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CONSIDERING A FRAMEWORK FOR HOW THE SUPREME COURT SHOULD
CONCEPTUALIZE THE PRESS CLAUSE OF THE FIRST AMENDMENT
IN THE NETWORK-SOCIETY ERA

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CONSIDERING A FRAMEWORK FOR HOW THE SUPREME COURT SHOULD
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A DISSERTATION APPROVED FOR THE
GAYLORD COLLEGE OF JOURNALISM AND MASS COMMUNICATION

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To my wife Laura Schroeder, whose support, encouragement, and strength inspired me
and helped me to complete this doctorate.

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Abstract

JARED C. SCHROEDER: Considering a framework for how the Supreme Court should conceptualize the press clause of the First Amendment in the Network-Society Era
(Under the direction of Professor Robert L. Kerr)

The Internet has made it possible for anyone to become a publisher, thus challenging traditional conceptualizations of the press and the press clause of the First Amendment, which has historically been understood in terms of the institutional media. The changes in the way members of a democratic society communicate have raised questions regarding how the courts should interpret the press clause in the network era. This dissertation utilized David Altheide's qualitative document-analysis process to systematically assess three bodies of discourse in order to propose a unified framework in which the courts can ground questions concerning the future of the press clause in the network era. That method of qualitative document analysis was applied to the narratives represented within lower-court rulings concerning cases in which citizen publishers argued for press-related protections, Supreme Court decisions regarding Internet questions that relate to the First Amendment, and essential theoretical conceptualizations of the role of communication in a democratic society. Drawing upon the thematic insights that emerged through the analysis of the bodies of discourse, this dissertation proposes that courts focus on the process through which messages are composed and delivered. Such an approach is consistent with the Supreme Court's press-clause jurisprudence and the dominant philosophical conceptualizations that emerged in the analysis regarding the role of the press in a democratic society, while at the same time relating with understandings regarding the unique dynamics of communication in the network era.

Chapter One: Introduction

The emergence of the network society has made defining who qualifies as “the press” a more difficult task. When the Framers of the Bill of Rights penned the First Amendment, commanding that “Congress shall make no law . . . abridging the freedom of speech, or of the press,” defining “the press,” was relatively simple.¹ Those who owned a press — the means to communicate messages to mass audiences — qualified as the press.² That definition of the press, a technologically and economically rooted approach, served as a reasonably reliable one through the nineteenth and twentieth centuries as radio, television, cable, and satellite technologies emerged.³ Those who held a broadcast license or the financial resources to begin and maintain a cable news network, for example, qualified as the press. Today, however, those standards no longer provide a clear delineation. The Internet has introduced a medium through which anyone with access to the Internet in effect can be a publisher. As a result, courts throughout the nation increasingly must face difficult questions as individuals and groups, such as bloggers, web magazine publishers, and political advocates, claim rights that have traditionally been associated with the institutional press.⁴ The massive, paradigmatic shift created by the emergence of what scholars such as Manuel Castells,⁵

¹ U.S. Const. amend. I.

² Bill Kovach and Tom Rosenstiel, *The Elements of Journalism: What Newspeople Should Know and the Public Should Expect* (New York: Three Rivers Press, 2007), 11.

³ *Ibid.*

⁴ *Obsidian Financial Group v. Cox*, 2012 U.S. Dist. LEXIS 43125 (P.D. Or., 2012); *Too Much Media v. Hale*, 206 N.J. 209 (N.J. 2011); *Johns-Byrne Co. v. TechnoBuffalo*, 40 Med.L.Rptr. 2619 (Ill. Cir. Ct. Cook County 2012); *Nexus v. Swift*, 785 N.W.2d 771 (Minn. Ct. App. 2010); and *Bailey v. State*, 900 F. Supp. 2d 75 (D. Me. 2012) represent examples of instances when lower courts have made rulings regarding challenges by citizen publishers who claimed rights press-related rights.

⁵ Manuel Castells, *Communication Power* (Oxford: Oxford University Press, 2009), 55. Castells defined the network society as a global structure that has emerged as a result of the formation of digital networks.

who explores sociology and communication-technology questions, have termed the “network society” has placed the power to publish in the hands of many, increasingly blurring the once-obvious line between the press and its audience in many contexts.⁶

The changes have resulted in an era of uncertainty in society’s understanding of what journalism is and in the nature of related legal considerations.⁷ Journalists, and those who study journalism, have been forced to reevaluate the mission, values, and practices of their field.⁸ Concepts such as increased transparency, connectivity, and interactivity are transfiguring traditional journalistic roles such as gatekeeping, access to sources of power, and the complete vetting and reporting of stories as finished products.⁹ As journalists consider their shifting, uncertain place in the network society, so too must legal scholars consider conceptual rationales that courts may utilize to interpret the press clause in an era when the definition of “the press” has become less clear. The Supreme Court has not addressed the press clause in the network era.¹⁰ With an undercurrent of lower-court cases pushing, questioning, and examining the very definition of who qualifies for the Constitutional protections of the press clause — a cornerstone of the First Amendment — it is reasonable to anticipate that the Supreme Court will examine the issue in the future.¹¹

⁶ Jane Singer, “Journalism and Digital Technologies,” in *Changing the News: The Forces Shaping Journalism in Uncertain Times*, eds. Wilson Lowrey and Peter J. Gade (New York: Routledge, 2011), 214-215.

⁷ Peter J. Gade and Wilson Lowrey, “Reshaping the Journalistic Culture,” in *Changing the News*, 22-23.

⁸ Singer, “Journalism and Digital Technologies,” 214.

⁹ Steven H. Chaffee and Miriam J. Metzger, “The End of Mass Communication,” *Mass Communication & Society* 4, no. 4 (2001): 366; Kovach and Rosenstiel, *The Elements of Journalism*, 18-19; Wilson Lowrey and Peter J. Gade, “Connective Journalism,” in *Changing the News*, 214-215.

¹⁰ Lee C. Bollinger, “A Free Press for a Global Society,” *Chronicle of Higher Education*, 26 Feb. 2010, B6.

¹¹ Robert W. McChesney, “Freedom of the Press for Whom? The Question to be Answered in Our Critical Juncture,” *Hofstra Law Review* 35 (2006-2007): 1434.

With these changes in mind, this dissertation contributes a well-supported framework that moves away from the historically problematic questions that arise with approaches that seek to determine *who* is or is not a journalist.¹² Instead, this dissertation proposes a *process*-based framework that focuses on how a message is composed and delivered, rather than on *who* communicated it. Such an approach aligns both with historical conceptualizations of the press clause and with the unique characteristics of the network society. In composing this framework, this dissertation was designed theoretically and methodologically to arrive at conclusions that provide a conceptual basis in which courts can ground such challenging questions concerning interpretations of the press clause in the network society. As fuller background, roughly the first half of this chapter is devoted to substantial discussion of the Supreme Court's body of rulings to date regarding the press clause, as well as to legal scholars' work considering the meaning of the clause. That is followed by discussions of scholarly literature addressing questions concerning how journalism and its role traditionally have been defined in relation to protections of the press clause, concepts regarding the nature and meaning of the rapidly emerging "network society," and finally assertions of journalism's identity in that evolving society.

The next three chapters utilize the methodological approach to document analysis conceptualized by David Altheide to develop thematic theoretical insights into three bodies of discourse relevant to the ultimate objective of this dissertation

¹² *Branzburg v. Hayes*, 408 U.S. 665, 705 (1972); *Mills v. Alabama*, 384 U.S. 214, 220 (1966). See also Rem Rieder, "Media Shield Law Moves Forward," *USA Today*, 12 Sept. 2013, which reports that much of the most recent congressional debate regarding a federal shield law revolved around creating a definition of *who* is a journalist, and William E. Lee, "The Demise of the Federal Shield Law," *Cardozo Arts & Entertainment Law Journal* 30 (2012): 27-30, which examines the problems Congress faces in attempting to define *who* is a journalist in the era of bloggers and citizen publishers.

concerning how courts in the network society may most effectively interpret the press clause. Altheide's method of document analysis is detailed near the end of this chapter.

Chapter Two applies that method to determine understandings that lower courts have articulated in asserting conceptual rationales they have developed for deciding cases in which bloggers or other citizen publishers have argued for protections historically more associated with the institutional press under the press clause. The lower courts are the focus of that analysis because the Supreme Court has yet to decide a case involving such questions. Chapter Three similarly utilizes Altheide's document analysis to identify understandings the Supreme Court has articulated in asserting conceptual rationales it has developed for deciding Internet questions that relate to the First Amendment. Then Chapter Four applies the document-analysis method to an essential body of philosophical conceptualizations of the role of communication in a democratic society.

Finally, drawing upon the body of essential understandings and representations that the results of those respective studies identify as significant in terms of the ultimate objective of this dissertation, the final chapter proposes a unified framework in which the courts can ground complicated questions concerning interpretations of the press clause in the network society. That framework is constructed on the basis of the essential components derived through the analysis just summarized in the context of a conceptual rationale that integrates historical understandings with those of a dramatically transformed media environment.

In that process, this dissertation contributes to the body of knowledge that has developed through the course of debates on the meaning of the press clause that began

well before the emergence of the network-society era, as discussed more fully later in this chapter.¹³ The Framers' intent for the press clause is not clear.¹⁴ Historical records from their discussions on the matter and the personal journals from the amendment's authors do not contain clear evidence regarding how the press clause was intended to be interpreted, especially as it relates to the speech clause.¹⁵ The Court's rulings to date regarding the press clause also are not clear on whether the press clause belongs to the people or the press.¹⁶ Indeed, the Court has often conflated speech and press, using them interchangeably or together, as if their meanings are connected.¹⁷ When the Court has focused on the press clause specifically, it has often upheld its value in protecting a democratic mission for the media,¹⁸ but has declared that journalists should receive no more and no fewer protections and access rights than other citizens.¹⁹ Nevertheless, the Court has also drawn upon journalistic practices as an important influence in its rulings regarding the press clause.²⁰

¹³ Katherine W. Pownell, "Defamation and the Nonmedia Speaker," *Federal Communications Law Journal* 41 (1988-1989): 195.

¹⁴ Leonard W. Levy, "On the Origins of the Free Press Clause," *UCLA Law Review* 32 (1985): 202-203; Melville B. Nimmer, "Introduction — Is Freedom of the Press a Redundancy: What Does it Add to Freedom of Speech," *Hastings Law Journal* 26 (1975): 640; Pownell, "Defamation and the Nonmedia Speaker," 195.

¹⁵ Levy, "On the Origins of the Free Press Clause," 202-203; Nimmer, "Is Freedom of the Press a Redundancy," 640.

¹⁶ John C. Merrill, *The Imperative of Freedom: A Philosophy of Journalistic Autonomy* (New York: Freedom House, 1990), 60.

¹⁷ In *Near v. Minnesota*, 283 U.S. 697 (1931); *New York Times v. Sullivan*, 376 U.S. 254 (1964); and *Curtis Publishing v. Butts*, 388 U.S. 130 (1967), the Court placed the speech and press clauses of the First Amendment together, or used them interchangeably.

¹⁸ In *Near*, 283 U.S. 697 (1931); *Sullivan*, 376 U.S. 254 (1964); *New York Times v. United States*, 403 U.S. 713 (1971); and *Cox v. Cohn*, 420 U.S. 469 (1975), the Court related the press clause to the democratic mission of the institutional media.

¹⁹ *Saxbe v. Washington Post*, 417 U.S. 843 (1974); *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978); and *Branzburg*, 408 U.S. 665 (1972) are examples of instances when the Court declined to extend rights to journalists that go beyond those available to others.

²⁰ *Saxbe*, 417 U.S. 843 (1974); *Zurcher*, 436 U.S. 547 (1978); *Curtis Publishing*, 388 U.S. 130 (1967); and *Herbert v. Lando*, 441 U.S. 153 (1979) represent instances when the Court incorporated considerations of journalistic practices and processes into its deliberations.

Much like the Court's justices, legal scholars have debated the meaning and value of the press clause. They have discussed whether the clause was the result of redundant wording or a deliberate choice by the Framers.²¹ Scholars have debated whether the clause was created to protect the press as an industry,²² the act of any person communicating through a form of media,²³ or the media as entity that acts as an independent watch on government.²⁴ Legal scholars have also debated in particular law professor Jerome Barron's access theory of the press clause, which argues that the clause was created to protect the public from government *and* private actions that limit the ability of people to express ideas.²⁵

The move from the mass-media era to the network society is the fundamental dynamic driving this dissertation's examination of the press clause and its future. That shift in paradigms is characterized by the move from the mass-media model of communication — in which a few communicators send messages to large, relatively inactive audiences — to an era in which communication is many-to-many, many-to-few, few-to-few, and few-to-many, and audiences are active *and* interactive.²⁶ Castells wrote, "What makes this revolution unique is how knowledge generation and information devices allow us to create a feedback loop that creates, uses and supports

²¹ Nimmer, "Is Freedom of the Press a Redundancy," 640; Pownell, "Defamation and the Nonmedia Speaker, 201-202; Potter Stewart, "Or of the Press," *Hastings Law Journal* 26 (1975): 633-634.

²² Stewart, "Or of the Press," 633.

²³ Nimmer, "Is Freedom of the Press a Redundancy," 650-651.

²⁴ C. Edwin Baker, "The Independent Significance of the Press Clause Under Existing Law," *Hofstra Law Review* 35 (2007): 959-960.

²⁵ Jerome A. Barron, *Freedom of the Press for Whom?* (Bloomington, Ind.: Indiana Press, 1973): 67.

²⁶ Castells, *Communication Power*, 55; Singer, "Journalism and Digital Technologies, 220; Bruce H. Westley and Malcolm S. MacLean, "A Conceptual Model for Communication Research," *Journalism Quarterly* 34 (1957): 35-38.

innovation in a continuous way.”²⁷ The revolution Castells spoke of is seen as the result of massive technological changes, mainly the availability of personal-computing devices and access to a worldwide system of networks.²⁸ The technologies and convergence culture relating to them have placed information, and the ability to produce it, interact with it, and share it, in the hands of people who in previous generations had no access to the means of significant mediated communication. Castells has argued that the emergence of the network era has signaled the creation of a new social structure that is characterized by the transformation of time and space, a weakening of traditional socializing institutions (including the media), and constant availability of information.²⁹ The shift has, in a sense, placed a press in the hands of anyone with a computer and an Internet connection.

The Supreme Court and the Press Clause

It was not until the 1960s and seventies that the Supreme Court turned substantial attention to the press clause.³⁰ Certainly, issues regarding free press emerged well before this time period. The Alien and Sedition Acts, passed in 1798, made it illegal to “write, print, utter or publish” information against the government.³¹ Cases related to the acts, however, never reached the Supreme Court.³² Also, until the Fourteenth Amendment was passed in 1868, press-clause questions that emanated from

²⁷ Manuel Castells, *The Rise of the Network Society* (Oxford: Blackwell Publishers, 2000), 31.

²⁸ Thomas L. Friedman, *The World is Flat: A Brief History of the Twenty-First Century* (New York: Picador, 2007); Henry Jenkins, *Convergence Culture: Where Old and New Media Collide* (New York: New York University Press, 2006), 2-3.

²⁹ Castells, *Communication Power*, 51; Manuel Castells, “Communication, Power and Counter-Power in the Network Society,” *International Journal of Communication* 1 (2007): 239-240.

³⁰ Stewart, “Or of the Press,” 632.

³¹ William J. Brennan, Jr., *The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crises* (Jerusalem, Israel: Law School of Hebrew University, 1987), 2.

³² Stewart, “Or of the Press,” 632.

the states were ruled as being outside the jurisdiction of the Supreme Court.³³ Early twentieth-century cases, such as *Schenck v. United States*³⁴ and *Abrams v. United States*,³⁵ both in 1919, considered the constitutionality of the Espionage Act, which made it illegal to “utter, print, write, or publish” information that was abusive to the United States government, Constitution, flag, or armed forces.³⁶ The Court, however, did not address these as press cases. Instead, the questions relating to the leaflets in the cases were seen as dealing with speech rights rather than press rights. As Justice Potter Stewart asserted, even as late as in the decades leading to the 1960s and seventies, “The Court was seldom asked to define the rights and privileges, or the responsibilities, of the organized press.”³⁷

The attention the press clause received in the second half of the twentieth century resulted from the shifting role of journalism during the time period. Journalists started to take a more aggressive role in questioning political authority.³⁸ The first Pulitzer Prize for investigative reporting was awarded in 1964.³⁹ News outlets were covering controversial topics, and in many cases, reflecting the nation’s skepticism about governmental decisions regarding issues such as the Civil Rights movement, Vietnam War, and Watergate scandal. Journalism historian Michael Schudson characterized the sixties as the time when the “adversary culture” between journalists

³³ Stewart, “Or of the Press, 632; In *Barron v. City of Baltimore*, 32 U.S. 243 (1833), the Supreme Court determined that the Bill of Rights applied only to the federal government.

³⁴ 249 U.S. 47 (1919).

³⁵ 250 U.S. 616 (1919).

³⁶ Brennan, *The Quest to Develop a Jurisprudence*, 4.

³⁷ Stewart, “Or of the Press,” 632

³⁸ Daniel C. Hallin, “The Media, the War in Vietnam, and Political Support: A Critique of the Thesis of an Oppositional Media,” *The Journal of Politics* 46, no. 2 (1984): 2.

³⁹ The Pulitzer Prizes, “Past Winners & Finalists by Category,” <http://www.pulitzer.org/bycat> (accessed 9 Oct. 2012).

and government officials emerged.⁴⁰ Increasingly, Schudson asserted, “News emphasized policy divisions and conflicts in Washington.”⁴¹ As journalists pushed, challenged, investigated, and reported on government activities, they tested the boundaries of their rights. Government officials started to focus on “news management” and new regulations were passed to limit media access.⁴²

As a result of the adversarial relationships between journalists and government officials that grew sharper in the sixties and seventies, a steady flow of press-clause-related cases worked their way to the Supreme Court. From this period, and a few cases before and after it, four general principles regarding the Supreme Court’s interpretation of the clause can be seen as most influential: (1) the speech and press clauses are either interchangeable or overlapping protections; (2) the press clause was created to halt prior restraints and government threats toward the press; (3) the press clause does not provide journalists with any more or fewer access rights or protections than other citizens; and (4) journalistic norms and practices should inform how the press clause is interpreted. While each of these principles carries strong case and legal-scholarship support, it is important to emphasize that they are not all necessarily mutually exclusive. Single cases often apply or emphasize more than one of the four principles. They are, however, valuable in understanding different ways the Court has viewed the press clause and in informing discussions of how the Court should interpret the press clause in the network era.

⁴⁰ Michael Schudson, *Discovering the News: A Social History of American Newspapers* (New York: Basic Books, 1978), 163-164.

⁴¹ Michael Schudson and Susan E. Tiftt, “American Journalism in Historical Perspective,” in *The Press*, eds. Geneva Overholser and Kathleen Hall Jamieson (New York: Oxford University Press, 2005), 31.

⁴² Schudson, *Discovering the News*, 163.

Press and Speech: Interchangeable, Overlapping, or Individual?

Legal scholars have lamented the Court's failure to clearly discern how the press clause is different than the speech clause in terms of First Amendment jurisprudence.⁴³ Most of the Court's decisions that deal with press issues include little or no indication regarding how the two clauses are different or if the Court views them as being different. Instead of defining the clauses, the Court has often chosen to use them together, referring to the freedoms of speech and press generally as First Amendment protections, or referring to the issue in question as simply a matter of freedom of expression. None of these tendencies, however, is helpful in clarifying how the Court differentiates between the two clauses. Legal scholar Melville Nimmer highlighted that the Court's problems in this area are best seen in defamation cases, such as *New York Times v. Sullivan*,⁴⁴ decided in 1964, and *Gertz v. Welch*,⁴⁵ from 1974. In *Sullivan*, an Alabama city commissioner argued that he was defamed by an advertisement in *The New York Times* titled "Heed the Rising Voices."⁴⁶ The Court ruled unanimously that a public figure must prove actual malice in order to establish the degree of fault required in order for a libel action to proceed.⁴⁷ The Court declared, "We are required in this case to determine for the first time the extent to which the constitutional protections for speech and press limit a State's power to award damages in a libel action brought by a public official."⁴⁸ Throughout the Court's landmark decision, in which it famously asserted that "debate about public issues should be uninhibited, robust, and wide-

⁴³ Nimmer, "Is Freedom of the Press a Redundancy," 647; Pownell, "Defamation and the Nonmedia Speaker," 198.

⁴⁴ 376 U.S. 254 (1964).

⁴⁵ 418 U.S. 323 (1974).

⁴⁶ 376 U.S. at 256.

⁴⁷ *Ibid.*, 279-280. The Court defined actual malice as knowing information is false or acting with reckless disregard for whether it is factual or not.

⁴⁸ *Ibid.*, 256.

open,”⁴⁹ it referred to the protections of speech and press together, offering no indication regarding whether it viewed the clauses as having separate meanings, and, if they do, what those meanings might be. For example, in *Sullivan*, the Court declared that the state supreme court’s ruling in the case was “constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required.”⁵⁰

If the case had been one regarding a physical protest outside the courthouse in Montgomery, Alabama, the Court’s decision likely could more easily be understood as dealing with the speech clause alone. In *Texas v. Johnson*,⁵¹ the 1989 flag-burning case involving a physical protest during the Republican National Convention in Dallas, the Court focused in its opinion on the flag-burner’s right to free speech.⁵² Because the message in *Sullivan* was published in a newspaper, the question arises regarding whether the case was grounded more in the speech or press clause. The Court’s ruling is not clear, and the case’s outcome is viewed as a victory for speech and the press.

Gertz, also a defamation case, provides another example of the lack of clarity the Court has afforded regarding the differences between the speech and press clauses. The case considered whether the *American Opinion*, a magazine, defamed a lawyer for his role in representing the family of a young man who was shot by a Chicago police officer.⁵³ In a five-to-four ruling, the Court overturned the lower court’s finding for Robert Welch and the *American Opinion*, emphasizing that Elmer Gertz was a private person and was more vulnerable to damage to his reputation than a public official or

⁴⁹ *Ibid.*, 270.

⁵⁰ *Ibid.*, 264.

⁵¹ 491 U.S. 397 (1989).

⁵² *Ibid.*, 406-407.

⁵³ *Gertz*, 418 U.S. at 325.

public figure. As in *Sullivan*, the case centered on a print publication. Justice Lewis Powell started the Court's opinion in *Gertz* in the same way Justice Brennan began *Sullivan*, by concluding that the case's core questions dealt with the freedoms of speech and press, and made references to the concepts of speech and press together throughout the opinion.⁵⁴ Nimmer argued, "The ambiguity in the sweep of the *Gertz* damage rules result from the Court's failure to acknowledge that speech and press represent two separate interests."⁵⁵ The pairing of the two clauses does not mean that the Court in these cases did not address press-related concerns. The Court has referred to "the press" often when considering cases that have dealt with newspaper and broadcast-related questions.⁵⁶ These references, however, were not specifically related with the meaning of the press clause and how it differs from the speech clause. The justices addressed the rights of the press often, but mostly connected them broadly to the First Amendment and not specifically to the press clause.⁵⁷ Another area of confusion arose from instances when justices referenced the speech and press clauses together, but were clearly referring to the press. In *Curtis Publishing v. Butts*, a 1967 decision, Justice John Harlan, writing the Court's opinion, explained:

The resolution of uncertainty in this area of libel actions requires, at bottom, some further exploration and clarification of the relationship between libel law and the freedom of speech and press, lest the *New York Times* rule become a talisman which gives the press constitutionally adequate protection only in a limited field.⁵⁸

The lack of clear definitions and differentiations regarding actual distinctive meanings of the speech and press clauses in a substantial line of Court precedents

⁵⁴ Ibid.

⁵⁵ Nimmer, "Is Freedom of the Press a Redundancy," 648.

⁵⁶ *Gertz*, 418 U.S. 323 (1974) and *Sullivan*, 376 U.S. 254 (1964), for example, involved printed publications.

⁵⁷ *Saxbe*, 417 U.S. at 862 (Powell, J. dissenting).

⁵⁸ 388 U.S. at 135.

contributes to the challenge of understanding how the Court should interpret the press clause in the network era. Justices' decisions to often place the clauses together, without separate definitions, provides support for the argument that the two are a pair, dependent on one another, or mean the same thing.⁵⁹ Viewing the two as a pair, and not as separate rights, provides support to those who argue the two were not intended to be interpreted separately.⁶⁰ This argument is outlined more fully in the next section, which looks at scholarly literature regarding the press clause.

The Press Clause as Protector of Journalism's Democratic Mission

While the Court has been less than clear regarding the differences between the press and speech clauses in some cases, especially those dealing with defamation, it has provided relatively strong support in other cases for the position that the press clause's primary purpose is to protect journalism's democratic mission. *Near v. Minnesota*,⁶¹ which in 1931 addressed a law that allowed prior restraints on "nuisance" publications, provides one of the strongest examples of this approach to the press clause.⁶² State officials utilized the nuisance law to bring suit against Jay Near's *Saturday Press* newspaper.⁶³ The officials sought to halt the publication indefinitely because of its attacks on local officials, local media outlets, and members of the Jewish community. The Court ruled that the state law was unconstitutional because prior restraints on publication violated the First Amendment.⁶⁴ As in other examples outlined in the

⁵⁹ Nimmer, "Is Freedom of the Press a Redundancy," 650.

⁶⁰ David Lange, "The Speech and Press Clauses," *UCLA Law Review* 77 (1975-1976): 118-119.

⁶¹ 283 U.S. at 697.

⁶² Prior restraint is a form of censorship that halts the communication of certain material before it is broadcast or published. Prior restraint is different than punishments that are employed after information is communicated because it stops ideas before they can be transmitted. See Don R. Pember and Clay Calvert, *Mass Media Law* (New York: McGraw-Hill, 2011), 648.

⁶³ *Near*, 283 U.S. at 703.

⁶⁴ *Ibid.*, 713.

previous section of this chapter, Chief Justice Charles Hughes mentioned speech and press protections together often during the first parts of the Court’s opinion. He emphasized, for example, that the freedoms of speech and press are not absolute.⁶⁵ Later in the opinion, however, he spoke specifically about the press clause. He contended that “liberty, in each of its phases, has its history and connotation and, in the present instance, the inquiry is as to the historic conception of the liberty of the press.”⁶⁶ The question Justice Hughes focused on in *Near* was whether prior restraints on publications violate the press clause.⁶⁷ He was specific about the press clause, and did not mention the speech clause. Justice Hughes wrote that the press clause’s “chief purpose” is to protect the media from prior restraints.⁶⁸

The *Near* ruling is especially stark as an example of the Court’s view of the press clause when it is viewed in context with other free-expression cases during this time period. In 1919, the Supreme Court upheld the Espionage Act of 1917 in two different landmark cases.⁶⁹ The Espionage Act made it a crime to make false statements with the intent to interfere with the success of the military.⁷⁰ The act was amended in 1918 to include uttering, printing, writing, or publishing disloyal or “scurrilous” language. In another First Amendment-related case, the Court upheld a New York criminal-anarchy law that limited anti-government speech in 1925.⁷¹ Two years later the Court unanimously upheld a California law against advocating criminal acts.⁷² In 1931, in *Near*, however, the Court drew the line at prior restraint. While the Court had upheld

⁶⁵ Ibid., 708.

⁶⁶ Ibid.

⁶⁷ Ibid., 713.

⁶⁸ Ibid.

⁶⁹ *Schenck*, 249 U.S. 47 (1919); *Abrams*, 250 U.S. 616 (1919).

⁷⁰ Brennan, *The Quest to Develop a Jurisprudence*, 4.

⁷¹ *Gitlow v. New York*, 268 U.S. 652 (1925).

⁷² *Whitney v. California*, 274 U.S. 357 (1927).

state and federal laws that punished certain types of speech in a variety of relatively recent cases, it struck down Minnesota’s law, and when it drew the line, it emphasized that the Minnesota law violated the press clause.

Forty years after *Near*, the Court’s strongly worded opinion in *New York Times v. United States*, popularly referred to as the Pentagon Papers case, provided additional support for the argument that the Court understands the press clause as protecting media outlets from prior restraints so they can carry out their missions in a democratic society.⁷³ *The New York Times* acquired a classified history of the Vietnam conflict from former military analyst and RAND Corporation employee Daniel Ellsberg and started publishing stories using the documents in 1971.⁷⁴ After three days of stories in the *Times*, the government obtained an injunction against further publication. In the resulting case, the justices determined that the government’s concerns regarding publication of classified documents did not overcome the “heavy presumption” against constitutional validity that any form of prior restraint bears when it comes before the Court.⁷⁵ In his concurrence in the per curium opinion, Justice Hugo Black emphasized that the injunction against publishing the Pentagon Papers halted “the publication of current news of vital importance to the people of this country.”⁷⁶ He contended that the press receives First Amendment protection so it can fulfill an “essential role in our democracy.”⁷⁷ That protection, Justice Black argued, means safety from censorship,

⁷³ 403 U.S. 713 (1971).

⁷⁴ Pember and Calvert, *Mass Media Law*, 69.

⁷⁵ *New York Times*, 403 U.S. at 714.

⁷⁶ *Ibid.*, 715 (Black, J., concurring).

⁷⁷ *Ibid.*, 717.

prior restraints, and injunctions from the government.⁷⁸ Finally, Black related the value of press protection and the media's democratic mission by emphasizing:

Only a free and unrestrained press can effectively expose deception in government. And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant land to die of foreign fevers and foreign shot and shell.⁷⁹

It is noteworthy that the speech clause played almost no role in Justice Black's concurring opinion. The clause arose only in general listings of First Amendment rights, and Justice Black did not pair speech and press clauses in his emphatic statements regarding journalism's role in democratic society. It is also important to highlight that Justice Black specifically characterized the press clause as a protection for the media industry.

Similar support for this connection between the press clause, the media industry, and the democratic mission of journalism can be seen in *Cox v. Cohn*, a 1975 ruling.⁸⁰ The case focused on the constitutionality of a Georgia law that made it illegal to publish the name of a rape victim. A television reporter learned the name of a rape victim using publicly available court documents during the trial for the assault and murder of the victim. In finding the Georgia law unconstitutional, the Court's opinion focused on the democratic function of the press. By "press" the Court appeared to be referring to traditional media, which the justices indicated serve a vital role in society.⁸¹ The Court determined, "Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the

⁷⁸ Ibid., 716.

⁷⁹ Ibid., 717.

⁸⁰ 420 U.S. 469 (1975).

⁸¹ Ibid., 491-492.

administration of government generally.”⁸² The Court also emphasized that the government should have no role in criminalizing the free exchange of publically available information in a democratic society.⁸³ Instead, the justices continued by asserting that the First Amendment protects “the public interest in a vigorous press.”⁸⁴

The Court, much as was seen in the previous section, has not always been clear regarding how it understands the press clause. While cases such as *Near* and *New York Times v. United States* provide robust arguments for the value of a free press in a democratic society, the definition of who or what constitutes the press varies from case to case. In the *Near* and the Pentagon Papers decisions, newspapers were at the center of the cases, and therefore were well connected to the press clause. In *Mills v. Alabama*, a 1966 decision that involved a state law that criminalized political endorsements in newspapers, the connection between the media and the press clause was less clear. In striking down the law, Justice Black wrote, “No test of reasonableness can save a state law from invalidation as a violation of the First Amendment when that law makes it a crime for a newspaper editor to do no more than urge people to vote one way or another in a publicly held election.”⁸⁵ While this portion of the decision supports press-clause protections for media outlets, Justice Black complicated the boundaries of the press clause in other parts of the opinion. He defined the press clause as protecting books, magazines, leaflets, and circulars.⁸⁶ He contended that many types of published work play a role in informing individuals in a democratic society.⁸⁷ A similarly broad

⁸² *Ibid.*, 492.

⁸³ *Ibid.*, 495.

⁸⁴ *Ibid.*

⁸⁵ 384 U.S. 214, 220 (1966).

⁸⁶ *Ibid.*, 219.

⁸⁷ *Branzburg*, 408 U.S. at 704-705.

argument regarding the meaning of the press clause as it relates to the democratic mission of the press emerged from the Court's opinion in *Branzburg v. Hayes*, in 1972. The Court characterized the question before it as whether reporters were protected from testifying before grand juries by the speech and press clauses of the First Amendment.⁸⁸ While the Court ruled that the First Amendment did not protect journalists from revealing information to grand juries, Justice Byron White, writing for the Court, provided further insight regarding the press clause. He argued that the liberty of the press applies as much to "the lonely pamphleteer who uses carbon paper or a mimeograph"⁸⁹ as it does to "the large metropolitan publisher who utilizes the latest photocomposition methods."⁹⁰ In the same passage, Justice White wrote that freedom of the press is a "fundamental right which is not confined to newspapers and periodicals."⁹¹ Instead, he argued the right applies to any kind of publication that carries information. He listed lecturers, novelists, scholars, and dramatists as people who contribute to public debate and knowledge.⁹²

While the cases above provide relatively strong support for the principle that the Court viewed the press clause as a protection for the flow of information in a democratic society, conflicts arose regarding *whom* the press clause protects. Justice White's considerations, as well as his assertions in *Mills*, characterized the press clause's protections as applying to anyone who contributed information to public discussion in democratic society. Those perspectives lend support to the idea that the press clause is not reserved solely for the media industry, and relate to questions

⁸⁸ *Ibid.*, 667.

⁸⁹ *Ibid.*, 704.

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

⁹² *Ibid.*, 705.

regarding how the Supreme Court should interpret the press clause in the network era. The reasoning in *Branzburg* and *Mills* conflicts with what is seen in cases such as *Near*, *Cox*, and *New York Times v. United States*, in which the Court related the press clause to media practitioners. The decisions in *Branzburg* and *Mills*, however, included conceptualizations by the Court suggesting many other forms of media contribute to deliberation in society. Thus, while the Court has never been clear about *who* the press clause was designed to protect, the justices have consistently communicated that they value the press clause's role in a democratic society.

