be used as a substitute procedure.”). Justice Marshall was more explicit in his dissenting opinion in *Leathers v. Medlock*, 499 U.S. 439 (1991), when he argued that a tax scheme that treated the cable media differently than other media violated the non-discrimination principle of the “Free Press Clause” and suggesting that the purpose of that Clause “was to preserve an untrammelled press as a vital source of public information.” *Id.* at 454–55 (Marshall, J., dissenting) (quoting *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936)). Still, it is unclear whether Marshall was suggesting that there is an antidiscrimination principle uniquely applicable to the press or whether he was merely using press language to restate the more general First Amendment presumption against speaker-based discrimination. See *Minneapolis Star & Tribune Co.*, 460 U.S. at 579 (striking down state laws taxing ink and newsprint, which placed unique burdens on print media).

dressed the clause's constitutional significance. In his concurring opinion in *First National Bank of Boston v. Bellotti*,<sup>109</sup> Burger surveyed the history of the Press Clause and concluded that it was not meant to be a source of unique protections for the institutional press but was meant merely as an extension of the Speech Clause, guaranteeing all people the ability to express ideas through "every sort of publication which affords a vehicle of information and opinion."<sup>110</sup> Burger also appeared to target Stewart directly, arguing, "To conclude that the Framers did not intend to limit the freedom of the press to one select group is not necessarily to suggest that the Press Clause is redundant."<sup>111</sup> Burger's *Bellotti* concurrence was a plain articulation of the expression model in that he emphasized the equal right of people to communicate through media, without acknowledging any of the less obvious ways in which expression and press independence can be impaired by government. It was also a repudiation of the special-rights model and an example of how that model—and by extension Justice Stewart—has been set up as the foil, despite the fact that the media litigants have not contended that the Press Clause carves out special protections for the institutional media or other discrete groups.<sup>112</sup>

The Court's majority has not addressed these issues as squarely as Burger did, and its approach has been haphazard. Instead of relying on the Press Clause as the textual hook for its decisions, the Court has used an assortment of words and phrases—"the First Amendment," "freedom of speech and press," "press freedom" and "freedom of the press"—to frame the media litigants' claims. These distinctions are not necessarily minor matters of style. They reflect (or could be perceived as reflecting) the Court's assumptions about the

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109 435 U.S. at 799–800 (Burger, C.J., concurring) ("The Speech Clause standing alone may be viewed as a protection of the liberty to express ideas and beliefs, while the Press Clause focuses specifically on the liberty to disseminate expression broadly . . . . Yet there is no fundamental distinction between expression and dissemination." (footnote omitted)).

110 *Id.* at 800 (internal quotation marks omitted) (quoting *Lovell v. Griffin*, 303 U.S. 444, 452 (1938)).

111 *Id.* at 799. Burger added, "The liberty encompassed by the Press Clause, although complementary to and a natural extension of Speech Clause liberty, merited special mention simply because it had been more often the object of official restraints." *Id.* at 800. Although Burger did not name Stewart, his repeated references to the "institutional press" and to protections for "a select group" suggest he was aiming his critique at the special-rights model. *Id.* at 799. Even more conspicuous is his use of the word "redundant," which is likely a reference to Stewart's admonition that merging the Speech and Press Clauses would create a "constitutional redundancy." Stewart, *supra* note 69, at 633.

112 See *infra* Part III.B.2.

identity of the litigants and the constitutional import of the underlying controversy.

The Court is clearly uncertain about what restrictions violate freedom of speech versus freedom of the press. It describes *Miami Herald Publishing Co. v. Tornillo*,<sup>113</sup> for example, exclusively in press terms even though it is essentially a garden-variety compelled speech case.<sup>114</sup> The fact that the law in question in that case targeted newspapers was incidental to the outcome. Nevertheless, the Court's opinion—strangely, written by Chief Justice Burger—never mentions the word “speech” and instead emphasizes the importance of media independence and the ways in which the law in question “violates the *guarantees of a free press*.”<sup>115</sup> This has led some, including Justice Stewart, to hold *Tornillo* up as the consummate press case.<sup>116</sup> It has also left the impression that perhaps a different constitutional template must be applied when the target of government restraints is a media or press defendant.

That might not be the interpretation the Court intended, but it is a plausible one in light of the way the Court framed the case. Even if the Court meant only to acknowledge the expressive rights of the press and not to either differentiate them from those of other citizens or to identify a broader zone of autonomy for the press, that does not explain why the Court has addressed the claims of other newspaper defendants,<sup>117</sup> as well as those of other media defendants,<sup>118</sup> as ones

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113 418 U.S. 241, 243 (1974) (“The issue in this case is whether a state statute granting a political candidate a right to equal space to reply to criticism and attacks on his record by a newspaper violates the guarantees of a free press.”).

114 The compelled speech doctrine stands for the principle that government may not force someone to speak any more than it can prohibit someone from speaking. *See, e.g.,* *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (striking down law that compelled public school students to recite the Pledge of Allegiance).

115 *Tornillo*, 418 U.S. at 243 (emphasis added). There are several similar references in the opinion, including the Court's ultimate declaration of its ruling: “It has yet to be demonstrated how governmental regulation of [the editorial] process can be exercised consistent with First Amendment guarantees of a *free press* as they have evolved to this time.” *Id.* at 258 (emphasis added).

116 *See* Stewart, *supra* note 69, at 633.

117 *See, e.g.,* *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 262 (1988) (addressing the First Amendment violation claims of school newspaper staff members); *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 (1984) (addressing the media's desire to disseminate information “obtained pursuant to a court order that both granted him access to that information and placed restraints on the way in which the information might be used”).

118 *See, e.g.,* *Reno v. ACLU*, 521 U.S. 844 (1997) (Internet); *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996) (cable television); *Simon & Schuster, Inc. v. N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991) (books); *Hustler Magazine, Inc. v. Fal-*

involving freedom of speech, not freedom of the press. Indeed, the Court even addressed *CBS v. Democratic National Committee* as a speech case though it was factually parallel to *Tornillo* except that the petitioner was a broadcaster instead of a newspaper.<sup>119</sup> This cannot be explained by simply distinguishing between print and broadcast media either because the Court characterizes some broadcast cases as press cases as well.<sup>120</sup> In a number of cases, the Court refers to freedom of speech and freedom of press in the same sentence without differentiation,<sup>121</sup> which could be a deliberate attempt by the Court to remain agnostic on the relationship between the two clauses. It could also be an expression-model fusion of the two clauses, although that does not explain why the Court in other cases very deliberately emphasizes one or the other.<sup>122</sup>

The Court's media decisions do not resolve questions about the scope of, and connections between, the Speech and Press Clauses.<sup>123</sup> Based purely on outcomes, the Court's approach is most akin to the expression model outlined by Justice Burger. But its inconsistent use of language and its acknowledgement in *Branzburg*, *Richmond Newspapers*, and other cases that the First Amendment protects more than just expressive acts, prevents such a clean categorization. Although it has refused to parse the Speech and Press Clauses, the Court's linguistic imprecision has left considerable doubt as to what the Court regards as a violation of freedom of speech versus freedom of the press.

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well, 485 U.S. 46 (1988) (magazines); *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (radio).

119 412 U.S. 94 (1973). Note, however, that Justice Stewart's concurring opinion declares that broadcasters "are surely part of the press," and says that if the courts were to treat private media as government actors, "[f]reedom of the press would then be gone." *Id.* at 133 (Stewart, J., concurring). Justice Douglas's opinion concurring in the judgment also frames the case as one about freedom of the press. *Id.* at 148-70 (Douglas, J., concurring in judgment).

120 *See, e.g., Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 497 (1975) ("[T]he protection of freedom of the press . . . bars the State of Georgia from making appellants' broadcast the basis of civil liability.").

121 *See, e.g., Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994); *Herbert v. Lando*, 441 U.S. 153 (1979); *Branzburg v. Hayes*, 408 U.S. 665 (1972); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971).

122 *See, e.g., Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987) ("Such official scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment's guarantee of freedom of the press.").

123 The Court leaves open questions about whether the two clauses either require or permit distinctions to be made between litigants based on their actions (e.g., newsgathering versus expression), their identity (e.g., mainstream media versus peripheral media), both, or neither.

## 2. *Media Litigants*

Like the Court, the media litigants have not generally affixed their claims to a particular clause of the First Amendment, although a few of them have quoted Stewart's *Or of the Press* speech or his other statements about the Press Clause.<sup>124</sup> In *FCC v. League of Women Voters of California*, the media litigants argued that "the press clause was specifically included in the Constitution to ensure that the government could not convert the communications media into a neutral market place of ideas."<sup>125</sup> And in *Herbert v. Lando*, the litigants made an even fuller argument, partially quoting Stewart's dissent in *Houchins v. KQED, Inc.*:

[T]he press clause of the First Amendment was no afterthought, no mere appendage of the speech clause, but a deeply felt response to the deprivations of press liberty that the colonists had witnessed and to which they had been subject. In short, "[t]hat the First Amendment speaks separately of freedom of speech and freedom of the press is no constitutional accident, but an acknowledgement of the critical role played by the press in American society."<sup>126</sup>

These were the only two instances in which a litigant made an explicit attempt to separate the two clauses, although in neither case did the litigant build its entire argument around the Press Clause.<sup>127</sup> Indeed, there was only one instance in which a litigant represented its claim as being solely about freedom of the press.<sup>128</sup> In every other case, the litigants based their claims on "the First Amendment," "free-

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124 In addition to the references that follow, Stewart's article was quoted in three other litigant briefs, but not to support the claim that the Press Clause has a separate meaning independent of the Speech Clause.

