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Press Rights and Government Power to Structure the Press

C. EDWIN BAKER*

First, Professor Baker explores an instrumentalist argument for special press rights going beyond those protected by a liberty theory of freedom of speech. Then, in Part II, he examines the threats of government power and private economic power to freedom of the "press" and considers the permissible extent of government intervention to structure the press or to protect it from private threats.

I. CONSTITUTIONAL RIGHTS OF THE PRESS	822
A. Rationale for a Separate Interpretation of the Press Clause	822
B. Defensive, Offensive, and Speech Rights	837
1. DEFENSIVE RIGHTS	840
2. OFFENSIVE RIGHTS	841
3. SPECIAL SPEECH RIGHTS	845
C. The Form of Protection	848
II. PRIVATE ECONOMIC INTERESTS AS A THREAT TO FREEDOM OF THE PRESS	858
A. Freedom for Whom	858
1. FREEDOM FOR THE PUBLIC	859
2. FREEDOM FOR THE PRESS PROFESSIONALS	862
3. FREEDOM FOR OWNERS	865
B. Freedom from What	866
1. STATE ACTION	866
2. CONFLICT BETWEEN THE SPEECH CLAUSE AND THE PRESS CLAUSE	867
C. Government Intervention to Support Freedom of the Press	868
1. GOVERNMENT OWNERSHIP, PUBLIC ACCESS, AND CONTENT REGULATION	870
2. PROTECTION OF EMPLOYEES	873
a. General Rules	875
b. Special Rules	876
3. REGULATION OF OWNERSHIP	877
a. The Proposal	878
b. The Proposal's Constitutionality	881
III. CONCLUSION	887

Last term, while arguing in dissent for a qualified privilege to resist disclosure of "predecisional communications among editors,"¹ Justice Brennan explained the jurisprudential basis upon which any separate constitutional protection for freedom of speech

* Visiting Associate Professor, University of Texas. My thoughts about the press clause have been influenced by ideas suggested in conversations with Justice Hans Linde and Ronald J. Brown, although they would no doubt disagree with portions of this article. I have also benefited from helpful comments and criticisms by Jennifer Freisen and Professors Dave Anderson and John Robertson.

1. *Herbert v. Lando*, 441 U.S. 153, 181 (1979) (Brennan, J., dissenting).

and freedom of the press² must rest. First, he described the grounds for absolute protection of freedom of speech:

Freedom of speech is itself an end because the human community is in large measure defined through speech; freedom of speech is therefore intrinsic to individual dignity. This is particularly so in a democracy like our own, in which the *autonomy of each individual is accorded equal and incommensurate respect*.³

Noting that the press did not rest its arguments for an editorial privilege upon the value of individual self-expression, Brennan then discussed how the first amendment "foster[s] the values of democratic self-government"⁴ and thereby is "instrumental to the attainment of social ends."⁵ By citing Professor Blasi's impressive article⁶ that describes the checking value of the first amendment,⁷ Brennan focused the discussion primarily upon cases involving the press and statements referring to the press. He appears to have recognized the central, instrumental role the press serves in "censur[ing] the state or expos[ing] its abuses."⁸ Brennan's distinction between respect for individuals as an end in itself and the instrumental advancement of social ends provides the crucial foundation for separate constitutional interpretations of the speech and press clauses.

Freedom of speech, of course, might be both an end and a means. To accord incommensurate respect to freedom based upon individual autonomy, however, is to imply that protection of this

2. For purposes of this article, I am equating the press with print, broadcast, and film media, except to the extent that the broadcast media are treated as partial common carriers. See text accompanying notes 160-63 *infra*.

3. 441 U.S. at 183 n.1 (emphasis added).

4. *Id.* at 184.

5. *Id.* at 187.

6. Professor Blasi persuasively shows that one value of free expression—free speech, free press, and free assembly—is its contribution to discovering and deterring the abuse of official power. He refers to this idea as the "checking value." Blasi, *The Checking Value of the First Amendment*, 1977 AM. B. FOUNDATION RESEARCH J. 521, 528.

7. The first amendment provides that "Congress shall make no law respecting an establishment of religion [establishment clause], or prohibiting the free exercise thereof [free exercise clause]; or abridging the freedom of speech [speech clause], or of the press [press clause]" U.S. CONST. amend. I.

8. 441 U.S. at 185. Although Justice Brennan, when speaking of censuring the state or exposing its abuses, explicitly referred to the protection given by the first amendment and not the press clause in particular, the context in which it appears suggests that he had the press clause in mind. The footnote accompanying that passage makes continued references to "the press," and Brennan quotes an historical passage praising freedom of the press in the text immediately following it.

freedom should prevail over policies based upon normal instrumental or utilitarian concerns. This value of freedom of speech as an end renders its value as a means redundant when used to justify the protection of speech, because the incommensurate value of the freedom means that no lack of instrumental value can reduce the need for protection. Therefore, inadequate instrumental value or even the arguably welfare-diminishing aspects of speech that is subversive, defamatory, profane, or pornographic should not justify limitation.⁹ In contrast, if instrumental concerns—for instance, those relating to an institution's contribution to our welfare or freedom—provide the sole foundation for particular constitutional rights, the extent and form of those rights may be different and less than absolute. The right should be fashioned to protect or further that institution's instrumental role. Thus, if freedom of the press is a right of this second type, the press might make claims different from, and independent of, those grounded upon a claim for respect under the speech clause.

Part I of this article develops an instrumentalist argument for an independent interpretation of the press clause, an argument that recognizes special rights for the press and for occupants of press roles. The analysis commences by noting that the merely instrumentalist value of commercial press activities indicates the need for protection based upon the press clause. After considering the minimal usefulness that the "protection of institutions" analogy to the establishment clause provides, I examine the fourth estate theory as a justification for special protection of the press. I conclude that, of the various special rights often asserted on the press's behalf, the fourth estate theory justifies only "defensive" constitutional rights, which generally should take an absolute form.

Part II investigates the implications of the speech clause and of the press theory developed in Part I for what some consider the greatest present threats to freedom of the press—monopolization

9. An emphasis on the instrumental value of speech, combined with the failure to recognize that this value is superfluous for justifying protection, may lead one to accept improper limitations on people's speech rights. Brennan's rejection of a merely instrumentalist approach to analyzing the fourth amendment exclusionary rule reflects a parallel concern. See *Herbert v. Lando*, 441 U.S. 153, 188 n.7 (citing the Court's analysis of the exclusionary rule in *Stone v. Powell*, 428 U.S. 465 (1976)). The exclusionary rule may be a required aspect of the government's respect for individual autonomy and not merely an instrument to the attainment of a right; if so, it should be enforced even if no instrumental justification would require enforcement. See also Baker, *Utility and Rights: Two Justifications for State Action Increasing Equality*, 84 YALE L.J. 39, 53 n.46 (1974) (analyzing the rule of *Miranda v. Arizona*, 384 U.S. 436 (1966), as grounded in an analysis of individual rights rather than utility).

and control of the press by market-oriented, economic interests. The immediate constitutional issues are whether the justification for protecting the press as an institution either allows or requires government intervention to "protect" the press from these threats from the private economic sector, and whether the speech clause limits that intervention. These issues raise more general theoretical problems: social theorists often justify certain types of socialism as necessary to promote "real" individual liberty or freedom, but typical notions of freedom of the press assume that freedom is conceivable only under private ownership. By considering whether "freedom of the press" means freedom for the public, the press workers, or the press owners, the article examines these ideas of freedom. The inquiry then focuses on whether structural regulation of press ownership or legal protection of the freedom of press workers against abridgement by owners, private or state, is constitutionally mandated, permitted, or prohibited.

I. CONSTITUTIONAL RIGHTS OF THE PRESS

A. *Rationale for a Separate Interpretation of the Press Clause*

In earlier papers, I advanced and investigated the implications of a "liberty theory" of free speech, a theory based on the premise that the community must respect individual autonomy as an end in itself.¹⁰ I concluded that in a capitalist market economy, one could expect no intrinsic connection between the speech of a commercial enterprise and the personal values or choices of anyone connected with the enterprise, because its market-enforced profit orientation dictates speech content.¹¹ For example, whatever the personal views of employees, management, or owners about the hazards of cigarette smoking, the threat of bankruptcy forces cigarette companies to choose speech that sells cigarettes. Commercial speech thus lacks the individual liberty and self-realization aspects of speech that justify its constitutional protection. In fact, I argued that because the businessperson's** personal choices, undistorted

10. Baker, *Scope of the First Amendment Freedom of Speech*, 25 U.C.L.A. L. REV. 964 (1978) [hereinafter cited as *Scope*]; Baker, *Commercial Speech: A Problem of Freedom*, 62 IOWA L. REV. 1 (1976) [hereinafter cited as *Commercial Speech*].

11. *Commercial Speech*, *supra* note 10, at 9-18.

** Editorial Note. At the request of the editors of the Review, the author has offered the following explanation of his diction and choice of pronouns: Use of pronouns of either gender represents a choice, and neither choice is more or less in need of explanation and justification than the other. My practice responds to my guess that the dominant practice of using male pronouns is one of various language practices that reflect and reinforce systems

by a desire for profit, do not control commercial speech, collective control of commercial speech would better promote individual choice and self-determination.¹² This analysis of commercial speech provides a theoretical explanation for a constitutional distinction between the regulation of property rights and the imposition of limits on personal liberties—an important but missing link in constitutional theory.¹³

of oppression—in this case, the undeniable and pervasive oppression of women in our society. See, e.g., C. MILLER & K. SWIFT, WORDS AND WOMEN 17-35 (1977). Moreover, whether or not the guess is correct, and whether or not one wants to go out of one's way to oppose oppression, I think that when forced to do something, for example, to choose a pronoun, one should make the choice that operates as a continuing and, to many, jarring reminder of oppressive aspects of our society. As a general matter, people interested in progressive change should consistently adopt practices that, either symbolically or materially, contradict the oppressive aspects of existing reality. See generally *Scope*, supra note 10, at 992-96. For a similar disagreement, see Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 636 n.64 (1980).

12. *Commercial Speech*, supra note 10, at 25. The Court has not accepted this analysis. Rather, it presently adopts an instrumentalist orientation; it views the importance of the first amendment as lying in its protection of a marketplace of information and ideas where the truth will come out. In *Bigelow v. Virginia*, 421 U.S. 809, 826 (1974), for example, the Court refers explicitly to the "marketplace of ideas."

Yet, there are signs that an analysis similar to that I have presented is gaining acceptance. For example, in *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978), Justice White, joined in a dissenting opinion by Justices Brennan and Marshall, investigated the absence of a connection between corporate political speech and individual choice and, using an analysis that parallels my approach, reached the same conclusions that I did about corporate political speech. Also, in an excellent critique of the Court's decision in *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (giving commercial speech first amendment protection similar to that afforded noncommercial speech), Professors Jackson and Jeffries, although expressing skepticism concerning my analysis of corporate political speech, agree that the *Virginia Board* decision represents a dangerous revival of the notion that statutes regulating the conduct of business enterprises can be a deprivation of liberty; that is, it represents a return to the discredited doctrine of "economic due process." See Jackson & Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1 (1979). Professor Emerson has also criticized the Court's recent decisions that tend to support first amendment protection for commercial speech. See, e.g., Emerson, *Comments*, in PROCEEDINGS OF THE SYMPOSIUM ON MEDIA CONCENTRATION 193, 194 (FTC 1978); Emerson, *First Amendment and the Burger Court*, 68 CALIF. L. REV. 422, 458-61 (1980).

13. Cf. *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972) (dichotomy between personal liberty and property rights is a false one).

To place commercial speech in a special nonprotected status is to suggest a subordination of property (economic) rights to personal rights. For an additional argument concerning the necessarily lesser status of property rights, see Baker, *Counting Preferences in Collective Choice Situations*, 25 U.C.L.A. L. REV. 381 (1978). Protecting commercial speech might therefore seem contrary to the Court's philosophy of the past forty years that greater constitutional protection should be afforded to personal rights than to property rights. See *Commercial Speech*, supra note 10, at 4. Rejection of a nonprotected status for commercial speech could represent an important element in a trend toward abandonment of a lesser status for property rights.

Difficulty arises when considering the rights of the press in this light. Since the press, the modern communications industry, is primarily composed of commercial enterprises, this analysis of commercial speech implies that exigencies of profitable operation dictate the expression of the press. One reaches the obviously unacceptable conclusion that expressions of the press do not merit constitutional protection. The press clause, however, provides an escape. One can interpret it as granting special constitutional protection to a particular institution, the press.

In support of the claim that market-enforced profit orientation makes a difference in first amendment theory, I noted that its effect on the media's content choices has been an important factor in attempts to justify public rights of access to the media.¹⁴ Moreover, the popularity of proposals for government intervention to force access to the media or improve the quality of the media's messages may vary with perceptions of the degree to which the profit motive influences content decisions within the targeted media. For example, the broadcast media may make more content decisions on the basis of profit criteria than do the print media, arguably leaving the broadcast media more of a wasteland in need of governmentally mandated improvements.

Actually, two structural features suggest that the profit motive may have less effect upon content decisions in the communications industry than elsewhere. First, although both advertisers and the media need to ensure profitability, the manner in which and the extent to which profit concerns constrain message choices differ between the two. The market constrains both the media and the advertiser to supply products that the consumer wants or can be stimulated to want. The market constrains the advertiser to choose messages that best promote its products. In contrast, since the message is the media's product, it retains considerable freedom in choosing message content. A journal may be equally able to editorialize in favor of or against legalized abortions, but market constraints require the advertiser of abortions to choose speech designed to lead the listener to one specific substantive conclusion: abortions are desirable.

Second, market constraints may not control the content of the media's speech if, to enable themselves to say what they choose, workers or owners subsidize their speech choices by working for

14. See *Commercial Speech*, *supra* note 10, at 27-31.

lower wages or accepting operating losses.¹⁵ In fact, the opportunity to engage in commercial communication operations may be very important for people who want to communicate their views. People are better able to continue their speech activities, as both preachers and politicians know, when they receive funds to "subsidize" their speech activities.¹⁶ The contribution of the commercial press to subsidizing people's individually chosen communications, as well as the difficulty in distinguishing that subsidizing function from the use of the commercial press to gain profits, provides further argument for protecting the press.

Still, these structural features do not adequately convince me that one can justify protecting the commercial press because of its connection with individual liberty. One can better explain this protection by considering the possible independent meaning of the press clause. Commentators frequently suggest that the establishment of religion clause in the first amendment provides a helpful analogy in the attempt to justify and understand protection of the press.¹⁷ They argue that both the establishment clause and the press clause protect the independence and integrity of important private centers of expression and power. Given that the clauses are independent and have different histories, however, this analogy provides only weak support at best for any interpretation of the press clause. Nevertheless, the analogy is useful.

People sometimes claim special exemptions from government regulations on the ground that government must not prohibit their free exercise of religion. The issue is whether recognition of these claims unconstitutionally establishes religion, whether recognition would have "the purpose or primary effect"¹⁸ of benefiting religion. The obvious answer, as Justice Harlan recognized, is yes: the establishment clause prohibits government from allowing any special

15. For example, Professor Bagdikian claims that no existing, distinguished newspaper, except perhaps the *Philadelphia Inquirer*, was developed by a chain and he notes that one small study indicates that nonchain papers have more of every type of serious news (local, state, national, and international) and more stories written by staff (rather than the cheaper, syndicated stories) than do the chain papers. His implicit explanation is that the local owners have subsidized those results—a type of investment in which the chain organizations were uninterested or which they were unable to make. Bagdikian, *Conglomeration, Concentration, and the Flow of Information*, in PROCEEDINGS OF THE SYMPOSIUM ON MEDIA CONCENTRATION 6, 15-17 (FTC 1978).

16. The opportunity for subsidization by workers should be greater, the more labor intensive the enterprise.

17. See, e.g., Bezanson, *The New Free Press Guarantee*, 63 VA. L. REV. 731, 732 (1977).

18. See, e.g., *Abington School Dist. v. Schempp*, 374 U.S. 203, 222 (1963).

privileges for conduct based on free exercise claims.¹⁹ This interpretation of *establishment*, however, eviscerates the free exercise clause, reducing it to protecting beliefs and speech, freedoms already protected for everyone under the speech clause: the free exercise clause would protect no conduct.²⁰

Of course, this interpretation of the establishment clause does not prevent government from creating broad exemptions from statutory requirements: exemptions, for example, for all individuals who are fundamentally, conscientiously opposed to following a statute²¹ or for all organizations engaged in nonprofit, charitable, humanitarian, educational, or community-uplift activities.²² The establishment clause permits legislative respect of free exercise concerns as long as the law does not distinguish between religious conduct and conduct not based on religion.²³ Still, any special claim based only on the free exercise clause loses.

If one reads the press clause to guarantee an independence from government that parallels the independence provided by Justice Harlan's interpretation of the establishment clause, neither special privileges nor burdens on the press would be permissible.²⁴ Presumably, legislative shield laws that protect reporters from forced disclosure of sources would not be constitutional, nor would government decisions to allow special mailing rates, to limit government-sponsored press conferences to representatives of the press, or to allow the press special access to prisons.

An alternative and much more persuasive reading of the establishment and free exercise clauses begins with an interpretation of "religion" that varies with the purpose of each clause. The

19. *Welsh v. United States*, 398 U.S. 333, 356-61 (1970) (Harlan, J., concurring) (military draft exemption limited to religious conscientious objectors is unconstitutional under establishment clause). See also Ely, *Legislative and Administrative Motivaion in Constitutional Law*, 79 YALE L.J. 1205, 1313-14 (1970).

20. Yet, it must be acknowledged that religions demand more than holding beliefs. Typically, religions require the faithful to forbear or perform certain acts and to manifest certain values or principles in their conduct. *Scope*, *supra* note 10, at 1035.

21. See, e.g., *Welsh v. United States*, 398 U.S. at 356-61 (Harlan, J., concurring).

22. The Court has upheld tax-exempt status for a broad category of institutions, which includes religious organizations. See *Waltz v. Tax Comm'n*, 397 U.S. 664 (1970) (legislation spares exercise of religion from burden of property taxation levied on private profit institutions).