No More and No Less Rights for Journalists

Beginning with *Branzburg*, the Court heard several cases in a relatively short time period (mostly from 1972 until 1980) that explored whether the press clause extended to protecting the right of access to information and provided protections from government searches and inquiries. The outcome of this line of cases was a relatively consistent conclusion from the Court that the press clause does not provide journalists any more or any fewer rights than other citizens. This line of decisions is especially important when considering the extent to which the network-society era has blurred the lines between journalists and citizen publishers. In fact, in *Branzburg*, Justice White outlined the difficulties with defining who qualified as a journalist, and used those problems as a support for his position that the press clause did not protect journalists from testifying before grand juries.⁹³

Paul Branzburg was a reporter for the *Louisville Courier-Journal* in Kentucky. In two instances he wrote stories using unnamed, confidential sources, regarding illegal

⁹³ Ibid., 704-707.

drug production and use.⁹⁴ He was summoned by grand juries after the stories were published, and in both cases, he declined to reveal his sources, arguing he had a Constitutional right to protect their anonymity. In deciding the case, the Court considered whether the speech and press clauses protected journalists from testifying before grand juries.⁹⁵ In what Justice Stewart, who dissented in the case, called a four-and-a-half to four-and-a-half ruling, the Court narrowly ruled that the First Amendment does not protect reporters from being compelled to reveal sources before grand juries.⁹⁶ As part of its opinion, the Court considered the problems involved with identifying who qualifies as a reporter, contending, “Sooner or later, it would be necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure.”⁹⁷ The Court continued in the passage by contending that the press clause was for everyone, not simply for journalists, and that many people would argue their work contributed to the flow of information, and therefore should be protected from appearing before a grand jury.⁹⁸

The Court also indicated in *Branzburg* that it understood the press clause as stopping short of providing reporters privileges that extend to the news-gathering process. In the opinion, the Court emphasized that requiring reporters to respond to questions from grand juries did not place prior restraints on the media or command journalists to publish certain information.⁹⁹ By emphasizing that point, the Court reinforced the principle that the press clause acted as a protection against government

⁹⁴ Ibid., 667-669.

⁹⁵ Ibid., 667.

⁹⁶ Stewart, “Or of the Press,” 635.

⁹⁷ *Branzburg*, 408 U.S. at 704.

⁹⁸ Ibid., 704-705.

⁹⁹ Ibid., 681.

restraints, and at the same time showed that justices saw a line between those restrictions and going further to offer reporters protections for the newsgathering process. The Court emphasized that journalists are citizens and that citizens are not made immune by any part of the Constitution from appearing before grand juries.¹⁰⁰ The Court wrote, “It is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability.”¹⁰¹ Scholars have identified those passages as key components to understanding the principle that the press clause does not provide rights to reporters that beyond those of other citizens.¹⁰²

It is important, however, to emphasize that *Branzburg* also produced one of the Court’s most famous and most influential concurring opinions. Justice Powell joined the five-justice majority on the judgment in the case, but wrote separately in his concurrence to emphasize that in a similar case with somewhat different facts he would have considered granting a limited privilege for journalists to protect their sources.¹⁰³ Justice Powell wrote, “The Court does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources.”¹⁰⁴ He emphasized that the Court’s historically robust protections of First Amendment freedoms would assure the media were not mistreated in regard to government subpoenas.¹⁰⁵ Since that time, some lower courts have relied upon Powell’s concurring opinion to allow journalists protection from

¹⁰⁰ Ibid., 682.

¹⁰¹ Ibid., 683.

¹⁰² Baker, “The Independent Significance of the Press Clause Under Existing Law,” 956; Anthony Fargo, “What They Meant to Say: The Courts Try to Explain *Branzburg v. Hayes*,” *Journalism & Communication Monographs* 12, no. 2 (2010): 72-73.

¹⁰³ *Branzburg*, 408 U.S. at 709-710 (Powell, J., concurring).

¹⁰⁴ Ibid., 709.

¹⁰⁵ Ibid.

revealing sources, particularly in cases not involving grand juries as *Branzburg* did.¹⁰⁶ Further, the Court has never acted to overrule that practice by lower courts. Thus, even though the *Branzburg* judgment did not support an understanding of the press clause as offering rights to journalists beyond those of other citizens, its practical effect has been to suggest that in some contexts such rights do exist.

Branzburg was not the only press-clause-related case that divided justices in this area. Nearly all of the landmark cases have been one-vote decisions.¹⁰⁷ All three of the cases that deal with access for reporters to prison facilities — *Saxbe v. Washington Post*, *Pell v. Procunier*, and *Houchins v. KQED* — were decided by one-vote majorities that interpreted the press clause as not extending journalists' rights beyond those of other citizens. And, as with *Branzburg*, two main principles arose in the decisions: forcing journalists to have the same rights as others does not create a prior restraint or otherwise impede the media's work and journalists should have the same rights as other citizens. Despite his strong dissent two years earlier in *Branzburg*, Justice Stewart wrote the Court's opinions in *Saxbe* and *Pell*.¹⁰⁸ In both cases, which were handed down on the same day in 1974, journalists contested the constitutionality of prison policies that prohibited members of the media from conducting interviews with specific inmates.¹⁰⁹ In *Saxbe*, Justice Stewart argued that a ban on *all* interviews with prison inmates would

¹⁰⁶ In *Schoen v. Schoen*, 48 F.3d 412 (9th Cir. 1995); *Gonzales v. National Broadcasting Company*, 194 F.3d 29 (2d Cir. 1999); and *United States v. Cuthbertson*, 630 F.2d 139 (3rd Cir. 1980), the courts cited Justice Powell's concurring opinion from *Branzburg* in justifying their decisions to protect journalists from having to reveal their sources.

¹⁰⁷ *Branzburg*, 408 U.S. at 667; *Saxbe*, 417 U.S. at 843; *Pell v. Procunier*, 417 U.S. 817 (1974); *Houchins v. KQED*, 413 U.S. 1 (1978); and *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991) resulted in five-to-four rulings. *Zurcher*, 436 U.S. at 547, was a five-to-three decision because Justice Brennan did not participate.

¹⁰⁸ Chief Justice Burger wrote the Court's opinion in *Houchins*, but Justice Stewart sided with the majority.

¹⁰⁹ 417 U.S. at 844; 417 U.S. at 819.

violate First Amendment press freedoms, but emphasized that under the prison policy, journalists were still able to gather information from inmates by conducting interviews through the mail or through an inmate's attorney.¹¹⁰ Importantly, Justice Stewart postulated that "the policy is applied with an even hand to all prospective visitors, including newsmen, who, like other members of the public, may enter the prisons to visit friends or family members."¹¹¹ Justice Stewart drew from the Court's ruling in *Branzburg* to contend in the *Pell* decision that limiting access to specific prisoners did not constitute a violation of the press clause.¹¹² Justice Stewart finished his opinion in *Pell* by emphasizing:

The First and Fourteenth Amendments bar government from interfering in any way with a free press. The Constitution does not, however, require government to accord the press special access to information not shared by members of the public generally.¹¹³

The Court's opinion in *Houchins*, a 1978 case that dealt with reporters' access to jail inmates, included a similarly phrased understanding regarding the line between press protections and news-gathering rights. The Court declared, "The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act."¹¹⁴ In the *Pell* opinion, the Court highlighted this exact conflict by emphasizing that the reporters did not claim that the government was impairing their right to publish. Instead, they claimed the policy limited their right to gather news without government interference.¹¹⁵ In asserting the difference between the two rights, the Court detailed different stories journalists were still free to write regarding prisons, and contended that the only real

¹¹⁰ 417 U.S. at 846.

¹¹¹ Ibid.

¹¹² *Pell*, 417 U.S. at 833.

¹¹³ Ibid., 834.

¹¹⁴ *Houchins*, 438 U.S. at 14.

¹¹⁵ 417 U.S. at 829-830.

change caused by the prison's policy was that journalists' access to face-to-face interviews with specific inmates was limited.

The Court's opinion in *Houchins* stood on Justice Stewart's opinions for the Court in *Pell* and *Saxbe*. In *Houchins*, journalists sought access to a specific area in a county jail to do a story regarding how inmates were being treated and their psychological conditions.¹¹⁶ The jail declined to allow the journalists in alone, but organized jail tours for groups of twenty-five. The tours did not include a portion of the jail where a prisoner had committed suicide. The Court upheld the jail's actions by reinforcing the distinction between protecting the press from government restraints and extending to reporters First Amendment-related rights of access. The Court found that the First Amendment protects "the freedom of the media to *communicate* information once it is obtained," and that it does not compel "the government to provide the media with information or access to it on demand."¹¹⁷

Finally, *Zurcher v. Stanford Daily*, which was decided in the same year as *Houchins*, provided another angle regarding the Court's argument that journalists should have no greater rights than other citizens. Law enforcement officials acquired a search warrant for the *Stanford Daily* newspaper's office after the publication ran photographs from a violent hospital protest. Officers were attacked and injured in the protest and the vantage point from which the photographs in the newspaper were taken indicated to law enforcement officials that the newspaper might have unpublished images that would identify the attackers.¹¹⁸ The newspaper staff argued the search violated their First and Fourth Amendment rights because additional considerations

¹¹⁶ 413 U.S. at 3.

¹¹⁷ *Ibid.*, 9 (emphasis included).

¹¹⁸ *Zurcher*, 436 U.S. at 551.

must be taken into account when the search includes a newspaper.¹¹⁹ The Court ruled five-to-three that newspapers should not receive protections from legally executed searches.¹²⁰ The newspaper argued that newsroom searches would disrupt timely production, endanger access to sources of confidential information, deter journalists from preserving notebooks and negatives, inhibit internal editorial deliberations, and encourage the press to self-censor.¹²¹ The Court argued the attention in a search warrant should be based in its reasonability, not on the property owner, and that it saw no reason why a newsroom should receive different protections than other places. In this sense, the Court outlined a slightly different incarnation of the principle that journalists should not receive greater protections than others.¹²² Justice Stewart, in his dissent, argued newsrooms should have an extra layer of protection from searches because he feared that they would burden the freedom of the press by interrupting time-sensitive writing, editing, and publishing cycles.¹²³ He also argued that the press clause isolated a single institution in the United States as deserving extra protection. He wrote, “Our Constitution does not explicitly protect the practice of medicine or the business of banking from all abridgment by government. It does explicitly protect freedom of the press.”¹²⁴ While the Court in *Zurcher* further supported the dominant argument that was found in *Branzburg*, *Saxbe*, *Pell*, and *Houchins*, that members of the press should have no greater rights, protections, or means of access than other citizens, Justice Stewart offered a strong opposing argument in that he understood the press clause as outlining

¹¹⁹ Ibid., 563-564.

¹²⁰ Ibid., 565.

¹²¹ Ibid., 564-565.

¹²² Ibid., 556.

¹²³ Ibid., 571 (Stewart, J., dissenting).

¹²⁴ Ibid., 576 (Stewart, J., dissenting).

rights for journalists that went beyond those of other citizens. His view of the press clause, however, has never been supported by a majority of the Court, and his own opinions for the Court in *Pell* and *Saxbe* appear to conflict with or at least limit this view.

The Supreme Court and Journalistic Practices and Processes

The Supreme Court has often included careful examinations of journalistic norms and practices when considering press-cause issues. Ties can be seen between the Court's deliberations regarding the press clause and journalistic processes as interpreted by the justices. The ties are evident in a variety of ways in key press-clause precedents, including cases regarding defamation claims,¹²⁵ information access,¹²⁶ newsroom searches,¹²⁷ and right-to-reply laws.¹²⁸

Journalistic practices were at the center of the *Curtis Publishing* ruling,¹²⁹ which established the standard that "public figures," people who are well known nationally or in their communities, must meet to win libel cases.¹³⁰ *Curtis Publishing* centered around a story published in the *Saturday Evening Post*, a weekly magazine, that accused University of Georgia Athletic Director Wally Butts of "conspiring to fix" his team's annual football game against the University of Alabama. The story accused Butts of giving all of the Georgia football team's plans and plays to Alabama coach Paul Bryant. The primary source in the article was an Atlanta insurance salesman who said he overheard a portion of a telephone conversation between the coaches. Butts sued for

¹²⁵ See *Curtis Publishing*, 388 U.S. at 130; *Herbert*, 441 U.S. at 153.

¹²⁶ *Saxbe*, 417 U.S. at 843.

¹²⁷ *Zurcher*, 436 U.S. at 547.

¹²⁸ *Miami Herald Publishing v. Tornillo*, 418 U.S. at 241 (1974).

¹²⁹ 388 U.S. at 130.

¹³⁰ Frederick Schauer, "Public Figures," *William & Mary Law Review* 25 (1984): 907.

libel, arguing the “magazine had departed greatly from the standards of good investigation and reporting and that this was especially reprehensible, amounting to reckless and wanton conduct, in light of the devastating nature of the article’s assertions.”¹³¹ The Court, in a five-to-four ruling, found the *Post* had shown a reckless disregard for the truth, meeting the standard for actual malice that was developed in *Sullivan*, which made it possible for Butts to win his libel claim. The Court’s opinion focused on Butts’s claim that the *Post* departed from proper journalistic conduct. The Court, in the final thesis portion of its opinion, stated:

A “public figure” who is not a public official may also recover damages for defamatory falsehood whose substance makes substantial danger to reputation apparent on showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.¹³²

The Court went on to explain that deficiencies in the reporting led to harm to Butts. The opinion listed numerous areas where the *Post* erred or departed from the justices’ understandings of journalistic norms. It outlined that the publication printed the story despite misgivings regarding the reliability of its primary source and without verifying its information with others.¹³³ The *Post* also assigned the story to a reporter who had limited knowledge of football and failed to consult with others who knew about the sport before submitting the story.

In *Curtis Publishing*, the Court incorporated journalistic maxims such as verification, research, truth, and the use of sources, with the Court’s actual-malice standard, which was created in *Sullivan* as a requirement for public officials to prevail

¹³¹ *Curtis Publishing*, 388 U.S. at 138.

¹³² *Ibid.*, 155.

¹³³ *Ibid.*, 157.

in libel actions and extended to public figures in the *Curtis Publishing* ruling.¹³⁴ Actual malice, the Court established in *Sullivan*, means knowledge of falsity or reckless disregard for whether published information is true or not.¹³⁵ *Curtis Publishing* provided a stronger definition and connection than *Sullivan* regarding how journalistic practices relate, in the Court’s eyes, to the press clause’s protections. The Court wrote, “It is the conduct element, therefore, on which we must principally focus if we are successfully to resolve the antithesis between civil libel actions and the freedom of speech and press.”¹³⁶ To the Court, the conduct of journalists, within boundaries largely set by the field’s practitioners, can be used to interpret the actual-malice standard in defamation cases.

In *Miami Herald Publishing v. Tornillo* and *Herbert v. Lando*, both cases that were decided after *Curtis Publishing*, the Court continued to incorporate journalistic practices with decisions that related to the press clause. In both of these cases, the Court primarily focused on editorial decision-making, providing a dividing line between where the press clause protected editorial processes and where it did not. *Tornillo* examined the constitutionality of a state “right of reply” law that required media outlets to allow people to respond to accusations about them. Pat Tornillo was running for public office when editorials in the *Herald* questioned his decision-making and actions he had taken in past public-service roles. Tornillo, referring to the right-of-reply law, demanded the *Herald* print his response, verbatim, to the accusations, but the newspaper declined to comply with his request.¹³⁷ The Court, in a unanimous decision,

¹³⁴ *Sullivan*, 376 U.S., at 280; *Curtis Publishing*, 388 U.S. at 144.

¹³⁵ 376 U.S. at 280.

¹³⁶ *Curtis Publishing*, 388 U.S. at 153.

¹³⁷ *Tornillo*, 418 U.S. at 243.

struck down the Florida law. In doing so, Court supported the idea that justices viewed editorial decision-making as a protected area of journalistic work. The opinion showed the Court recognized that journalists exercise certain processes in reporting and disseminating information, and that the government should have no influence on those processes.¹³⁸ The Court argued that “any such compulsion to publish that which ‘reason tells them should not be published’ is unconstitutional.”¹³⁹ Later in the opinion, the Court asserted that the Florida law “fails to clear the barriers of the First Amendment because of its intrusion into the function of editors.”¹⁴⁰ The decision also defined a newspaper as more than a “receptacle” for information, explaining that journalists make careful decisions based on understandings of public issues, public officials, and space and time limitations.¹⁴¹ The case provided relatively strong support for the idea that the Court incorporates its understandings of journalistic practices when it considers the meaning of the press clause.

The Court considered editorial decision-making in a different way in *Herbert*, a case that involved Anthony Herbert, a retired Army officer who accused his superior officers of covering up war crimes while he was serving in Vietnam.¹⁴² CBS did a story about Herbert, which he argued falsely portrayed him fabricating stories about war crimes because he was relieved of command. Herbert contended the story also damaged the value of his forthcoming book.¹⁴³ Following the *Sullivan* and *Curtis Publishing* precedents, Herbert sought to prove the journalists had displayed a reckless disregard

¹³⁸ Ibid., 256.

¹³⁹ Ibid.

¹⁴⁰ Ibid., 258.

¹⁴¹ Ibid.

¹⁴² 441 U.S. at 155.

¹⁴³ Ibid., 156.

for the truth. To do so, Herbert's attorneys deposed Lando regarding his editorial decision-making processes, but Lando declined to answer questions regarding his decision-making process, arguing that the First Amendment protected him from disclosing such information.¹⁴⁴ The Court ruled six-to-three in favor of Herbert, finding the First Amendment went as far as protecting journalists from government restraints on publication, but halted at protecting them from responding to questions regarding their state of mind when making journalistic deliberations.¹⁴⁵ The Court acknowledged journalists' concerns, and in doing so supported principles that emerged from *Tornillo* regarding how the Court viewed editorial thinking. The Court showed sensitivity toward CBS's concerns that "frank discussion among reporters and editors will be dampened and sound editorial judgment endangered if such exchanges, oral or written, are subject to inquiry by defamation plaintiffs."¹⁴⁶ While these concerns were not understood by the Court as substantial enough to change the course of its decision, they support the idea that the Court considers how journalists do their work when making rulings. *Herbert*, especially when thought of with *Tornillo*, provided another layer of understanding regarding how the Court has related journalistic practices to the press clause.

Further support for this concept can be found in the Court's analyses of journalists' information-gathering processes and needs for accurate information. The Court debated the value of in-person interviews in *Saxbe*, which stemmed from a Federal Bureau of Prisons policy that prohibited in-person interviews between

¹⁴⁴ Ibid., 157.

¹⁴⁵ Ibid., 172.

¹⁴⁶ Ibid., 173.

journalists and specifically requested inmates.¹⁴⁷ While the Court ruled five-to-four to uphold the policy, its opinion, and Justice Powell’s thoughtful dissent, include a careful look at the journalistic practice of interviews. The Court found that the prison policy did not stop journalists from conducting “brief interviews with any inmates they encounter.”¹⁴⁸ It also argued the policy did not stop journalists from conducting letter-based interviews with inmates. In his dissent, Justice Powell found considerable problems with the Court’s understanding of what constituted an interview. Justice Powell outlined the differences between conversations and interviews, arguing that conversations were spontaneous and did not afford for privacy, a one-on-one focus, or preparation time for the journalist.¹⁴⁹ In contrast, Justice Powell defined an interview as a “prearranged private meeting with a specifically designated inmate. It is unrestricted as to subject matter and lasts a sufficient time period to permit full discussion.”¹⁵⁰ Justice Powell went on to explain the importance of interviews to journalists. He argued that “personal interviews are crucial to effective reporting . . . [and] a newsman depends on interviews in much the same way that a trial attorney relies on cross-examination.”¹⁵¹ He identified the interaction that occurs between reporters and sources during in-person interviews, and asserted that the value of follow-up questions as well as the ability to make requests for immediate clarification of information provided by a source. Justice Powell acknowledged that “newsmen are reluctant to publish a story without an opportunity through face-to-face discussion to evaluate the veracity and reliability of a

¹⁴⁷ 417 U.S., at 844.

¹⁴⁸ Ibid., 847.

¹⁴⁹ Ibid., 852 (Powell, J., dissenting).

¹⁵⁰ Ibid.

¹⁵¹ Ibid., 853.

source.”¹⁵² In his argument, Justice Powell touched on journalistic values such as accuracy, truth, and source evaluation. He found the practice of in-person interviews to provide a unique dynamic that carried with it, as a journalistic process, tools that helped journalists gather and evaluate information. In his dissent, Justice Powell argued the press clause was endangered when these practices of the press were limited.¹⁵³

Interviews were not the only information-gathering tool the Court addressed. The Court focused on the need for the media to freely report on information found in the public record in *Cox*, a case in which the Court struck down a Georgia law that made it illegal to report the name of sexual assault victims.¹⁵⁴ The case stemmed from a television report that used a publicly available court record to obtain and report the name of a rape victim. Beyond finding that the First Amendment protects reporters from being penalized for reporting publicly available information, the Court emphasized the importance of truth and accuracy in reporting. The Court wrote, “Great responsibility is accordingly placed upon the news media to report *fully* and *accurately* the proceedings of government, and official records and documents open to the public are the basic data of government operations.”¹⁵⁵ In that sense, by considering journalistic routines, the Court related an understanding that the press clause protects the democratic function of the media in society.

Broadly, the final principle from the Court’s rulings regarding the press clause indicated that the way journalism defines itself, through its values and practices, could influence how the Court defines journalism, and the press clause itself, in future rulings.

¹⁵² Ibid., 854.

¹⁵³ Ibid., 856.

¹⁵⁴ 420 U.S. at 469.

¹⁵⁵ Ibid., 491-492 (emphasis added).

With this in mind, the ways that professional journalism adapts to changes created by the network society as well as the ways in which citizen journalists adopt the values and practices of journalists can be expected to be factors in the way journalistic norms are viewed by the Court in the future.

Legal Scholars and the Press Clause: Redundancy, Preference, and Access

Legal scholars have consistently indicated, regardless of their varying conclusions regarding the press clause's meaning, that one of the great challenges in understanding the clause is that the authors of the First Amendment were not clear regarding the clause's intended meaning or the scope of its protections.¹⁵⁶ Legal scholar David Lange acknowledged, "The Framers left us language in the First Amendment which justifies the present debate — language which, under almost any view one takes, is less than clear."¹⁵⁷ Legal scholars have examined the Court's decisions and have, in many ways, come to different conclusions regarding the meaning of the press clause.¹⁵⁸ They have carefully considered whether the press clause is a redundancy to the speech clause, or a deliberate, distinct part of the rights created by the Framers. Examining both of these veins of thought from legal scholars, as well as considering the access theory that was advanced by Barron, provides insights into how legal scholars have viewed the press clause in the past and how it might be understood in the future.

¹⁵⁶ Anthony L. Fargo and Laurence B. Alexander, "Testing the Boundaries of the First Amendment Press Clause: A Proposal for Protecting the Media from Newsgathering Torts," *Harvard Journal of Law & Public Policy* 32 (2009): 1097; Nimmer, "Is Freedom of the Press a Redundancy," 639-641; Stewart, "Or of the Press," 633-634; Pownell, "Defamation and the Nonmedia Speaker," 202.

¹⁵⁷ Lange, "The Speech and Press Clauses," 88.

¹⁵⁸ Fargo and Alexander, "Testing the Boundaries of the First Amendment Press Clause," 1097.

The Press Clause: Redundancy or Distinct Right?

Justice Stewart, in a law article that was published during the height of the Court's focus on the press clause in the 1970s, provided one of the most-complete articulations regarding the clause's meaning when he explained that the press clause was not a redundancy to the speech clause, and that it was created to protect the media as an industry.¹⁵⁹ He wrote, "The Free Press Clause extends protection to an institution. The publishing business is, in short, the only organized private business that is given explicit constitutional protection. This basic understanding is essential."¹⁶⁰ In Justice Stewart's view, the clause was an *institutional* protection. He explained that most of the rights in the First Amendment relate to personal protections.¹⁶¹ He also argued that because the press clause references a specific industry, its protections belong to the press and not to the people. If the press clause was interpreted as belonging to the people, he contended, it would be a redundancy with the speech clause.¹⁶² To Justice Stewart, a reporter who wrote a story and published it utilized his or her free-speech rights, just like any other person who communicates a message.¹⁶³ Yet, Justice Stewart wrote that the press clause is not "simply freedom of speech for reporters."¹⁶⁴ He contended that the clause's purpose is to "create a fourth institution outside the government as an additional check on the three official branches."¹⁶⁵ To Justice Stewart, the press clause was not created to protect the journalist's messages; it was written to guard the media industry from governmental prior restraints and other intrusions.

¹⁵⁹ Stewart, "Or of the Press," 631.

¹⁶⁰ *Ibid.*, 633.

¹⁶¹ *Ibid.*

¹⁶² *Ibid.*

¹⁶³ Stewart, "Or of the Press," 635.

¹⁶⁴ *Ibid.*

¹⁶⁵ *Ibid.*, 634.

Justice Stewart's institutional approach has been utilized as the foundation of a substantial number of subsequent examinations of the press clause within legal scholarship. Nimmer supported and expanded on Justice Stewart's view when he examined the fundamental question the Court has struggled with in many of its decisions: "Is any freedom conferred upon 'the press' by the freedom of the press clause which would not be available to it (as well as nonmedia speakers) by the freedom of speech clause?"¹⁶⁶ To answer his question, Nimmer differentiated between the press and speech clauses by explaining that the press clause protects the media's role in providing information to citizens so they can take part in deliberation in democratic society.¹⁶⁷ The speech clause, he argued, does not play much of a role in that area. Instead, the speech clause provides protection for self-fulfillment and creates a safety-valve function in that people feel free to express their views.¹⁶⁸ By conceptualizing the press clause as protecting the media's ability to provide information to a democratic society, Nimmer's conclusion overlapped with Justice Stewart's understandings. Importantly, Nimmer found that the functions of the press and speech clauses often intersect or have commonalities that cause the Court consider them together.¹⁶⁹ Similarly, First Amendment scholar Edwin Baker contended that speech rights protect personal autonomy and the liberty to act, while press rights safeguard the media industry in a democratic society.¹⁷⁰ Legal scholar David Anderson, who conducted an extensive investigation of how the idea of a press-protecting clause in the First Amendment

¹⁶⁶ Nimmer, "Is Freedom of the Press a Redundancy," 639.

¹⁶⁷ *Ibid.*, 653.

¹⁶⁸ *Ibid.*, 653-654.

¹⁶⁹ *Ibid.*, 655.

¹⁷⁰ Baker, "The Independent Significance of the Press," 957-958.

evolved, concluded the authors viewed the clause as a distinct and important element for protecting their vision of a government for and by the people.¹⁷¹

Other legal scholars have found weaknesses in Justice Stewart's institutional approach to the press clause, and have questioned how the press clause can be seen as different from the speech clause if it does not provide any rights for journalists beyond those enjoyed by others. Scholars who examine the clause from this perspective have focused on cases such as *Branzburg*, *Saxbe*, and *Zurcher* as examples. Anthony Fargo, a media-law scholar, emphasized that the Court has consistently argued that both speech and press rights are for individuals, not a specific institution or group of practitioners.¹⁷² In this sense, the speech and press rights are viewed as interconnected rights. Margaret Blanchard, a First Amendment historian, observed, "Freedom of the press is almost universally measured by the standard of what the general public could do in a like situation."¹⁷³ From her perspective, the Court has consistently seen the press clause as an extension of the speech clause, because when freedom of speech has been granted to individuals, it has been granted to the press.¹⁷⁴ She found one exception to that rule: "If the protection sought by the press for its activities is not identical with the protection granted the public in a like situation, the Court will be sympathetic if, and only if, a distinct benefit will accrue to the public from such a decision."¹⁷⁵ Blanchard concluded that journalists should focus their efforts on widening the rights of everyone to have access to information and to communicate, because expanding the rights of everyone

¹⁷¹ David A. Anderson. "The Origins of the Press Clause," *UCLA Law Review* 30 (1982-1983): 537.

¹⁷² Fargo and Alexander, "Testing the Boundaries of the First Amendment Press Clause," 1096.

¹⁷³ Margaret A. Blanchard, "The Institutional Press and Its First Amendment Privileges," *The Supreme Court Review* 1978 (1978): 226.

¹⁷⁴ *Ibid.*

¹⁷⁵ *Ibid.*

was the best route through which the interests of journalism would be served. With these ideas in mind, Blanchard contended that the press should not argue for privileges that would have the press clause viewed as an institutional protection, such as Justice Stewart and other legal scholars posited.

Blanchard was not alone in finding problems with the institutional approach. Lange explained that in Justice Stewart's conceptualization of the press clause, it is difficult to define which forms of communication would qualify as the institutional press, and therefore receive the press-clause protections.¹⁷⁶ Furthermore, Lange wrote that if the press clause provides members of the institutional press unique rights "it seems equally clear that it can do so only at the expense of individual interests which have long been protected."¹⁷⁷ In other words, if the press clause is considered unique to the speech clause in that certain rights are provided to the press that are not available to others, then some who are not identified as members of the media will, inherently, have fewer rights. This concern was also raised in attorney Katherine Pownell's examination of how defamation law operates for media and nonmedia speakers. She contended that the *Sullivan*¹⁷⁸ precedent extended to both media and nonmedia speakers because the case focused on a critique of the government and the media entity was more of a vehicle for the critical speech. While *The New York Times* was the defendant in the case, the litigation revolved around an advertisement that was purchased by a group that was seeking to raise funding and awareness for the civil rights movement in the South.¹⁷⁹ The Court's ruling that the public official, Sullivan, was required to prove actual malice

¹⁷⁶ Lange, "The Speech and Press Clauses," 101.

¹⁷⁷ *Ibid.*, 119.

¹⁷⁸ 376 U.S. at 254.

¹⁷⁹ *Ibid.*, 256-259.

focused more on speech than press protections.¹⁸⁰ Pownell acknowledged journalism occupies a vital role in society, but argued individuals who share and discuss information on smaller scales, nonmedia speakers, also execute that mission.¹⁸¹ In this sense, she acknowledged the value of journalism but did not find that the press clause should be used to elevate journalists' rights and protections beyond those of other communicators.¹⁸²

Pownell also addressed the practical challenges attached to interpreting the press clause as providing additional protections to journalists: How should "journalist" be defined?¹⁸³ In this regard, Pownell, Lange, Blanchard, and others referred to Justice White's sweeping argument in *Branzburg* that the liberty of the press protected a broad range of communication forms in society. He wrote that freedom of the press was for "the lonely pamphleteer" as much as it was for the "large metropolitan publisher."¹⁸⁴ The passage also postulated that many other groups contributed information to members of society. The often-cited passage represents one of the most-explicit definitions of how the Court perceives the press clause, and, at the same time, highlights the difficulty in defining who would receive press-clause protections. Justice White's considerations highlight the central problems with Justice Stewart's institutional understanding of the press clause. Justice Stewart's model did not define which groups were a part of the "publishing business" that he conceptualized the press clause as being created to protect.¹⁸⁵ This challenge of definition is only exacerbated by the technological and

¹⁸⁰ Pownell, "Defamation and the Nonmedia Speaker," 197.

¹⁸¹ *Ibid.*, 203.

¹⁸² *Ibid.*, 215.

¹⁸³ *Ibid.*, 212-213.

¹⁸⁴ *Branzburg*, 408 U.S. at 704-705.

¹⁸⁵ Stewart, "Or of the Press," 633.

social changes brought about by the network society. Scholars struggled to define who or what deserves press-clause protections before the Internet evolved, and that remains important when looking to the future of the clause. Lange wrote, “Problems in definition, then, are the first obstacle to providing separate constitutional status for speech and the press.”¹⁸⁶ He contended that if the press is defined using Justice White’s broader approach, the press clause will be conceived as similar to the speech clause.¹⁸⁷ If the press is defined more narrowly, however, lonely pamphleteers and underground press groups might be excluded, leaving out two of the primary groups the Framers would have acknowledged.¹⁸⁸

Access Theory and Its Day in Court

The debate among legal scholars regarding the strengths and weaknesses of Justice Stewart’s institutional understanding of the press clause operate from similar assumptions regarding the role of the press in society and the protections the press and speech clauses provide. Barron’s access theory offers a substantially different reading of the press clause, because he asserted that it was created to ensure that individual citizens have access to the means of mass communication. Contrary to Justice Stewart’s institutional understanding, Barron argued the press clause was created for the people, not the press. Developed during the height of the Supreme Court’s focus on the press clause in the 1960s and 1970s, Barron’s access theory contends that freedom of the press means members of the public should have freedom to access society’s vehicles of mass communication.¹⁸⁹ His theory questions the predominant interpretations of the

¹⁸⁶ Lange, “The Speech and Press Clauses,” 106.

¹⁸⁷ Ibid.

¹⁸⁸ Ibid.

¹⁸⁹ Barron, *Freedom of the Press for Whom?*, xiii-xiv.

press clause and provides an alternative reading that is based on the understanding that individual voices can only make an impact if they are spoken through the mass media¹⁹⁰ and that the mass media, with its commercial interests and limited number of owners, is restricting the freedom of the press by limiting the voices who can be heard.¹⁹¹ Access theorists argue that the limited avenues through which members of the public can express their views through the press is not consistent with the intent of the authors of the First Amendment.¹⁹² Barron contended that partisan pamphleteering, newspapers, and essays represented the press during the period that the First Amendment was written, and, to that end, the Framers could not have envisioned the oligarchical and limiting media system that has evolved in the centuries since then.¹⁹³ Barron wrote:

The mass media's development of an antipathy to ideas requires legal intervention if novel and unpopular ideas are to be assured a forum — unorthodox points of view which have no claim on broadcast time and newspaper space as a matter of right are in poor position to compete with those aired as a matter of grace.¹⁹⁴

Barron highlighted his assertion that the First Amendment had been interpreted as protecting expression, but the protection could only be realized for those who had access to the means of communication.¹⁹⁵ He viewed the “marketplace of ideas” theory that was articulated in Justice Holmes’s opinion for the Court in *Abrams* as a romanticized approach to the First Amendment.¹⁹⁶ The view, originally discussed by British author John Milton, argued that the truth would emerge when placed in a free

¹⁹⁰ Ibid., xiii.

¹⁹¹ Ibid., 5.

¹⁹² Michael G. Chatzky and William E. Robinson, “A Constitutional Right of Access to Newspapers: Is There Life After *Tornillo*,” *Santa Clara Law Review* 16 (1976): 456-457.

¹⁹³ Ibid., 456.

¹⁹⁴ Jerome A. Barron, “Access to the Press — A New First Amendment Right,” *Harvard Law Review* 80 (1967): 1641.