125 Brief for Appellees at 33 n.23, *FCC v. League of Women Voters of Cal.*, 468 U.S. 364 (1984) (No. 82-912) (internal quotation marks omitted) (quoting Stewart, *supra* note 69, at 636).

126 Brief of Respondents at 55, *Herbert v. Lando*, 441 U.S. 153 (1979) (No. 77-1105) (alteration in original) (quoting *Houchins v. KQED, Inc.*, 438 U.S. 1, 17 (1978) (Stewart, J., concurring)).

127 The only other reference to the Press Clause was by the media litigant in *Rosenberger* who argued that its rights were protected by the "Speech and Press Clause[s] of the First Amendment." Brief for the Petitioners at 2, *Rosenberger v. Univ. of Va.*, 515 U.S. 819 (1995) (No. 94-329).

128 *See* Brief for Petitioners at 28, *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978) (No. 76-1484). This brief does not attempt to define freedom of the press, however, or to explain how it is separate from freedom of speech. Nevertheless, because this case involved a First Amendment challenge to the search of a newsroom—that is, it did not involve a direct restraint of expression—the litigants seemed to be working from an autonomy model.

dom of speech and press,” or some variant that combined the two principles.<sup>129</sup>

Even though the litigants did not limit their claims to Press Clause arguments or even to claims about freedom of the press, they often characterized their rights as involving press freedom, even where they also claimed a violation of their speech rights.<sup>130</sup> Some litigants seemed to perceive a benefit in having their rights recognized as those of the press. This was especially common among the peripheral media litigants—those using handbills, flyers, newsletters, or underground publications, for example. Their rights were treated uniformly by the Court as only raising free speech concerns,<sup>131</sup> but most of the peripheral media litigants claimed violations of speech *and* press.<sup>132</sup> Still, a few litigants—both peripheral and mainstream—framed their arguments only in speech terms.<sup>133</sup> This could mean that they did not see themselves as the press, or it simply could have been a strategic decision to avoid antagonizing the Court with claims that might be misunderstood as demands for special status. In any case, the litigants did not follow a consistent approach by, for example, limiting their free-speech claims to contexts in which their expressive acts were targeted, or reserving their press-based claims for contexts in which their autonomy was targeted. They were, however, less prone than the Court to emphasizing one or the other.

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129 These included: “free speech and press,” “free speech and free press,” “freedom of speech and press,” “freedom of speech and freedom of the press,” “freedoms of speech and publication,” and “speech and press provisions of the First Amendment.” *Id.*

130 *See, e.g.*, Brief for Petitioners at 12, *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996) (No. 95-124) (arguing that for cable television operators and programmers, a restraint of their expression violated the “speech and press provisions of the First Amendment”).

131 *See infra* Part III.C.1.

132 *See, e.g.*, Brief of Petitioner at 39, *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334 (1995) (No. 93-986); Brief for the Appellee at 24, *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986) (No. 85-701); Brief for the Plaintiff-Appellees at 64, *USPS v. Council of Greenburgh Civic Ass’ns*, 453 U.S. 114 (1981) (No. 80-608); Brief of Respondents at 13, *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981) (No. 80-795); Brief for the Appellants at 21, *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264 (1974) (No. 72-1180); Brief for Petitioner at 16, *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972) (No. 71-492).

133 *See, e.g.*, Brief of Appellee at 10, *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803 (2000) (No. 98-1682); Brief of Appellees at 1, *Reno v. ACLU*, 521 U.S. 844 (1997) (No. 96-511); Brief for Appellants at 33, *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997) (No. 95-992); Brief of Petitioners & Cross-Respondents at 12, *Int’l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992) (Nos. 91-155, 91-339); Reply Brief of Petitioner at 1, *Burson v. Freeman*, 504 U.S. 191 (1992) (No. 90-1056); Brief of Respondents at 20, *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990) (No. 89-645); Brief for Respondent at 11, *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (No. 77-528).

Most importantly, the litigants' briefs do not reflect a broad embrace of the special-rights model or a desire to separate the Speech and Press Clauses. There were only a couple of exceptions,<sup>134</sup> but even in those cases the litigants did not seek to secure special rights for the institutional press, though, like the Court,<sup>135</sup> they highlighted the press's unique democratic role.<sup>136</sup> Instead, those cases reflect the litigants' broader commitment to the autonomy model in which journalists and the public enjoy an equal right to express themselves, and in which journalists—that is, all those serving a journalistic function—are protected against government incursions on their news-gathering.

This might appear to be a substantial departure from the Court's approach, but that is less true in terms of rationales than outcomes. The Court's acknowledgement in *Branzburg* that some pre-expressive acts are protected, and its holding in *Richmond Newspapers* that the press and public have a right to acquire information, at least in some contexts, suggests that the Court and the litigants have not been working from polar frameworks. By seeking qualified protections against newsroom searches,<sup>137</sup> inquiries into journalists' editorial processes,<sup>138</sup> and forced disclosure of source identities,<sup>139</sup> among other things, the media litigants were simply finishing the Court's thought in *Branzburg* that the First Amendment protects more than speech. Similarly, the litigants' pursuit of affirmative rights of access, which the Court treated with particular disdain in *Pell v. Procunier*,<sup>140</sup> *Saxbe v. Washington Post Co.*,<sup>141</sup> and *Houchins v. KQED, Inc.*,<sup>142</sup> is conceptually

134 See *supra* notes 125–29 and accompanying text.

135 See *infra* Part III.C.1.

136 The litigants in *Houchins* emphasized the fact that the rights they were seeking were less for their own benefit than “for the benefit of all of us.” Brief for Respondents at 24, *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978) (No. 76-1310) (quoting *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967)). And in *Herbert*, the litigants pointed out that the Framers “knew how crucial a role [the press] could play in shaping government.” Brief of Respondents at 51, *Herbert v. Lando*, 441 U.S. 153 (1979) (No. 77-1105); see also *infra* Part III.C.2.

137 See *Zurcher v. Stanford Daily*, 436 U.S. 547, 552 (1978) (addressing media-litigants' action seeking declaratory and injunctive relief against the police officers who searched their newspaper).

138 See *Herbert*, 441 U.S. at 158 (rejecting protections under the First Amendment for inquiries into journalists' editorial processes).

139 See *Branzburg v. Hayes*, 408 U.S. 665, 667 (1972) (holding that questioning reporters before a grand jury does not abridge freedom of speech).

140 417 U.S. 817, 835 (1974) (upholding state prison policy prohibiting media interviews with inmates).

141 417 U.S. 843, 850 (1974) (upholding federal prison policy prohibiting media interviews with inmates).

compatible with the Court's argument in *Richmond Newspapers* that the First Amendment safeguards not only expressive freedom, but also some of the antecedent acts that make that freedom meaningful.<sup>143</sup>

### B. *Special Rights*

This section addresses whether and to what extent the Court has either established special rights for certain groups or media, or provided a doctrinal foundation for the recognition of such rights. More importantly, it evaluates the media briefs to see if the litigants have urged recognition of special press rights, and if so, on what basis.

#### 1. *U.S. Supreme Court*

Although the Court's rulings consistently eschew special rights, its rationales and definitions are more nebulous. The Court addressed the question of special press rights at length in *Branzburg* when it held that journalists may not claim immunity against the execution of grand jury subpoenas or any other generally applicable requirements.<sup>144</sup> The Court insisted that the press has neither a "license . . . to violate valid criminal laws"<sup>145</sup> nor "a testimonial privilege that other citizens do not enjoy."<sup>146</sup> Justice Stewart, joined by Justices Brennan and Marshall, argued in dissent that without at least qualified protection, the government could "annex the journalistic profession as an investigative arm of government."<sup>147</sup>

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<sup>142</sup> 438 U.S. 1, 15–16 (1978) (upholding county prison policy prohibiting news media from bringing cameras or recording equipment into jail and from interviewing inmates).

<sup>143</sup> See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575–76 (1980) (recognizing the right to attend criminal trials as giving meaning to the protections of the First Amendment).

<sup>144</sup> *Branzburg*, 408 U.S. at 682–83 ("It is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability. Under prior cases, otherwise valid laws serving substantial public interests may be enforced against the press as against others, despite the possible burden that may be imposed.").

<sup>145</sup> *Id.* at 691.

<sup>146</sup> *Id.* at 690.

<sup>147</sup> *Id.* at 725 (Stewart, J., dissenting). Stewart argued that a qualified privilege would not necessarily confer special rights on journalists as individuals, but give the press as an institution the freedom it needs to serve society's interest "in a full and free flow of information to the public." *Id.* This instrumental press function, according to Stewart, "underlies the Constitution's protection of a free press." *Id.* at 725–26. Stewart therefore proposed not a regime of special rights for individuals, but protections for an institution whose "constitutional mission" is to serve the informational needs of the public. *Id.* at 729.