23. See, e.g., *Welsh v. United States*, 398 U.S. at 356-61 (Harlan, J., concurring) (the Court appropriately imposed exemption for both religious and nonreligious conscientious objectors as a constitutional way to carry out Congress's intent to provide some exemption from the draft).

24. Bezanson, *supra* note 17. Professor Bezanson apparently reaches the conclusion that this kind of neutrality is required.

founding fathers had reason to fear that government might support or suppress particular sects or doctrinal approaches. At that time, history was replete with religious dissidents fleeing European religious establishments. In addition, some of the colonies in America had their own religious orthodoxies. It is reasonable to view the *establishment clause* as a response to this justifiable fear, drafted in an atmosphere in which the issue demanded attention and concern. One would then interpret the establishment clause to require the separation of the state from all religious institutions or sectarian practices and to require that government action be directed at neither suppression nor support of religious sects or institutions.

In contrast, considerable historical evidence suggests that the *free exercise clause* concerns individual liberty and the rights of conscience.²⁵ Thus, one would interpret the free exercise clause as freeing an individual from government mandates that violate the fundamental dictates of conscience. One's substantive values would be protected even without a religion as their source. The neutrality requirement of the establishment clause would be preserved inviolate since exemptions for action or nonaction based on conscience are broader than exemptions limited to claims based on sectarian or religious doctrine. Thus, this interpretation allows a person to claim the right to engage or not engage in certain conduct on the basis of the free exercise clause.

If this alternative interpretation of the religion clauses provides the appropriate analogy, it underlines the plausibility of interpreting some first amendment clauses (free exercise and speech) as focused on individual liberty, and others (the establishment and press clauses) as focused on principles that control or regulate the relation between government and specific institutions. This interpretation of the two religion clauses also suggests that the permitted or required relation between government and private institutions depends on the purpose of constitutionalizing the relationship rather than on a simple mandate of neutrality. Gov-

25. For this interpretation of free exercise, see generally *Scope*, *supra* note 10, at 1035-39. The phrasing in the religion section of the first amendment adopted by the House on August 24, 1789, indicates concern with the rights of conscience: "Congress shall make no law establishing religion or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed." Madison's proposal read: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed." 1 ANNALS OF CONG. 434 (Gales ed. 1789) (emphasis added), quoted in *New York Times Co. v. United States*, 403 U.S. 713, 716 n.2 (1971) (Black & Douglas, JJ., concurring).

ernment action that affects religious sects, institutions, or doctrines must be neutral only because of the specific concerns that underlie the establishment clause. Unless analogous concerns underlie the press clause, government neutrality toward the press, here defined as "no purpose specially to benefit or impede press activities," would not be required. Finding an analogous concern seems implausible. Indeed, the term "freedom" in "freedom of the press" suggests a greater parallel with the idea of freedom in "free exercise," which, as previously discussed, may require special privileges not permitted by the establishment clause. Both "freedoms" protect the party in upsetting government routine: in the name of individual autonomy under the free exercise clause and, as I will later argue, in order to check government abuses under the press clause.

Thus, both religion clauses have parallels to the press clause: the establishment analogy suggests the focus on an institution and the free exercise clause points to the concern for freedom. The analogy, nonetheless, does not address the crucial question. Because of the difference between the purposes of the religion and press clauses, the analogy leaves unexplained both the content of press freedom and the form of the required relation between the press and the government.

In my article on commercial speech, I concluded that the "fourth estate" role of the press—in Blasi's terms, the checking function—provides the rationale for its protection.²⁶ This fourth estate characterization distinguishes the communications industry from other businesses and justifies insulating its publication decisions from government control. Still, the argument at this point does not explain why the media should have any special rights over and above the speech rights of individuals. The analysis merely limits the conclusion that the legislative majority should be able to regulate even the speech activities of commercial enterprises, by introducing a fourth estate theory that requires an exception for the press. This exception requires only that the press be as free from government content regulation as are individual speakers.

26. *Commercial Speech*, *supra* note 10, at 31-32. Briefly, as the "fourth estate," the press requires protection from government so that it can counterbalance government. The work of the press in ferreting out the Watergate scandal is a prominent example of the press's fulfilling this "fourth estate" role. Thomas Carlyle used the phrase when referring to Britain as it was a century ago: "Burke said there were Three Estates in Parliament; but, in the Reporters' Gallery yonder, there sat a Fourth Estate more important far than they all." Stewart, *Or of the Press*, 26 *HASTINGS L.J.* 631, 634 (1975).

Whether the press clause grants the press special rights remains an open question. One needs more than the premise that the theoretical bases for the *freedoms* of speech and of press differ to show that speech and press *rights* differ, that the "weaker," instrumentalist justification of press freedom in fact requires special press rights. Analysis of the role of the press in our society is necessary to lay a proper foundation for an instrumental analysis of the propriety of special press rights.

Any justification of special rights will presumably emphasize the importance of enabling the press to serve one of two significant functions. First, the press undertakes to expose abuses of government or private power and thereby contributes to the restraint of abuse. Second, the press provides people with a diverse, nongovernmentally controlled source of information, entertainment, and perspectives. Of course, the two are related. The first is in some sense a functionally prominent subpart of the second. Likewise, general information and entertainment may help form the perspectives from which people evaluate government practices. Without perspective there can be no motivation to oppose particular government practices.²⁷

Despite the importance of both these functions and the lack of clear lines between them, the first function, exposure of abuse of power, provides the best guide for interpreting the press clause. This function is more likely than the general information function to justify institutional rights beyond those already accorded by the free speech doctrine that the government must not directly control or censure the content of private communications or adopt laws for the purpose of stopping or limiting communications between willing speakers and willing listeners. Moreover, as Justice Stewart noted²⁸ and Professor Blasi convincingly demonstrated,²⁹ both the historical roots and the present importance of constitutional protection for the press rest upon the role of the press as an exposé of abuses—a monitor of and check on governmental use of power.

Special provision for this role is a particularly logical use of constitutional power. This conclusion may not be obvious, since

27. The impact of general information or entertainment sources is illustrated by several of my "activist" friends who have recently cited Marge Piercy's *Woman on the Edge of Time* as the writing most directly related to their vision of the struggle for a better future. It is a fictional account of a woman moving back and forth between a present, unjust order and two alternative versions of a future society.

28. Stewart, *supra* note 26.

29. Blasi, *supra* note 6, at 527-44.

the arguments for protection of the press are instrumentalist (based on collective social welfare) and since, in a democratic society, one normally assumes that the legislature is the most appropriate governing body to make social welfare judgments. Nevertheless, the hope that any branch of government will make reasonably accurate welfare or utilitarian judgments is least bright when these judgments concern privileges designed to aid outsiders in investigating and sanctioning that branch. Leaving these judgments to the government comes too close to allowing it to control the judge in its own case—or, at least, to set the rules for its own trial. Rather than leave this welfare judgment to political bodies, it seems more sensible to constitute the system of government in a way that delegates judgments about the value of exposing abuses to someone other than the alleged abuser. A key function of any constitutive plan is to allocate powers and set procedures rather than to make particular, outcome-oriented decisions.³⁰ Some allocations of power are designed to promote efficiency. Others are required by fundamental value premises, such as respect for individual autonomy. In many cases, as the “checks and balances” rubric suggests, allocations are designed to decrease the likelihood of abuse of concentrated power. This latter purpose suggests the plausibility of interpreting the press clause as an instrumentally justified, separation-of-powers or fourth-estate provision that functions to check abuses of governmental power.

One feature of this fourth estate theory of the press clause requires further comment: my interpretation purports to follow Justice Stewart’s suggestions in his Yale speech³¹ and to build upon Professor Blasi’s elaboration of the checking function.³² As I noted earlier, Justice Brennan cited Blasi’s article among quotations referring to freedom of the press in a dissenting opinion in which he considered a claim for a special editorial privilege. Blasi, however, treats the checking value not as a basis for interpreting freedom of the press,³³ but as a general component of first amendment theory.

30. See Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 254 (1976). It is easy to read too much into this comment. Some commentators have read the equal protection clause as concerned purely with process or means, not substantive values—a view that I think is fundamentally wrong. See Baker, *Neutrality, Process, and Rationality: Flawed Interpretations of Equal Protection*, 58 TEX. L. REV. — (1980).

31. Stewart, *supra* note 26. Justice Stewart believes that the press clause embodies different values than the assembly and speech clauses because its foundation is the institutional checking function of the organized press.

32. See Blasi, *supra* note 6, at 565 n.146.

33. See *id.* at 521, 528, 548, 565 n.146, 649 n.416.

Nevertheless, I conclude that one can best read Blasi's contribution as a basis for finding independent content in the press clause.

The traditional free speech advocate³⁴ experiences immediate concern over the rather weak protection of speech that Blasi attributes to the first amendment. Blasi even retreats in some ways from current levels of protection.³⁵ He would, for example, restrict the protection of the "reckless disregard" standard established by *New York Times Co. v. Sullivan*³⁶ only to speech about the official actions of public officials,³⁷ retreating from the Court's application of the standard to speech about public figures.³⁸

More objectionably, Blasi would uphold many claims by the public for a right of access to media founded either directly on the Constitution or on statutes. Blasi believes that the Court wrongly decided³⁹ *CBS v. Democratic National Committee*,⁴⁰ although he found Douglas's concurring opinion "the most explicit judicial recognition to date of the function free speech and a free press can perform in checking the abuse of power by government officials."⁴¹ Blasi's praise of Douglas's framework, combined with his rejection of Douglas's conclusion, suggests some tension or ambiguity in the way Blasi applies the checking function. More dramatically, Blasi disagrees with the unanimous result in *Miami Herald Publishing Co. v. Tornillo*⁴² and would have upheld the access statute if the

34. I use this nomenclature to refer to anyone who generally rejects a balancing approach and favors broad protection for speech. Despite disagreements among them, Justices Black and Douglas, Professor Emerson, and the American Civil Liberties Union are traditional free speech advocates.

35. Blasi does note that he is merely elaborating the checking value and that other strands of first amendment theory might change some of his conclusions. See Blasi, *supra* note 6, at 528, 632.

36. 376 U.S. 254 (1964).

37. Blasi, *supra* note 6, at 581.

38. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 164 (1967).

Presently, "liberal" academic opinion seems to be equivocating over the degree of protection that the Constitution grants to one who defames and I will not enter the debate here. Nevertheless, I do note that a "liberty theory" of the first amendment provides a plausible ground for abolishing the tort of defamation, and that the "marketplace of ideas" theory logically requires limiting the tort to situations in which the defamer made the statement with knowledge of its falsity or with reckless disregard of the truth. *Scope*, *supra* note 10, at 966, 972-73, 1002-04.

39. See Blasi, *supra* note 6, at 629. Blasi states that "political advertisements can be an effective medium for the ventilation of unconventional viewpoints, and the incursion on journalistic autonomy represented by loss of control over the content of advertisements seems minimal." *Id.*

40. 412 U.S. 94 (1973) (first amendment does not require broadcasters to accept paid political announcements from a private group).

41. Blasi, *supra* note 6, at 621.

42. 418 U.S. 241 (1974). In *Tornillo*, the Court held unconstitutional a Florida statute

right of reply were not limited to candidates for office and were not granted to incumbents.⁴³

Some "interest balancing" interpretations of the first amendment treat the access cases as invoking a conflict between the free speech interests of private speakers seeking access, or the public's interest in hearing them, and the interest in having a free press that exercises full control over its publications. From this "interests" perspective, Blasi is siding with the speech interest rather than the press interest. There is, however, a better approach and a better characterization. The more traditional view recognizes that the first amendment is directed at government: "Congress shall make no law abridging" This language clearly suggests that the speech and press clauses do not represent two conflicting interests; rather, they are part of a single mandate that the government should not direct what private entities can or cannot say.⁴⁴ Blasi's interest analysis leads to an abridgment of this traditional right of speakers to be free from governmental control of content.

Blasi would also allow gag orders if their absence endangered the fairness of a trial, although he would ban gag orders that restrict press reports of criminal trials involving allegations of abuse of official power.⁴⁵ The traditional free speech advocate, in contrast, easily concludes that the first amendment requires an absolute ban on gag orders, finding no conflict between the defendant's sixth amendment right to a fair trial and the first amendment right of others to speak out about what is happening. Both are rights against the state; the state therefore has a responsibility to carry out its activities in a manner that respects both.⁴⁶ Finally, unlike traditional advocates of free speech, Blasi approves the Hatch Act, at least to the extent that it restricts government employees from politicking on behalf of incumbents.⁴⁷

Blasi's consistent employment of a balancing analysis and his use of the checking value to interpret the first amendment outside

that required a newspaper to allow any candidate free space to reply to editorials attacking the candidate's personal character or record in office.

43. See Blasi, *supra* note 6, at 621-22, 627-28.

44. See *Commercial Speech*, *supra* note 10, at 41 n.144, for an analysis in which CBS, *Tornillo*, and *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (upholding the FCC's "fairness doctrine"), are consistent with this traditional interpretation. I might add, however, that I share the skepticism with which Blasi and others view *Red Lion*.

45. Blasi, *supra* note 6, at 636-37.

46. See, e.g., Linde, *Fair Trials and Press Freedom—Two Rights Against the State*, 13 WILLAMETTE L.J. 211 (1977).

47. Blasi, *supra* note 6, at 634-35; cf. T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* (1970).

the context of press claims result in only weak protection of freedom of expression. In contrast, I will argue that balancing should be restricted to the press context and that any reliance on the instrumental importance of the checking function to interpret the speech clause should be rejected.⁴⁸

Blasi suggests that the "concept of human autonomy is largely irreducible."⁴⁹ This irreducibility, combined with Brennan's "incommensurate respect"⁵⁰ explains why those who espouse the libertarian argument from autonomy usually claim that individuals have an absolute right to engage in expression that is an aspect of human autonomy. Blasi states, however, that the activities instrumentally serving the checking value and not expressing human autonomy can properly be "balanced against competing regulatory interests," and promoted incrementally.⁵¹ As long as one shares Blasi's belief that the autonomy value and the checking value are co-existing bases of the first amendment, one might follow either of two approaches to meshing them.

In the approach Blasi apparently takes, the checking value is a very important part of the first amendment and is narrower in scope than most other first amendment values. Indeed, it could be viewed as a component of the self-government value.⁵² A plausible calculus gives greatest constitutional protection when the various speech values overlap, or to the more specific, narrowly defined values. Either way, the calculus provides greatest protection to speech relevant to the checking function. Blasi adopts this method when he finds that the checking function warrants voiding limits on speech (certain defamation claims and gag orders) and denying protection of speech (political speech of government employees)

48. My disagreements with Blasi about constitutional approach are limited criticisms though important ones. Blasi has clearly advanced first amendment theory, and I agree that he is right to emphasize the social importance of the checking function.

49. Blasi, *supra* note 6, at 547.

50. *Herbert v. Lando*, 441 U.S. 153 (1979) (Brennan, J., dissenting).

51. Blasi, *supra* note 6, at 547.

52. *Id.* at 558. The self-government theory, advanced by Professor Meiklejohn, regards the freedom of expression guaranteed by the Constitution as flowing from the principle of self-government. Thus, the first amendment protects speech only when it furthers the self-government process. Speech that advances the checking value would presumably further self-government. Meiklejohn, *What Does the First Amendment Mean?* 20 U. CHI. L. REV. 461 (1953).

I have argued that the importance of self-government is best seen as an aspect of respect for individual autonomy and that political self-government is a subpart of human self-determination. Therefore, the important aspects of Meiklejohn's approach are best explained and implemented by the liberty theory of the first amendment.

that he would otherwise find justifiable.

This calculus is meaningless if speech that performs a checking function already receives absolute protection based on respect for individual autonomy. But Blasi apparently rejects the idea that certain values, *e.g.*, respect for individual autonomy, should or can receive absolute protection in the sense that, as elaborated, they constitute the framework within which instrumental accommodations are made. Instead, his method of meshing values appears to result from his tendency to view all law as a compromise between interests: he simply states that "the process of formulating legal standards is one of accommodating competing interests rather than deriving standards from constitutive premises."⁵³

The second and more plausible way to integrate Blasi's observations about the different nature of the autonomy value and the checking value is to give them each a separate role. Specifically, one should rely on the checking value to give content to the freedom of the press clause. This reliance would not decrease the protection of speech justified by the respect for individual autonomy, which provides a key, constitutive, legitimating element of our legal order. If the courts absolutely protect speech rights on autonomy grounds, then the fact that the same expression also serves the checking function would be interesting—but irrelevant to the need for constitutional protection. I can think of no speech *content* that serves the checking function that should not receive protection under an expansive autonomy or liberty interpretation of the first amendment.

The value of autonomy, however, does not make the checking value redundant in all instances. As discussed earlier, the liberty or autonomy theory of free speech does not protect all *speakers*. It does not protect commercial enterprises, leaving the problem of justifying protection for the press's "speech." Moreover, the liberty theory provides no obvious argument for protecting any institution, even one that originates expressions serving the checking function, except, possibly, when the speech originates in a constitutionally protected assembly or association. One suspects that the liberty theory's normal demand for absolute rights has little coherence, much less rationale, when applied to protection of institutions. Our concept of a person and the related notion of personal autonomy provide the guide to specifying the content of absolute rights that protect a person's expression of her identity; no similar

53. Blasi, *supra* note 6, at 547.

concept provides a guide for defining the content or form of institutional rights. Although some institutions may serve basic functions for society, they seem inherently in need of instrumental justification. Thus, both the formulation and the protection of rights of institutions would proceed incrementally on the basis of "accommodating competing interests."

This second approach to the autonomy and checking values argues that the appropriate constitutional relevance of the checking function is in justifying and interpreting press rights, because of: 1) the checking function's instrumentalist content and reach; 2) the instrumental basis for arguments for institutional rights; 3) the preeminent place of the press in serving the checking function; and 4) the irrelevance of instrumental arguments for justifying fundamental individual liberty rights.