¹⁹⁵ Ibid.

¹⁹⁶ Ibid., 1642.

and open encounter with false ideas.¹⁹⁷ Barron argued the theory failed to account for nongovernmental obstacles to the spread of ideas, such as concentrated media ownership and focuses on economic rather than informational priorities.¹⁹⁸

Barron's solution to the problem of limited access as a result of concentrated commercial ownership of the media was to allow the government to intervene in the media to compel journalists to provide the public access to the means of mass communication.¹⁹⁹ A year after his seminal work regarding access theory was published, Barron argued the merits of his ideas before the Supreme Court in the *Tornillo* case that was discussed earlier in this chapter. In his arguments before the Court, Barron focused on the foundational ideas of access theory, and postulated that the Florida right-of-reply law was created to enable debate about public issues.²⁰⁰ He supported his arguments with ideas from the Court's relatively recent decisions in *Sullivan*²⁰¹ and *Rosenbloom v. Metromedia*,²⁰² both defamation cases that focused on the First Amendment's role in protecting discussion about public issues.²⁰³ Barron contended that political discussion could not take place effectively if only one debater had the megaphone power of the mass media. To this end, Barron emphasized that the *Herald's* circulation size was much larger than any other media outlets in the area. He argued that for *Tornillo* to engage effectively in debate regarding the issues of his

¹⁹⁷ John Milton, *Areopagitica and of Education*, trans. George H. Sabine (Arlington Heights, Ill.: Harland Davidson, 1951), 50.

¹⁹⁸ *Ibid.*, 1643.

¹⁹⁹ Barron, *Freedom of the Press for Whom?*, 319-320.

²⁰⁰ Jerome A. Barron, "Miami Herald Publishing Co. v. Tornillo," April 17, 1974, transcript and audio, Oyez Supreme Court Media, Illinois Institution of Technology's Chicago-Kent College of Law, http://www.oyez.org/cases/1970-1979/1973/1973_73_797.

²⁰¹ 376 U.S. 254 (1964).

²⁰² 403 U.S. 29 (1971).

²⁰³ Barron, "Miami Herald Publishing Co. v. Tornillo."

candidacy and the criticisms raised by the editorial, he would need access to the *Herald*.²⁰⁴

The Supreme Court was skeptical of Barron's theory and ultimately voted unanimously to strike down the Florida right-of-reply law that the legal scholar had championed. At the heart of the Court's opinion was a rebuttal of the fundamental assumptions of Barron's theory. The Court wrote:

Proponents of enforced access to the press take comfort from language in several of this Court's decisions which suggest that the First Amendment acts as a sword as well as a shield, that it imposes obligations on the owners of the press in addition to protecting the press from government regulation.²⁰⁵

The Court examined some of Barron's arguments before determining, "However much validity may be found in these arguments, at each point the implementation of a remedy such as an enforceable right of access necessarily calls for some mechanism, either government or consensual."²⁰⁶ The Court found that compelling publishers to print that which they did not see fit to print would damage the "gloss" on the First Amendment that had developed throughout history. The Court also dispatched Barron's argument that the concentration of media ownership required that newspapers be compelled to provide access to the public, explaining that newspapers were bound by only two factors: finding enough readers and advertisers to support their businesses and maintaining credibility as news sources.²⁰⁷

While the Supreme Court, in many ways, unanimously rejected the assumptions of access theory in its decision in *Tornillo* nearly forty years ago, Barron's approach is still advanced in legal scholarship, and Barron has continued to develop his theory. He

²⁰⁴ Ibid.

²⁰⁵ *Tornillo*, 418 U.S., 251.

²⁰⁶ Ibid., 254.

²⁰⁷ Ibid., 255.

has contended, for example, that the Internet has created greater access to forms of expression and debate, but media ownership trends still make the need for more formal access requirements necessary.²⁰⁸ He has also examined the Court's more balanced approaches regarding access in *Turner Broadcasting System v. FCC*²⁰⁹ and *Denver Area Educational Telecommunications Consortium v. FCC*, both cases that dealt with freedom of speech questions as they relate to cable television.²¹⁰ Communication scholar Robert McChesney, in an article that focused on access theory in the network-society era, argued that the massive media conglomerates that own the major news outlets are too focused on profits to serve people with the information they need.²¹¹ In doing so, he brought Barron's concerns about ownership into a twenty-first-century context, and considered the future of press freedom "when the right to launch effective new media is non-existent in a market or effectively limited to billionaires, and the investors have no more interest in journalism than they do in insurance or producing undergarments."²¹² McChesney's solution to this concern was similar to what Barron concluded four decades before: the government is obligated to step in and create a press system that includes requirements that media companies provide access to the public.²¹³ McChesney argued that several factors, including technological and economic changes brought about by the network society, would cause the Court to readdress Barron's

²⁰⁸ Jerome A. Barron, "Rights of Access and Reply to the Media in the United States Today," *Communications and the Law* 25 (2003): 11.

²⁰⁹ 512 U.S. 622 (1994).

²¹⁰ 518 U.S. 727 (1996); Jerome A. Barron, "The Electronic Media and the Flight from First Amendment Doctrine: Justice Breyer's New Balancing Approach," *University of Michigan Journal of Law Reform* 31 (1997-1998): 817.

²¹¹ McChesney, "Freedom of the Press for Whom? The Question to be Answered in Our Critical Juncture," 1442.

²¹² *Ibid.*, 1447.

²¹³ *Ibid.*, 1446.

original question: “Freedom of the press for whom?”²¹⁴ He concluded, “What the First Amendment means for freedom of the press is likely to be determined in the coming generation, and scholars, legal and communication, need to prepare for it.”²¹⁵

Thus, the legal scholarship regarding the press clause can be divided into three groups: the institutional conceptualization that was put forth by Justice Stewart and supported by legal scholars such as Nimmer and Baker; those who argue the institutional understanding of the clause is unworkable,²¹⁶ and Barron’s access theory, which contends that the press clause was intended to make the press more freely available to the public. Each of these areas of consideration regarding the press clause provide a set of theoretical assumptions that contribute to this study’s efforts to construct a framework for how the courts can interpret the press clause in the network-society era.

Journalism, Change, and the Press Clause

One of the key areas of conflict in the Court’s deliberations and the scholarly literature regarding the press clause involves how journalism, or the role of a journalist, would be defined if the clause was interpreted as providing the media distinct rights as compared to those afforded by the speech clause. Fargo highlighted this conflict by pointing out the divergent conceptualizations of the press put forth by justices White and Douglas in *Branzburg*.²¹⁷ Writing the Court’s opinion, Justice White outlined a broad conceptualization of journalism, in which the “press in its historic connotation comprehends every sort of publication which affords a vehicle of information and

²¹⁴ Ibid., 1434.

²¹⁵ Ibid., 1455.

²¹⁶ Blanchard, “The Institutional Press and Its First Amendment Privileges,” 226; Fargo, “What they Meant to Say: The Courts Try to Explain *Branzburg v. Hayes*,” 72-73.

²¹⁷ Fargo, “Testing the Boundaries of the First Amendment Press Clause,” 1095-1096.

opinion.”²¹⁸ Justice Douglas, in a dissent that starkly opposed Justice White’s conceptualization of the press clause, utilized a more mission-oriented approach to outline journalism. He wrote, “The press has a preferred position” so it can provide information to citizens so they can be self-governing.²¹⁹ These passages from the Court relate closely to questions that have evolved regarding journalism’s mission and roles that have only intensified since the emergence of network technology. The case literature also indicates the Court has shown a willingness to use the practices of journalism, especially in defamation cases, to guide its decisions.²²⁰ For these reasons, examining how the Court should interpret the press clause in the twenty-first century requires consideration of the unique characteristics of network communication and the influence of the network era on journalism and its practices. In light of the Court’s past considerations regarding journalism’s practices, examining the ideas that underpin the network society and its influences on communication provides another building block in considering how the courts should interpret the press clause in the twenty-first century.

Characteristics of the Network Society

People are using network technologies in ways that have profoundly changed the way they communicate.²²¹ Castells conceptualized the shift in the way people communicate in the network-society era as a revolution that is, in many ways, comparable to what occurred during the Industrial Revolution.²²² Both revolutions, he explained, included fundamental changes in technology, which resulted in shifts in

²¹⁸ *Branzburg*, 408 U.S. at 704.

²¹⁹ *Ibid.*, 721 (Douglas, J., dissenting).

²²⁰ As discussed earlier in this chapter, the Court in cases such as *Curtis Publishing*, 388 U.S. at 130; *Saxbe*, 417 U.S. at 843; and *Zurcher*, 436 U.S. at 547, considered characteristics of journalistic practices and processes in its rulings.

²²¹ Castells, *The Rise of the Network Society*, 1-3.

²²² *Ibid.*, 29.

economy, society, and culture.²²³ The revolutions are different in that one was fueled by energy-related innovations, such as the steam engine and electricity, while the network era is characterized by information technology.²²⁴ Information, via new technologies, is not only being made massively available to people, but is being used to generate new ideas in a continuous cycle of innovation. Castells contended:

What characterizes the current technological revolution is not the centrality of knowledge and information, but the application of such knowledge and information to knowledge generation and information/communication devices, in a cumulative feedback loop between innovation and the uses of innovation.²²⁵

The use and generation of information by all types of people has profoundly influenced how the media interact with audiences and vice versa, Castells contended. In this sense, the network era represents a paradigmatic shift from the mass-media model and its assumptions about audiences, meaning, and how messages are transmitted.²²⁶ In considering how the Court will interpret the press clause in a new era, the characteristics of the mass-media and network-society paradigms must be considered. The modes of communication now available to all people, a fundamental part of questions about the press clause's future, must also be examined.

Many of the characteristics that define journalism in the United States evolved with the creation of a "mass" media during the Progressive Era, which started in the late nineteenth century. The conceptualization of the media audience as a "mass" came as part of a broader historical shift in American life during the Industrial Revolution.²²⁷ Much as massive technological shifts are reshaping daily life today, the move to more

²²³ Ibid.

²²⁴ Ibid., 30.

²²⁵ Ibid., 31.

²²⁶ Gade and Lowrey, "Reshaping the Journalistic Culture," 22-23.

²²⁷ Shearon Lowery and Melvin L. DeFleur, *Milestones in Mass Communication Research* (New York: Longman, 1988), 10.

urban, industrial, and corporate lifestyles brought unlike people together.²²⁸ People arrived in cities from traditional lifestyles on farms and in rural areas to find jobs in growing mass-production markets, and as a result they shared less in common with their neighbors than they did in pre-industrial society, which was more pastoral, interconnected, and homogeneous.²²⁹ The creation of the “mass” audience came as a result of these social changes. As communication scholars Shearon Lowery and Melvin DeFleur stated, “Modern societies are media-dependent societies. Their populations make use of the media for achieving a great many goals that are handled differently in the traditional society.”²³⁰ Thus, the social changes at the start of the Progressive Era created the need for mass publications. During the same time period, technological changes made it possible to print massive amounts of information at relatively low costs. As Paul Starr, a media historian, explained, the idea of the media audience as a “mass” came from the standardized culture of the time.²³¹ In an era when daily life revolved around mass production, it was easy to view the audience as a “mass.”

The constitutive assumptions of the mass-media paradigm came to be that communication was largely a one-way street and that audiences were uniform groups.²³² News production required expensive technology and only publishers or broadcasters had the power and resources to use the tools of mass communication.²³³ Finally, the media had relatively exclusive access to powerful individuals, and were therefore in a

²²⁸ Ibid., 8.

²²⁹ Ibid., 7-8.

²³⁰ Ibid., 9.

²³¹ Paul Starr, *The Creation of the Media: Political Origins of Modern Communication* (New York: Basic Books, 2004), 250-251.

²³² Gade and Lowrey, “Reshaping the Journalistic Culture,” 22; Westley and MacLean, “A Conceptual Model for Communication Research,” 31.

²³³ Gade and Lowrey, “Reshaping the Journalistic Culture,” 22.

position to provide the scarce resource of information to large audiences.²³⁴ The conceptualization of a mass media that communicated to mass audiences began to wane in the final decades of the twentieth century, as a series of compounding technological advancements were introduced.²³⁵ Among them were the personal computer, fiber-optic cable, and software that made networked communication accessible to many.²³⁶ Because the advances dealt with information technologies, and information is central to human activity, their spread had a powerful impact on society.²³⁷ The pervasiveness of the new technologies helped bring about a new system regarding how people communicate. Castells wrote, “The potential integration of text, images, and sounds in the same system, interacting from multiple points, in chosen time (real or delayed) along a global network, in conditions of open and affordable access, does fundamentally change the character of communication.”²³⁸ The changes in communication brought on by these technological innovations undermined the fundamental assumptions of the mass-media model.²³⁹ Communication was no longer a one-way street — it became interactive. In the network era, users share control over content production and its reception; audience members are active participants in news selection, information creation, and distribution; and individuals can take on some of the roles journalists once held nearly complete power over, such as publishing or broadcasting information.²⁴⁰

²³⁴ Ibid.

²³⁵ Castells, *Communication Power*, 57; Castells, *The Rise of the Network Society*, 29.

²³⁶ Friedman, *The World is Flat*, 10.

²³⁷ Castells, *The Rise of the Network Society*, 70.

²³⁸ Ibid., 356.

²³⁹ Peter J. Gade, “Journalism Guardians in a Time of Great Change: Newspaper Editors’ Perceived Influence in Integrated News Organizations,” *Journalism & Mass Communication Quarterly* 85, no. 2 (2008): 371.

²⁴⁰ Chaffee and Metzger, “The End of Mass Communication?,” 369; Kovach and Rosenstiel, *The Elements of Journalism*, 19.

Castells identified the roots of the shift to the network-society era as emerging before the key inventions of the last part of the twentieth century. In the 1970s, while mass-media outlets communicated to large audiences, computer-mediated communication, primarily on a one-to-one level, began to evolve.²⁴¹ As the technology improved, the once-distinct lines between mass communication and computer-mediated communication began to blur. By the early years of the twenty-first century, the two had become nearly indistinguishable from one another as audience members blogged, shared, and interacted in other ways with personal and traditional-media messages.²⁴² Castells wrote, “As people (the so-called users) have appropriated new forms of communication, they have built their own systems of mass communication.”²⁴³

Castells argued the convergence between traditional media and computer-mediated communication led to the creation of a new and pervasive form of communication: mass self-communication.²⁴⁴ The new communication form is massive in that it can reach large and geographically dispersed audiences. It is self-communication in that the messages are created and directed by users.²⁴⁵ To Castells, mass self-communication joins interpersonal and mass communication to create an interactive, coexistent environment where the three forms complement each other.²⁴⁶ The concept of mass self-communication bears important repercussions regarding how the Court could interpret the press clause. Castells explained that sites such as YouTube are similar to traditional mass communication in that people can use them to reach large

²⁴¹ Castells, *Communication Power*, 64.

²⁴² *Ibid.*, 65.

²⁴³ *Ibid.*

²⁴⁴ *Ibid.*, 55.

²⁴⁵ *Ibid.*

²⁴⁶ *Ibid.*

audiences, but the key difference between traditional conceptualizations of mass communication and mass self-communication is that “anyone can post a video on YouTube, with few restrictions. And the user selects the video she wants to watch and comment on from a huge list of possibilities.”²⁴⁷ In other words, mass self-communication is free of the institutional editorial decision-making, time and space constraints, and economic considerations that journalists use to create and disseminate some messages and ignore others. Media scholar Henry Jenkins, in discussing participatory culture on the Internet, wrote, “Convergence represents a cultural shift as consumers are encouraged to seek out new information and make connections among dispersed media content.”²⁴⁸ To that end, Jenkins suggested groups of people can work together, pool resources, combine skills, and use “collective intelligence” as “an alternative source of media power.”²⁴⁹ To the extent that conceptualizations of mass self-communication and participatory culture, such as Castells and Jenkins discussed, gain wider acceptance and prove relevant as dominant ideas regarding how the media operate in the network era, such considerations could prove to be factors that influence the Court regarding how it interprets the press clause.

Journalistic Identity in the Network Society

The paradigm shift from the mass-media to the network-society model has led to change and uncertainty regarding journalistic norms and practices.²⁵⁰ Technological advancements have allowed anyone with access to a computer and an Internet connection to be a publisher, and this widespread ability to communicate messages to

²⁴⁷ Ibid., 67.

²⁴⁸ Jenkins, *Convergence Culture*, 3.

²⁴⁹ Ibid., 4.

²⁵⁰ Wilson Lowrey and Peter J. Gade, “Complexity, Uncertainty, and Journalistic Change,” in *Changing the News*, 3.

audiences has raised questions regarding who is and is not a journalist and what norms and practices should guide journalism in the twenty-first century.²⁵¹ For a field of work to be considered a profession, two primary criteria must be met: (1) on a cognitive level, a profession requires that its practitioners hold a unique body of knowledge that is not generally held by others, and (2) on a normative level, a professional must contribute something that is essential to the health and functioning of society.²⁵² The levels of autonomy and prestige afforded to practitioners of a craft also must be considered.²⁵³ A doctor, for example, must complete a rigorous educational process, including supervised practice, and be cleared by a medical board to practice his or her profession. Journalism holds no such education requirements. Not all journalists have degrees, and not all who do have degrees in journalism.²⁵⁴ As for prestige and appreciation for its role in society, studies routinely find journalists are not highly regarded by others and their autonomy is seen as being too great.²⁵⁵ This vein of thought also relates to questions regarding the cognitive aspects of journalism. Journalism does not have a unique body of knowledge.²⁵⁶ Furthermore, journalism does not have requirements for entry into the field.²⁵⁷ In regard to contributions to society, journalists have historically

²⁵¹ Singer, "Journalism and Digital Technologies," 214-215.

²⁵² Jane B. Singer, "Who are These Guys? The Online Challenge to the Notion of Journalistic Professionalism," *Journalism* 4, no. 2 (2003): 141; Randal A. Beam, David H. Weaver, and Bonnie J. Brownlee, "Changes in the Professionalism of U.S. Journalists in the Turbulent Twenty-First Century," *Journalism & Mass Communication Quarterly* 86, no. 2 (2009): 278.

²⁵³ Singer, "Who are These Guys?," 141.

²⁵⁴ *Ibid.*, 144.

²⁵⁵ *Ibid.*, 146.

²⁵⁶ John Merrill, *Media, Mission, and Morality: A Scholarly Milestone Essay in Mass Communication Volume I* (Spokane, Wash.: Marquette Books, 2006), 109.

²⁵⁷ Singer, "Who are These Guys?," 144.

tied their work's meaning to the public-service role of providing information to citizens so that they can take part in deliberations with others in a democracy society.²⁵⁸

Journalism scholars are not in agreement regarding whether journalism is a profession. Merrill argued journalism was not a profession, and journalism scholars Peter Gade and Wilson Lowrey contended that journalism can be seen as a semi-profession because it lacks predetermined standards for membership but has functions and attributes that are shared by a group of practitioners.²⁵⁹ Beam and Meeks classified journalism as a profession, but one that was being deprofessionalized as a result of technological changes brought about by the network era and decisions made by the profession in response to the changes.²⁶⁰ Beam and Meeks found that journalism is a profession because it has organizations that advocate for members, universities that provide specialized education in the field, common professional values, and relative similarity in practices that are shared across traditional medial outlets.²⁶¹ The authors explained that the growth of blogs and other citizen-publishing efforts are undermining journalists' traditional hold on the provision of information. Beam and Meeks wrote, "Journalists are being forced to share control over news making with these 'non-professionals.' The power sharing with the audience has created uncertainty about journalists' professional roles and has diminished the occupation."²⁶² The uncertainty identified by Beam and Meeks relates to how journalists do their work, which ties with

²⁵⁸ Ibid., 143.

²⁵⁹ Gade and Lowrey, "Reshaping the Journalistic Culture," 30; Merrill, *Media, Mission, and Morality*, 109.

²⁶⁰ Randal A. Beam and Lindsey Meeks, "So Many Stories, So Little Time: Economics, Technology, and the Changing Professional Environment for News Work," in *Changing the News*, 239-240.

²⁶¹ Ibid., 239.

²⁶² Ibid., 239-240.

both considerations regarding professionalism and larger questions about differentiating journalism from citizen publishing in the twenty-first century.

Journalism scholar Jane Singer, in examining how characteristics of journalism have weathered the shift from the mass-media model to the network era, found that journalists can no longer identify themselves by their ability to disseminate information to audiences.²⁶³ Both journalists and citizen publishers are capable of building and reaching audiences of varying sizes in the network era. Journalists can no longer find a distinctive identity in having access to sources of information either.²⁶⁴ The Internet has placed libraries of information in the hands of anyone with Internet access.²⁶⁵ The ability to communicate clear, skillfully crafted messages to audiences is also no longer a trait journalists can claim as their own, since many information providers, including bloggers and regular contributors to sites such as the *Huffington Post*, can make that claim.²⁶⁶ To this end, Singer proposed that journalism remain strongly guided by its normative claims regarding its public-service role to society and adapt past roles to the distinctive characteristics of network society.²⁶⁷ She wrote, “The normative stances, however, are more useful in setting boundaries around the entity of journalism and the enterprises of those who practice it.”²⁶⁸

Journalism’s gatekeeping role, traditionally one of its core functions, has been substantially diminished by the emergence of the network society.²⁶⁹ Instead of deciding

²⁶³ Singer, “Journalism and Digital Technologies,” 215.

²⁶⁴ Ibid.

²⁶⁵ Lowrey and Gade, “Complexity, Uncertainty, and Journalistic Change,” 3.

²⁶⁶ Singer, “Journalism and Digital Technologies,” 215.

²⁶⁷ Ibid.

²⁶⁸ Ibid.

²⁶⁹ Jane B. Singer, “The Political J-Blogger: ‘Normalizing’ a New Media Form to Fit Old Norms and Practices,” *Journalism* 6, no. 2 (2005): 178.

the information audiences receive, journalists are shifting to provide the service of helping audiences make sense of what they encounter. Kovach and Rosenstiel wrote:

The new journalist is no longer deciding what the public should know — this was the classic role of gatekeeper. He or she is helping audiences make order out of it. This does not mean simply adding interpretation or analysis to news reporting. The first task of the new journalist/sense maker, rather, is to verify what information is reliable and then order it so people can grasp it efficiently.²⁷⁰

The authors described this function as a gate-watching role that places journalists in the positions of intermediaries, sense-makers, and verifiers regarding the flood of information audience members receive.²⁷¹

The concepts of truth and a completed journalistic report are changing as well. Singer related these changes to the postmodern conceptualizations of truth, facts, and reality, in regard to Internet culture.²⁷² Journalism's roots in Enlightenment thinking regarding the rationality of man and modernist approaches regarding scientific methods and processes to discover truth put it at odds with an online culture that bears more postmodern characteristics,²⁷³ such as skepticism regarding universal truths and a lack of respect for experts.²⁷⁴ Journalists have traditionally defined truth as the outcome of a series of steps regarding comparing and verifying information from a set of sources.²⁷⁵ The process begins and ends before a story is published. Singer wrote, "The online zeitgeist flips that on its head. Publication is the first, not the last, step in the process of

²⁷⁰ Kovach and Rosenstiel, *The Elements of Journalism*, 19.

²⁷¹ Ibid.

²⁷² Singer, "Journalism and Digital Technologies," 221.

²⁷³ Singer, "Journalism and Digital Technologies," 221-222; Gade, "Postmodernism, Uncertainty, and Journalism," 63.

²⁷⁴ David Harvey, *The Condition of Postmodernity: An Enquiry into the Origins of Cultural Change* (Cambridge, Mass.: Blackwell, 1990), 44.

²⁷⁵ Singer, "Journalism and Digital Technologies," 221.

verification because only after an idea is published can it be, collectively, vetted.”²⁷⁶ Network-society audiences expect to engage in the verification process, and the truth, then, emerges through interaction with the audience.²⁷⁷ Media ethicist David Craig included this aspect of twenty-first-century journalism in his list of standards for excellence in online journalism. He wrote, “Journalists need to continue doing their own independent reporting while communicating actively with readers and welcoming their insights.”²⁷⁸ This approach changes the traditional conceptualization of a completed story. Published content becomes something that is a work in progress, a shift that Kovach and Rosenstiel conceptualized as making journalists more similar to forum or seminar leaders than as authorities.²⁷⁹

Considering the audience’s role in verifying information and creating a more open-ended approach to content creation relates to another emerging norm for twenty-first-century journalists: transparency. This area of focus relates with the other changing roles in that it incorporates an understanding that online audiences are active, and skeptical of experts and absolute truths. Transparency, in this context, means communicating “as much as possible about what has gone into a story — a story that is not complete once the journalist has written it but rather is part of an ongoing and more broadly shared process.”²⁸⁰ Incorporating transparency as a journalistic practice in the network era helps provide journalists with more credibility in their work during a time

²⁷⁶ Ibid.

²⁷⁷ Ibid.

²⁷⁸ David A. Craig, *Excellence in Online Journalism: Exploring Current Practices in an Evolving Environment* (Los Angeles: Sage, 2011), 169.

²⁷⁹ Kovach and Rosenstiel, *The Elements of Journalism*, 19.

²⁸⁰ Singer, “Journalism and Digital Technologies,” 222.

and atmosphere when more postmodern conceptualizations of truth are emphasized.²⁸¹ Kovach and Rosenstiel explained that journalists can help make up for limitations they face regarding knowing the truth or the accuracy of information they gather by being transparent about the nature of the information they are conveying to the audience.²⁸² The authors, as an example, contended that journalists should be transparent about the questions their stories fail to answer.

The requirement that journalists produce original content is not new to the network era.²⁸³ And while originality does not constitute a new role or practice for journalists, it represents a dividing line for how journalists can separate themselves from citizen publishers. In this sense, originality of content could play a role in how the Court defines the press clause in the network era. Citizen publishers do little or no original reporting and instead act as compilers or analyzers of other people's messages.²⁸⁴ Singer concluded that "a traditional journalist's reportorial skills — negotiating with and interviewing sources, witnessing and recording events, and turning what has been learned into a cogent, original story — remain largely unthreatened."²⁸⁵ The temptation, however, for journalists to take information from online sources, including other media outlets, is greater when the pressure to produce and constantly update information is so great.²⁸⁶ Kovach and Rosenstiel emphasized the need for journalists to produce original content and to avoid taking second-hand information from online sources. Kovach and Rosenstiel's argument relates to the central element of

²⁸¹ Singer, "Journalism and Digital Technologies," 222; Kovach and Rosenstiel, *The Elements of Journalism*, 92.

²⁸² Kovach and Rosenstiel, *The Elements of Journalism*, 92.

²⁸³ *Ibid.*, 100.

²⁸⁴ Singer, "Who are These Guys?," 149.

²⁸⁵ *Ibid.*

²⁸⁶ Craig, *Excellence in Online Journalism*, 28-31.

journalistic verification, while Singer’s reasoning for highlighting originality is to help examine journalistic professionalism. In either case, the role of originality has been elevated as a mechanism to distinguish professional from nonprofessional journalism in the network society.

The characteristics of the network society and questions regarding journalistic professionalism and the role and practices of journalism in the twenty-first century, while divided into separate sections in this chapter, share relationships in regard to considerations of how the Court should interpret the press clause in the network-society era. Gade, for example, brought many of these ideas together when he contended, “Journalists should become more ‘responsive and responsible’ to the network by seeking other voices and using the ‘crowd’ to help verify content.”²⁸⁷ The Court has considered editorial decision-making and journalism’s skills and practices in past rulings.²⁸⁸ Such considerations provide evidence that the Court will likely again consider how journalists understand and go about their work in future cases.

As emphasized in the introduction of this chapter, the Court has not made a ruling regarding the press clause in the network era.²⁸⁹ Therefore, this study draws upon relevant bodies of legal and theoretical discourse to construct a framework in which courts in the network-society era can ground complicated questions concerning interpretations of the press clause in a conceptual rationale that integrates historical understandings with those of a dramatically transformed environment. The final section

²⁸⁷ Lowrey and Gade, “Connective Journalism,” 275.

²⁸⁸ *Curtis Publishing*, 388 U.S. at 130; *Saxbe*, 417 U.S. at 843; and *Zurcher*, 436 U.S. at 547.

²⁸⁹ McChesney, “Freedom of the Press for Whom? The Question to be Answered in Our Critical Juncture,” 1434.

of this chapter details the methodological approach that will be utilized in this analysis.

This study will be guided by the following research questions:

- What understandings are dominant in this study's analysis of the relevant bodies of legal and philosophical discourse?
- Are there significant commonalities among dominant understandings identified in the respective bodies of legal and philosophical discourse?
- Are there significant conflicts among dominant understandings identified in the respective bodies of legal and philosophical discourse?
- To the extent that significant commonalities and conflicts can be identified in the respective bodies of legal and philosophical discourse, how do they critically relate to historical understandings of the press clause?
- What does this analysis suggest regarding how understandings dominant in this study's examination of the relevant bodies of legal and philosophical discourse can provide grounding for interpreting the press clause in the network society?

Method

This study will employ a qualitative methodological approach to guide the evaluation of the three sets of primary sources discussed in the introduction of this chapter to propose a framework from which the courts can ground questions regarding interpretations of the press clause within the unique communication environment that is being engendered by the network society. A study that centers on understandings relevant to judicial interpretations of the press clause and theoretical conceptualizations of the role of the press in democratic society can be effectively advanced by utilizing the text-based and meaning-making-oriented approaches offered by qualitative

methods.²⁹⁰ The approach focuses intensely on identifying patterns and themes within messages.²⁹¹ As John Pauly, a scholar whose work examines the history and sociology of mass media, articulated, the fundamental focus of qualitative research is that it seeks to provide deeper understandings of meaning-making — “the symbolic processes by which humans constantly re-orient themselves to the world.”²⁹² That effort will be advanced methodologically in this study through the use of qualitative content analysis to examine narratives represented in lower-court rulings when citizen publishers have claimed protections that have been traditionally reserved for journalists, Supreme Court decisions in which justices have articulated conceptual understandings regarding Internet questions related to the First Amendment, and philosophical conceptualizations that are central to understanding the phenomenon of a digitally networked society.

As introduced early in this chapter, that analysis will be specifically grounded in sociologist David Altheide’s twelve-step, qualitative document-analysis process in order to systematically assess the documents from each of the bodies of discourse that are the focus of this study in terms of the broader concerns regarding the future of the press clause in the network-society era. Altheide emphasized that his approach to document analysis is “oriented to documenting and understanding the communication of meaning, as well as verifying theoretical relationships.”²⁹³ His approach asserts that the underlying understandings and meanings that are most significant in a set of documents are seldom initially evident. The meanings must be allowed to “emerge or

²⁹⁰ Thomas R. Lindlof & Bryan C. Taylor, *Qualitative Communication Research Methods* (Los Angeles: Sage, 2011), 8-9

²⁹¹ John J. Pauly, “A Beginner’s Guide to Doing Qualitative Research in Mass Communication,” *Journalism Monographs* (1991), 1-2.

²⁹² *Ibid.*, 3.

²⁹³ David L. Altheide, *Qualitative Media Analysis* (Thousand Oaks, CA: Sage Publications, 1996), 16.

become more clear through constant comparison and investigation of documents.”²⁹⁴

The term “emerge,” in Altheide’s conceptualization, is central to the process of a gradual formation of meaning through immersion in the documents. For Altheide, the documents themselves, when properly assessed, can reveal context for symbolic meaning that contribute to a tracking of the creation and influence of social understandings.²⁹⁵

Altheide’s method focuses on identifying what he calls “dominant themes.” His twelve-step approach involves formulating research questions, creating a context through which documents can be analyzed, examining a small group of the documents to allow preliminary categories to form for data collection, testing preliminary categories by examining more documents, revising categories, implementing “progressive theoretical sampling” (a process that includes selecting materials based on an evolving understanding of the topic of the study), collecting data, analyzing data (which includes repeated reading, sorting, and searching through documents), comparing and contrasting extremes and noteworthy differences, summarizing findings, and placing the findings within a broader interpretation.²⁹⁶

Fundamental to Altheide’s method is his articulation of how themes and frames should be understood. Themes, to Altheide, can be seen as “mini-frames” or primary ideas that regularly recur in a set of documents.²⁹⁷ Frames are “a kind of super theme” that act as a larger boundary for how something is discussed in a set of documents. Altheide declared, “The significance of frames, themes, and discourse for document

²⁹⁴ Ibid., 10.

²⁹⁵ Ibid., 12.

²⁹⁶ Ibid., 23-44.

²⁹⁷ Ibid., 30-31.

analysis cannot be overemphasized. Theoretically, frames and themes are crucial in defining situations and provide much of the rationale for document analysis.”²⁹⁸ Altheide’s understanding of frames complements sociologist Erving Goffman’s conceptualization of framing. Goffman defined framing as the process people use to define and classify the situations they encounter using certain principles from social events and their places in those events.²⁹⁹ Communication scholar Robert Entman highlighted the way that frames encourage specific understandings of a narrative. Such understandings influence “those perceiving and thinking about events to develop particular understandings of them.”³⁰⁰ In this conceptualization, people frame reality so they can make sense of it and manage it. Entman characterized framing as a powerful research tool, asserting, “The concept of framing consistently offers a way to describe the power of a communicating text. Analysis of frames illuminates the precise way in which influence over a human consciousness is exerted by the transfer (or communication) or information.”³⁰¹ Framing analysis has been used in many studies concerned with matters broadly similar to the focus of this dissertation. Political-science scholars Adam Simon and Jennifer Jerit, for example, examined framing in political communication regarding debates about abortion, and journalism scholar Stephen Reese conducted a case study on how journalism was framed in the Newseum in Washington, D.C.³⁰²

²⁹⁸ Ibid., 31.

²⁹⁹ Erving Goffman, *Frame Analysis: An Essay on the Organization of Experience* (New York: Harper and Row, 1974), 10-11.

³⁰⁰ Robert M. Entman, “Framing U.S. Coverage of International News: Contrasts in Narratives of the KAL and Iran Air Incidents,” *Journal of Communication* 41, no. 4 (1991): 7.

³⁰¹ Robert M. Entman, “Framing: Toward Clarification of a Fractured Paradigm,” *Journal of Communication* 43, no. 4 (1993): 51-52.