The Court, meanwhile, was particularly troubled by the definitional dilemma that recognition of a reporter's privilege would present. Its decision was mostly rooted in the expression model in that it denied protection for pre-expressive activity while also describing freedom of the press as a "fundamental personal right' which 'is not confined to newspapers and periodicals,'" but "comprehends every sort of publication which affords a vehicle of information and opinion."<sup>148</sup> *Branzburg* was the first of several cases in which the Court raised the specter of special rights and used it as a basis for rejecting the media's claims.<sup>149</sup> The Court in *Branzburg* essentially says that because everyone can be a member of the press, the Court cannot recognize the protection being sought. But the conclusion does not follow from the premise. The Court confounds itself by intermingling the two key models of the press. Its premise reflects the egalitarian conception of the press and is focused on the functions being performed by those seeking recognition of the privilege. But the Court's conclusion reverts back to the expert conception of the press by assuming that some delineation based on identity (e.g., qualifications, characteristics, institutional affiliations) would be necessary to apply the privilege.

In the end, the Court never addresses the fact that a truly egalitarian conception of the press largely solves the special-rights dilemma. The Constitution does not assign any rights to particular groups of citizens to the exclusion of others, except to the extent that a person claiming a right must be engaged in the behavior—or find himself in the circumstance—for which the right was established. To invoke the Second Amendment,<sup>150</sup> for example, one must own or seek to own a weapon. To invoke the Third Amendment,<sup>151</sup> one must own or oc-

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148 *Id.* at 704 (quoting *Lovell v. City of Griffin*, 303 U.S. 444, 450, 452 (1938)). In this sense, the "press" is merely a channel of communication, not a set of behaviors. So, when the Court emphasizes freedom of the press, it is merely acknowledging the fact that the expression in question was being disseminated through a particular medium. That does not explain why the Court in other cases suggests that freedom of the press also encompasses some non-expressive activity, like gathering news and attending court proceedings. See *supra* notes 137–43 and accompanying text.

149 See also, e.g., *Cohen v. Cowles Media*, 501 U.S. 663, 670 (1991) ("It is, therefore, beyond dispute that '[t]he publisher of a newspaper has no special immunity from the application of general laws.'" (alteration in original) (quoting *Assoc. Press v. NLRB*, 301 U.S. 103, 132–33 (1937))); *Herbert v. Lando*, 441 U.S. 153, 165 (1979) ("The rules are applicable to the press and to other defendants alike . . .").

150 U.S. CONST. amend. II ("[T]he right of the people to keep and bear Arms, shall not be infringed.").

151 U.S. CONST. amend. III ("No Soldier shall . . . be quartered in any house . . .").

cupy a residence. To invoke the Sixth Amendment,<sup>152</sup> one must be charged with a federal crime, and so on. But these kinds of qualifying criteria are inseparable from the purpose of the underlying right. These are rights possessed by everyone, even if only some citizens will ever have a need to assert them. On the other hand, to impose eligibility requirements that are either unrelated or tangentially related to the purpose of the right *would* present a special-rights problem. Providing a First Amendment reporter's privilege only to those who work for traditional news organizations, who have college degrees, or who work as journalists "for gain or livelihood"<sup>153</sup> would arbitrarily exclude some whose actions advance the core purposes of the right. The problem is that the litigants have never supported the application of such narrow criteria.<sup>154</sup> Not only has the Court routinely misconstrued the nature of special rights, but also it has subtly left the false impression that the litigants have pursued them.<sup>155</sup>

The Court addressed the issue of special rights in several other cases. In *Pell v. Procunier*, the Court rejected the media litigant's claim of a right of access to state prisons for the purpose of interviewing specific inmates.<sup>156</sup> "The Constitution does not . . . require government to accord the press *special access* to information,"<sup>157</sup> the Court wrote. Justice Stewart authored the majority opinion, and while it might appear to contradict his dissent in *Branzburg*, the two are reconcilable. *Pell* involved a claim for recognition of an affirmative right of access—that is, a right that compelled the government to act in some way to facilitate the claimants' interests,<sup>158</sup> while *Branzburg* and

152 U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .").

153 This language is used in several state shield laws. See, e.g., FLA. STAT. § 90.5015(1)(a) (2006).

154 See *infra* Part III.B.2.

155 In *Branzburg*, *Zurcher*, *Houchins*, and *Cohen*, among other cases, the Court set up the mainstream media litigants as the antagonists by implying that their aim was to appropriate the First Amendment for their own purposes. See *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 782 (1978) ("[T]he press does not have a monopoly on either the First Amendment or the ability to enlighten.").

156 417 U.S. 817, 828 (1974).

157 *Id.* at 834 (emphasis added).

158 The Court has not been entirely consistent with respect to affirmative rights. In *Branzburg*, the Court said that "news gathering is not without its First Amendment protections," which could imply the existence of access rights, although it need not be interpreted that way. *Branzburg v. Hayes*, 408 U.S. 665, 707 (1972). More significantly, the Court recognized First and Fourteenth Amendment rights of access for the press and public to various court proceedings. See *supra* note 20. Certainly these conclusions are defensible, but

most other cases were about negative rights—that is, shields against government interference of some kind.<sup>159</sup> The Court’s opinion in *Pell* was less a repudiation of special rights than a rejection of affirmative rights. As Stewart wrote for the Court in *Pell*:

It is one thing to say that a journalist is free to seek out sources of information not available to [others] . . . . It is quite another thing to suggest that the Constitution imposes upon government the affirmative duty to make available to journalists sources of information not available to members of the public generally.<sup>160</sup>

In *Saxbe v. Washington Post Co.*, Justice Stewart again wrote for the Court and rejected the claims of the media litigants who had challenged the constitutionality of a federal prison ban on inmate interviews.<sup>161</sup> Stewart framed the case as one involving special access rights. But because the prison policy did “not place the press in any less advantageous position than the public generally,” he found that the press had no valid First Amendment claim.<sup>162</sup> Justice Powell, joined by Justices Brennan and Marshall, concurred in part and dissented in part in both *Pell* and *Saxbe*, employing the same rationale advanced by Stewart in his *Branzburg* dissent—that freeing the press serves larger societal interests in public information. Powell wrote that because universal access is impractical, “[t]he press is the necessary representative of the public’s interest . . . and the instrumentality which effects the public’s right.”<sup>163</sup> But Powell took this rationale further than Stewart, who refused to read the First Amendment as a mandate for affirmative rights.

The last of the prison-access cases was *Houchins v. KQED, Inc.*,<sup>164</sup> in which the Court rejected a broadcaster’s claim for a right of access to a county jail where a prisoner suicide had occurred. The Court held that “the media have *no special right of access* to the Alameda County Jail different from or greater than that accorded the public gener-

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it is puzzling that the Court is so dismissive of access claims in some contexts when it has embraced them in others.

159 Stewart explicitly rejected recognition of affirmative rights in his Yale speech. See Stewart, *supra* note 69, at 636 (“The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act.”).

160 417 U.S. at 834. This was one of several cases in which the Court mischaracterized the claims of the media litigants. The litigants did not demand to be afforded access to information unavailable to the public. Instead, they proposed a public right of access, but emphasized the acuteness of their interest in light of their social and professional role as conduits of public information.

161 417 U.S. 843, 850 (1974).

162 *Id.* at 849.

163 *Id.* at 864 (Powell, J., dissenting).

164 438 U.S. 1 (1978).

ally.”<sup>165</sup> Indeed, neither the press nor the public has any right of access to government information, the Court held, at least in this context.<sup>166</sup> There may be public policy rationales for permitting access, but that is not the province of the judiciary. The Court wrote: “We must not confuse what is ‘good,’ ‘desirable,’ or ‘expedient’ with what is constitutionally commanded by the First Amendment. To do so is to trivialize constitutional adjudication.”<sup>167</sup> Justice Stevens, joined by Justices Brennan and Powell, dissented in *Houchins* to argue that the case was not really about special rights; it was about a more general public right of access. The fact that the first person to invoke this right happened to be a reporter was merely coincidental.<sup>168</sup> This was essentially how the litigants framed their arguments in *Houchins* and other access cases,<sup>169</sup> but the Court implied that the litigants tried to separate themselves from the public, not merely in terms of their capacity to broadly disseminate public information but in terms of their entitlement to that information in the first place.

In addition to these early access cases, the Court applied its bogus special-rights framework in several other cases that, like *Branzburg*, raised questions about journalistic autonomy, as opposed to speech or access. In each case, the Court largely applied an expression-model analysis and rejected the litigants’ claims. In *Zurcher v. Stanford Daily*,<sup>170</sup> the Court held that the First Amendment does not prevent police from executing an otherwise valid search of a newsroom just because its occupants are “the press.”<sup>171</sup> Justice Stewart dissented, arguing that newsroom searches are self-evident violations of “freedom of the press”<sup>172</sup> that chill speech and undermine reporters’ confiden-

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<sup>165</sup> *Id.* at 16 (emphasis added).