This conclusion does not ignore the fact that private speakers also serve the checking function. One still expects that press activity in our society is likely to be central; think of Watergate or the Pentagon Papers. Blasi makes this point when he notes that, given the complexity of modern government, the checking function needs "well-organized, well-financed, professional critics to serve as a counterforce to government."⁵⁴ Moreover, general first amendment protection of speech may provide adequate protection for the contributions of individuals to the checking function. In contrast, although institutions such as the press are usually more powerful than single individuals, their operations depend on the continued cooperation of many individuals both within and outside of the institutional boundary. Various decisionmakers within the press enterprise possess the power to frustrate its performance of the checking function. Moreover, the press enterprise exists as a relatively stable, easily identifiable, and important target that some persons in government may wish to restrain. These differences between the press institution and private individuals may leave the press comparatively more vulnerable to government practices that could frustrate their operations. Consequently, the institutional press may be more exposed to governmental manipulation or appropriation, undermining its ability to check government—and therefore needs special protection.

The theoretical approach outlined above should secure general agreement. Although it differs from Blasi's conclusion, it builds upon Blasi's basic insights. I should note that Blasi argues for

54. *Id.* at 541.

some special press rights;⁵⁵ this position is not surprising, given the press's special need for protection. Moreover, in his first section, which examines the historical basis of the checking value before and contemporaneously with the adoption of the first amendment, Blasi reports statements and arguments that primarily refer to freedom of the press, or that use press activities as the example for or context of the argument.⁵⁶ When seeking historical support for the checking function, Blasi quite uniformly comes up with references to the press. Similarly, cases involving the press provide the occasional support that he finds in modern Supreme Court decisions for the recognition of the checking function as a first amendment value.⁵⁷ For example, the classic statement in support of the checking value presents the press as the principal performer of the checking function:

The Constitution specifically selected the press . . . to play an important role in the discussion of public affairs. Thus the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve.⁵⁸

In sum, despite his more general claims, Blasi's careful development of the checking function is best read not as a general first amendment interest to be balanced, but as the doctrinal foundation for the press clause and for special press rights.⁵⁹ As Justice Brennan apparently recognized, Blasi's discussion of the importance of the press adds detail to Justice Stewart's earlier call for special constitutional protection for the fourth estate.⁶⁰

55. See *id.* at 564. See also *id.* at 602-07 (arguing for reporter's privilege).

56. See *id.* at 529-38. For example, Blasi reports that Wilkes emphasized the checking function inherent in the "liberty of the press"; Father of Candor attacked the doctrine of seditious libel and viewed exposure of bad government as possibly the greatest benefit of "the liberty of the press"; Junius emphasized the checking value within the "liberty of the press"; and a letter from the First Continental Congress to Quebec emphasized the checking role as a justification for "freedom of the press."

57. See *id.* at 620-21.

58. *Mills v. Alabama*, 384 U.S. 214, 219 (1966) (striking down an Alabama statute banning election-day newspaper endorsements or criticisms of candidates).

59. Since Blasi and I adopt different doctrinal approaches, our specific conclusions about the content of special press rights differ. Blasi's other interesting claims, which often unduly limit the protection offered to speech, should be analyzed using traditional speech theory. When his balancing approach contradicts traditional first amendment doctrine, one should reject his balancing analysis as unnecessary and inappropriate to his key insight into the importance of the checking function.

60. *Herbert v. Lando*, 441 U.S. 153, 180 (1979) (Brennan, J., dissenting).

B. *Defensive, Offensive, and Speech Rights*

One can agree that the press merits special constitutional protection without defining the specific content of those press rights. Disagreement about the specific content of press rights, in fact, is common. For example, Justice Stewart, the most prominent proponent of a special reading of the press clause, disagrees with many other press advocates by rejecting the claim that the first amendment provides the press with a special right of access to prisons.⁶¹

There is also disagreement concerning the extent to which the first amendment provides immunity for defamatory statements. Arguably, the constitutional limitations on state defamation laws derive from the need to protect the press in its performance of its special role of assuring "bold and vigorous prosecution of the public's business"⁶² and therefore do not protect nonmedia speakers.⁶³ Indeed, many commentators read *Gertz v. Robert Welch, Inc.*,⁶⁴ to limit protection to media defendants.⁶⁵ The opposite conclusion, that the Constitution protects the defamatory communications of all speakers equally,⁶⁶ has also been argued.⁶⁷

Moreover, commentators disagree about the interpretation of *Miami Herald Publishing Co. v. Tornillo*,⁶⁸ in which the Supreme Court struck down a right-to-reply statute, and *CBS v. Democratic National Committee*,⁶⁹ in which it rejected a claim of access to the media. Some conclude that those cases recognized the superiority of the press's claim over the competing speech claims of those de-

61. Writing for the majority in *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974), Justice Stewart stated:

"[N]ewsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public." The proposition "that the Constitution imposes upon government the affirmative duty to make available to journalists sources of information not available to the public generally . . . finds no support in the words of the Constitution or in any decision of this Court."

Id. at 850 (quoting *Pell v. Procunier*, 417 U.S. 817, 834-35 (1974)) (citations omitted).

62. Stewart, "Or of the Press," 26 HASTINGS L.J. 631, 635 (1975).

63. Justice Stewart states, "the Court has never suggested that the constitutional right to free speech gives an individual any immunity from liability for either libel or slander." *Id.* But cf. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (directing verdict for private, nonmedia defendants).

64. 418 U.S. 323 (1974).

65. See, e.g., Nimmer, *Introduction—Is Freedom of the Press a Redundancy: What Does It Add to Freedom of Speech?* 26 HASTINGS L.J. 639, 649 (1975).

66. I use "speaker" to refer to anyone who communicates, whether it be an individual talking to a friend or the press publishing a story.

67. See Lange, *The Speech and Press Clauses*, 23 U.C.L.A. L. REV. 77, 116-17 (1975).

68. 418 U.S. 241 (1974).

69. 412 U.S. 94 (1973).

nied access,⁷⁰ but others interpret them as following the traditional analysis that protects the expression of private entities from government interference and reminding access claimants that the first amendment has never provided a right to effective speech.⁷¹ Finally, Professor Bezanson argues, relying on a mistaken analogy to the establishment clause, that the press clause requires government neutrality toward the press and that the press should not have any special right of access to information.⁷² Bezanson opposes virtually all other press advocates when he argues that the press clause is consistent with, and possibly requires, denial of a reporter's testimonial privilege.⁷³

Clearly, people who agree to a special constitutional status for the press do not agree about the implications of the status. One needs a more focused inquiry to connect constitutional theory with a specific content of press rights. I conclude that the press clause gives the press defensive protection against various forms of government interference that restrict or impede its ability to carry out its checking and its informative functions. The analysis leading to that conclusion is elaborated in this section.

Claims that the press clause guarantees privileges or protection for the press have appeared in many contexts. Among the claims are that: 1) the press has some right of access to information or facilities controlled or maintained by the government, such as a right to interview prisoners⁷⁴ or to be present at all criminal proceedings;⁷⁵ 2) special constitutional protection should extend to defamatory statements made by the press; 3) the press should receive greater constitutional protection against gag orders and other prior restraints than other speakers should;⁷⁶ 4) reporters should not have to appear before or answer questions posed by a grand

70. See Nimmer, *supra* note 65, at 644-45.

71. See Lange, *supra* note 67.

72. See Bezanson, *supra* note 17, at 754-62.

73. *Id.* Although the plurality in *Branzburg v. Hayes*, 408 U.S. 665 (1972), rejected a qualified testimonial privilege for reporters, Justice Powell's concurrence may be read along with the dissents in order to find support for such a privilege. See, e.g., Goodale, *Branzburg v. Hayes and the Developing Qualified Privilege For Newsmen*, 26 *HASTINGS L.J.* 709, 716-18, 742-43 (1975).

74. See *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974); *Pell v. Procunier*, 417 U.S. 817 (1974).

75. See *Gannett Co. v. DePasquale*, 443 U.S. 368, 397 (1979) (Powell, J., concurring).

76. This situation would occur if *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976), applies only to the press. See *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 848 (1978) (Stewart, J., concurring).

jury;⁷⁷ 5) in civil suits, the press should be privileged not to respond to "inquir[ies] into the state of mind of thsse who edit, produce, or publish, and into the editorial process";⁷⁸ 6) the press should receive special protection against searches and seizures by government, at least when it is not suspected of criminal activity;⁷⁹ and 7) the press should be free from government regulations undertaken for any of a variety of purposes, *e.g.*, to promote fairness or diversity in press communications,⁸⁰ to apply general taxation and economic legislation designed to further economic and social policies,⁸¹ or to create an industrial structure that promotes journalistic freedom or other first amendment "goals," such as diversity.⁸²

Generally, these and other press claims can be characterized as either defensive rights, offensive rights, or speech rights. Testimonial privileges, protection against searches and seizures, and most protections against regulation are defensive rights: they protect the institution against destruction, interference, or appropriation by government. Special access to information is an offensive right, a special privilege to engage in activities relevant to press functions. Protection against gag orders, prior restraints, and defamation suits are speech rights: they protect the press in communicating what it chooses.

I will clarify the content of each category and the differences between them by examining the practical and theoretical rationales for each. Defensive rights protect press enterprises (or, possibly, particular press corps or practices of press personnel) from government appropriation and interference. Offensive rights give the press enterprise or the reporters special rights of action or special rights to obtain materials outside the institutional boundaries of the press. The right to refuse to cooperate is defensive; the demand for cooperation is offensive.

Distinctions between defensive and offensive rights are obviously somewhat conventional because they necessarily rest on our culturally based understanding of institutional boundaries. One could imagine a society in which all government files were viewed, in a sense, as press property; in that culture, the institutional

77. See *Branzburg v. Hayes*, 408 U.S. 665 (1972).

78. See *Herbert v. Lando*, 441 U.S. 153, 157 (1979).

79. See *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978).

80. See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

81. See *Associated Press v. NLRB*, 301 U.S. 103 (1937).

82. See *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978).

boundaries of the press would encompass more than do the institutional boundaries of our press. According to the perspective of that culture, the press could have a *defensive* right to block government interference with journalistic use of government files because the official blocking access would be interfering with the internal operations of the press. Our own culture imparts the intuitive understanding that government files in no sense belong to the press; to characterize government files as within the control of the press does violence to our conventional understanding of institutional borders. Hence, in our society, the press could have at most an *offensive* right to the files because it would have to ask or demand cooperation from the government. Likewise, within our perception, any right to refrain from disclosure of sources would be *defensive* because government is doing the demanding; the press could refuse to cooperate.

Having described this intuitive notion of what falls into each category, I will explore the justification for each of the three types of proposed press rights. Relying heavily on the justifications for institutional protection of the press—1) the need to preserve an outside source that can expose government practices and abuses and 2) the importance of non-governmentally controlled sources of information, opinion, perspective, and speech-based entertainment—I will conclude that the press clause rationale is persuasive only for defensive rights.

1. DEFENSIVE RIGHTS

The checking function of the press clearly requires independence from government; it requires rights that give the press a defense against government intrusions. Defensive protection against hostile, manipulative, or retaliatory action by government is vital to protecting the press's capacity to expose government. Even well-intended regulations designed to further the government's conception of a properly functioning press, such as public access or right-to-reply rules, can undermine press independence. Likewise, broad government actions designed to address concerns that affect media and nonmedia alike can weaken the press's integrity and capacity to perform its informative functions.

Other considerations support protection of defensive press rights. Defensive rights fit neatly into a constitutional framework that distributes decisionmaking power among various entities and specifies and guards the boundaries of these entities. Defensive rights merely police the boundary between government and the

press in the way that principles of federalism or separation of powers provide some autonomy for various decisionmaking centers, and in the way that individual rights protect individual autonomy from certain forms of government intrusion. As I will argue, the balancing required to define defensive rights, as contrasted to offensive rights, can more often lead to relatively clear rules. Clear rules give greater guidance in individual cases and avoid continual, inept, ad-hoc judicial evaluations of each controversy.

Defensive rights should be protected for yet another pragmatic reason. The context in which people assert defensive rights simplifies the troublesome problem of identifying "the press." When the government attempts to regulate communication enterprises or solicit testimony from people who, at the time of the government inquiry, have evidenced an involvement with the press and whose testimony relates to that involvement, the task of identifying the press becomes plausible. Of course, definitional problems remain: Does the in-house publication qualify? Does the one-shot pamphleteer qualify? Is the informer as well as the informed reporter protected? These, however, are questions to which one can address reasoned arguments rather than speculations about unformed motivation and unknown future behavior,⁸³ speculations one must face when analyzing offensive rights. When an individual claims an offensive privilege, such as access to a prison, it is difficult for the state and sometimes difficult even for the person seeking access—perhaps a young Doris Lessing, Truman Capote, or Alexander Solzhenitsyn⁸⁴—to know whether the visit will move that person to write or lecture about it in the future.

2. OFFENSIVE RIGHTS

As the preceding discussion suggests, offensive rights are more problematic than defensive rights. Clearly, a right of access to government facilities or information furthers the press's capacity to inform and expose. Having access as a matter of right rather than

83. The focus in special protection for the press centers on people's continuing role in uncovering and communicating information to a public usually as large as is willing to receive (pay for) the communication. This role suggests that the lecturer as well as the print publisher should receive protection if 1) a consistently large proportion of her time is devoted to this role and 2) she makes her communications available to the general public. Protection would not, then, extend to the private detective. Nevertheless, rather than fully develop and defend this approach, I will take the usual "out" of a person who does not want to think through the issue, by suggesting that a definition of "press" be developed through case-by-case adjudication.

84. This problem was suggested by Lange, *supra* note 67, at 105-06.

privilege may also be important to protect the press from being subtly manipulated by, or falling into a cozy cooperation with, those whom it claims to watch. Nevertheless, constitutionally based access privileges are not as necessary to the protection of the press's integrity or capacity to expose the uses and methods of government power as are defensive rights; the absence of access rights does not give the government a tool with which to frustrate the internal workings of the press so that the government can pursue its own hostile or benign goals. Because offensive rights do not maintain institutional autonomy or boundaries, neither a separation-of-powers nor a fourth-estate theory requires them.

Even if granted access, the press will probably continue to rely upon present sources of information because of the likelihood that government officials engaged in dangerous abuses will attempt, often successfully, to render unproductive any access designed to disclose their abuse. Today's press has at its disposal powerful weapons to use when the government denies legitimate requests for access. It can, for example, report rumors of unseemly practices or conditions while publicly speculating about the reasons why the government denied access, thereby forcing the government to provide either access or a convincing justification for its denial. A strong, competent, and independent press should be able to work within any information environment. Still, one can conclude that public access will promote proper government functioning—but should that access result from political choice or from constitutional mandate?

The rationale for constitutional protection of the press suggests no obvious standards with which to evaluate access claims. Virtually no one argues that all government information and practice should be public. In fact, the press itself argues that secrecy is sometimes essential for its institutional functions,⁸⁵ thereby implicitly conceding to the government the utility of secrecy claims in some situations.⁸⁶ Given the legitimacy of some secrecy in government, it seems that a judicially created right of access would require continual adjudication of access claims without the benefit of clear standards for evaluation; judges would have to determine and weigh the public interest in access relative to the public interest in

85. One can contrast this claim with an individual's claims to secrecy that may derive from premises of liberty, autonomy, or equality. See Baker, *Posner's Privacy Mystery and the Failure of Economic Analysis of Law*, 12 GA. L. REV. 475 (1978).

86. This concession, by itself, does not provide an argument that government should be able to stop the communication of information once the press or anyone else has obtained it.

keeping the relevant information confidential. Constitutional decisionmaking seems least appropriate for such factually based policy judgments. Judicial decisions would necessarily be instrumentally outcome-based rather than competency-based; that is, the court would determine the social desirability of the particular access claim rather than determining the proper authority, under the separation of powers doctrine, to make such a decision.

Still, the access proponent could persist, by arguing that the courts would gradually develop rules or guidelines for evaluating secrecy claims. The decisions would not necessarily be *ad hoc*; the courts could develop principles to distinguish contexts in which access could be denied or must be mandated, to categorize justifications for denials, and to evaluate the procedures and restrictions upon which the government could condition access. Rather than condemning this process as an unprincipled form of judicial policy-making, the access proponent would emphasize that it is appropriate, in constitutional theory, to balance press rights since they, unlike autonomy-based speech rights, are incremental.

Most significantly, the access proponent would emphasize that the general rationale for constitutional protection of the press (that the self-interest or the limited perspective of representative bodies will lead them to give a degree of freedom to the press that is insufficient to check abuse and that does not maximize welfare) applies with particular force to political bodies' evaluations of the need for secrecy. It is apparent that most enterprises, as well as individuals, have an almost automatic impulse toward secrecy and, indeed, try to preserve more secrecy than is socially desirable.

This last argument for judicial evaluation of secrecy claims, however, may be misplaced. It seems doubtful that courts will order legislative bodies to disclose information;⁸⁷ if most access demands are directed at executive agencies, legislatures should be able to evaluate them rationally. Congress and state legislatures have, in recent times, responded to demands for access with a plethora of acts fostering freedom of information, open meetings, and open records. The political process may in fact work better here than in many other areas.⁸⁸

87. *Cf. United States v. Richardson*, 418 U.S. 166 (1974) (federal taxpayer lacked standing to demand that Congress provide constitutionally mandated disclosures).

88. This discussion may also apply to defensive rights. Legislatures can, and often do, respond with shield laws. In fact, reliance on the judiciary is particularly problematic in the case of defensive rights. The claim is often for defense against inquiries that involve the judiciary. One could conclude that, as a party in interest, the judiciary will be particularly

The arguments for and against offensive rights seem inconclusive. Despite the practical difficulties of identifying the press in this context and the necessity of making difficult instrumental judgments concerning the conditions and the degree of access justified for various kinds of information, one could conclude that courts should recognize offensive rights as constitutional. Thus far, I have not found the arguments for constitutionally based access rights persuasive. Although a democratic society cannot allow government will to operate in secret, I am unpersuaded that sufficient openness will not ensue from the demands of the people and the responsible decisions of officials. In addition, the strongest argument for the constitutional status of defensive rights, that they are implicit in the idea of separation of powers or of the structural integrity of the press, does not apply to offensive rights. Moreover, an insufficient degree of legislative recognition of access claims does not seem as frightening or as dangerous as does the possibility of actions that attack the internal workings of the press or stop the press from publishing what it chooses.