³⁰² Adam F. Simon & Jennifer Jerit, “Toward a Theory Relating Political Discourse, Media, and Public Opinion,” *Journal of Communication* 57 (2007): 254-271; Stephen D. Reese, “Prologue: Framing

Utilizing Altheide's document analysis in developing this dissertation began with drawing upon a relatively wide range of relevant sources — such as mass-media reports, scholarly journals, and court opinions — to place the overall study in context with regard to the historical influences on the way the press clause is understood today, the unique technological influences on the emergence of the network society, and other elements of this study. With guidance from the research questions and context provided by the supporting readings, a set of search criteria for each of the three sets of documents was developed. In the case of each respective body of discourse that is focused upon in this study, an initially wider set of information was read and the search criteria were then revised until a clear set of criteria had been created for each of the three sets of documents. This approach was employed in a manner consistent with the openness that is emphasized in qualitative research methods, beginning without rigid predetermined themes but instead emphasizing an inductive process that includes interaction between the researcher and the documents.³⁰³ Utilizing the criteria established through the initial document-gathering and reading, a final set of documents were gathered from each of the three subject areas. See chapters Two, Three, and Four for more detailed explanations regarding the process that was utilized for each of the respective bodies of discourse. Altheide stipulated that this step in the process requires the researcher to focus on the questions involved in the project and read texts until either all of the relevant texts have been found and examined or a wide enough sample

Public Life: A Bridging Model for Media Research,” in *Framing Public Life: Perspectives on Media and Our Understanding of the Social World*, ed. Stephen Reese, Oscar Gandy, and August Grant (Mahwah, N.J.: Lawrence Erlbaum, 2001).

³⁰³ Bruce. L. Berg, *Qualitative Research Methods for the Social Sciences* (Boston: Allyn & Bacon, 2001), 245.

has been selected from a larger population of what was found.³⁰⁴ In regard to the lower-court cases in Chapter Two and the Supreme Court decisions in Chapter Three, a high degree of confidence was established that all of the relevant cases were found. In the case of the theoretical discourse central to understanding the phenomenon of a digitally networked society in Chapter Four, a set of relevant texts was necessarily drawn from a wider pool.

Consistent with Altheide's approach emphasizing "extensive reading, sorting, and searching," through materials, the data-analysis stage included reading each chapter's documents closely and repeatedly.³⁰⁵ Throughout the readings, detailed notes were taken and initial possible themes and frames were identified. Possible themes and frames were revised and further focused after the initial set of readings and then throughout overall re-readings of the texts. The process included labeling extreme examples that both supported and conflicted with emerging themes and frames, as well as writing short summaries regarding what each text discussed. From these immersive interactions with the texts for each chapter, a clearer and more focused set of themes gradually emerged. Once interactions with the documents failed to result in further adjustments, the themes for each chapter were summarized and supplemented with examples.³⁰⁶ The themes and frames were analyzed within the context of each respective chapter's subject matter and then ultimately drawn upon to advance the objective of this study to form a unified framework in which the courts can ground complicated questions concerning interactions of the press clause in the network society.

³⁰⁴ Ibid., 35-36.

³⁰⁵ Ibid., 43.

³⁰⁶ Ibid., 44.

Conclusion

As the overview in this chapter detailed, the emergence of the network society has raised substantial questions in regard to how the press clause of the First Amendment will be conceptualized by the courts in the twenty-first century. The Supreme Court's past rulings regarding the press clause have not clearly differentiated it from the speech clause, but justices have indicated that they do not understand the clause as providing journalists with rights that go beyond those available to others in society, and that they will often consider journalistic norms and practices when deliberating on questions that relate to the freedom of the press. Future legal deliberations regarding the press clause could be influenced by the way jurists understand journalism. Similarly, a substantial amount of the legal scholarship relating to the press clause focused on whether it is distinct from the speech clause, and whether Justice Stewart's conceptualization of the press clause as an institutional protection for the media as an industry is accurate. From both the legal and the scholarly perspectives, the historically uncertain nature of the boundaries of the press clause's protections are only exacerbated by the emergence of network technologies that allow individuals to communicate with audiences of varying sizes, further complicating questions regarding the clause's protections. The next chapter begins the document analysis of the three bodies of discourse that will be assessed on that methodological basis in this dissertation. It focuses on lower-court opinions in which judges developed rationales for deciding cases in which citizen publishers argued for protections that have traditionally been associated with journalists under the press clause.

Chapter Two: Lower Courts, Citizen Publishers, and Press Protections

This chapter focuses on the narrative represented by lower-court opinions in which the courts developed conceptual rationales for deciding cases in which bloggers or other citizen publishers argued for protections historically more associated with the institutional press under the press clause. The cases were analyzed with a focus on identifying a consistent and qualitative emphasis on what will be discussed here in terms of four themes identified in the articulation of those conceptual rationales. Each of the themes involve representations of the press clause or arguably related protections as understood in terms of particular concerns that were emphasized in the courts' conceptual rationales. In particular, the themes in that context focused on (1) concern with the way a message is delivered more than with the content of a message, (2) concern with whether messages are delivered according to accepted rules of journalism, (3) concern with the exercise of the First Amendment's speech clause more than with exercise of its press clause, and (4) preference for organizations and groups over individual citizen publishers.

As detailed in greater length in Chapter One, the categories were identified using Altheide's process of document analysis, a methodological form of qualitative content analysis. It involves examining a small number of the documents to begin developing categories to guide data collection, testing the categories on more documents, revising the categories, and implementing "progressive theoretical sampling" — which refers to "the selection of materials based on emerging

understanding of the topic under investigation.”¹ Altheide’s qualitative data analysis “consists of extensive reading, sorting, and searching through” the documents, comparing and contrasting extremes and key differences, and then summarizing and integrating findings with interpretation.² Ultimately, Altheide characterized the themes that emerged through this process as “mini-frames,” or central ideas within a text.³ He conceptualized a frame as “a kind of super theme” that acts as a primary idea within a set of documents.⁴

The cases analyzed in this chapter represent all of the relevant lower-court decisions available in which judges articulated conceptual rationales for deciding cases in which bloggers or other citizen publishers argued for protections historically more associated with the institutional press under the press clause. To be reasonably certain that all of the relevant cases were included in the analysis, the same keyword search was conducted using all four of the primary legal research databases. The terms “internet or blog” and “First Amendment” and “journalist or journalism or media” were searched in separate inquiries across the Westlaw, Bloomberg’s Media Law Reporter, LexisNexis Law Schools, and Bloomberg Law databases.⁵ Searches were limited to cases decided after January 1, 1995, a date that corresponds with the time period when the public and media companies began to use the Internet in significant numbers.⁶ From the hundreds

¹ David L. Altheide, *Qualitative Media Analysis* (Thousand Oaks, Calif.: Sage Publications, 1996), 33-34.

² *Ibid.*, 23-44.

³ *Ibid.*, 30-31.

⁴ *Ibid.*

⁵ John Palfrey, “Cornerstones of Law Libraries for an Era of Digital Plus,” *Law Library Journal* 102, no. 2 (2010-2011): 171, 178. In this article, Palfrey indicated that Westlaw, LexisNexis Law, and Bloomberg Law are the central legal resources that are used by legal scholars.

⁶ David Carlson, “The History of Online Journalism,” in *Digital Journalism: Emerging media and the changing horizons of journalism*, ed. Kevin Kawamoto (Lanham, Md.: Rowman and Littlefield Publishers, 2003), 51-52.

of cases found in the searches, only those that appeared to address instances when citizen publishers claimed protections that have traditionally been reserved for journalists were saved. By the time the fourth database, Bloomberg Law, was searched, no new cases that fit the analysis' criteria were found. Initially, twenty-seven cases were pulled from the database searches because they appeared to include judges' conceptual rationales for deciding cases in which citizen publishers argued for protections historically more associated with the institutional press under the press clause. Those cases were printed and read completely, and several were found to deal with issues that were outside of the scope of this analysis. Ultimately, twelve cases were found to fit the study's criteria. The twelve cases were analyzed using Altheide's method, which in that stage involved repeated readings, note-taking, sorting, and searching the documents, as well as comparing and contrasting differences between the texts.⁷

This chapter is divided into two sections, the first of which examines the earliest cases that emerged from the lower courts, those ranging from 2001 to 2009, and the second includes the six most recent decisions, those from 2010 to 2012. Those groupings were made in order to include consideration of whether substantial differences may have been evident between those respective periods, given the more widespread social awareness and understanding of Internet-related matters in the second time period. Each section is structurally organized to provide discussion of the facts, central questions, and key ideas from each case. Then the themes or categories that emerged using Altheide's process of document analysis are discussed.

⁷ Altheide, *Qualitative Media Analysis*, 43.

Early cases, 2001-2009

This section of the chapter focuses on the earlier set of lower-court rulings, those from 2001 to 2009, that involved instances when citizen publishers claimed protections that have been traditionally reserved for journalists. The cases focused on in this section are: *Smith v. Plati* (2001), *O’Grady v. Superior Court of Santa Clara County* (2006), *Forensic Advisors v. Matrixx Initiatives* (2006), *BidZirk v. Smith* (2007), *Alvi Armani Medical Inc. v. Hennessey* (2008), and *Kaufman v. Islamic Society of Arlington* (2009).⁸ After a detailed factual discussion of each case, the themes that emerged through application of Altheide’s process of document analysis are presented.

Smith v. Plati

Smith is the oldest of the twelve cases in this analysis. The United States Court of Appeals for the Tenth Circuit decided the case in 2001, but the initial issue occurred in 1998,⁹ just as legislators and the courts were beginning to grapple with what the Internet was and if, how, and to what extent it should be regulated. To provide historical context, the Communications Decency Act was passed in 1996 and the Supreme Court considered its first Internet-related First Amendment case, overturning the provisions in the CDA that dealt with Internet content in 1997, just months before Theodore Smith started the online news site involved in this case.¹⁰ Considered in this historical context, *Smith* provided the first instance where an online publisher, using technologies still not

⁸ *Smith v. Plati*, 258 F.3d 1167 (10th Cir. 2001); *O’Grady v. Superior Court of Santa Clara County*, 139 Cal. App. 4th 1423 (Cal. Ct. App. 6th Dist. 2006); *Forensic Advisors v. Matrixx Initiatives*, 170 Md. App. 520 (Md. Ct. Spec. App. 2006); *BidZirk v. Smith*, 35 Media L. Rep. 2478 (G.D. S.C. 2007); *Alvi Armani Medical Inc. v. Hennessey*, 37 Med. L. Rptr. 1420 (S.D. Fla. 2008); and *Kaufman v. Islamic Society of Arlington*, 291 S.W.3d 130 (Tex. App. 2009).

⁹ 56 F. Supp. 2d 1195, 1198 (Colo. 1999).

¹⁰ The Communications Decency Act was passed by Congress in 1996. It included two provisions that were intended to protect minors from indecent material on the Internet. In a unanimous ruling, the Supreme Court found the two provisions of the CDA were overly broad and that they abridged the First Amendment’s freedom of speech protections. See *Reno v. ACLU*, 521 U.S. 844 (1997).

yet fully comprehended by regulators, judges, or the general public, sought the same treatment as a traditional media outlet. At the time, legal scholars speculated that the courts would create a “crazy quilt” of First Amendment jurisprudence pertaining to the Internet.”¹¹ Unlike later cases, which show an evolving understanding of the Internet by both the judges and the parties involved, *Smith* did not involve what became the traditional battle lines in cases, such as citizen publishers’ claims that they qualify for the media exemption in trademark or election laws or bloggers’ arguments that they are protected by reporters’ shield-law protections. This case simply involved an enthusiastic citizen publisher who wanted to document University of Colorado athletics just as the World Wide Web was first becoming technologically and economically available throughout the United States.¹² In 1997, Smith created Netbuffs,¹³ a website that includes stories, chat rooms, pictures, and message boards regarding University of Colorado athletics.¹⁴ Initially, Smith was given the same access and privileges as those afforded to members of the traditional media.¹⁵ He had opportunities to interview players and coaches and was able to take photographs during sporting events. At the start of the 1998 school year, the athletic department limited his access, and he was no longer given the same access as members of the traditional media. He was asked to pay for schedules, news releases, and photographs.¹⁶ Smith argued David Plati, the university’s assistant athletic director for media relations, wanted to eliminate Netbuffs

¹¹ Jonathan Wallace and Michael Green, “Bridging the Analogy Gap: The Internet, the Printing Press and Freedom of Speech,” *Seattle University Law Review* 20 (1996): 711.

¹² Lee Sproull and Manuel Arriaga, “Online communities,” in *The Handbook of Computer Networks: Distributed Networks, Network Planning, Control Management, and New Trends and Applications*, Vol. 3, ed. Hossein Bidgoli (Hoboken, N.J.: John Wiley & Sons, 2012), 903.

¹³ *Smith*, 56 F. Supp. 2d at 1198.

¹⁴ *Smith*, 258 F.3d at 1172.

¹⁵ *Smith*, 56 F. Supp. 2d at 1199.

¹⁶ *Ibid.*

because it competed with the university's athletics website.¹⁷ In taking legal action against the university, Smith claimed he had a right to the same level of access as is provided to other media. He also claimed his free-speech rights were infringed upon because the university retaliated against him by limiting his access to the sources of information for his site.¹⁸

The court dismissed Smith's claim that Plati and the athletic department were retaliating against him and his website. The court determined, without discussion, that "publishing Netbuffs.com is undoubtedly an activity protected by the First Amendment."¹⁹ The court stopped short, however, of finding Plati's actions harmed Smith's rights. The court recognized the university's actions made Smith's work more difficult, but found that he had other means of gathering the information he sought. The fact that the court determined Smith's website was protected by the First Amendment but was not harmed by his lack of access to information made available to others raises questions regarding whether a traditional media outlet, such as a Boulder, Colorado, newspaper or television station, would have received the same treatment from the court. The judge contended, "Plati's actions did not cause Smith to suffer an injury that would chill a person of ordinary firmness from continuing to publish an internet site."²⁰ The court's opinion did not debate whether Netbuffs qualified as a news outlet, nor did any of Smith's contentions appear to require the designation be made. For this reason, it is

¹⁷ *Smith*, 258 F.3d at 1172.

¹⁸ *Ibid.*, 1177.

¹⁹ *Ibid.*

²⁰ *Ibid.*

difficult to know if a newly established, one-man website that used technologies that were still being interpreted by lawmakers and judges, weakened Smith's case.²¹

The court then turned to Smith's claim of equal access to information provided to members of the traditional news media. The court found no Supreme Court or Tenth Circuit precedents that supported a First Amendment right of access, and emphasized that the Supreme Court had repeatedly stated that no First Amendment right of access existed for the public or the press.²² Next the court considered Smith's claim that a Colorado law could be utilized to compel a governmental official to perform the tasks of his or her duty.²³ The court dispatched this claim as well, writing, "Plati's job requires him to make on-going decisions regarding what University athletic information is made public, given to the press, or kept confidential — and every variety of decision in between — under constantly changing circumstances."²⁴ To that end, the court viewed any decision in Smith's favor as an intrusion by the legal system into the day-to-day responsibilities of Plati's job. Plati had the right, the court wrote, to decide how many photographers, for example, are on the sidelines of a football game and to decide who those photographers were.²⁵ To this end, the appeals court found in favor of Plati.

O'Grady v. The Superior Court of Santa Clara County

Five years after *Smith*, there is clear evidence in *O'Grady*, a 2006 case, that judges and citizen publishers had by then developed more sophisticated understandings

²¹ Few law articles refer to this case. One of the few that specifically discussed the case stated that the *Smith* opinion elaborated on the Tenth Circuit's precedents regarding retaliation against people who exercise their free speech. See Anjoli Terhune, "Redressing the Balance: An Examination of the Scope of First Amendment Protections, Prosecutorial Discretion and Probable Cause in the Wake of *Hartman v. Moore*," *Journal of the National Association of Administrative Law Judiciary* 27 (2007): 684.

²² *Smith*, 258 F.3d at 1178.

²³ *Ibid.*, 1202-1203. The court cited Colorado Rules of Civil Procedure Rule 106(a)(2).

²⁴ *Ibid.*, 1179.

²⁵ *Ibid.*

of online communication. Much as in *Smith*, the *O'Grady* case revolved around Internet-only publications. *O'Grady* involved two online magazines that claimed protection under the California reporter's shield law from being compelled to provide identifying information regarding anonymous sources.²⁶ The case, which was at the state appeals-court level, centered on Apple's argument that Internet-only publications *O'Grady's Power Page* and *Apple Insider* must turn over the names of the sources that provided them confidential information about an upcoming, unreleased Apple Computer product.²⁷ In November 2004, the websites published articles about a GarageBand-related product that was to be announced early the next year. The articles included product specifications, drawings, and how much the product would cost. The case pivoted on whether or not the web magazines qualified for protection under the state shield law. In considering this central aspect of the case, the three-judge panel's opinion carefully considered the characteristics of the sites. The court examined the longevity and publishing frequency of the two sites, pointing out that *PowerPage* had published daily since 1995, and that *Apple Insider* had distributed several articles per week since 1998.²⁸ The opinion highlighted that each site received hundreds of thousands of unique visitors a month, giving them discernable audiences.²⁹ The court also recognized that *PowerPage* had nine editors and reporters on staff. These factors of time in existence, frequency of publication, and audience size operated as measures of credibility to the court. The court's decision to use these characteristics to evaluate an online source could provide guidance in future cases. One legal scholar has proposed a

²⁶ 139 Cal. App. 4th at 1437.

²⁷ *Ibid.*, 1432-1433.

²⁸ *Ibid.*, 1432.

²⁹ *Ibid.*

two-prong test regarding whether online news sites qualify for shield-law protection using the court's website evaluation methods in *O'Grady*.³⁰ Another legal scholar identified this a "functional approach" and also indicated it could be used by other courts.³¹

The court's opinion in *O'Grady*, importantly, also considered the intended meaning of the state shield law and whether it applied to the websites. The shield law, which originates in the California Constitution, states:

A publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication . . . shall not be adjudged in contempt . . . for refusing to disclose the source of any information procured while so connected or employed for publication in a newspaper, magazine or other periodical publication.³²

Apple argued the web magazines did not qualify for protection under the shield law because they were not engaged in "legitimate journalistic activities" and did not fit the types of people or publications listed as being protected by the law.³³ In this sense, Apple argued the websites did not apply from both the standpoint of the type of messages they communicated or the vehicle through which they were delivered. The court disagreed with Apple's assessment, finding that the shield law was intended to "protect the gathering and dissemination of news," and that the websites were fulfilling that role when they published the information.³⁴ The court also found the websites were more than qualified in regard to the classes of people protected by the law. Using relatively strong language, and devoting several pages to its justification, the court

³⁰ Carol Toland, "Internet Journalists and the Reporter's Privilege: Providing Protection for Online Periodicals," *University of Kansas Law Review* 57 (2008): 461, 484-488.

³¹ Adam Cohen, "The Media that Need Citizens: The First Amendment and the Fifth Estate," *Southern California Law Review* 85 (2011): 1, 55.

³² *O'Grady*, 139 Cal. App. 4th at 1456.

³³ *Ibid.*

³⁴ *Ibid.*, 1457.

asserted, “Petitioners’ Web sites are not only ‘publications’ under various sources we have noted but also bear far closer resemblance to traditional print media than to television and radio.”³⁵ The court explained that the websites had pages and articles that readers open and that, while articles were not published on a set schedule, information was regularly updated. While the court, in this instance, used understandings of traditional media functions and information to guide its decision, it is noteworthy that the judges were not completely free in their determinations. They were asked to interpret a law in which the precedential interpretation had been established in the 1980s, long before Internet-based news outlets emerged.³⁶ As is seen in other cases in this section, courts in other states have also found it challenging to interpret shield laws that were written before the network era brought about massive changes in communication technologies. In this instance, the California court found the sites were protected under the shield law and therefore did not have to provide the names of their sources.

Forensic Advisors v. Matrixx Initiatives

A few months after *O’Grady*, on the other side of the country, the Maryland Court of Special Appeals faced another instance when an online-only information source claimed shield-law protections. A subscription-based financial newsletter, the *Eyeshade Report*, published an article in 2003 that raised questions about the stability and viability of Matrixx Initiatives, a publicly traded health-care company.³⁷ The twenty-three-page report, with more than one-hundred footnotes, included misleading

³⁵ Ibid., 1462.

³⁶ The court cited *Mitchell v. Superior Court of Marin County*, 37 Cal. 3d 268 (Cal. 1984).

³⁷ *Forensic Advisors*, 170 Md. App. at 524.

statements that led Matrixx to sue for defamation.³⁸ Matrixx, based in Arizona, subpoenaed Forensic Advisors, the Maryland company that publishes the *Eyeshade Report*, for its documents relating to the story. It also called the company president to appear before the trial court in Arizona.³⁹ Forensic Advisors complied, sending hundreds of documents, and the president, Timothy Mulligan, provided a deposition for the court. When Mulligan was again subpoenaed several months later, he declined to respond.⁴⁰ Mulligan claimed protection under the Maryland news-media privilege and argued that if he testified, his subscribers — whom he relied on for both income and information for stories — would no longer feel comfortable providing information and would likely cancel their subscriptions.⁴¹

The Maryland shield law, outlined in the court’s opinion, does not mention newsletters or online media.⁴² Interestingly, the opinion did not address whether an online newsletter was eligible for protection under the law. It merely discussed if a financial newsletter counted as a “periodical” according to the Maryland news-media privilege law. The California court in *O’Grady* focused on a similar question because the state’s law listed “other periodical publications” as part of the list of types of media that were protected.⁴³ The Maryland court found the *Eyeshade Report* qualified for protection under the state law.⁴⁴ Unlike in *O’Grady*, however, the Maryland court did not examine characteristics of the *Eyeshade Report* in detail. Other than noting the length of the report, the number of footnotes, and the contents of the report as they

³⁸ Ibid.

³⁹ Ibid., 525.

⁴⁰ Ibid., 526-527

⁴¹ Ibid., 527-528.

⁴² Ibid., 534.

⁴³ 139 Cal. App. 4th at 1459.

⁴⁴ *Forensic Advisors*, 170 Md. App. at 535.

related to the case, the court focused more on pre-Internet precedents than on analysis of the website and the newsletter it carried. Media law scholar Dean Smith highlighted that the wording in the Maryland shield law that defined “news media” happened to be broad enough that the court was not forced to evaluate the financial newsletter to the same extent that the California court examined the websites in *O’Grady*.⁴⁵ This reasoning, however, means that citizen publishers who seek shield-law protections that have traditionally been reserved for traditional media will have varying levels of success depending on the wording of state shield laws. In this case, with little further discussion regarding its reasoning, the Maryland Court determined the *Eyeshade Report* fit within the state shield law’s definition of “news media” and remanded the case to the district-court level.

BidZirk v. Smith

Unlike the previous two cases, *BidZirk*, a 2007 federal-district-court case from South Carolina, did not involve a shield-law claim by a citizen publisher. It did, however, require a judge to evaluate the content of a series of blog posts in an effort to determine if they qualified for the news exemption contained within the Lanham Act.⁴⁶ While the legal question in this case is different, the judge was asked to evaluate some of the same legal questions as those found in *O’Grady* and *Forensic Advisors*.

BidZirk, an online-auction-listing company, brought defamation, invasion of privacy, and trademark violation claims against a blogger who wrote a four-part series

⁴⁵ Dean C. Smith, “*Price v. Time* Revisited: The Need for Medium-Neutral Shield Laws in the Age of Strict Construction,” *Communication Law & Policy* 14 (2009): 235, 263.

⁴⁶ The Lanham Act was enacted in 1946. It was created to halt unfair business competition. The act included the creation of a national trademark registry and legal protection for trademark holders. See Don R. Pember and Clay Calvert, *Mass Media Law* (New York: McGraw-Hill, 2011), 561; “Lanham Act,” Legal Information Institute, accessed April 4, 2013, http://www.law.cornell.edu/wex/lanham_act.

about the business’s services.⁴⁷ The four-part series was titled: “Special Report: You Gotta Be Berserk to Use an eBay Listing Company!”⁴⁸ In the report, Phillip Smith outlined his experience using BidZirk to list his goods on eBay. The judge highlighted that Smith’s blog included “positive and mostly negative aspects of utilizing an eBay listing company, like BidZirk, and provided a checklist for his readers to utilize in deciding whether to use a listing company.”⁴⁹ In deciding the case, the judge dispatched the invasion-of-privacy claim on procedural grounds and determined that Smith’s words were not defamatory.⁵⁰ In the trademark claim, however, the judge was forced to designate whether Smith’s blog was a commercial or news-and-information endeavor. The Lanham Act provides an exemption from trademark-infringement actions when the trademark is used for news, reporting, or commentary.⁵¹ Smith utilized the BidZirk company logo in his blog reports, and BidZirk argued his blog was not a news site, but rather a commercial vehicle. The judge indicated that he could find no precedent that determined whether a blogger was a journalist.⁵² Unlike the approach used in *O’Grady*, where the characteristics of the sites were evaluated, the judge in *BidZirk* considered the details of the message and the circumstances that drove its creation. In doing so, the judge determined Smith’s blog fit the news, reporting, or commentary requirements under the Lanham Act. He emphasized that he considered the “content of the material, not the format, to determine whether it is journalism.”⁵³ The judge also indicated that he considered Smith’s intent, which was to convey information to the public, in making his

⁴⁷ *BidZirk*, 35 Media L. Rep. at 2480.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*, 2480-2483.

⁵¹ *Ibid.*, 2483-2484.

⁵² *Ibid.*, 2484.

⁵³ *Ibid.*

determination. Importantly, the judge emphasized that the story included positive and negative aspects of BidZirk’s services, it provided a checklist people could use in deciding if an eBay listing company would be beneficial for them, and it shared what the author learned in his experiences in a way that could benefit others.⁵⁴ Finally, the judge emphasized that Smith conducted research before writing the blog posts. Smith, the judge explained, read other people’s discussions of BidZirk’s services and read about BidZirk’s competitors. The judge wrote, “Smith’s article evidences his intent to report what he believed was a newsworthy story for consumers.”⁵⁵

Alvi Armani Medical v. Hennessey

Armani, a 2008 case, included different legal questions but reprised similar issues as those found in *BidZirk*. The key similarity this case has with *O’Grady*, *Forensic*, and *BidZirk* is that a court was asked to decide whether a citizen publisher could be considered a type of news media in relation to a state or federal law. In *Armani*, a federal-district court in Florida examined whether the *Hair Restoration Network*, an information site about hair treatments, could be viewed as a media source in regard to two different claims made against it by Dr. Antonio Avli Armani, a hair restoration specialist. Armani argued Patrick Hennessey and his company, Media Visions, defamed him and used deceptive business practices by posting negative statements on their website, and created fake accounts in order to post disparaging comments on the site’s forums.⁵⁶

The judge in this case considered Media Visions’s motion for all the claims against it to be dismissed. Armani’s unfair-trade-practices claim was based on a Florida

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ *Armani*, 37 Med. L. Rptr. at 1421.

law that was created to protect against “unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce.”⁵⁷ The central point of contention in that claim was the “trade and commerce passage.” Media Visions argued its website’s forums were not involved in trade and commerce, so the claims should be dismissed. The site itself received monthly revenues from hair-transplant doctors who paid to be on the site’s list of recommended practitioners. Media Visions, argued, however, its site was fundamentally focused on news and information for a specific audience. The judge highlighted that Media Visions, “through their website provide[s] information to the consumer public about the hair restoration and transplant industry. . . . Potential patients heavily rely upon information provided in the website.”⁵⁸ Because the judge’s only task in this case was to rule on Media Visions’s motion for dismissal, he did not determine whether or not the information posted on the website was news and information and therefore exempt from prosecution under the unfair-trade-practices law. The judge concluded that Armani’s claim of unfair trade practices could continue, finding that Armani “adequately alleged the defendants have engaged in ‘unfair methods of competition’ . . . and that such allegations are sufficient to satisfy the ‘trade or commerce’ language contained” in the law.⁵⁹

The defamation claim resulted in a similarly complex argument. A Florida law requires that media outlets are notified and given at least five days to respond before a

⁵⁷ Ibid., 1423. The ruling cited Fla. Stat. §501.204(1) (2008). The law defines trade and commerce as including, “the advertising, soliciting, providing, offering, or distributing, whether by sale, rental, or otherwise, of any good or service or any property, whether tangible or intangible, or any other article, commodity, or thing of value, wherever situated.”

⁵⁸ *Armani*, 37 Med. L. Rptr. at 1421.

⁵⁹ Ibid.

person can file a defamation action.⁶⁰ Media Visions argued it did not, as a news outlet, receive the legally required notice before Armani filed the suit. Armani contended that the law did not apply because the *Hair Restoration Network* was not a media outlet.⁶¹ The judge explained, much as in *BidZirk*, that none of the precedents in his jurisdiction provided guidance regarding whether a website like the *Hair Restoration Network* could be viewed as a news outlet for the purposes of the Florida law. The judge declined to consider the cases Armani brought forth to support his claim that the website was not a news outlet because almost all of them predated the Internet era.⁶² Instead, the judge found agreement with the cases put forth by Media Visions, which included two previous Florida decisions that found online media could receive protection under the state's law.⁶³ One of the cases, a 2006 Florida circuit-court decision, specifically found stories published on the Internet could qualify for protection under the law's "other medium" designation.⁶⁴ Using these cases, the judge determined the site qualified as a news outlet, acknowledging that "in reaching this conclusion, the court reasoned that it could find no legitimate justification for interpreting the broad term 'other media' to exclude the internet."⁶⁵

The judge's decision relates to factors Smith recognized regarding *Forensic Advisors*.⁶⁶ The state law, much as was the case regarding the Maryland shield law in *Forensic Advisors*, was written broadly enough that a citizen publisher's website could

⁶⁰ *Ibid.*, 1424. The ruling referred to Fla. Stat. §770.01 (2008). The law requires prior notification for "publication or broadcast, in a newspaper, periodical, or other medium." Media Visions claimed it qualified as "other media."

⁶¹ *Armani*, 37 Med. L. Rptr. at 1424.

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ *Holt v. Tampa Bay Television*, 34 Med. L. Rptr. 1540 (Fla. Cir. Ct., 2006).

⁶⁵ *Armani*, 37 Med. L. Rptr. at 1424.

⁶⁶ Smith, "Price v. Time Revisited," 263.

qualify as a form of news media. Aside from the judge's designation of the website as being protected by the state law, it is noteworthy that the decision was nearly entirely focused on the mode of communication, an online forum. So much attention was devoted to the vehicle the message was carried in that the judge's decision did not include any information about what specifically was stated on the website that caused the initial conflict between the parties. This approach was substantially different from how the federal-district judge in *BidZirk* went about evaluating the questions in that case. The judge in *BidZirk* considered the content of the message and the intent, but the judge focused on the vehicle the message was conveyed in, rather than its content.

Kaufman v. Islamic Society of Arlington

Kaufman, like *Armani*, hinged on a decisive detail found in a state law. In this case, however, the three-judge, Texas-appeals-court panel delved into greater detail regarding the author of the message and the vehicle through which it was delivered when determining whether Joe Kaufman, a citizen journalist, qualified for media protections. The 2009 case arose from an article about Muslim Family Day at Six Flags Over Texas in Arlington. Kaufman wrote that the park would be "invaded by a radical Muslim organization that has physical ties with the Muslim Brotherhood and financial ties with Hamas."⁶⁷ The article was published in 2007 in *Front Page Magazine*, an online-only publication. The Islamic organizations sued Kaufman for defamation, intentional infliction of emotional distress, and for an injunction against Kaufman's current and future publications.⁶⁸ Among the conflicting legal maneuverings from both parties, the Texas appeals court was tasked with deciding if the Islamic group's motion

⁶⁷ *Kaufman*, 291 S.W.3d at 133.

⁶⁸ *Ibid.*, 135-136.

for dismissal of Kaufman’s appeal of the lower-court decision could be halted by Kaufman’s claim that he was a member of the media. Texas law does not allow a media member’s appeal in defamation cases to be dismissed. The law states that an appeal must be allowed if there is “a motion for summary judgment that is based in whole or in part upon a claim against or defense by a member of the electronic or print media.”⁶⁹

The Islamic group argued Kaufman was not a member of the media, so he could not thwart its motion for dismissal by calling upon the state law. The group contended that Kaufman’s Internet posts did not equate to journalism, *Front Page Magazine* was a blog and therefore not a media outlet, and that Kaufman had none of the training traditionally connected with journalism.⁷⁰ The court disagreed, finding that Kaufman was eligible for protection under the state law. Therefore, in this case, the court focused on external credentials, rather than the content of the message, presenting a contrast to the content and intent-based approach the judge used in *BidZirk*, the careful analysis of the site characteristics in *O’Grady*, and the focus on the method of communication found in *Armani*. While the facts and laws under consideration in each of these preceding cases were somewhat different, each of them, along with *Kaufman*, asked a court to make a designation regarding whether a citizen publisher could be viewed as receiving protections that have been traditionally enjoyed by journalists. In *Kaufman*, the court emphasized that the author had worked as a full-time journalist for various national publications since 1995, and that he was a regular contributor to *Front Page*

⁶⁹ Ibid.,137-138. The case cited Tex. Civ. Prac. & Rem. Code Ann. §51.014 (2008), which reads, in part: “(a) A person may appeal from an interlocutory order of a district court, county court at law, or county court that . . . denies a motion for summary judgment that is based in whole or in part upon a claim against or defense by a member of the electronic or print media, acting in such capacity, or a person whose communication appears in or is published by the electronic or print media, arising under the free speech or free press clause of the First Amendment to the United States Constitution, or Article I, Section 8, of the Texas Constitution, or Chapter 73.”

⁷⁰ *Kaufman*, 291 S.W.3d at 138.

Magazine, which had nearly half-a-million readers a month. Also, others edited Kaufman’s work before it was published. Finally, the court considered the credentials of *Front Page Magazine*’s publisher, David Horowitz.⁷¹ The fact that Horowitz had appeared on cable-news channels and as a speaker at universities helped the court decide Kaufman was a member of the news media.