<sup>166</sup> *Id.* at 15 (“Neither the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government’s control.”).

<sup>167</sup> *Id.* at 13.

<sup>168</sup> *Id.* at 25 (Stevens, J., dissenting) (noting that the litigant’s claim did not “rest on the premise that the press has a greater right of access to information regarding prison conditions than do other members of the public” and therefore the litigant should not be punished merely because members of the public “have not yet sought to vindicate their rights”).

<sup>169</sup> *See supra* note 160; *see also infra* Part III.B.2.

<sup>170</sup> 436 U.S. 547 (1978).

<sup>171</sup> *Id.* at 565 (“Properly administered, the preconditions for a warrant—probable cause, specificity with respect to the place to be searched and the things to be seized, and overall reasonableness—should afford sufficient protection against the harms that are assertedly threatened by warrants for searching newspaper offices.”).

<sup>172</sup> *Id.* at 571 (Stewart, J., dissenting).

tial source relationships.<sup>173</sup> Although *Zurcher* appears to be a rejection of special press rights and a manifestation of the expression model, the Court actually embraced the essential argument asserted by the litigants: “A seizure reasonable as to one type of material in one setting may be unreasonable in a different setting”<sup>174</sup> and where a seizure targets material “protected by the First Amendment, the requirements of the Fourth Amendment must be applied with ‘scrupulous exactitude.’”<sup>175</sup> So, the divide between the Court and the litigants in *Zurcher* was less about the principle of autonomy than about the appropriateness of the litigants’ proposed remedy.

In light of this, one might have expected the Court to have been more solicitous the next year in *Herbert v. Lando*, in which the Court held that it does not violate the First Amendment rights of journalists to permit libel plaintiffs to inquire into their editorial decision-making processes when trying to establish actual malice.<sup>176</sup> The plaintiff in that case, a public figure,<sup>177</sup> argued that it would be impossible to prove actual malice without seeking to understand what the defendants knew at the time of publication. The defendants argued that without some kind of constitutional shield against such inquiries, full and candid discussion would vanish from American newsrooms<sup>178</sup> and the press would lose much of its independence from government.<sup>179</sup> The litigants’ autonomy argument again was misconstrued by the Court as a selfish demand for special rights. “The rules are applicable to the press and to other defendants alike,”<sup>180</sup> the Court insisted, making no mention of *Zurcher* and its recognition of press autonomy as a constitutional principle.

The Court in *Herbert* did revisit its decisions in *Tornillo* and *CBS v. Democratic National Committee*, concluding that they only prevent gov-

173 *Id.* at 571–73. Stewart argued that the press was not absolutely immune from searches, but that the government should be required to first seek the information through a subpoena.

174 *Id.* at 564 (internal quotation marks omitted) (quoting *Roaden v. Kentucky*, 413 U.S. 496, 501 (1973)).

175 *Id.* (quoting *Stanford v. Texas*, 379 U.S. 476, 485 (1965)).

176 441 U.S. 153, 158 (1979).

177 Public figures suing for libel must prove that the defendant published the allegedly false and defamatory statements with actual malice. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974).

178 Brief of Respondents at 35, *Herbert*, 441 U.S. 153 (No. 77-1105).

179 *Id.* at 46 (“One question this case poses is thus whether the same public officials and public figures against whom the press—at its best—is to guard are to be permitted to compel answers to questions at the heart of the press’s decision-making process regarding what to print about them.”).

180 *Herbert*, 441 U.S. at 165.

ernment interference with media messages; they do not erect an impenetrable shield around the press.<sup>181</sup> Justice Brennan's dissent objected to that idea, noting: "Through the editorial process expression is composed; to regulate the process is therefore to regulate the expression. The autonomy of the speaker is thereby compromised."<sup>182</sup> Brennan urged recognition of a qualified editorial privilege that would shield defendants against this form of discovery unless the plaintiff first proved the publication was both false and defamatory.<sup>183</sup> Brennan wrote that this privilege should not be conferred upon journalists as individuals to prevent interference with their individual self-expression.<sup>184</sup> Instead, it should be recognized because the defendants are "representatives of the communications media"<sup>185</sup> and they have a "special and constitutionally recognized role of . . . informing and educating the public, offering criticism, and providing a forum for discussion and debate."<sup>186</sup>

The Court took a similar approach in *Cohen v. Cowles Media Co.*, holding that journalists who break promises to their sources can be sued under the doctrine of promissory estoppel without triggering the First Amendment.<sup>187</sup> The Court treated this as another demand by the litigants for special rights and immunities from generally applicable laws.<sup>188</sup> But the litigants did not base their claim on their special identity. They simply noted that because they revealed the

181 *Id.* at 166–67. The Court leaves the impression here that its decisions only prohibit direct restraints of expression, but the Court does not mention its statement in *Branzburg* that newsgathering is protected, even though Justice White wrote the majority opinion in both cases.

182 *Id.* at 190 (Brennan, J., dissenting). This was a perfect expression of the autonomy model in that it acknowledged the indirect effects of government actions or subpoenas while also adding that these threats raise constitutional problems "whether [the] speaker is a large urban newspaper or an individual pamphleteer." *Id.*

183 *Id.* at 197. This would be sufficient, he argued, to protect press defendants against abuse of the discovery process by plaintiffs.

184 *Id.* at 184 n.1 ("So grounded, an editorial privilege might not stop short of shielding all speech.").

185 *Id.* at 188.

186 *Id.* at 189 (internal quotation marks omitted) (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 781 (1978)). It might appear that Brennan was recognizing special rights, but, in fact, he was emphasizing the special role played by the press while also recognizing that it is a role that anyone can play. *See, e.g., infra* note 197.

187 501 U.S. 663, 672 (1991).

188 *Id.* at 670 ("It is, therefore, beyond dispute that '[t]he publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others.' Accordingly, enforcement of such general laws against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations." (emphasis added) (alteration in original) (citation omitted) (quoting *Associated Press v. NLRB*, 301 U.S. 103, 132–33 (1937))).

name of their source in the context of a news story about a matter of significant public interest, their First Amendment interests ought to be weighed against the plaintiff's interests.<sup>189</sup> Justice Souter and three other Justices agreed with the litigants, arguing that “[t]here is nothing talismanic about neutral laws of general applicability,” and that such laws can be as suppressive as ones that target content directly.<sup>190</sup> Justice Blackmun’s dissenting opinion mirrored the arguments of the litigants by suggesting that the case was governed by *Smith v. Daily Mail Publishing Co.*,<sup>191</sup> which held that truthful speech on matters of public interest can only be restricted to serve “a state interest of the highest order.”<sup>192</sup> The Court, however, ignored the expression issue altogether and represented the case as one about media exclusivity.

Although the Court has generally opposed recognition of special rights for the press, it muddled its position on this issue in a series of libel cases in the 1970s and 1980s. The Court used language in these cases suggesting that the rights of media defendants are different than those of other defendants. In *Rosenbloom v. Metromedia, Inc.*, the Court wrote, “We expressly leave open the question of what constitutional standard of proof, if any, controls the enforcement of state libel laws for defamatory falsehoods *published or broadcast by news media.*”<sup>193</sup> Three years later in *Gertz v. Robert Welch, Inc.*,<sup>194</sup> the Court’s opinion repeatedly emphasized the interests of “the press and the broadcast media.”<sup>195</sup> The Court did the same in *Time, Inc. v. Firestone*, in which it wrote that “[b]y requiring a showing of fault the Court in *Gertz* sought to shield the *press and broadcast media* from a rule of strict liability.”<sup>196</sup> In *Philadelphia Newspapers, Inc. v. Hepps*, the Court held “that the common-law presumption that defamatory speech is false

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189 Brief of Respondent at 29, *Cohen*, 501 U.S. 663 (No. 90-634).

190 *Cohen*, 501 U.S. at 677 (Souter, J., dissenting) (alteration in original) (internal quotation marks omitted) (quoting *Employment Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872, 901 (1990) (O’Connor, J., concurring)).

191 443 U.S. 97 (1979).

192 *Id.* at 103. Blackmun also insisted that *Cohen* was about expression, not special rights, and that “[n]ecessarily, the First Amendment protection afforded respondents would be equally available to nonmedia defendants.” *Cohen*, 501 U.S. at 673 (Blackmun, J., dissenting).

193 403 U.S. 29, 44 n.12 (1971) (emphasis added).

194 418 U.S. 323 (1974).

195 *Id.* at 337.

196 424 U.S. 448, 465 (1976) (emphasis added). *See also* *Cox Broad. v. Cohn*, 420 U.S. 469, 499 (1975) (Powell, J., concurring) (explaining that in *Gertz* the Court “held that the First Amendment prohibits the States from imposing strict liability for *media publication* of allegedly false statements that are claimed to defame a private individual” (emphasis added)).

cannot stand when a plaintiff seeks damages against a *media defendant* for speech of public concern.”<sup>197</sup> Four years later, in *Milkovich v. Lorain Journal Co.*, the Court wrote, “we think *Hepps* stands for the proposition that a statement on matters of public concern must be provable as false before there can be liability under state defamation law, at least in situations . . . where a *media defendant* is involved.”<sup>198</sup> The next year, however, the Court described a libel case involving *The New Yorker* as a free-speech case, with no reference to the press or any special protections that might inhere in such a characterization.<sup>199</sup>

Whether or not the Court intended to, or in fact did, confer special rights on the press,<sup>200</sup> it has never disavowed any of the media-specific language from its libel decisions.<sup>201</sup> That is certainly something the Court needs to revisit. But much more consequential is the fact that the Court has not only misconceived the *nature* of special rights, it has repeatedly mischaracterized the claims of the media litigants as *demands* for special rights. This has very clearly affected the outcomes of these cases, and it is not impossible to imagine that it has also shaped public assessments of the press and the legitimacy of their legal claims.