My tentative conclusion may reflect one other consideration. Access claims closely resemble contentions that the first amendment guarantees a right to effective speech. I have elsewhere argued that courts should not and do not recognize a first amendment right to effective speech, although the state should promote it as a matter of policy.⁸⁹ Both the access claim and the effective speech claim would require judicial action to *promote* interests assumed to be implicit in the first amendment. But the phrase "Congress . . . shall make no law *abridging* the freedom . . ."⁹⁰ suggests an intent merely to protect an individual or institution from governmental restraint or punishment in exercising its freedom; the first amendment does not mandate that the government *assist* in that exercise. One who reads the first amendment this way finds

insensitive to defensive claims. Consider, for example, the impulse of some courts to strike down shield laws as improper legislative interference with their judicial power. See *Farr v. Superior Court*, 22 Cal. App. 3d 60, 99 Cal. Rptr. 342 (1971), *cert. denied*, 409 U.S. 1101 (1972); *Ammerman v. Hubbard Broadcasting, Inc.*, 89 N.M. 307, 551 P.2d 1354 (1976). See generally Goodale, *Courts Begin Limiting the Scope of Various State Shield Laws*, Nat'l L.J., Dec. 11, 1978, at 28, col. 1.

Nevertheless, most courts have been responsive to claims of a qualified privilege for newsmen. Goodale finds that nine federal circuits have adopted a qualified privilege while one, the Fifth Circuit, has apparently rejected it; and the states, either by court decision or legislative action, have split 16 to 4 in favor of a qualified privilege. Goodale, *Review of Privilege Cases*, in COMMUNICATIONS LAW 431, 491-507 (1979).

89. See *Scope*, *supra* note 10, at 990-1009.

90. U.S. CONST. amend. I (emphasis added).

claims for a right of effective speech and claims for a right of access for the press equally unpersuasive.

3. SPECIAL SPEECH RIGHTS

The final category of claimed press rights comprises special rights, denied to private individuals, to communicate information or opinion. These claims are unjustifiable. Only the broadest protection of individual rights of expression could be consistent with the constitutionally required respect for individual autonomy, the importance of speech for self-fulfillment, and the importance of not limiting self-expression or the use of communication for purposes of creation and change.⁹¹

Earlier, I discussed the main arguments against greater speech rights for institutions than for individuals.⁹² The crucial concern was to show why a press controlled by market-enforced profit dictates should be *as free* from government control of its speech as are individuals. The instrumentalist, fourth-estate argument satisfied that concern, but it could never justify more protection for the content of the press's speech than the autonomy-based arguments could justify for the content of an individual's speech. Indeed, all the social functions served by press communications, and possibly more,⁹³ are served when individuals communicate.⁹⁴ Only because the press is particularly vulnerable as an institution does it require special rights protecting its operating structure;⁹⁵ but there are no grounds to allow the press to say things that individuals are forbidden to say. Any other conclusion would be quite odd: imagine its being illegal to say to another what one had just read in a newspaper.⁹⁶

These arguments for equal speech rights for the press and individual speakers apply directly to the prior restraint (gag order) issue. An absolute prohibition on gag orders, which the Court al-

91. *Scope*, *supra* note 10, at 981-90.

92. *See* text accompanying notes 10-16 *supra*.

93. In the interesting interchange between Nimmer and Lange on the personal fulfillment press people obtain from their work, Lange argues that "a sense of self-fulfillment continues to provide a substantial portion of the *raison d'être* of the so-called 'working press.'" Lange, *supra* note 67, at 104.

94. *See* Blasi, *supra* note 6, at 589-91.

95. *See* text accompanying notes 54-55 *supra*.

96. *But see* *Nebraska Press Ass'n v. Stuart*, 423 U.S. 1327, 1333-34 (1975). In his published opinion, Mr. Justice Blackmun temporarily prohibited the press from reporting the facts of the case, including some of the facts recited in his opinion.

most recognized in *Nebraska Press Association v. Stuart*,⁹⁷ should apply equally to the press and individuals. Gag orders applied to the witnesses, defendants, and attorneys involved in a case raise a separate issue; upholding them would not imply that the Constitution distinguishes between the press and individual speakers.⁹⁸

Some argue that the press should receive special protection when it makes defamatory statements because the probability of large jury awards in defamation suits, added to the high cost of defending the suit, could destroy the press or at least have a "deterrent effect" upon press activities. One wonders, however, why we should not also be worried about individuals who will have to pay such awards. The implication underlying an argument for special protection of the press against defamation suits may reflect an instrumentalist conclusion that fear of jury awards will not deter useful speech of individuals as much as it would deter the press, or a conclusion that, even if equally deterred, the deterrence of the press would more drastically harm society. For now, I will offer only a few comments about this instrumentalist reasoning.

One suspects that instrumentalist arguments may point even more strongly toward applying defamation standards that protect the press less than they protect individual speakers. First, one should predict that application of rules to a structured organization that is not only carefully attuned to profit and legal risks, but is continuously involved in the particular activities covered by the rules, will result in a higher degree of compliance than will application to random individuals. Anti-defamation rules, then, should have greater effectiveness in stopping defamatory speech when

97. 427 U.S. 539, 588, 604, 612 (1976) (Brennan, Stewart & Marshall, JJ., concurring); *id.* at 570 (White, J., concurring); *id.* at 617 (Stevens, J., concurring).

Settled case law concerning the impropriety and constitutional invalidity of prior restraints on the press compels the conclusion that there can be no prohibition on the publication by the press of any information pertaining to pending judicial proceedings or the operation of the criminal justice system, no matter how shabby the means by which the information is obtained.

Id. at 588.

98. The relevant distinction is between those formally involved in the trial process, who might be subject to special rules because of and during their involvement, and those who are not. The proper standard to measure the legitimacy of restraints on the trial participants should be similar to those used to evaluate restraints that government places upon the speech of its employees, *see, e.g., United Public Workers v. Mitchell*, 330 U.S. 75 (1947), unless the involuntary involvement of the defendant or witnesses distinguishes them from government employees, who could presumably escape the speech limitations by leaving their employment. The defendants' claimed right to make their defense, in part, to the public may also make a gag order impermissible. In any event, those not involved should be equally free to communicate information and opinion about the crime and the trial.

applied to the press. Second, one can reasonably expect that defamations by the press will cause greater injury than similar defamations by individuals. Third, one should include in the instrumentalist calculus the damage done by rules expressing the notion that the press enjoys a special right to injure or destroy individuals casually, through defamation or invasion of privacy, against which the law has generally protected individuals. These costs, caused by the contradictory messages sent by the legal system about individual rights, would include demoralization of the individual⁹⁹ and resentment against the press. Given these three factors, the application of anti-defamation rules to the press should result in more prevention and an increased ability to compensate for injuries per given expenditure of enforcement resources. One could extend this instrumentalist reasoning, but the considerations just presented indicate that the instrumentalist cost-benefit calculations do not support giving the press special protection when they defame.

My second comment concerns the qualitative difference between special speech rights for the press and defensive or offensive rights.¹⁰⁰ Defensive rights and most offensive rights would not allow the press directly to violate the rules defining an individual's rights to property or liberty. Defensive and offensive press rights merely impose constitutional constraints on the interaction of the press and the government. Protection of the press's defamatory speech, however, would be a special privilege allowing the press to do what the law properly establishes as a harm to another person.¹⁰¹ An appropriate analogy would be to allow the press to commit burglaries to obtain information. One can easily conclude that the press has a constitutional right to communicate any information obtained from an illegal burglary without recognizing any exemption from liability from the generally applicable laws of burglary.¹⁰² Moreover, given that one has an otherwise constitutionally permitted property right in one's reputation, a special press right

99. For a discussion in a slightly different context of the relevance of demoralization costs to utilitarian calculations, see Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1214-24 (1967). See also Franklin, *Winners and Losers and Why: A Study of Defamation Litigation*, 1980 AM. B. FOUNDATION RESEARCH J. 455.

100. See text following note 82 *supra*.

101. I do not imply that defamation has been properly established as a legal harm, but only that one must conclude that it is a legal harm if one denies protection to the individual speaker.

102. See *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 572 (1976) (Brennan, J., concurring).

to defame amounts to a forced economic subsidy of the press by private individuals. Under a strongly pro-speech interpretation of the first amendment, one might conclude that the state must not recognize the claimed right of the defamed person to control another's speech and must hold that such a property right in one's reputation is unconstitutional. Under the special press right interpretation, however, the state recognizes this property interest in reputation, but grants the press a privileged right to appropriate it. This interpretation would put the press above the law.

These considerations all point to what I think should be the fundamental question about defamation: Under what circumstances relating to the care taken by the speaker, the falsity of the speech, and the identity of the person injured, should the first amendment protect the use of defamatory speech? This question should receive the same answer whether the defendant is a private individual or the press.

C. *The Form of Protection*

I have argued that the social value of checking abuses by government and preserving independent sources of information and perspective justifies interpreting the freedom-of-the-press guarantee as providing certain instrumental "defensive rights" to the press in addition to the speech rights they share with all individuals. Although the instrumentalist nature of the argument suggests the theoretical legitimacy of a "balancing of interests" analysis, the propriety of balancing, not to mention the form that it will take, remains to be discussed.

People use the term "balancing" to describe a wide variety of practices. One can usually distinguish "meta-balancing," a process of arriving at general rules, from "ad hoc balancing," a process of reaching conclusions in individual cases. Arguments for an absolutist, line-drawing approach also vary, and at least one of them, described in the next paragraph, is consistent with an instrumentalist form of meta-balancing. Sometimes, the absolutist argues that because of the fundamental nature or constitutive basis of the claimed right, general societal welfare interests should not count as sufficient reasons to override the constitutional claim and, therefore, utilitarian or instrumentalist balancing is inappropriate. This consideration, I assume, is the kind Mr. Justice Brennan recognized when he claimed that the "autonomy of each individual is

accorded equal and incommensurate respect."¹⁰³

In different ways, Professor Thomas Emerson and Justice Hans Linde have convinced me of the relevance of a second, more pragmatic critique of balancing. Their arguments stress the importance of the method of formulating and interpreting constitutional limits on government power for the effective operation of our system of legal rights. Constitutional directives are usually addressed to government officials. Conscientious officials can most easily follow directives that are clearly and precisely formulated. Clarity should increase the effectiveness of the directives and, possibly, their degree of acceptance. Since constitutional provisions are less clear if interpreted as a set of interests to be balanced in each case, a balancing approach undermines these desirable objectives.

There is yet another reason why ad hoc balancing is undesirable for determining the content of defensive press rights. Any process that involves the weighing of interests is extremely subjective. In times of conflict or crisis, dominant factions of society often feel threatened and respond by limiting the rights of anyone apparently connected with the threat. Since the judicial "weighers" usually come from the same dominant community, they are likely to perceive that the restrictions advance weighty interests. Consequently, one should expect a balancing approach to lead to accordion-like protection: When there is little need for protection, the "constitutional interests" seem to justify wide-ranging claims; but when the need for first amendment protection is urgent, when the asserted rights become threatening, the "constitutional interests" seem insufficient and protection collapses. Even in less turbulent situations, one might suspect that ad hoc balancing would primarily protect claims congruent with the values of the judge's social class, since the judge is apt to be persuaded that these values or interests are most weighty.

These pragmatic criticisms of balancing suggest that even when only instrumental arguments support the claimed constitutional right, ad hoc balancing will fail to provide effective, adequate protection due to systemic features of the legal order. Absolute rules, it seems, are necessary to avoid accordion-like protection. One wonders whether one can describe and theoretically justify defensive press rights in a relatively rule-like form.

By balancing interests at a high level of generality, one may be able to formulate principles that provide the preferable, rule-like

103. *Herbert v. Lando*, 441 U.S. 153, 183-84 n.1 (1979) (Brennan, J., concurring).

protection. For example, consider the following two-part formulation: First, the government must not have a purpose either to lessen the capacity of the press to perform its special functions or to retaliate against the press for its performance of these functions. Second, the government should not be able, without the press's permission, to appropriate the items, thoughts, or information that flow from the press's performance of its constitutionally protected role. That role, of course, protects press personnel as investigators and reporters of crime, not as participants in crime or in taking evidence of the crime other than the evidence created by press personnel.

The first part of the proposed principle seems obvious—the government must not try to destroy or undermine the operations of the press. This portion of the principle derives from standard constitutional doctrine. Even if the government can act in a way that has the effect of limiting speech opportunities or disproportionately burdening a racial minority, it cannot, under the Constitution, have a purpose to do so. All of the Justices in the *Branzburg*¹⁰⁴ case apparently agreed upon this tenet. Clearly, President Nixon would have violated freedom of the press if he had ordered licensing trouble for the Washington Post's broadcast stations in response to the Post's exposés.¹⁰⁵

The second part of the principle, protecting the legitimate work product of the press from government appropriation, embodies the concept of institutional autonomy. This protection would not give the press any special affirmative privilege to act or to obtain information or resources. It merely would prohibit government from requisitioning the products of the proper activities of the press.

As a basis for refusing to testify about sources or about the research that led to a story, the protection would be similar in nature and rationale to other recognized testimonial privileges. Statutory or constitutional privileges often protect the confidential communications of lawyers, doctors, psychiatrists, and priests when secrecy is important for the successful fulfillment of their social roles.¹⁰⁶ Although the legitimate formulation of these roles,

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

105. See H. LINDE AND G. BUNN, LEGISLATIVE AND ADMINISTRATIVE PROCESSES 644-45 (1976) (quoting *Hearings Pursuant to H.R. Res. 802 Before the House Comm. on the Judiciary*, 93d Cong., 2d Sess., bk. VIII, 321-23 (1974) (excerpts of Nixon's conversations concerning the *Washington Post*)).

106. FED. R. EVID. 501.

and hence the privilege, does not extend to involvement in crime,¹⁰⁷ the privilege usually is absolute within its relevant range. Denying the privilege would discourage socially important communications and, to that extent, would not even serve state law enforcement concerns.

Irrespective of these empirical considerations, it seems unfair to allow government to rely on these role holders for information that they would not divulge voluntarily. The protection of privilege extends to information or communications that would not be generated and that the privileged party would not possess but for the confidentiality essential to that person's performance of a certain socially useful, socially sanctioned role.

All of these general statements concerning privilege would apply to the protection given the press's work product. They suggest that protection of the legitimate work product of the press is a fair principle upon which to preserve institutional integrity. The principle is justified by a belief that maintaining the integrity of the press promotes a better society and makes our liberty more secure.¹⁰⁸ In addition, granting rather than denying the privilege to the press might, depending upon empirical factors, better satisfy government's need to receive information about wrongdoing; the privilege would increase the press's knowledge of wrongdoing, thus giving it material for exposés from which law enforcement agencies benefit.¹⁰⁹

Exceptions to the press's work product privilege may be appropriate, just as other testimonial privileges have exceptions, but one should not define press privilege exceptions by simple analogy. The specific rationale differs for each privilege, as does the social function served by protecting the privileged communications originating within each role. One may, however, employ a balancing analysis to argue for or against specific exceptions to the press's work product privilege.

107. For example, confidentiality of communications between an attorney and his client will not be judicially recognized should the conversations entail some joint criminal exploit. The fifth amendment may, however, prevent forced testimony.

108. See notes 26-32 and accompanying text *supra*.

109. *But see* *Pittsburg Press Co. v. Pittsburg Comm'n on Human Relations*, 413 U.S. 376, 388 (1973). In dicta, the Court said that it had "no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes." One wonders why. The state's interest in law enforcement would seem well served if the police had prior knowledge of the location of a crime. Only the interest in suppressing information about a person's willingness to engage in consensual criminal activity, a purpose of suppression that one would have thought to be unconstitutional, justifies the ban.

One conceivable exception is information about future crimes. Most testimonial privileges relate to the need to promote a counseling relationship between the role holder and a "client." Arguably, protecting communications concerning future crimes does not further the rationales behind these privileges. Even if it did, the importance of stopping the crime may outweigh the importance of promoting this aspect of the counseling relationship.¹¹⁰ These privileges, then, would not protect communication about future crime.

The privilege proposed for the press is premised on the need to promote an investigative role that provides information to the public, not on a counseling relationship. This aspect of the role blurs the importance of any distinction between communications about past, present, and future crime. To the extent that the privilege helps the press obtain and then make available information about criminal activity, including government misconduct, one could conclude that the gain from extending the privilege to information concerning future crime is worth any predicted weakening of law enforcement effectiveness.¹¹¹

Of course, having a privilege does not necessarily imply that it will be used. A privilege to print the names of crime victims, for instance, does not imply that all papers will always choose to ignore the victim's interest in privacy. A newspaper with a legal privilege not to divulge confidential communications and sources, whether or not future crime is involved, still has an ethical obligation to help stop evil practices; it may therefore choose to betray its confidences. Moreover, the newspaper may lose important goodwill if it gets a bad reputation in the community for abusing the privilege and failing to live up to common ethical standards.

This comment does not pretend to resolve the issue of whether information about future crime should be excepted from the proposed principle that the government be precluded from appropriating the press's legitimate work product. My point is 1) that the

110. Given the importance of stopping crime, one might conjecture that promoting communication about the crime within the counseling scenario is in fact desirable, giving counselors a chance to dissuade the potential wrongdoer. A privilege promoting this effect could, of course, exist to a limited degree; in that case, no duty to divulge the contents of the communication would arise if the attempted dissuasion succeeds.

111. The privilege may actually weaken law enforcement very little. As is evident today, the absence of a privilege that protects the press from having to disclose information that they receive about future crime does *not* guarantee that reports will be made directly to government officials. People often conceal prior knowledge of forthcoming crime; they are sanctioned only if authorities discover their prior knowledge and decide to prosecute them for their noncooperation.

issue should be framed as an instrumental judgment reflecting how we ought to define the press role, and hence the boundary between press rights and government authority, and 2) that the answer will not necessarily duplicate privileges accorded other roles.