Uniquely for this case, in comparison with the preceding cases that involved state laws enacted before the emergence of the Internet, the Texas legislature had revised its definition of “news media” in 2009 to include “electronic; and other means, known or unknown, that are accessible to the public.”⁷² While the law’s new wording did not explicitly include “website” or “Internet,” the court concluded *Front Page Magazine* qualified both as “electronic” and as “accessible to the public.”⁷³ In regard to the vehicle through which the message was communicated, the court determined that the state law should be interpreted in the same way for traditional and online media parties. The court wrote, “We hold that a person who communicates facts or opinions through the internet is entitled to appeal” under the law.⁷⁴ Even without the revised wording, the Texas court indicated it would have found that *Front Page Magazine* qualified as news media. The court referred to a Texas Supreme Court precedent in finding that “when the text of a statute logically authorizes the application of the statute to a new technology or communication medium, we should apply the statute in that

⁷¹ Ibid., 139-140.

⁷² Ibid., 142, citing Tex. Civ. Prac. & Rem. Code Ann. §22.021(3).

⁷³ *Kaufman*, 291 S.W.3d at 142.

⁷⁴ Ibid.

way.”⁷⁵ Using broad strokes, and without applying any qualifiers, the court argued anyone who communicated online qualified as a member of the electronic media.⁷⁶

The court in *Kaufman* considered a combination of website characteristics, such as examining the site’s monthly readership, and the author’s and broader publication’s journalistic credentials to evaluate the question posed in the case.

Document Analysis

The following subsections focus on utilizing Altheide’s method of document analysis to categorize representations that emerged through such examination of the preceding six lower-court decisions. Those representations related to the press clause or arguably related protections as understood in terms of particular concerns that were emphasized in the courts’ conceptual rationales. In Altheide’s articulation of the heart of the methodological approach, the “actual words and direct messages of documents carry the discourse that reflects certain themes, which in turn are held together and given meaning by a broad frame.”⁷⁷ As emphasized in the introductory section of this chapter, the themes identified in that analysis were: concern for (1) the way a message is delivered more than with the content of a message, (2) whether messages are delivered according to accepted rules of journalism, (3) emphasis on the exercise of the First Amendment’s speech clause more than with the exercise of its press clause, and (4) preference for organizations and groups over individual citizen publishers.

⁷⁵ Ibid., 141.

⁷⁶ Ibid., 142.

⁷⁷ Altheide, *Qualitative Media Analysis*, 31.

The Way the Message is Delivered Versus the Content of the Message

In the cases summarized above — with one exception — the courts’ discourse consistently reflected the construction of a theme in which citizen publishers’ claims for protections that have been traditionally reserved for journalists were to be decided within the framework of the vehicle through which the message was sent. The content of the message the citizen publisher conveyed was characterized within the narrative put forth in these cases as being of lesser or no importance. In *Forensic Advisors*, for example, the court’s discourse communicated that it understood the question before it as being related to “whether a financial newsletter is entitled to protection under the state’s news-media privilege.”⁷⁸ The narrative conveyed in the cases emphasized the vehicle of communication, and placed the possible contribution made by the message in a secondary role. Furthermore, the text in *Forensic Advisors* included only a one-sentence footnote that summarized some of the problems in the twenty-three-page report from which the case arose, and no other mention of the content of the message was made.⁷⁹ The discourse in *Armani* was similar in that the case revolved around claims of defamatory message-board postings and unfair business practices regarding the website’s content, but none of the content that led to the issues in the case was included within the opinion.⁸⁰ Instead, the court’s narrative concentrated on whether websites, and message boards especially, qualified as an “other medium” according to a Florida law.⁸¹ By focusing their determinations on the vehicle through which messages are delivered, the courts in the discourse carried in these cases communicated an

⁷⁸ 170 Md. App. at 534.

⁷⁹ *Ibid.*

⁸⁰ 37 Med. L. Rptr. at 1421-1425.

⁸¹ *Ibid.*, 1424.

understanding that the content of the messages, regardless of their value to deliberation in society, is of little importance when judges evaluate citizen publishers' claims for protections that have traditionally been reserved for journalists.

The theme appeared to emerge within this body of discourse for two primary reasons: First, the narrative conveyed by the judges communicated a concern that they could not find precedential support to guide their decisions. The mostly pre-network-era precedents they focused on were medium-based precedents, those that focused on whether or not a type of communication delivery should be included under existing laws. Second, this body of discourse indicated that the wording of existing press-related statutory protections, such as shield laws, directed the courts' focus toward the vehicle of communication and not the message.

The *Forensic Advisors*, *BidZirk* and *Armani* rulings in particular included passages where judges indicated they could not find clear precedential support for the questions before them. The Florida court in *Armani* wrote, for example, that the issue before it “has not been definitively resolved by the Supreme Court of Florida or by any court in this circuit.”⁸² The judge in *BidZirk* wrote that “there is no published case deciding whether a blogger is a journalist.”⁸³ The *Financial Advisors* ruling included a similar statement and then turned to pre-Internet precedents from Ohio and Massachusetts, those regarding print materials, to guide the court's deliberation regarding the web-based financial newsletter in question.⁸⁴ The Texas court in *Kaufman* directed much of its deliberation on whether “articles communicated through the internet equate in legal effect in some circumstances to words published by more

⁸² Ibid.

⁸³ 35 Media L. Rep. at 2483-2484.

⁸⁴ 170 Md. App. at 534-535.

traditional electronic or print media.”⁸⁵ As with *Forensic Advisors* and *Armani*, the courts’ narrative articulated an understanding that the central question in the case related to the matter of how the message was delivered, rather than concern for the content of the message.

In constructing this theme, the narrative put forth by the California court in *O’Grady* went a step further by associating the lack of relevant precedent with reasons why it concentrated on the way the message was delivered rather than on the content of the message. The opinion included extensive details with respect to the contents of the messages, but the judges ultimately communicated an understanding that vehicle-based considerations were the determining factors in their decision. The court wrote, “We decline the implicit invitation to embroil ourselves in the questions of what constitutes ‘legitimate journalism.’ . . . We can think of no workable test or principle that would distinguish ‘legitimate’ from ‘illegitimate’ news.”⁸⁶ In this sense the discourse conveyed an understanding that a content-based approach was unworkable, and from that point in the decision, the narrative framed the question before the court as pertaining to whether the websites were periodicals or if the author of the messages qualified as an “other person” according to the California shield law.

The narrative also indicated that these cases carried a greater concentration on the way a message was delivered than on the content of the message itself because state shield laws, and other laws considered within these cases, focused on the medium. The California shield law that was considered in *O’Grady*, for example, concentrated on *who* is covered and *what* types of publications are covered. The law’s wording does not

⁸⁵ 291 S.W.3d at 140.

⁸⁶ *O’Grady*, 139 Cal. App. 4th at 1457.

take into account what was is communicated in the messages. The law does not consider, for example, whether the message is of a legitimate public concern or if it contributes to what is known in a democratic society. The Maryland shield law’s wording, examined in *Forensic Advisors*, lists newspapers, magazines, journals, press associations, news agencies, wire services, radio, television, and any “printed, photographic, mechanical, or electronic means of disseminating information to the public.”⁸⁷ These criteria do not consider the content, only the communicated format of the information, and therefore substantially direct the courts’ evaluations of citizen publishers’ claims. This theme was not limited to shield laws. The *Armani* and *Kaufman* cases focused on other types of state laws that afford protections to the media. The defamation law in *Armani* that requires that five days pass after a story is printed or broadcast before a lawsuit can be brought against a media outlet specifically mentions newspapers, broadcasts, periodicals, or “other medium[s].”⁸⁸ This wording, the narrative indicated, channeled the court’s attention toward addressing the vehicle of communication, rather than the content of the message.

The opinion in *BidZirk* communicated a different understanding than what was conveyed by the courts in the other cases in this section. The case was decided on the basis of the message, not the vehicle in which it was carried. The judge characterized his approach as examining “the content of the material, not the format, to determine whether it is journalism.”⁸⁹ The text carried an understanding that the message and the intent of the author were of central importance in the judge’s deliberation. The judge wrote, “Smith felt that what he learned from his experience with BidZirk would be

⁸⁷ 170 Md. App. at 535.

⁸⁸ 37 Med. L. Rptr. at 1424.

⁸⁹ *BidZirk*, 35 Media L. Rep. at 2484.

helpful to others dealing with an eBay listing company. . . . There is no evidence that the sole purpose of the article was to denigrate BidZirk.”⁹⁰

While *BidZirk* provided a contrast, the fact that the primary determining consideration in the narrative contained within these cases was on the way the message was delivered indicates that even those who have insightful or important ideas to contribute to democratic society will have to communicate them through a form of online media that can be easily linked to state shield-law or related statutory language, which tends to favor traditional media, or stay within the medium-based logic of lower-court judges. While the courts’ decisions often turned to older, non-network-era precedents and state laws that were not written to include online communication, five of these six decisions, all but *Smith*, resulted in the court finding the citizen publisher qualified for rights that have been traditionally reserved for journalists.

Message Delivery According to Accepted Rules of Journalism

The discourse within this set of cases most consistently reflected an expectation by the courts that the way messages were delivered, and to a far-lesser extent the content of the messages, should resemble judges’ understandings of the rules of journalism. The criteria varied in each case, because there was no full, formal exploration of journalistic practices in any of the decisions. The narrative carried within these cases, however, indicated, through the way judges assessed journalism in a variety of contexts that they expected a person who claimed to be a journalist to display some comprehension of traditionally accepted journalistic concepts. In *Kaufman* and *O’Grady*, for example, the narrative specifically asserted that the authors went beyond

⁹⁰ Ibid., 2483.

simply posting ideas on forums and recognized the editorial thought-processes involved in the publications.⁹¹ The discourse represented in these decisions indicated that judges expected to see evidence of information-gathering, editorial decision-making, editors vetting messages, and the use of original information and interviews. In finding the online-only magazines in *O'Grady* qualified as media under the California shield law's wording, for example, the judge wrote, "It is established without contradiction that they gather, select, and prepare for purposes of publication to a mass audience, information about current events of interest and concern to that audience."⁹² In this sense, the decisions indicated that judges were seeking a way to distinguish the work of citizen publishers from members of the traditional media.

The fact that the authors in *BidZirk* and in *Kaufman* conducted background research appeared to be central to the judges' thinking in both cases. The judge's discourse in *Forensic Advisors* carried a concern regarding the danger to the information-gathering capabilities of the online publication if it was compelled to divulge its anonymous sources.⁹³ The judge in *BidZirk* asserted, "Smith engaged in background research. . . . Smith's article evidences his intent to report what he believed was a newsworthy story."⁹⁴ The court in *Kaufman* recognized on two occasions in the opinion that the writer gathered information from government publications, public documents, and Muslim websites.⁹⁵ The discourse in both cases communicated an understanding that the presence of research and original information were central to the court's determination. The central contention of the plaintiff in *Smith* was that the

⁹¹ *O'Grady*, 139 Cal. App. 4th at 1458; *Kaufman*, 291 S.W.3d at 137.

⁹² 139 Cal. App. 4th at 1468.

⁹³ 170 Md. App. at 528.

⁹⁴ 35 Media L. Rep. at 2484.

⁹⁵ 291 S.W.3d at 137-139.

athletics officials at the University of Colorado had halted his access to information. In the decision, the judge weighed the parties' arguments, asserting that Smith sought to observe teams' practices and interview sources. While the court did not rule in Smith's favor, its opinion communicated an understanding that information-gathering, as a part of the way it comprehended journalism, was an important characteristic within its evaluation of the citizen publisher's claim. In *O'Grady*, Apple argued the online-magazine publishers could not claim media protections because the content they posted was mostly just stolen data. The opinion rejected that understanding by recognizing a difference between simply posting information and coming "into possession of, and convey[ing] to their readers, information those readers would find of considerable interest."⁹⁶ In further contributing to that theme, the opinion asserted, "The decision whether to take this approach, or to present original information at the top level of an article, is itself an occasion for editorial judgment."⁹⁷ In refuting Apple's contentions, the opinion discussed the way the online-magazine publishers exhibited editorial processes that went beyond those found on simple discussion boards. The judges concluded the publishers demonstrated editorial judgment that dictated which stories ran, where they ran, their length, and how they would be presented.⁹⁸ The court's discourse placed emphasis on the manner in which those characteristics contributed to the conclusion that the online magazines qualified for protection under the state shield law.

The narrative conveyed in the *Kaufman* opinion communicated a similar understanding in its assessment of the way the editorial process was involved in the

⁹⁶ 139 Cal. App. 4th at 1458.

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*, 1457.

writer's publication in *Front Page Magazine*. The text articulated an understanding that the presence of an editorial process helped Kaufman qualify for protection under the Texas law.⁹⁹ In both *BidZirk* and *Kaufman*, the opinions reflected an understanding that not all people who published online were journalists.¹⁰⁰ As the court in *Kaufman* expressed it, "We do not hold, therefore, that everyone who communicates on the internet would qualify as a member of the electronic media."¹⁰¹ The opinion further asserted that the journalistic characteristics demonstrated by *Front Page Magazine* also included the fact that the author addressed a national issue of public concern, which the narrative communicates contributed to the court's decision. The fact that the discourse in these cases so often recognized the way that the parties followed certain journalistic rules contributed to the theme that the way messages were delivered should resemble judicial understandings of the rules of journalism in order to support claims for protections that have been traditionally reserved for journalists.

Exercise of Speech Clause Versus Exercise of Press Clause

With few exceptions, judges framed the issues before them as matters of free speech in the context of expression exercised on the Internet. In other words, the narrative carried an understanding that what the citizen publishers communicated was *speech* expressed online rather than something published in a press-clause sense. The press clause was mentioned three times in the six cases, once in a quote from a Supreme Court case and twice in tandem with the speech clause.¹⁰² It was not otherwise

⁹⁹ *Kaufman*, 291 S.W.3d at 142.

¹⁰⁰ *BidZirk*, 35 Media L. Rep. at 2484.

¹⁰¹ 291 S.W.3d at 142.

¹⁰² *Smith*, 258 F.3d at 1178; *O'Grady*, 139 Cal. App. 4th at 1467; *Kaufman*, 291 S.W.3d at 138.

explicitly included in the discourse represented by the cases. In *Smith*, for example, the court utilized an earlier, pre-Internet case that was analogous to the citizen publisher's in which a police officer "retaliated against a plaintiff's freedom of speech."¹⁰³ Similarly, in the *O'Grady*, the opinion framed the question before the court as being based on if the articles were "protected speech."¹⁰⁴ These two particular examples are noteworthy because *Smith* was a one-man website publisher, while *O'Grady* encompassed two online-only magazines with large audiences and a series of editors and reporters. While it is understandable that a court would understand a one-man operation as a type of soapbox whose messages appeared to be more related with an individual's speech, it is worth emphasizing that the more complex operations in *O'Grady* were also conceptualized in the text as relating to speech-clause concerns.

The discourse within the *Armani* case further carried the theme that the courts understand citizen publishers' messages as relating to the speech clause. In discussing *Armani's* demand for an injunction against *The Hair Restoration Network* website, the narrative focused on the fact that his claim sought "an impermissible prior restraint on *speech* and should be dismissed as inconsistent with the First Amendment of the United States Constitution."¹⁰⁵ The word "speech" was utilized on every reference regarding prior restraints and the opinion never conveyed an understanding in which the website was discussed as a form of press or as something specifically triggering press-clause protection. In *O'Grady*, however, the discourse on more than one occasion represented the web-based magazines at the center of the case as being like printed newspapers and magazines. The court wrote, "News-oriented Web sites like petitioners' are surely 'like'

¹⁰³ 258 F.3d at 1176.

¹⁰⁴ 139 Cal. App. 4th at 1438.

¹⁰⁵ *Armani*, 37 Med. L. Rptr. at 1422 (emphasis added).

a newspaper or magazine for these purposes.”¹⁰⁶ Despite this representation of the online magazines as being *like* traditional media outlets that have historically been at the center of press-clause cases, the narrative in *O’Grady* primarily articulated an understanding of the case from a speech-clause perspective.¹⁰⁷

In *Smith*, the discourse framed the author’s two primary claims in terms of speech issues. The narrative only shifted to press issues when the court dispatched Smith’s right-of-access claim. The court then drew upon Supreme Court rulings regarding access for reporters in contending that the institutional press has not been found to receive greater access to information than others.¹⁰⁸ And even in discussing press-oriented access cases, the text did not refocus its thematic attention on the press clause, which in fact was not specifically mentioned. In *Kaufman*, the press clause was mentioned once, and then in conjunction with the speech clause, in a footnote as part of an excerpt from a Texas law.¹⁰⁹ In asserting that the article’s author and the website were eligible for the news-media exemption, the court correlated its discourse with another Texas-court opinion by concluding that a “plain reading of this language evidences clear legislative intent that a party seeking summary judgment on claims and defenses that implicate free speech be entitled to appeal a trial court’s denial of this relief.”¹¹⁰ The case the opinion drew upon dealt with a false advertising claim regarding a trade journal. The case, with its speech-clause orientation, was utilized in the court’s

¹⁰⁶ *O’Grady*, 139 Cal. App. 4th at 1460.

¹⁰⁷ Justice Stewart characterized *Rosenbloom*, 403 U.S. 29 (1971); *Curtis Publishing*, 338 U.S. at 130; *Sullivan*, 376 U.S. at 254; and *New York Times*, 403 U.S. at 713 as press-clause cases. All of these dealt with major media outlets. See Stewart, “Or of the Press,” 632-633.

¹⁰⁸ The court cited *Pell*, 417 U.S. 817 (1974); *Houchins*, 438 U.S. 1 (1978); *Saxbe*, 417 U.S. 843 (1974); and *Branzburg*, 408 U.S. 665 (1972).

¹⁰⁹ 291 S.W.3d at 138.

¹¹⁰ *Ibid.*, 138-139, (quoting *Astoria Indus. of Iowa v. SNF*, 223 S.W.3d 616, 623 (Tex. App. 2007)).

discourse to contextualize its determination that the law's media exemption extended to online publications.

Preference for Organizations and Groups over Individuals

The narrative consistently represented the characteristics relevant to citizen publishers' websites and communications in terms of comparisons to traditional media. Although the discourse communicated a level of skepticism that individual citizen publishers could be understood in equivalent terms to how journalists traditionally have been, the discourse in these cases nevertheless generally categorized what the citizen publishers were doing as similar to the practices of traditional media sources of information. This thematic approach made it far more likely that a group of people with an established audience, a clear information niche, a business model, an association with other professionals, and regular updates on their website or blog would succeed in their claims for protections that have traditionally been reserved for the press. The other side of that coin, however, meant that communicators acting alone who did not exhibit such characteristics faced a more difficult threshold when seeking protection.

The construction of this theme was reflected in the way the courts' discourse articulated how they understood the citizen publishers. In *Smith*, the opinion primarily referred to Smith by his last name and referred to his website, Netbuffs, only sparsely in the opinion. The text carried a similar understanding in *BidZirk*, referring to the blogger by his last name and only mentioning the blog title on first reference. In all of the group-oriented cases, the discourse primarily referred to the group or publication in question, such as the *Eyeshade Report* in *Forensic Advisors* or *Front Page Magazine* in

Kaufman. In *O'Grady*, the opinion referred to *Apple Insider* and *O'Grady's PowerPage* throughout.¹¹¹ The use of the citizen publisher's name in the individual-based cases versus the online publication's name in the group-oriented cases operated as a noteworthy form of positioning, intentionally or not, on the part of the judges. When a website was nearly always referred to by the name of its author, it seemed to make less sense, in terms of the understandings articulated in the narrative, that it receive protections that have traditionally been reserved for the media. When the website's name was utilized throughout, that suggested that it made more sense in terms of the judges' understandings that the website would be a type of media outlet, something deserving of press-related protections.

Because Smith also lacked other characteristics that were emphasized in the narrative, those generally found in group-oriented websites, the opinion expressed an understanding of him as a "person" and not as a media entity. In dispatching one of Smith's claims, the opinion concluded that the athletic department's actions did not cause "Smith to suffer an injury that would chill a *person* of ordinary firmness from continuing to publish an Internet site."¹¹² The case's text further contributed to the articulation of this theme by asserting that the athletic department's decision to exclude Smith might have hindered his ability to gather information, but "alternative avenues to information remained open."¹¹³ Finally, in this passage, the court's discourse framed its understanding in terms of the district court's logic concerning the fact that the state did nothing to halt Smith from publishing. The district court wrote, "Smith continues to possess the ability to publish anything any *citizen* could by opening a privately operated

¹¹¹ *O'Grady*, 139 Cal. App. 4th 1433-1535.

¹¹² *Smith*, 258 F.3d at 1177 (emphasis added).

¹¹³ *Ibid.*

website.”¹¹⁴ These passages contribute to the theme because the discourse communicates an understanding that the court was reluctant to represent Smith as anything more than a person with a website. In the context of the other cases in this analysis, that decision to view Smith as a *person* and not as *media* placed him in the context of a lone publisher who lacked many of the traditional media-like characteristics the courts drew upon in constructing their dispositive understandings. In contrast, when the California court in *O’Grady* determined that the online-only magazines qualified for protection under the state shield law, its opinion represented the publications as if they were news outlets. It found that “news-oriented Web sites like petitioners’ are surely ‘like’ a newspaper or magazine.”¹¹⁵ The court highlighted the fact that the magazine had editors and that they were “conceptually indistinguishable from publishing a newspaper.”¹¹⁶

Understandings that favored group-oriented online publications were also apparent in *Kaufman* and *Forensic Advisors*. The discourse in *Forensic Advisors* carried an emphasis that the *Eyeshade Report* focused on publishing information about publicly traded companies and that it included a network of subscriber-contributors. The text asserted that “because some of FAI’s customers are ‘sources’ of the information provided in the *Eyeshade Report*, disclosure of FAI’s customer list would create substantial likelihood that the customer/sources would no longer be willing to provide information.”¹¹⁷ This passage communicated that the court constructed its understanding from concerns with both the information-gathering ability of the report

¹¹⁴ Ibid., 1177, (quoting *Smith*, 56 F. Supp. 2d at 1205) (emphasis added).

¹¹⁵ 139 Cal. App. 4th at 1460.

¹¹⁶ Ibid., 1459.

¹¹⁷ *Forensic Advisors*, 170 Md. App. at 528.

and the financial model. Similarly, in *Kaufman*, the narrative conveyed a recognition that *Front Page Magazine* had a sizeable audience, a clear subject area of focus, and a history of regularly updating its site with information.¹¹⁸ The discourse also stressed the significance of the online publication having a system of editors who vetted information that was submitted by contributors such as Kaufman.¹¹⁹

As examined in the first theme discussed in this chapter, *BidZirk* stands to some extent apart from the other cases. It represents the only time in the twelve cases focused upon in this chapter that an individual citizen publisher had his claims for press-related protections affirmed. As in *Smith*, the judge in references throughout the opinion utilized the blog author's name. The judge did not appear, however, to place significance on the characteristics that often were represented as most crucial in other cases. No reference was made regarding the financial status of the website, and it was not clear from the construction of the opinion whether Smith's blog was consistently published, had a large audience, or had a specific area of focus. The discourse's focus on the message, rather than the way the message was delivered, and its related recognition of the journalistic qualities of the message, contributed heavily to the fact that Smith's four-part blog series about online auction-listing companies was understood as qualifying for the media exemption that was at the center of the case.

The judges in their discourse in these cases articulated an understanding that citizen publishers are more akin to individuals with the ability to communicate online than they are to media outlets. This theme was conveyed by judicial understandings that citizen-publishing groups, such as the online magazines in the *O'Grady* case, are more

¹¹⁸ 291 S.W.3d at 139.

¹¹⁹ Ibid.

similar to traditional media and, therefore, more deserving of rights traditionally reserved for institutional media. Similarly, the rights of citizen publishers were conceptualized as relating to speech-clause, rather than press-clause, concerns. The discourse within the cases in the next section of this chapter communicated the same themes, but the decisions in those cases generally represented a greater level of skepticism from the courts regarding citizen publishers' claims for traditional-media protections.

Later cases, 2010-2012

This section of Chapter Two focuses on the later set of lower-court rulings, those from 2010 to 2012, involving instances when citizen publishers claimed protections that have been traditionally reserved for journalists. The cases focused upon in this section are: *Mortgage Specialists, Inc. v. Implode-Explode Heavy Industries, Inc.* (2010), *Nexus v. Swift* (2010), *Too Much Media v. Hale* (2011), *Obsidian Financial Group v. Cox* (2012), *Johns-Byrne Company v. TechnoBuffalo* (2012), and *Bailey v. State* (2012).¹²⁰ After a detailed factual discussion of each case, the themes that emerged through application of Altheide's process of document analysis are presented.

Mortgage Specialists v. Implode-Explode Heavy Industries

In *Mortgage Specialists*, the New Hampshire Supreme Court came to similar conclusions as those made by the Texas court in *Kaufman* less than six months earlier. The court employed similar reasoning, when compared with *Kaufman*, when faced with a case that hinged on whether a website qualified for media privileges. As with the

¹²⁰ *Mortgage Specialists, Inc. v. Implode-Explode, Inc.*, 160 N.H. 227 (N.H. 2009); *Nexus v. Swift*, 785 N.W.2d 771 (Minn. Ct. App. 2010); *Too Much Media v. Hale*, 206 N.J. 209 (N.J. 2011); *Obsidian Financial Group v. Cox*, 2012 U.S. Dist. LEXIS 43125 (P.D. Or., 2012); *Johns-Byrne Co. v. TechnoBuffalo*, 40 Med.L.Rptr. 2619 (Ill. Cir. Ct. Cook County 2012); *Bailey v. State*, 900 F. Supp. 2d 75 (D. Me. 2012).

Texas court, the New Hampshire court focused on the way the message was delivered, rather than on the content itself. Implode-Explode Heavy Industries maintained a website that ranked businesses that were involved in the mortgage industry and provided forums for readers to discuss their experiences with mortgage lenders.¹²¹ In August 2008, the website posted confidential information about Mortgage Specialists and listed the company as “at risk” on its ranking device, the “Implode-O-Meter.”¹²² It also posted information about state actions that were taken against the lender. Finally, a reader posted what Mortgage Specialists claimed were defamatory comments on the website’s forums. In the case, Mortgage Specialists pursued an injunction against the site, demanded the confidential documents be taken down, and sought the identity of the anonymous poster.

Implode declined to take the information down from its website or to identify the name of the person who posted on its website. The group claimed it was a news organization, which meant it was protected by the newsgatherer’s privilege in the New Hampshire Constitution.¹²³ Mortgage Specialists disagreed, arguing Implode was not a news organization and was not eligible for the newsgatherer’s privilege. Importantly, as was seen in *BidZirk*, the court explained that there was little precedent available regarding the question it was considering. In making its determination, the court wrote, “Although our cases discussing the newsgathering privilege have involved traditional news media, . . . we reject Mortgage Specialists’ contention that the newsgathering privilege is inapplicable because Implode is neither an established media entity nor

¹²¹ *Mortgage Specialists*, 160 N.H. at 231.

¹²² *Ibid.*

¹²³ *Ibid.*, 232-233.

engaged in investigative reporting.”¹²⁴ In outlining its decision, the court referred to the Supreme Court’s reasoning in *Branzburg v. Hayes*, referring to the justices’ determination that freedom of the press was a “fundamental *personal* right which is not confined to newspapers and periodicals.”¹²⁵ *Implode* provided information to the public, which the court found qualified it as a reporter under the New Hampshire Constitution’s privilege.¹²⁶ To this end, the court rejected *Mortgage Specialists*’ call for an injunction, determining that such a move would violate the First Amendment. In regard to protecting the anonymity of the person who posted on the forum, the court remanded that portion of the case.¹²⁷ Though the outcomes were similar, the finding in this case, with the facts in mind, is more broad and inclusive than the shield-law rulings in *O’Grady* and *Forensic Advisors*. Attorney Benjamin Wischnowski argued the *Mortgage Specialists* ruling could damage the formation of a standard for how citizen publishers’ claims for media protections will be evaluated in the future, because he found, “Extending the reporter’s-privilege protection to a website simply because that site ‘serves an informative function in the flow of information’ creates an amorphous standard that is unlikely to prove sustainable.”¹²⁸

Nexus v. Swift

Nexus, decided in 2010 in a state appeals court in Minnesota, provided a murkier set of facts in comparison to previous cases regarding citizen-publishers’ claims on privileges traditionally held by journalists. The case revolved around Janette Swift’s

¹²⁴ *Ibid.*, 233.

¹²⁵ *Ibid.*, 234. (quoting *Branzburg*, 408 U.S. 665, 704 (1972)) (emphasis added).

¹²⁶ Benjamin J. Wischnowski, “Bloggers with Shields: Reconciling the Blogosphere’s Intrinsic Editorial Process with Traditional Concepts of Media Accountability,” *Iowa Law Review* 97 (2011): 327, 342.

¹²⁷ *Mortgage Specialists*, 160 N.H. at 239-240.

¹²⁸ Wischnowski, “Bloggers with Shields,” 342.

fight against plans to relocate a residential facility for juvenile sex offenders near her home.¹²⁹ As part of her protest, Swift utilized YouTube, a personal website, a blog, and email to spread information about a patient who died at the hands of a Nexus staff member while he was being restrained. The text she posted with the YouTube video stated that the center was “getting away with murder.”¹³⁰ She called the company “sadistic” and posted that the leaders were “bad people” on her website. She sent emails to Nexus employees and its board of directors. The company sued Swift for defamation, contending that Nexus was never charged with murder and that the employee followed state-approved procedures for restraining a patient.¹³¹ The company outlined other problems regarding information Swift had posted as well. In her defense, Swift argued she was a media defendant, a claim which was treated with skepticism by the court. While the court ultimately declined to rule on this aspect of the case, instead choosing to remand the case, it appeared dismissive of Swift’s claims in a way that was similar to the federal appeals court’s reaction in *Smith*. The court stated Swift “seems to contend she is a media defendant.”¹³² In acknowledging Swift’s argument that her work was placed on a blog and on a video, the court wrote, “She sites no authority for the proposition that this renders her a media defendant, and we are aware of none.”¹³³ Much as in *Smith*, the court appeared dismissive of the citizen publisher’s work in a way that would be unlikely to occur in the face of a more-established, traditional-media organization.

¹²⁹ *Nexus*, 785 N.W.2d at 776.

¹³⁰ *Ibid.*

¹³¹ *Ibid.*, 777.

¹³² *Ibid.*, 784 (emphasis added).

¹³³ *Ibid.*

In claiming to be a media defendant, Swift argued the First Amendment and Article I, Section Three of the Minnesota Constitution protected her statements.¹³⁴ According to the Minnesota Constitution, if she were viewed as a media defendant, Nexus would have to prove “actual malice,” the highest degree of fault required in order for a libel action to proceed, to win its claim against Swift.¹³⁵ Actual malice requires the plaintiff to prove that the defendant showed reckless disregard for the truth or knew the information being published was untrue and published it anyway.¹³⁶ Because the court chose to remand the case, it provided limited insight regarding Swift’s media claim.

The final angle the court considered was in regard to the message’s intent. Swift argued her messages were a form of public participation, which under Minnesota law can provide protection to a communicator who is accused of defamation. Public participation, according to the state law, is defined as “speech or lawful conduct that is genuinely aimed in whole or in part at procuring favorable government action.”¹³⁷ Nexus disagreed with Swift’s contention, claiming that her statements “were too attenuated from the public controversy to meet the statutory definition.”¹³⁸ Nexus also argued the public-participation aspect of Minnesota law did not apply to online communication. The court flatly rejected this view, determining that the state law’s “public-participation requirement does not exclude speech communicated through the medium of the Internet.”¹³⁹ In closing, the court instructed the district court to decide if Swift was a media defendant and if her statements classified as public participation.

¹³⁴ Ibid., 777.

¹³⁵ Ibid., 784-785.

¹³⁶ Pember and Calvert, *Mass Media Law*, 643.

¹³⁷ *Nexus*, 785 N.W.2d at 786.

¹³⁸ Ibid., 786.

¹³⁹ Ibid.

Too Much Media v. Hale

Too Much Media is the first of two similar cases in which citizen publishers had their claims for media protections rejected. In this case, a 2011 ruling by the New Jersey Supreme Court, the way the message was delivered was the determining factor. Shellee Hale, a former Microsoft employee who became a life coach, was victimized by cyber-flashers who pretended to be interested in her classes only to flash her when she put them on her web-camera.¹⁴⁰ Her experiences led her to investigate other ways women were being abused online. She started work on an online resource, Pornafia, for victims and potential victims of the adult entertainment industry.¹⁴¹ While she worked on her website, she utilized a pornography-industry website's message board to communicate her information. Her message-board posts included claims that Too Much Media, a company that creates payment and information-tracking software for the pornography industry, had threatened people and profited from a breach that exposed its otherwise-anonymous customers' names. The company sued Hale for defamation and false-light invasion of privacy.¹⁴² Too Much Media argued Hale's posts implied the company was engaged in illegal activities, used technology in unethical ways, and committed fraud. Hale contended that her message-board posts were intended to inform the public and encourage debate about a matter of public concern.¹⁴³ She also claimed protection under the New Jersey reporter's shield law and the First Amendment right to free speech.

Hale argued she spoke with the attorney general of Washington State and her congressman, went to several adult-industry trade shows, interviewed people involved

¹⁴⁰ *Too Much Media*, 206 N.J. at 217-218.

¹⁴¹ *Ibid.*, 218.

¹⁴² *Ibid.*, 221.

¹⁴³ *Ibid.*, 220.

in the adult-entertainment industry, and read extensively online in preparing the messages she posted on the Oprano message boards.¹⁴⁴ From the beginning, the court asserted that Hale’s journalism-related activities would make little difference in its decision. The court wrote, “Our focus in this case, though is not on *what* the law protects. Instead, we are required to determine *whom* the Legislature intended to cloak with an absolute privilege.”¹⁴⁵ The court focused on the vehicle of communication that Hale utilized, a message board, rather than the content of her messages. The court conducted a detailed reading and analysis of the state shield law, highlighting that the statute had not been amended since 1979.¹⁴⁶ The fact that online technologies were not listed in the law did not eliminate them from protection, the court explained. Instead, the court concluded, “The existence of new technology merely broadens the possible spectrum of what the Shield Law *might* encompass.”¹⁴⁷ In this sense, the court in *Too Much Media* was faced with a similar challenge to what the California court in *O’Grady* and the Maryland court in *Forensic Advisors* faced: Interpreting a shield law that was written before the communication technology at the center of the case was invented. The court examined the nature and uses of message boards, and determined that they

¹⁴⁴ Ibid., 219.

