

FREEDOM OF THE PRESS

INTRODUCTION

The Supreme Court developed constitutional principles for freedom of the press based on the recognition that “speech concerning public affairs . . . is the essence of self-government.”

Garrison v. Louisiana (1964). Accordingly, the Court has formulated doctrines consistent with “the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.” *Associated Press v. United States* (1945). For example, in *New York Times v. United States* (1971), the Court reaffirmed that “any system of prior restraint of expression . . . [bears] a heavy presumption against its constitutional validity.”

At the same time, First Amendment protection for the press also extends to various modes of disseminating information – pamphlets, leaflets, signs, magazines, advertisements, books, motion pictures, radio and television broadcasts, and Internet blogs and other websites. Thus, the “lonely pamphleteer” and the “citizen-critic” are protected along with the “institutional press.” This is because the speech and press clauses have traditionally been viewed as inseparable, coterminous, and somewhat of a constitutional redundancy.

In the last four decades, however, there has been a movement to further the scope of the First Amendment by recognizing the “institutional status” of the press – such as affirmative press rights to acquire information and special press privileges shielding reporters from indirect restraints on their freedom. Justice Stewart, among others, argued in a law review article entitled “Or of the Press,” 26 *Hastings Law Journal* 631 (1973), that the First Amendment “is, in essence, a structural provision of the Constitution” that confers preferred constitutional status on “the organized press” and “the daily newspapers and other established news media.” The “primary purpose” of the amendment, in his words, “was to create a fourth institution outside of the Government as an additional check on the three official branches. . . . The publishing business is, in short, the only organized private business that is given explicit constitutional protection.”

A dilemma posed by such a structuralist interpretation and special privileges for the institutional press lies in how to define *the press*. As Justice White notes in *Branzburg v. Hayes* (1972), press privileges “present practical and

conceptual difficulties of a high order.” The Court could fashion constitutional press privileges by following the lines drawn by some legislatures in drafting press shield laws (which, in some instances, protect reporters from having to reveal their sources), defining members of the institutional press according to their employer, work schedule, or publication record. Alternatively, immunity could be given for all those who write professionally.

But both approaches threaten to deny constitutional protection for the citizen-critic. And broader definitions of “the press” might prove so overinclusive as to render meaningless any special privileges carved out for the press in the first place.

Is the First Amendment guarantee against “abridging the freedom of speech, or of the press” redundant? Should the press be accorded special constitutional status? If so, who or what should be recognized as “the press”? These are some of the underlying issues confronting the Court in the cases that you will discuss that arise from direct and indirect restraints on press freedoms.

Today, the constitutional issues of press freedom may be overwhelmed by the practical threats facing the economic realities of journalism in an Internet age. Employment in newspapers newsrooms decreased by 45 percent from 2008 to 2016 alone. Newspapers’ paid circulation has declined from 62.5 million in 1968 to 34.2 million in 2016, while the country’s population increased 50%. Newspaper advertising revenue, their major source of income, dropped from \$45.4 billion in 2007 to \$18.3 billion in 2016.

The overall numbers don’t reflect the greater story of the transformative effects of the Internet on journalism’s character. Professional work done by the institutional press is different from “citizen journalism” on the Internet, and the creation of new information through original reporting and research is different from commenting on the online information that is available to everybody. Although the World Wide Web may be wonderful for self-designated solo journalists, it is not so for reporting conducted by organizations with paid staffs dedicated to original fact-based reporting on local as well as national news. Indeed, at the top of the list of disappeared journalism is original local investigatory reporting. The closest we have to a systemic solution to the collapse of traditional newspapers is the effort of nonprofit news organizations that focus narrowly on journalism of high public value, such as ProPublica and the Center for Investigative Reporting, single-issue nonprofits such as InsideClimateNews (on

the environment), The Trace (on guns), and The Marshall Project (on criminal justice), and local news websites such as The Voice of San Diego and The Texas Tribune. Most of these organizations rely almost exclusively on philanthropy and some government support.

As Nicholas Lemann explains in his excellent article, “Can Journalism Be Saved,” published in *The New York Review of Books* (February 17, 2020): “What has happened in journalism in the 21st Century is a version, perhaps an extreme one, of what has happened in many fields. A blind faith that market forces and new technologies would always produce a better society has resulted in more inequality, the heedless dismantling of existing arrangements that had real value, and a heightened gap in influence, prosperity, and happiness between the dominant cities and the provinces. The political implications of this are painfully obvious in the United States and elsewhere. In journalism, the poorer, the more nativist, the angrier parts of the country (which vote accordingly) are the ones where journalism can’t deliver on its public promise because of its severe economic constraints. Journalism is a case in which it’s going to take a whole new set of arrangements, and a new way of thinking, to solve the present crisis.”

Excerpt on constitutional press freedoms derived from David M. O’Brien, *Constitutional Law and Politics: Civil Rights and Civil Liberties*, Volume 2 (New York: Norton Press, 8th ed. 2011), pp. 623-624.

Excerpt on modern journalism derived from Nicholas Lemann, “Can Journalism Be Saved,” *New York Review of Books* (February 17, 2020), pp. 39-42.