The proposed principle, restated in the context of testimonial privilege, is that unless a member of the press appears to have engaged in criminal conduct—which may give her a fifth amendment privilege—she should not be required to answer questions about her investigations or her sources. This proposal goes beyond the qualified privilege that counsel advocated in *Branzburg*¹¹² and Justice Stewart accepted in his dissent. Possibly because he took as the relevant analogy legislative investigations of private associations protected by the first amendment,¹¹³ Stewart did not address arguments for an absolute, rather than a qualified, privilege.¹¹⁴

The analogy made by Justice Stewart does not bear up if one adopts my rationale for finding special institutional protection for the press—a rationale that Stewart has advocated at other times. Claims for protection of the associations against investigatory exposure and claims for special protection of the press rest upon different theoretical foundations; constitutionally required respect for individual autonomy justifies the rights of speech and association, but instrumental grounds justify the special press rights. As argued earlier,¹¹⁵ this weaker or instrumentalist argument for special press rights does not imply that the press should receive less protection than the individual speaker—in this discussion, that it should have a weaker testimonial privilege. Rather, the instrumentalist argument justifies added press protection not implied by the protection

112. *Branzburg v. Hayes*, 408 U.S. 665, 725 (1972) (Stewart, Brennan & Marshall, JJ., dissenting).

Justice Stewart would adopt the following qualified privilege for reporters:

[T]he 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 (footnotes omitted).

Justice Douglas, on the other hand, recognized a more absolute privilege on two grounds: as a specific right of the press and as a general privilege for anyone engaged in first amendment activity. *Id.* at 712-17.

113. *Id.* at 738-43.

114. One is immediately reminded that a lawyer's natural tendency to advocate the apparently narrowest ground for reaching the proper result sometimes misdirects doctrinal development. This occurs, for example, when a principled justification exists for the broader but not the narrower ground.

115. See text accompanying note 54 *supra*.

accorded individual speech or association under the autonomy theory, which, although absolute in its demands, is limited in scope. Stewart followed this approach when he premised his argument for a press privilege upon its importance for the effective performance of the press's role;¹¹⁶ the free speech guarantee, in contrast, does not provide protection instrumentally designed to promote effective speech. To carry the point further, it is unclear that requiring legislative testimony even violates one's right to express oneself as one wants, although it is obvious how required testimony, like many possible government actions, may make the choice of certain expressions less appealing.

Before too confidently rejecting the analogy with legislative investigation of voluntary associations, one needs to understand the reasoning of these cases. Given that the instrumentalist arguments for an absolute press privilege do not apply to legislative investigation of private associations, it is unclear what does support protective decisions.¹¹⁷ This article is not the place to offer a complete analysis of this complex issue, but two lines of reasoning seem promising, and neither involves the theoretical flaws of the balancing analysis that is usually attributed to these cases. The first, an approach that seems consistent with the case results,¹¹⁸ is to ask whether one can persuasively explain the state's questions and its procedure as directed toward aiding it in making legislative decisions, or whether given the context, the method of investigation, and the relation of the inquiry to proper government purposes actually being pursued, the questioning is better understood as a use of exposé to punish or deter first amendment activities.¹¹⁹ Although the first amendment does not guarantee either effective speech or secrecy, it does outlaw government action undertaken for the purpose of sanctioning or stopping speech.¹²⁰

An alternative approach under the first amendment goes be-

116. *Branzburg v. Hayes*, 408 U.S. 655, 728-36 (1972) (Stewart, J., dissenting).

117. I wish to mention, but not discuss, an argument that might apply to some of these cases. If the questions in the legislative investigation concerned the association's, or individual's, role in gathering and distributing information, it may be that they could claim protection as a press, a term that should be functionally defined.

118. See *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539 (1963); *Koningsberg v. State Bar*, 366 U.S. 36 (1961); *Braden v. United States*, 365 U.S. 431 (1961); *Wilkinson v. United States*, 365 U.S. 399 (1961); *Barenblatt v. United States*, 360 U.S. 109 (1959); *Watkins v. United States*, 354 U.S. 178 (1957).

119. The analysis of purpose here would be the same as in other areas of constitutional law, e.g., equal protection, establishment clause, negative implication of the commerce clause.

120. *Smith v. Arkansas State Highway Employees Local 1315*, 441 U.S. 463 (1979).

yond this analysis of purpose and beyond the very limited first amendment protection presently given to those resisting investigation. This approach relies on the relatively well-accepted doctrine that the government cannot impose burdens based on the exercise of constitutional rights.¹²¹ By requiring testimony concerning the exercise of one's constitutional rights, the state imposes a burden that exists only because of the exercise of those rights. This burden is an impermissible infringement. Of course, this approach returns us¹²² to Justice Douglas' second argument in response to the *Branzburg* majority, an argument that deserves more attention: One cannot be forced to testify about one's activities that are related to the first amendment. Granted, this protection would somewhat impede the functioning of government, but perhaps something is wrong with government or the way it allocates costs when it cannot obtain through voluntary cooperation the information it requires for serving the needs of its citizens. Setting aside this uncomfortable thought,⁴ and having concluded that limits placed upon legislative investigations by the speech clause rest on entirely different doctrinal foundations than do testimonial privileges for the press, I will return to the analysis of press privileges.

The same rationale that justifies a testimonial privilege for the press also justifies protection of the press against some searches and seizures.¹²³ The freedom-of-the-press issue breaks down into two parts. First, what materials possessed by the press should be potentially available to the government? Second, what methods of obtaining this information does the Constitution permit?

Government cannot appropriate the legitimate product of the press's investigative efforts—this is the proposed principle.¹²⁴ The principle implies that unless the press is suspected of taking possession of material evidence in addition to the press's own pictures, notes, or recordings, it possesses nothing that the government has a right to obtain; courts should not permit government to subpoena or search for the press's work product. When the press does possess evidence other than that which it has created, the situation changes. The press may have a first amendment right to inform

121. See, e.g., *Keyishian v. Board of Regents*, 385 U.S. 589 (1967).

122. See note 112 *supra*.

123. Although I find it convincing on a first reading, I will not consider Justice Stevens' dissenting argument in *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978), that the fourth amendment does not allow a search warrant for an unannounced search of the property of a citizen not suspected of criminal conduct, absent reasonable grounds for a "fear that, if notice were given he would conceal or destroy the object of the search." *Id.* at 582.

124. See text accompanying note 105 *supra*.

itself with notes, pictures, and the like, in order to improve its ability to inform the public, but the activity of gaining information does not imply the need to take possession of the evidence of a crime. The latter would be a privilege to interfere with law enforcement activities, which neither the citizen nor the press should have. Thus, the government should be able to wrest such materials from the press's possession. The question is, "How?"

When answering this question, we should presume that both the government and the press will normally be law-abiding. Still, there is the fear, the danger, that the government will execute a search for illicit purposes or that the press, faced with a subpoena, will destroy the evidence. If either becomes lawless, society loses.

Even though any opportunity to search could lead to abuse, a complete prohibition on searches of press facilities seems unwarranted. The press argues that any execution of a search warrant is likely to disrupt its operations. Yet the gravest danger to a press intent on exposing government or private wrongdoing is that the wrongdoer will ransack files of the press, destroying or taking important notes or documents and obtaining information that the wrongdoer can use in thwarting an exposé. If the government were a lawless monolith, no rule could provide the needed security.

But because the government is not a monolith, appropriately designed legal rules may provide important protection against abusive press searches. In designing those rules, one should limit warrant availability to discrete situations in which the danger of press abuse makes the government's need to search great, and in which a specific burden of proof imposed on warrant-seeking officials makes the likelihood of approving a sham search slight. Tentatively, two resolutions seem plausible. One could interpret the press clause as barring searches except when there are reasonable grounds to suspect that the press has become involved in a crime. This interpretation would greatly limit the government's opportunity to obtain a warrant, while allowing it to obtain one when the reasons to trust the press to preserve and present the evidence are weakest. Alternatively, one could interpret the press clause to allow searches only if the government presents a magistrate with strong grounds to believe that the press would destroy the evidence if subpoenaed.

the press from abusive government action that endangers its successful functioning as a checking agent, and the government's legitimate claim to obtain certain types of evidence that an unethical press might choose to destroy. It seems, however, that one could

expect more uniform application of the first rule. An inquiry focused on reasons to suspect press involvement in crime may be more factual and less subjective than an attempt to predict future action. If one of the criteria for rules in this area is that it will not exhibit the accordion-like quality of contracting whenever the times are tense and the authorities distrust the entity claiming the right, the more objective inquiry would seem preferable.

This concludes my analysis of what form defensive rights derived from the press clause should take.

At this point, a few comments about my general approach seem in order. Obviously, I have not tried to describe existing law. Instead, I tried first to determine if there are persuasive arguments for recognizing the press as a constitutionally protected institution. I concluded that there are. I then tried to determine what kinds of rights these arguments justified. Defensive rights (testimonial privileges, protection from search and seizures), offensive rights (special access to information), and special speech rights have recently been asserted on behalf of the press. Only the arguments for the first of these three seemed convincing, although the arguments for offensive rights have considerable force.

Still trying to develop the implications of the argument on a theoretical level, I did not ask in what form these rights are most likely to garner majority support on the Court, but instead tried to determine what content is most reasonably implied by existence of the rights. Different conclusions and different balances are possible. For example, if one thought that legitimate government interests in reaching information possessed by the media, as a general matter, are quite weighty, one could fashion rules to allow appropriation of the press's work product in situations when predictable interferences with press operations are not too serious. Sources could still be protected, *at least* when neither the government nor the reporter has good reason to suspect that the source had engaged in the crime, and searches could still be limited. Such a pro-law-enforcement balance would, however, require the press to disclose all pictures or information relating to the alleged crime, when properly requested. Other resolutions are possible, such as those suggested by Justice Stewart's dissents in *Zurcher*¹²⁵ and

125. In his *Zurcher* dissent, Justice Stewart argued that police should use a subpoena rather than a search warrant to secure material from a newspaper office unless "[a] search warrant application should demonstrate probable cause to believe that a subpoena would be impractical" 436 U.S. 547, 575 (1978).

Branzburg.¹²⁶ Nevertheless, it seems that the most persuasive elaboration of the rationale behind the press clause points to complete protection from forced government appropriation of the press's legitimate work product. Absent a reason to suspect press involvement in crime, this implies protection against searches of press offices and files and an absolute testimonial privilege.

II. PRIVATE ECONOMIC INTERESTS AS A THREAT TO FREEDOM OF THE PRESS

A. *Freedom for Whom*

Advertisers veto program content. Profit becomes the sole or determinative concern of media corporations. Even more dangerous, conglomerates monopolize media outlets. Non-media-based corporations (companies not primarily engaged in journalism, *e.g.*, railroads or tire companies) own increasing portions of the communications industry. Owners of the remaining independent media outlets often share similar political and economic views. One can easily conclude that economic forces and structures pose a threat to the free press equal to or greater than the threat posed by government.¹²⁷ Debate about the impact and value implications of market forces and about the wisdom of various government or private responses rages continuously. In this section, I will adopt a narrow focus and consider only the first amendment implications of these issues.

Given the theory developed in Part I for special constitutional protection of the press industry, the notion of an economic or market threat to freedom of the press raises two questions in one: Does the press clause require, and does it permit, a government response to this threat from the private sector? The quick answer from the perspective of the fourth estate concept is that the private press should be powerful and any government attempt to regulate it contradicts the rationale for special constitutional protection of the industry: maintenance of institutional autonomy to allow performance of the checking function and the free flow of ideas. This answer, I think, comes too quickly.

126. 408 U.S. 665 (1972); see note 112 *supra*.

127. At least one commentator has suggested that our European allies have drawn this conclusion. See R. HOMET, *POLITICS, CULTURES AND COMMUNICATIONS* 98-99 (1979); Homet, *Communications Policymaking in Western Europe*, 29 J. Com. 31, 34 (1979). Obviously, I have not attempted to explore the extent or content of this economic threat in this introductory paragraph.

The question traditionally assumed to be relevant for interpreting the constitutional command that "Congress shall make no law . . . abridging the freedom . . . of the press"¹²⁸ is, "Freedom from what?" The obvious answer is, "Freedom from government restriction." Nevertheless, as the following discussion will show, one should also ask a second question suggested by Jerome Barron: "Freedom of the press for whom?"¹²⁹ Three possibilities come immediately to mind: the public; the owners; the press professionals—i.e., reporters, journalists, writers, and editors. Leaving aside for now the explanation of why this second question is constitutionally relevant, I want to consider the claims that each of these three groups can make that the freedom ought to be theirs.

1. FREEDOM FOR THE PUBLIC

The meaning of "freedom for the public" is unclear. Of course, one could return to the instrumentalist argument for special constitutional protection for the press and emphasize that the press's rights are designed to benefit the public. The press serves the public's interest in information and, by checking abuses of power, its interest in liberty. The mere fact that an institution or practice is "for the public," however, does not mean that members of the public have any legal right to obtain specific goods or opportunities from the institution; for example, the public welfare and the public's interest in liberty also provide the primary justifications for the constitutional separation of powers in government and for the policy of keeping military secrets. Even though the public's interest provides the ultimate justification for press rights, this does not imply that the public would have a right of access to the press or a right to receive specific information or any other specific rights.

Alternatively, "freedom for the public" might mean the right of anyone to become a press professional or, if financially able, to own and operate a press outlet. This interpretation, though, merges with the second or third: freedom for the owners or for the press professionals.

Advocates most often claim that the freedom is for the public, justifying public access rights. Individuals desire access to the media for various reasons: to respond to attacks on their reputa-

128. U.S. CONST. amend. I.

129. See J. BARRON, *FREEDOM OF THE PRESS FOR WHOM?* (1975). Although I appreciate his question, it should be clear that I do not adopt his answer.

tion,¹³⁰ to exhibit their creative talents, to express their views, to disseminate information, and to maintain or further particular cultural, artistic, or moral perspectives. Arguably, the public as a whole would gain from the increase in the diversity of presentations that might result from public access to the media, but whether the public wants greater diversity than the media as a whole already provides, or whether the public should receive it, wanted or not, is a debated issue.¹³¹ Whether the public as a whole, as opposed to those members of the public who exercised their access rights, would actually benefit from the existence of access rights to private presses is at best unclear.

Even if greater diversity is desirable, it is doubtful that access rights would significantly increase the flow of diverse information or viewpoints. Assuming that the technical facilities necessary to handle public access requests existed and anyone who wished to print or broadcast a message could do so, society would gain little if few people listened. Television may presently exercise tremendous influence because of its huge audience; but what size and kind of audience, and hence what influence or gain in diversity, could one expect to result from public forum access to some channels? How often would how many people choose to watch the nonprofessional programming that the public access station aired? Who would be the listeners to this multitude of tongues?

Rather than creating a public forum to promote diversity, protecting the freedom of press personnel could plausibly increase both the quality and the diversity of communications. Press professionals come from a wide variety of backgrounds and have a wide range of values and perspectives. Of course, one effort along these lines, public broadcasting,¹³² does not gather a large audience, despite its well-developed, well-financed programs and sched-

130. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

131. Even at present, one can find considerable diversity if one looks at the entire range of media output. One should recognize that the diverse content of communications presently emanating from any particular segment of the communications industry results in large part from the interaction of the public's "desires" and the legal and economic contexts within which the segment operates. Our multitude of special interest magazines, in contrast to lesser diversity in television programming, results, in part, from the different ways in which the enterprise can capture economic return from the "benefited" audience—i.e., whether it can more successfully sell advertising space or sell the "publication" directly to the audience. A large increase in the number of channels, combined with a system of consumer (audience) payment for individual programs, could dramatically increase the diversity of programming in the television industry, making it more like the magazine industry.

132. See *A PUBLIC TRUST: THE REPORT OF THE CARNEGIE COMMISSION ON THE FUTURE OF PUBLIC BROADCASTING* (1979).

ules.¹³³ But certainly if noncommercial media are to have any significant impact, the public is likely to find this form of organization more appealing and more beneficial than it would find a public forum or "Hyde Park" form of broadcast.¹³⁴

The claim that freedom of the press means freedom for the public has other faults. The notion of public access rights to the privately operated press directly contradicts the instrumentalist, public-interest-based arguments for special press rights. The purpose of these rights is to protect the institutional integrity of the press and to assure control by the press of its own output.¹³⁵ Public access would itself amount to a breach of this institutional integrity.

Perhaps, however, this approach incorrectly characterizes public access claims. Rather than resulting from the conclusion that the "freedom" within the *press* clause is "for the public," access claims may make most sense if understood to be assertions of a right to effective *speech*. In part because of the concentrated ownership of the media and the limited access available to disfavored or impoverished groups, the "marketplace of ideas" may fail adequately to perform its social functions. Advocates of the market-failure model conclude that social realities require state intervention in the speech arena, just as in the economic arena, to correct

133. *But see id.* at 275-80. Arguably, having a small audience for specific programs but a large audience for the entire set of offerings is consistent with the proper goals of broadcasting. Measured by this standard, public broadcasting may be increasingly successful.

134. Nevertheless, a form of public access in which members of the public designate agents for broadcast purposes might be effective. The Netherlands have developed a procedure of this type. *See R. HOMER, supra* note 127, at 25-27 (concludes system is not presently living up to promise). Moreover, the suggestion in the text that a mandated public forum approach may have little impact on audiences does not rule out the possibility of either commercial or nonprofit, subsidized stations allocating some time to this format if they conclude that audience response would justify it. Finally, if one views some communication facilities as complete or partial common carriers, both constitutional and public welfare analyses would be consistent with considering the possible public benefits of a system combining some "stations" or "times" as the province of "private presses" and others as available for some format of public access. Cable presents an obvious context in which the arguments for partial common carrier status are persuasive; it has many more features parallel to telephones than to newspapers.