¹⁴⁵ Ibid., 228 (emphasis included).

¹⁴⁶ The New Jersey Shield law is found in N.J.S.A. 2A:84A-21 and 2A:84A-21a.

Part 2A:84A-21 reads, in part, “A person engaged on, engaged in, connected with, or employed by news media for the purpose of gathering, procuring, transmitting, compiling, editing or disseminating news for the general public or on whose behalf news is so gathered, procured, transmitted, compiled, edited or disseminated has a privilege to refuse to disclose, in any legal or quasi-legal proceeding or before any investigative body, including, but not limited to, any court, grand jury, petit jury, administrative agency, the Legislature or legislative committee, or elsewhere.

Part 2A:84A-21a utilizes the following definitions:

a. “News media” means newspapers, magazines, press associations, news agencies, wire services, radio, television or other similar printed, photographic, mechanical or electronic means of disseminating news to the general public.

b. “News” means any written, oral or pictorial information gathered, procured, transmitted, compiled, edited or disseminated by, or on behalf of any person engaged in, engaged on, connected with or employed by a news media and so procured or obtained while such required relationship is in effect.”

¹⁴⁷ *Too Much Media*, 206 N.J. at 233 (emphasis included).

were forums for conversation. The court contended that message boards are used to allow people to post and read “topics of common interest.”¹⁴⁸ Ultimately, the court classified message boards, as a communication tool, are more comparable to letters to the editor than newspapers or other forms of traditional media.¹⁴⁹ The determination centered on a single passage in the shield law, which states that qualifying information sources must be “similar” to traditional news sources.¹⁵⁰ The court wrote “these sites allow people a chance to express their thoughts about matters of interest. But they are not the functional equivalent of the types of news media outlets outlined in the Shield Law.”¹⁵¹

In closing its opinion, the court addressed a more content-based avenue, much like the one used by the federal-district court in *BidZirk*, of assessing if a message-board post qualified as journalism. It asserted that this approach accounted for whether the message provided information to the public and considered the process involved in gathering the information. The court, however, stated it was charged with interpreting a specific law, not a theory: “If the legislature had wanted to create an intent test alone, it could have done so.”¹⁵² Much as in *O’Grady* and *Forensic Advisors*, the unique nature of the state’s shield law influenced the outcome. The courts’ evaluations of the press-related statutory protections, such as shield laws, however, have varied. The court in *O’Grady* placed substantial weight on its evaluation of the characteristics of the site. The Texas court in *Kaufman* evaluated the website’s characteristics and the author’s journalistic qualifications. In *Too Much Media*, the New Jersey court considered the

¹⁴⁸ Ibid., 217.

¹⁴⁹ Ibid., 235.

¹⁵⁰ Ibid., 216.

¹⁵¹ Ibid., 235.

¹⁵² Ibid., 238.

characteristics of the site as well, but it ultimately focused on a narrow understanding of the shield law, indicating that no matter the importance of the message Hale was conveying, it would not be protected because it was posted on a message board. In this sense, Wischnowski viewed the *Too Much Media* and *Mortgage Specialists* decisions as being on opposing sides of a spectrum. In the *Mortgage Specialists* decision, the New Hampshire court's interpretation of the shield law was relatively broad, which left room for the Implode website to be considered a media outlet. The *Too Much Media* ruling, however, was too exclusive because it focused only the form of delivery, Wischnowski argued.¹⁵³

Obsidian Financial Group v. Cox

Obsidian, a 2012 decision, represents another instance within this set of cases when a citizen publisher's claimed for shield-law protection under a state law was denied. Obsidian Finance sued Cox for defamation after she posted numerous blog posts that accused the company of fraud, stealing, and lying.¹⁵⁴ The posts were on multiple sites, including "obsidianfinancesucks.com" and "bankruptcycorruption.com."¹⁵⁵ Many of the posts consisted of a single sentence. Cox claimed protection under the First Amendment, the Oregon shield law, and another Oregon law that, much like the Florida law in *Armani*, requires those who plan to bring a defamation action against a media defendant to first demand a retraction or correction. Since Obsidian never demanded a correction or retraction from Cox, her designation regarding whether or not she qualified as a journalist was a key determination in the case. The judge, however, read the retraction law and saw no mention of blogs among

¹⁵³ Wischnowski, "Bloggers with Shields," 336.

¹⁵⁴ 812 F. Supp. 2d 1220, 1225-1232 (P.D. Or. 2011).

¹⁵⁵ *Ibid.*, 1230-1231.

the types of media that were listed as being protected.¹⁵⁶ The law requires that the offending message is published or broadcast in a newspaper, magazine, radio, television, movie, or “other printed periodical.”¹⁵⁷ For this reason, the judge found Cox’s was not a media defendant, and therefore, that Obsidian’s defamation claim was not hindered by that fact that it did not wait five days before commencing its defamation suit.¹⁵⁸ The judge came to the same conclusion in regard to Cox’s argument for protection under the shield law. The law required, the judge found, that the person who claimed protection work for one of a group of specifically listed types of media outlets.¹⁵⁹ The judge explained that the law in question is specific in its wording and contended, “The Legislature did not simply say ‘publications’ or ‘broadcasts,’ but instead, delineated specific types of media.”¹⁶⁰

Cox also argued that, since she was a media defendant, Obsidian had to prove actual malice, the highest standard of scrutiny for a plaintiff to reach in a defamation case.¹⁶¹ In response to this claim, the judge listed seven criteria that, in his conceptualization of journalistic practices and processes, characterized journalism. He

¹⁵⁶ The retraction law is found in Oregon Revised Statutes 31.200 to 31.225. The law expressly mentions specific media types. O.R.S 31.205, for example, reads: “Except as provided in ORS 31.210 (When general damages allowed), in an action for damages on account of a defamatory statement published or broadcast in a newspaper, magazine, other printed periodical, or by radio, television or motion pictures, the plaintiff may recover any general and special damages which, by competent evidence, the plaintiff can prove to have suffered as a direct and proximate result of the publication of the defamatory statement.”

¹⁵⁷ Ibid., O.R.S. 31.205.

¹⁵⁸ *Obsidian Financial Group v. Cox*, 2011 U.S. Dist. LEXIS 137548, 1-2 (P.D. Or. 2011).

¹⁵⁹ The wording, in part, contained in Oregon Revised Statutes 44.510 reads: “Medium of communication has its ordinary meaning and includes, but is not limited to, any newspaper, magazine or other periodical, book, pamphlet, news service, wire service, news or feature syndicate, broadcast station or network, or cable television system. Any information which is a portion of a governmental utterance made by an official or employee of government within the scope of the officials or employees governmental function, or any political publication subject to ORS 260.532 (False publication relating to candidate or measure), is not included within the meaning of medium of communication.”

¹⁶⁰ *Obsidian*, 2012 U.S. Dist. LEXIS 43125 at 39.

¹⁶¹ *Obsidian*, 2011 U.S. Dist. LEXIS 137548 at 12-13.

The criteria he listed were: (1) an education in journalism, (2) an affiliation with a news outlet, (3) observance of journalistic practices of editing and disclosure of conflicts of interest, (4) keeping interview notes, (5) creating understandings of confidentiality with anonymous sources, (6) the creation of an original product, rather than a compilation of the work of others, and (7) getting both sides of the story.¹⁶² The judge offered no citation regarding the origins of his list. He concluded that Cox failed to meet any of the criteria he outlined, writing, “I did not state that to be considered ‘media,’ one had to possess all or most of the characteristics I recited.”¹⁶³ In this sense, he found that neither the letter of the law, nor his impression of what constituted journalism, supported Cox’s claim as a media defendant.

Much as in *Too Much Media*, the judge interpreted the state law as not protecting an individual citizen publisher. The judge in *Obsidian* added a list of professional criteria and found that Cox did not meet any of the requirements. The professional credentials part of the decision is similar to the Texas appeals court’s approach in *Kaufman*. Only in that case, the court used a more broad understanding of the law’s wording. Regarding *Obsidian*, Attorney John Dougherty cautioned that protection should not be dictated by “extraneous factors such as education [and] employment status.”¹⁶⁴ He concluded that Cox’s speech likely was not eligible for the media protections she claimed, but the judge’s strict understanding of the law and his list of journalistic criteria likely would mean that deserving citizen publishers would also not be protected.

¹⁶² Ibid., 13.

¹⁶³ *Obsidian*, 2012 U.S. Dist. LEXIS 43125 at 20.

¹⁶⁴ John J. Dougherty, “*Obsidian Financial Group, LLC v. Cox* and Reformulating Shield Laws to Protect Digital Journalism in an evolving media world,” *North Carolina Journal of Law & Technology* 13 (2012), 287, 303.

Johns-Byrne Company v. TechnoBuffalo

Johns-Byrne shares substantial similarities with *O’Grady* in that both cases involve an online-only technology magazine that published unreleased plans for a large technology company’s upcoming product.¹⁶⁵ The *Johns-Byrne* decision came from a 2012 Illinois Circuit Court decision that leaned heavily on the reasoning found in the *O’Grady* and *Too Much Media* rulings.¹⁶⁶ In August 2011, unreleased images of the Motorola Droid Bionic smartphone, were stolen from Johns-Byrne, the company that was hired to print the product’s manual. *TechnoBuffalo* posted images and information about the phone. The printing company, believing the website knew the name of the anonymous source, petitioned the court to compel *TechnoBuffalo* to provide all of its communications from a seven-day span.¹⁶⁷ *TechnoBuffalo* claimed the Illinois reporter’s privilege protected it from having to disclose the names of its sources.

In examining the website’s claim, the judge considered *TechnoBuffalo*’s characteristics, listing that the website encouraged technology-firm employees to break the law. He also highlighted that “the sole purpose of the *TechnoBuffalo* solicitation is to promote *TechnoBuffalo*, without a second thought as to what harm it may cause lawful companies whose stolen information it leaks.”¹⁶⁸ The website, however, included layers of editors and fact-checkers for its information, the judge recognized. The site contained information about technology-related issues, commentary, guides, reviews, and video. It boasted more than a million visitors per month. The printing company argued the website did not acquire the information through active investigation and that

¹⁶⁵ 40 Med.L.Rptr. at 2620.

¹⁶⁶ Ibid., 2622.

¹⁶⁷ Ibid., 2620.

¹⁶⁸ Ibid., 2621.

its information was mere hype and not actual journalism.¹⁶⁹ In his decision, the judge chose to primarily focus on the characteristics of the website, instead of the credentials of the reporters or the content of the messages.

After examining the characteristics of the website, the judge turned to the state law's wording. He emphasized that the laws states, "No court may compel any person to disclose the source of any information obtained by a reporter."¹⁷⁰ The judge determined *TechnoBuffalo* fit the definition, under the law, of a reporter.¹⁷¹ He disagreed with Johns-Byrne's argument that newsgathering must be active to be considered reporting. He wrote that "how news is collected — actively, passively or otherwise — is not set out or discussed in the Act."¹⁷² The judge next examined whether *TechnoBuffalo* qualified as a news medium according to Illinois law. He lamented that "the line between what constitutes an online newspaper or periodical and a standard news website remains hazy."¹⁷³ In his evaluation of the *TechnoBuffalo* website's characteristics, he compared *chicagotribune.com*, a traditional media outlet's news site, with the merits of *Salon*, which does not have a print product. Finally, he acknowledged that the law included the wording "print or electronic format," which he construed as including online media.¹⁷⁴ With these determinations, the judge found that he had no other option but to rule *TechnoBuffalo* was a news medium according to Illinois law.

¹⁶⁹ Ibid.

¹⁷⁰ Ibid.

¹⁷¹ Illinois Civil Procedure code 735 ILCS 5/8-902(a) defines a reporter as, "any person regularly engaged in the business of collecting, writing or editing news for publication through a news medium on a full-time or part-time basis; and includes any person who was a reporter at the time the information sought was procured or obtained."

¹⁷² *Johns-Byrne*, 40 Med.L.Rptr. at 2623.

¹⁷³ Ibid., 2622.

¹⁷⁴ Illinois Civil Procedure code 735 ILCS 5/8-902(b) defines a news medium as, "any newspaper or other periodical issued at regular intervals whether in print or electronic format and having a general circulation; a news service whether in print or electronic format; a radio station; a television station; a television network; a community antenna television service; and any person or corporation engaged in the making of news reels or other motion picture news for public showing."

This determination meant the state could not compel the site to provide the information the printing company sought. As in other cases in this chapter, the unique wording of a state shield law substantially influenced the course of the decision. Still, the judge chose to direct his considerations toward the characteristics of the specific website involved in the case, not the form of online media in general, as the judge did in *Too Much Media*. He also did not consider the content, as was the case in *BidZirk*, or the credentials of the authors, as the courts did in *Kaufman* and *Obsidian*.

Bailey v. State

Bailey presents a unique scenario in comparison to the previous cases because the case deals with a Maine election law that requires political advocacy groups to report their funding sources and to provide a name and contact address on all communications.¹⁷⁵ The federal-district-court case required the judge to decide if a website that published negative information about a single candidate during the final months of the 2010 gubernatorial election qualified for the election law's media exemption. In outlining the facts of the case, the judge highlighted that the author of the website, Dennis Bailey, was a trained journalist who had spent many years working as a reporter for Maine newspapers.¹⁷⁶ He had also worked as a press secretary, speechwriter, and adviser for top members of Maine's state and national political figures. At the time of the 2010 election, he ran a public-relations firm and operated a related news-and-commentary blog. During the primary he worked as a political consultant for gubernatorial candidate Rosa Scarcelli. When she lost in the primary, Shawn Moody, an independent candidate in the governor's race, hired Bailey. In

¹⁷⁵ 900 F. Supp. 2d at 76-78.

¹⁷⁶ *Ibid.*, 78.

August of 2010, a few months before the general election, Bailey created “The Cutler Files,” which did not identify the source of the website’s contents or how it was financed.¹⁷⁷ The website, which consisted of nine negative stories about gubernatorial candidate Eliot Cutler, received nearly 50,000 visits during the two months it was online. The Maine Commission on Government Ethics and Election Practices fined Bailey \$200 for violating state election law.¹⁷⁸ Bailey claimed the website qualified for protection under the law’s press exemption, but the commission rejected his claim.¹⁷⁹ Specifically, the commission, looking at the wording of the media exemption within the law, determined the site was not a “periodical publication,” so it did not qualify.¹⁸⁰ Before the federal district judge, Bailey argued he was a citizen journalist who qualified for the exemption, that the election law’s requirement that he identify himself violated his First Amendment right to speak anonymously, and that the law compromised his Fourteenth Amendment right to equal-protection under the law.¹⁸¹

Bailey’s media claim was the central feature of the judge’s decision. In the instance of the Fourteenth Amendment equal-protection claim, Bailey argued giving the press an exemption to a state law made one group favored above the other. The judge disagreed with Bailey’s claim, contending that “in determining if the Cutler Files was entitled to the press exemption the Commission focused on the website’s *form*, which is

¹⁷⁷ Ibid., 79.

¹⁷⁸ The law, Maine Revised Statute 21-A §1014, regarding messages that are not authorized by a candidate reads: “The communication must clearly and conspicuously state that the communication is not authorized by any candidate and state the name and address of the person who made or financed the expenditure for the communication. If the communication is in written form, the communication must contain at the bottom of the communication in print that is no smaller in size than 12-point bold print, Times New Roman font, the words “NOT PAID FOR OR AUTHORIZED BY ANY CANDIDATE.”

¹⁷⁹ The law, Maine Revised Statute 21-A §1012(3)(B)(1), includes a press exemption that reads: “Any news story, commentary or editorial distributed through the facilities of any broadcasting station, newspaper, magazine or other periodical publication, unless the facilities are owned or controlled by any political party, political committee, candidate or candidate's immediate family.”

¹⁸⁰ *Bailey*, 900 F. Supp. 2d at 80.

¹⁸¹ Ibid., 81-82.

exactly what the commission is required to do.”¹⁸² She emphasized that the Cutler Files was not disqualified from the exemption because it was a website. She supported the commission’s argument, explaining “news stories, commentaries or editorials posted on the internet would fall within the press exemption as long as they were disseminated by broadcast stations, newspapers, magazines, or other periodical publications.”¹⁸³ The key difference was The Cutler Files was not “the equivalent” of a broadcast or print media outlet and it did not have a track record of being a “periodical publication.” The commission’s determination, the judge argued, had nothing to do with Bailey’s position as a citizen journalist.¹⁸⁴

While *Bailey* was not a shield-law case, the judge was asked to interpret the wording of a law and to discern if a citizen publisher qualified as a media outlet. It is noteworthy that the law in question was enacted in 2010, but does not list bloggers or any specific form of online communication. The legislature was aware of the existence of all of the new forms of communication and chose not to include them. The judge in this case was not asked whether a law that was written before its authors could have conceived of the Internet era should be interpreted as including citizen publishers. The authors of the Maine law knew of the changes and chose not to include them. Without any form of online communication being enumerated in the law, the judge considered whether Bailey’s website could be viewed as a “periodical publication” under the law.

Bailey’s website, the judge highlighted, was only online during the two months before the general election. The fact that it was started and discontinued to fit the final portion of the election cycle indicated the website’s mission was not to be a periodical

¹⁸² Ibid., 89 (emphasis added).

¹⁸³ Ibid., 88.

¹⁸⁴ Ibid.

publication but a political tool. The judge also focused on how often the website was updated, new content was added six times in the two months it was online, when determining whether or not it was a periodical publication. Finally, she speculated, “This case could well have come out differently if the Cutler Files had any sort of track record before it appeared on August 30, 2010, or if it had extended beyond its two month run.”¹⁸⁵ Because the judge found Bailey was not treated differently due to the fact that he was a citizen journalist, she dismissed his equal protection claim.

Similarly, she dispatched his claim that his First Amendment right to anonymous speech was violated. The Maine law requires only those engaging in advocacy-oriented political communication to register, and therefore, does not limit political speech, the judge argued. The law served a state interest because “an informed electorate is near its zenith where a widely-viewed website falsely claiming to be written by journalists unaffiliated with any campaign expressly advocated the defeat of an opposing candidate.”¹⁸⁶ Voters have to know, she postulated, the sources of the information they receive during elections. It is noteworthy that, though the judge did not explicitly mention it, the commission and judge considered the characteristics and background of the website’s author. The case listed the author’s education, professional experience, and the fact that he worked for two different candidates during the campaign. It is possible, though the judge did not discuss it, that the outcome could have been different if the citizen publisher had been a lesser-known and less-affiliated person, rather than a well-known, paid operative in Maine politics.

¹⁸⁵ Ibid., 91.

¹⁸⁶ Ibid., 86.

Document Analysis

The following subsections utilize Altheide's method of document analysis to categorize representations that emerged through such examination of the preceding six lower-court decisions. Those representations related to the press-clause or arguably related protections as understood in terms of particular concerns that were emphasized in the courts' conceptual rationales. In Altheide's articulation of the heart of the methodological approach, the "actual words and direct messages of documents carry the discourse that reflects certain themes, which in turn are held together and given meaning by a broad frame."¹⁸⁷ As outlined earlier, the themes were: concern for (1) the way a message is delivered more than with the content of a message, (2) whether messages are delivered according to accepted rules of journalism, (3) emphasis on the exercise of the First Amendment's speech clause more than with the exercise of its press clause, and (4) preference for organizations and groups over individual citizen publishers.

The Way a Message is Delivered Versus the Content of the Message

The discourse communicated an understanding in all six of the cases in this set that the most important factor in the decisions was the way messages were delivered, rather than the content of the messages. None of these cases were comparable to the one in *BidZirk*, a case in which content was conceptualized by the judge as being the determining factor. Instead, the narrative in these cases carried a relatively unified understanding that the content of the message, no matter its potential value to a democratic society, would not be a factor for a citizen publisher who sought protections

¹⁸⁷ Altheide, *Qualitative Media Analysis*, 31.

that have traditionally been reserved for journalists. The understandings articulated in the discourse indicated that citizen publishers will have to be certain the characteristics of the type of online communication they choose to use substantially resemble a traditional media outlet. That determination, the narrative also indicated, will largely be left up to the wording of the state’s press-related statutory protections and a judge’s interpretation of them.

The discourse communicated understandings relating to this theme in the earlier set of cases in this chapter, but in this group of cases the narrative put forth more strict interpretations of the laws. In the earlier cases, five of the six decisions were favorable to the citizen publishers. The texts in those cases carried an emphasis on the way the message was delivered, but did not convey the same level of rigidity regarding the exact wording of the laws in question as the judges communicated in this set of cases. The more-accepting posture that was communicated in the earlier cases was especially evident in *O’Grady*, where the narrative indicated that just because the California legislature did not explicitly include websites in the shield law’s wording did not mean it meant to exclude them from protection.¹⁸⁸ Importantly, the discourse in the cases in this section communicated an expectation that the messages be delivered in a format that closely resembled a traditional form of media.

In *Too Much Media*, for example, the court postulated, “Our focus in this case, though, is not on *what* the law protects. Instead, we are required to determine *whom* the Legislature intended to cloak with an absolute privilege.”¹⁸⁹ The ruling’s primary focus, though the “whom” could be viewed as indicating a focus on authorship, was

¹⁸⁸ 139 Cal. App. 4th at 1461.

¹⁸⁹ *Too Much Media*, 206 N.J. at 228 (emphasis included).

constructed upon determining whether or not an online message board was similar enough to traditional media to qualify under the wording of the state shield law. The centrality of the text's focus was based on the fact that the shield law, written before the emergence of the network era, did not specifically enumerate online forms of communication, especially not message boards. The opinion recognized that judges in other jurisdictions had employed content or intent-based approaches in similar cases, but rejected the idea because it did not line up with the shield law's wording.¹⁹⁰ To that end, the discourse focused on the part of the law that stated that other forms of media, those not specified in the law, could be protected, if they were similar to traditional forms of media.¹⁹¹ The court found message boards did not meet the requirements, and in doing so conveyed an understanding in its opinion that is consistent with the way this theme was constructed in this set of cases. The discourse carried understandings of press-related statutory protections as not extending to online communication conducted by citizen publishers because the way they communicated their messages often did not relate closely enough with traditional media. The court in *Too Much Media* wrote, "In the context of news media, posts and comments on message boards can be compared to letters to the editor. . . . But they are not the functional equivalent of the types of news media outlets outlined in the Shield Law."¹⁹² The understanding that was communicated in the New Jersey court's opinion was in strong contrast to the *O'Grady* decision's far more interpretive wording. The court in that case stated, "Presumably the Legislature was not prescient enough to have consciously intended to include digital magazines, . . .

¹⁹⁰ Ibid., 226.

¹⁹¹ Ibid., 234.

¹⁹² Ibid., 235.

by the same token, however, it cannot have meant to *exclude* them.”¹⁹³ Both opinions considered the wording of a shield law that was written before the network era, but reflected vastly different understandings of those laws, further contributing to the differences regarding how this theme was constructed between the earlier and later cases analyzed in this chapter.

The discourse in the *Obsidian* ruling carried an understanding that is analogous to the decision in *Too Much Media* regarding how messages were delivered. The opinion does not include an evaluation of the content of the citizen publisher’s blog posts, which were only briefly mentioned in the fifty-two-page ruling, contributing to the theme that the messages were not central to the courts’ determinations. Instead, the narrative in *Obsidian* conveyed an understanding that the case came down to an interpretation of the state-shield law, which placed the focus on the way the message was delivered. The blogger’s shield-law claim was rejected as a result of a reading of the Oregon shield law that related to the understandings articulated by the court in *Too Much Media*. The narrative in the *Obsidian* ruling conveyed an understanding that in the absence of an explicit inclusion of online forms of communication in the shield law, no protections would be extended to citizen publishers. The judge wrote, “The legislature did not simply say ‘publications’ or ‘broadcasts,’ but instead delineated specific types of media in which the statements had to occur before they received protection.”¹⁹⁴ In *Bailey*, the opinion also expressed the understanding that the *form* of the communication, not the content, had to be the focus.¹⁹⁵ Despite the newness of the 2010 election law in question, the judge determined that Bailey’s political-attack

¹⁹³ *O’Grady*, 139 Cal. App. 4th at 1461 (emphasis included).

¹⁹⁴ *Obsidian*, 2012 U.S. Dist. LEXIS 43125 at 39.

¹⁹⁵ 900 F. Supp. 2d at 89.

website did not qualify for the media exemption because it was not a broadcast station, newspaper, magazine, “or other periodical publication.”¹⁹⁶ By declining to include details about the messages that were conveyed on the website, the narrative further contributed to the theme that the central determining factor to the courts related to the way the message was communicated. The opinion in *Bailey* focused on the “periodical publication” portion of the law, asserting that the ruling had nothing to do with the fact that Bailey was not a paid journalist or that he posted his messages online. The opinion emphasized that Bailey’s website was updated six times during the two months it was online and that it was taken down just before the November election. For this reason, the website was compared to a political leaflet in the opinion, further articulating an understanding that the way the message was communicated was the judge’s primary focus.

As a part of this theme, the discourse in these cases carried an understanding that citizen publishers must develop a track record of consistent publication and they must do so using a form of online communication that resembles a traditional news outlet’s work. The *TechnoBuffalo* opinion focused on the way the website was organized, listing that it included “news,” “reviews,” “videos,” “user-submitted,” “in the news,” and “giveaways” sections, and that more-than-a-million readers visited it each month.¹⁹⁷ In comparing *TechnoBuffalo* to other websites, the opinion examined it alongside those of news outlets such as the *Chicago Tribune*’s and *Time*’s, indicating through the choice of comparisons that the judge sought an established outlet with a news-like format. By focusing upon these characteristics, the discourse further

¹⁹⁶ Ibid., 77.

¹⁹⁷ 40 Med.L.Rptr. at 2621.

communicated that the way the message was delivered was central to the court's deliberations. Conversely, Swift, the defendant in *Nexus*, posted videos with comments on YouTube and additional statements on personal blog sites. While the court remanded the case, the opinion communicated skepticism that Swift qualified for media protections under Minnesota law. The court stated, dispatching Swift's arguments that she was a media defendant, that "she cites no authority for the proposition that this renders her a media defendant, and we are aware of none."¹⁹⁸

The discourse represented in these cases strongly supported an understanding that the courts are more concerned with the way messages are communicated, than with their content. The later set of cases added an additional dimension, in comparison to the earlier cases, in that the narrative indicated that the way messages are communicated must generally line up closely with how the state's press-related statutory protections are worded and how they view traditional media as operating.

Message Delivery According to Accepted Rules of Journalism

The narrative in these cases communicated an understanding that citizen publishers seeking protections that have traditionally been reserved for journalists were expected to gather, produce, and distribute information in ways that resemble traditionally understood journalistic practices and processes. In these cases, as in the earlier ones, the discourse strongly communicated that judges sought evidence of journalistic processes, such as editorial decision-making, information gathering, fact checking, editing, and producing original content. The narrative in the *Obsidian* opinion, for example, carried a recognition of the lack of journalism-related

¹⁹⁸ *Nexus*, 785 N.W.2d at 784.

characteristics in the blogger's posts. The judge asserted, "Defendant had presented no evidence as to any single one of the characteristics which would tend to establish oneself as a member of the 'media.'"¹⁹⁹ The *Too Much Media* opinion conveyed a similar understanding, asserting that the message-board poster in the case lacked the journalistic credentials to qualify for protection under the shield law. The court in *Too Much Media* concluded, "Defendant has exhibited none of the recognized qualities or characteristics traditionally associated with the news process, nor has she demonstrated connection or affiliation with any news entity."²⁰⁰ The opinion, importantly, became more specific when it highlighted the absence of evidence that the citizen publisher edited, fact-checked, took notes during interviews, identified herself as a reporter, or gave Too Much Media an opportunity to tell its side of the story.²⁰¹ By including characteristics such as these in its deliberations, the opinion further contributed to the theme that judges consider traditionally understood journalistic practices when evaluating citizen publisher's claims for press-related protections.

Furthermore, the narrative in *Johns-Byrne* communicated a similar conceptualization of this theme, asserting that the story at the center of the case was chosen as part of an editorial process that involved considering a specific audience, that the stolen information in the case was not repeated verbatim but was incorporated into an article, and that a system of editors fact-checked the information.²⁰² The judge

¹⁹⁹ 2012 U.S. Dist. LEXIS 43125 at 20. The judge was referring to a list of journalistic criteria he compiled and utilized in his ruling in Cox's appeal six months earlier. In that opinion, the characteristics he considered were: (1) an education in journalism, (2) an affiliation with a news outlet, (3) observance of journalistic practices of editing and disclosure of conflicts of interest, (4) keeping interview notes, (5) creating understandings of confidentiality with anonymous sources, (6) the creation of an original product, rather than a compilation of the work of others, and (7) getting both sides of the story.

²⁰⁰ *Too Much Media v. Hale*, 413 N.J. Super. 135, 160 (N.J. Super. Ct. App. Div. 2010).

²⁰¹ *Too Much Media*, 206 N.J. at 222-223.

²⁰² 40 Med.L. Rptr. at 2621.

concluded, referring to the Illinois shield law, that “some journalistic process, at least as encompassed by the Act, took place.”²⁰³ Similarly, the opinion in *Mortgage Specialists* carried a recognition that the authors of the website in the case gathered information and that information was “legitimate” and truthful and was published to an audience.²⁰⁴ The court wrote, “We conclude that *Implode*’s website serves an informative function and contributes to the flow of information to the public. Thus, *Implode* is a reporter for the purposes of the newsgathering privilege.”²⁰⁵ The same undercurrent can be found in *Nexus*, but in that case however, the opinion characterized the citizen publisher’s work as lacking the required journalistic standards. The narrative carried an understanding that the citizen publisher’s work should be accurate and include context, asserting that the author’s use “of a selective quotation from her blog post leaves out the notable preceding sentence.”²⁰⁶ The discourse in these decisions communicated an understanding by the courts that these citizen publishers, who were seeking protections that have traditionally been reserved for journalists, deliver their information in ways that, to some extent, line up with judicial conceptualizations of journalism.

Finally, the discourse in *Too Much Media* constructed this theme in terms of a set of journalism-related criteria that it understood to be a tool for gauging the validity of claims made by citizen publishers. The opinion listed: “Connection to news media; purpose to gather or disseminate news; and a showing that the materials sought were obtained in the course of professional newsgathering activities.”²⁰⁷ By providing a list with these characteristics, the narrative articulated that the court was looking to relate

²⁰³ *Ibid.*, 2623.

²⁰⁴ 160 N.H. at 233-234.

²⁰⁵ *Ibid.*, 234.

²⁰⁶ *Nexus*, 785 N.W.2d at 785.

²⁰⁷ *Too Much Media*, 206 N.J. at 241-242.

the citizen publisher's work with the way it understood journalism. The opinion communicated an understanding that while the Internet has allowed anyone who utilizes social media or a blog to assert journalistic protections, the court understood the three journalism-based criteria it listed as providing a sort of mooring for future courts.²⁰⁸ The criteria put forth in *Too Much Media*, as well as the meanings regarding this theme that were communicated in the other cases within this set, indicated that judges utilize conceptualizations of traditionally understood journalistic practices and processes in adjudicating claims for press-related protections that are made by citizen publishers.

Exercise of Speech Clause Versus Exercise of Press Clause

Citizen publishers' communications were consistently represented as relating to speaking or speech-clause concerns, rather than to publishing or the press clause. The way judges communicated their understandings indicated they viewed the press clause as protecting an institution that the citizen publishers were not a part of and often did not resemble. The courts' conceptualizations of citizen publishers' messages as relating to speech was seen in *Nexus*, a decision in which the court wrote, "Here we find nothing in the text or implication of the statute to suggest that it demarcates Internet speech from other forms of speech. Internet speech is speech protected by the First Amendment."²⁰⁹ Throughout the discourse, the court conveyed the understanding that Swift's blog posts and comments on YouTube, items that were posted on the Internet, were analogous to "speech." Conversely, the press clause was not invoked because, to the court, the institution of the press was not at issue. Instead, the opinion put forth an

²⁰⁸ Ibid., 242.

²⁰⁹ *Nexus*, 785 N.W.2d at 786.

understanding of Swift as a lone speaker and attributed speech-clause related protections and precedents to her.

In *Too Much Media* the discourse communicated that the court understood the state's shield law as relating to the press clause, contending that the New Jersey shield law "flows from the right to free expression and freedom of the press."²¹⁰ The opinion went on to list the traditional media forms the law protected. When considering the citizen publisher's claim, the court stated, "This case is about the Shield Law, not freedom of speech. Defendant was free to exercise a right at the heart of our democracy by posting her thoughts online on Oprano's message board."²¹¹ In this passage, the narrative communicated that the court understood the citizen publisher as a *speaker* who had crossed the line in asking for shield-law protection because she was not part of the institutional press the law was created to guard.

The opinion in *Mortgage Specialists* conveyed a variation of this understanding when it concluded the *Implode* website, which examined the credibility of mortgage lenders, was a media outlet and therefore worthy of press protections under the New Hampshire Constitution. The case is distinct in this set of decisions because the opinion related the press clause to the website, and communicated an understanding that it interpreted the citizen publisher's website as being comparable to traditional media. The court wrote, for example, "The fact that Implode operates a website makes it no less a member of the press. . . . Implode's website serves an informative function and contributes to the free flow of information to the public."²¹² The opinion also referred to

²¹⁰ 206 N.J. at 226.

²¹¹ *Ibid.*, 225.

²¹² *Mortgage Specialists*, 160 N.H. at 234.

the website's content as being "published" and it being a "publication."²¹³ It is no coincidence that this case also represents one of the two instances where courts in this set of decisions supported a journalistic protection claim made by citizen publishers. In the decision, the discourse conveyed an understanding that the court saw the website's characteristics as lining up with its conceptualization of the press and the press clause.

In *Nexus* and *Too Much Media*, the opinions characterized the citizen publishers' messages as "posts" or "statements," rather than utilizing words such as "published" and "publication," as was seen in *Mortgage Specialists*. The word choices in *Nexus* and *Too Much Media* communicated that the judges did not understand the work that was done by the citizen publishers as relating to or resembling the work of the institutional press or press-clause concerns.²¹⁴ In comparison, the opinion in *Mortgage Specialists* characterized the *Implode* website as being *like* a media organization and therefore worthy of the press-clause protections, those traditionally reserved for journalism institutions. In the meanings communicated in the narrative, the *Implode* website's organization went beyond the type of communication seen in *Nexus* and *Too Much Media*, where single speakers' messages were viewed as matters of free speech. Because the opinion in *Mortgage Specialists* conceptualized the *Implode* website as a media organization, something that could be related to the press clause, the court drew from the *Branzburg* decision, contending that "Freedom of the press is a fundamental personal right which is not confined to newspapers and periodicals."²¹⁵ By using the quote from the *Branzburg* precedent, the opinion asserted an understanding that the

²¹³ Ibid., 233-234.

