Marquette University

Erik Ugland

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Demarcating the Right to Gather News: A Sequential Interpretation of the First Amendment

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DEMARCATING THE RIGHT TO GATHER NEWS: A SEQUENTIAL INTERPRETATION OF THE FIRST AMENDMENT

ERIK UGLAND*

ABSTRACT

The recent spate of cases in which reporters have been subpoenaed, fined, jailed, or otherwise disciplined has laid bare the divisions among the courts over the existence and scope of the "reporter's privilege." The cases have also exposed the doctrinal, historical, and theoretical infirmities of the broader law of newsgathering, which encompasses not only source relationships, but also rights of access to places and records, protections against civil and criminal liability for torts and crimes committed in the pursuit of news, and protections against government searches of newsrooms and phone records, among other things. Resolving these conflicts has grown more urgent with the democratization of media and the emergence of bloggers and other news providers who have challenged traditional conceptions of "journalists" and "the press."

To settle these controversies, this Article seeks to move past the courts' desultory analyses, focus on core principles, and situate those assessments in the context of a particular approach to constitutional interpretation. This Article proposes a "sequential" interpretation of the First Amendment—an approach that assesses, in turn, the text of the Amendment, its history, its place in the broader constitutional structure, and its contemporary meaning in light of substantial social change. This approach draws upon conventional interpretive frameworks to show that there is abundant constitutional support to

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* Assistant Professor, J. William and Mary Diederich College of Communication, Marquette University. B.A. 1991, University of Minnesota; J.D. 1995, University of Minnesota; M.A. 1999, University of Minnesota; Ph.D. 2002, University of Minnesota.

recognize most aspects of the right to gather news, including the reporter's privilege, and that doing so does not require any interpretive contortions. However, recognizing some newsgathering rights depends on a more egalitarian definition of "journalist"—one that emphasizes the function served by newsgatherers, and not their social or professional status or credentials. And although there is a historical and constitutional foundation for many newsgathering protections, some access claims and liability defenses—particularly those that are dependent on an affirmative-rights construction of the First Amendment—are not constitutionally cognizable, despite their appeal as matters of policy.

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INTRODUCTION

The summer of 2007 should have been a propitious time for Major League Baseball. With Sammy Sosa becoming only the fifth player in league history to hit six hundred home runs,[1] and Barry Bonds eclipsing the most storied record in sports—Hank Aaron's 755 career home runs—one might have expected the same kind of ceremonial pomp that accompanied Mark McGwire's sixty-second home run in 1998[2] or Cal Ripken's 2131st consecutive game in 1995.[3] But with baseball still reeling from reports that some of its biggest stars, including Sosa and Bonds, were steroid users, the 2007 celebrations were awkward and perfunctory.

Rumors of steroid use in baseball have percolated for years, but the issue erupted after a March 2005 congressional hearing and the publication of a series of news stories filled with damaging disclosures,[4] admissions,[5] and accusations.[6] The most explosive report came from *San Francisco Chronicle* reporters Mark Fainaru-Wada

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1. Babe Ruth, Willie Mayes, Hank Aaron, and Barry Bonds are the others. Career Leaders & Records for Home Runs, *at* http://www.baseball-reference.com/leaders/HR_career.shtml.

2. On September 8, 1998, McGwire broke Roger Maris's record of sixty-one home runs in a season. McGwire finished the season with seventy home runs. Barry Bonds broke McGwire's record when he hit seventy-three home runs in 2001.

3. On September 6, 1995, Ripken broke Lou Gehrig's record of 2130 consecutive games played. Ripken's streak ended after 2,632 games in 1998.

4. During the March 17, 2005, hearing before the House Government Reform Committee, McGwire effectively admitted his past steroid use by refusing to directly answer questions on the subject. *Restoring Faith in America's Pastime: Evaluating Major League Baseball's Efforts To Eradicate Steroid Use: Hearing Before the H. Comm. on Gov't Reform*, 109th Cong. (2005). And less than five months after shaking his finger at the congressional panel and declaring, "I have never used steroids. Period," *id.* at 227, then-Baltimore Orioles player Raphael Palmeiro was reported to have failed a steroid test. *See* Associated Press, *Palmeiro Still Not Sure Why He Tested Positive*, USA TODAY, Dec. 28, 2005, *available at* http://www.usatoday.com/sports/baseball/2005-12-28-palmeiro-steroid_x.htm.

5. The most prominent admission came from New York Yankee Jason Giambi who conceded in December 2004 that he had used steroids. His brother Jeremy, a minor league player, admitted the same in March 2005, just days before the congressional hearing. Todd Zolecki, *Ex-Phil Jeremy Giambi Admits To Using Steroids*, PHILA. INQUIRER, Mar. 14, 2005, at C3. Previously, ex-players Ken Caminiti and Jose Canseco had made similar admissions. *See* Larry Stone, *Believe Canseco? We Might Have To*, SEATTLE TIMES, Feb. 13, 2005, at C1.

6. In April 2005, former Philadelphia Phillies player Lenny Dykstra was accused by his friend and business partner of having used steroids. Associated Press, *Between the Seams: Dykstra Accused of Using Steroids*, SEATTLE TIMES, Apr. 25, 2005, *available at* http://archives.seattletimes.nwsource.com/cgi-bin/texis.cgi/web/vortex/display?slug=seam25&date=20050425&query=dykstra+accused. Jose Canseco published a book replete with claims that various major league players, including Mark McGuire and Sammy Sosa, were steroid users. JOSE CANSECO, JUICED (2005).

and Lance Williams, who revealed that the Bay Area Laboratory Cooperative (BALCO) did not merely manufacture nutritional supplements, but also distributed exotic steroids. Williams and Fairanu-Wada also provided compelling evidence that Bonds, arguably the greatest player of his generation, was one of BALCO's steroid clients.[7]

Fainaru-Wada and Williams, who published their reports both in the *Chronicle* and later in the book *Game of Shadows*, exposed widespread criminal wrongdoing[8] and were lionized for their work. They were also subpoenaed.[9] United States Attorney Debra Wong Yang demanded that the reporters reveal the source of some of their key information—specifically, leaked testimony from witnesses in the grand jury investigation of BALCO.[10] When Fairanu-Wada and Williams refused, the court held them in civil contempt and ordered them to serve eighteen months in prison. Before their appeal could be heard, defense attorney Troy Ellerman admitted to being the source of the secret testimony, so the subpoenas were withdrawn.[11]

Had Ellerman not come forward, Fairanu-Wada and Williams would likely have gone to prison. The federal courts have taken a jaundiced view of reporter–source confidentiality over the past several years,[12] and rulings in some high-profile cases have

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7. The reporters say Bonds was jealous about the success of McGuire, who broke Roger Maris's single-season home-run record in 1999 while using androstenedione, which is now a banned substance. Bonds decided then to start taking "the shit" in order to elevate his game and reclaim the spotlight. MARK FAINARU-WADA & LANCE WILLIAMS, GAME OF SHADOWS xvi (2006).

8. It became illegal to use steroids without a prescription after passage of the Anabolic Steroid Control Act of 1990. Anabolic Steroid Control Act of 1990, Pub. L. No. 101-647, § 1902, 104 Stat. 4851 (1990). Distributors of steroids can be punished by up to five years in prison and a $250,000 fine. 21 U.S.C. § 841(b)(1)(D) (2006).

9. *In re* Grand Jury Proceedings, Mark Fainaru-Wada & Lance Williams, No. CR 06-90225 JSW, 2006 WL 2734275 (N.D. Cal. Sept. 25, 2006).

10. Federal officials began investigating BALCO in 2003, and it has been the focus of a grand jury proceeding ever since. So far, BALCO President Victor Conte and several associates, including Bonds's personal trainer, have been convicted, and others have been indicted. Among the many athletes who have been linked to BALCO are Olympic sprinters Tim Montgomery and Marion Jones, Olympic shot-putter C.J. Hunter, and Major League Baseball players Giambi and Bonds. *See* FAINARU-WADA & WILLIAMS, *supra* note 7.

11. On July 12, 2007, Ellerman was sentenced to two and a half years in prison for his role in the leak. *See* Bob Egelko, *The BALCO Case: Judge Sends Leaker to Slammer, Chides Bush*, S.F. CHRON., July 13, 2007, at B4.

12. *See, e.g.*, McKevitt v. Pallasch, 339 F.3d 530 (7th Cir. 2003) (refusing to recognize a reporter's privilege). *See also* Randall D. Eliason, *Leakers, Bloggers and Fourth Estate Inmates: The Misguided Pursuit of a Reporter's Privilege*, 24 CARDOZO ARTS & ENT. L.J. 385 (2006); Kara A. Larson, *The Demise of the First Amendment Reporter's Privilege: Why this Current*

underscored reporters' vulnerability to federal subpoenas. In 2006, the Ninth Circuit upheld a contempt citation against freelance videographer and blogger Joshua Wolf, who had been subpoenaed to testify and to turn over video footage he gathered of a San Francisco protest in which a police car was burned.[13] Wolf was imprisoned for 226 days—the longest sentence ever served by a journalist for refusing to comply with a subpoena—before he was released in April 2007.[14]

Two years earlier, the D.C. Circuit rejected *New York Times* reporter Judith Miller's attempts to quash a subpoena that sought the name of the source who leaked to her the identity of undercover CIA agent Valerie (Plame) Wilson.[15] In that case, which grew out of Special Prosecutor Patrick Fitzgerald's ongoing investigation into illegal leaks at the White House,[16] Miller was held in contempt and spent eighty-five days in prison before securing a waiver from her

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Trend Should Not Surprise the Media, 37 CONN. L. REV. 1235 (2005); Anthony L. Fargo, *Is Protection from Subpoenas Slipping? An Analysis of Three Recent Cases Involving Broadcast News Outtakes*, 47(3) J. OF BROADCASTING & ELECTRONIC MEDIA 455 (2003).

13. *In re* Grand Jury Subpoena, Joshua Wolf, 201 Fed. App'x 430 (9th Cir. 2006).

14. *Video Blogger is Now Longest-Jailed American Journalist*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, Feb. 6, 2007, *available at* http://www.rcfp.org/news/2007/0206-con-videob.html.

15. Miller's motion to quash was denied by U.S. District Court Judge Thomas F. Hogan in *In re Special Counsel Investigation*, 338 F. Supp. 2d 16 (D.D.C. 2004). Her appeal of the contempt citation was rejected by the D.C. Circuit in *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964 (D.C. Cir. 2005), *reh'g denied*, 405 F.3d 17 (D.C. Cir. 2005), *cert. denied*, 125 S. Ct. 2977 (2005). Citing *Branzburg v. Hayes*, 408 U.S. 655 (1972), the D.C. Circuit held that journalists do not have a First Amendment right to refuse to comply with grand jury subpoenas. *In re Miller*, 397 F.3d at 968. The Court neither accepted nor rejected Miller's second argument that she was entitled to journalist's privilege protection under the federal common law. The court was divided on the question of the existence of a common law privilege, but concluded that even if one does exist, the government had provided sufficient evidence to overcome it. *Id.* at 972–73.

16. This investigation is focused on whether government officials illegally leaked the identity of undercover CIA agent Valerie Wilson, also known by her maiden name, Valerie Plame, to reporters in the summer of 2003. The investigation was triggered by a column published July 14, 2003, by Robert Novak, which disclosed that Plame, the wife of former diplomat Joseph C. Wilson IV, was a CIA agent. Novak attributed this information to "two administration sources." As part of a grand jury inquiry into possible illegal leaks, Fitzgerald subpoenaed several reporters to determine whether they had been told Plame's identity by government officials and to determine the names of those officials. Novak was the only journalist to publish Plame's name and the fact that she was an undercover agent. Some have suggested that government officials deliberately leaked this information to reporters as an act of retribution against Wilson who had written a July 2003 opinion piece in the *New York Times* that debunked administration claims about Iraq's possession and pursuit of weapons of mass destruction.

source.[17] Shortly thereafter, Miller and a former colleague at the *New York Times*, Philip Shenon, became the targets of another attempt by the government to discover the identities of their confidential sources—this time over stories the reporters wrote about a planned government raid of two Islamic charities suspected of funding terrorists. Fitzgerald, also the prosecutor in the Islamic charities case, wanted to know who informed the reporters so he seized their phone records. Miller and Shenon challenged the seizure, but the Second Circuit rejected their claims,[18] and in November 2006, the Supreme Court refused to halt the government's review of the records.[19]

Miller, Shenon, Wolf, Fairanu-Wada, and Williams are the most recent combatants[20] in an ongoing, thirty-five-year struggle for judicial recognition of a "reporter's privilege"—the right of journalists to refuse to comply with certain subpoenas seeking their testimony or work products.[21] Although these reporters' legal battles have rekindled interest in the privilege and spurred congressional consideration of a federal shield law,[22] the high profile of these

17. U.S. District Court Judge Thomas F. Hogan held Miller in contempt in October 2004. On September 30, 2005, after receiving a waiver of confidentiality from her source, I. Lewis "Scooter" Libby, Chief of Staff to Vice President Richard Cheney, Miller testified that although she had had a confidential interview with Libby, and although the name "Valerie Flame" [sic] appears in her notes from that interview, she did not believe that Libby mentioned Plame's name to her, and that the reference in her notes to "Valerie Flame" was from an interview with a different source whose identity she could not recall. *See* Don Van Natta Jr. et al., *The Miller Case: A Notebook, a Cause, a Jail Cell and a Deal*, N.Y. TIMES, Oct. 16, 2005, *available at* http://www.nytimes.com/2005/10/16/national/16leak.htm. In March 2007, Libby was convicted of perjury and obstruction of justice for lying to the grand jury and FBI officials about his role in the case. On July 2, 2007, President George Bush commuted his sentence. *See* Amy Goldstein, *Bush Commutes Libby's Prison Sentence*, WASH. POST, July 3, 2007, at A1.

18. N.Y. Times Co. v. Gonzales, 459 F.3d 160 (2d Cir. 2006).

19. N.Y. Times Co. v. Gonzales, 127 S. Ct. 721 (2006) (Mem.).

20. Wolf and Miller are two of at least twenty-two reporters jailed since 1972 for refusing to comply with a subpoena seeking information related to newsgathering activity. *See Journalists Jailed*, 25 THE NEWS MEDIA AND THE LAW 28 (Fall 2001).

21. Work products can include notes, film negatives, videotape, outtakes, computer files, audio recordings, and other materials.

22. Two bills are currently pending in Congress that would establish a shield law giving journalists some protection against subpoenas in federal cases. The bills, H.R. 2102, sponsored by Reps. Mike Pence (R-Ind.) and Rich Boucher (D-Va.), and S. 1267, sponsored by Sens. Richard Lugar (R-Ind.) and Chris Dodd (D-Conn.), were both introduced in their respective chambers on May 2, 2007. The bills are identical and would provide broad protection for journalists to conceal the identities of their confidential sources and substantial protection for non-confidential work product as well. The bills also define "journalist" as anyone engaged in the "gathering, preparing, collecting, photographing, recording, writing, editing, reporting, or publishing of news or information that concerns local, national or international events or other matters of public interest for dissemination to the public." H.R. 2102, 110th Cong. § 4(5).

reporters has perhaps obscured the fact that they are just a few among dozens who have been subpoenaed,[23] fined,[24] imprisoned,[25] or otherwise disciplined by judges and prosecutors in the past few years. These reporter–court entanglements, many of which remain unresolved, have laid bare the divisions among courts on the issue of privilege. And they have exposed the doctrinal, historical, and theoretical infirmities of the broader legal framework that governs newsgathering, which not only protects source relationships, but also protects against civil and criminal liability for torts and crimes committed by journalists in the pursuit of news, protects against newsroom searches, and protects access to places and records, among other things. These problems have persisted for decades, and resolving them has grown all the more urgent with the

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Presumably, then, this protection would extend to bloggers and other non-traditional journalists.

23. In the White House leak case, several other reporters were subpoenaed, including *Time*'s Matthew Cooper, *NBC*'s Tim Russert and Andrea Mitchell, and the *Washington Post*'s Bob Woodward, Walter Pincus, and Glenn Kessler. In December 2004, thirteen news organizations were subpoenaed to provide information,including the identities of confidential sources, in a civil Privacy Act suit brought by former FBI official James Hatfill who claimed he was wrongly identified as a suspect in the 2001 anthrax attacks in the United States. In July 2007, Hatfill sought the reporters' confidential source information, and on August 14, 2007, U.S. District Court Judge Reggie B. Walton ordered five reporters—Mickael Isikoff and Daniel Klaidman of *Newsweek*, Allen Lengel of the *Washington Post*, Toni Locy of *USA Today*, and James Swart of *CBS News*—to testify in the case. For more on these and other news media subpoena cases, see Reporters and Federal Subpoenas, http://www.rcfp.org/shields_and_subpoenas.html.

24. In November 2005, for example, U.S. District Judge Rosemary M. Collyer held *Washington Post* reporter Walter Pincus in contempt and ordered him to pay $500 per day for refusing to disclose the names of his confidential sources in a civil case brought by former Los Alamos Nuclear Laboratory physicist Wen Ho Lee against the Department of Justice and the Department of Energy. Lee accused those agencies of violating the Privacy Act by releasing private information about him without his consent. In August 2004, in this same proceeding, five other reporters were held in contempt for refusing to reveal their sources. All but one of the contempt citations were upheld on appeal by the D.C. Circuit. *Lee v. U.S. Dep't of Justice*, 413 F.3d 53 (D.C. Cir. 2005). This case was settled in June 2006, with contributions to the settlement by the subpoenaed media parties.

25. In addition to Joshua Wolf and Judith Miller, *Time* magazine reporter Matthew Cooper was also held in contempt in the White House leak investigation and was on the verge of going to jail before securing a last-minute waiver of confidentiality from his source. Television reporter Jim Taricani was sentenced to jail for contempt after refusing to identify his confidential source to prosecutors investigating government corruption in Providence, R.I. (Because Taricani has a heart condition, his sentence was later changed from jail time to home confinement). And in 2001–2002, freelance author Vanessa Leggett was held in contempt for refusing to turn over tapes of interviews she had conducted with witnesses whom prosecutors believed had information relevant to a murder investigation. She served 168 days in jail—then the longest sentence ever served by a reporter in a privilege case. Press Release, Reporters Committee for Freedom of the Press, Vanessa Leggett Released From Jail After 168 Days (Jan. 4, 2002), *available at* http://www.rcfp.org/news/releases/view.cgi?2002_01_04_vlreleas.txt.

democratization of media and the emergence of a new cohort of bloggers and other independent news providers who have challenged traditional definitions of "journalists" and "the press."

Although today's media environment and broader social conditions have changed since the early 1970s when debate over newsgathering rights began in earnest, the fundamental questions have not: is there a First Amendment right to gather news, who is entitled to claim its protections, and over what behavior does it extend? It is axiomatic that all citizens enjoy a right to express themselves. The right to seek out information, however, is indistinct. Over the past three decades, journalists have sought to broaden the definition of press freedom to protect newsgathering, arguing that if they are to serve the highest purposes of their profession, freedom of the press must encompass more than the right to publish what they know; it must also protect their pursuit of the *un*known. Journalists have therefore fought, with varied success, for judicial acknowledgement of a right to attend judicial proceedings,[26] to access government records,[27] to monitor activities in federal prisons,[28] to break promises with their confidential sources without being sued for damages,[29] to be protected against tort claims targeting their newsgathering activity,[30] and to be exempt from prosecution for certain crimes committed in their pursuit of news.[31] They have also challenged restrictions that intrude too deeply on journalistic autonomy and which they say have the potential to inhibit both journalistic expression and investigative zeal. These include government subpoenas of their confidential materials,[32] government

26. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (holding that the public, including the press, has a First Amendment right to attend criminal trials).

27. U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press, 489 U.S. 749 (1989) (holding that the government did not violate the Freedom of Information Act by refusing to disclose the contents of FBI rap sheets).

28. Saxbe v. Wash. Post Co., 417 U.S. 843 (1974) (holding that a federal regulation prohibiting press interviews with prison inmates did not violate the First Amendment).

29. Cohen v. Cowles Media Co., 501 U.S. 663 (1991) (holding that journalists have no First Amendment protection against the application of generally applicable laws).

30. 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 from their newsgathering behavior).

31. United States v. Matthews, 209 F.3d 338 (4th Cir. 2000), *cert. denied*, 531 U.S. 910 (2000) (holding that the First Amendment does not protect journalists when they engage in illegal conduct).

32. Branzburg v. Hayes, 408 U.S. 665 (1972) (holding that a journalist does not have a First Amendment right to refuse to comply with a grand jury subpoena seeking testimony about crimes he or she witnessed).

searches of their newsrooms,[33] and attempts to compel disclosure of the details of their editorial decision-making processes.[34] Journalists argue that protecting against all of these encumbrances on newsgathering is essential, not merely as a matter of public policy, but as a matter of constitutional law.

Some courts have been sympathetic to these challenges, but many have rejected them, showing little patience for what judges often construe as media demands for "special rights."[35] The mixed success of media litigants and the lack of conclusive rulings from the U.S. Supreme Court have yielded a body of law that is conflicted in both its outcomes and its rationales. The newsgathering rights of the press vary across jurisdictions and few doctrinal or theoretical threads hold the courts' decisions together. Case law regarding the right to gather news is almost entirely built around either ad hoc arguments or mechanical applications of precedent. Rarely do judges connect their rulings to broader theories of free expression, and even more rarely do judges attempt to tie these determinations to a particular approach to constitutional interpretation. To settle contemporary controversies over the right to gather news, this Article moves past the courts' desultory analyses, focuses on the core principles that underlie the broader law of newsgathering, and situates those assessments in the context of a specific approach to constitutional interpretation.

This Article pays special attention to three long-debated but inadequately answered questions: (1) Should the Press Clause[36] of the First Amendment be interpreted as having a separate meaning apart from the Speech Clause?[37] More specifically, should the Press Clause

33. Zurcher v. Stanford Daily, 436 U.S. 547 (1978) (holding that journalists do not have a First Amendment right to refuse to comply with an otherwise valid search warrant).

34. Herbert v. Lando, 441 U.S. 153 (1979) (holding that journalists do not have a First Amendment right to refuse to testify about their state of mind at the time they published allegedly defamatory material).

35. *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); United States v. Antar, 839 F. Supp. 293, 296–97 (D.N.J. 1993) ("It is naïve to blindly acknowledge or adopt the unfettered First Amendment freedoms espoused by the press . . . ."). Many courts also cite the Supreme Court's opinion in *Branzburg*, 408 U.S. at 738, which rejects the idea of "special safeguards" for the press and also its opinion in *Associated Press v. NLRB*, 301 U.S. 103, 132–33 (1937), saying that a newspaper "has no *special privilege* to invade the rights and liberties of others." *Id.* (emphasis added).

36. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of . . . the press . . . .").

37. *Id.* ("Congress shall make no law . . . abridging the freedom of speech . . . .").

be read as bestowing a set of special rights on the press not possessed by the public generally? (2) To the extent that any unique protections are provided to the press, how should "the press" and "journalist" be defined? (3) Does the First Amendment provide the press, the public, or both a set of affirmative rights—rights of access to information or places, for example—that protect non-expressive actions aimed at uncovering rather than disseminating information?

These are questions most courts have avoided even though they have been the subjects of scholarly examination.[38] And they are at the center of the longstanding constitutional quarrels over particular newsgathering practices, the most important of which involve *autonomy* (including not only the reporter's privilege but also protections against government inquiries into journalists' editorial decision-making and protections against newsroom searches), *access* (including access to records, courts and government property), and *liability* (including protection from both civil tort claims and criminal charges stemming from journalists' newsgathering activity).

This Article addresses these issues by proposing a "sequential" interpretation of the First Amendment—an approach that assesses, in turn, the text of the Amendment, its history, its place in the broader constitutional structure, and its contemporary meaning in light of substantial social change. This approach draws upon conventional interpretive theories, each of which represents an essential line of inquiry, but none of which is sufficient by itself. This Article shows that constitutional support for recognizing most aspects of the right to gather news, including the reporter's privilege, is abundant and that the Supreme Court's treatment of these issues is fundamentally flawed. Furthermore, even those who apply more conservative interpretive approaches should find substantial evidence pointing to a more expansive view than the one the Supreme Court and many

38. *See, e.g.*, David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429 (2002); Matthew Bunker et al., *Triggering the First Amendment: Newsgathering Torts and Press Freedom*, 4 COMM. L. & POL'Y 273 (1999); Timothy B. Dyk, *Newsgathering, Press Access and the First Amendment*, 44 STAN. L. REV. 927 (1992); David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455 (1983); Anthony Lewis, *A Preferred Position for Journalism?* 7 HOFSTRA L. REV. 595 (1979); Floyd Abrams, *The Press is Different: Reflections on Justice Stewart and the Autonomous Press*, 7 HOFSTRA L. REV. 565 (1979); William W. Van Alstyne, *The Hazards to the Press of Claiming a 'Preferred Position,'* 28 HASTINGS L.J. 761 (1977); Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631 (1975); Melville B. Nimmer, *Introduction—Is Freedom of the Press a Redundancy: What Does it Add to Freedom of Speech?* 26 HASTINGS L.J. 639 (1975); Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967).

lower courts have endorsed. However, recognizing some of these newsgathering protections depends on a more egalitarian definition of "journalist"—one that emphasizes the function served by newsgatherers, and not their social or professional status or credentials.[39] And although there is a historical and constitutional foundation for many newsgathering protections, some access claims and liability defenses—particularly those that are dependent on an affirmative-rights[40] construction of the First Amendment—are not constitutionally cognizable, despite their appeal as matters of public policy.

Part I of this Article identifies the central questions that must be answered to forge a consistent and sustainable First Amendment jurisprudence and outlines the ways in which the current law of newsgathering remains conflicted. Part II proposes a sequential approach to constitutional interpretation and explains how that theory fits within, and draws upon, the menu of traditional approaches. Part III applies the sequential approach to the First Amendment. Part IV provides an analysis of that application and what it suggests about the constitutionality of particular newsgathering restrictions. Part V concludes the Article by providing a set of recommendations for reshaping the law of newsgathering.

I. THE CENTRAL QUESTIONS

To the extent that the law of newsgathering lacks clarity, much blame lies with the Supreme Court, which has supplied a series of indefinite rulings, beginning with its 1972 decision in *Branzburg v. Hayes*.[41] In *Branzburg*, the Court held that a reporter who witnesses illegal activity does not have a First Amendment right to refuse to comply with a grand jury subpoena, even if complying would expose

39. *See* Erik Ugland & Jennifer Henderson, *Who is a Journalist, What is the Press and Why Does it Matter? Disentangling the Legal and Ethical Arguments*, 22 J. OF MASS MEDIA ETHICS 1 (2007) (distinguishing this egalitarian model from an "expert model, 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").

40. Affirmative or positive rights are those that give the press, the public, or both a right of access to information or property within the government's legitimate control. They provide freedom *for the press*, as opposed to most negative rights that provide freedom *from the government*. In this sense, an affirmative right is a sword used to secure some action from the government and a negative right is a shield used to repel government encroachments. *See infra* Part I.C.

41. 408 U.S. 665 (1972).

the identity of a confidential source.[42] Writing for the majority, Justice Byron White rejected the idea that reporters should be afforded special protections not possessed by the public generally.[43] Nevertheless, his opinion contained an important concession: "News gathering is not without its First Amendment protections."[44] In fact, White wrote that "without some protection for seeking out the news, freedom of the press could be eviscerated."[45] White did not define this right, but acknowledging some level of protection for newsgathering seemed to foreclose any suggestion that the rights of the press extend only to what journalists publish.

Although White's opinion was clear about the disposition of the cases before the Court, it did not address many of the underlying doctrinal and theoretical questions. Its precedential weight was also limited by the fact the full opinion had the support of only four justices. Justice Lewis Powell issued the decisive vote and held against the journalists in *Branzburg*, but recommended a case-by-case assessment of the necessity of subpoenas.[46] This effectively made *Branzburg* a 4.5-to-4.5 decision, which gave lower courts latitude to supply their own interpretations.[47] Some federal circuit courts have interpreted *Branzburg* as rejecting a First Amendment reporter's privilege,[48] others have recognized a qualified privilege under either the First Amendment or federal common law,[49] and some have even

42. The defendant, Paul Branzburg, was a reporter for the *Louisville Courier-Journal* who, after promising confidentiality to a source, witnessed the source turning marijuana into hashish. The Court consolidated Branzburg's case with two companion cases, *In re Pappas* and *United States v. Caldwell*, both of which involved journalists who had been given access to the Black Panthers organization on condition that they not publicly identify its members. Like Branzburg, journalists Earl Caldwell and Paul Pappas refused to testify after being subpoenaed by grand juries. *Branzburg*, 408 U.S. 665. The Court refused to shield any of these reporters from having to respond to the grand jury subpoenas.

43. *Id.* at 683.

44. *Id.* at 707.

45. *Id.* at 681.

46. *Id.* at 710 (arguing that each case "should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct") (Powell, J., concurring).

47. Note, however, that the rule that the press enjoys at least some protection to gather news was not limited by Powell's concurrence. Indeed, all nine justices agreed that some government restrictions of newsgathering would be unconstitutional, although it did not provide examples.

48. *E.g.*, *In re* Grand Jury Proceedings, 810 F.2d 580 (6th Cir. 1987) (affirming *Branzburg* and criticizing other federal circuit courts that recognized a reporter's privilege outside the grand jury context); McKevitt v. Pallasch, 339 F.3d 530 (7th Cir. 2003).

49. *E.g.*, *In re* Madden, 151 F.3d 125 (3d Cir. 1998); United States v. Smith, 135 F.3d 963 (5th Cir. 1998); *In re* Shain, 978 F.2d 850 (4th Cir. 1992); United States v. LaRouche Campaign,

concluded that *Branzburg* itself recognized a privilege.[50] In addition, thirty-three states and the District of Columbia have enacted shield laws establishing varying degrees of protection,[51] Congress is considering a federal shield law,[52] and many state courts have interpreted their state constitutions[53] or state common law[54] as providing some protection for reporters.

As such, the law of reporter's privilege is riddled with discontinuities. Each jurisdiction provides a different level of protection, each relies upon different rationales, and each employs different definitions so that the ability of reporters to quash subpoenas depends entirely on where they work. The law governing other newsgathering practices is similarly uneven, so there is certainly a need for the Supreme Court to reenter the field and provide some doctrinal and theoretical ballast. The Court will almost certainly get that chance in the next year or two as reporters like Fainaru-Wada,

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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).

50. Shoen v. Shoen, 5 F.3d 1289 (9th Cir. 1993).

51. *See Federal Shield Laws Introduced in Both Houses*, Reporters Committee for Freedom of the Press (May 2, 2007), *available at* http://www.rcfp.org/news/2007/0502-con-federa.html. The shield-law states are the following: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, and Washington. Most shield laws provide qualified protection, using a version of the three-part balancing test proposed by Justice Stewart in his dissenting opinion in *Branzburg*. 408 U.S. at 743 (Stewart, J., dissenting). Under that test, parties can only compel a response to a subpoena when they can:

> (1) show that there is 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 less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information.

Id. The Minnesota Free Flow of Information Act provides a representative example of the ways in which states have codified Stewart's dissent. It compels the disclosure of covered materials only if the party seeking disclosure proves:

> (1) that there is probable cause to believe that the specific information sought (i) is clearly relevant to a gross misdemeanor or felony, or (ii) is clearly relevant to a misdemeanor so long as the information would not tend to identify the source of the information or the means through which it was obtained, (2) that the information cannot be obtained by any alternative means or remedy less destructive of first amendment rights, and (3) that there is a compelling and overriding interest requiring the disclosure of the information where the disclosure is necessary to prevent injustice.

Minn Stat. § 595.024, subd. 2 (1998).

52. *See supra* note 22.

53. *See, e.g.*, New Hampshire v. Siel, 444 A.2d 499 (N.H. 1982); O'Neill v. Oakgrove Constr., Inc., 523 N.E.2d 277 (N.Y. 1988); Zelenka v. State, 266 N.W.2d 279 (Wis. 1987).

54. *See, e.g.*, Senear v. Daily Journal-American, 641 P.2d 1180 (Wash. 1982).

Williams, and the dozens of others currently under subpoena appeal their contempt citations. If and when the Court does intervene, it will have to more squarely address the three core questions that have been at the heart of this debate since the beginning: (1) Does the Press Clause have a meaning separate from the Speech Clause that endows journalists with a unique set of constitutional protections? (2) Does the First Amendment protect both affirmative (positive) rights and negative rights?[55] (3) Who is a journalist?

A. "Special Rights": Speech v. Press

While *Branzburg* may not have emboldened American journalists and their advocates, it did not discourage them either. In the subsequent decade, news organizations brought suits seeking access to judicial proceedings,[56] prisons,[57] and government records.[58] They sought to establish the autonomy of news organizations and their editorial processes by challenging the execution of search warrants on newsrooms[59] and protesting laws forcing news organizations to publish material they do not want to publish.[60] And in the face of *Branzburg*, news organizations continued to urge recognition of a reporter's privilege.[61]

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55. Affirmative rights are distinct from negative rights in that they protect actions and behavior that are non-expressive. Rights of access to records or places, for example, are affirmative rights, whereas negative rights protect people from government intrusions on their liberty or autonomy. As applied to journalists, negative rights guard the news media from government restrictions of their expression—what they actually publish or broadcast. Negative rights also prevent government actions that interfere with the media's editorial independence. To put it simply, negative rights are more shield than sword because they prevent the government from restricting journalists' expressive functions; affirmative rights are more sword than shield because they give journalists the power to make demands on government (access to the courts, for example).

56. *E.g.*, Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (seeking recognition a First Amendment right of access to criminal trials).

57. *E.g.*, Saxbe v. Wash. Post Co., 417 U.S. 843, 844 (1973) (seeking recognition of a First Amendment right of access to federal prisons).

58. *E.g.*, Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 591 (1978) (seeking access to judicial records).

59. *E.g.*, Zurcher v. Stanford Daily, 436 U.S. 547, 563 (1978) (seeking recognition of at least a qualified privilege under the First Amendment against enforcement of newsroom searches).

60. *E.g.*, Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241, 243 (1976) (arguing that a statute giving political candidates a right to reply in any newspaper to criticism of them was unconstitutional).

61. It is not uncommon for these arguments to prevail. Most state courts now recognize some constitutional or common law protections for journalists, and most federal courts also recognize at least a qualified reporter's privilege. *See generally Reporter's Privilege: Compendium*, Reporters Committee for Freedom of the Press, *available at*

Media lawyers found support for their claims from Supreme Court Justice Potter Stewart, whose 1974 speech at Yale Law School, later published as a law review article,[62] provoked considerable scholarly reflection on the meaning of the Press Clause[63] and whether it provides a set of rights separate from those guaranteed by the Speech Clause.[64] In particular, media lawyers clung to Stewart's suggestion that the Press Clause uniquely protects the institution of the press—by which he meant the "daily newspapers and other established news media"[65]—that are not provided to all other citizens under the Speech Clause. The Speech Clause merely protects citizens' right of free expression. The Press Clause, however, has a separate purpose. The Clause provides the press with the freedom not only to publish but also to seek out the news and to serve as a "fourth institution outside the Government [acting] as an additional check on the three official branches."[66] By using the words "or of the press" the Framers meant something, Stewart argued, otherwise the Press Clause would be "a constitutional redundancy."[67] Critics of Stewart challenged this idea, because it would authorize a tiered system of rights, would require judges to define who is a journalist, and could potentially lead to public demands that the press abide by certain ethical standards.[68] As Justice White noted in *Branzburg*, this is a "questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods."[69]

The Supreme Court has largely, but not entirely, rejected the idea of special rights for the press. Although Justice White's opinion in *Branzburg* argued against any special accommodations, the Court's subsequent decisions in a series of libel cases implied that a different

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http://www.rcfp.org/privilege/index.php (listing various legal protections for journalists in jurisdictions across the country).

62. Stewart, *supra* note 38, at 631.

63. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of . . . the press.")

64. *Id.*

65. Stewart, *supra* note 38, at 631.

66. *Id.* at 634.

67. *Id*. at 633.

68. *See* Robert D. Sack, *Reflections on the Wrong Question: Special Constitutional Privilege for the Institutional Press*, 7 HOFSTRA L. REV. 629 (1979); Van Alstyne, *supra* note 38.

69. 408 U.S. 665, 704 (1972).

set of constitutional standards might be required for the press. In *Philadelphia Newspapers v. Hepps*, the Court held that "the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a *media defendant* for speech of public concern."[70] The Court used similar language in other media-related cases as well.[71] By singling out media defendants, the Court seemed to suggest that they are empowered with additional protections. This contradicts the egalitarian spirit of *Branzburg*, as well as most of the Court's subsequent rulings, including *Cohen v. Cowles Media Co.*[72] In *Cohen*, the Court held that when journalists break their promises of confidentiality to sources, they can be sued for damages under the doctrine of *promissory estoppel*[73] without upsetting the First Amendment:[74]

> "[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 of others." Accordingly, enforcement of such laws against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations.[75]

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70. 475 U.S. 767, 777 (1986) (emphasis added).

71. *See* Milcovich v. Loraine Journal Co., 497 U.S. 1, 19–20 (1990) ("[A] statement on matters of public concern must be provable as false . . . at least in situations, like the present, where a *media defendant* is involved." (emphasis added)); Cox Broad. Corp. v. Cohn, 420 U.S. 469, 499 (1975) (Powell, J., concurring) (stating that the law prohibits states "from imposing strict liability for *media publication* of allegedly false statements" (emphasis added)); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (making repeated references to the interests of "media" defendants in libel cases); Rosenbloom v. Metromedia, 403 U.S. 29, 44 n.12 (1971) ("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*." (emphasis added)).

72. 501 U.S. 663, 665 (1991).

73. *Promissory estoppel* is "the principle that a promise made without consideration may nonetheless be enforced to prevent injustice if the promisor should have reasonably expected the promisee to rely on the promise and if the promisee did actually rely on the promise to his or her detriment." BLACK'S LAW DICTIONARY 571 (7th ed. 1999).

74. In this case, an aide to a Republican gubernatorial candidate approached reporters for both the *Minneapolis Star Tribune* and the *St. Paul Pioneer Press* to offer "damaging" information about the opposing candidate, provided they not identify him as the source of the information. *Cohen*, 501 U.S. at 665–66. The reporters agreed, but their editors overrode their promises of confidentiality, believing that the information was so inconsequential that the public deserved to know both the information *and* who provided it. *Id.* (The opposing candidate had once been charged with stealing $6 worth of sewing supplies, and the conviction was later vacated.).

75. *Id.* at 670 (quoting Associated Press v. NLRB, 301 U.S. 103, 132–33 (1937)) (alterations in the original) (emphasis added).

This view certainly has some appeal. Special status is inconsistent with the constitutional premise of equality under law.[76] Less clear is whether the general applicability of a law is all that need be considered. Justice David Souter, joined by Justices Harry Blackman, Thurgood Marshall, and Sandra Day O'Connor, argued in dissent in *Cohen*:

> Thus "there is nothing talismanic about neutral laws of general applicability," for such laws may restrict First Amendment rights just as effectively as those directed specifically at speech itself. Because I do not believe the fact of general applicability to be dispositive, I find it necessary to articulate, measure, and compare the competing interests involved.[77]

The Court's unwillingness to weigh these contextual factors and its disregard of the broader principle of autonomy are apparent in several other cases as well. In *Zurcher v. Stanford Daily*, the Court held that the First Amendment does not shield a news organization from having its offices searched pursuant to a valid warrant because the Fourth Amendment provides adequate protection against any unreasonable interference.[78] The staff of the *Stanford Daily* would surely disagree, as would the lawyers for the *New York Times* who, nearly twenty years after *Zurcher*, were unable to prevent the federal government from seizing reporters' phone records in the Islamic charities case.[79] That case provides just one recent example of the inadequacy of the Fourth Amendment as a shield against government usurpations of media independence.[80]

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76. *See, e.g.*, U.S. CONST. amend. XIV, § 1 ("No state shall deprive any person of . . . the equal protection of the laws."); THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal."). This principle is given force through the Equal Protection Clause of the Fourteenth Amendment and has also been upheld in the First Amendment context. *See* Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 234 (1987) (invalidating a state tax that targeted only certain types of publications); Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 592–93 (1983) (striking down a use tax on ink and paper because it singled out the print press for disparate treatment).

77. *Cohen*, 501 U.S. at 677 (O'Connor, J., concurring) (quoting Employment Div., Dept. of Human Res. of Ore. v. Smith, 494 U.S. 872, 901 (1990)) (internal citation omitted).

78. 436 U.S. 547, 566 (1978). The Court did suggest, however, that search warrants targeting the press be reviewed with "'scrupulous exactitude.'" *Id.* at 564 (quoting Stanford v. Texas, 379 U.S. 476, 485 (1965)).

79. N.Y. Times Co. v. Gonzales, 459 F.3d 160 (2d Cir. 2006).

80. Largely in response to *Zurcher*, Congress passed the Privacy Protection Act, which shields news organizations against searches or seizures of most work products or documentary materials. This law does not prohibit searches or subpoenas of third parties, however. 42 U.S.C. § 2000aa (1980).

The Court applied a similar framework in *Herbert v. Lando* when it held that news organizations have no First Amendment privilege to refuse to respond to inquiries by plaintiffs in libel cases about the organization's editorial decision-making processes.[81] Anyone suing for defamation must prove that the allegedly defamatory statements were published with fault, which is difficult to do without knowing what information the journalists knew or had access to prior to publication.[82] But the Court again took this neutrality principle to the extreme, seeing no threats to editorial autonomy by litigants being able to probe the details of news organizations' private editorial meetings, discussions, and processes.[83] Instead of recognizing the risk of abuse and at a minimum establishing a qualified protection,[84] the Court treated the media's autonomy arguments as little more than brazen demands for special status.[85]

The Court's application of a rigid, no-special-rights template and its unwillingness to recognize the media's claims as attempts to vindicate *public* rights rather than plots to secure *private* protections[86] are two of the central flaws of the Court's newsgathering jurisprudence. These flaws are all the more conspicuous now that changes in the media marketplace have eroded the press–public distinction.[87] That should have been recognized in *Cohen* in 1991; instead, the Court again refused to make any allowance for context and treated the media's claims as largely self-serving.[88]

In *Cohen*, the Court echoed earlier precedents in holding that journalists have no constitutional protection against the application of "generally applicable laws" regardless of how substantially they might impair newsgathering or dissemination.[89] This is facially

81. 441 U.S. 153, 176 (1979).

82. *Id.* at 156–57.

83. *Id.* at 171–74.

84. Justice Brennan suggested as much in his dissenting opinion, arguing that plaintiffs should be forced to demonstrate that a publication is both false and defamatory before inquiring into a communicator's editorial processes. *Id*. at 197–198.

85. *Id.* at 165–69.

86. *See infra* Part I.B.

87. The proliferation of weblogs and other inexpensive online communications media has enabled those without traditional credentials and training to compete with mainstream news outlets. This has triggered considerable debate over the question of who is a journalist. *See generally* Ugland & Henderson, *supra* note 39.

88. *Cohen*, 501 U.S. at 669–70.

89. *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

unremarkable. But the *Cohen* decision, building off of *Branzburg*, *Zurcher*, and *Herbert*, provided the foundation for dozens of lawsuits over the past fifteen years in which plaintiffs have sued news organizations, not over what was published or broadcast, but over the methods used in gathering the information.[90] By targeting the media's newsgathering *behavior*, plaintiffs have—with mixed success—avoided the formidable constitutional shield that protects media *expression*.[91]

The best exemplar is *Food Lion, Inc. v. Capital Cities/ABC, Inc.*,[92] which involved a civil suit by the Food Lion grocery chain against ABC over its "Prime Time Live" undercover investigation of unsanitary conditions at Food Lion stores.[93] After lying on their job applications and getting hired as Food Lion employees, ABC reporters used hidden cameras and microphones to document unhealthy and illegal food handling practices.[94] Food Lion brought suit for fraud, trespass, unfair trade practices, and breach of the duty of loyalty, but did not sue for defamation.[95] Food Lion knew it would be easier to sue on those grounds and still persuade a sympathetic

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rights and liberties of others.'" (quoting Associated Press v. NLRB, 301 U.S. 103, 132–133 (1937) (alteration in original))).