135. It may be possible to distinguish, in a legal sense, the facilities of communication (printing presses, broadcast facilities, etc.) from the communications enterprise that puts together newspapers or television or radio programs. It may then be possible to distinguish access to the facilities from access to someone else's communication enterprise and, by conceptualizing the communications *enterprise* as the press, to justify treating the communications *facilities* as utilities and regulating them as common carriers. I leave this possibility aside for now, since it obviously would not satisfy public access proponents.

for these market failures.¹³⁶

The Supreme Court, for good reasons that will not be explored here, has rejected this interpretation of the speech clause.¹³⁷ Even if the Court recognized rights to effective speech or to speech opportunities within a free speech or equal protection theory, not as an aspect of freedom of the press, one should interpret those rights as claims against the government, not as claims against private entities in the communications industry.¹³⁸ Government would have to provide people with at least some minimal level of opportunities to print or broadcast¹³⁹—but this would not justify any restrictions placed on the private presses.

2. FREEDOM FOR THE PRESS PROFESSIONALS

Reporters, editors, writers, and other press personnel can argue that the press clause should protect them, that the public interest justifying freedom of the press requires their protection. Moreover, as long as one focuses only on the question "Freedom for whom?", the workers' claim of freedom presumably would be directed at both the government and the press owners or employers, either of which might want to censor content or punish attempted exercises of freedom. From this perspective, legal rules that maintain freedom for the press personnel against abridgment by the press owners obviously would be requisite to legal protection of freedom of the press. In this country, attempts to protect freedom in government-subsidized public broadcasting and in student-managed school papers and attempts to maintain academic freedom in government-owned universities provide the most obvious analogies for formulating rule structures or institutional arrangements necessary to protect the freedom of press personnel from abridgment by government owners.¹⁴⁰ More generally, since

136. For an elaboration and critique of this argument, see *Scope*, *supra* note 10, at 981-90.

137. See, e.g., *Buckley v. Valeo*, 424 U.S. 1 (1976); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974); *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973). See also *Scope*, *supra* note 10, at 985-90.

138. See *Linde*, *supra* note 46.

139. Note the suggestion in *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1, 35-36 (1973), that some level of education might merit constitutional protection to provide for a meaningful exercise of one's speech or electoral franchise rights. A similar argument could be made for access rights. See *Linmark Assocs., Inc. v. Willingboro*, 431 U.S. 85 (1977); *United States v. O'Brien*, 391 U.S. 367 (1968) (Harlan, J., concurring). See generally Michelman, *On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

140. Any full development of the argument in this section would require a method of

freedom for the press personnel requires that the legal system protect the worker from the owner, this view of press freedom raises all the legal issues implicit in the problem of maintaining worker freedom in a socialist state.

Interpreting "freedom of the press" as freedom of the press personnel is intuitively plausible and could be vital if the press is to serve the functions that justify its special constitutional status. I suspect that most people—people not legally trained and thus not so concerned with emphasizing the first amendment's literal restraint only of "Congress"—understand "freedom of the press" to mean, at least in part, the protection of journalists and editors to say what they think, to report what they see, and to have some discretion in determining what needs investigation. A multi-industry conglomerate violates this concept of freedom of the press if it orders its newspapers not to report on certain matters of important public interest. Likewise, advertisers violate this concept if they pressure stations or papers not to report important news stories or not to present certain perspectives.¹⁴¹

Of course, many well-trained lawyers will be quick to point out that the public's concept of freedom of the press does not matter, that many members of the public also find violation of freedom of speech when an employer fires an employee because of her publicly expressed views. The public, they will say, merely fails to read the constitutional language that specifically restrains Congress (or, as lawyers who choose how to reinterpret the language usually conclude, government) rather than providing people with general rights. Of course, I agree that this lawyerly response is often appropriate.

Yet *sometimes*, instead of inadequately reading the Constitution, the public may be more perceptive and up-to-date than the courts and the lawyers. One suspects, for example, that the public distinguishes a conglomerate's firing of an editor to suppress her speech, or a business's refusal to hire an employee because she is black, from an individual's choice not to associate with persons holding particular political views or belonging to a particular race. The public might be wiser, and ahead of the Court, in seeing that the rationale for finding state action and for enforcing constitutional constraints often applies to the decisions of market enter-

resolving the conflicting claims of superiors (*i.e.*, the editor-in-chief) and subordinates (*i.e.*, a reporter).

141. See McDonald, *The Media's Conflict of Interests*, CENTER MAGAZINE, Nov./Dec. 1976, at 15, 19-20.

prises.¹⁴² In any event, I will argue that there is considerable logic in the popular perception that "freedom of the press" connotes protection of press personnel from censorship by government and, in some cases, by owners.

Of the three proffered groups to be protected under "freedom of the press," press personnel seems to be the choice that best promotes diversity and allows pursuit of the press's obviously vital fourth-estate role—checking abuse by government. Moreover, protecting the press personnel from censorship by the owners promotes these values even in the situations where their stories and exposés are contrary to the owners' perceived interests. Obviously, the fact that an interpretation best implements this instrumentalist rationale for protection counts strongly in its favor. Press workers ferret out the information and make the analyses that serve to check government abuses; they create the alternative visions that can help redirect, provoke, or maintain society. To perform these tasks with distinction is often the personal and professional goal of members of this diverse group.

Distinguished performance of these tasks is often a less forceful incentive for press owners—particularly for owners of conglomerates. In fact, the economic interests of the owners often are aligned with the government or with other non-press, commercial interests that, periodically at least, are served best by censorship or suppression of news stories. Even if owners do not represent a monolithic perspective, there is probably greater diversity in backgrounds, values, and perspectives among press professionals. The tenet that all viewpoints deserve presentation in an informative way might be served better by protecting professional journalists from censorship by either government or private owners than by protecting owners from censorship by government.

Finally, although not particularly relevant to the instrumentalist considerations that should control the interpretation of the press clause, one cannot help noting that protecting the freedom of those whose daily lives are involved in press activities and whose creative and productive efforts are therein dedicated may best promote individual liberty by contributing to their self-actualization.¹⁴³

142. See, e.g., *Bell v. Maryland*, 378 U.S. 226, 242 (1964) (opinion of Douglas, J.); Berle, *Constitutional Limitations on Corporate Activity*, 100 U. PA. L. REV. 933, 942 (1952).

143. Of course, this argument is more a general claim that control by workers usually promotes individual liberty than a special consideration relating to the press, unless journalists stake more of their personal identity upon their professional creativity and discretion to

Surprisingly, this claim that the press clause is directed toward protecting the press personnel is not inconsistent with the case law. Cases in which courts have invoked the press clause as a source of special press rights have uniformly concerned activities of, and claims of rights for, press personnel. Although restrictions on government, not owners, were therein demanded, the thrust of the litigation was clearly to provide freedom-of-the-press protection for those people whose work makes up the press. This thrust is consistent with the Court's holdings recognizing government power to regulate the ownership structure of the press, an issue I will discuss later. From the perspective that the press clause protects the freedom of press workers, any conflict between freedom of speech and freedom of the press would be a conflict between claims of owners and claims of press personnel, not, as is often suggested, competing claims of the "press" and those who want access.

3. FREEDOM FOR OWNERS

Despite these arguments for the protection of press personnel in their performance of press functions, it should be clear that the first amendment recognizes a person's right to decide what to communicate and to use her resources to communicate it. In *Buckley v. Valeo*,¹⁴⁴ the Court was surely correct—and arguably too timid—in emphasizing that freedom of speech must include the right to use one's wealth to communicate one's political views. Freedom to use one's wealth for communication, however, derives from the concept of individual autonomy inherent in the speech clause; it does not necessarily rely on any independent interpretation of the press clause. The issue at this point, then, is whether the rights of the owners receive overlapping protection from the press clause or, if not, whether the owners' speech rights conflict with, for example, the press personnel's press rights. As a preliminary comment on how to avoid this possible conflict, I note that even if wealthy individuals—possibly the press owners or certain advertisers—have a speech right to use wealth to communicate as they wish, it is not obvious that this includes a corollary right to use one's wealth to suppress communication by others—for instance, a right to suppress what the press personnel would choose to communicate.

I originally concluded that our deeply embedded judgment that the commercial communications media should receive consti-

make on-the-job decisions than do most workers.

144. 424 U.S. 1, 39-59 (1976).

tutional protection must rest on an interpretation of the press clause, since a free speech theory, properly based on protection of individual autonomy, does not justify protection of a profit-seeking enterprise whose speech the market constrains.¹⁴⁵ Special reliance on the press clause is required because the content of the media's communications has no necessary connection with the owners' value judgments. Freedom for the owner, then, is not a premise of the press clause analysis; at most, one can derive it from the analysis only if it provides the best way to serve the press's checking and informational functions. But, as noted above, freedom for the owner does not seem to provide the best way.

Even though the owner's use of wealth to communicate is protected on a basis of respect for individual autonomy, the contrary implications of the instrumentalist focus of the press clause leave one to think that "the owners" is an unlikely answer to the question: "Freedom of the press for whom?" It seems that, of the public, the press professionals, and the owners, the ones most deserving of press clause protection are the press professionals. The issues, however, are not fully resolved; one must still face numerous problems, which include the possible conflict between the owners' speech rights and the press professionals' press rights.

B. *Freedom from What*

Even if one concludes that press professionals are the immediate recipients of special constitutional protection for the press (and that the people are the ultimate beneficiaries), the question "Freedom for whom?" may make little difference for two reasons. First, if the first amendment restrains only the government (the traditional answer to "Freedom from what?"), only those interests of press workers that are consistent with those of owners turn out to be relevant. No matter how ruthlessly private owners exercise censorship powers, they could not violate anyone's first amendment rights. Second, even if one did not interpret the first amendment as restraining only government, it seems that owners' speech rights would prevail over claims (whether under the press clause or by statute) by press personnel for freedom from owner censorship. Private owners would argue that their absolutely protected speech rights, upon which the legitimacy of the legal order depends, are superior to merely instrumentally justifiable press rights. Nevertheless, neither argument is conclusive. The crucial premises upon

145. See Berle, *supra* note 142, at 942-43.

which they are based do not withstand analysis.

1. STATE ACTION

The lawyer's argument that only the state, not the owners, can violate press workers' constitutional rights falters, once one recognizes that state action is everywhere. At least, it is everywhere that people rely on property and contract rights that the state maintains and could change. In resolving a dispute between two parties, the government recognizes one party's claim, thereby limiting and arguably abridging the other's freedom. For example, the only state action in *New York Times Co. v. Sullivan*¹⁴⁶ was the state court's recognition of a traditional tort, a property interest in one's reputation; the Court held that the state's recognition of this property interest violated the other party's first amendment right that the government not abridge its speech. The Court found state action in the state's choice of property rules and held that in this first amendment context, the Constitution compelled an assignment of rights contrary to the one chosen by the state.

Similarly, in settling disputes between press professionals and their employers, the courts must determine whether the Constitution mandates recognition of either the employees' or the owners' claims, or whether the Constitution permits the government to formulate these property rules as it chooses. The traditional answer to the question "Freedom from what?" does not resolve this legal issue or settle their constitutional claims. One must first define the "press" whose freedom the government may not abridge. If the "press" is the owners, the Constitution may bar a state attempt to protect the freedom of press personnel. If the "press" is the press personnel, the Constitution may mandate assignment of property rights or establishment of legal rules that protect their freedom.

Alternatively, the state may have some discretionary power to identify the press or to define property rights and arrange decisionmaking authority therein. That is, if the freedom is for the press as an *institution*, and if the government has some power to structure or define the legal relations that compose the institution, the state could decide whether to protect an owner's authority or to protect the press personnel from censorship by the owner. The constitutional constraint, the press clause, would only forbid the government to control or censor the press-related decisions of

146. 376 U.S. 254 (1964).

whatever press institution it recognizes.

2. CONFLICT BETWEEN THE SPEECH CLAUSE AND THE PRESS CLAUSE

The question "Freedom for whom?" is best answered, "For press personnel," which presumably identifies the press with its personnel and requires that they be protected from the owners. Even if this argument is persuasive, the speech clause apparently stymies the analysis. Abridgment of owners' speech rights, either by legislation or by judicial opinion, is unconstitutional.

Because one should try to avoid, if not immediately reject, constitutional interpretations that produce conflicts between constitutional provisions, perhaps one should not interpret the press clause to require protection of press personnel. Alternatively, if one did not reject this interpretation and if conflict resulted, the instrumentalist, social-welfare argument for press rights would have to give way to the absolute respect accorded speech rights.

More pragmatic arguments also militate against holding, as a constitutional matter, that the press personnel must prevail. If they did prevail, the courts would have to develop detailed rules defining what powers and rights the employees have and what powers and rights the owners have, a task not well suited for constitutional analysis. Moreover, the institutional implications of such a holding are unclear. It might lead, for example, to a withdrawal of capital and a collapse of the industry, to decreased efficiency, higher costs, and lessened output, or to some other result directly contrary to the social interests supposedly justifying the holding.

These problems suggest an alternative interpretation introduced in my discussion of state action: The press clause protects the decisionmaking freedom of whatever institution is recognized as the press, but leaves the government considerable freedom to structure the institution and its internal authority relationships as long as it does so without abridging speech rights and without limiting that institution's integrity or its power to make press-related decisions independently of government control or supervision.¹⁴⁷

This interpretation of the press clause has three components.

147. Obviously, this approach describes many aspects of the government's present involvement in structuring the broadcast industry, although it suggests both that government supervision to insure that broadcasting be in the public interest and that government restrictions on broadcast choices are unconstitutional.

First, it protects the press institution by prohibiting various overt government interferences with press operations; it provides the defensive rights discussed in the first half of this article, but which the Supreme Court has not yet firmly recognized. Second, this interpretation does not require any particular delineation of property rights. Third, it does not mandate but does suggest the propriety and desirability of legislative rules that promote editorial and journalistic freedom and diversity, as long as these rules do not prevent persons from using wealth to say what they want. I will amplify these second and third points in the next section while evaluating several forms of government intervention periodically suggested for improving the press's contribution to a free society. I will also make a few observations suggesting that the Court presently accepts the second and third points.

C. *Government Intervention to Support Freedom of the Press*

One can counter the feared negative impact of economic forces and ownership concentration upon the quality, diversity, and freedom of the press in numerous ways.¹⁴⁸ First, government could respond by nationalizing all media outlets, or at least those of a particular type, and forbidding private ownership,¹⁴⁹ or by sponsoring and subsidizing alternative papers or broadcasts. Either response allows the government to organize the publicly owned presses as government mouthpieces, independent editorial entities protected from government censorship, public forums with rules guaranteeing nondiscriminatory public access, or some combination of these forms. Second, government could impose requirements on the quality and diversity of the press's output, as the FCC does to some extent with broadcast licensees. Third, government could attempt to promote diversity, balance, and fairness by requiring "private" presses to provide opportunities for either free or paid access by the public. These access opportunities could be general—*e.g.*, the government could require the media to accept advertising without content discrimination—or specific—*e.g.*, people could be guaranteed only a right to reply to statements con-

148. Of course, policymaking at this point might require more thought about what constitutes diversity and why and when it should be sought. See *Symposium, Diversity in Broadcasting: What is It and What is It For?* 28 J. Com. 28 (1978).

149. In some countries, the state owns all of the broadcast media. In 1928, Leon Blum, a French socialist leader, proposed that the state take over the finances of political newspapers, but allow the political parties to maintain publishing and editorial control. F. TERROU & L. SOLAL, *LEGISLATION FOR PRESS, FILM AND RADIO* 80-81, 157-91 (1972).

cerning themselves. Fourth, government could pass legislation directly protecting employees against employers' censorship. This legislation could protect only against retaliation for the speech activities of an employee undertaken outside the immediate scope of employment,¹⁵⁰ or it could protect journalistic freedom within the enterprise, a goal that animates the legislation recently proposed in Germany to combat the ill effects of press concentration,¹⁵¹ and arguably the most effective way of preserving or creating freedom and diversity in press output.¹⁵² Fifth, government could structurally regulate the press industry (regulating ownership in particular) to increase the number of independent press outlets. One would expect this structural reform to increase the diversity of output.¹⁵³ This reform would also alter the structure of bargaining relations between owners and employees. It would arguably increase the probability that, either through informal or contractual arrangements, employees would successfully demand protection of their freedom from owner censorship.

1. GOVERNMENT OWNERSHIP, PUBLIC ACCESS, AND CONTENT REGULATION

I will not attempt a policy analysis of the five responses just given but, instead, will briefly consider the constitutionality of each. The first version of the first proposal, government ownership of media combined with a prohibition of private ownership of media, clearly violates the first amendment even if the government presses operate as public forums or provide guaranteed public ac-

150. CBS suspended news correspondent Daniel Schorr after he passed a secret Congressional committee report to *The Village Voice*. See McDonald, *supra* note 141, at 33-34. McDonald develops a list of recommended steps to improve the integrity and contribution of the press. See *id.* at 27-35. That list overlaps the measures suggested in this article.

151. See Hollmann, *Antitrust Law and Protection of the Press in the Federal Republic of Germany*, 24 ANTITRUST BULL. 149, 166-68 (1979).

152. *Id.* at 163-68.