²¹⁴ *Nexus*, 785 N.W.2d at 776-777 and *Too Much Media*, 206 N.J. at 221-222.

²¹⁵ *Mortgage Specialists*, 160 N.H. at 234 (quoting *Branzburg v. Hayes*, 408 U.S. 665, 704 (1972)).

courts are willing to extend press-clause-related protections to citizen publishers, but their work must resemble traditional media. The speech clause was more dominant in these cases because the discourse conveyed an understanding that the courts did not view what the citizen publishers did in most of the cases as being related to the institutional press that they conceptualized the press clause was created to protect. Instead, citizen publishers were understood as speakers, worthy of speech-clause protections. The *Bailey* decision further contributed to this theme because the opinion articulated an understanding of the author as a political speaker, not a publisher. The discourse indicated that Bailey lacked the characteristics that would make him worthy of an institutionally construed press clause. The judge wrote that the “press exemption does not prohibit speech, but only reduces the requirements which the press must meet in order to speak.”²¹⁶ In this sense, the court’s discourse articulated an understanding that Bailey was free to *speak* to the same extent as anyone else but that he did not qualify for the press exemption because he did not show the characteristics of the institutional press, which the press clause was created to guard.

Preference for Organizations and Groups over Individuals

The discourse in this set of cases communicated a greater level of comfort in expanding protections that have traditionally been reserved for journalists to groups and organizations formed by citizen publishers, rather than to individual citizen publishers. None of the individuals who claimed press-related protections in this set of cases succeeded in receiving them. The two organizations, Implode-Explode Heavy Industries and *TechnoBuffalo*, however, succeeded in their claims for press-related protections.

²¹⁶ *Bailey*, 900 F. Supp. 2d at 87.

The distinction communicated by the courts' discourse regarding the groups emanated from two frames that were utilized to understand the communicators and their messages. Individual citizen publishers were framed in the narrative as *speakers* and their work was consistently described as a "post" or "statement." The opinions utilized the individual speaker's name throughout, repeating phrases such as "Swift expressed her opposition"²¹⁷ or "She repeatedly referred to herself as media."²¹⁸ The *group* frame, in comparison, described the citizen publishers as being similar to traditional news organizations. Their messages were described as "articles" or "reports." The opinions referred to the organization's name, not individuals who wrote for or managed the website. Thus, the opinions included phrases such as "TechnoBuffalo maintains it is a 'news organization'"²¹⁹ and "*Implode* published an article that detailed administrative actions."²²⁰ In the group-related cases, the opinions also carried references to the specific audience the website served. The judge in *Johns-Byrne* wrote, "*TechnoBuffalo*'s website provides articles covering a breadth of technology-related issues and topics."²²¹ In the place of these references, the opinions in the speaker-related cases included questions regarding whether the information that was communicated was self-serving or for the public's good. In *Nexus*, the court wrote, "Swift seems to contend she is a media defendant . . . because her statements were disseminated on a blog and a widely-viewed video."²²²

²¹⁷ *Nexus*, 785 N.W.2d at 776.

²¹⁸ *Obsidian*, 2012 U.S. Dist. LEXIS 43125 at 8.

²¹⁹ *Johns-Byrne*, 40 Med.L.Rptr. at 2621.

²²⁰ *Mortgage Specialists*, 160 N.H. at 231.

²²¹ 40 Med.L.Rptr. at 2621.

²²² 785 N.W.2d at 786.

The existence of these two separate, communicator-centered frames, rather than a single understanding of citizen publishers, substantially influenced the outcomes in this set of cases. When a court’s discourse utilized a publication’s name, referred to its messages as “articles,” and identified an area it contributed information to in society, the citizen publishers involved stood a far greater chance of being understood as a type of media under state law. This was evident in *Mortgage Specialists* when the court concluded that the *Implode* website covered information about the mortgage industry. The opinion referred to the site as “*Implode*” throughout the decision. When the court analyzed Mortgage Specialists’s argument for an injunction against further publication of the information at the center of the case, it considered the content within the context of landmark Supreme Court cases that have dealt with traditional media outlets, such as *New York Times v. United States*, often referred to as the Pentagon Papers case, and *Near v. Minnesota*. In supporting its conclusion that *Implode* could not constitutionally be enjoined from communicating information, the court asserted, “While it may be true that Mortgage Specialists’s loan information is ‘confidential,’ such information is certainly not more sensitive than the documents at issue in the Pentagon Papers case.”²²³ In placing *Implode* and the *New York Times*’s plight in the Pentagon Papers case together, the discourse indicated that the court understood the citizen publishers involved in the case, citizen publishers collected in a group, as being like a traditional news outlet. To contrast, it is likely the courts in *Too Much Media*, *Obsidian*, and *Nexus* would have viewed the individual citizen publishers involved in their cases as being more like Daniel Ellsberg, the individual speaker who sought to speak and did so by

²²³ *Mortgage Specialists*, 160 N.H. at 244.

going to the mass media with the Pentagon Papers, than a news outlet like the *New York Times*, which utilized the information to write articles and serve a clear audience.

The opinion in *Too Much Media* further constructed this theme, starting its opinion by contending, “Millions of people with Internet access can disseminate information today in ways that were previously unimaginable.”²²⁴ In articulating its conceptualization of the Internet in this way, the court communicated it understood Hale to be a speaker and it placed its immediate focus on “people,” indicating the speaker frame would be utilized. The opinion also carried a recognized that Hale’s comments were not screened or edited, and were more comparable to unread letters to the editor than work that deserved protection under the New Jersey shield law.²²⁵ In this sense, Hale was framed as a speaker and the opinion communicated that the court understood her as someone who had an idea and sought to share it through the media. The court went on to characterize Hale as a “self-described journalist who posted comments on an Internet message board.”²²⁶ The *Obsidian* ruling conveyed comparable understandings with the judge asserting in the opinion that a dividing line exists between those who are speakers and those who are journalists. The judge wrote, “Statements on the Internet range from those made by traditional print publications such as daily newspapers (e.g., nytimes.com), to those more typically associated with a community bulletin board (e.g., craigslist.com).”²²⁷ In conceptualizing citizen publishers’ work in this way, the judge’s discourse in *Obsidian* conveyed an understanding that Cox was a speaker, someone on the “community bulletin board” end

²²⁴ *Too Much Media*, 206 N.J. at 216.

²²⁵ *Ibid.*, 235.

²²⁶ *Ibid.*, 216.

²²⁷ *Obsidian*, 2012 U.S. Dist. LEXIS 43125 at 40.

of the spectrum. Furthermore, the discourse in *Johns-Byrne* communicated that the judge understood *TechnoBuffalo* as an example of the work of a group of citizen publishers whose website was closer to that of daily newspapers. In determining if *TechnoBuffalo* was a media outlet under the Illinois shield law, the judge compared it to eWeek.com, Time.com, and chicagotribune.com. Because *TechnoBuffalo* fit within the group frame, it was conceptualized as something that compared with more journalistic websites, instead of individual blogs or message boards. The result of the division between the two frames was that individual citizen publishers faced a far higher threshold than those who were in groups when they sought protections that have traditionally been reserved for journalists.

The overall meanings that were conveyed by the discourse in these cases indicated that the courts understand citizen publishers' claims for press-related protections in terms of *how* the messages are communicated and whether or not the information and its delivery are comparable to judicial understandings of traditional journalistic practices and processes. The narrative also conceptualized individual citizen publishers as lone speakers who do not resemble traditional news organizations and therefore have no right to claim protections that have historically been related to journalism.

Conclusion

In the span of cases in this chapter — from Smith's initial disagreement with the University of Colorado athletics program in 1998 to the Maine court's finding that Bailey's website was not eligible for the press exemption in the state's election law in 2012 — the lower courts in jurisdictions throughout the United States appeared to

develop a greater understanding of how the Internet was being used by people as a communication tool. And while the same four themes were clearly evident in the cases from the two time periods in this chapter, the courts clearly started to hone their understandings of the Internet, and how citizen publishers and traditional journalists differed, in the later cases. This could be seen in the broader, more-accepting decisions in the six earlier cases, where five of the citizen publishers or citizen-publisher-based groups received the journalism protections they sought. This could also be seen in the early cases in decisions such as *O'Grady* or *Forensic Advisors*, where the courts read state shield laws that were written before the emergence of the network society and found that citizen publishers qualified for protections. In the later cases, the courts displayed greater depth in their understandings of online communication. They articulated more detailed and stringent expectations of citizen publishers who sought protections that have traditionally been reserved for journalists. This was seen in *Too Much Media*, *Obsidian*, and *Bailey*, for example, as the judges in these cases found the individual communicators, in the way citizen publishers' messages were delivered, their general failure to follow accepted rules of journalism, and their failure to work with others to create a news-outlet-like operation, could not be seen as qualifying for press-related protections under that various state laws in question in the cases.

It is important to remember that this chapter focused on lower-court decisions regarding citizen publishers and their claims for protections that have traditionally been reserved for journalists because the Supreme Court has not addressed similar questions. The lower courts do not have a network-society-era precedent from the Supreme Court to guide them. The Supreme Court, however, has considered the Internet and Internet

freedoms. The next chapter focuses on the understandings the Supreme Court has articulated in asserting the conceptual rationales it has developed for deciding Internet questions that relate to the First Amendment.

Chapter Three: The Supreme Court and the Place of the Internet in First Amendment Protections

This chapter focuses on the narrative represented by Supreme Court opinions in which justices articulated conceptual rationales they have developed for deciding Internet questions that relate to the First Amendment. The cases were analyzed with a focus on identifying consistent and qualitative emphasis on what are discussed here in terms of three themes that were identified in the articulation of those conceptual rationales. The themes focused on justices conceptualizing the Internet as (1) an idealized public sphere, (2) a vehicle connected to the speech clause and not the press clause, and (3) as a socially and technologically unique form of communication.

As detailed in Chapter One and similarly utilized in chapter Two and Four, the themes — and the methodological basis for categorizing them terminologically in this manner — were identified using Altheide’s method of document analysis, a form of qualitative content analysis that focuses on identifying thematic meaning in discourse. Altheide characterized themes as “mini-frames,” or central ideas within a text.¹ He conceptualized a frame as “a kind of super theme” that acts as a primary idea within a set of documents.² As throughout the analytic process of this dissertation, the implementation of “progressive theoretical sampling” in which Altheide’s qualitative data analysis is grounded,³ was utilized in an effort to identify the “specific properties of the . . . narrative that encourage . . . particular understandings . . . and [that] convey

¹ David L. Altheide, *Qualitative Media Analysis* (Thousand Oaks, Calif.: Sage Publications, 1996), 30-31.

² Ibid.

³ Ibid., 33-34.

thematically consonant meanings across media and time.”⁴

The cases analyzed in this chapter represent all of the Supreme Court decisions in which justices have articulated understandings in asserting the conceptual rationales the Court has developed for deciding Internet questions that relate to the First Amendment. In order to identify all of the Court’s cases that fit this criteria, a keyword search was conducted using three primary legal research databases: Westlaw, Bloomberg Media Law Reporter, and LexisNexis Law.⁵ The search terms were: “Internet or web or online or ‘World Wide Web’ or blog or website and ‘First Amendment.’” When the database offered the option, the search was narrowed to Supreme Court cases only. Searches were also limited to cases decided after January 1, 1995, a date that corresponds with the time period when the public and media companies started to use the Internet in large numbers.⁶ The three searches found 131 cases, though many were duplicates. Each of the cases was examined to see if it addressed the conceptual rationales the Court has developed for deciding Internet questions that relate to the First Amendment. The three searches found many cases that did not address the criteria and simply had the word “Internet” or “website” mentioned as part of a citation in a First Amendment-related case. A final search was conducted to find all of the Supreme Court cases that referenced *Reno v. ACLU*, the first case in which the Supreme Court addressed Internet questions as they related to the First Amendment. Since *Reno* was the first precedent in this area of law, this search was used

⁴ Robert M. Entman, “Framing U.S. Coverage of International News: Contrasts in Narratives of the KAL and Iran Air Incidents,” *Journal of Communication* 41, no. 4 (1991): 7.

⁵ John Palfrey, “Cornerstones of Law Libraries for an Era of Digital Plus,” *Law Library Journal* 102, no. 2 (2010-2011): 171, 178. In this article, Palfrey indicated that Westlaw, LexisNexis Law, and Bloomberg Law are the central legal resources that are used by legal scholars.

⁶ David Carlson, “The History of Online Journalism,” in *Digital Journalism: Emerging media and the changing horizons of journalism*, ed. Kevin Kawamoto (Lanham, Md.: Rowman & Littlefield Publishers, 2003), 51-52.

to make sure the preceding queries had found all of the relevant cases. The search brought up twenty-one cases, all of which had been found in the preceding database searches. An initial set of nine cases was printed and read thoroughly with the criteria in mind. Three of the cases involved discussion of the Internet, but did not require justices to articulate understandings regarding the conceptual rationales the Court has developed for deciding Internet questions that relate to the First Amendment. For this reason, the initial selection group was narrowed to the six cases analyzed and discussed in this chapter.

This chapter is divided into two sections. The first section examines the four cases that considered Internet questions related to the First Amendment that were decided during the Rehnquist Court — the era during which the Court was presided over by Chief Justice William H. Rehnquist, which began in 1986 and ended with his death in 2005. The second section examines the two decisions related to this topic from the period during which the Court has been presided over by Chief Justice John Roberts, which runs from late 2005 through the present. Placed in chronological order in each section below, the facts, central questions, and key ideas from the cases in the two sections are discussed. After that, each section focuses upon discussion of the themes that emerged in the Altheide document analysis.

Rehnquist Court Cases

This section considers the four earliest Supreme Court cases that dealt with Internet questions as they related to the First Amendment. After a detailed discussion of each case, the themes that emerged through application of Altheide's process of document analysis are presented. The cases in this section are: *Reno v. ACLU* (1997),

Ashcroft v. ACLU (2002), *United States v. American Library Association* (2003), and *Ashcroft v. ACLU* (2004).⁷ The 2002 *Ashcroft v. ACLU* decision is referred to as “*Ashcroft I*” and the 2004 *Ashcroft v. ACLU* decision is referred to as “*Ashcroft II*” on all subsequent references.

Reno v. ACLU

Reno marked the first time the Supreme Court examined the nature and extent of First Amendment freedoms concerning expression on the Internet. The 1997 decision set the foundational precedent for how the Supreme Court would move forward in conceptualizing First Amendment freedoms in the emerging network society. *Reno* has been cited by the court in nearly every other Internet-related case it has considered, including each of the other cases in this chapter.⁸ Over the course of more than fifteen years since the ruling, it has been cited in more than six hundred lower-court cases.⁹ *Reno* also marked the start of a conflict between Congress and the Supreme Court regarding regulation of expression on the Internet. The Supreme Court’s decision to strike down central provisions of the Communications Decency Act (CDA) of 1996 in *Reno* led to the Child Online Protection Act of 1998, which resulted in two different Supreme Court decisions,¹⁰ and the Child Internet Protection Act of 2000, which led to another ruling by the Court.¹¹ Each of these cases is discussed in this section of the chapter. Legal scholars have questioned if the unique characteristics of online

⁷ *Reno v. ACLU*, 521 U.S. 844 (1997); *Ashcroft v. ACLU (Ashcroft I)*, 535 U.S. 564 (2002); *United States v. American Library Association*, 539 U.S. 194, 215 (2003); *Ashcroft v. ACLU (Ashcroft II)*, 542 U.S. 656 (2004).

⁸ The “Shepardize” function in Lexis-Nexis Academic found *Reno* has been cited twenty times by the Supreme Court as of March 2013.

⁹ The “Shepardize” function in Lexis-Nexis Academic found *Reno* has been cited 664 times by lower-courts as of March 2013.

¹⁰ *Ashcroft I*, 535 U.S. at 564; *Ashcroft II*, 542 U.S. at 656.

¹¹ *American Library Association*, 539 U.S. at 194.

communication, along with its international nature, will make it impossible for Congress to craft a law advancing its asserted interest in protecting children from indecent content online that can survive the Supreme Court's strict-scrutiny test,¹² which is applied in challenges to government restrictions on content of expression protected by the First Amendment.¹³ The decision in *Reno* is of seminal significance in that it marks the beginning of the back-and-forth between Congress and the Supreme Court regarding attempts to restrict expression considered inappropriate for children and the First Amendment. It also represents the cornerstone of the Court's jurisprudence establishing online communication as among the most protected forms of media.

In *Reno*, the American Civil Liberties Union challenged two provisions of the CDA. The first challenged provision prohibited people from using any "telecommunications device" to send obscene or indecent images to people who were younger than eighteen.¹⁴ The second provision in question made it a crime to use a computer to make any "patently offensive messages" available to people younger than eighteen years old.¹⁵ While the Court was unanimous in its decision to overturn both

¹² The strict-scrutiny test is a standard of judicial review that requires the government to prove that it has a compelling interest in regulating a form of speech and that the law in question is narrowly tailored so that no more speech than is necessary is limited by the statute. See Don R. Pember and Clay Calvert, *Mass Media Law* (New York: McGraw-Hill, 2011), 649.

¹³ Kate Reder, "Ashcroft v. ACLU: Should Congress Try, Try, and Try Again, or Does the International Problem of Regulating Internet Pornography Require an International Solution," *North Carolina Journal of Law & Technology* 6, no. 1 (2004): 139, 140-141; Charles Nesson and David Marglin, "The Day the Internet Met the First Amendment: Time and the Communication Decency Act," *Harvard Journal of Law & Technology* 10, no. 1 (1996): 113, 113-114.

¹⁴ *Reno*, 521 U.S. at 858-861 (citing U.S.C.A §223(a) (Supp. 1997)) reads, in part: "Any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication."

¹⁵ *Ibid.* (citing 47 U.S.C.A §223(d) (Supp. 1997)) reads, in part: "(1) in interstate or foreign communications knowingly — (A) uses an interactive computer service to send to a specific person or persons under 18 years of age, or (B) uses any interactive computer service to display in a manner available to a person under 18 years of age any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the

provisions of the CDA because it found they violated the speech clause of the First Amendment, Justice Sandra Day O'Connor filed an opinion in which she concurred in part and dissented in part with the Court's judgment.¹⁶ Specifically, the Court found the way the provisions were worded was overly broad and not sufficiently clear. The Court argued, "The breadth of the CDA's coverage is wholly unprecedented. . . . Its open-ended prohibitions embrace all nonprofit entities and individuals posting indecent messages."¹⁷

Before outlining its reasoning, the Court briefly described the history of the Internet, how it works, and who was using it.¹⁸ Significantly, in the Court's first Internet case regarding the First Amendment, it demonstrated a strong grasp on the essential defining characteristics of the still-emerging Internet. The Court emphasized, for example, the Internet's international scope and its capacity to connect "tens of millions of people with one another and to access vast amounts of information from around the world."¹⁹ Importantly, the Internet was characterized as a "wholly new medium" for people around the world to use to communicate. Observing that some forty million people already were using the Internet in 1996, the Court highlighted emerging challenges that legislators and courts would face regarding networked technology. Characterizing the Internet as quickly evolving and difficult to categorize, the Court wrote that the vast new communication tool was "located in no particular geographical location but available to anyone, anywhere in the world," with access to networked

user of such service placed the call or initiated the communication; or (2) knowingly permits any telecommunications facility under such person's control to be used for an activity prohibited by paragraph (1) with the intent that it be used for such activity."

¹⁶ *Reno*, 521 U.S. at 886 (O'Connor, J., concurring in part and dissenting in part).

¹⁷ *Ibid.*, 877.

¹⁸ *Ibid.*, 849-853.

¹⁹ *Ibid.*, 850.

technology.²⁰ The Court compared emails to letters, characterized newsgroups as tools that foster discussion and information exchange, and pointed out that web pages have addresses that are analogous to telephone numbers.²¹ The Court also identified chat rooms as providing the potential to give “town criers . . . a voice that resonates farther than it could from any soapbox.”²² The Court explained that many different types of people publish information online, making the web “comparable, from the readers’ viewpoint, to both a vast library including millions of readily available and indexed publications and a sprawling mall offering goods and services.”²³ In these points can be seen some of the very foundations for how the Court would over the years ahead come to conceptualize and adjudicate First Amendment questions involving the Internet. The Court conceptualized the Internet as worldwide, both of informational and commercial value, decentralized geographically, and as a “unique new medium” in comparison to other media types.²⁴ These characterizations of the Internet played a central role in the Court’s first ruling regarding First Amendment freedoms online.

Importantly, the *Reno* Court established that regulations of online content must be content-neutral and narrowly tailored. In doing so, it dispatched three previous Supreme Court precedents that were used by the government to argue its case, thus declining to accept the Internet, for First Amendment purposes, as within the realm of another type of media or types of content in which regulation could be permissible. The *Reno* Court found the provisions in question were not comparable to the precedent from *Ginsberg v. New York*. In that case, the Court established that the First Amendment did

²⁰ *Ibid.*, 851.

²¹ *Ibid.*, 851-852.

²² *Ibid.*, 870.

²³ *Ibid.*, 853.

²⁴ *Reno*, 521 U.S. at 851.

not protect child pornography.²⁵ The Court emphasized that the law in that case was narrowly tailored to commercial transactions and provided a clear definition of what content was indecent. The CDA provisions in question provided no clear definition of what should be classified as indecent and it applied to informational and commercial transactions.²⁶

The Court also declined to accept the government's argument that online indecency could be regulated in a way that was analogous to broadcast. Prior to *Reno's* appearance before the Supreme Court, legal scholars Charles Nesson and David Marglin postulated that the Court's determination in the case would likely hinge on how it understood the Internet. The authors contended that the case would center on the "application of constitutional standards that depend on facts about the nature of the medium."²⁷ In many ways, the scholars were correct. The government built part of its argument around *Federal Communications Commission v. Pacifica Foundation*, which set the precedent that the pervasiveness of broadcast media gave the government a compelling interest in regulating speech conveyed over the public airwaves during certain times of day and regarding certain content.²⁸ In writing the Court's opinion, Justice John Paul Stevens, who was part of the majority in the 1978 *Pacifica* ruling, emphasized that *Pacifica* was wholly inapplicable to the Internet. *Pacifica* dealt with an established agency that was assigned to regulating broadcast. The *Pacifica* case focused on "when — rather than whether — it would be permissible to air such a program in

²⁵ *Ginsberg v. New York*, 390 U.S. 629 (1968).

²⁶ *Reno*, 521 U.S. at 865-866.

²⁷ Nesson and Marglin, "The Day the Internet Met the First Amendment," 114.

²⁸ 438 U.S. 726 (1978).

that particular medium.”²⁹ The Court emphasized that it was acceptable to limit broadcast freedoms in *Pacifica* because the medium had historically received less First Amendment protection than any other.³⁰ In *Reno*, the justices did not find the Internet to be pervasive or a form of communication that necessitated being treated like a medium that should receive limited First Amendment protection.

Finally, the government argued that the CDA provisions were constitutional because they sought to create a form of “cyberzoning” online, much like the zoning laws the Supreme Court upheld in *City of Renton v. Playtime Theatres, Inc.* In *Renton*, the Court found city zoning laws that limited where adult entertainment businesses could be located were constitutional.³¹ Justice Stevens, who was part of the Court when it decided *Renton* in 1985, argued zoning was not possible online.³² Justice O’Connor focused her partial concurrence and partial dissent in *Reno* on the concept of online zoning. She explained that physical zoning laws are based on geography and identity, and speculated that it would be possible to zone the Internet at some point, but that the Internet was “fundamentally different” than the physical world.³³ Justice O’Connor emphasized that zoning laws are only applicable if they do not restrict adults from accessing constitutionally protected content. She differed from the Court in that she would have only invalidated the CDA provisions in cases when the law, in an effort to

²⁹ *Reno*, 521 U.S. at 867.

³⁰ *Ibid.*

³¹ 475 U.S. 41, 54 (1986). Chief Justice Rehnquist, in the Court’s opinion, wrote, “In our view, the First Amendment requires only that Renton refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the city, and the ordinance before us easily meets this requirement. In sum, we find that the Renton ordinance represents a valid governmental response to the ‘admittedly serious problems’ created by adult theaters.”

³² *Reno*, 521 U.S. at 868.

³³ *Ibid.*, 889 (O’Connor, J., dissenting in part).

protect minors, halted adults from obtaining constitutionally protected content.³⁴ The Court's broader conclusion, much like Justice O'Connor's concern, was that the CDA provisions outlawed constitutionally protected messages in their efforts to protect minors. By providing a unanimous decision that recognized the Internet as an altogether unique form of communication, the Court articulated a strong precedent that set the starting point for later cases.

Ashcroft v. ACLU I

The Court's thinking in *Ashcroft I* was situated in the foundational ideas articulated in *Reno*, which was decided less than five years earlier. In many ways, the *Ashcroft I* decision represented a continuation of the Court's discussion regarding freedom of speech on the Internet that started in *Reno*. In *Ashcroft I* and in the Court's second examination of the Child Online Protection Act (COPA) two years later in *Ashcroft II*, however, the Court started to show some divisions. While the members of the Court remained the same between *Reno* in 1997 and *Ashcroft II* in 2004, the more intricate questions posed by Congress's second attempt to regulate online indecency started to divide the justices.

COPA posed more complex questions than the CDA provisions that were ultimately struck down in *Reno* because the law was tailored to address the Court's concerns from that case regarding freedom of speech on the Internet. The overly broad, sweeping language from the CDA provisions was replaced with a more narrowly tailored law in COPA in 1998, a year after the *Reno* decision.³⁵ The law, which was

³⁴ Ibid., 887-888 (O'Connor, J., dissenting in part).

³⁵ Reder, "Ashcroft v. ACLU," 143; Namita E. Mani, "Judicial Scrutiny of Congressional Attempts to Protect Children from the Internet's Harms: Will Internet Filtering Technology Provide the Answer Congress has been Looking for?," *Boston University Journal of Science & Technology* 9 (2003):

enjoined before it went into effect and spent four years in the court system before it reached the Supreme Court, addressed many of the Supreme Court's concerns regarding the CDA provisions in *Reno*. The Court, however, focused on only one aspect of COPA in *Ashcroft I*. The Court considered if the use of the "community standards" part of the Miller Test³⁶ made COPA unconstitutional.³⁷ In an eight-to-one decision, the Court found the law's use of "community standards" criteria was constitutional and remanded the case. The lower courts, with the Supreme Court's finding in mind, were to consider the constitutionality of the overall law.³⁸ Justice Stevens, the author of the Court's opinion in *Reno*, dissented.

Much as with the CDA provisions that were struck down in *Reno*, COPA was created to halt minors from gaining access to indecent materials online. COPA, however, focused only on the World Wide Web, rather than the Internet as a whole, and the law also only covered commercial interactions. The law defined "indecent" and "patently offensive," by using the obscenity test developed in *Miller v. California*. While these factors narrowed the law's breadth, they also led to the question before the Court. Recognizing that physical geography does not apply to online communication, the ACLU and other plaintiffs, argued the use of the "contemporary community standards" portion of COPA was unconstitutional because it would force all

201, 203; Sue Ann Mota, "Protecting Minors from Sexually Explicit Materials on the Net: COPA Likely Violates the First Amendment According to the Supreme Court," *Tulane Journal of Technology & Intellectual Property* 7 (2005): 95, 100.

³⁶ The Miller Test arose from *Miller v. California*, 413 U.S. 15, 24 (1973). Chief Justice Warren Burger, in the Court's opinion, outlined the three considerations in the test: "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."

³⁷ *Ashcroft I*, 535 U.S. at 566.

³⁸ *Ibid*.

communities to live by the values of the “most puritan community standard in the entire country.”³⁹ Web publishers, it was contended, do not have any way to control which communities their messages reach.⁴⁰

While the question led to an eight-to-one decision by the Court on the judgment, justices were divided in their reasoning and skeptical of the broader law’s constitutionality. Not a single justice agreed in full with Justice Clarence Thomas’s opinion for the Court. Justices Anthony Kennedy and O’Connor, in separate concurring opinions, contended that the overall law might be unconstitutional.⁴¹ Justice O’Connor, despite some concerns about the law, found that community standards did not vary widely enough across the nation to make COPA overbroad.⁴² Justice Kennedy, however, whose concurrence was joined by justices David Souter and Ruth Bader Ginsburg, foreshadowed some of the points he made in writing the Court’s opinion in *Ashcroft II*, when he asserted that “there is a very real likelihood that the Child Online Protection Act . . . is overly broad and cannot survive such a challenge. Indeed, content-based regulations like this one are presumptively invalid abridgements of the freedom of speech.”⁴³

Writing for the court, Justice Thomas relied on three primary arguments. He posited that the community standards criterion could be subject-based, rather than focusing on the traditional geographic definition that emerged from the Miller Test.⁴⁴ Justice Stephen Breyer supported this argument in his concurring opinion when he

³⁹ *Ashcroft I*, 535 U.S. at 597 (Kennedy, J., concurring).

⁴⁰ *Ibid.*, 573.

⁴¹ *Ibid.*, 591 (Kennedy, J., concurring); *Ibid.*, 587 (O’Connor, J., concurring).

⁴² *Ibid.*, 587 (O’Connor, J., concurring).

⁴³ *Ibid.*, 591 (Kennedy, J., concurring).

⁴⁴ *Ibid.*, 576.

wrote that Congress intended “the word ‘community’ to refer to the Nation’s adult community taken as a whole, not to geographically separate local areas.”⁴⁵ Justice Thomas’s second argument was that the other two portions of the Miller Test, the “prurient interest” and “serious value” criteria were strong enough to support the problems found in the “community standards” portion of the test. He wrote, “When the scope of an obscenity statute’s coverage is sufficiently narrowed by a ‘serious value’ prong and a ‘prurient interest’ prong, we have held that requiring a speaker disseminating material to a national audience to observe varying community standards does not violate the First Amendment.”⁴⁶ Finally, Justice Thomas argued that if a communicator does not want to face a nationalized community-standards test, he or she should avoid using the Internet because the messenger “need only take the simple step of utilizing a medium that enables it to target the release of its material into those communities.”⁴⁷

In his dissent, Justice Stevens used some of the same arguments he employed when he wrote the Court’s opinion in *Reno*. He argued that COPA holds the Internet to standards that were created during a different time, because it “covers a medium in which speech cannot be segregated to avoid communities where it is likely to be harmful to minors.”⁴⁸ He emphasized that the Internet is unique and that it cannot be regulated using the same means that were used in the 1970s, when the Miller Test was developed. Justice Stevens argued that since web publishers cannot control who views their messages, COPA is overly broad and, therefore, unconstitutional. He wrote that

⁴⁵ Ibid., 589 (Breyer, J., concurring).

⁴⁶ Ibid., 580.

⁴⁷ Ibid., 583.

⁴⁸ Ibid., 605 (Stevens, J., dissenting).

the Court has “repeatedly rejected the position that the free speech rights of adults can be limited to what is acceptable for children.”⁴⁹

United States v. American Library Association

While COPA remained enjoined and mired in the federal court system, Congress passed the Children’s Internet Protection Act (CIPA) in 2000, another law that sought to limit the availability of indecent content to minors. The law, which was enjoined before it could take effect, stipulated that public libraries, in order to receive two forms of federal funding, must install software designated to filter out indecent content. The law required that for a library to be eligible for the federal funding, the software must be on every computer connected to the Internet.⁵⁰ The law included an option for patrons to request that the library temporarily disable the filter.⁵¹ Legal scholars have argued that CIPA represented a new, incentive-based approach by lawmakers to limiting children’s access to indecent content.⁵² Attorney Kate Reder contended, for example, that the fact that CIPA was upheld by the Court would mean “Congress is likely to draft legislation that includes powerful incentives . . . in order to encourage and functionally require the use of filters on computers across the country.”⁵³

The Court, however, was far from unanimous in upholding CIPA, and the justices’ relatively fractured conclusions regarding CIPA provided further evidence of the growing divisions within the Court regarding Internet speech protections that had begun to emerge in *Ashcroft I*. The Court upheld CIPA in a six-to-three decision on the

⁴⁹ *Ibid.*, 604 (Stevens, J., dissenting).

⁵⁰ *American Library Association*, 539 U.S. at 230 (Stevens, J., dissenting).

⁵¹ *Ibid.*, 233 (Stevens, J., dissenting).

⁵² Reder, “*Ashcroft v. ACLU*,” 147; Katherine A. Miltner, “Discriminatory Filtering: CIPA’s Effect on Our Nation’s Youth and Why the Supreme Court Erred in Upholding the Constitutionality of the Children’s Internet Protection Act,” *Federal Communications Law Journal* 57 (2004-2005): 555, 560.

⁵³ Reder, “*Ashcroft v. ACLU*,” 147

judgment, but only three justices joined Chief Justice Rehnquist's plurality opinion for the Court. Justices Kennedy and Breyer wrote separate concurrences and Justices Stevens and Souter penned separate dissents. The Court's opinion, and the dissents, included a lively, comparison-infused discussion regarding how the holdings of traditionally conceptualized libraries related to the content available on the Internet, and how the law's filtering requirements might influence what was made available to the public. Chief Justice Rehnquist emphasized in the Court's opinion that libraries have never attempted to provide every book and other source of information to their patrons.⁵⁴ Libraries choose materials that are most likely to benefit the community they serve, he explained. As part of those decisions, the chief justice asserted that libraries traditionally do not provide pornography to their patrons. Thus, he declared, "It would not make sense to treat libraries' judgments to block online pornography any differently."⁵⁵ He reasoned that libraries are not public forums and not akin to sidewalks or parks, as the district court had argued.⁵⁶ Chief Justice Rehnquist compared viewing a library as a public forum to allowing the public to control the editorial content of a public television station's news reports. He wrote, "Public library staffs necessarily consider content in making collection decisions and enjoy broad discretion in making them."⁵⁷ The government, he explained, has traditionally stayed out of controlling what libraries can and cannot place in their collections.⁵⁸ Library acquisition processes, he contended, are not open to the public's demands in the sense that a park or other forum is open to the public.