90. Buoyed by the "generally applicable laws" rationale from *Cohen*, many plaintiffs have since sued journalists under various theories, see, e.g., W.D.I.A. Corp. v. McGraw-Hill, Inc., 34 F. Supp. 2d 612, 614 (S.D. Ohio 1998) (fraud); Special Force Ministries v. WCCO Television, 584 N.W.2d 789, 791 (Minn. Ct. App. 1998) (trespass); Ruzika v. Conde Nast Publ'n, Inc., 999 F.2d 1319, 1320 (8th Cir. 1993) (promissory estoppel); Veilleux v. Nat'l Broad. Co., 206 F.3d 92, 101 (1st Cir. 2000) (misrepresentation); Shulman v. Group W Prod., Inc., 955 P.2d 469, 475 (Cal. 1998) (intrusion); Med. Lab. Mgmt. Consultants v. ABC, Inc., 30 F. Supp. 2d 1182, 1186 (D. Ariz. 1998)) (tortious interference with contract); Berger v. Cable News Network, No. CV 94-46-BLG-JDS, 1996 WL 390528, at *2 (D. Mont. Feb. 26, 1996) (conversion); and several other civil causes of action. These suits have targeted a variety of journalistic activities—police "ride-alongs," the use of hidden cameras and microphones, the use of deception to uncover news, and the use of stolen documents or information in news reports.

91. *See, e.g.*, Sanders v. ABC, Inc., 978 P.2d 67 (Cal. 1999) (where plaintiff sued for intrusion instead of libel after ABC aired a hidden-camera investigation of plaintiff's telephone psychic hotline business, ultimately eliciting a $900,000 settlement from the defendant). *But see* Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505 (4th Cir. 1999) (holding ABC liable for trespass and breach of the duty of loyalty in their undercover investigation of Food Lion grocery stores, but refusing to award any damages related to the broadcast itself).

92. *Food Lion*, 194 F.3d 505.

93. *Id.* at 510.

94. *Id.* at 510–11.

95. *Id.* at 510.

jury to award punitive damages.[96] The strategy worked and Food Lion won at the trial court level.[97]

On appeal, the Fourth Circuit noted that, although journalists are not immune from liability for the torts they commit in their pursuit of news,[98] the First Amendment prevents awarding damages based on what they publish or broadcast.[99] This was a victory for the press because plaintiffs like Food Lion are less likely to sue if they are constitutionally prohibited from recovering publication-related damages. But the court left the door open to these kinds of suits by not offering any First Amendment protection for newsgathering activity,[100] as opposed to the subsequent publication, and by not foreclosing the ability of plaintiffs to obtain punitive damages for *de minimus* tort violations.[101] The crux of *Food Lion* is that the First Amendment protects journalists in their expressive function, but it does not protect them against civil liability in their newsgathering or investigative function.

In 2000, the Fourth Circuit reinforced this view in the criminal case of *United States. v. Matthews*.[102] The court held that radio producer Larry Matthews did not have constitutional immunity to download child pornography from the Internet, despite his claim that he was doing research for a freelance news story.[103] Several news organizations supported Matthews' appeals, arguing, like the four

96. *See id.* at 522.

97. Food Lion, Inc. v. Capital Cities/ABC, Inc., 984 F. Supp. 923 (M.D.N.C. 1997). The jury awarded Food Lion $1,402 in compensatory damages and over $5 million in punitive damages, *id.* at 927, later reduced by the court to $315,000, *id.* at 939. The Fourth Circuit reversed in part, holding that by allowing Food Lion to sue for non-reputational torts while still allowing the broadcast to be considered in the calculation of damages, Food Lion was doing an end run around the First Amendment. *Food Lion*, 194 F.3d at 524.

98. *Food Lion*, 194 F.3d at 520 (citing Cohen v. Cowles Media Co., 501 U.S. 663 (1991)).

99. *Id.* at 522–24.

100. The court did cite the Supreme Court's statement in *Branzburg v. Hayes*, 408 U.S. 665 (1972), that newsgathering activity does enjoy some protection, but like the *Branzburg* Court, the Fourth Circuit did not elaborate on what activities that right protects or how far it extends. *Food Lion*, 194 F.3d at 520 (citing *Branzburg*, 408 U.S. at 681).

101. Although the court rejected the availability of publication damages, it would be difficult, as a practical matter, for jurors not to consider at least subconsciously what was published or broadcast when calculating punitive damages. Indeed, one of the *Food Lion* jurors said after the trial that she wanted to award the grocery company $1 billion in damages. *See* Linda Lightfoot, *Editors Hear the Roar of the* Food Lion *Case*, AM. SOC'Y OF NEWSPAPER EDITORS, Jan. 1, 1997, *available at* http://www.asne.org/kiosk/editor/97.jan-feb/lightfoot1.htm. So, one could argue that the court's limitation on publication damages is only a modest, and perhaps illusory, safeguard against tort suits aimed at journalists' newsgathering.

102. 209 F.3d 338, 339 (4th Cir. 2000), *cert. denied*, 531 U.S. 910 (2000).

103. *Id.*

dissenters in *Cohen*,[104] that it is insufficient to simply say journalists are not above the law and end the analysis there.[105] Courts must go further in considering context to ensure that the enforcement of otherwise valid criminal laws does not unduly restrain First Amendment interests. Nevertheless, courts have consistently rejected a First Amendment defense in cases involving journalists' alleged criminal behavior.[106]

The lower court decisions in civil cases are far from uniform. In intrusion cases,[107] some courts, cognizant of the special-rights dilemma posed by the Court in *Branzburg*, have built their opinions entirely around the no-immunity principle.[108] Other courts have better appreciated the First Amendment implications of these suits and the need to preserve those interests by narrowing the public's legally enforceable zone of privacy.[109] Similarly, in trespass cases,[110] some

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104. *See supra* text accompanying note 77.

105. Brief for Reporters Committee for Freedom of the Press et al. as Amici Curiae Supporting Appellant Seeking Reversal at 1, 10, United States v. Matthews, 209 F.3d 338 (4th Cir. 2000) (No. 99-4183). The Reporters Committee was joined by the Society of Professional Journalists, National Public Radio and the Radio-Television News Directors Association. *Id.* at iv. They argued that:

> when an individual engaged in constitutionally protected activity, such as newsgathering, violates a law that directly affects that protected activity, and the violation does not cause the harm the law seeks to proscribe, that individual should be allowed to argue at trial as an affirmative defense that the First Amendment protects his actions.

Id. at 5.

106. Reporters have been charged, and their First Amendment defenses have been rejected, in cases involving criminal trespass, Stahl v. Oklahoma, 665 P.2d 839, 840 (Okla. Crim. App. 1983), criminal harassment, Galella v. Onassis, 487 F.2d 986, 991–92 (2d Cir. 1973), and disorderly conduct, City of Oak Creek v. King, 436 N.W.2d 285, 286 (Wis. 1989), among many others. The Supreme Court reiterated this principle in Bartnicki v. Vopper, 532 U.S. 514, 533 (2001), but added that while a person can be punished for illegally obtaining information, the subsequent publication of that information by a third party is protected by the First Amendment, provided it is of public interest and the disseminating party played no role in the illegal acquisition. *Id.* at 525, 533–34.

107. Intrusion is one of the four common-law privacy torts identified first by Prosser and recognized to varying degrees by state courts. WILLIAM PROSSER, PROSSER'S HANDBOOK OF THE LAW OF TORTS § 117 (1971). The others are public disclosure of private facts, appropriation and false light. *Id.* According to the Restatement (Second) of Torts, a person who "intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for [intrusion], if the intrusion would be highly offensive to a reasonable person." RESTATEMENT (SECOND) OF TORTS § 652B.

108. *See, e.g.*, Dietemann v. Time, Inc., 449 F.2d 245, 249 (9th Cir. 1971) ("The First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another's home or office.").

109. *See, e.g.*, Kee v. City of Rowlett, 247 F.3d 206, 217–18 (5th Cir. 2001) (finding that plaintiff did not have reasonable expectation that her conversations with others during an outdoor memorial service at a cemetery would be private); Deteresa v. ABC, Inc., 121 F.3d 460,

courts have refused to award damages on First Amendment grounds where the plaintiff has suffered no apparent harm,[111] while other courts have awarded nominal damages in such cases.[112] Results are also mixed in fraud cases. Some courts have dismissed these cases where the plaintiff has not suffered direct harm[113] and other courts have allowed them to go forward even in the absence of any demonstrable injury.[114]

Courts that refuse to recognize the rights of newsgatherers in these contexts make three key mistakes. The first is that these courts tend to characterize the claims of defendants as all-or-nothing appeals for blanket immunity.[115] What most proponents of newsgathering protections seek, however, is not "a license . . . to violate valid criminal laws,"[116] but the creation of some evidentiary barrier that plaintiffs and prosecutors would have to surmount before liability (in the civil context) or guilt (in the criminal context) could be found.[117] Much

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466 (9th Cir. 1997), *cert. denied*, 523 U.S. 1137 (1998) (finding that plaintiff did not have a reasonable expectation of privacy when she was being questioned at the front door of her house, which was visible to the street); Stressman v. Am. Black Hawk Broad. Co., 416 N.W.2d 685, 687 (Iowa 1987) (holding that a woman did not have a reasonable expectation of privacy in a public restaurant). However, courts are still somewhat divided about what constitutes a public place. *See* Cassidy v. ABC, Inc., 377 N.E.2d 126, 132 (Ill. App. Ct. 1978) (holding that the surreptitious recording of a police officer's undercover investigation of a massage parlor was newsworthy and concluding that "no right of privacy against intrusion can be said to exist with reference to the gathering and dissemination of news concerning [an officer's] discharge of public duties"). *Compare* McCall v. Courier Journal and Louisville-Times Co., 609 S.W.2d 366 (Ky. Ct. App. 1980), *rev'd on other grounds*, 623 S.W.2d 882 (Ky. 1981) (holding that an attorney could not sustain an intrusion claim against a client who surreptitiously recorded their conversation in her office), *with* Sanders v. ABC, Inc., 978 P.2d 67, 71, 73–74 (Cal. 1999) (holding that employees have at least a limited expectation of privacy in their workplace).

110. *See* Special Force Ministries v. WCCO Television, 584 N.W.2d 789, 792 (Minn. Ct. App. 1998) ("A person commits trespass when that person enters another's land without consent." (citing Copeland v. Hubbard Broad., Inc., 526 N.W.2d 402, 403 (Minn. Ct. App. 1995))).

111. Robinson v. City of Philadelphia, No. 99-1158, 2001 U.S. Dist. LEXIS 23128, at *8–9 (E.D. Pa. Mar. 28, 2001).

112. Shiffman v. Empire Blue Cross & Blue Shield, 681 N.Y.S.2d 511, 512 (N.Y. App. Div. 1998).

113. *See, e.g.*, Med. Lab. Mgmt. Consultants v. ABC, 30 F. Supp. 2d 1182, 1190–91 (D.Ariz. 1998); Homsy v. King World Entm't, Inc., No. 01-96-00708-CV, 1997 WL 52154, at *5 (Tex. App. Feb. 6, 1997).

114. *See, e.g.*, *Special Force Ministries*, 584 N.W.2d at 794.

115. *See, e.g.*, Branzburg v. Hayes, 408 U.S. 665, 682–683 (1972) ("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 . . . ."); United States v. Antar, 839 F. Supp. 293, 296–297 (D.N.J. 1993) ("It is naïve to blindly acknowledge or adopt the unfettered First Amendment freedoms espoused by the press . . . .").

116. *Branzburg*, 408 U.S. at 691.

117. *See, e.g.*, Matthew D. Bunker, Sigman L. Splichal & Sheree Martin, *Triggering the First Amendment: Newsgathering Torts and Press Freedom*, 4 COMM. L. & POL'Y 273, 294 (1999)

like the libel context, where liability only attaches when some level of fault is proved, similar safeguards in the newsgathering context would protect journalists unless plaintiffs or prosecutors could demonstrate a superior interest. The construction of the First Amendment proposed in this Article does not put newsgathering behavior in a special category. But because many of the civil tort claims and some of the criminal prosecutions targeting newsgathering are so prone to abuse,[118] some protection ought to be recognized—not to immunize journalists' investigative activity, but to prevent subtle and indirect assaults on expressive activity.

The second key problem with the courts' treatment of these cases is that they expressly or impliedly characterize the defendants' claims as demands for special rights.[119] But the media litigants in newsgathering cases have routinely made clear that they are seeking judicial recognition of protections claimable by all people who gather

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(arguing that, in newsgathering tort cases, "the plaintiff must establish a compelling interest in vindicating the common-law newsgathering claim alleged"); Erwin Chemerinsky, *Protect the Press: A First Amendment Standard for Safeguarding Aggressive Newsgathering*, 33 U. RICH. L. REV. 1143, 1162 (1999–2000) (proposing that tort claims aimed at newsgathering be subjected to at least intermediate constitutional scrutiny—that is, newsgathering should be protected "unless it can be proven that there is an important interest gained by allowing liability"); Paul A. LeBel, *The Constitutional Interest in Getting the News: Toward a First Amendment Protection from Tort Liability for Surreptitious Newsgathering*, 4 WM. & MARY BILL RTS. J. 1145, 1154–55 (1995–1996) (suggesting that newsgathering activity be treated as constitutionally parallel to publication and a balancing approach be applied to newsgathering-related tort claims, much like the courts have balanced the competing interests involved in libel and privacy cases).

118. These suits can be used as a pretext to seek compensation for the harms associated with a publication or broadcast, allowing the plaintiff to skirt the First Amendment shield that protects expression. This kind of tactic has been repudiated by the Supreme Court in a slightly different context. *See* Hustler v. Falwell, 485 U.S. 46, 57 (1988) (rejecting attempt by plaintiff to seek reputation-related damages by suing for intentional infliction of emotional distress rather than libel). *See also* Nathan Siegel, Commentary, *Newsgathering and Privacy Rights*, 1999 ANN. SURV. AM. L. 207, 215 (1999) ("[E]ven though [*Food Lion*] was supposed to be an issue about a generally applicable law, no one, neither Food Lion nor ABC, could find a single precedent . . . where any company had ever tried to assert that kind of claim against any one of its entry-level employees. That suggests to me that we're not really dealing here with general laws. Rather, we're dealing here with an attempt to bend the law to try to find a basis to sue over news reports.").

119. *See, e.g.*, Herbert v. Lando, 441 U.S. 153, 179 n.1 (1979) (noting that the Court's prior rulings "provide no support for the theory that the prepublication editorial process enjoys a special status under the First Amendment"); Zurcher v. Stanford Daily, 436 U.S. 547, 570 (1978) ("[T]here is no justification for the establishment of a separate Fourth Amendment procedure for the press . . . .") (Powell, J., concurring); Pell v. Procunier, 417 U.S. 817, 834 (1974) ("The Constitution does not . . . require government to accord the press special access to information . . . ."); 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).

and disseminate news, not merely those employed by traditional news organizations. The special-rights dilemma, then, is largely illusory, at least when operating under an egalitarian definition of the press.[120]

B. Defining "The Press"

Those opposed to recognizing a constitutionally distinct status for journalists or the press point to the difficulty of defining the types of people or organizations that ought to be able to claim those protections.[121] As Justice White wrote in *Branzburg*, trying to define who is a journalist would "present practical and conceptual difficulties of a high order."[122] It is possible to avoid the definitional problem of who is a journalist, but it would require reversing decisions by each of the federal courts that have recognized the journalist's privilege, and it would require rewriting dozens of state and federal laws that give journalists special dispensations.[123] Irrespective of the constitutional validity of special rights, the contemporary reality is that such protections exist and cannot be effectively implemented in the absence of a definition. The question is no longer whether "journalist" or "the press" should be defined, but how.

Several criteria could apply in forming a definition. Looking to membership in professional associations might help, but because journalists are not licensed like doctors and lawyers, many qualified journalists might not seek such memberships. Education is another possibility, but certainly there are excellent reporters and editors who do not have journalism degrees. Employment could likewise be the operative criterion. Under the New York shield law, for example, one must be a "professional journalist"—that is, someone working as a

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120. *See* Ugland & Henderson, *supra* note 39. *See also infra* Part I.B.

121. *See, e.g.*, *In re* Grand Jury Subpoena, Judith Miller, 397 F.3d 964, 979 (D.C. Cir. 2005) ("Are we then to create a privilege that protects only those reporters employed by *Time Magazine*, the *New York Times*, and other media giants, or do we extend that protection as well to the owner of a desktop printer producing a weekly newsletter?") (Sentelle, J., concurring).

122. Branzburg v. Hayes, 408 U.S. 665, 704 (1972).

123. See discussion of shield laws, *supra* notes 22, 51. In addition to shield laws, many freedom of information laws allow for waivers of photocopying and search fees related to records requests by journalists. *E.g.*, The Freedom of Information Act, 5 U.S.C. § 552(a)(4)(A)(ii) (2002) ("[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 . . . ."). Many states also have retraction statutes that require libel plaintiffs suing news organizations to first seek a retraction before filing suit. *E.g.*, WIS. STAT. § 895.05(2) ("Before any civil action shall be commenced on account of any libelous publication . . . the libeled person shall first give those alleged to be responsible or liable for the publication a reasonable opportunity to correct the libelous matter.").

journalist "for gain or livelihood."[124] But this definition eliminates anyone supplying news who does not receive a paycheck, including many freelancers and most bloggers. Another possible basis for a definition could be the type of organization involved. But would a reporter for the *New York Times* count and not someone who writes for a trade publication or *People* magazine? Protections could be limited to traditional news media, but would it make sense to grant privileges to a reporter from *National Review* and not one from *Talking Points Memo*? Another approach would be to define journalists based on the function they are performing. The reporter's privilege could be made available to anyone serving a *press function*—seeking out news of public interest for the purpose of disseminating it to an audience—whether or not the person possesses any of the other attributes or affiliations described above.

Courts have not reached a consensus about the shape that a definition should take. The Supreme Court has provided little guidance, and the lower court approaches and statutory definitions are inconsistent and sometimes arbitrary.[125] The definition proposed here is built around the last of the criteria discussed above—function. This seems to be the direction favored by most circuit courts,[126] and it is the only approach that can be squared with the ethos of equality that pervades the Constitution.[127] At its core, newsgathering is simply collecting information for the purpose of presenting it to an audience. Although employees of mainstream news organizations most often undertake this task, there is nothing to prevent a non-traditional journalist or an ambitious do-it-yourselfer from engaging in the same activity with the same intentions and achieving the same result. Because all people have the ability to serve this investigative function—whether or not they have any relevant training, experience

124. N.Y. CIV. RIGHTS LAW § 79-h (a)(6) (2007).

125. For example, many state shield laws only protect those who are "salaried employees" of a news organization. *See, e.g.*, FLA. STAT. § 90.5015(1)(a) (2007). Many retraction statutes only protect print publications. *See, e.g.*, WIS. STAT. § 895.05(02) (2006). And some laws, like one of the earlier versions of the proposed federal shield law, which was never enacted into law, would not cover those working solely for Web-only organizations. H.R. 3323 § 5(2), 109th Cong. (1st Sess. 2005).

126. *See, e.g.*, von Bulow v. Von Bulow, 811 F.2d 136, 144 (2d Cir. 1987) (affording the privilege to one who has "the intent to use the material—sought, gathered or received—to disseminate information to the public and that such intent existed at the inception of the newsgathering process").

127. *See infra* text accompanying notes 213–216.

or credentials—these prerogatives should not belong to a preferred class.

This does not, however, mean that all citizens should be able to refuse to comply with subpoenas. This protection should belong solely to those *serving a press function*. Such individuals would be those (1) engaged in the process of gathering information of public significance, (2) for the purpose of communicating it to an audience, (3) with the intent at the start of the newsgathering process to distribute the information to others, and (4) whose compliance with the government's demand would pose a legitimate risk of impairing their *future* expressive or newsgathering activity. This proposed definition avoids the special-rights problem by providing protection to anyone whose actions serve the purposes of press freedom. The definition also acknowledges the democratizing and decentralizing role played by the Internet and other new media technology. And, perhaps most importantly, it is a definition that does not require any judicial improvisation, but flows naturally from the sequential interpretation of the First Amendment applied here.

Should the Supreme Court revisit the reporter's privilege issue, it ought to recognize that the egalitarian conception of the press envisaged by Justice White in *Branzburg*[128] is not the bane of the privilege, but its salvation. By distributing these protections based on the functions newsgatherers perform instead of their characteristics, credentials, or professional affiliations, the Court would solve the special-rights problem and simplify the definitional dilemma. The only remaining challenge for journalists would be to convince the Court that the reporter's privilege—as well as the protections sought in *Zurcher*,[129] *Herbert*,[130] and *Cohen*[131]—can be recognized without doing damage to the rest of the Court's First Amendment jurisprudence. Those protections are necessary to preserve the autonomy of those who gather and disseminate news and are, unlike the access cases described next, not merely affirmative rights (privileges, in the truer sense of the word) but negative rights—shields

128. 408 U.S. 665, 705 (1972) ("The informative function asserted by representatives of the organized press in the present cases is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists.").

129. Zurcher v. Stanford Daily, 436 U.S. 547 (1978).

130. Herbert v. Lando, 441 U.S. 153 (1979).

131. Cohen v. Cowles Media Co., 501 U.S. 663 (1991).

against intrusions by the government into journalists' processes, property, and private relationships.[132]

C. *Affirmative v. Negative Rights*

As with the other questions addressed above, there is a similar absence of uniformity regarding whether the First Amendment provides merely a negative barrier against government intrusions or also provides a set of affirmative rights—rights of access to places and information, for example. Affirmative rights in this context are those that protect actions aimed at uncovering, rather than disseminating information. Negative rights protect people from government encroachment on their liberties—both their expression and, it is suggested here, their autonomy.[133]

In the 1970s and 1980s, some journalists and First Amendment advocates sought judicial recognition of a constitutional right of access built around a nebulous right-to-know principle.[134] The Supreme Court had previously frustrated these efforts in *Zemel v. Rusk*, holding that the government can limit the countries to which American citizens may travel.[135] But in *Lamont v. Postmaster General of the United States*,[136] the Court struck down Post Office rules permitting the destruction of "communist propaganda" sent through the mails, holding that the rules violated the First Amendment rights of the intended recipient.[137] In so holding, the Court acknowledged a limited right to receive information, which it affirmed and extended in

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132. For more on the affirmative–negative distinction, *see supra* notes 40, 55.

133. Some scholars propose an affirmative rights model with a decidedly different focus. They argue that freedom of speech and press are rights that the public possesses, not merely against government infringement but against all infringement, and that the government is free to advance people's expressive opportunities even if doing so requires limiting the speech of some (for example, the mainstream media) for the broader use and benefit of the many. *See, e.g.*, JEROME A. BARRON, FREEDOM OF THE PRESS FOR WHOM? 340–43 (Indiana Univ. Press 1973). The Supreme Court has rejected this view, most notably in *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256–57 (1974), striking down a statute that required newspapers to give political candidates a right of reply.

134. David Mitchell Ivester, Note, *The Constitutional Right to Know*, 4 HASTINGS CONST. L.Q. 109 (1977); Thomas I. Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U.L.Q. 1 (1976).

135. 381 U.S. 1, 16 (1965).