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197 475 U.S. 767, 777 (1986) (emphasis added). Note that Justice Brennan wrote separately in *Hepps* to emphasize his view that the libel principles established by the Court are equally applicable to media and non-media defendants. *Id.* at 779–80 (Brennan, J., concurring).

198 497 U.S. 1, 19–20 (1990) (emphasis added).

199 *See Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 523 (1991) (“Here, we reject any suggestion that the incremental harm doctrine is compelled as a matter of First Amendment protection for *speech*.” (emphasis added)).

200 The Court has not found a constitutional defect in *legislative* schemes that provide subsidies or other benefits to the media. *See, e.g., L.A. Police Dep’t v. United Reporting Publ’g Corp.*, 528 U.S. 32 (1999) (finding constitutional a state records statute that gave news organizations and others access but did not permit access for commercial requesters); *Leathers v. Medlock*, 499 U.S. 439 (1991) (holding that it does not violate the First Amendment for the government to apply its generally applicable sales tax requirements to cable television services alone while exempting the print media).

201 C. Edwin Baker points out that, in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758–59 (1985), a majority of the Justices (four dissenting Justices and one concurring Justice) rejected the application of different libel criteria to a non-media defendant. Baker, *supra* note 28, at 957. That is true but it does not settle the issue, particularly in light of the reference just noted from *Milkovich*, 497 U.S. at 19–20, which was written four years after *Dun & Bradstreet* in a seven-member majority opinion. Individual Justices have repudiated the special-rights rhetoric from the libel cases, but the Court majority has never addressed it.

## 2. *Media Litigants*

The media litigant briefs largely reflect an autonomy-model of the First Amendment, which is not built around the special status or identity of the claimants but around the functions they perform. It is also a model that recognizes the threats posed to journalistic autonomy by regulations targeting some non-expressive activity. There were some instances in which the litigants emphasized their press credentials or highlighted the important social role of the press. But that is not to say that they sought to position themselves atop some constitutional pecking order.

It is possible that some of the litigants thought they might derive some benefit from being viewed as “the press” and that it would be a factor in the Court’s constitutional calculus. Because the Court in some cases deliberately emphasized freedom of the press rather than freedom of speech,<sup>202</sup> it is understandable that some litigants might have hoped for some special allowance, even though it was not something they explicitly sought. Indeed, the media litigants often made it clear that they were not seeking recognition of a separate sphere of protections for the institutional media<sup>203</sup> and that the rights they were pursuing were not for their own benefit but for the benefit of the public.<sup>204</sup>

The closest the litigants came to making special-rights claims was in the three prison-access cases.<sup>205</sup> The media litigants in these cases occasionally employed some of the rhetoric associated with an expert conception of the press. In *Pell v. Procunier*, for example, they argued that “excluding the press wrongly discriminates against them and the constitutional interest they represent. Indeed, the First Amendment actually grants them a *preferred* status, and discriminations which heavily burden First Amendment values are especially reprehensible . . . .”<sup>206</sup> The litigants in *Saxbe* mirrored some of these arguments

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202 See, e.g., *Ark. Writers’ Project, Inc. v. Ragland*, 481 U.S. 221 (1987); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975); *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241 (1974).

203 See, e.g., Brief for the Appellee at 69, *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986) (No. 85-701) (“The liberty of the press secured by the First Amendment is not the special province of the traditional ‘institutional press,’ but is a fundamental right which comprehends every sort of publication.”).

204 See *infra* note 260.

205 *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978); *Saxbe v. Wash. Post Co.*, 417 U.S. 843 (1974); *Pell v. Procunier*, 417 U.S. 817 (1974).

206 Brief of Appellants at 11–12, *Pell*, 417 U.S. 817 (No. 918). This might be misleading in the sense that the litigants might simply have been suggesting that press freedom is af-

by highlighting the “unique constitutional status of those who inform the public”<sup>207</sup> and the “unique expertise” the press has in “determining what matters are newsworthy and what interviews are needed in order to inform the public.”<sup>208</sup> Because of this expertise, the litigants in *Houchins v. KQED, Inc.* contended, some differential access can be afforded the press without upsetting the Constitution: “Freedom ‘of the press’ need not be defined in all circumstances by the rights of the public at large.”<sup>209</sup> The litigants in each of these cases later turned to the familiar arguments, endorsed by some of the Justices, that press access—even “somewhat different” access<sup>210</sup>—is required not to serve the individual interests of journalists, but to facilitate their ability to deliver newsworthy information to the public.

This is an important principle underlying the litigants’ claims in access cases, where their arguments often seemed less about constitutional hierarchies than about simple efficiencies. Specifically, they wanted the Court to recognize that with finite space and opportunities for access, giving priority access to a journalist over a non-journalist would yield greater social benefits. Even though their interests and their intellectual capacities might be identical, the journalist is more likely seeking access for the purpose of communicating to the public and is likely to have access to more robust channels of communication. So the litigants would have likely acknowledged, and in some cases did acknowledge, that anyone *can be* a journalist, but that is different from saying everyone *is* a journalist. And when a government official is faced with access requests from otherwise identically situated claimants, there are sound policy reasons for giving preference to the journalist. The litigants perhaps crossed the line, however, in suggesting that this preference is constitutionally mandated, and that differential access is permissible because of journalists’ unique expertise.

Still, these indefinite references, which are limited to a couple of early cases in the somewhat anomalous access-to-places context,<sup>211</sup>

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forded preferential (that is, explicit constitutional) recognition, not that individual claimants are preferred over others serving similar ends.

207 Brief for Respondents at 28 n.8, *Saxbe*, 417 U.S. 843 (No. 73-1265).

208 *Id.* at 67.

209 Brief for Respondents at 43, *Houchins*, 438 U.S. 1 (No. 76-1310).

210 *Id.* at 42.

211 These cases are unlike most in that they are complicated by the commingling of policy and constitutional arguments and by the conjunction of special-rights and affirmative-rights issues.

provide sparse evidence of a campaign for special rights.<sup>212</sup> The litigants were much more magnanimous in other cases, in which they made no distinctions between particular types of journalists or between journalists and the press. In *Richmond Newspapers*, for example, the litigant urged the Court “to recognize a First Amendment right of *members of the public* to attend criminal trials,”<sup>213</sup> which is a phrasing repeated in other access cases not involving prisons.<sup>214</sup>

The same was true in cases involving non-expressive activity, where the litigants sought rights that were unique to the press, but with the press defined in egalitarian terms. In *Herbert*, they urged the Court to provide First Amendment protection against inquiries into editorial decision-making, but they did not demand that it be confined to mainstream media or to journalists of a particular order.<sup>215</sup> Likewise, in *Zurcher* the litigants did not rest their claim on the right of the press to immunity from government searches, but proposed a broader right that would provide protections whenever a search “affects freedom of *speech or press*.”<sup>216</sup> *Herbert* and *Zurcher* are therefore quintessential autonomy-model cases in that the litigants emphasized a neutral principle that transcends identity. It might appear that the media litigants in *Cohen v. Cowles Media Co.* sought special protections by arguing that the government should not be able to enforce a generally applicable law against the press where it would prevent them from communicating newsworthy information to the public about an upcoming election.<sup>217</sup> But the thrust of their argument was that the government should not be permitted to interfere with *anyone’s* ability

212 See, e.g., *Houchins*, 438 U.S. 1. The litigants did not seek preferential access; they simply argued that the government could not use its desire for neutrality as a basis for denying access altogether. In other words, the government could not simply shut down access altogether. Through this argument, the litigants also sought judicial recognition of affirmative rights, which the Court has recognized in other contexts. See *supra* note 20.

213 Brief of Appellants at 27, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (No. 79-243) (emphasis added).

214 See, e.g., Supplemental Brief of Petitioners, *El Vocero de Puerto Rico v. Puerto Rico*, 508 U.S. 147 (1993) (No. 92-949); Brief of Petitioner on the Merits, *Press-Enter. Co. v. Superior Court*, 478 U.S. 1 (1985) (No. 84-1560); Brief for Petitioner on the Merits, *Press-Enter. Co. v. Superior Court*, 464 U.S. 501 (1984) (No. 82-556); Reply Brief of Appellant, *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (No. 81-611); Brief of Appellants, *Chandler v. Florida*, 449 U.S. 560 (1981) (No. 79-1260); Brief of Appellants, *Richmond Newspapers*, 448 U.S. 555 (No. 79-243); Brief of Petitioner, *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979) (No. 77-1301); Brief for Respondent, *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589 (1978) (No. 76-944).