153. Whether these results would follow is not obvious; one should be careful in developing expectations upon which one bases policy. Although there is some evidence that locally owned newspapers provide more local news and generally put more effort into informing readers than do the chain-owned papers, Bagdikian, *supra* note 15, at 6, 16-17, and that locally owned television stations deviate from fare supplied by their network more than do network-owned stations, Litman, *Is Network Ownership in the Public Interest?* 28 J. COM. 51 (1978), it seems that the FCC policy favoring local rather than regional television stations is a major factor preventing development of a fourth commercial network because of the limit the FCC policy places on the number of stations that can reach a given audience. Rosse & Dertouzos, *Economic Issues in Mass Communications Industries*, in PROCEEDINGS OF THE SYMPOSIUM ON MEDIA CONCENTRATION 40, 49 (FTC 1978). Arguably, this result is directly contrary to the FCC's desire to promote diversity.

cess, because prohibiting persons from using their resources to purchase and operate presses directly abridges their freedom of speech.¹⁵⁴

In contrast, government action undertaken for purposes other than to undermine the economic viability of private presses, even if it has that effect, violates neither freedom of speech nor freedom of the press. The general principle that one has no right to effective speech, only a right to use for speech purposes any resources one has, supports this conclusion. Thus, government-induced changes in advertising practices, labor costs, or costs of newsprint, or the attractiveness of alternative, government-subsidized media could dramatically affect the economics of the newspaper industry without violating freedom of the press or freedom of speech.¹⁵⁵

The press clause's guarantee of special institutional protection for the press may cause some to doubt that, as the prior discussion indicates, one should consider these effects constitutionally irrelevant. Nevertheless, a press claim that the government must preserve particular, favorable economic conditions or particular market rules would resemble offensive rights more than the defensive rights approved earlier; it would not involve protection from government "appropriation" of the press's legitimately obtained work product. More fundamentally, no constitutional theory would guide the potentially all-encompassing reach of this argument. One would have no clear answer, for example, to the claim that government could not prohibit or tax any form of advertising—even assuming that the first amendment does not protect commercial speech—because of its effect on the press's economic viability. Any thoughtfully developed "effect" argument must have some conception of the base line social organization from which one evaluates the effects of new government policies. No first amendment theory, however, has shown that the Constitution mandates any particular social and industrial organization.

Although a prohibition of private ownership of presses would be unconstitutional, mere government ownership of presses is not.

154. See *Buckley v. Valeo*, 424 U.S. 1 (1976).

155. If commercial advertising were not constitutionally protected, regulation of advertising could greatly affect the economics of various communications enterprises, but this effect should not be constitutionally relevant. See *Capital Broadcasting Co. v. Mitchell*, 405 U.S. 1000 (1972) (upholding ban on cigarette advertising over the electronic media). The application of the National Labor Relations Act to the press could conceivably increase the press's cost of labor, yet the Court held such application valid in *Associated Press v. NLRB*, 301 U.S. 103 (1936). See also *Associated Press v. United States*, 326 U.S. 1 (1945); *P.A.M. News Corp. v. Butz*, 514 F.2d 272 (D.C. Cir. 1975).

The government can (and does) own presses and freely choose how it will operate them: as its own mouthpiece, as public forums or common carriers, or as independent editorial boards insulated from government content regulation.¹⁵⁶ Presumably, government can, and to some extent should, use its ownership or subsidies to counteract some of the ill effects of economic "distortion" of private communications or to promote the freedom of press and artistic personnel—two purposes of government support of public broadcasting.

If private ownership of presses is not forbidden, but general economic conditions or government monopoly of necessary resources prevent the viable operation of private presses,¹⁵⁷ then government may be obliged to provide for public access. The speech clause arguably prevents government from choosing to operate the only available presses solely as its mouthpieces.¹⁵⁸ Alternatively, setting up press boards insulated from government control and interference is an alternative that might satisfy the constitutional requirement of a non-governmentally controlled source of information and expression.

The second and third responses allow the government to regulate the content of press output and provide for public access to private presses to remedy the evils of economic forces, improve quality, and increase diversity. Both actions, however, directly interfere with the press's right to choose what it will communicate and to select a form that best advances the choice. As I noted earlier, this interference violates the owner's speech rights and abridges the freedom of the press as an institution to make its own publication decisions.¹⁵⁹

These conclusions are not inconsistent with much basic Supreme Court doctrine even in the context of electronic media regulation. Although *Red Lion Broadcasting Co. v. FCC*¹⁶⁰ may ap-

156. See generally M. YUDOF, *WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION FOR AMERICA* (forthcoming).

157. This situation would occur, for example, if newsprint became a "scarce resource" that the government controlled and allocated. At times, countries such as England, France, Italy, Sweden, India, and Mexico have chosen central, sometimes public, ownership or control of newsprint and its allocation instead of relying on market mechanisms. F. TERROU & L. SOLAL, *supra* note 149, at 108-13.

158. See T. EMERSON, *supra* note 47, at 712-14. Obviously, the doctrinal foundations and the specific rules relating to this conclusion need development. Because they do not go to the central concern of this paper, I will put those issues aside for now.

159. The Court unanimously adopted this view in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

160. 395 U.S. 367 (1969) (upholding the fairness doctrine and its component personal-

pear to hold that regulating the content of press output does not necessarily interfere with the freedoms of speech and press, given that Congress could have established the broadcast media as common carriers and presumably could also set up stations as partial private presses and partial common carriers—i.e., public forums.¹⁶¹ Under this line of reasoning, government could require stations to devote some time to “public forum” access; to this extent *Red Lion* would be justified. This argument would not, however, permit government evaluation of *specific* broadcast decisions or evaluation of the general quality of the station’s broadcasts. *CBS v. Democratic National Committee*¹⁶² merely represents a situation in which Congress, through the FCC, did not choose to create the public forum availability sought by the plaintiffs, but instead allowed the private press model, including the right to exercise journalistic judgment, to prevail. Thus, these cases provide no rationale for allowing the government to control the content of a broadcast.¹⁶³

2. PROTECTION OF EMPLOYEES

The fourth response, that legislation should protect the journalistic freedom of press professionals against either censorship or retaliation by press owners, presents a more complex theoretical issue. I earlier concluded that although interpreting the press clause as requiring protection for press personnel is plausible, the potential conflict between this interpretation and the resource owner’s freedom of speech leads to the conclusion that the constitutional protection initially should be described as neither for the owners nor for the employees but for the institution. This conclusion leaves the state at least some discretion in structuring the decisionmaking relations within the institution. The issue then becomes whether the state can find a method of protecting the press personnel’s role without abridging the owners’ speech rights. The answer will depend on the specific content of the government’s

attack and political-editorializing regulations as a legitimate exercise of congressional authority delegated to the FCC).

161. See *Commercial Speech*, *supra* note 10, at 41 n.143. This argument does not imply that government has parallel power to convert private newspapers into common carriers.

162. 412 U.S. 94 (1973) (Court rejected claimed constitutional right of nonprofit, private groups to force broadcast stations to sell them advertising time).

163. See Powe and Krattenmaker, *Televised Violence: First Amendment Principles and Social Science Theory*, 64 VA. L. REV. 1123 (1978), for a thorough critique of *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), in which the court upheld an FCC determination that a radio station could not play George Carlin’s “dirty words” monologue on the air at a time when children might be listening.

rules.

First, government might prohibit owners from firing or penalizing employees because they engage in speech activities that are independent of their role within the media outlet. For example, the government could have protected Daniel Schorr, who leaked a committee report to the *Village Voice*, from retaliation on the part of CBS. This regulation should be permissible. It does not require or prohibit any speech choices by CBS. The claim that one should be able to use one's resources for speech purposes does not imply that the Constitution requires freedom to use them to control another's expression. Some labor legislation that protects employee speech already recognizes this concept,¹⁶⁴ but Congress should go further by providing general protection for all employees from employer retaliation for their non-job-related speech.

This conclusion could present some difficult interpretative problems. For example, if an employer chooses the employee because of her public image, and if that image is relevant to the content or success of the owner's communications, then the off-duty activities of the employee may interfere with her ability to communicate effectively in the way her employer desires.¹⁶⁵ Of course, one hears similar arguments used to criticize laws prohibiting discrimination on the basis of race, age, sex, or sexual preference. Later, I will discuss some reasons for rejecting these arguments.

More problematic are government efforts to protect the freedom of press professionals in their expressive activities within the enterprise. Various approaches are possible. For example, government could regulate terms of employment by limiting the reasons for which an employer could fire a press professional, requiring lengthy severance pay if she were fired or if she quit under certain pressures, or requiring that owners give editors-in-chief a guarantee of editorial freedom for some specific lengthy period. Alternatively, government could attempt structural regulation of the enterprise. It could require that elected councils or certain worker committees have specific decisionmaking power, *i.e.*, to nominate the candidates from which the editor-in-chief is chosen or to veto

164. See, e.g., 29 U.S.C. § 158(b)(4) (1973).

165. Two good analogies: Anita Bryant's crusade against homosexuality while advertising for Florida citrus growers, and Suzanne Sommers' *Playboy* pictures published while she was making commercials for Ace Hardware Company. An exception to a rule against penalties for off-duty speech may be appropriate if the speech affects the capacity of a person to perform the job for which she was hired, but this exception could be dangerous unless narrowly construed. See generally *Branti v. Finkel*, 100 S. Ct. 1287 (1980); *Elrod v. Burns*, 427 U.S. 347 (1976).

the firing of the editor-in-chief or perhaps other employees. It could also empower the committees to participate in the operations and policy decisions of the enterprise.

These forms of intervention may be necessary to provide a desirable degree of freedom for press professionals. The possibility that the parties will bargain for optimal protection for decision-making rights is particularly remote, even without considering the unequal power and wealth of the bargainers, as long as society, and not merely the employees, gains from protection of the employees' freedom. One cannot expect employer-employee bargaining to take into account the value to the public of the employees' freedom. Reliance on bargaining is thus unwise, since it is precisely this presumption of social gain that justifies special constitutional protection for the press.

Just as the first amendment does not guarantee a right to effective speech, so it places few limits on government's power to define economic authority relationships, that is, property rights.¹⁶⁶ Whether rules that protect workers' job security, limit owners' censorship power, or provide for employee participation in enterprise decisionmaking can withstand scrutiny under the first amendment, however, is sometimes thought to depend upon whether the rules apply broadly to all economic enterprises or only to the press.

a. General Rules

General rules define authority relationships in all or a large category of productive enterprises. Like government-imposed safety rules, these general rules merely limit the employer's power to bargain about or control certain aspects of the employment relationship; they limit and structure the employer's authority to control the work efforts or work conditions of others. Although it is generally conceded that this type of general regulation is permissible, application of these rules to the press arguably clashes with the premise that the government can not prohibit private ownership of a press. Control of the business and its employees is, after all, an attribute of ownership. Further, such rules would seem to limit each owner's freedom to contract for the labor and skills of

166. As used herein, "property rights" specify who has what decisionmaking authority in what circumstances. The first amendment may require some allocation of property rights. The idea of expressing oneself, of a person having freedom of speech, may require that a person have those rights essential to one's identity as a person. This may require rights over one's body and one's speech decisions. See *Scope*, *supra* note 10, at 1014-15. See generally *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

others to operate the press, write copy, or otherwise help spread the owner's views.

I am unsure how to avoid this apparent contradiction. The cynic would claim that contradiction is inevitable in any attempt to reconcile rights based on individualistic concepts of freedom with an even vaguely socialist economic order. The cynic's claim does pinpoint the source of the problem. The argument in behalf of the rules that protect employee freedom properly assumes that replacement of private ownership with collective control of the means of production is constitutionally permissible and may promote individual liberty; in contrast, first amendment protected liberty requires freedom in the choice of consumption goods or, at least, freedom to choose communication as a consumption good.¹⁶⁷ These two premises, however, provide no principled way to determine whether the purchase of press operations and employment of press personnel is an unprotected purchase of a means of production (a capital expenditure) or is a protected purchase of a consumer good (communications). Were those families who developed our most distinguished newspapers¹⁶⁸ spending money to express their views or to own means of production in order to increase their wealth or, one suspects, both?

Several supplementary rules may supply the constitutionally required protection of the opportunity to use one's wealth for communication purposes, while still allowing general rules to protect the freedom of press personnel in the operation of the commercial press. One's opportunity to use wealth for speech purposes may be adequately protected if: 1) private parties can own private presses; 2) nonprofit associations that attempt to advance group goals through operation of their presses are exempt from government regulation of their choice of decisionmaking structures; and 3) owners of press facilities and groups organized to supply printing or copywriting services, although operating under general rules ap-

167. The argument connects individual freedom with how a person leads her life. The more a person can control the meaning and content of her activities, the more her freedom is advanced. This must include control over the large part of her time spent in productive activities or working, as well as how she spends her "leisure" time. In contrast, the argument that collective control of the means of production advances the workers' freedom but does not seriously limit the owners' freedom assumes that owners intend their investments or capital contributions as merely instrumental means of gaining more wealth or securing their present wealth, not as a life activity expressing individuality. As discussed earlier, it is the partial or occasional inaccuracy of this assumption, even in capitalist societies, that presents difficulties for the argument.

168. See Bagdikian, *supra* note 15, at 15.

plied to all economic enterprises, may sell communication services—that is, may work for private individuals. This third requirement parallels the logic of the speech clause's mandate that if government were to monopolize the press, it should make facilities available through public forums or implementation of the common carrier concept.

Whether one relies on these rules or on others, the basic point seems correct. However one resolves the specific issues, the government should be permitted to promote workers' freedom through definition of property rights and regulation of market practices as long as it does so, as it presumably can, in a manner that preserves the right of people to use their resources to purchase communication opportunities. Such government action, if intelligently pursued, could greatly advance the freedom of the press enterprise.

b. Special Rules

Constitutionally based criticism of rules imposed by government arguably becomes more persuasive if the rules apply only to the press. In such a case, government would be thwarting persons from using wealth to control one particular enterprise and would be forbidding persons from purchasing one particular, constitutionally favored, commodity. Instead of regulating general economic relationships, the rule could be described as directed at thwarting an individual's opportunities to use personal wealth for speech purposes. This is seemingly the same type of direct abridgment of speech that the Court properly struck down in *Buckley v. Valeo*.¹⁶⁹ Even if rules directed solely at the press promote the freedom of press personnel and thus freedom of the press as an institution, their defense founders against the obvious point that the government may promote this freedom, but only by means that do not purposefully sacrifice freedom of speech.

This criticism, however, moves too fast from the observation that the government singled out the press to the conclusion that, as in *Buckley v. Valeo*, it prohibited a speech activity. Traditional first amendment analysis concludes that a law is an unconstitutional abridgement of freedom of speech if it *prohibits* a speech activity or one's efforts to engage in an expressive activity; a law whose *effect* is to diminish the availability or attractiveness of opportunities to speak effectively is unconstitutional only if its *purpose* is to limit expression or if the government is under a constitu-

169. 424 U.S. 1 (1976).

tional duty to make that speech opportunity available—as might be the case if the government has monopoly control over the relevant means of communication. If one can design both general regulations of economic activities and special regulations of the press in ways that do not prohibit speech activities—for example, this is a possible consequence of adopting subsidiary rules¹⁷⁰ that protect expenditures for communication purposes. Then, if both regulations have similar *effects* on speech activities, their *purpose* will be the only relevant constitutional distinction. If the special regulation is best understood as an attempt to promote press freedom, rather than to stop communications, then the purpose should not be objectionable, and the courts should uphold the regulation.

This analysis suggests that regulations directed solely at the press need not always be impermissible. The governing principle is: Regulations must take a form that neither limits the integrity of the press operation (the defensive rights protected by the press clause), nor prevents people from using their wealth for speech purposes, nor manifests a purpose to limit expression (the latter two parts mandated by the speech clause). For example, laws mandating public access to private presses violate the first two parts of the principle because they interfere with the integrity of the press operation and they force the owner to make communications of which she does not approve. Such laws violate both the press clause and the speech clause. In contrast, the various structural reforms suggested below, although aimed directly at the press, would not violate protected freedoms.

3. REGULATION OF OWNERSHIP

Regulation of ownership structures within the communications industry is the fifth and last suggested means for meeting the negative impact upon press freedom caused by economic forces and ownership concentration.¹⁷¹ Antitrust laws and FCC cross-ownership rules are obvious examples of structural regulation upheld by the Supreme Court.¹⁷² These cases might be narrowly interpreted.

170. For three examples of subsidiary rules, see the paragraph following note 168 *supra*.

171. See text accompanying note 153 *supra*.

172. See *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978) (upholding rule prohibiting ownership of both a newspaper and a radio or TV station in the same community); *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969) (joint ownership agreement between the only two newspapers in Tucson violates Sherman and Clayton Acts); *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956) (upholding regulation limiting the number of stations that an applicant for a new license may own); *Associated*

Antitrust laws apply to any business that affects interstate commerce, and the Court sometimes indicates that some special status of the broadcast media and the government's role in allocating channels justify FCC rules.¹⁷³ Nevertheless, similar regulations that are focused specifically upon the ownership of media outlets, rather than on general economic interests or only on the broadcast media, should be upheld; and such regulations could go much farther toward limiting permissible ownership forms and requiring deconcentration.

Structural regulation of ownership might advance several constitutionally permissible objectives that further, rather than frustrate, the functioning of the press. The goals might be: 1) to increase the power of press workers (editors, writers, reporters) to determine the content of their own work and control its use; 2) to increase the diversity of the press's output and the number and diversity of the people making content decisions; 3) to prevent large corporate power, as well as government, from dictating the media's orientation or from squelching exposés; and 4) to increase the possibility of individuals' making editorial decisions that are independent of profit dictates. One could use these or other goals as standards against which to evaluate the existing, or any proposed, ownership structure and the rules that regulate this structure.¹⁷⁴

a. The Proposal

I suspect that the following proposal would advance these goals, although determining the efficacy of such a program would require a detailed theoretical and empirical study beyond the scope of this paper. The proposal has two parts. First, government

Press v. United States, 326 U.S. 1 (1945) (agreement prohibiting distribution of news to nonmembers of a news association stifles competition and violates Sherman Act); *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943) (upholding rule prohibiting the granting of a license when applicant too closely related to a network).

173. See, e.g., *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. at 794-95; *National Broadcasting Co. v. United States*, 319 U.S. at 216. Commentators have severely criticized various proposed rationales for the constitutionally special status of the broadcast industry: rationales such as the scarcity of channels, the great power of the broadcast media, and the intrusiveness of the broadcast media. See, e.g., Powe, *Or of the [Broadcast] Press*, 55 *TEX. L. REV.* 39 (1976); Powe and Krattenmaker, *supra* note 163.