136. 381 U.S. 301 (1965).

137. *Id.* at 305 (construing Postal Service and Federal Employees Salary Act of 1962, 39 U.S.C. § 4008(a) (2000), which required destruction of unsealed materials deemed to be communist propaganda unless the intended recipient submitted a reply card indicating his or her desire to receive the materials).

subsequent cases.[138] However, the Court was only recognizing a negative right against government interference with the exchange of information by private citizens. In a series of rulings in the 1970s involving access to prisons—a more clearly affirmative-rights context—the Court was far more skeptical. In *Saxbe v. Washington Post Co.*[139] and *Pell v. Procunier*,[140] the Court held that neither journalists nor the public have a First Amendment right of access to prisons.[141] In *Houchins v. KQED, Inc.*,[142] another case involving prison access, the Supreme Court added, "This Court has never intimated a First Amendment guarantee of a right of access to all sources of information within government control."[143] In these cases, the Court referenced its earlier ruling in *Adderley v. Florida*,[144] in which it held that "the State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated."[145] Most lower courts have followed suit, limiting press and public rights of access to places where their presence would not interfere with the intended use of the property, although the courts' rulings and rationales in these contexts are far from uniform.[146]

After *Houchins*, the campaign for affirmative rights of access was moribund. But just two years later, the Court took an extraordinary step in *Richmond Newspapers, Inc. v. Virginia*,[147] holding that the public and press have a First Amendment right to attend criminal

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138. *See, e.g.*, Va. State Bd. of Pharmacy v. Va. Citizens Consumers Council, Inc., 425 U.S. 748, 757 (1976) (concluding that "[i]f there is a right to advertise, there is a reciprocal right to receive the advertising . . . ."); Kleindienst v. Mandel, 408 U.S. 753, 762 (1972) ("In a variety of contexts this Court has referred to a First Amendment right to 'receive information and ideas.'") (quoting Stanley v. Georgia, 394 U.S. 557, 564 (1969)). The principle was also supported in a case prior to *Lamont*, 381 U.S. 301. *See, e.g.*, Martin v. City of Struthers, 319 U.S. 141, 143 (1943) ("[The First Amendment] embraces the right to distribute literature . . . and necessarily protects the right to receive it.") (citing Lovell v. Griffin, 303 U.S. 444, 452 (1938)).

139. 417 U.S. 843 (1974).

140. 417 U.S. 817 (1974).

141. *Saxbe*, U.S. at 849–50 (1974); *Pell*, U.S. at 833 (1974). The Court in *Pell* also addressed the special-rights question, holding that "newsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public." *Id.* at 834.

142. 438 U.S. 1 (1978).

143. *Id*. at 9.

144. 385 U.S. 39 (1966).

145. *Id*. at 47.

146. *Compare* J.B. Pictures, Inc. v. U.S. Dep't of Def., 86 F.3d. 236, 242 (D.C. Cir. 1996) (upholding federal regulation excluding the press and public from the area of Dover Air Force Base where bodies of dead soldiers are returned), *with* Connell v. Town of Hudson, 733 F. Supp. 465, 471 (D.N.H. 1990) (holding that a freelance photographer's First Amendment rights were violated by police order that he stop taking photos of an accident scene).

147. 448 U.S. 555 (1980).

trials.[148] The Court emphasized the fact that in Great Britain and the United States, courtrooms have for centuries been open to the public and that access serves vital democratic purposes. "People in an open society do not demand infallibility from their institutions," the Court held, "but it is difficult for them to accept what they are prohibited from observing."[149] Because criminal trials have historically been open to the public, and because access helps ensure the fairness of these proceedings, the Court concluded that they are presumptively open.[150] The Court in *Richmond* thus established an affirmative right of access that was supported by two key rationales: history and function.[151]

Two years later, in *Globe Newspaper Co. v. Superior Court*,[152] the Court struck down a law that peremptorily mandated closure of trials in which minor victims of sexual assaults would be testifying.[153] In 1984, the Court extended the presumption of access to the jury selection process in *Press-Enterprise Co. v. Superior Court* (*Press Enterprise I*),[154] holding that closure of *voir dire* would only be constitutional if the closure order were "narrowly tailored" and served an "overriding interest."[155] In 1986, the Court held that the presumption of access also applies to preliminary hearings in *Press-Enterprise Co. v. Superior Court* (*Press Enterprise II*),[156] and that the presumptive openness of judicial proceedings depends on the two factors highlighted in *Richmond*: (1) whether the proceeding "ha[s] historically been open to the press and general public,"[157] and (2) "whether public access plays a significant role in the functioning of

148. *Id.* at 580. There is only a presumptive right of access, however. The Court acknowledged that there might be countervailing interests that are sufficiently compelling to justify closure. *Id.* at 598.

149. *Id.* at 572.

150. *Id.*

151. *Id.* The Court has also used the term "logic" instead of "function" to refer to this part of the test. *See, e.g.*, Globe Newspaper Co. v. Sup. Ct. for Norfolk County, 457 U.S. 596, 606 (1982) ("In sum, the institutional value of the open criminal trial is recognized in both *logic* and experience.") (emphasis added).

152. *Globe Newspaper*, 457 U.S. 596.

153. There may be times when privacy interests supersede access rights, the Court held, but the presumption must be openness, and closure must only be permitted where the government can demonstrate that it serves a compelling government interest and is narrowly tailored to serve that interest. *Id.* at 607–08.

154. 464 U.S. 501 (1984).

155. *Id.* at 510.

156. 478 U.S. 1, 8 (1986). This case actually involved a request for the transcript of a preliminary hearing that had previously been closed. *Id.*

157. *Id.*

the particular process in question."[158] If a proceeding is held to be presumptively open, access can only be denied by satisfying the strict-scrutiny test outlined in *Press Enterprise II*.[159]

The presumption of access to most criminal proceedings has been reinforced by dozens of lower-court decisions.[160] But there is a significant discrepancy in the way courts have applied the function component of *Richmond*. The Court in *Richmond* held that judges should look at whether the functioning of the proceeding in question would be significantly aided by open access.[161] The holding suggests that, in some cases, access is essential to the proper administration of justice, not merely because it enhances public understanding of the courts and court proceedings, but also because it directly affects the integrity of the proceedings themselves.[162] Some lower courts have paid less attention to this aspect of *Richmond* and have required public access largely because it enhances citizens' knowledgeable participation in civic life.[163] The Supreme Court may have encouraged this kind of interpretation by its own emphasis on this public benefit in *Globe Newspaper Co. v. Superior Court*: "[B]y offering [access], the First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of

158. *Id.*

159. *Id.* In its most recent court-access case, *El Vocero de P.R. v. Puerto Rico*, 508 U.S. 147 (1993), the Court added that when considering whether a proceeding has historically been open, courts should not focus on the unique traditions of a particular jurisdiction but rather on whether the type of proceeding has traditionally been open throughout the United States. *Id.* at 150.

160. Courts have declared a variety of criminal proceedings to be presumptively open. *See, e.g.*, United States v. Criden, 675 F.2d 550, 557–58 (3d Cir. 1982) (suppression hearing); Seattle Times v. U.S. Dist. Court for the W. Dist. of Wash., 845 F.2d 1513, 1517 (9th Cir. 1988) (bail hearings); State v. Eaton, 483 So.2d 651, 658–59 (La. Ct. App. 1986) (competency hearings); CBS, Inc. v. U.S. Dist. Court for the Cent. Dist. of Cal., 765 F.2d 823, 825 (9th Cir. 1985) (a post-conviction proceeding on a defendant's motion for a reduction his sentence); Soc'y of Prof'l Journalists v. Sec'y of Labor, 616 F. Supp. 569, 571 (D. Utah 1985) (administrative hearings). Grand jury proceedings are the primary exception to the presumption of openness. *See generally In re* Subpoena to Testify Before Grand Jury Directed to Custodian of Records, 864 F.2d 1559 (11th Cir. 1989).

161. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 569 (1980) ("[Access] gave assurance that the proceedings were conducted fairly to all concerned, and it discouraged perjury, the misconduct of participants, and decisions based on secret bias or partiality.").

162. *Id.*

163. *See, e.g.*, Cable News Network, Inc. v. Amer. Broad. Cos., Inc., 518 F. Supp. 1238, 1244 (N.D. Ga. 1981) ("[T]he rights guaranteed and protected by the First Amendment include a right of access to news or information concerning the operations and activities of government. This right is held by both the general public and the press, with the press acting as a representative or agent of the public as well as on its own behalf. Without such a right, the goals and purposes of the First Amendment would be meaningless.").

self-government."[164] This is undoubtedly true, but if it is the chief rationale upon which access is granted, there may be no principled basis for denying access to any government information or proceeding. As the Supreme Court noted in the 1965 case, *Zemel v. Rusk*, "There are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow."[165]

Although the Supreme Court and lower courts have correctly provided access to most criminal and civil[166] court proceedings, to the extent that their rulings rely on the public-edification rationale instead of one focused on procedural fairness, the courts read into the First Amendment an anomalous right that is both impossible to confine to the context of judicial proceedings and inconsistent with the Court's other First Amendment rulings that uniformly shape rights by a negative construction.[167] If the function component is satisfied whenever access yields useful insights into government processes and decision-making, it is hard to know what prevents function from serving as an almost boundless mandate for direct public supervision of all government operations.

Although journalists generally regard *Richmond* as one of the few unmovable pillars of First Amendment law—as vital to their work as *Near v. Minnesota*[168] and *New York Times v. Sullivan*[169]—it is difficult to square its affirmative-rights construction with the Court's other First

164. 457 U.S. 596, 604–05 (1982).

165. 381 U.S. 1, 16–17 (1965).

166. The Court has not addressed the question of access in the context of a civil proceeding, but it wrote in dicta in *Gannett Co. v. DePasquale*, 443 U.S. 368, 387 n.15 (1979), that access claims in those cases might be "as strong [or] stronger" than in many criminal cases. Lower courts have regularly provided access to most civil proceedings, except those that implicate some overriding privacy interest—for example, cases involving divorce, custody, civil commitment, and adoption.

167. The Court has interpreted the First Amendment as a negative barrier against government encroachments or usurpations of the press' editorial discretion, not as an affirmative command to supply it with information or access. As Justice Potter Stewart suggested, "The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act." Stewart, *supra* note 38, at 636. With the exception of the court access cases, *see supra* text accompanying notes 146–156, the Court has consistently rejected interpretations of the First Amendment that would put affirmative obligations on the government. *See*, *e.g.*, Houchins v. KQED, 438 U.S. 1, 9–10, 14–16 (1978); Saxbe v. Wash. Post. Co., 417 U.S. 843, 850 (1974); Pell v. Procunier, 417 U.S. 817, 834–35 (1974); Adderly v. Florida, 385 U.S. 39, 47 (1966); *Zemel*, 381 U.S. at 16 (1965).

168. 283 U.S. 697, 773, 735 (1931) (ruling that prior restraints of the press are presumptively unconstitutional).

169. 376 U.S. 254 (1964) (ruling that public-official libel plaintiffs have the burden to prove that information published about them is false and that it was published with actual malice; that is, with knowledge that it was false or with reckless disregard for its truth or falsity).

Amendment rulings.[170] That is not to say that access to the courts has no constitutional basis. But those rights are better recognized as components of procedural fairness guaranteed in other constitutional provisions, particularly the Sixth,[171] Seventh,[172] and to a lesser extent, Eighth Amendments.[173] By recognizing an affirmative First Amendment right of access to the judiciary, the Court has muddied its First Amendment jurisprudence and facilitated the disparate rulings of lower courts. The Court was right to acknowledge that access has edifying effects,[174] but those are merely ancillary benefits of access, not compelling reasons for providing it. What *is* a compelling rationale is that the legitimacy of most judicial proceedings is in fact preserved by access and undermined by its denial. This is not true, at least not in the same way, in other contexts where access could be seen as useful.[175]

The interpretation of the First Amendment proposed here does not recognize affirmative rights. It does support public access to the judiciary, but under the umbrella of the Sixth, Seventh, and Eighth Amendments, not the First. This is the only approach that can resolve the incongruities spawned by *Richmond* and its progeny, and it is an approach that finds support in most of the traditional theories of constitutional interpretation, including the sequential approach applied in Part III. The interpretation proposed here is also built around a conception of affirmative rights that is different than the one applied by the Court. The Court in *Branzburg*, *Zurcher*, *Herbert*, and *Cohen* seems to construe the claims of the media litigants as demands for special exemptions or immunities from the normal obligations of citizenship while minimizing the potentially suppressive

170. *See supra* note 163.

171. 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, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.").

172. U.S. CONST. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . .").

173. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

174. *See supra* text accompanying note 160.

175. The presence of the public provides external oversight of judicial proceedings and serves as a check against any mistakes or mischief that occurs there. Although some of the same interests are served by access to the legislative process, the participants in those proceedings are more readily held accountable through the electoral process.

effects of government intrusions on journalists' source relationships, editorial decision-making, and newsroom privacy.[176] It works from a dichotomous framework in which direct restraints of expression are presumptively unconstitutional, but restraints of newsgathering and other behavior that are one step removed are, in most cases, permissible.[177] The Court gives too little consideration to contextual issues in the application of generally applicable laws, and does not recognize or acknowledge that neutral laws can still breach the press' autonomy and produce the same kinds of effects as content-based laws.[178] The interpretation proposed here would realign those cases by applying a negative-rights construction of the First Amendment, but one that recognizes a negative right as protection against restrictions both on expressive activity and journalistic autonomy.

II. THE ROLE OF CONSTITUTIONAL INTERPRETATION

Before charting the dimensions of a right to gather news, one must identify some constitutional language from which the right can be said to originate. Some say the First Amendment generally supports recognition of a right to gather news.[179] Others, most notably Justice Potter Stewart, argue that those protections derive specifically from the Press Clause.[180] Others insist that the Press and Speech Clauses are to be read together as a collective statement about the right of

176. Branzburg v. Hayes, 408 U.S. 665, 682 (1972) ("The sole issue before us is the obligation of reporters to respond to grand jury subpoenas as other citizens do."); Herbert v. Lando, 441 U.S. 153, 155 (1979) ("[W]e are urged to hold for the first time that when a member of the press is alleged to have circulated damaging falsehoods and is sued for injury to the plaintiff's reputation, the plaintiff is barred from inquiring into the editorial processes of those responsible for the publication."); Cohen v. Cowles Media, 501 U.S. 663, 669 (1991) ("[G]enerally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news."). *See also* Zurcher v. Stanford Daily, 436 U.S. 547 (1978) (failing to address the First Amendment implications of newsroom searches).

177. *See* William J. Brennan, Jr., *Newhouse Dedication Address*, 32 RUTGERS L. REV. 173, 176 (1979) (describing the Court's two-track approach to evaluating speech and press controversies).

178. For example, the excessive use of subpoenas and newsroom searches, even though issued or conducted pursuant to a neutral law, could produce the same kind of "chilling effect" that the Court has emphasized in other First Amendment cases. N.Y. Times v. Sullivan, 376 U.S. 254, 300 (1964).

179. *See, e.g.*, *Branzbug*, 408 U.S. at 681 ("[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated.").

180. Stewart, *supra* note 38, at 633–34 (1975) (arguing that the Press Clause is a "structural provision" that protects "the institutional autonomy of the press").

citizens to express themselves, whether through speech or through media.[181]

These interpretive battles might have been unnecessary if not for James Madison's verbal economy. The Speech and Press Clauses, about which millions of words have been written, consist of only fourteen.[182] But because their meaning is not self-evident, it can only be said that the clauses protect certain behaviors and not others by offering some theory of constitutional interpretation to support that conclusion. The sequential approach outlined here relies upon several familiar sources when interpreting constitutional provisions—text, history, structure, and context—all of which are necessary, but none is sufficient. These sources are briefly described below and specifically applied to the First Amendment in Part III.

A. *Analysis of Text*

Text-focused approaches to judicial review seek answers to constitutional questions from the plain language of the Constitution.[183] Although the text provides clear answers to some constitutional questions—How old must someone be to run for president?[184] How many years is each presidential term?[185]—most provisions require some extrapolation. Phrases like "equal protection," "due process," and "the press" force even the most determined textualists to look beyond the document for guidance.[186]

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181. *See, e.g.*, First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 799–800 (dismissing the notion of a separate meaning for the Press Clause and arguing that the press merited separate mention by the Framers merely because "it had been more often the object of official restraints").

182. *See* U.S. CONST. amend I ("Congress shall make no law . . . abridging the freedom of speech, or of the press.").

183. *See, e.g.*, Ofer Raban, *The Supreme Court's Endorsement of a Politicized Judiciary: A Philosophical Critique*, 8 J.L. SOC'Y 114 (2007) ("[T]extualism limits legal interpretation (where possible) to literal linguistic constraints."). Justice Hugo Black declared himself to be a First Amendment absolutist, because he read that amendment as a literal prohibition of all restraints of individual expression. *See* Smith v. California, 361 U.S. 147, 157 (1959) (Black, J., concurring) ("I read 'no law . . . abridging' to mean no law abridging."). Note, however, that Justice Black was willing to tolerate restraints of free expression when they were coupled with some kind of conduct. *See, e.g.*, Tinker v. Des Moines, 393 U.S. 503, 516 (Black, J., dissenting) (arguing against recognition of the speech rights of high school students who wore black armbands to school to protest the Vietnam War).

184. *See* U.S. CONST. art. II, § 1, cl. 5.

185. *See* U.S. CONST. art. II, § 1, cl. 1.

186. Justice Black, for example, who advocated a literal reading of the words of the Constitution as a way of concretizing and stabilizing its meaning and removing the discretion of judges to promote their own creative translations, was nevertheless overzealous in his claim to

Justice Hugo Black was perhaps the most celebrated textualist. He began serving on the Court during the ascendancy of judicial realism,[187] a philosophy that he viewed as an assault on the legitimacy of the judiciary.[188] Justice Black sought to restore some precision and neutrality to constitutional interpretation. To this end, he argued that the Constitution is fundamentally a statement against excessive government intrusions into private domains,[189] and that it was designed very deliberately to proclaim certain absolutes—or "thou shalt nots," as Justice Black called them[190]—in circumscribing government. Justice Black eschewed balancing formulas like the "clear and present danger test"[191] that were too malleable in the hands of undisciplined judges. Instead, he favored a more literal reading of the Constitution that put clear and immovable barriers at the feet of government officials. Justice Black believed that this would better protect individual autonomy, provide greater consistency, and make the law, particularly the Constitution, understandable to all citizens.[192]

By limiting judicial discretion, textualism minimizes what Alexander Bickel called the "counter-majoritarian difficulty"—the

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"merely [be] enforcing the plain meaning of plain words and [the] agreed-upon intent of the Framers." Sylvia Snowiss, *The Legacy of Justice Black*, *in* JUSTICE BLACK AND THE FIRST AMENDMENT 18 (Everette E. Dennis, Donald M. Gillmor & David L. Grey eds., Iowa State Univ. Press 1978). As Snowiss points out, the very fact that there was, and remains, widespread disagreement about the plain meaning of many of these constitutional passages suggests that Justice Black's claims about their certainty were overstated, whether or not they were disingenuous. *Id.* at 17.

187. Underlying realism was the belief that judicial decision-making is inherently subjective, political and personal, and that there is no way to purify constitutional interpretation from the contaminating influence of judicial discretion.

188. *See, e.g.*, *In re* Winship, 397 U.S. 358, 384–85 (1970) (Black, J., dissenting) ("It can be . . . argued that when this Court strikes down a legislative act because it offends the idea of 'fundamental fairness,' it furthers the basic thrust of our Bill or Rights . . . . But that argument ignores the effect of such decisions on perhaps the most fundamental individual liberty of our people—the right of each man to participate in the self-government of his society.").

189. Edmond N. Cahn, *Dimensions of First Amendment 'Absolutes': A Public Interview*, *in* JUSTICE HUGO BLACK AND THE FIRST AMENDMENT 41, 46 (Everette E. Dennis, Donald M. Gillmor & David L. Grey eds., Iowa State Univ. Press 1978) ("Why was a Constitution written for the first time in this country except to limit the power of government and those who were selected to exercise it at the moment?").

190. *Id.* at 51.

191. *See* Schenck v. United States, 249 U.S. 47, 52 (1919) (holding that government restrictions of speech are unconstitutional unless the "words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent").

192. *See* Laura Krugman Ray, *Judicial Personality: Rhetoric and Emotion in Supreme Court Opinions*, 59 WASH. & LEE L. REV. 193, 198 (2002) ("As a self-conscious stylist, Black wanted his prose to be accessible to ordinary people because he wanted them to understand and appreciate for themselves the legal protections the Constitution provided.").

seeming incongruity of judges being empowered to override the will of the majority, as expressed by Congress.[193] But textualism presents other problems. The Constitution's text is rarely clear, and its meaning can change over time. What is "cruel and unusual"[194] in one century might be perfectly ordinary in another, for example. Without some accommodation for the evolution of human experience, a literal interpretation of the Constitution would bind society to a set of definitions and values that have, in some cases, become archaic. Literalist interpretations also risk undermining the intent of the Framers. The Seventh Amendment, for example, preserves the right to a jury trial for common law suits, but only when the "value in controversy shall exceed twenty dollars."[195] A literal interpretation that did not account for inflation would destroy that monetary limitation and defeat the original purpose of the provision. The text, then, is the necessary starting point in constitutional interpretation, but an unadulterated textual analysis does not account for conflicts between text and intent and does not permit the Constitution to evolve in the face of new circumstances.

B. Analysis of Intent

Historical approaches to constitutional interpretation focus on the intent of the Constitution's Framers, ratifiers, or both. Strict historicists—also commonly referred to as originalists or intentionalists—believe judges should ascertain what the Framers intended each specific phrase of the Constitution to mean.[196] Moderate historicists are less interested in the contextual meaning of words and phrases and more interested in the Framers' broader aims.[197]

Historical approaches have intuitive appeal. It seems self-evident that if the Constitution is the supreme law and the ultimate

193. ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 16 (Yale University Press 2d ed. 1986) (1962).

194. U.S. CONST. amend. VIII.

195. U.S. CONST. amend. VII.

196. *See* Hudson v. McMillian, 503 U.S. 1, 18–23, 28 (1992) (Thomas, J., dissenting) (relying on historical understandings of "cruel and unusual" to conclude that the Eighth Amendment only prohibits corporal punishments of prisoners that cause "serious injury").