215 Brief for Respondents, *Herbert v. Lando*, 441 U.S. 153 (1979) (No. 77-1105).

216 Brief for Respondents at 13, *Zurcher v. Stanford Daily*, 436 U.S. 547 (1977) (Nos. 76-1484, 76-1600) (emphasis added).

217 Brief of Respondent, *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991) (No. 90-634).

to disseminate truthful information of public interest,<sup>218</sup> and that First Amendment interests cannot be ignored merely because the law being enforced is generally applicable.<sup>219</sup>

There were some hints of special-rights rhetoric by media litigants in the libel cases, but these were probably attempts by the litigants to mirror the Court's linguistic patterns. In *Firestone*, the litigant described the holding from *Gertz* as one preventing liability without fault in libel actions against "a member of the 'press.'"<sup>220</sup> The litigant also argued that the Court had "long emphasized" that the role of the press in informing the public requires "maximum freedom and *special protection*."<sup>221</sup> And in *Masson*, the litigant referenced the extent to which libel plaintiffs could recover damages from "the press" but did not expand on this.<sup>222</sup> It is important to emphasize, however, that in all other libel cases, including *Hepps*, the litigants broke from the Court and framed their claims purely as matters of free speech.<sup>223</sup>

Despite these occasional references, and despite the common allusions to the unique role and function of the press,<sup>224</sup> the media litigants did not demand recognition of special rights.<sup>225</sup> The evidence gathered from the briefs thus does not support the more general accusation of media exceptionalism, much less an attempt to exalt the rights of particular segments of the press.<sup>226</sup> Whether or not these descriptions accurately characterize the out-of-court statements of journalists and their advocates, they are not reflected in the briefs filed with the Court.

218 *Id.* at 29.

219 *Id.* at 34–36. The litigants note that laws governing libel, privacy, and intentional infliction of emotional distress are all generally applicable, yet the Court has subjected their application to some First Amendment limitations.

220 Brief for Petitioner at 16, *Time, Inc. v. Firestone*, 424 U.S. 448 (1975) (No. 74-944) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347–48 (1974)).

221 *Id.* at 26 (emphasis added).

222 Brief for Respondents at 23–24, *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1990) (No. 89-1799).

223 *See, e.g.*, Brief for Appellants at 25, *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1985) (No. 84-1491).

224 *See infra* Part III.C.2.

225 Indeed, even in cases in which the Court emphasized press autonomy or freedom of the press, the litigants often used more neutral language and relied on more traditional arguments.

226 This is not to say that the litigants made no distinction between the press and the public. They did seek some rights that would be available only to the press. But because their claims were coupled with an egalitarian conception of the press, the litigants' approach did not exclude members of the public who might seek to serve the same journalistic purposes.

### C. *The Role and Identity of the Press*

This section addresses the ways in which the parties defined “journalists” and “the press” and how they distinguished them from other people and institutions. Unlike the earlier sections, which looked at how the parties characterized the underlying *claims*, this section looks at how they framed the identity and journalistic aims of the *claimants*.

#### 1. *U.S. Supreme Court*

The Supreme Court has not explicitly defined either “journalist” or “the press.” Of course, it deliberately skirted the issue in *Branzburg* after refusing to recognize a reporter’s privilege.<sup>227</sup> But even in its libel rulings, where the Court implied that the press might possess unique constitutional protections,<sup>228</sup> it acted as if the meaning of “the press” was self-evident.

The Court’s conceptions of “journalist” and “the press” can potentially be discerned by noting the types of people and institutions to which the Court has applied those terms. Unfortunately, the Court’s approach has been wildly inconsistent. Despite its statement in *Branzburg* 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,”<sup>229</sup> the Court’s other statements and characterizations are far less populist. The Court has consistently described traditional, mainstream media organizations as the press, but it has not done the same for the peripheral media. In all cases involving mainstream magazines and daily newspapers, the Court operated from the assumption that those organizations are part of the press and that their claims involved either “freedom of the press” or “speech and press.” The same was true in cases involving the mainstream broadcasters<sup>230</sup> and cable programmers and operators.<sup>231</sup>

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<sup>227</sup> *Branzburg v. Hayes*, 408 U.S. 665, 704 (1972).

<sup>228</sup> See *supra* notes 193–99 and accompanying text.

<sup>229</sup> *Branzburg*, 408 U.S. at 704.

<sup>230</sup> See, e.g., *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 382 (1984) (“[T]he press, of which the broadcasting industry is indisputably a part, carries out a historic, dual responsibility in our society . . .” (citation omitted)); see also *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 497 (1975) (“[T]he protection of freedom of the press . . . bars the State of Georgia from making appellants’ broadcast the basis of civil liability.”).

<sup>231</sup> See, e.g., *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994) (“There can be no disagreement on an initial premise: Cable programmers and cable operators . . . are entitled to the protection of the speech *and press* provisions of the First Amendment.” (emphasis added)); see also *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 815 (1996) (“[C]able operators engage in speech by providing news, information,

Despite its famous platitude about the virtuous “lonely pamphleteer,”<sup>232</sup> the Court has not been willing to endow communicators using less traditional media with the label “the press,” nor has it characterized their rights as involving “freedom of the press.” The Court has analyzed these as speech cases,<sup>233</sup> despite some occasional references by dissenting or concurring Justices to “the press” or “freedom of the press.”<sup>234</sup> The different characterizations of mainstream versus peripheral media defendants suggests that the Court is employing—though certainly not carefully articulating—a more corporate or expert conception of the press than is implied by its egalitarian statements in *Branzburg*. In each of these cases, the media litigant’s rights were upheld.<sup>235</sup> At the very least, this creates some doctrinal confusion, even though the disparities are at the definitional level rather than the decisional level, and are therefore less confounding in terms of outcomes.

The discrepancies between mainstream and peripheral media cases might make sense if the Court had simply been seeking to draw

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and entertainment to their subscribers and . . . they are part of the press.” (internal quotation marks omitted)); *Leathers v. Medlock*, 499 U.S. 439, 444 (1991) (“Cable television provides to its subscribers news, information, and entertainment. It is engaged in ‘speech’ under the First Amendment, and is, in much of its operation, part of the ‘press.’”). In three other cable cases, however, the Court recognized the First Amendment rights of cable operators, but focused solely on their expressive or speech rights without specifically mentioning “the press.” See *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803 (2000); *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997); *City of L.A. v. Preferred Commc’ns, Inc.*, 476 U.S. 488 (1986).

<sup>232</sup> *Branzburg*, 408 U.S. at 704.

<sup>233</sup> See, e.g., *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334 (1995) (involving restrictions on dissemination of anonymous campaign literature); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (addressing censorship of stories about divorce and teen pregnancy in high school newspaper); *Heffron v. Int’l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981) (entailing the distribution of sectarian literature at the Minnesota State Fair); *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264 (1974) (involving a libel action against a union newsletter for referring to claimants as “scabs”); *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667 (1973) (pertaining to restrictions on an underground college publication criticizing the police); *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972) (addressing the restraint of handbills urging people to attend anti-war rally); *Org. for a Better Austin v. Keefe*, 402 U.S. 415 (1971) (involving the distribution of leaflets accusing real estate broker of fraud and discrimination). It should be noted that there was nothing about the content of the messages being disseminated in these peripheral media that distinguished these cases from others. Each case involved what was arguably core speech.

<sup>234</sup> See, e.g., *McIntyre*, 514 U.S. at 359 (Thomas, J., concurring); *Hazelwood*, 484 U.S. at 284 (Brennan, J., dissenting); *Old Dominion Branch*, 418 U.S. at 288 n.2 (Douglas, J., concurring); *Lloyd Corp.*, 407 U.S. at 573 (Marshall, J., dissenting).

<sup>235</sup> One exception, not mentioned above, was *Burson v. Freeman*, 504 U.S. 191 (1992), in which the Court upheld a law limiting the distribution of literature near a polling place on the day of an election.

a line between dissemination (speech, distribution) and newsgathering (access, autonomy).<sup>236</sup> In several cases involving the dissemination of content in mainstream media, the Court did address the First Amendment claims as involving free speech, not free press,<sup>237</sup> and all of the peripheral media cases involved expression issues. But the Court does not follow a consistent pattern, and goes out of its way in some expression cases to identify a litigant as “the press” or to characterize its claim as one involving freedom of the press.<sup>238</sup>

What is it, then, that distinguishes the press? The Court is unclear. It regularly highlights the unique social role of the press—how it monitors the abuses of government, keeps the public informed, provides a vehicle for the exchange of ideas and enables the public’s self-governing tasks, which subtly suggests a certain regularity of communication and perhaps a kind of expertise that connotes an expert conception of the press. The Court also implies that an organization’s or individual’s status as a “media defendant” is relevant in determining the scope of its constitutional rights,<sup>239</sup> and that only certain communicators or media organizations are capable of making claims involving freedom of the press. Yet its more explicit statements affirm the idea that the rights of the press extend no farther than those of the public<sup>240</sup> and that the lonely pamphleteer is as much “the press” as is a large daily newspaper.