174. This schema is set out for illustrative purposes. I do not intend to argue that this set of goals provides an adequate standard against which to evaluate the merits of a proposed rule nor to argue that such an instrumental analysis is crucial to the constitutionality of the rules, nor, finally, to argue that my two-part proposal reaches all of the goals listed in the text.

should prohibit media ownership by corporations not primarily engaged in the communications business. This rule would prohibit oil companies, electronics firms, railroads, tire companies, and the like from owning a newspaper or broadcast station. Second, government should prohibit ownership of more than one media outlet by any one corporation, although a single individual could own more than one. In this proposal, I would define ownership as the legal power (through equitable title, contractual rights, or other means) to choose or otherwise control content. The proposal would exempt media internal to a corporation or organization, such as employee newsletters, and media outlets operated on a nonprofit basis by nonprofit organizations that are not controlled by profit-based enterprises.

One must realize that without radical restructuring of the economy, any proposal such as this would only modify power relations, not successfully democratize them. The direct power of corporate giants to control media through ownership would decrease, but direct control of media by rich individuals might increase. Although I consider it unlikely, one must consider the possibility that these individuals might turn out to be both more socially and politically homogeneous than corporate management, and more inclined to involve themselves actively in decisions about media content. Moreover, corporate control of advertising funds would allow business to retain considerable control over the media.¹⁷⁵ The proposal, nevertheless, would limit direct control by corporations not primarily engaged in the communications business and decrease the likelihood of large-scale media monopolies. It clearly would in-

175. Complex institutional structures, however, produce anomalies; simplistic expectations are often belied. Despite its control over huge advertising funds, Mobil Corporation took out a full page advertisement in the *Wall Street Journal*, complaining that CBS denied Mobil access to television when Mobil wanted to respond to CBS News' allegedly inaccurate, prefabricated story about Mobil's corporate profits. *Wall St. J.*, Nov. 6, 1979, at 24.

It may be that Mobil did not face a corporate monolith; John Bache, President of CBS, argues that diversity can and does exist under a single corporate mantle. He cites among other examples a condemnation of a CBS news documentary on hunting, "The Guns of Autumn," by *Field and Stream*, a part of CBS. Bache, *Size and Competition: The Danger of Negative Thinking*, 28 J. Com. 48, 50 (1978). One suspects, however, that this intramural competition furthered the overall corporate interests of CBS. In contrast to Bache's report of corporate pluralism, Donald McDonald cites an incident in which *Field and Stream* fired its conservation editor after he began to rate United States Senators and Representatives according to their environmental voting records and criticized the Forest Service's Environmental Program for the Future. McDonald, *supra* note 141, at 20. McDonald also reports that CBS officials, when criticized for broadcasting an eighth rerun of "The Real McCoys" rather than the Senate Foreign Relations Committee hearings on Vietnam, replied that CBS shareholders will not accept a decrease in net profits. *Id.*

crease the number of independently owned outlets, which, in turn, would probably increase the number of actors who would have the opportunity to initiate program experimentation or expand the range of offerings.

The proposal's effect upon the distribution of decisionmaking power between press professionals and owners is more problematic. This is a crucial issue that needs study. As a tentative hypothesis, I suggest that the proposal would push in two opposing, but arguably desirable, directions. The proposal probably would increase the number of individually owned media outlets and outlets controlled by small groups of individuals, as opposed to groups of widely dispersed stockholders. First, this change probably would lead to an increase in owner involvement in content and policy decisions. Second, when the corporate "distance" between the journalistic personnel and the owners or corporate managers is decreased, the personnel might have greater motivation and more favorable opportunities to bargain for some degree of journalistic freedom and for control over their work product.¹⁷⁶ This development would increase freedom of the press in the sense of freedom for the press personnel.

The predicted effects of the proposal would also improve the strategic location of those potential owners and press workers who wish to use their financial resources or their labor to subsidize innovation or merely to present their particular views or styles. The opportunity to make decisions to subsidize these perceptions should increase as: 1) the opportunities to own a media outlet increase; 2) "red tape," inherent in the decisionmaking process of a large organization, decreases; and 3) opportunities to negotiate easily with those parties whose consent is essential to implementation of a subsidization practice increase.

b. The Proposal's Constitutionality

Even if the proposed rule had these hypothesized effects—

176. The basis for this expectation is the hypothesis that it would be harder for a large, dispersed group of employees to agree on the form or extent of their interest in participating in policy or editorial decisionmaking than on their interest in direct monetary benefits. Likewise, it would be harder for owners or managers to evaluate the risks of giving up decisionmaking power to a dispersed, diverse group than to a smaller group with whom they have more direct and constant contact. Accordingly, either formal or informal bargaining over decisionmaking authority as well as material benefits will more likely occur within the single outlet operation than within the multi-outlet enterprise. There may, however, be other factors I have not considered that point the other way.

proliferation of independent outlets, reduction in the degree of control over the media by nonmedia corporations, greater opportunity for experimentation, and improved bargaining position for press personnel—and even if one counted these changes as gains, as potential bulwarks of freedom, the change might involve sufficient detrimental aspects to cause one to reject the proposal. One could advance several reasons to prefer the existing structure. First, it might be argued that only large corporate owners can finance new technical innovations. Several additional steps are needed, however, to show that the corporate financier of innovation must own media outlets or that owners of single outlets, either individually or in groups, could not raise the needed capital.

Second, one might argue that large corporate owners are better able to subsidize expensive journalistic investigations and are more willing and able to take the risks inherent in journalistic or artistic experiments. Note, however, that the proposal would not rule out network financing or programming, or wire-service reporting. It would prohibit only network ownership of stations and agreements that delegate authority to corporate outsiders to make programming or publishing decisions. The asserted need for large, monopolistic media conglomerates, or for ownership of stations by corporations not primarily engaged in the communications business, to increase the likelihood of risk taking, innovation, or the undertaking of “checking function” activities is not obvious.¹⁷⁷ For example, after the centralized Corporation for Public Broadcasting lost considerable power to the Public Broadcasting Service, which was controlled by local stations, PBS set up the Station Program Cooperative in which local stations pool resources to fund and select programs available nationally and in which independent stations have the option to participate in given programs.¹⁷⁸ Other devices, including syndication, should allow considerable room for financing projects beyond the budget of a single member of the media.

Third, the proposed proliferation of ownership might merely increase the dominance of local, wealthy individuals who will provide the community with primarily local material evincing a fairly consistently single-minded or parochial viewpoint. But again, ex-

177. In the 1950's, Eric Sevareid claimed, “The bigger our information media, the less courage and freedom of expression they allow. Bigness means weakness.” He also said, “Courage in the realm of ideas goes in inverse ratio to the size of the establishment.” McDonald, *supra* note 141, at 24.

178. A PUBLIC TRUST, *supra* note 132, at 45-48, 155-56, 157.

actly what range of perspectives those individuals would represent, exactly what degree of control they would exercise, and whether a few wealthy individuals, as opposed to a larger, dispersed group of stockholders, would own most of the outlets are important questions to which no answer appears obvious. Moreover, the relationship between these possibly detrimental aspects of the proposal and the likelihood that the proposed ownership structure would increase the press's willingness and ability to expose government or corporate abuses—in other words, to perform the checking function—is unclear. Offhand, the dangers of the proposal appear overrated; a press broken up into small units of independent ownership could probably perform the checking function and provide diversity of outlook at least as well as the present press does.

Even if the proposed rules regulating ownership are desirable on policy grounds, one must still measure them against the first amendment. Because I discussed most of the relevant issues earlier, a summary will suffice now.

One defense of the proposed ownership rule begins with the theory that the speech of profit-seeking, market-oriented enterprises does not represent the autonomous choices of the owners of the enterprise and therefore has no claim to protection under the speech clause.¹⁷⁹ Alternatively, one could make the periodically proposed, somewhat more limited claim that corporations, as legal constructs created by the state, have no claims to liberty that merit constitutional protection, but at most have only derivative claims based on the rights of the individuals who control them.¹⁸⁰ Either way, it follows that a rule prohibiting a profit-seeking corporation not primarily engaged in the communication business from owning a media outlet does not violate first amendment freedom of speech. Although prohibitions on an individual's ownership of media outlets would contravene freedom protected by the speech clause, the proposed rule would not contravene that freedom, because it would allow individuals, at least those with sufficient wealth, to own one or more media outlets.

The crucial step in this argument is to explain why individuals do not have a right to use a profit-seeking corporation not primarily engaged in the communication business as their means of owning media outlets. Basically, the explanation, noted earlier, is that

179. See *Commercial Speech*, *supra* note 10, at 9-18.

180. See, e.g., O'Kelley, *The Constitutional Rights of Corporations Revisited: Social and Political Expression and the Corporation After First National Bank v. Bellotti*, 67 GEO. L.J. 1347 (1979).

the effect on communications of a regulation that does not prohibit protected expression and does not have that purpose is constitutionally irrelevant. Unlike a rule that denies an individual the opportunity to use the corporate form to own presses—a rule whose apparent purpose would be to make ownership of a press more difficult—this proposed rule can be conceptualized in two ways. In denying the *press* the opportunity to own profit-seeking corporations not primarily engaged in the communication business, the proposed rule merely regulates *ownership* of enterprises whose speech is not protected by the speech clause. In denying profit-seeking corporations not primarily engaged in the communication business the opportunity to own media outlets, the rule regulates only the *use* one can make of the unprotected organization. Limitations on the uses and activities of business enterprises are a normal, constitutional form of economic regulation. From either perspective, the individual's right to own presses is not affected. Moreover, one cannot view the purpose of the rule as designed to make individual ownership of press outlets more difficult—in fact, the converse is true. Therefore, since the rule does not prevent use of one's wealth for communication purposes, it does not violate freedom of speech.¹⁸¹

The press clause requires that government not abridge the institutional integrity of the press. Arguably, failure to exempt the press from certain general practices (such as grand jury inquiries or third party searches) abridges its independence. Likewise, sometimes one can argue that the press should also be free from special regulation of its ownership structure because that regulation will result in similar abridgement. This abridgement will not necessarily result. True, having *some effect* upon the regulated activity must be part of the purpose of any regulation unless, possibly, it is enacted for purely symbolic purposes. Congress surely intended antitrust legislation to affect production and sales, yet the court has approved it as applied to the press. One must not equate merely having an effect on the institution with undermining the institution or limiting its freedom. The proposal would not obviously undermine the institutional integrity of the press. To the contrary, I suggested these rules as a means to increase institutional integrity by increasing the capacity of press personnel freely

181. The split between production and consumption goods helps illustrate this conclusion. The government's power to regulate market-controlled, profit-oriented economic enterprises suggests the power to require that ownership of these enterprises be separate from ownership of protected consumption goods (the press, for example).

to follow their own light and decide how to use their work product. The special rules would not limit what the press could do when engaged in press activities. They would not appropriate the work product of the press. They hardly manifest a purpose to decrease the ability of the press to perform its checking, informational, and entertainment roles, nor are they likely to have that effect. Under the proposal, the only permissible direct censorship imposed on press personnel would be by individual owners exercising their protected speech rights. Arguably, *the proposal would increase institutional integrity by stopping censorship that the state, through its property laws, previously permitted*. One must conclude that this form of special regulation would not abridge freedom of the press.

The case law supports these conclusions. The Court has rejected first amendment challenges to the application of antitrust laws to newspapers and wire services and to FCC regulation of the ownership of broadcast stations.¹⁸² For example, it upheld FCC rules restricting ownership of both newspapers and broadcast stations in the same community.¹⁸³ Although these cases typically either involve the application of general laws (the antitrust laws) or rely on the "special circumstances" of broadcasting, neither factor provides a principled ground for limiting the precedential value of the cases, and the Court has not indicated that one should read them narrowly.

Thirty-five years ago, Justice Black set the tone for the Court's reasoning in this area when he claimed:

It would be strange indeed, however, if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is

182. See notes 155 & 172 *supra*.

183. *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978).

In upholding FCC regulations that limit individual ownership of several media outlets, even through the use of separate corporations, the Court has gone beyond the structural regulation of the press proposed in this article. Those who accept my argument will view such regulations as a violation of freedom of speech unless 1) freedom to use one's wealth to communicate does not protect using wealth to stop others from communicating and 2) the multiple ownership effectively denied others the opportunity to use their wealth for communication purposes. Some discussion by the Court suggests this reasoning. *Id.* at 800 n.18. Other portions of the opinion rely instead upon the view that government has a special power to regulate broadcasting. See *id.* at 798-801.

essential to the welfare of the public Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.¹⁸⁴

Speaking for the Court, Justice Black upheld the application of the antitrust laws to the Associated Press even though, unlike the structural regulation of ownership proposed herein, the judicial order required the Associated Press to make its "views" available, on nondiscriminatory terms, to those whom the AP would not choose to give them—thus, to "speak" when it would choose not to. Although this order would be unconstitutional if applied to an individual claiming the right of free speech,¹⁸⁵ it raises different issues as a structural regulation of the press. Congress certainly intended the antitrust law to have consequences when applied; its application to the press amounted to a government-imposed structural reform of the procedure for distributing information. The purpose of the antitrust laws, however, was to increase diversity, competition, and the availability of information. The Court's holding neither destroyed the press's ability to operate, nor prohibited the press from communicating or from performing any of its functions, nor involved government appropriation of the press's work product. The antitrust laws could hardly be said to violate the press clause.

The Court's holding prompted Justice Murphy to argue in dissent that "government action directly aimed at the methods or conditions of [the collection and distribution of the news and information] is an interference with the press"¹⁸⁶ As noted earlier, this statement is too broad. Still, overall, Murphy's dissent,

184. *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

185. *Wooley v. Maynard*, 430 U.S. 705 (1977); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

186. 326 U.S. at 51.

France responded with legislation to an analogous problem in 1947. Before World War II, one company controlled newspaper distribution and arguably discriminated against some newspapers. The new legislation guaranteed all press enterprises the right to distribute their own papers, but required that any organization that distributed more than one paper be a cooperative company. Only owners of newspapers or periodicals could own the capital of this cooperative and each owner was allowed only one vote. Moreover, the cooperative had to permit any press enterprise to join and its charges could not be discriminatory. Such legislation would be constitutional in the United States under the analysis developed herein. F. TERROU & L. SOLAL, *supra* note 149, at 116-18.

which parallels later constitutional criticisms of access legislation, would be persuasive in suggesting that, by forcing the AP to speak to those with whom it would choose to exclude, the government had violated the owners' speech rights, except for the premise that one has no constitutional right to use one's wealth to stop others from speaking as they choose—an effect that the Court assumed was a result of the presumably monopolistic practices challenged in the case. Or, more broadly, the right to speak does normally determine what one's economic rights in the speech will be.¹⁸⁷

III. CONCLUSION

Justice Black's theses in *Associated Press*—1) that the government can intervene to protect freedom of the press and to promote a diversity of voices and 2) that private interests have no constitutional right to stop speech or repress the freedom—as well as the general assumption that the government can apply neutral rules and regulations to the press unless they abridge freedom of speech, have presently prevailed. My analysis agrees with this understanding except for two significant caveats, caveats that may be consistent with Black's underlying views.

In Part I of this paper I argued that the fourth-estate interpretation of “freedom of the press” justified certain special “defensive rights” against government to protect the integrity of the press's separate institutional existence. These rights are an exception to the principle that the press is subject to all general laws. Part II attempted to explore, support, and extend Black's conclusion that the first amendment does not sanction, and is in fact undermined by, “repression of [press] freedom by private interests,” but I added a caveat that government response to the threat by private economic interests must not abridge individuals' freedom of speech.

There is some tension between these two conclusions. Since the regulations of the press enterprise I advocated in Part II interfere with how the press operates (why else would one regulate?), the recognition in Part I of institutional protection for the press

187. It is argued that the decree interferes with freedom “to print as and how one's reason or one's interest dictates.” The decree does not compel AP or its members to permit publication of anything which their “reason” tells them should not be published. It only provides that after their “reason” has permitted publication of news, they shall not, for their own financial advantage, unlawfully combine to limit its publication.

Associated Press v. United States, 326 U.S. at 20 n.18 (1945).

might imply that these regulations violate the press clause. Moreover, there is the additional problem that any regulation of ownership restricts the speech of the restricted owner.

One key insight necessary to resolve these tensions between the argument for constitutional protection against government interference with the press and the arguments for government power to structure the press was seeing the relevance of an institution's necessarily conventionalist nature. One must recognize that the structure of the press has no natural content but is only an instrumentally justified creation that should serve a variety of social functions justifying constitutional protection, functions that may be promoted by protecting the freedom of the press personnel. On the other hand, one must recognize that the principle that the press must be protected from government interference renders certain government purposes impermissible reasons for structuring the institution and requires that the government not invade the institutional boundaries of whatever institution the laws recognize.

Three further considerations show how this insight resolves the tension between the two parts of the paper. First, one must recognize that any set of rules, whether specifically directed at the press or of general application, will affect the press. Thus, the mere fact that the law has an effect on the press cannot determine the law's constitutionality. While protecting the press as an institution, government retains some discretion in deciding how to define the institution and, therefore, whose freedom to favor. Nevertheless, a desirable, if not mandated, interpretation of press freedom favors the press personnel's freedom in order to protect their ability to perform the checking and informational functions. From this, one can conclude that neither general nor special rules should be held unconstitutional under the *press clause* unless 1) they are designed to limit the journalistic freedom of the press personnel or 2) they undermine the press's integrity as an institution or its independence from government.

Second, although ownership regulations restrict the owner, only some are problematic once one concludes that freedom of speech is a right of individuals, not corporations. This argument that the regulations do not violate the *speech clause* is incomplete, however, without the third argument: The individual's speech interest is in the press not as a profitmaking unit, as a means of production, but as a consumption good, that is, as a means to communicate what one chooses. Therefore, as long as general economic regulations or rules specially directed at the press—e.g., those

designed to protect the freedom of press personnel—are not designed to impede people's use of wealth to communicate their views (that is, to impede consumption expenditures) and do not prohibit any communicative activity by individuals, these rules do not violate people's speech rights. Acceptance of these arguments dissolves the tension between recognizing special rights to institutional freedom for the press and recognizing the permissibility, if not the constitutional necessity, of structural intervention by government to promote press freedom in the face of threats from private economic interests.