197. *See, e.g.*, Trop v. Dulles, 356 U.S. 86, 101 (1958) ("The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."). Here, the Court is concerned with intent but is focused on identifying the underlying principal and not ascertaining the contextual meaning of the words.

expression of the public will, it should be given the meaning intended by those who adopted it. Yet historicists must inevitably confront the problems that accompany all historical inquiry. Can an objective rendering of past eras ever be constructed—particularly for a period whose historiography is so steeped in patriotic sentiment and great-person mythos?[198] And can one discern the meaning of the Constitution or the intent of those who drafted and ratified it when there were so many participants and when the debate took place over so many years? As constitutional historian Jack Rakove observes, the framing and ratifying of the Constitution "involved processes of collective decision-making whose outcomes necessarily reflected a bewildering array of intentions and expectations, hopes and fears, genuine compromises and agreements to disagree."[199]

Critics of historicism also suggest that its adherents either näively suppose or disingenuously contend that it is an apolitical, value-neutral interpretive method.[200] They argue instead that because people are naturally drawn to historical sources that are most compatible with individual viewpoints, and because people examine and perceive empirical evidence through their own peculiar lenses, portrayals of intent will always be imperfect.[201] Historicism's critics also ask why contemporary Americans should be beholden to the intentions of their long-deceased forbearers who, by virtue of being

198. The Great Person or Great Man approach to historical study focuses on the heroic and nefarious acts of individuals as the keys to understanding past eras. This approach is seen by many contemporary historians as a failing of modern historiography—it is so tightly trained on individuals that it misses the more diffuse social forces that shaped particular events or periods. The traditional works examining the Revolutionary era, for example, are often criticized for their preoccupation with the founders—Washington, Jefferson, Adams, Madison, and the like. *See* HOWARD ZINN, *Forward* to RAY RAPHAEL, A PEOPLE'S HISTORY OF THE AMERICAN REVOLUTION (Perennial 2002) (arguing that this approach serves "the interests of the privileged and powerful, because, by ignoring ordinary people, it reinforces their feelings of powerlessness").

199. JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 6 (Alfred A. Knopf, Inc. 1996).

200. *See, e.g.*, Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545, 558 (2006) ("As a political practice, originalism has been nothing if not practical. It has engaged in a perfectly ordinary effort to identify and appropriate a politically useable past by strategically selecting and resurrecting particular historical themes and events. It has ignored elements of the original understanding that do not resonate with contemporary conservative commitments.").

201. *See, e.g.*, Quentin Skinner, *Meaning and Understanding in the History of Ideas*, 8 HIST. & THEORY 3, 6 (1969) ("[T]hese models and preconceptions in terms of which we unavoidably organize and adjust our perceptions and thoughts will themselves tend to act as determinants of what we think or perceive. We must classify in order to understand, and we can only classify the unfamiliar in terms of the familiar.").

dead, are no longer stakeholders in American democracy.[202] Non-interpretivists[203]—those who espouse approaches that go beyond both history and intent—argue that historicism is in fact a status quo reinforcing approach that turns the Constitution into a static anachronism.[204] The Constitution should be a living document, and to strictly adhere to the meanings intended by those who drafted and ratified it two centuries ago disempowers those who must abide by it today.[205]

All of these are sound arguments, which is why historicist and interpretivist theories can never be relied upon exclusively. But intent cannot be dismissed. To do so is to undermine through judicial interpretation what the citizens of 1791 established through constitutional amendment. And if their intent is not respected, it enfeebles both the amendment process and the larger democratic architecture. The complexities that accompany these kinds of inquiries are inadequate reasons to abandon them. This does not mean that the intent of the Framers with respect to discrete constitutional passages can ever be understood with mathematical precision. But it is possible, particularly in the context of the First Amendment, to understand more general sentiments and to identify and exclude the most specious interpretations.[206]

C. Analysis of Structure

When clear meanings cannot be gleaned from text, intent, or both, some insights can be found in the broader design or structure of the

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202. *See infra* note 205.

203. *See* Thomas C. Grey, *Do We Have an Unwritten Constitution?* 27 STAN. L. REV. 703 (1975). Grey distinguishes the "interpretive" model of constitutional interpretation—in which judges abide by the clear dictates of the text, animated by original intent—from the "noninterpretive model," in which a court has an "additional role as the expounder of basic national ideals of individual liberty and fair treatment, even when the content of these ideals is not expressed as a matter of positive law in the written Constitution." *Id.* at 706.

204. *See, e.g.*, Amy Kapczynski, *Historicism, Progress, and the Redemptive Constitution*, 26 CARDOZO L. REV. 1041, 1043 (2005).

205. *See, e.g.*, Erwin Chemerinsky, *Transcript of the University of Hawaii Law Review Symposium: Justice Scalia and the Religion Clauses*, 22 U. HAW. L. REV. 501, 507 (2000) ("I am skeptical of original meaning because it assumes that the world when the Constitution was adopted, is the world that should govern us today. We live in a vastly different world, obviously, than in 1787 or in 1791, or 1867.").

206. *See* Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 422 (1985) ("That I am unsure whether rafts and floating motorized automobiles are 'boats' does not dispel my confidence that rowboats and dories most clearly are boats, and that steam locomotives, hamburgers, and elephants equally clearly are not.").

Constitution. Structural analysis requires judges to engage in a more holistic reading of the Constitution and to situate their interpretations of individual passages within more macro-level analyses of the entire document. Analysis of some constitutional provisions can be more precisely understood when interpreted in light of, or in conjunction with, the rest of the Constitution's language.

Structural analysis is a four-corners approach that looks for meaning from within the document and not from extrinsic sources. It should be differentiated, however, from the kind of structuralism described by some constitutional scholars, which focuses on the broader systems established by the Constitution and the relationships it creates between the branches and between the federal and state governments.[207] The structural analysis applied here is more focused on the organization and composition of the document, and what it says about the role of government vis-à-vis the individual and about the Constitution's animating values and principles. It is more akin, then, to what Philip Bobbitt describes as ethical analysis.[208] Bobbitt argues, much like Justice Black,[209] that the Constitution provides a template for a political system based on maximum freedom, autonomy, and limited government.[210] The Constitution's text and design provide a "constitutional motif" that should be applied when analyzing claims of both new and old rights.[211] Bobbitt argues that the "constitutional grammar" has already been provided "so that once heard we can supply the rest on our own," which includes recognizing new rights not explicitly stated in the text.[212]

The claim of a constitutional right of privacy, for example, can be recognized not merely because it provides protections that some believe desirable, but because the right can be logically inferred from the existing cadence of rights.[213] Recognizing additional rights from time to time, when consistent with the original constitutional structure, is not only warranted but was anticipated by the Founders.

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207. *See, e.g.*, PHILIP BOBBITT, CONSTITUTIONAL FATE 74–92 (1982).
208. *Id*.
209. *See supra* text accompanying notes 187–188.
210. BOBBITT, *supra* note 207, at 101.
211. *Id*. at 177.
212. *Id*.
213. For Bobbitt, a case like *Griswold v. Connecticut*, 381 U.S. 479 (1965), requires no sleight-of-hand. Quite simply, the use of birth control is not the business of the state, and to regulate it would upset the "ethos of limited government" that the whole Constitution enshrines.

James Madison was one of many Framers reluctant to enumerate rights in the Constitution for fear that future generations would assume the list was exhaustive.[214] Bobbitt argues that "to some extent the fears of Madison and others . . . have been fulfilled. Insofar as we treat the Bill of Rights as the sole source . . . of constitutional rights, we are contributing to the realization of the Framers' misgivings."[215]

Another obvious structural feature of the Constitution is its emphasis on equality. This emphasis is reflected explicitly in the Preamble and in the Fourteenth Amendment's Equal Protection Clause, as well as in the Privilege and Immunities Clauses of both the Fourth and Fourteenth Amendments.[216] Equality is also reflected implicitly by the absence of provisions that elevate one group's protections over another's[217] and by the universal language used in elucidating the rights in the first eight amendments. This emphasis on equality provides courts with useful guidance in assessing the constitutionality of government acts that discriminate against particular groups. For example, the Fifth Amendment Due Process Clause does not contain an equal protection statement akin to the one found in the Fourteenth Amendment.[218] Theoretically, then, the Constitution does not explicitly limit discriminatory acts by the federal government. But the ethos of equality suggests that there is an implicit limitation on *all* discrimination. The Supreme Court has applied this principle in several cases, including *Bolling v. Sharpe*, in which it struck down public school segregation in the District of Columbia, noting that "the concepts of equal protection and due process, both stemming from our *American ideal of fairness*, are not mutually exclusive."[219] The Court's analysis in *Bolling* was at least partly structural in that it made some reasonable deductions from the

214. *See* Randy E. Barnett, *Reconceiving the Ninth Amendment*, 74 CORNELL L. REV. 1, 8 (1988). Madison ultimately relented, but he later introduced into Congress what would become the Ninth Amendment. *Id.* at 1–2.

215. BOBBITT, *supra* note 207, at 176.

216. THE DECLARATION OF INDEPENDENCE, para. 2 ("We hold these Truths to be self evident, that all Men are created equal."); U.S. CONST. art. IV, § 2, cl. 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."); U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.").

217. The obvious exception, however, is the Constitution's tacit recognition of the institution of slavery. *See, e.g.*, U.S. CONST. art. IV, § 2, cls. 2–3.

218. U.S. CONST. amends. V, XIV.

219. 347 U.S. 497, 499 (1954) (emphasis added). The Court held that due process includes an implicit guarantee of equal protection. *Id.* at 499–500.

Constitution's text without leaning on extrinsic sources.[220] Structural characteristics, particularly those of autonomy and equality, are especially useful in charting the dimensions of the First Amendment and the right to gather news.

D. *Analysis of Context*

Whether it is true that the text, history, and structure of the Constitution support recognition of a particular right, no approach to constitutional interpretation is tenable without some acknowledgement of contemporary conditions and societal evolution. This is necessary not only to properly apply rights that have already been recognized, but also on rare occasions to recognize new ones.[221] As the Court has noted, some rights cannot be meaningfully applied without an accounting of shifting social conditions and new technology.[222] The Court must extrapolate from time to time in order to sustain the Constitution's relevance to successive generations. As Ronald Dworkin puts it, the Framers have merely enunciated a series of *concepts* to which individuals must apply their own *conceptions*.[223]

In applying the sequential approach to interpreting the First Amendment, then, a right might still be cognizable—even if it is not explicitly protected by the text, nor implicitly protected by references to the Framers' intent or the Constitution's broader ethos—provided it is either (1) indispensable to the exercise of other clearly protected rights, or (2) so culturally embedded that refusing recognition would subvert a widely recognized dimension of liberty.[224] The Supreme

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220. The Court essentially concluded that equal protection is merely a more specific expression of due process, which is merely one dimension of liberty. *Id.* at 499. So, although the Court resolved this as a Fifth Amendment due process case, its decision may have been made easier by the existence of the Equal Protection Clause in the Fourteenth Amendment.

221. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 484–86 (1965) (recognizing a constitutional right to privacy).

222. Because print media were the only ones known to the Framers, a strict historicist interpretation of the First Amendment would preclude protections for communication via broadcast, cable, internet and wireless media, among others. The Supreme Court has never taken this view and has extended constitutional protection to various media, focusing primarily on their communicative function, rather than on the means by which they accomplish it. *See, e.g.*, 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.'").

223. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 134 (1988).

224. The Ninth Amendment provides one constitutional hook for recognition of these types of rights. U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."). In most cases, the Due Process Clauses of the Fifth and Fourteenth Amendments, which respectively protect people

Court has endorsed the former idea in a number of cases, most notably *Richmond Newspapers v. Virginia*.[225] The latter idea is more nebulous, and interpretivists would no doubt deride it as a usurpation of congressional prerogatives or an invitation for judicial embellishments. The risk of overreaching here is certainly real, but to foreclose recognition of non-enumerated rights would betray the intent of those who drafted and ratified the Ninth Amendment.[226]

Identifying what constitutes a culturally embedded right is an unavoidably hazardous exercise, but one that the courts have engaged in many times. The courts have recognized the right of criminal defendants to be presumed innocent, for example, even though the Constitution does not mention it.[227] The Supreme Court has recognized a constitutional right to travel, both as a necessary pre-condition for the enjoyment of certain privileges[228] and as an essential component of individual freedom.[229] And certainly all courts would have been justified in recognizing a constitutional right for African-Americans and women to vote, even before ratification of the Fifteenth and Nineteenth Amendments. These are the kinds of

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against deprivations of their liberty by federal and state governments, are better sources. *See* U.S. CONST. amends. V, IV.

225. 448 U.S. 555, 579–80 (1980) ("But arguments such as the State makes have not precluded recognition of important rights not enumerated. Notwithstanding the appropriate caution against reading into the Constitution rights not explicitly defined, the Court has acknowledged that certain unarticulated rights are implicit in enumerated guarantees. For example, the rights of association and of privacy, the right to be presumed innocent, and the right to be judged by a standard of proof beyond a reasonable doubt in a criminal trial, as well as the right to travel, appear nowhere in the Constitution or Bill of Rights. Yet these important but unarticulated rights have nonetheless been found to share constitutional protection in common with explicit guarantees. The concerns expressed by Madison and others have thus been resolved; fundamental rights, even though not expressly guaranteed, have been recognized by the Court as indispensable to the enjoyment of rights explicitly defined.").

226. U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.").

227. The Fifth Amendment requires indictment by grand jury for capital crimes, U.S. CONST. amend. V, and the Sixth Amendment protects a defendant's right to a speedy and public trial, U.S. CONST. amend. VI, but neither makes clear whether guilt or innocence is to be presumed nor what evidentiary standard must be applied. Nevertheless, the Court has held that "[t]he presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice." Estelle v. Williams, 425 U.S. 501, 503 (1976).

228. *See* Shapiro v. Thompson, 394 U.S. 618, 629–31 (1969) (striking down state law imposing one-year residency requirement for receipt of welfare benefits).

229. *See* Kent v. Dulles, 357 U.S. 116, 125–26 (1958) ("The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment . . . . Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country, may be . . . as close to the heart of the individual as the choice of what he eats, or wears, or reads.").

judgments courts must make, at least where the underlying activity involves matters of profound societal expectation that are, as the Supreme Court put it, "basic in our scheme of values."[230]

III. SEQUENTIAL ANALYSIS AND THE RIGHT TO GATHER NEWS

This section applies the elements of the sequential analysis described in Part II to the Speech and Press Clauses of the First Amendment to consider what each suggests about the existence and dimensions of newsgathering rights. In identifying the core principles underlying the First Amendment, this section pays special attention to the key questions raised earlier regarding affirmative rights, special rights and the definition of "journalist" and "the press."[231]

A. Newsgathering and Text

Because the rights outlined in the First Amendment are so concisely stated and the language so encompassing, it is impossible to define the limits of freedom of the press by reference to the text alone. But all constitutional analysis must begin with the text,[232] and in the case of the First Amendment, the text provides some insights. The First Amendment reads "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."[233] It does not read "speech *and* press," as if to suggest a single concept, or even "speech *or* press." It says "of speech, *or of the* press," which is a more starkly disjunctive wording and suggests, however subtly, a calculated separation. The use of the word "the" before "press" could even be significant. By referring to "*the* press," perhaps the Framers were referring to a distinct institution. This interpretation would lend support to Justice Stewart's proposition that the Framers intended the

230. *Id.* at 126.

231. *See supra* Part I.

232. *See* Schauer, *supra* note 206, at 431 ("An interpretation is legitimate (which is not the same as correct) only insofar as it purports to interpret some language of the document, and only insofar as the interpretation is within the boundaries at least suggested by that language."). The Supreme Court has made some references to this idea in the constitutional context, see, e.g., Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 260 ("It is useful to begin with the text of Article III."), and it is an interpretive canon in the statutory context, see, e.g., Limtiaco v. Camacho, 127 S. Ct. 1413, 1418 (2007) ("As always, we begin with the text of the statute.").

233. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .").

press to have a unique constitutional status and that the Press Clause should be interpreted apart from the Speech Clause.[234]

There is some support for that view. At the time the Bill of Rights was ratified, nine states had already provided state constitutional protection for press freedom while only one did the same for speech.[235] Does this indicate a desire by the states to provide unique protection for the press? The 1776 Virginia Declaration of Rights refers to the press as "the greatest bulwark of liberty,"[236] and the 1780 Massachusetts Constitution states that "liberty of the press is essential to the security of the state."[237] These phrases imply that the press serves some instrumental purpose—checking government and thereby preserving other freedoms—and perhaps that it should be protected because of those functions. James Madison used similar language in his initial draft of the First Amendment: "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable."[238] This phrasing suggests even more concretely that an individual right of expression exists apart from the liberty of the press. Furthermore, the press has a specific role to play—to serve as a bulwark of liberty, presumably by acting as a government watchdog. The rights of "the people" are presented as natural rights, while the rights of the press are more instrumental. The separation between the two is emphasized by Madison's use of a semicolon.

It is clear that those who drafted these constitutions viewed the press as serving a special role, but that does not necessarily mean they had in mind a special set of protections for printers or publishers. It is possible that they anticipated that anyone could serve a press function—at least anyone with access to a printing press. The Pennsylvania Constitution of 1776, which protected both speech and press, reads: "'That the people have a right to freedom of speech, and of writing, and publishing their sentiments; therefore the freedom of

234. Stewart, *supra* note 38, at 631.

235. Anderson, *supra* note 38, at 464–65.

236. *Id.* at 464. This language is borrowed from Cato's Letters. *Id.* at 463 (citing LEONARD LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY 68–69 (1960)). Similar language was used in the 1776 North Carolina Declaration of Rights. *Id.* at 463–64.

237. *Id.* at 465. Similar language was used in the 1783 New Hampshire Bill of Rights. *Id.*

238. *Id.* at 478 (quoting 1 DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES 690 (1789)).

the press ought not to be restrained.'"[239] Here the emphasis is not so much on the instrumental role of the press, but on the natural right of all people to express themselves freely in any medium. Rights of expression, whether through speech or printed words, reside with the individual and should be protected for reasons other than their social benefits. On this view, freedom of the press is simply an extension of freedom of speech. It is not so much a distinct institution as it is simply a unique medium through which ideas can be delivered to an audience.

Historian Leonard Levy argues that the common understanding at the time of ratification was that freedom of speech and freedom of the press were thought of interchangeably.[240] The fact that nine states had protections for a free press supports Levy's thesis, according to Melville Nimmer, because it would be senseless to protect freedom of the press and not freedom of speech.[241] That the First Amendment contains references to both speech and press does not necessarily imply a two-tiered set of rights, at least according to Levy and Nimmer.[242] Perhaps the emphasis on the press was simply to recognize that the press was the principal venue for government criticism; it had undeniable social and political power, and the press—not unmediated *speech*—had been the primary target of punishment during the preceding century. Because many of the Framers were also regular contributors to publications,[243] they might have simply been declaring that the right to free expression reached both the contributor and the publisher.

After John Adams was selected to draft the Massachusetts Constitution, he included provisions protecting "freedom of speaking" and "liberty of the press."[244] This language parallels the First Amendment, and it too can be interpreted several ways. On one hand, the separation of these two phrases suggests that they may not be interchangeable. On the other hand, it is unclear whether Adams had in mind a separate set of constitutional protections for the press as an institution.

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239. *Id.* at 465 (quoting I.B. SCHWARTZ, 1 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 266 (1971)).

240. *See* LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 183–85 (1985).

241. *See* Nimmer, *supra* note 38, at 639–41.

242. *See id.*; LEVY, *supra* note 240, at 183–85.

243. *See, e.g.*, *infra* text accompanying notes 309–315.

244. DAVID MCCULLOUGH, JOHN ADAMS 221 (2001).

The text of the First Amendment does not yield definitive answers, even when looking to parallel provisions in state constitutions. What is certain is that the Framers intended to protect the freedom of all citizens to publicly express ideas regardless of medium. Most of the evidence also suggests that the Framers recognized that the press played a unique role in society.[245] It served as a "bulwark of liberty" that provided a check on those in power. Several questions remain, however. First, does the press serve the bulwark-of-liberty function merely by providing a vehicle for political dialogue and criticism of government, or did the Framers anticipate a more active press role? Second, even though the Framers clearly recognized a unique role for the press, did they intend to endow the institution or its practitioners with a special set of rights? Third, whom did the Framers see as the press? As another provision of the Pennsylvania Constitution reads: "The printing presses shall be free to every person who undertakes to examine the proceedings of the legislature, or any part of the government."[246] In this example, the press seems almost incidental—it is not an institution; it has no character, identity, or spirit. It is merely a useful technology, employable by "every person" who seeks to act as a bulwark of liberty.

Although revealing in some ways, the text of the First Amendment is sufficiently ambiguous that its meaning cannot be deduced without paying attention to the next step in the sequence: intent. As David Anderson explains, "[T]ext and meaning ultimately are inseparable; to understand what the Framers said, we inevitably seek to understand what they meant."[247]

B. Newsgathering and Intent

Although freedom of the press is a central feature of American democracy, the Supreme Court did not decide a case involving the press until 1931—almost a century and a half after the First Amendment was ratified.[248] The Press Clause laid dormant for 140

245. Indeed, most state constitutions prior to the ratification of the Constitution contained provisions protecting freedom of the press. *See* Anderson, *supra* note 38, at 464–66.

246. PA. CONST. art. I, § 7.

247. Anderson, *supra* note 38, at 462.

248. One reason for this was that the Supreme Court had held in earlier decisions that the Bill of Rights did not apply against state governments. *See* Patterson v. Colorado, 205 U.S. 454, 460 (1907); Fox v. Ohio, 46 U.S. (1 How.) 410, 434 (1847); Holmes v. Jennison, 39 U.S. (1 Pet.) 540, 582 (1840).

years before the Supreme Court, in *Near v. Minnesota*, struck down an injunction against a muckraking newspaper publisher.[249] In so doing, the Court breathed life into the Press Clause[250] and affirmed the principle that prior restraints on the press are presumptively unconstitutional.[251] In addition, *Near* was the first case in which the Supreme Court held that state governments have no more discretion than the federal government to restrict citizens' freedom of speech or press.[252]

To many, including scholar Zechariah Chafee, Jr., *Near* was merely the first step in a long process of charting the boundaries of press freedom.[253] But to others, *Near* was both the beginning and the end of free-press jurisprudence.[254] These individuals pointed to the work of historian Leonard W. Levy, which sought to debunk the "received hypothesis" that the First Amendment was designed to provide sweeping protection against restraints on expression, including subsequent punishments.[255]

Levy made four key points in his work, *Legacy of Suppression*. First, the libertarian philosophy of press freedom that had been advanced by Chafee, Justice Oliver Wendell Holmes, Jr., Justice Louis Brandeis, Justice Hugo Black, and others did not reflect the view of

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249. Near v. Minnesota, 283 U.S. 697, 722–23 (1931).