The Court has been equally imprecise in its use of the terms “journalist,” “reporter,” and “newsman,” but it has been more consistent in

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<sup>236</sup> All of the peripheral-media cases were, after all, about expression issues, not access or autonomy.

<sup>237</sup> *See, e.g.*, *Reno v. ACLU*, 521 U.S. 844 (1997) (involving the restriction of indecent content on the Internet); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) (regarding a civil suit for intentional infliction of emotional distress based on a parody advertisement published in a magazine); *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (pertaining to a restriction on indecent content broadcast by a public radio station).

<sup>238</sup> *See, e.g.*, *Cohen v. Cowles Media Co.*, 501 U.S. 663, 664 (1991) (stating that the First Amendment does not immunize the press from a promissory estoppel cause of action based on a breach of promise); *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 768 (1986) (finding that the burden of proving the falsity of allegedly defamatory speech cannot be placed on the press); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 325 (1974) (giving protection to the press from liability in defamation cases when a public issue is discussed, absent proof of knowledge of falsity or reckless disregard of the truth); *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (holding that a state statute allowing for “right of reply” in newspapers violated freedom of the press); *see also supra* notes 230–31.

<sup>239</sup> *See supra* Part III.B.1.

<sup>240</sup> *See, e.g.*, *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972) (“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.”).

application.<sup>241</sup> The Court uses these terms in a matter-of-fact way, apparently assuming that whatever meaning it ascribes to them is shared by their audience. These terms are not used in every case involving the press or media. Their application is narrower. Not every employee of a media organization is described as a journalist, for example. The Court generally characterizes people as journalists or reporters only when they publish or broadcast information of *public significance*<sup>242</sup> or when they seek and gather such information,<sup>243</sup> and even then only if they work in mainstream media.

Finally, the Court suggests that a journalist is someone who serves as a watchdog and is an agent of the public. The Court says journalists and the news media serve as the “‘eyes and ears’ of the public, [and] can be a powerful and constructive force, contributing to remedial action in the conduct of public business.”<sup>244</sup> Because “[n]o individual can obtain for himself the information needed for the intelligent discharge of his political responsibilities,”<sup>245</sup> journalists and the news media play a “special and constitutionally recognized role . . . in informing and educating the public.”<sup>246</sup> This is the type of language the Court routinely uses, and it suggests a traditional definition of journalists—one that mirrors the widely recognized Woodward-and-Bernstein archetype.<sup>247</sup> Yet in other cases, the Court has said that the press “does not have a monopoly on either the First

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241 During the mid-1980s the Court was more likely to use the term “media” as opposed to “the press” in referring to the litigants. This was probably just an attempt to acknowledge the parallels between print media, on one hand, and broadcast, cable, and Internet media on the other. Similarly, in referring to reporters, the Court used the archaic term “newsman” in *Branzburg*. But in subsequent decisions, it used “journalist” and occasionally “reporter.” In no case was the meanings of these terms specifically examined, however.

242 See *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 499 (1991) (“The First Amendment protects . . . journalists who write about *public figures* . . .” (emphasis added)).

243 See, e.g., *Branzburg*, 408 U.S. at 691 (noting that by rejecting the reporter’s privilege, the Court was not seeking to restrain the “quality of information reporters may *seek to acquire*, nor . . . threaten the vast bulk of *confidential relationships* between reporters and their sources” (emphases added)).

244 *Houchins v. KQED, Inc.*, 438 U.S. 1, 8 (1978).

245 *Saxbe v. Wash. Post Co.*, 417 U.S. 843, 863 (1974) (Powell, J., dissenting).

246 *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 781 (1978).

247 The Court’s characterizations of the press need not be interpreted as embracing an expert conception, but because the Court uses this language in cases involving mainstream media, whose claims they characterize as being about freedom of the press, and because the Court generally does not use this language in cases involving peripheral-media litigants whose cases are presented as ones involving freedom of speech, the Court creates unnecessary confusion.

Amendment or the ability to enlighten,”<sup>248</sup> and that “[t]he informative function asserted by representatives of the organized press . . . 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 . . . .”<sup>249</sup> The Court implies that journalists are no different than other communicators, at least in their expressive or informative functions. This begs the question whether they are different from others in their newsgathering or investigative functions. The Court has suggested that they are, but at the same time has refused to provide them with any protections—other than access to the courts, which is a right that they share with the public—that are uniquely tied to that task.

There are several problems with the Court’s conceptions of journalists and the press. The Court emphasizes the unique role played by the press in serving as a check on the exercise of power. Yet the Court on many occasions has defined media organizations as the press when they do not necessarily serve that function.

Cable television is the clearest example. Cable television system operators, though exercising some editorial discretion in selecting the menu of channels they offer to subscribers, do not serve a checking function, at least not directly. They provide a vehicle through which this information reaches the public, but they usually produce none of their own content. Perhaps these functions warrant First Amendment protection, but to the extent that they serve a checking function, their role is more indirect than traditional news organizations, or even intrepid bloggers or pamphleteers. The Court declares that certain media are the press and that they are protected as such, but if the press is defined as any organization that communicates information, that hardly distinguishes it from other institutions.

Using that criterion, it also makes little sense to characterize publishers of pamphlets, newsletters, and student newspapers as only speakers and not also the press. In short, the Court needs to make clear what rights the press possesses qua press. If none, then the Court should abandon its exhaustive chronicling of the press’s storied role as the nation’s bulwark of liberty, or at least make clear that those are functions that any motivated citizen can perform.

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248 *Bellotti*, 435 U.S. at 782.

249 *Branzburg v. Hayes*, 408 U.S. 408, 705 (1972).

## 2. *Media Litigants*

Like the Court, no media litigant has ever proposed a specific definition of “the press.” Nevertheless, many litigants have deliberately presented themselves to the Court as the press, perhaps hoping or assuming this would enhance their claims to constitutional protection. In *Herbert v. Lando*, the media litigants insisted that although CBS and the “60 Minutes” staff were broadcasters, they were also the press, a point the media litigants believed had not been and could not be disputed.<sup>250</sup> Other cases reflect this tendency as well.<sup>251</sup> The Court was inconsistent in its characterizations of the electronic media litigants, but the litigants themselves made more predictable efforts to position themselves as the press,<sup>252</sup> although this was not always the case.<sup>253</sup>

The peripheral media litigants were particularly determined to convince the Court of their press status. Although the Court uniformly characterized these litigants’ claims as only involving speech,

<sup>250</sup> Brief of Respondents at 26 n.1, *Herbert v. Lando*, 441 U.S. 153 (1979) (No. 77-1105).

<sup>251</sup> *See, e.g.*, Brief for Appellant at 21–22, *Ark. Writers’ Project, Inc. v. Ragland*, 481 U.S. 221 (1987) (No. 85-1370) (arguing that newspapers and magazines are both instruments of the press); Brief for Petitioner at 32, *Branzburg*, 408 U.S. 665 (No. 70-85) (arguing that “[p]etitioner is a member of the press” by virtue of being an investigative reporter for a newspaper). These could simply have been attempts by the media litigants to distinguish themselves from other businesses and institutions by emphasizing the fact that they engage, as part of their operations, in expressive activity, and in doing so, are covered by the First Amendment. These need not be interpreted, in other words, as attempts by the litigants to claim broader immunities.

<sup>252</sup> *See, e.g.*, Brief for Appellants at 21, *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994) (No. 93-44) (“Sections 4 and 5 deliberately interfere with . . . the editorial functions of members of the press . . .”); Brief for Respondent at 29, *City of L.A. v. Preferred Commc’ns, Inc.*, 476 U.S. 488 (1986) (No. 85-390) (“City’s desire to manage a medium of the press is *improper*.”); Brief for Appellees at 38, *FCC v. League of Women Voters of Cal.*, 468 U.S. 364 (1984) (No. 82-912) (“There can be no doubt that broadcasting falls within the First Amendment’s protection against governmental abridgement of freedom of speech and the press.”); Brief for Respondent at 52, *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979) (Nos. 77-1575, 77-1648, 77-1662) (“[C]able systems should be accorded the same First Amendment rights as newspapers . . .”).

<sup>253</sup> Several electronic media litigants focused on their speech rights and did not seek to characterize themselves as the press. *See* Brief of Appellee at 21, *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803 (2000) (No. 98-1682) (alleging that limited television broadcasting privileges for sexually explicit programs is an unconstitutional restraint of free speech); Brief of Appellees, *Reno v. ACLU*, 521 U.S. 844 (1997) (No. 96-511) (discussing indecency statutes as an unconstitutional abridgement of free speech in the context of the Internet); Brief for Appellants at 3–4, *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997) (No. 95-992) (maintaining that mandatory carriage requirements for broadcast television are regulations that burden free speech); Brief for Respondent at 34, *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (No. 77-528) (arguing that censoring airwaves restricts freedom of expression).

the litigants often sought to persuade the Court that they were no different, in function if not form, than the mainstream press and that their rights under the First Amendment should parallel those of traditional newspapers, magazines, and broadcast outlets. In *FEC v. Massachusetts Citizens for Life*, for example, the media litigant argued that a pro-life newsletter should be protected as a matter of “[t]he liberty of the press” to the same extent as “the traditional institutional press.”<sup>254</sup> It argued that the restriction in question “would silence a publication more akin to the newspapers circulated at the time the First Amendment was written than the publications now printed by media conglomerates.”<sup>255</sup> In *USPS v. Council of Greenburgh Civic Ass’ns*, the media litigant argued that pamphlets and leaflets “fall within the purview of the free press protections,”<sup>256</sup> and most other peripheral media litigants made similar arguments.<sup>257</sup>

The characteristics that media litigants identified as defining the press and its social role paralleled those highlighted by the Court. The litigants portrayed themselves as exercising editorial control,<sup>258</sup> communicating information of public significance relevant to the public’s self-governing tasks,<sup>259</sup> “bar[ing] the secrets of govern-

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254 Brief for Appellee at 69, *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986) (No. 85-701) (internal quotation marks omitted).

255 *Id.* at 70–71.

256 Brief for Plaintiffs-Appellees at 62, *USPS v. Council of Greenburgh Civic Ass’ns*, 453 U.S. 114 (1981) (No. 80-608).

257 *See, e.g.*, Brief of Petitioner at 40, *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334 (1995) (No. 93-986) (describing the case as one involving speech and press, and describing political pamphlets and leaflets as “the poor man’s printing press” (quoting Harry Kalven, Jr., *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 30)); Brief of Respondents at 4, *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (No. 86-836) (arguing that student newspapers are the press); Brief of Respondents at 13–14, *Heffron v. Int’l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981) (No. 80-795) (describing a religious pamphleteering case as one involving “freedoms of speech, press, religious exercise, association, and assembly”); Brief for Respondents at 15, *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972) (No. 71-492) (arguing that pamphlets warrant press protections). There were a few peripheral-media litigants who focused solely on their speech rights. *See* Brief of Petitioners and Cross-Respondents at 13–14, *Int’l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 830 (1992) (Nos. 91-155, 91-339) (arguing that religious literature in airports is a permissible form of free speech); Brief of Respondent at 2, *Burson v. Freeman*, 504 U.S. 191 (1992) (No. 90-1056) (advocating that the prohibition of political literature in polling places is a burden on the right to free speech); Brief for Petitioners at 10–11, *Org. for a Better Austin v. Keefe*, 402 U.S. 415 (1971) (No. 135) (arguing that pamphlets qualify for constitutional protections of free speech).

258 *See, e.g.*, Brief for Appellants at 30, *Turner Broad. Sys., Inc.*, 512 U.S. 622 (No. 93-44) (arguing that the laws in question “interfere[] with the editorial functions of the press”).

259 *See, e.g.*, Brief of Appellant at 22, *Fla. Star v. B.J.F.*, 491 U.S. 524 (1989) (No. 87-329) (saying that it is “the responsibility of the press to report” information regarding the commission of a crime involving actions of the government); Brief of Nat’l Citizens Comm. for

ment,”<sup>260</sup> “expos[ing] abuses of power,”<sup>261</sup> and “engaging the public in a ‘dialogue in ideas.’”<sup>262</sup> Furthermore, journalists and the press do these things not for their own sake, but in serving as the “agent or proxy of the public.”<sup>263</sup> Like the Court then, the media litigants had a vision of a journalist that valued the watchdog function and that involved more than the mere dissemination of content (i.e., speech). Unlike the Court, however, the litigants would have secured additional protections against government restraints of press autonomy and access.

In addition, the media litigants, collectively, were much more faithful to the egalitarian, lonely-pamphleteer conception of the press than was the Court. The Court reserved the press label for mainstream media, while the litigants saw themselves as essentially co-equals. The mainstream litigants made no attempts to exclude smaller media by urging recognition of ranks or tiers,<sup>264</sup> and the peripheral media litigants were nearly unanimous in emphasizing the commonalities among media and among communicators. As the litigants wrote in *FEC v. Massachusetts Citizens for Life, Inc.*, “The liberty of the press secured by the First Amendment is not the special province of the traditional ‘institutional press,’ but is a fundamental right which comprehends every sort of publication.”<sup>265</sup>

#### IV. CONCLUSION

Despite thirty-five years of litigation and legislative action, the law of newsgathering is still a contested and unsteady terrain in which there are only a handful of loosely formed theoretical and doctrinal

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Broad. et al. as Amici Curiae Supporting Respondents at 15, *CBS Inc. v. FCC*, 453 U.S. 367 (1981) (Nos. 80-207, 80-213, 80-214) (“[B]roadcasters have long had some responsibility to disseminate political speech.”).

<sup>260</sup> Brief of Appellant at 24, *Landmark Commc’ns, Inc. v. Virginia*, 435 U.S. 829 (1978) (No. 76-1450) (quoting *N.Y. Times v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring)).

<sup>261</sup> Brief for Respondent at 16, *City of L.A. v. Preferred Commc’ns, Inc.*, 476 U.S. 488 (1986) (No. 85-390).

<sup>262</sup> Brief for Appellees at 33, *FCC v. League of Women Voters of Cal.*, 468 U.S. 364 (1984) (No. 82-912) (quoting *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 547 (1976)).

<sup>263</sup> Brief for Respondents at 36, *Saxbe v. Wash. Post Co.*, 417 U.S. 843 (1974) (No. 73-1265).

<sup>264</sup> *See, e.g.*, Brief for Plaintiffs-Appellees at 63, *USPS v. Council of Greenburgh Civic Ass’ns*, 453 U.S. 114 (1981) (No. 80-608) (“The First Amendment was intended by the Founding Fathers to be available to all, not merely to those who can bear great financial burdens and project their press product in an imposing cover.”).

<sup>265</sup> Brief for Appellee at 69, *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986) (No. 85-701).

anchors. In the face of these ambiguities, both mainstream and peripheral journalists have urged lower courts to clarify and enlarge the Supreme Court's newsgathering jurisprudence. But those efforts have often been derailed by mistrustful judges and lawmakers, many of whom no doubt share the public's disapproval of press performance<sup>266</sup> and its pernicious assumption that mainstream journalists regard the First Amendment as a special manifest of rights that has been set aside for, as Spiro Agnew put it, a "tiny and closed fraternity of privileged men."<sup>267</sup>

The results of this analysis show no support, however, for the abiding accusation that the media litigants have claimed an elite or preferred constitutional position, or that they have sought judicial recognition of a framework of special rights. It is true that the litigants made some distinctions between speech and press, and between the press and public. But they linked their claims to an egalitarian conception of the press in which the distinctions among communicators were made on the basis of function, not identity.

The portrayal of mainstream journalists as disciples of Justice Stewart who have sought to co-opt the Press Clause is still part of the historical narrative about the news media's constitutional cases, and it is subtly reflected in popular critiques as well. It is plainly contradicted, however, by the briefs submitted to the Court. The litigants did not attempt to bifurcate the First Amendment and to tie their claims to particular clauses. And to the extent that they distinguished speech and press, it was to separate expression and newsgathering, not to establish an identity-based partition that would deny rights to those lacking certain credentials or institutional affiliations. The litigants' arguments were also anything but radical. They fit comfortably under the rubric of the autonomy-model, which the Court has largely endorsed as a matter of principle, even though it has lost track of it on occasion.

The Court, meanwhile, has muddled this area of law by waffling between the expression, autonomy, and special-rights models, by using the rhetoric of both the expert and egalitarian conceptions of the press, and by not providing a clear basis for distinguishing free-speech and free-press controversies.

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266 PROJECT FOR EXCELLENCE IN JOURNALISM, *THE STATE OF THE NEWS MEDIA 2008: AN ANNUAL REPORT ON AMERICAN JOURNALISM* (2008), [http://www.stateofthenewsmedia.com/2008/printable\\_overview\\_chapter.htm](http://www.stateofthenewsmedia.com/2008/printable_overview_chapter.htm).

267 See Daniel Schorr, *The Government's Current War with the Free Press*, *CHRISTIAN SCI. MONITOR*, July 7, 2006, at 9.

Even more problematic from the media's perspective is that the Court has frequently mischaracterized the nature of special rights by attaching that label to anything that benefits the press, irrespective of how "press" is defined. The Court has also exacerbated misconceptions about the litigants' claims by suggesting that they would require the abandonment of long-standing neutrality principles or the application of exotic theories. In many cases in which the Court rejected the litigants' claims, however, the litigants were making logical extrapolations from the Court's earlier rulings—often relying on autonomy-model principles that the Court had previously embraced but refused to revisit.

The fact that many of the litigants' arguments flow directly from the Court's earlier opinions suggests that the two sides are not impossibly far apart. Going forward, if the Court could become slightly more solicitous of the autonomy principles relied on by the litigants in cases like *Zurcher*, *Herbert*, and *Branzburg*, and if the litigants could allay some of the Court's concerns by being even clearer about their interest in protecting the core functions of the press and not the special status of the claimants, there will be some opportunity for a sensible reordering of press law and perhaps a reconciliation between the media and the Court. Until then, those opposed to the broadening of press protections will no doubt continue repeating the familiar, if apocryphal, tales about the press's brazen demands for special rights, and in so doing, they will further impair the right of everyone to gather and report news.