250. Although some previous cases dealt with material that was printed, see, e.g., Abrams v. United States, 250 U.S. 616 (1919) (pamphlets); Schenck v. United States, 249 U.S. 47 (1919) (mailed documents)—*Near* was the first case involving a traditional mass medium. It was also the first in which the Court addressed the meaning of the Press Clause, and the first in which the Court struck down as unconstitutional a government action restricting the press.

251. The Court conceded that there might be rare situations in which a prior restraint would be constitutional. Restrictions of obscene speech, speech that incites violence or speech that poses an immediate threat to national security might justify the use of a prior restraint. *Near*, 283 U.S. at 716.

252. *Id.* at 707. This was the first manifestation of the "incorporation doctrine." The Court held that because the Fourteenth Amendment prevents states from restricting "life, liberty and property," and because freedom of speech and press are among people's core liberties, the states have no more latitude to restrict those rights than does the federal government.

253. ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES 381 (1948). Chafee argued that freedom of the press meant much more than freedom from prior restraints. He attacked laws aimed at sedition and others that he thought contradicted the broad aims of the First Amendment.

254. Indeed, the Court reinforced this view in *Near* by noting that there was nothing to prevent aggrieved readers from bringing a suit for libel against Jay Near or others like him. *Near*, 283 U.S. at 628.

255. LEVY, *supra* note 236, at 309.

those who framed and ratified the First Amendment.[256] Levy argued that a libertarian view of press freedom did not emerge until the early 1800s in the wake of prosecutions under the Sedition Act of 1798.[257] Second, the Framers did not intend to eliminate the law of seditious libel or the traditional conception of press freedom as defined by Sir William Blackstone in his *Commentaries on the Laws of England*.[258] Blackstone wrote: "'The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous restraints* upon publications, and not in freedom from censure for criminal matter when published.'"[259] Levy argues that the First Amendment was designed to be nothing more than a codification of this principle.[260] Third, although prosecutions for seditious libel prior to the revolution were rare, colonial legislatures punished speech more repressively and more frequently than previous scholars had acknowledged.[261] Finally, according to Levy, the First Amendment was not penned to satisfy a deeply felt public concern for freedom of the press but was, like the rest of the Bill of Rights, merely "a lucky political accident."[262]

Levy's alternative thesis of the First Amendment provoked widespread criticism.[263] Some of it was not aimed at the strength of his scholarship, but at its practical consequences for the cause of press freedom.[264] Indeed, the "received hypothesis," whether credible or

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256. *Id.* at 214–15 ("Freedom of the press was everywhere a grand topic for declamation, but the insistent demand for its protection on parchment was not accompanied by a reasoned analysis of what it meant . . . .").

257. *Id.* at 258 (citing Act of July 14, 1798, 1 Stat. 596 (1798) (expired)).

258. LEVY, *supra* note 240, at 245–48.

259. *See id.* at 12 (quoting WILLIAM BLACKSTONE, 2 COMMENTARIES ON THE LAWS OF ENGLAND 151–52 (emphasis added)).

260. LEVY, *supra* note 240, at 309 (criticizing the early advocates of the libertarian view of falling victim to the "Anglo-American habit of going forward while facing backwards: rights that should exist are established on the fictitious pretense that they have ever existed").

261. Levy argued that, because many of the same legislators who were meting out punishments against colonial publishers were the same ones who debated and ratified the Bill of Rights, we should not assume that their conceptions of press freedom were any more expansive than the Blackstonian position. *Id.* at vii–viii.

262. LEVY, *supra* note 240, at xii Levy argues that the absence of a Bill of Rights was first trumpeted by the Anti-federalists who used it as a smokescreen to undermine support for the new Constitution. After it was passed, it was used by the Federalists to pander to public opinion and allay fears about excessive federal power.

263. *See, e.g.*, James Morton Smith, *Legacy of Suppression*, 20 WM. & MARY Q. 156 (1963) (book review).

264. Levy says his work "appalled some liberals" and that his critics feared that his work would be used as a justification for rescinding many of the protections the courts and legislatures had conferred on the press in the preceding decades. LEVY, *supra* note 240, at xvii.

not, was working just fine as a foundation for favorable court rulings.[265] But the critique of Levy's work was more substantial than the mere sour-grapes protests of press advocates. Levy himself retreated from some of his key propositions, writing a revised version of *Legacy* twenty-three years later, titled *Emergence of a Free Press*.[266] In this follow-up, Levy stood by many of his earlier conclusions but admitted he was wrong to contend that the "American experience with freedom of political expression was as slight as the conceptual and legal understanding was narrow."[267] Levy was so focused on the *law* of the press—which, among other things, permitted prosecutions for sedition—that he underappreciated the actual practices of the press, which he said "operated as if the law of seditious libel did not exist."[268] The press "scorchingly" and "contemptuously" ridiculed public officials, he said, and routinely filled their papers with calumny and rumor.[269] Jeffrey Smith remarked that, "No governmental institution, political faction, or individual was free from attacks such as few newspapers today would dare to print."[270] The brazen, outrageous, and fiercely partisan press of the time was *in practice* as free as it had ever been, and perhaps as free as it ever would be.[271]

He also notes that Justice Hugo Black, whom Levy says was "innocent of history when he did not distort it or invent it" wrote in a letter to a friend that *Legacy* was "probably one of the most devastating blows that has been delivered against civil liberty in America for a long time." *Id.* at xviii.

265. Between the Court's 1931 ruling in *Near v. Minnesota*, 283 U.S. 697 (1931) and the 1960 publication of *Legacy of Suppression*, the libertarian view of the First Amendment had begun its ascendancy and it was beginning to find expression in the opinions of the Court. *See, e.g.*, Burstyn v. Wilson, 343 U.S. 495 (1952) (extending First Amendment protection to motion pictures); Terminiello v. Chicago, 337 U.S. 1 (1949) (narrowing the "fighting words" exception to the First Amendment); W. Va. St. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (striking down a flag-salute statute as a violation of the First Amendment); Grosjean v. Am. Press Co., 297 U.S. 233 (1936) (striking down a tax law that imposed special burdens on the press). All of these were precursors to the most important catalyst for libertarian press theory. N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964) (requiring public officials suing for libel to prove the defendant acted with actual malice and rejecting the legitimacy of seditious libel).

266. LEVY, *supra* note 240, at x–xi.

267. *Id.* at x.

268. *Id.*

269. *Id.*

270. JEFFREY A. SMITH, PRINTERS AND PRESS FREEDOM 5 (1988) (quoting Merrill Jenson, *Legacy of Suppression*, 75 HARV. L. REV. 456, 457 (1961) (book review)).

271. We might like to think the press today operates with greater freedom than it did two centuries ago, but when one considers the burdens imposed on the modern media by civil suits for libel, privacy, and other torts, as well as the regular issuances of subpoenas, a case could be made that the media today are less free—or at least they behave less freely—than the press of the Revolutionary period.

It is true, however, that during the Revolutionary period the Tory or loyalist presses were regularly attacked (verbally and physically), which led Levy to ask "whether there was free speech during the Revolutionary era if only the speech of freedom was free."[272] But this statement should only temper and not obscure the undeniable fact that the press of the Revolutionary period was "uninhibited, robust and wide-open."[273] And it is implausible that the Framers' vision of the future included a press with less freedom than the press they knew. The notion that the Framers viewed the First Amendment exclusively as a barrier against the imposition of prior restraints is specious, because prior restraints had all but vanished in the colonies after the end of press licensing in the 1720s.[274] Why would the principal concern of the Framers have been the protection of a right that had not been restricted for more than seventy years?[275]

It is also false, or at least an overstatement, to suggest as Levy did that no libertarian press ideology had evolved by the time of the First Amendment's ratification, as it had in England, and that the Framers therefore did not have a well-conceived notion of the meaning of freedom of the press. Levy observed that there were only two significant sources of libertarian press ideology during the colonial and Revolutionary periods. The first was the argument of lawyer Andrew Hamilton in his defense of Printer John Peter Zenger, who had been charged with seditious libel in 1735.[276] Zenger was acquitted by a jury that audaciously defied the judge's explicit instructions.[277] The second was the widespread publication of John Trenchard and Thomas Gordon's essay "On Freedom of Speech"—one of the essays

272. LEVY, *supra* note 240, at xii.

273. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964). This phrase comes from Justice Brennan's opinion for the court in which, in dicta, he rejected the constitutionality of the Sedition Act, saying, "Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history." *Id.* at 276 (internal citations omitted).

274. *See* LEVY, *supra* note 240, at 36–37, 49.

275. Levy later conceded this point, noting that "freedom of the press *merely began* with its immunity from previous restraints." LEVY, *supra* note 240, at xi (emphasis added).

276. *See* LEONARD W. LEVY, FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON 43–62 (1966). For a more comprehensive account of the case, see VINCENT BURANELLI, THE TRIAL OF JOHN PETER ZENGER (1957).

277. *See* Nathan Seth Chapman, Note, *Punishment by the People: Rethinking the Jury's Political Role in Assigning Punitive Damages*, 56 DUKE L.J. 1119, 1128 (2007) (noting that despite the judge's instruction to only consider the factual question of whether or not Zenger published the allegedly libelous material, and to not consider its legality, the jury acquitted Zenger in what was an historic act of jury nullification).

collectively known as *Cato's Letters*.[278] The absence of other examples led Levy to conclude that freedom of expression must not have been a serious concern of the Framers and their contemporaries.[279]

But Cato and Zenger had more than momentary significance. The bold actions of the jury in the Zenger trial, as well as Hamilton's arguments in that case, became part of the Revolutionary folklore.[280] Though Zenger's case did not change the law of libel, it provided a catalyzing example of a subversive spirit and helped fortify the press' efforts to monitor colonial overseers.[281] *Cato's Letters*, a collection of radical Whig essays first published in the colonies by Benjamin Franklin in 1722, were even more influential.[282] Those essays were excerpted in hundreds of publications and were quoted ad nauseam by patriot leaders.[283] *Cato's Letters* were part of the ideological backbone of the Revolution, and the essay on freedom of speech was the most venerated statement of the eighteenth century on the liberty of the press.[284] Its "bulwark of liberty" language became the printer's mantra and those words were incorporated into several state constitutions as well as Madison's initial draft of the First Amendment.[285] So, even if few other prominent sources of libertarian press ideology existed during this period, they were hardly necessary.

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278. John Trenchard & Thomas Gordon, *Of Freedom of Speech: That the Same is Inseparable from Public Liberty*, *in* 1 CATO'S LETTERS: ESSAYS ON LIBERTY, CIVIL AND RELIGIOUS, AND OTHER IMPORTANT SUBJECTS 86 (1733) ("Freedom of speech is the great bulwark of liberty; they prosper and die together.").

279. *See* LEVY, *supra* note 240.

280. Levy acknowledges that James Alexander's account of the trial, "A Brief Narrative of the Case and Tryal [sic] of John Peter Zenger," was, "with the possible exception of *Cato's Letters*, the most widely known source of libertarian thought in England and America during the eighteenth century." LEVY, *supra* note 240, at 130.

281. *See* MICHAEL EMERY ET AL., THE PRESS AND AMERICA: AN INTERPRETIVE HISTORY OF THE MASS MEDIA 40 (2000) (noting that even though the Zenger case did not change the law of libel, it enunciated the principle that the people have the right to criticize their governors and that it is perhaps no coincidence that there is no record of any seditious libel case in a colonial court after 1735).

282. Franklin first published the essay *On Freedom of Speech* after his brother James had been imprisoned for publishing something that offended the Massachusetts Legislature. LEVY, *supra* note 240, at 113, 119.

283. SMITH, *supra* note 270, at 25 ("Cato's Letters were published and republished for decades in Britain and were immensely popular in America, where journalists and political theorists praised and imitated the authors.").

284. CLINTON ROSSITER, SEEDTIME OF THE REPUBLIC 141 (1953) ("No one can spend any time in the newspapers, library inventories, and pamphlets of colonial America without realizing that Cato's Letters rather than Locke's Civil Government was the most popular, quotable, esteemed source of political ideas in the colonial period.").

285. *See supra* text accompanying notes 229–231.

Jeffrey Smith points out that in fact there was a "lucid and dynamic" free press ideology at the time of the First Amendment's ratification.[286] This ideology developed from a combination of radical Whig philosophy emphasizing the connection between public knowledge and political freedom, and broader liberal and Enlightenment political philosophies, which rejected the divine right of kings, emphasized reason over orthodoxy, and put faith in the individual as an autonomous political actor.[287]

The contention that the Framers had no intention of eliminating the law of seditious libel has more support, and it was one of the conclusions from *Legacy* that Levy defended in *Emergence*.[288] It is true that the writers of the Revolutionary period, even the most libertarian—"Cato," Tunis Wortman, even Thomas Jefferson—would often temper their free-press advocacy with a caveat suggesting some limit to the freedom.[289] The Pennsylvania Constitution is representative in that it protects people's ability to "freely speak, write or print on any subject, *being responsible for the abuse of that liberty*."[290] But these caveats are merely acknowledgements that freedom of the press is not absolute, something nearly every writer, judge, scholar, and critic has conceded over the past two centuries.[291] Also, during Senate debate over the language of the First Amendment, a motion was made to qualify Madison's phrasing to include a provision saying press freedom should be protected "in as ample a manner as hath at any time been secured by the common law."[292] This motion's failure is evidence that the First Amendment was not designed merely to codify the common law.[293]

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286. SMITH, *supra* note 270, at vii–viii.

287. *Id.* at 42–53.

288. LEVY, *supra* note 240, at xii.

289. *See* 7 THE WRITINGS OF THOMAS JEFFERSON 98 (ALBERT ELLERY BERGH & ANDREW A. LIBSCOMB eds., 1907) ("A declaration that the Federal Government will never restrain the presses from printing anything they please will not take away the liability of the printers for false facts printed.").

290. PA. CONST. art. I, § 7 (emphasis added).

291. Although some have taken the view that the First Amendment provides an absolute shield against government interference with speech, see, e.g., Lyle Denniston, *Absolutism: Unadorned and Without Apology*, 81 GEO. L.J. 351 (1992), few, if any, have suggested that "speech" be defined so broadly as to fully immunize every expressive act or utterance, including the shouting of "fire" in a crowded theatre, to use Justice Oliver Wendell Holmes, Jr.'s familiar example. Schenck v. United States, 249 U.S. 47, 52 (1919).

292. Anderson, *supra* note 38, at 480 (quoting JOURNAL OF THE FIRST SESSION OF THE SENATE 70 (1789)).

293. Smith adds that there was widespread opposition to the crime of seditious libel prior to the First Amendment's ratification, and that although most writers agreed that people should

Some suggest that the clearest evidence of the Framers' narrow conception of press freedom was the passage of the Sedition Act in 1798.[294] Why would the Federalists, many of whom participated directly in the framing, passage, or ratification of the First Amendment, be so indifferent to free-press interests in 1798 if they had an expansive notion of press freedom in 1791? The answer is simple. If the Framers all agreed upon one thing, it was that power is inevitably abused—particularly where concentrated or unchecked.[295] It is a natural and inescapable human tendency that the Constitution—with its focus on limited government, enumerated powers, and checks and balances—and the Bill of Rights—with its focus on preserving individual autonomy against government intrusion—were designed to guard against. That the Federalists sought to usurp these constitutional protections *after* ratification of the Bill of Rights simply confirms what the Framers—both Republicans and Federalists—understood and anticipated *prior to* the ratification. As James Madison opined in *Federalist 51*, men are not angels; if they were, "neither external nor internal controls . . . would be necessary," and indeed, neither would government.[296] Thomas Jefferson subsequently exonerated all those who were prosecuted under the Sedition Act, and Congress later repaid the fines,[297] which suggests that the law was more likely an anomalous political overreach than an expression of broad indifference to First Amendment interests.

In assessing the Framers' intent, the focus should be on what they said and wrote before the Constitution was adopted—before their judgments were clouded by politics and practicalities; before they had

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have legal recourse to defend their personal reputations, the proper remedy was a civil suit for damages. *See* Smith, *supra* note 263, at 74–77.

294. *See supra* note 250. The Sedition Act made it a crime—punishable by a fine of up to $2,000 and a prison sentence of up to two years—to publish any "false, scandalous and malicious writing or writings against the government of the United States . . . with intent to defame the said government . . . ." JAMES MORTON SMITH, FREEDOM'S FETTERS 441–42 (1956). There were fourteen prosecutions under the Act, all targeting the Republican or opposition press and ten convictions. After Thomas Jefferson assumed the presidency, he and Congress allowed the law to expire, and Jefferson pardoned those in jail and exonerated those awaiting trial. EMERY ET AL., *supra* note 281, at 72.

295. *See* Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RESEARCH J. 521, 528 (1977) (noting that the Framers saw the First Amendment as essential in "checking the inherent tendency of government officials to abuse the power entrusted to them").

296. THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

297. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 276 (1964).

emerged from what John Rawls describes as the "original position."[298] It is in that position, in which the Framers did not know whether they would be the wielders or the subjects of the powers they were creating, that their natural inclination toward self-aggrandizement yielded to more extrinsic interests.

Although Levy and other critics have provided a healthy antidote to the most idealized characterizations of original intent, they overstate their case. It is clear that the Framers believed strongly in individual autonomy; they believed the press should play an important watchdog role; and they believed the press should be uninhibited, robust and wide open, although certainly not completely unrestrained or beyond the reach of the law.

How the Framers felt about the right to gather news is more difficult to gauge, because newsgathering practices had not yet evolved into the sophisticated set of techniques and standards that are familiar today. If newsgathering was defined broadly as the search for and acquisition of newsworthy information for the purpose of communicating it to others, then newsgathering is, in fact, as old as human civilization. Even if that definition is too broad, one must concede that newsgathering has been conducted in America for as long as there have been news media, and certainly well before ratification of the First Amendment.

In 1690, in the first edition of the first newspaper ever published in the American colonies, printer Benjamin Harris made a bold statement to his readers about his newsgathering practices. Harris wrote that his new publication, *Publick Occurrences Both Forreign and Domestick ("Publick Occurrences")*, would not merely serve as a vehicle for his personal reflections on the world but would seek to apprise people of all newsworthy information, relying on only the best sources.[299] He promised readers that "[this publisher] will take what pains he can to obtain a Faithful Relation of all such things; and will particularly make himself beholden to such Persons in Boston whom he knows to have been for their own use the diligent Observers of such matters."[300] He added later that he would only publish what he knew to be true, "repairing to the best fountains for Information."[301]

298. *See* JOHN RAWLS, A THEORY OF JUSTICE 136–42 (1971).
299. JAMES MELVIN LEE, HISTORY OF AMERICAN JOURNALISM 10 (1923).
300. *Id.*
301. *Id.*

The royal governor banned *Publick Occurrences* after its first issue,[302] and it would be fourteen years before the appearance of the next colonial paper, Boston's *News-Letter*, in 1704.[303] John Campbell published the *News-Letter*, relying on the part-time services of several correspondents in New York, Newport, Portsmouth, Philadelphia, and Salem to supply the paper with much of its news.[304] The paper's contents were often prosaic (arrival dates of ships, accidents, court actions, storm reports),[305] but Campbell did rely on *sources*, just as Harris had promised to do. In several instances, the paper provided detailed coverage of more newsworthy events.[306] In at least a limited sense, then, Harris and Campbell, the colonies' first newspaper publishers, were also its first newsgatherers.

Colonial printers and publishers relied on sources in a manner similar to how modern reporters do, although perhaps less formally and less frequently. In addition to at least occasionally consulting with sources, most colonial papers had relationships with contributors who wrote essays pseudonymously. This was a common practice in the early papers and continued throughout the eighteenth and much of the nineteenth centuries.[307] The most famous political tracts of the colonial period, the radical Whig essays of Gordon and Trenchard, were published under the pseudonym "Cato."[308] During the Revolutionary period, anonymous essays abounded in the press.[309] Thomas Paine's famous tract attacking slavery was published in the *Philadelphia Journal* under the name "Humanus."[310] Paine's *Common Sense* was also published pseudonymously, and in fact was later attacked by College of Philadelphia Provost William Smith under the

302. *Id.* at 9.

303. *Id.* at 17, 19.

304. FRANK LUTHER MOTT, AMERICAN JOURNALISM 50 (1962). Note, however, that these were not correspondents in the contemporary sense. They were not paid or identified in print, and their reports were sporadic. They were primarily postmasters from other cities. Other early papers also relied on correspondents, including the *Boston Gazette* and the *Pennsylvania Gazette*. *Id.*

305. LEE, *supra* note 299, at 12.

306. Campbell, for example, provided detailed, first-hand accounts of the hanging of six pirates in 1704, which were published in a special edition of the paper. *Id.* at 24.

307. *See* HAZEL DICKEN-GARCIA, JOURNALISTIC STANDARDS IN NINETEENTH-CENTURY AMERICA 67 (1989) (noting that reporters rarely identified their sources, "even as late as the 1890s").

308. *See supra* text accompanying note 278.

309. *See generally* LEVY, *supra* note 240 (discussing several authors who submitted writings using a pseudonym).

310. *See* MOTT, *supra* note 304, at 91 & n.36.

name "Cato."[311] Paine rebutted Smith in the *Pennsylvania Packet* as "The Forester."[312] John Adams, John Dickenson, and Samuel Adams all published anonymous essays that were instrumental in the Revolutionary campaign.[313] Even the great essays of Madison, Hamilton, and Jay, which urged ratification of the newly minted Constitution and ultimately became known as the *Federalist Papers*, were first published in the *New York Independent Journal,* and later scores of other papers, under the pseudonym "Publius."[314] These essays provide a handful of examples of a practice that was a defining feature of American journalism and one that remains so today.[315]

Printers' relationships with anonymous contributors were similar to today's confidential reporter–source relationships in that the printers usually understood that the contributors' identities were to be kept confidential, though in many cases the identities of the anonymous authors were widely known or could be deduced from their writings.[316] But in some instances in which the author's identity was unknown, the targets of printed criticisms sought to discover the author's identity.[317] Importantly, many of those demands were challenged or ignored.[318] In 1765, during the controversy over the Stamp Act, a person or group signing as "Freedom" submitted a letter to the clerk of the House in New York that accused its members of not supporting "public Liberty."[319] The Assembly then requested that the governor offer a reward of fifty pounds to anyone who would reveal the identities of the authors of the "Libellous, Scandalous, and

311. *Id.* at 91.

312. *Id.*

313. *Id.* at 89.

314. Clinton Rossiter, *Introduction* to THE FEDERALIST PAPERS, at viii (Clinton Rossiter ed., 1961).

315. Most contemporary publications include bylines on works submitted by others (letters to the editor, columns, Op/Ed pieces), which is unlike the practice in the Revolutionary era. But the news is still replete with information and quotations from unidentified sources, and much of the material on blogs is published anonymously or without precise attribution.

316. *See* LEVY, *supra* note 240, at 206 (citing ROBERT L. BRUNHOUSE, THE COUNTER-REVOLUTION IN PENNSYLVANIA, 1776–1790 (1942)).

317. *See id.* at 62–83.

318. Dwight L. Teeter, for example, notes that "[t]he pennames of the men who wrote for the newspapers concealed some of Pennsylvania's—and America's—most renowned politicians" and that "[p]olitical power helped to shield the printers from punishment." Dwight L. Teeter, *Press Freedom and the Public Printing: Pennsylvania 1775–83*, 45 JOURNALISM Q. 445, 448–49 (1968).

319. *See* LEVY, *supra* note 240, at 64.

Seditious" letter.[320] This was a substantial reward, but no one responded.[321]

In 1769, after the Governor offered a 150-pound reward for the identity of the author of two handbills that attacked the New York Assembly, a journeyman printer in the shop that produced the handbills came forward to claim the money and identified the printer's owner, James Parker, as publisher of the handbills.[322] Parker was questioned, and though he initially balked at having to identify the handbills' author, he ultimately relented after interrogation and threats of imprisonment and the loss of his job as comptroller of the post office.[323] Parker identified the author as Alexander McDougall, who was subsequently tried for seditious libel.[324]

Even more revealing are the actions of *New-Jersey Gazette* editor Isaac Collins, who published an anonymous essay in 1779 satirizing Governor William Livingston.[325] The governor's Council demanded that Collins reveal the author's name, but he refused.[326] As Leonard Levy explains, Collins then wrote a letter to the Council explaining his decision and pointing out that "if he gave up the name of the author without his permission, he would not only be betraying a trust; he would 'be far from acting as a faithful guardian of the press.'"[327] The Council voted seventeen-to-eleven against taking further action against Collins.[328] Five years later, Livingston himself wrote an anonymous essay in the *Gazette* under the name "Scipio," and after Collins was again pressured to reveal the author's identity, Livingston, using the same penname, responded with a series of articles defending anonymous writings and their importance to press freedom.[329]

These few anecdotes do not provide conclusive evidence of a pervasive appreciation for newsgathering or the sanctity of reporter–source relationships. But they do help dispel the notion that prior to the First Amendment, printers had no such conceptions. Scholars like Don Pember are probably correct when they say "[n]ews-gathering,

320. *Id.*
321. *Id.*
322. *Id.* at 76.
323. *Id.* at 76–77.
324. *Id.* at 77.
325. *Id.* at 189.
326. *Id.*
327. *Id.*
328. *Id.*
329. *Id.* at 189–90.

reporting, access to government information as we speak of it today was not really an important part of the American press of that era."[330] But it is just as misleading to suggest that printers during this period did not gather news, did not have relationships with sources, and did not appreciate source confidentiality.

With respect to history and the Framers' intent, a few points seem clear. First, the Framers and their contemporaries understood that the press plays a vital role in checking government abuses and in providing a forum for individual expression.[331] There is no evidence, however, that they saw the press—that is, the institutional class of printers—as requiring special rights that other individuals or groups did not possess. It was not the unique skill, identity, or character of printers that the Framers sought to protect; it was the function they served and the vehicle they provided for individuals' expression that warranted protection. This view augers for the kind of egalitarian conception of the press described earlier—one that emphasizes conduct over credentials and that encompasses bloggers and others whose practices parallel those of the printers and pamphleteers of the Revolutionary era.[332] Second, printers during this period did engage in newsgathering activity and did consult with sources.[333] Moreover, they respected the special nature of their relationship with sources and in some instances refused to divulge the names of their anonymous contributors in the face of considerable government pressure.[334] Protections like the reporter's privilege, then, have a substantial historical foundation that should not be overlooked. Third, the Framers almost certainly did not anticipate the First Amendment being used as a vehicle for access to government records or proceedings. Other than the criminal courts, which had been open to the public for centuries in both the colonies and England, the Framers' experience with open government was almost non-existent, and there is certainly no evidence that they viewed access as a constitutional requirement.[335] The arguments to the contrary are

330. Don R. Pember, *Founders (Meeting in Secret) Protected Our Right to Publish, but Not to Gather the News*, BULL. AM. SOC'Y NEWSPAPER EDITORS, Dec. 1978–Jan. 1979, at 6.

331. *See generally* Blasi, *supra* note 295.

332. *See supra* Part I.B.

333. *See supra* text accompanying notes 299–315.

334. *See supra* text accompanying notes 316–329.

335. Neither the proceedings of the Continental Congress nor the Constitutional Convention were open to the public, the U.S. Senate did not open its doors until 1794, and according to historian Harold Nelson, the colonial legislatures only admitted the public when

usually built around a set of indefinite statements from Madison and others[336] that, although clearly supporting access as a kind of civic virtue, did not suggest that it is constitutionally mandated.[337]

All of these conclusions are based on an analysis of text and intent. But further clarity can be sought by reading the First Amendment and interpreting the historical record in light of the Constitution's broader structure and rhetorical framing.

C. Newsgathering and Structure

In applying the sequential approach to the First Amendment, it is necessary to step back from these sources and consider whether the rights sought flow naturally from the general tenor of the Constitution. Rights not explicitly stated in the Constitution may nevertheless be recognized where they are consistent with the constitutional grammar that shapes the entire document. In this context, the question is whether a right to gather news is compatible with the framework of rights outlined in the Constitution.

In assessing the meaning of the Speech and Press Clauses of the First Amendment, several structural characteristics of the broader document must be considered. One is that the Constitution was plainly composed to preserve negative freedom—that is, freedom *from* government.[338] The Constitution and the Bill of Rights do not

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"the revolutionaries could make propaganda out of [it]." Harold L. Nelson, *Separating the Inseparable? Linking News-Gathering with Publishing Called "Dubious,"* BULL. AM. SOC'Y NEWSPAPER EDITORS, Dec. 1978–Jan. 1979, at 7.

336. *See, e.g.*, Dyk, *supra* note 38, at 959 (suggesting that the Framers recognized the importance of access). Dyk quotes Cato's essay on "Freedom of Speech," which states, "[I]t is in the Interest, and ought to be the Ambition, of all honest magistrates, to have their Deeds openly examined, and publickly [sic] screened . . . ." *Id.* He also quotes James Madison, who wrote that to "'freely examine public characters and measures, and of free communication thereon' was 'the only effectual guardian of every other right.'" *Id.* Both of these statements can be read, however, as seeking only a right to openly criticize and hold accountable through expression, not as a right of access to monitor officials' daily activities.

337. Nelson, *supra* note 335, at 7.

338. The main body of the Constitution, for example, carefully delimits the powers of the various branches and only allows government officials to exercise the authority specifically granted to them. *See, e.g.*, U.S. CONST. art. I, § 8 (identifying the so-called enumerated powers of Congress). In addition, the Bill of Rights provisions are presented as a list of prohibitions—things the government may not do—as opposed to a list of actions it must take or obligations it must fulfill on behalf of the people. *See, e.g.*, U.S. CONST. amend. I ("Congress shall make no law . . . ."); U.S. CONST. amend. II ("[T]he right of the people to keep and bear Arms, shall not be infringed."); U.S. CONST. amend. III ("No soldier shall . . . be quartered in any house . . . ."); U.S. CONST. amend. IV ("The right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated . . . ."); U.S. CONST. amend. V ("No person shall be held to

compel the government to guarantee specific things to individuals (e.g., property, health care, employment, education) nor to protect private parties from each other.[339] The founding documents identify the government's powers, with an emphasis on the limits of those powers, and impose a set of restraints on government authority to intrude into the lives of sovereign people. None of the rights in the Bill of Rights can be properly characterized as affirmative, particularly the First Amendment ("Congress shall make no law").[340] Thus, in interpreting the First Amendment, the arguments for rights of access to government records or proceedings are invariably strained, in part because they require the application of an interpretive template that recasts the First Amendment in ways that are inconsistent with both the language of the Amendment and the language used throughout the Constitution. The Constitution's negative construction suggests only that the government must not interfere with individuals' expressive freedom, not that it must affirmatively assist their acquisition of knowledge or facilitate access to communications media.[341] And proposals for rights of access to the media, even if they find support from some theory of free expression, would require an abandonment of this key structural characteristic of the Constitution.[342] Legitimate bases remain upon which to recognize constitutional rights of access,[343] but they find no support from a structural analysis of the Constitution.

Another structural characteristic of the Constitution is that it is fundamentally an expression of support for individual autonomy. Clearly, the First Amendment prohibits most direct restraints on individual expression, but the tenor and shape of the Constitution also suggest that government actions that interfere with individual or institutional autonomy—particularly those which intimidate speakers or otherwise inhibit expressive or investigative acts—ought to be

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answer . . . ."); U.S. CONST. amend. VIII ("Excessive bail shall not be required . . . nor cruel and unusual punishment inflicted.").

339. The Constitution only addresses the powers of the federal government and the limitations on those powers.

340. U.S. CONST. amend. I.

341. Similarly, the fact that the government is prohibited from forcing a citizen to surrender his arms or to quarter troops in his home does not mean it is obligated to supply him with weapons and a home in the first place. Nor does the First Amendment's prohibition of government suppression of religious expression compel the government to facilitate that activity by constructing places of worship.

342. For more on the negative rights construction, see *supra* Part I.C.

343. *See supra* text accompanying notes 170–173.

sharply scrutinized.[344] For this reason, the Court should have treated differently the protections sought by the media litigants in *Branzburg*, *Zurcher*, *Herbert*, and *Cohen*. For example, in *Branzburg* and other reporter's privilege cases decided by the lower courts, the privilege is often framed as little more than a demand by journalists to be excused from the normal obligations of citizenship.[345] When presented that way, the conclusion is simple: Journalists are not above the law and are not entitled to any extraordinary protections.

Yet the reporter's privilege is really about government interference with the private, confidential relationships between journalists and their sources. The privilege should therefore be conceived of as a negative right, shielding journalists (defined broadly) from government encroachments. The same analysis should be applied in cases involving newsroom searches, inquiries into journalist's editorial processes, and journalists' decisions about the violability of their own agreements with sources.[346] But it is clear that the courts deciding these cases have overlooked or minimized the autonomy principle and how destructive these government intrusions can be to the independence and intrepidity of journalists.

A third key structural characteristic of the Constitution is its emphasis on equality. None of the rights protected in the Constitution and Bill of Rights is conferred only on a particular class of citizens. Constitutional rights can be invoked by any citizen, provided the citizen is engaged in the underlying behavior that the right was designed to protect.[347] Thus, any claim that the First Amendment supports recognition of special rights available only to the "institution of the press," as Justice Stewart suggested, is contradicted by this equality principle.[348] Such a claim is also

344. The negative rights framing of the Constitution and Bill of Rights, and the latter's clear emphasis on individual autonomy from the state suggests that a broader zone of freedom from the government ought to be recognized—one that does more than merely prohibit direct suppression of speech. There are indirect actions that government can take that produce the same pernicious effects. *See supra* note 77.

345. 408 U.S. 665, 682 (1972) ("The sole issue before us is the obligation of reporters to respond to grand jury subpoenas as other citizens do."). *See also* 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 . . . is a journalist.").

346. *See infra* Part IV.A.

347. In the case of the First Amendment, this means that the citizen was gathering information of public interest for the purpose of communicating to an audience.

348. Justice Stewart might have challenged this seeming contradiction by pointing to the fact that the institution of "the press" was clearly identified in the text of the First Amendment. Thus, those rights can safely be awarded only to certain groups, much like, for example, Sixth

incompatible with the explicit language of the Constitution's Preamble, the Privileges and Immunities Clause of the Constitution, the Privileges or Immunities Clause of the Fourteenth Amendment, and the Equal Protection Clause of the Fourteenth Amendment.[349] This ethos of equality reinforces the adoption of egalitarian definitions of "journalist" and "the press" that do not condition rights on the status, credentials, experience, or professional standing of those engaged in newsgathering and dissemination.

On the other hand, a structural analysis provides little support for a right of access to government information or proceedings or of other affirmative rights under the First Amendment. Similarly, there is little support for the notion of special rights for the press, as Justice Stewart urged,[350] at least where the press is defined as a preferred class based on attributes other than the function they are performing. The structural analysis does however, support those who urge for recognition of a reporter's privilege and other protections that preserve reporters' investigative and expressive activity.

D. Newsgathering and Context

The preceding analysis suggests that there is substantial constitutional support for recognizing a broader right to gather news than the narrow right identified by the Supreme Court,[351] and that this conclusion is defensible even without considering the contextual factors described next. The text, history, and structure of the First Amendment and Constitution provide a sufficient foundation for protecting journalists' ability to preserve confidential source relationships, repel newsroom searches and refuse to fully comply

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Amendment rights were designed specifically to protect criminal defendants, and Third Amendment rights were specifically designed to protect homeowners. But this interpretation is built on the assumption that the Framers used the phrase "the press" to refer to a particular institution or class of speakers and not merely to the medium or the phenomenon of "the press." The evidence, though not uniform, favors the latter interpretation.

349. *See* U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws."); THE DECLARATION OF INDEPENDENCE, para. 2 ("We hold these Truths to be self evident, that all Men are created equal . . . .").

350. *See* Stewart, *supra* note 38, at 636.

351. Despite its statement that "without some protection for seeking out the news, freedom of the press could be eviscerated," Branzbrug v. Hayes, 408 U.S. 665, 681 (1972), the Court has not recognized any protections for newsgathering, except the right of the press and the public to attend certain judicial proceedings.

with government inquiries into their editorial processes, among other things. Still, there are some protections that find less support from those sources but that might nevertheless be worthy of recognition, because they are essential to the exercise of other rights, or because they involve culturally embedded practices that are part of widely held conceptions of individual liberty.

Undoubtedly, newsgathering activity is an accepted, culturally embedded practice. Newsgathering is as old as the press itself, and it cannot be prohibited entirely without destroying the "bulwark" function of the press. Even though newsgathering had not fully evolved by the time of the First Amendment's ratification, it has grown more sophisticated and is now an essential component of contemporary notions of press freedom.

Reporters have relied on sources since the earliest days of journalism, and independent observation of news events has been practiced since at least the late 1600s.[352] During the Civil War period, these and other newsgathering techniques became more standardized.[353] Unlike many of their predecessors, Civil War reporters relied on eyewitnesses, conducted interviews, and built their stories around multiple sources.[354] In addition, Hazel Dicken-Garcia notes that "[r]eporters also cultivated high-ranking officials to maintain good relations and keep access to sources open."[355]

Reporters during this period also took seriously their obligations to their sources and took pains to protect sources' identities.[356] In 1851, John Nugent of the *New York Herald* became the first reporter to claim a privilege when he was jailed for contempt of Congress after refusing to identify the source who leaked to him a secret draft of a proposed treaty.[357] Maryland became the first state to pass a shield law to protect journalists' confidentiality agreements in 1896.[358] In

352. *See supra* text accompanying notes 295–311.

353. *See* DICKEN-GARCIA, *supra* note 307, at 51.

354. *See id.* at 53–55.

355. *Id.* at 55.

356. Dicken-Garcia notes that reporters did not identify their sources in their stories throughout most of the nineteenth century and that reporters' bylines rarely appeared until the Civil War period and that this omission was part of "journalists' 'protected' status." *See id.* at 67–68.

357. *See* Mary-Rose Papandrea, *Citizen Journalism and the Reporter's Privilege*, 91 MINN. L. REV. 515, 533 (2007).

358. *See* Bruce Bortz & Laura Bortz, *'Pressing' Out the Wrinkles in Maryland's Shield Law for Journalists*, 8 U. BALT. L. REV. 461, 462 n.10 (1979).

this sense, most of the core professional practices today are not modern-day creations, but have been practiced for hundreds of years.

There is also a long tradition of investigative journalism in the United States.[359] Hazel Dicken-Garcia points out that during the Civil War, Northern reporters used disguises to avoid being detected while working in the South.[360] This subterfuge provided an early model for the investigative reporters who proliferated at the end of the century.[361] In 1880, Henry Demarest Lloyd published a series of magazine articles exposing corruption in business and politics.[362] Other "muckrakers" emerged in the early part of the twentieth century: Lincoln Steffens, who found evidence of widespread graft in America's cities;[363] Ida Tarbell, who revealed the abuses of Standard Oil Company;[364] and Upton Sinclair, whose investigations brought attention to unsanitary meat-packing practices in Chicago.[365] Other reporters followed their lead and over the course of the twentieth century investigative reporting became one of the principal components of mainstream American journalism.

In some cases, these investigations involved undercover reporting and other deceptive practices. In 1887, Nelly Bly (Elizabeth Cocheran) feigned insanity to expose inhumane conditions at Blackwell's Island Asylum.[366] Eighty-five years later, a young WABC reporter named Geraldo Rivera entered the grounds of a similar facility, the Willowbrook State School, to expose the poor treatment

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359. *See* James Aucoin, *Investigative Journalism*, *in* AMERICAN JOURNALISM: HISTORY, PRINCIPLES, PRACTICES 210 (W. David Sloan & Lisa Mullikin Parcell eds.) (2002) ("Although 'investigative journalism'—as practiced by professional journalists today—began in about the 1920s, there has been an investigative spirit burning in American journalism ever since the colonial period.").

360. *See* DICKEN-GARCIA, *supra* note 307, at 55.

361. *Id*.

362. These articles were *The Story of a Great Monopoly* and *The Political Economy of Seventy-Three Million Dollars*, published in 1881 and 1882 respectively, in the *Atlantic Monthly*, and *Making Bread Dear* and *Lords of Industry*, published in 1883 and 1884 respectively, in the *North American Review*. Some consider Lloyd to be America's first investigative journalist.

363. *See generally* LINCOLN STEFFENS, THE SHAME OF THE CITIES (1904). This book is based on Steffens' articles originally published in *McClure's*.

364. *See generally* IDA TARBELL, HISTORY OF STANDARD OIL COMPANY (1904). This book is based on Tarbell's articles originally published in *McClure's*.

365. *See generally* UPTON SINCLAIR, THE JUNGLE (1905).

366. Bly wrote a series of articles that first appeared in the *New York World* on Oct. 9, 1887. Bly's series was later published in book form as *Nellie Bly's Ten Days in a Mad-House*. *See generally* BROOKE KROEGER, NELLY BLY: DAREDEVIL, REPORTER, FEMINIST 85–89 (1994).

of its mentally disabled patients.[367] Scores of other undercover techniques, including hidden cameras and microphones, have become commonplace over the past century, whether their use is in all contexts legal or ethical.[368] How is all of this relevant to the constitutionality of restrictions of newsgathering activity? To the extent that the previous analyses of text, history, and structure provide a sufficient basis for recognizing newsgathering protections, these contextual considerations are unnecessary, although they certainly reinforce the earlier conclusions. If, however, the text, history, and structure are inadequate, then some attempt should be made to evaluate the current cultural context and the public's expectations.

It would clearly be unconstitutional, for example, for Congress to pass a law prohibiting people from conducting interviews (at least for the purpose of disseminating the information to others). Whether or not the text, history, or structure of the Constitution would prohibit such a law, the law would punish activity that is essential to the full exercise of the right to freedom of the press and it would forbid a practice that is "basic in our scheme of [First Amendment] values."[369] The ability of journalists, and all citizens, to interact with others and to acquire new information and ideas is an elemental prerequisite for the meaningful exercise of expressive freedom. That ability should be protected even though the act of interviewing someone is not, by itself, expressive. The same argument could be made to challenge laws prohibiting undercover reporting. Undercover reporting techniques are part of contemporary conceptions of freedom of the press and involve the kinds of antecedent acts that are critical to journalists' ability to provide useful oversight of government officials and others who occupy powerful positions. That is not to say that the contemporary context requires recognition of broader immunities for journalists who break the law or commit tortious acts while gathering news.[370] But, for example, certainly any attempt to prohibit journalists

367. *See generally* GERALDO RIVERA, WILLOWBROOK: A REPORT ON HOW IT IS AND WHY IT DOESN'T HAVE TO BE THAT WAY (1972).

368. *See generally* Brief for Investigative Reporters and Editors as Amici Curiae Supporting Respondent, Food Lion v. Capital Cities/ABC, Inc., No. 97-2492, 97-2564 (4th Cir. Apr. 19, 1998), at 20–23, *available at* http://www.ire.org/obsolete/publications/IREBRIEF.PDF (describing dozens of instances where reporters have used undercover methods to expose information of vital public importance).

369. Kent v. Dulles, 357 U.S. 116, 126 (1958).

370. However, as indicated earlier, some kind of qualified protection ought to be recognized because of the high risk of abuse by prosecutors and plaintiffs in these kinds of cases.

from concealing their identities from others would be unconstitutional, at least where the non-disclosure is not fraudulent.

These contextual arguments are more difficult to make when used to support protections for the use of hidden cameras or high-powered microphones. These techniques are not part of a centuries-old tradition, although they are arguably modern applications of older methods. One might agree that there is a culturally embedded expectation that journalists will be afforded a certain amount of autonomy from government, but not that they will be excused from their duties as citizens to respond to valid subpoenas. The reporter's privilege is a contested idea that has not been uniformly embraced by either courts or legislatures.[371] Still, a social consensus should not be necessary for recognizing a constitutional right. And in light of journalists' long history of relying on confidential sources—one that predates the First Amendment's ratification—the public probably does appreciate the special nature of reporter–source relationships and recognizes the risks posed by excessive government encroachments.

This contextual analysis is more pertinent with respect to claims for affirmative rights—particularly rights of access to places and records. Even though the text, history, and structure of the First Amendment and the Constitution evidence a negative-rights framework,[372] a compelling case can be made that access rights are culturally embedded and that a living constitution must account for matters of profound societal expectation, such as the ability to witness what occurs in the criminal courts.[373] That ability, which the Court recognized as First Amendment right in *Richmond Newspapers*, could be characterized as culturally embedded because America's criminal courts have always been open.[374] Still, any attempt to place this right within the ambit of the First Amendment is problematic because it necessitates an affirmative construction. A better approach recognizes a right of access to the courts, not as part of an affirmative right to know, but as a necessary condition for the proper

371. *See supra* text accompanying notes 41–51.

372. *See supra* Part I.C.

373. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 572 (1980) ("People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.").

374. The same is not true—at least not to the same extent—with access to records or to places other than the courts.

enforcement of rights protected by the Sixth, Seventh, and Eighth Amendments.[375]

IV. RESHAPING NEWSGATHERING LAW

In order to resolve some of the incongruities in the courts' treatment of specific newsgathering problems, courts should begin by revisiting the three key issues addressed in Part I. First, courts must reject Justice Stewart's proposition that the Speech and Press Clauses be read to provide distinct sets of rights based on communicators' expertise, credentials, or institutional affiliations.[376] Courts must also cease to recognize special rights for the press—at least where "the press" is defined using expert-model criteria. The Supreme Court in particular must explicitly disavow its statements differentiating the legal claims of media and non-media parties in its string of libel cases in the 1980s and 1990s.[377] Although there is some conflicting evidence on the Framers' intent regarding the Speech and Press Clauses, the best evidence suggests that they merely sought to distinguish the different *means* by which messages could be communicated, not to carve out a distinct constitutional status for the established printers.[378] The Framers clearly understood the unique capacity of the press to serve as a "bulwark of liberty," driving public discourse and monitoring and exposing abuses by those in power.[379] But because licensing of the press ceased long before the Revolution,[380] and because there were no *de jure* barriers to any person's use of that medium,[381] it is implausible that if the Framers were alive today they

375. A more appropriate application of a contextual analysis (although still a challenging one) would be if, for example, Congress passed a law closing public and press access to the galleries in the House and Senate chambers. This is a situation where there is no alternative constitutional hook like there is with access to the courts. So, one would be forced to rely on the First Amendment and to propose an affirmative-rights construction, suggesting that because journalists have been provided access to House debates since the first Congress and because the Senate has been open since 1794, closing those chambers would thwart a critical societal expectation involving the processes by which citizens are governed.

376. Stewart, *supra* note 38.

377. *See supra* text accompanying notes 71–74.

378. *See, e.g.*, First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 799–800 (1978) (dismissing the notion of a separate meaning for the Press Clause and arguing that the press merited separate mention by the framers merely because "it had been more often the object of official restraints").

379. *See* Blasi, *supra* note 295, at 528.

380. *See* LEVY, *supra* note 240, at 36–37.

381. Anyone wanting to publish needed to have access to a printing press. But this was an obstacle more readily overcome than a legal prohibition or a system of licensing.

would reserve "press" rights for the mainstream news media to the exclusion of freelancers, bloggers, or "lonely pamphleteers." Many eighteenth century publications were, after all, functionally equivalent to the burgeoning micro-media of today.

Second, the courts must close the door on affirmative rights or find a sturdier basis for recognizing them. Because the structure of the First Amendment and the Bill or Rights compels a negative construction, affirmative rights of access should not be recognized where they are built around a vague and boundless "right-to-know" rationale. Whatever edifying benefits the right of access provides,[382] one cannot, as the Supreme Court has said, "confuse what is 'good,' 'desirable,' or 'expedient' with what is constitutionally commanded by the First Amendment. To do so is to trivialize constitutional adjudication."[383] Nevertheless, there are other constitutional hooks for recognizing some of these rights.[384] Contextual arguments can also be applied to support some access claims—suggesting, for example, that a right of access to criminal courts is a culturally embedded expectation—but this requires a more nuanced interpretation, and one that is unnecessary given other bases for protection.

Third, the courts must fashion a definition of "journalist" based upon the egalitarian and functional criteria described earlier—criteria that the Supreme Court has embraced in dicta[385] and that some other courts have fleshed out more explicitly.[386] Other approaches cannot be squared with the ethos of equality that pervades the Constitution, nor can they be reconciled with the overwhelming evidence that the Framers of the Constitution recognized and sought to safeguard the freedom of all citizens to serve—through both speech and press—as bulwarks of liberty. The definitional question will not be an urgent

382. *See, e.g.*, Press-Enterprise Co. v. Super. Ct. of Cal. for Riverside County, 478 U.S. 1, 9 (1986) ("[O]penness in criminal trials, including the selection of jurors, 'enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.'").

383. Houchins v. KQED, Inc., 438 U.S. 1, 13 (1978).

384. *See* discussion *infra* Part IV.C.

385. Branzbrug v. Hayes, 408 U.S. 665, 703–04 (1972).

386. *See, e.g.*, von Bulow v. von Bulow, 811 F.2d 136, 147 (2d Cir. 1987) ("We hold that an individual claiming the journalist's privilege must demonstrate, through competent evidence, the intent to use material sought to disseminate information to the public and that such intent existed at the inception of the newsgathering process."). The Court in *von Bulow* emphasized that those claiming the privilege need not be members of the "institutionalized press" as long as they are "involved in activities traditionally associated with gathering and disseminating news." *Id*. at 142.

one for the Supreme Court until it revisits *Branzburg*; however, given the frequency with which reporters and courts clash over source confidentiality[387] and the doctrinal discord among the federal circuits,[388] an eventual reassessment seems inevitable.

Making these changes will help resolve a number of the uncertainties and imperfections in the three key areas of newsgathering law: autonomy, liability, and access.

A. Autonomy

In nearly all of the Supreme Court's newsgathering cases, the Court has rejected the media litigant's claims, largely because the Court construed them as somehow pitting the rights of journalists against those of the broader public.[389] The Court was correct to eschew special rights, but it miscast the media litigants' claims in *Cohen*, *Zurcher*, *Branzburg*, and *Herbert*, among others,[390] treating them as pleas for special protections instead of attempts to claim rights available to anyone who gathers news.[391] Because the Court characterized the press as a discrete class of citizens,[392] instead of as a *role* that any citizen can play, it created an obstacle around which it was then forced to navigate. Had the Court conceived of "the press" in more egalitarian terms, there would have been no special-rights problem. Certainly, those protections would only be meaningful to those engaged in newsgathering activity, but that does not mean the protections would be special rights for which some citizens would be ineligible. No one would say, for example, that the Third Amendment is a special right because its protections are only useful to homeowners,[393] or that the Sixth Amendment is a special right because it is only applicable to those charged with federal crimes.[394] These rights, like those under the First Amendment, are available to *all*, even if only *some* will ever need to invoke them.

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387. *See supra* pp. 1–6.

388. *See supra* notes 48–51 and accompanying text.

389. *See, e.g.*, *Branzburg*, 408 U.S. at 684–88.

390. In the prison access cases, for example, the Court reached the correct conclusions, but nevertheless mischaracterized the claims of the litigants as demands for exceptional treatment. *See* 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).

391. *See, e.g.*, *Branzburg*, 408 U.S. at 684–88.

392. *See supra* note 123.

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

394. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . .").

In addition to unnecessarily complicating the special rights problem, the Court's newsgathering decisions have also undervalued the principle of autonomy. Its decisions form around a simple dichotomy in which expressive activity is fully protected and can only be limited in extraordinary circumstances, while newsgathering activity is minimally protected and must often yield to other social concerns.[395] The justices understand that there is a connection between newsgathering and expression,[396] but they tend not to see restraints on the former as imperiling the latter. The problem with subpoenas, newsroom searches, and inquiries into journalists' editorial processes is not merely that these actions might jeopardize reporters' relationships with sources, but that they could be used to harass, intimidate, and ultimately inhibit reporters' future newsgathering and expression. They present a wholly different set of hazards than does, for example, a denial of access to government records. The latter forecloses one source of information; the former poses a risk that reporters will not seek that information in the first place—from *any* source—and that if they do, they will be reluctant to write about it. In short, the separation between expression and newsgathering is much narrower in the autonomy contexts (e.g., *Branzburg*, *Zurcher*, *Herbert*) than in the access contexts (e.g., *Richmond*, *Press Enterprise*). Restrictions on newsgathering are *per se* violations that suppress the free pursuit and publication of news, while the restrictions on access are more akin to denials of benefits or privileges.

An interpretation of the First Amendment that fails to acknowledge and account for the potentially coercive effects of government usurpations of press autonomy cannot be sustained. These protections need not be absolute. Newsgathering behavior is

395. The two-track model outlined by Justice Brennan in his famous Rutgers University speech essentially summarizes the Court's approach. Brennan, *supra* note 173, at 176 ("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."). But unlike many of his brethren, Justice Brennan appreciated the risks posed to the press' autonomy and the inhibiting effect some seemingly content-neutral restrictions might have. In *Herbert v. Lando*, 441 U.S. 153, 196–98 (1979) (Brennan, J., dissenting), for example, he dissented in part to emphasize that while journalists ought not be immune from inquiries from libel plaintiffs, some qualified protection is necessary to minimize the risk of unnecessary or excessive intervention.

396. *See, e.g.*, *Branzburg*, 408 U.S. at 681 ("[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated.").

still one step removed from pure expression, but the ethos of autonomy that pervades the Constitution and the clear connection between autonomy and expression requires at least qualified protection for newsgathering.[397]

B. Liability

With the possible exception of the reporter's privilege, the area of newsgathering law that has provoked the most debate in the past decade has been the use of content-neutral laws to punish newsgathering activity. This tactic gained steam after the Court held in *Cohen* that journalists have no constitutional protection against "the application of general laws."[398] This holding invited plaintiffs to sue media organizations for fraud, trespass, and other torts based on how the journalists gathered their information rather than on what they broadcast or published.[399] These cases have been controversial in part because they raise the most basic question: Is newsgathering, *by itself*, constitutionally protected? The Supreme Court appeared to answer this question in *Branzburg* when it held that "news gathering is not without its First Amendment protections"[400] and that "without some [First Amendment] protection for seeking out the news, freedom of the press could be eviscerated."[401] But the Court has never explained what it meant by these statements, nor has it actually recognized any newsgathering-specific rights.

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397. These protections could take many forms. The dissenting justices in many of these cases have actually outlined proposals that strike an acceptable balance. In *Branzburg*, Justices Stewart, Brennan, and Marshall suggested that before a reporter could be made to comply with a subpoena, the government must: "(1) show that there is 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 less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information." *Id.* at 743. This approach has been followed by several lower courts and has served as the model for several state shield laws. In *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978), Justices Stewart and Marshall argued that a newsroom search should only be permitted when the possessor of the information sought has refused to comply with a valid subpoena. *Id.* at 547, 575–76 (Stewart, J., dissenting). Furthermore, in *Herbert v. Lando*, 441 U.S. 153 (1979), Justice Brennan argued that before libel plaintiffs could inquire about journalists' editorial processes, they must first demonstrate that the underlying publication was both false and defamatory. *Id.* at 181 (Brennan, J., dissenting).

398. Cohen v. Cowles Media Co., 501 U.S. 663, 670 (1991) (quoting Associated Press v. NLRB, 301 U.S. 103, 132–33 (1937)).

399. *See supra* text accompanying notes 96–114.

400. *Branzburg*, 408 U.S. at 707.

401. *Id.* at 681.

Under the Court's longstanding First Amendment doctrine, general laws that do not target expression (i.e., content-neutral laws) are nevertheless subject to heightened scrutiny where their enforcement imposes incidental burdens on free expression.[402] In *O'Brien v. United States*, the Court held that, to sustain such a law, the government must show that it serves a substantial government interest and that its impact on expression is no greater than necessary.[403] It is perplexing, then, that the Court in *Cohen* made no mention of *O'Brien*.[404] Promissory estoppel is a generally applicable law, and it was applied in *Cohen* in a manner that punished two newspapers' decisions to publish information of clear public interest (i.e., that an aide to a gubernatorial candidate was engaging in smear tactics to subvert a political opponent).[405] Perhaps the Court saw *Cohen* not as a case about expression, but about the enforceability of pre-publication contractual agreements. But *Cohen* was about more than pre-publication issues. Indeed, the lawsuit was triggered when two newspapers published articles containing information that was clearly newsworthy and relevant to the outcome of a political campaign.[406]

The Court was wrong in *Cohen*, both in the outcome it reached and in the way it framed the issue. But what about fraud and trespass cases where the triggering act *is* unrelated to, or at least separable from, publication? If one contends that newsgathering is not constitutionally protected, then the answer is simple: The cases can be adjudicated under the *Food Lion* framework that prohibits publication-related damages but that applies no unusual scrutiny to the underlying tort.[407] But can this approach be squared with the Supreme Court's declaration in *Branzburg* that newsgathering *is* constitutionally protected?[408] What the Court said in *Branzburg*

402. *See* United States v. O'Brien, 391 U.S. 367 (1968).

403. *See id.* at 377 ("[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.").

404. *See generally* Cohen v. Cowles Media Co., 501 U.S. 663 (1991).

405. *Id.* at 668–70.

406. In *Cohen*, the *St. Paul Pioneer Press* and the *Minneapolis Star Tribune* published stories indicating that the plaintiff, a high-ranking campaign worker for a gubernatorial candidate, was engaged in a campaign to anonymously impugn the character of the opposing candidate. *Id.* at 665.

407. *See generally* Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505 (4th Cir. 1999).

408. Branzburg v. Hayes, 408 U.S. 665, 707 (1972).

seems innocuous, if not self-evident, yet the courts have not given any concrete meaning to that abstract sentiment. Looking only at the outcomes of Supreme Court cases, it appears that newsgathering is not constitutionally protected and that the Supreme Court's statements to the contrary in *Branzburg* were just platitudinous dicta. But if a law were passed that prohibited people from conducting interviews, or from taking photographs or shooting video in public places, it seems unlikely that the Court would acquiesce. If it did, the Court would have to disavow its statements regarding newsgathering from *Branzburg* and declare that newsgathering is not protected.[409] If it rejected such restrictions, however, the Supreme Court and lower courts would have to reconsider a whole line of cases, including *Food Lion*, where general laws affecting newsgathering were given no heightened scrutiny, except to the extent they directly impacted expression.[410]

The evidence from the sequential analysis outlined in this Article suggests that the Supreme Court's *Branzburg* dicta was correct. There are non-expressive acts that are essential to individual autonomy, individual self-fulfillment, and individuals' capacity to serve as effective watchdogs. As the Supreme Court put it more than seventy years ago, the government should not be permitted to disturb the "the natural right of the members of an organized society, united for their common good, to impart *and acquire* information about their common interests."[411] This does not mean that government must affirmatively aid those efforts, but the First Amendment circumscribes its ability to interfere with them. And because that interference can come in the form of either content-based or content-neutral laws, and because it can target either expression or pure newsgathering, there must be some opportunity to weigh the competing interests and to test the sincerity of the government's purposes. The Court's categorical framework set forth in *Cohen* leaves open too many opportunities for abuse by hostile officials and clever plaintiffs.

The simplest solution is to apply the intermediate scrutiny test from *O'Brien* both to cases in which neutral laws incidentally burden *expression*—which the Court has always done, *Cohen* notwithstanding—and to cases in which those laws incidentally

409. *See id.* ("News gathering is not without its First Amendment protections . . . ."). *See also supra* text accompanying notes 41–47.

410. *See supra* text accompanying notes 92–106.

411. Grosjean v. Am. Press Co., 297 U.S. 233, 243 (1936) (emphasis added).

burden *newsgathering*.[412] Properly applying the *O'Brien* test in the newsgathering context would permit plaintiffs who have been harmed by a newsgatherer's non-expressive behavior to recover damages, but would respect the newsgatherer's expressive interests both by prohibiting publication-related damage awards and by ensuring that *de minimus* tort violations are not used to harass newsgatherers or elicit punitive damage awards from sympathetic juries.[413]

Intermediate scrutiny in these contexts would provide sufficient protection, but only if applied properly. In making the initial determination whether a law is content-based or content-neutral, courts must examine both the government's motivations and its patterns of enforcement. Indeed, even the *O'Brien* court did not acknowledge the strong evidence showing that the prohibition on destroying draft cards was motivated by an intent to suppress dissent, despite the fact that the Court had previously acknowledged the relevance of motive.[414] So, while the test the Court relied upon in *O'Brien* is useful, it must be applied in a more searching way than the Court did in the *O'Brien* case itself. Otherwise, neutral language can continue to be used to disguise press-punitive laws, and neutral laws will be applied discriminatorily to suppress newsgathering and expression.[415]

C. Access

Although the Supreme Court has been relatively consistent in employing a negative-rights template in speech and press cases, its access rulings have introduced anomalous arguments that find no support in either the text or history of the First Amendment or in the

412. *See* Erwin Chemerinsky, *supra* note 117, at 1161 (suggesting that intermediate scrutiny be applied to tort claims affecting newsgathering).

413. Although the First Amendment should protect the newsgathering rights of communicators as well as their expressive rights, a generally applicable law that only implicates the former would often be acceptable under *O'Brien*. The newsgathering freedom described above would therefore have limited reach. But where someone's newsgathering interests and their expressive interests are put in jeopardy, the law's application would be more likely to fail *O'Brien*. So, if a plaintiff only sought compensation for the actual harm caused by a reporter's trespass, for example, *O'Brien* would rarely stand in the way. But if any attempt were made to punish the subsequent publication, either by the awarding of publication damages, or by enforcement of a contrived tort claim, *O'Brien* would provide some protection.

414. *See* Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 811 (1985).

415. Nathan Siegel, *Law and the Media: Striking a Balance for the Future*, 1999 ANN. SURV. OF AM. L. 207, 214 (1999) ("If in reality these torts have to be stretched and bent so far just to try to find some theory to use as a pretext to sue the media for what's being reported, we are not really dealing here with laws that would generally be applied to people other than journalists.").

structure of the broader Constitution. There are other constitutional provisions that provide a sound basis for recognizing some access rights, but the Court weakened its First Amendment architecture by building its rulings in *Richmond Newspapers*, etc.,[416] around the amorphous right-to-know/public-edification concept.[417] In *Globe Newspapers*, the Court wrote that "to the extent that the First Amendment embraces a right of access to criminal trials, it is to ensure that this constitutionally protected 'discussion of governmental affairs' is an informed one."[418] But this rationale provides no basis for concluding that access to the judiciary is different from access to any other government proceeding.[419] Its reach is limitless.

Had the Court relied solely on the historical rationale, it could have made a contextual argument suggesting that the right of access to the courts is culturally embedded and an essential dimension of individual liberty. But that approach requires an affirmative construction of the First Amendment, which, even if legitimate, is nevertheless unnecessary, because the same result can be reached by relying on other constitutional provisions. A better approach, and one that permits a purely negative-rights construction of the First Amendment, is to provide access to the judiciary as a matter of procedural fairness, guaranteed to all citizens by the Fifth, Sixth, Seventh, and Eighth Amendments. Collectively, these provisions should be read as providing all citizens—both criminal defendants and civil litigants—with a constitutional guarantee that the judicial process will function equitably. Although judges would retain some discretion to close proceedings in rare circumstances, under this

416. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980). *See also* Press Enterprise Co. v. Superior Court of California for Riverside County (Press Enterprise II), 478 U.S. 1 (1986); Press-Enterprise Co. v. Superior Court of California, Riverside County, 464 U.S. 501 (1984); Globe Newspaper Co. v. Superior Court for Norfolk County, 457 U.S. 596 (1982).

417. The Constitution does support a "right to know" with respect to citizens' ability to receive information, but not a right to demand information from the government. The latter is an affirmative right. The former, however, is a negative right that prohibits government interference in the exchange of information between autonomous individuals (or groups), which is a principle the Court has correctly upheld. *Cf.* Lamont v. Postmaster Gen., 381 U.S. 301, 305 (1965) (holding that law requiring post-masters to hold mail that the Secretary of the Treasury determined to be communist propaganda until addressee affirmatively requested the mail's release was unconstitutional as against the First Amendment).

418. *Globe Newspaper*, 457 U.S. at 604–605.

419. It is true that citizens have an interest in knowing that the political and administrative branches of government are also functioning equitably and in ways that serve the public interest, but the judgments made by judges and juries are more permanent and less easily remedied through the normal political processes than are those made by public officials in the other branches.

negative-rights construction citizens would be presumptively free to witness all civil and criminal court proceedings, much as they are today.[420]

CONCLUSION

The first decade of the twenty-first century has already been one of the most catalytic periods in the history of American journalism. The media marketplace is still dominated by the traditional goliaths, but the mainstream media's audiences and influence are dwindling with the emergence of new media and new journalistic forms. These changes are occurring in a political climate that illustrates the need for vigilant oversight of government by journalists and citizens from every social and ideological stratum. Unfortunately, the power of public oversight is weakened by the disjointed legal framework that continues to govern the right to gather news.

The courts need to restructure their jurisprudence regarding newsgathering and the First Amendment in a way that coheres around a set of core principles—e.g., negative constitutional constructions, no special rights, egalitarian conceptions of "the press"—and that flows from a sensible and consistent approach to constitutional interpretation. The sequential approach proposed in this Article is just one method (or cluster of methods), but its application here should illustrate not only that stronger protections for newsgathering are constitutionally supportable, but that doing so does not require any interpretive contortions or the application of exotic theories.

Throughout the past three decades the Court has responded to media claims in ways that fail to adequately protect all citizens' expressive and newsgathering rights. These decisions and approaches have created confusion about the dimensions of the Court's First Amendment doctrine. The alternative approach proposed here builds

420. Technically, this right would not "belong" solely to the individuals seeking access or to those involved in the litigation, which means that access is not a right that could be waived. The litigants would not be free to decide for themselves what procedural safeguards are warranted, because all citizens have a stake in the proper functioning of that process, and because there is a danger that some criminal defendants could be coerced into waiving their rights. The proposal supported here would not, therefore, revive the Court's ruling in *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 383 (1979) (explaining that access is an issue rooted in the Sixth Amendment right to an open trial, and because that right belongs to criminal defendants, they are free to waive it).

off the strengths of the Court's approach while righting its mistakes to seek a more predictable and internally consistent legal framework oriented around a particular approach to constitutional interpretation.

Toward that end, this Article suggests that the Court begin defining First Amendment rights in terms of expression and newsgathering, rather than speech and press; that it abandon any suggestion that "freedom of the press" implies anything other than the freedom of all citizens to seek out the news and to communicate it through media; that it reverse its ruling in *Cohen* and dispose of the "generally applicable laws" straight-jacket it imposed on lower courts; that it find a different constitutional basis for recognizing rights of access to the judiciary; that it reverse *Branzburg*, *Herbert*, and *Zurcher* and the other autonomy cases and recognize that some qualified privileges are necessary in these contexts to prevent the chilling of expression and newsgathering. Finally, in employing these constitutional protections, the Court should adopt a definition of the press that is focused on the functions being performed rather than the identity or characteristics of those performing them. As Chief Justice Burger wrote: "The First Amendment does not 'belong' to any definable category of persons or entities: It belongs to all who exercise its freedoms."[421]

421. First Nat'l Bank v. Bellotti, 435 U.S. 765, 802 (1978) (Burger, C.J., concurring).