⁵⁴ *American Library Association*, 539 U.S. at 204.

⁵⁵ *Ibid.*, 208.

⁵⁶ *Ibid.*, 202.

⁵⁷ *Ibid.*, 205.

⁵⁸ *Ibid.*, 202.

The fact that the law allowed libraries to unblock sites or temporarily turn off filters at the request of patrons was enough to alleviate a majority of the justices' concerns about the possibility of filters blocking legitimate sites.⁵⁹ Justice Breyer, in his concurring opinion, stated that the requirement that patrons request the filtering software be turned off represented no more of a burden than libraries' traditional practices of using interlibrary loan systems that require the patron to work with a librarian to obtain a desired source of information.⁶⁰ However, that specific part of the law was at the center of Justice Souter's dissent, because he found it problematic that an adult would have to convince a librarian that his or her need for the filter to be removed was justified. For that reason, Justice Souter maintained that the law amounted to constitutionally protected material being kept from adults in an effort to protect children. He wrote that the unblocking portion of the law's wording led to "a substantial amount of unobscene material harmful to children but lawful for adult examination, and a substantial quantity of text and pictures harmful to no one" being blocked.⁶¹ He argued less-restrictive means were available, such as the libraries installing filtering software on designated terminals for children, but leaving others unblocked for adults. Justice Stevens, in his dissent, added that patrons might not know if information was valuable enough to make it worth asking the librarian to unblock a site. He compared the effect of the filters to a library that kept a portion of its collection locked away, only available upon request. Justice Stevens wrote, "Some curious readers would in time obtain access to the hidden materials, but many would not."⁶²

⁵⁹ Ibid., 209.

⁶⁰ Ibid., 219 (Breyer, J., concurring).

⁶¹ Ibid., 233-234 (Souter dissenting).

⁶² Ibid., 224-225 (Stevens, J., dissenting).

Justice Souter also emphasized that the unique characteristics of the Internet made comparisons between physical library collections and what was available online problematic. He asserted that librarians make content-based decisions about which materials to make available to patrons, but those decisions are the result of budgetary and shelf-space limitations, concerns that do not apply to the Internet. He wrote, “The proper analogy therefore is not to passing up a book that might have been bought; it is either buying a book and then keeping it from adults lacking an acceptable ‘purpose’ or to buying an encyclopedia and then cutting out pages with anything thought to be unsuitable for adults.”⁶³ He concluded that because the filtering requirement involved no budgetary or shelf-space justification, the law’s requirements represented a form of censorship.

Justice Stevens repeated the arguments he used in writing the Court’s opinion in *Reno* and in his dissent in *Ashcroft I*: No provision to protect children from indecent material online can, at the same time, stop adults from having access to constitutionally protected speech.⁶⁴ To this end, his primary concern was the likelihood that the filters would block constitutionally protected material. He wrote that “overblocking is the functional equivalent of a host of individual decisions excluding hundreds of thousands of individual constitutionally protected messages from Internet terminals located in public libraries throughout the nation.”⁶⁵ Justice Stevens’s final concern was in regard to the act’s threat that funding would be withheld from libraries that did not comply, a penalty which he found equally as severe as jail time or fines. He wrote, “The

⁶³ Ibid., 237 (Souter, J., dissenting).

⁶⁴ Ibid., 220-221 (Stevens, J., dissenting).

⁶⁵ Ibid., 222 (Stevens, J., dissenting).

abridgement of speech is equally obnoxious whether a rule like this one is enforced by a threat of penalties or by a threat to withhold a benefit.”⁶⁶

The issues that were tied to CIPA placed the ways individual justices conceptualized the Internet in stark contrast. Chief Justice Rehnquist compared the filtering requirements within the context of how libraries manage their physical collections, while justices Stevens and Souter argued Internet access was something far different than anything libraries physically held within their collections, and therefore something that must be uniquely considered. These growing fractures within the Court regarding how to conceptualize the Internet reached their apex in the next case, *Ashcroft II*.

Ashcroft v. ACLU II

In 2004, two years after the Supreme Court ruled on a narrow constitutional question and remanded *Ashcroft I*, the case, and the constitutionality of COPA were again before the Court. In the intervening time, the federal appeals court found the act likely violated the First Amendment and upheld the injunction that was stopping the law from going into effect.⁶⁷ As was the case in *Ashcroft I*, the Court did not specifically consider the act on its own. Since the act had not gone into effect, no party could claim that its rights were violated. Therefore, the question before the Court centered on whether the appeals court’s decision to uphold the injunction that was keeping the law from going into effect was correct.⁶⁸ In the final time the Rehnquist Court addressed freedom-of-speech issues relating to the Internet, the divided justices voted five-to-four to uphold the injunction against COPA and, to the great frustration of Justice Breyer,

⁶⁶ Ibid., 231 (Stevens, J., dissenting).

⁶⁷ 542 U.S. at 660.

⁶⁸ Ibid.

again remanded the case. In 2008, after *Ashcroft II*, the United States Court of Appeals for the Third Circuit upheld the trial court’s finding that the law violated the First Amendment, and the government appealed the decision only to have the Supreme Court decline to address the law for a third time, ending COPA’s more than ten-year journey through the court system.⁶⁹

While it upheld the injunction that kept COPA from going into effect, the Court showed sensitivity toward Congress’s work to protect children from indecency online. Justice Kennedy, writing for the Court, recognized that the Court should be careful to not overstep its bounds by overturning laws, but concluded, “The imperative of according respect to the Congress, however, does not permit us to depart from well-established First Amendment principles. Instead, we must hold the Government to its constitutional burden of proof.”⁷⁰ Since COPA focused on limiting content, rather than time, place, or manner restrictions, for example, the Court used the strict-scrutiny standard to examine the law’s constitutionality. Strict scrutiny requires a law to have a compelling governmental interest, be narrowly tailored to achieve that interest, and that there are no other less-restrictive ways of achieving the government’s goal. The Court focused on the fact that filtering technology, which the justices had carefully examined in *American Library Association* a year earlier, provided a less-restrictive way for the government to protect children from indecent material online.⁷¹ It wrote that filters “impose selective restrictions on speech at the receiving end, not universal restrictions at the source.”⁷² The Court concluded the filters limited the likelihood that indecent

⁶⁹ *ACLU v. Mukasey*, 534 F.3d 181 (3rd Cir. 2008); *Mukasey v. ACLU*, 555 U.S. 1137 (2009).

⁷⁰ *Ashcroft II*, 542 U.S. at 660.

⁷¹ *Ibid.*, 666-668.

⁷² *Ibid.*, 666-667.

speech that was constitutionally protected for adults would be criminalized in the effort to protect children, and that filters were more effective in achieving the government's interest because they could halt indecent content from around the world. COPA, on the other hand, could only criminalize content posted in the United States, the Court contended.⁷³ The Court's reasoning in this area led Reder to postulate that the only way Internet legislation will be successful will be if it is global — because no national solution can address the international nature of online communication — and if it focuses on incentives for using filters, rather than content-based laws such as COPA.⁷⁴

Justice Antonin Scalia, in his terse, one-page dissent, argued COPA did not raise First Amendment issues and, therefore, did not necessitate the use of the exacting strict-scrutiny standard.⁷⁵ Justice Breyer, agreeing with Justice Scalia in his dissent, contended the material regulated by COPA “does not enjoy First Amendment protection.”⁷⁶ Justice Breyer also disagreed that the filtering software could be seen as a less-restrictive alternative because the software costs money and depends on parents who are willing and capable of using it properly. He also emphasized that the software is not precise because it blocks some sites that are not problematic and fails to block others that include indecent content.⁷⁷ The Court's opinion recognized that filtering software was an imperfect solution, but argued that it was not up to the ACLU and other organizations in the case to solve the problem of indecent material being available to children online. Instead, the government had to meet the burden of showing there were no other effective means that would meet its goal. The government, in the Court's

⁷³ Ibid., 667.

⁷⁴ Reder, “*Ashcroft v. ACLU*,” 146.

⁷⁵ *Ashcroft II*, 542 U.S. at 676 (Scalia, J., dissenting).

⁷⁶ Ibid., 676 (Breyer, J., dissenting).

⁷⁷ Ibid., 684-686 (Breyer, J., dissenting).

opinion, failed to meet that burden. Justice Breyer flatly disagreed, and he conveyed his frustration with the Court's decision to remand the case for a second time by writing:

After eight years of legislative effort, two statutes, and three Supreme Court cases the Court sends this case back to the District Court for further proceedings. What proceedings? I have found no offer by either party to present more relevant evidence. What remains to be litigated?⁷⁸

Justice Breyer went on to emphasize that COPA was written by Congress to fulfill the directions the Court provided when it struck down the CDA provisions in *Reno*. To this end, Justice Breyer decried that the Court had missed an opportunity to conduct a “constructive discourse” with Congress.⁷⁹ Despite Justice Breyer's concern, when the Court remanded COPA in 2004, it marked the final significant analysis by the Rehnquist Court of any major congressional legislation regarding freedom of speech on the Internet.

Document Analysis

The following subsections utilize Altheide's method of document analysis to categorize representations that emerged through the analysis of the preceding four Supreme Court decisions. The considerations related to the press clause or arguably related protections as understood in terms of particular concerns that were emphasized in the courts' conceptual rationales. In Altheide's conceptualization of the central idea of his methodological approach, the “actual words and direct messages of documents carry the discourse that reflects certain themes, which in turn are held together and given meaning by a broad frame.”⁸⁰ As outlined in the introductory section, the themes that emerged in that analysis were: the Internet as (1) an idealized public sphere, (2) a

⁷⁸ Ibid., 689 (Breyer, J., dissenting).

⁷⁹ Ibid.

⁸⁰ Altheide, *Qualitative Media Analysis*, 31.

vehicle connected to the speech clause and not the press clause, and (3) a socially and technologically unique form of communication.

The Internet as an Idealized Public Sphere

The discourse in these cases conceptualized the Internet as an emerging opportunity for the formation of a new, relatively unhindered virtual public sphere. The opinions consistently articulated representations and understandings that strongly supported the theme that justices recognized, even from the beginning in *Reno* in 1997, that the Internet presented a unique opportunity for an idealized form of the public sphere. In the *Reno* ruling, Justice Stevens asserted, “Through the use of chat rooms any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox.”⁸¹ In passages such as this, the narrative communicated that the Court understood the Internet as empowering individuals to engage with others in democratic society. Furthermore, in constructing this theme, the discourse conveyed an understanding that because the justices conceptualized the Internet as an idealized form of the public sphere, few laws would be allowed to stand if they were found to diminish the near-absolute standard they established as the appropriate level of First Amendment protection for nearly all online communication. The discourse further contributed to this theme in the *Reno* ruling when the Court declined to accept government arguments that the Internet should be regulated like broadcast communication. The Court wrote, “Neither before nor after the enactment of the CDA

⁸¹ 521 U.S. at 870.

have the vast democratic fora of the Internet been subject to the type of government supervision and regulation that has attended the broadcast industry.”⁸²

The way the opinions communicated understandings regarding the value of the Internet as an emerging space for public discussion related, in several ways, to Habermas’s description of seventeenth-century coffeehouses in England.⁸³ The coffeehouses, to Habermas, were forums where individuals interested in taking part in discussions about issues in society stepped from their private lives into the public sphere. Similarly, the justices, in the discourse in these cases, conceptualized the Internet as a space that individuals in society could step into so they could take part in discussions about a variety of issues.⁸⁴ To this end, the meanings communicated in the decisions indicated that the justices were hesitant to allow any form of legislation to create barriers that would make it more difficult for speakers to step into the virtual public sphere. Justice Stevens, for example, postulated in the *Reno* decision that one of the advantages of the Internet was that so many people could gain access to discussions that were happening throughout the world regarding a variety of topics. He contended, “Taken together, these tools constitute a unique new medium — known to its users as ‘cyberspace’ — located in no particular geographical location but available to anyone anywhere in the world, with access to the Internet.”⁸⁵ The discourse in *Reno* further contributed to the theme when it recognized how people were using the Internet to both inform themselves and to communicate ideas regarding an endless range of topics.⁸⁶

⁸² Ibid., 868.

⁸³ Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Bourgeois Society*, trans. Thomas Burger and Frederick Lawrence (Cambridge, Mass.: MIT Press, 1999), 59-60.

⁸⁴ *Reno*, 521 U.S. at 868.

⁸⁵ Ibid., 851.

⁸⁶ Ibid., 853.

Having identified the ease of entry into online interactions, the discourse revealed that the justices paused when aspects of the CDA, COPA, and CIPA, the three acts discussed in these cases, sought to make entry into certain discussions more difficult. When the government, for example, argued in *Reno* that websites that were concerned about government prosecution because minors might see indecent content on their pages should require users to enter credit-card numbers for access, the Court refused to consider that approach to be a viable option. The narrative communicated that the Court understood such a requirement would make otherwise protected speech inaccessible to adults who did not have credit cards.⁸⁷ Similarly, the narrative in *American Library Association*, a case in which the justices' decision-making appeared to turn on their interpretation of the part of the law that allowed patrons to ask a librarian to turn off the filter, conveyed an understanding that the ability to enter online discussions was of central importance. Justice Kennedy's short concurring opinion, for example, emphasized that his decision hinged on the ability of individuals to have the filter turned off. He wrote, "If some libraries do not have the capacity to unblock specific Web sites or to disable the filter or if it is shown that an adult user's election to view constitutionally protected Internet material is burdened in some other substantial way, that would be the subject for an as-applied challenge."⁸⁸ Justice Souter's dissent carried a similar emphasis upon the ability of individuals to gain access to information, finding that no adult should have to ask for permission to view constitutionally protected speech.⁸⁹ Finally, in *Ashcroft II*, the discourse further contributed to this theme by communicating that it favored the voluntary use of Internet

⁸⁷ *Ibid.*, 856.

⁸⁸ *American Library Association*, 539 U.S. at 215.

⁸⁹ *Ibid.*, 233 (Souter, J., dissenting).

filters, rather than legally imposed restrictions and penalties, because it sought to avoid the chilling effects that COPA would have created in individuals who were afraid to step into the discussion and communicate.⁹⁰ All of these perspectives conveyed the idea that part of the Court’s understanding of the Internet as an idealized public sphere requires that entry into the sphere receive relatively strong protection.

The opinions in these cases also communicated a substantial level of concern regarding the legal controls put forth in the four cases. Despite the fact that the laws, especially CIPA and COPA, focused on a relatively narrow set of indecent content, the narrative carried in the opinions conveyed a high level of reticence regarding limiting the potential for discussion on the Internet. In *Ashcroft I*, for example, Justice Kennedy’s concurring opinion communicated an understanding of the Internet as an inexpensive and easy vehicle through which people can communicate. He wrote, “When Congress purports to abridge the freedom of a new medium, we must be particularly attentive to its distinct attributes.”⁹¹ Similarly, Justice Stevens’s concurring opinion in *Ashcroft II* characterized filtering as a better option than “attempting to regulate the vast content of the World Wide Web at its source, and at a far less significant cost to First Amendment values.”⁹² In this sense, the meanings conveyed by the opinions in these cases communicated that the Court understood the Internet as holding vast potential for discourse, and therefore approached each of the laws in question with deep reservations about congressional efforts to temper speech, even indecent speech, online.

⁹⁰ 542 U.S. at 667.

⁹¹ 535 U.S. at 595 (Kennedy, J., concurring).

⁹² 542 U.S. at 674 (Stevens, J., concurring).

The Internet as a Vehicle Connected to the Speech Clause and Not the Press Clause

In another consistent theme that emerged through the document analysis, the discourse put forth by the Court conceptualized the Internet as a powerful new avenue for individual speech. In the narrative in these cases, justices conveyed considerable concern regarding congressional efforts to limit the ability of individual speakers to communicate messages using the Internet. This conceptualization of the Internet as a tool that is primarily associated with speech, and the speech clause of the First Amendment, also indicated that the Court did not understand the Internet to be a press or a form of media that should be associated with the press clause in regard to individual communication. Justice Stevens in *Ashcroft II*, for example, asserted that COPA threatened “Web speakers,” not publishers.⁹³ Similarly, Justice Kennedy in *Ashcroft I* wrote, “There is a very real likelihood that the Child Online Protection Act is overbroad and cannot survive such a challenge. Indeed, content-based regulations like this one are presumptively invalid abridgements of the freedom of speech.”⁹⁴ In *Reno*, Justice Stevens compared the Internet to a “town crier” and as something more powerful than a “soap box.”⁹⁵ Comparisons such as these, rather than those that might have been utilized to relate the Internet to a printing press or traditional news outlet, further contributed to the the theme that the Court understands the Internet as a speech tool and speech-clause-related form of media.

Within this line of thinking, it is important to consider the types of legal questions that the cases brought before the Court. All four of the cases dealt with the constitutionality of congressional efforts to limit the availability of indecent content to

⁹³ Ibid. (Stevens, J., concurring).

⁹⁴ 535 U.S. at 591 (Kennedy, J., concurring).

⁹⁵ 521 U.S. at 870.

minors on the Internet. As a result of this focus, the cases primarily addressed the ability of *individuals* to communicate messages and to receive information using the Internet. The cases did not generally ask the Court to address the ability of organizations, businesses, or traditional news organizations, for example, to communicate messages to audiences. For this reason, the Court’s conceptualization of the Internet as a new avenue for speech in the discourse contained within these cases indicated that it understands individuals who communicate messages online as speakers, not publishers, and therefore relates such communications to the speech clause, rather than the press clause. These four cases represent the foundational Supreme Court precedents regarding how the Internet is conceptualized. *Reno* alone has been cited in nearly two-dozen Internet-related Supreme Court decisions and in hundreds of lower-court rulings.⁹⁶

It is also important to highlight that although the justices in some instances utilized the term “publish,” the narrative much more consistently articulated an understanding of the Internet as a tool for speech. In *American Library Association*, for example, Chief Justice Rehnquist wrote, “A public library does not acquire Internet terminals to create a public forum for Web publishers to express themselves, any more than it collects books in order to provide a public forum for the authors of books to speak.”⁹⁷ In this sense, the chief justice employed the term “Web publishers” but he clearly distinguished it as something separate from what was in question in the Internet First Amendment case before the Court. Similarly, Justice Stevens wrote in his dissent in *Ashcroft I* that, “Web publishers cannot control who accesses their Web sites . . . [and therefore] using community standards to regulate speech on the Internet creates an

⁹⁶ The “Shepardize” function in Lexis-Nexis Academic found *Reno* has been cited twenty times by the Supreme Court and 664 by lower courts as of March 2013.

⁹⁷ 539 U.S. at 206.

overbreadth problem.”⁹⁸ Much as in Chief Justice Rehnquist’s passage, Justice Stevens utilized the term “Web publishers” but related the usage to speech regulations.

The absence of any discussion of the press clause as dispositive in the relevant understandings articulated in these four cases indicated that the justices by every indication viewed individuals’ communications online as something more squarely within the purview of the speech clause. A central change in the paradigm shift from the mass media to the network-society era has been the newfound ability of individuals who are not part of traditional media to communicate messages to audiences large and small.⁹⁹ In representations of the Court as indicated through this analysis, individual communicators were understood to be speakers, rather than publishers.

The Internet as a Socially and Technologically Unique Form of Communication

The narrative in these cases consistently conceptualized the Internet as an entirely new and unique form of communication. The recognition of the Internet as distinctive went beyond the characteristics of the form of communication as compared to older types of media. Instead, the discourse put forth by the justices in these first cases regarding online communication showed the Court conceptualized the Internet as fundamentally different socially and technologically than all other forms of communication. In *Reno*, the Court’s first examination of First Amendment questions concerning the Internet, Justice Stevens wrote, “Each type of media presents its own problems — so the Court has recognized times when a certain type of media can have

⁹⁸ 535 U.S. at 606 (Stevens, J., dissenting).

⁹⁹ Jane Singer, “Journalism and Digital Technologies,” in *Changing the News: The Forces Shaping Journalism in Uncertain Times*, eds. Wilson Lowrey and Peter J. Gade (New York: Routledge, 2011), 214-215.

certain regulation.”¹⁰⁰ While Justice Stevens indicated in this passage that some forms of communication can be regulated differently, his articulated understandings contributed to a broader narrative from the justices, one that may be seen as reflecting some commonality with the first theme in this section, that the Court understands the Internet as an idealized form of the public sphere. To that end, the Court in its discourse isolated the Internet as unique from other forms of media, not because “each type of media presents its own problems,” but because it conceptualized online communication as carrying a unique potential for fostering deliberation in a democratic society.

Justice Kennedy articulated a similar understanding in his concurring opinion in *Ashcroft I*. He wrote, “Each mode of expression has its own unique set of characteristics, and each ‘must be assessed for First Amendment purposes by standards suited to it.’”¹⁰¹ So again an understanding was articulated that *each* type of media had to be assessed independently regarding the First Amendment. The broader narrative, however, indicated that Justice Kennedy, like Justice Stevens, identified the Internet as separate from other media in that it carried a unique potential for fostering deliberation among individuals and groups in society. In *Reno*, this theme was further constructed through the way the Court’s discourse evaluated the government’s arguments that the precedent from *Pacifica* could be applied to questions regarding the CDA. The Court wrote, “Neither before nor after the enactment of the CDA have the vast democratic fora of the Internet been subject to the type of government supervision and regulation that has attended the broadcast industry.”¹⁰² To that end, the opinion both rejected the

¹⁰⁰ 521 U.S., at 868.

¹⁰¹ *Ashcroft I*, 535 U.S. at 594 (Kennedy, J., concurring). In part of the passage, he is quoting *Southeastern Promotions v. Conrad*, 420 U.S. 546, 557 (1975).

¹⁰² *Reno*, 521 U.S., at 868-869.

idea that the Internet can be regulated in ways that are similar to broadcast and communicated a related understanding that it sees the Internet as a powerful, new, and democratizing form of media.

Chief Justice Rehnquist communicated a variation of this theme in the Court's opinion in *American Library Association*, when he compared librarians' efforts to select materials that best serve the needs and interests of their communities with the need for libraries to filter online content. The opinion conceptualized the Internet as another tool libraries have available to them to make information available to their communities.¹⁰³ While the opinion recognized the Internet as providing "a vast amount of valuable information," it did not represent the Internet as having the same level of unique social or technological significance as was communicated in the justice's broader narrative. In fact, Chief Justice Rehnquist's conceptualization of the Internet as just another tool for librarians appears to be an anomaly in the cases that were analyzed. Justice Souter, in his dissent with Justice Ginsburg, in *American Library Association* articulated an understanding of the Internet that was more in line with ideas articulated in *Reno* and *Ashcroft II* when he wrote,

The Internet blocking here defies comparison to the process of acquisition. Whereas traditional scarcity of money and space require a library to make choices about what to acquire, and the choice to be made is whether or not to spend money to acquire something, blocking is the subject of a choice made after the money for Internet access has been spent or committed.¹⁰⁴

Justice Souter' asserted that blocking the Internet was not the same as exercising choices regarding which books to buy for the library. Instead, the he understood filtering as being analogous to buying the book and then keeping it away from patrons,

¹⁰³ *American Library Association*, 539 U.S. at 207.

¹⁰⁴ *Ibid.*, 236-237 (Souter, J., dissenting).

which by his reasoning made utilizing blocking software a form of censorship. He wrote, “There is no preacquisition scarcity rationale to save library Internet blocking from treatment as censorship.”¹⁰⁵ Justice Souter, in making the fundamental distinction between physical library collections and the information made available through terminals in libraries through the Internet, further articulated an understanding that online communication was unique in both technological and social aspects. The technological aspect of his conceptualization was primarily made in the explicit distinction between physical library collections and the Internet. The social aspect was communicated more implicitly through his concern that the filters could limit the vast potential for deliberation that was made possible by online communication. To this end, Justice Souter wrote that the filters blocked “adult enquiry” and therefore amounted to censorship.¹⁰⁶

The discourse in *Ashcroft II* further contributed to the theme that the Internet is a new and unique technological and social tool. The opinion utilized phrases such as “obtain access” and “gain access” when discussing how filters, rather than the legal restrictions outlined in COPA, were a less-restrictive way to limit minors’ access to indecent content online.¹⁰⁷ By focusing on “gaining” and “obtaining” access, the narrative represented the Internet as a gateway to socially valuable material, one that operated as a unique tool similar to no other form of media. The filtering option put forward in the *Ashcroft II* opinion also placed the ability to choose content in the hands of users, rather than halting the content before it was created. While this idea certainly relates to traditional understandings of how an informed democracy functions, it also

¹⁰⁵ Ibid., 241.

¹⁰⁶ Ibid., 242.

¹⁰⁷ *Ashcroft II*, 542 U.S. at 667.

contributes to an understanding that the Court viewed this particular form of media as uniquely valuable to modern democracy.

The document analysis in this section indicated that the Court understands the Internet as an idealized form of the public sphere, which requires a high level of protection from regulation. The justices' discourse also conceptualized communication that occurs on the Internet as being related to speaking in a virtual space and the speech clause, rather than publishing and the press clause. Finally, the narrative in these cases articulated an understanding of the Internet as a socially and technologically unique form of communication. The next section considers the same three themes through the understandings that were communicated by the Supreme Court in two more-recent cases that considered Internet question that related to the Internet.

Roberts Court Cases

This section considers two more recent Supreme Court cases that dealt with Internet questions as they related to the First Amendment. After a detailed discussion of each case, the themes that emerged through application of Altheide's process of document analysis are presented. The facts, central questions, and key ideas regarding each case are outlined before the themes are discussed. The cases in this section are *United States v. Williams* (2008) and *Doe v. Reed* (2010).¹⁰⁸

United States v. Williams

In 2008, *Williams* signaled a shift in the Court's focus from cases that were specifically about attempts to regulate online communication to instances when the Court, in light of a broader question, examined the impact and role of the Internet on society and social issues. *Williams* is also noteworthy because it represents the first time

¹⁰⁸ *United States v. Williams*, 553 U.S. 285 (2008); *Doe v. Reed*, 130 S. Ct. 2811 (2010).

the Roberts Court examined First Amendment issues as they relate to the Internet. Chief Justice Rehnquist died in 2005 and Justice O'Connor stepped down in 2006. Both contributors to the opinions in the four preceding cases, they were replaced by Chief Justice John Roberts and Justice Samuel Alito. Justice Souter, who also was outspoken at times in the preceding four cases, left the Court in 2009 between the *Williams* and *Reed* decisions. He was replaced by Justice Sonya Sotomayor.

In *Williams*, the Court voted seven-to-two to uphold the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act (PROTECT) of 2003. The Court's judgment in the case, with seven justices signing on to the opinion of the Court and only one concurrence and one dissent, showed more agreement between the justices when compared to Rehnquist Court decisions, such as *American Library Association* and *Ashcroft II*. The PROTECT Act made it a crime to use any form of communication, including computerized transactions, to intentionally lead someone to believe that a person possessed child pornography.¹⁰⁹ The case centered on an Internet chat-room interaction between Michael Williams and an undercover Secret Service agent in which Williams claimed he had child pornography and offered to show it to the agent. During the interaction, Williams posted several pornographic images involving children. He pleaded guilty to child pornography charges for the images he posted, but challenged the constitutionality of the PROTECT Act because he argued the law was overbroad in that it criminalized merely stating that a person had child pornography or that he or she wanted to see such material.¹¹⁰

¹⁰⁹ *Williams*, 553 U.S. at 289-290.

¹¹⁰ *Ibid.*, 292-293.

The Court’s opinion contended that the law was created in light of the changing technological environment in which photos could be duplicated and posted on the Internet quickly, repeatedly, and in many cases, without any way to know whether the image involved real children.¹¹¹ The Court emphasized that since the First Amendment does not protect illegal transactions, such as exchanging child pornography, the law was constitutional because it did not halt any form of protected speech.¹¹² The Court highlighted that the law’s requirements did not make it a crime to advocate for child pornography; it merely criminalized offers of and requests for child pornography.¹¹³ It is noteworthy that Justice Stevens, a strident defender of free speech on the Internet in *Reno*, *American Library Association*, and both of the cases concerning COPA, found no constitutional problems regarding the PROTECT Act. Justice Stevens wrote, “It is abundantly clear from the provision’s legislative history that Congress’s aim was to target materials advertised, promoted, presented, distributed, or solicited with a lascivious purpose — that is, with the intention of inciting sexual arousal.”¹¹⁴ He contended it was possible that protected speech, such as pornography that appears to depict children but does not, could be viewed as illegal under the act, but the wording of the law specifically requires that the person has to believe or convince someone else to believe that the images included real children.¹¹⁵

While Justice Stevens found the wording of the law sufficient to safeguard constitutionally protected speech from prosecution, justices Breyer and Ginsburg

¹¹¹ Ibid., 290-291. In *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), the Court struck down a law that banned sexually explicit images that included either computer-generated depictions of children or adults who were made to look like children.

¹¹² Ibid., 297.

¹¹³ Ibid., 299.

¹¹⁴ Ibid., 307-308 (Stevens, J., concurring).

¹¹⁵ Ibid., 310 (Stevens, J., concurring).

dissented for similar reasons. Justice Breyer found that constitutionally protected material, such as computer renderings or images of adults who were made to look like children, were criminalized by the act.¹¹⁶ He asked, “What justification can there be for making independent crimes of proposals to engage in transactions that may include protected materials?”¹¹⁷ Based on that reasoning, he argued the law should have been overturned because it was overly broad.

It is noteworthy that the law in question in *Williams* pertained to physical and virtual communication. The facts of the case and the Court’s focus in its opinion, however, focused on online communication. And despite Justice Breyer’s concerns, the Roberts Court’s first case relating to freedom-of-speech issues on the Internet did not appear to employ the same high level of scrutiny for laws that affect online communication as Rehnquist Court decisions, such as *Reno* and *Ashcroft II*.

Doe v. Reed

Much like *Williams*, *Reed*, a 2010 case, did not deal with a law that was specifically crafted to regulate a form of speech on the Internet. The case arose after the Washington State legislature passed a law that provided certain marital benefits to same-sex couples in 2009. Protect Marriage Washington conducted a drive and gathered the necessary number of signatures to have a referendum item regarding the same-sex benefits law placed on the ballot for the next election. Four groups made public information requests regarding the referendum petition, including WhoSigned.org and KnowThyNeighbor.org, who stated they requested the information so they could post

¹¹⁶ Ibid., 313-314 (Breyer, J., dissenting).

¹¹⁷ Ibid., 314 (Breyer, J., dissenting).

the names and addresses of the petition’s signers online in a searchable format.¹¹⁸

Protect Marriage Washington and some of those who signed the petition filed for an injunction to stop the state from releasing the documents. The groups made two claims: that the state public-records law violated the First Amendment when it was used for referendums, and that the law violated the First Amendment when applied to the referendum regarding the Washington law that extended marriage-like benefits to same-sex couples.¹¹⁹ The Supreme Court, by an eight-to-one vote, found that releasing the referendum petitions was constitutional in both instances.

The Court’s opinion highlighted that the central argument made by the petition groups was that if their names and addresses were provided to the groups and posted online, they would be subjected to harassment and intimidation, which would violate their right to free speech and chill further petition efforts because potential signers would fear recourse as a result of their participation.¹²⁰ The petition organizers and signers only mentioned concerns about the information being placed on the Internet. Though the groups who sought the information, once they possessed it, could have communicated it using any form of media, no other form of communication was mentioned in the case. The Court identified that in past cases, under certain circumstances, it had found that public disclosure could be halted to protect a speaker if he or she faced a “reasonable probability” that the information would lead to reprisals from the government or private groups.¹²¹ The Court did not see the petitioners’

¹¹⁸ *Reed*, 130 S. Ct. at 2816.

¹¹⁹ *Ibid.*, 2817.

¹²⁰ *Ibid.*, 2820-2821.

¹²¹ *Ibid.*, 2820. Chief Justice Roberts referred to *Buckley v. Valeo*, 424 U.S. 1 (1976) and *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), both corporate-political-speech cases.

concerns as qualifying for such protections. The Court wrote, “Voters care about such issues, some quite deeply — but there is no reason to assume that any burdens imposed by disclosure of typical referendum petitions would be remotely like the burdens plaintiffs fear in this case.”¹²²

The Court rejected the groups’ concerns for two main reasons: it found signing a petition to be form of public political expression, and it concluded that the disclosure of petition information supported the integrity of the democratic process. In regard to the first reason, the Court wrote, “An individual expresses a view on a political matter when he signs a petition under Washington’s referendum procedure.”¹²³ The petition groups argued signing a petition was a legislative act, not a form of political expression, but the Court dispatched that claim by arguing that signing a petition was expressive whether it was a legislative act or not.¹²⁴ In regard to the second reason, the Court explained that releasing the petition information to the public allowed citizens to check for invalid signatures, fostered government transparency, and combated fraud.¹²⁵ Justice Stevens, in his concurring opinion, boiled the issue before the Court to a few simple ideas: “This is not a hard case. . . . [The law] does not prohibit expression, nor does it require that any person signing a petition disclose or say anything at all.”¹²⁶ To Stevens, in the absence of any form of regulation on speech or limitation on expression, there was no problem releasing the information.¹²⁷

¹²² Ibid., 2821.

¹²³ Ibid., 2817.

¹²⁴ Ibid., 2818.

¹²⁵ Ibid., 2819.

¹²⁶ Ibid., 2829-2830 (Stevens, J., concurring).

¹²⁷ Ibid.

In his concurring opinion, Justice Alito agreed with the majority that the public-records law was constitutional in regard to referendum petitions in general, but he suggested that the petition groups' claim in the instance of the same-sex-benefits referendum could be viewed as qualifying for protection.¹²⁸ He wrote, "If this information is posted on the Internet, then anyone with access to a computer could compile a wealth of information about all of those persons."¹²⁹ Justice Alito listed different types of information people place on the Internet, such as photographs of family, children's school information, and wedding announcements.¹³⁰ Such information, Justice Alito concluded, could be used to harass petition signers if their information were released. He found that the public interest in having access to the information through the public records law was not greater than the right of the petitioners to be free of harassment when they signed a petition.¹³¹ In his dissent, Justice Thomas raised similar concerns when he found that the petitioners' concerns for protection were of greater importance than the public's need to receive the information. He suggested that the government create a website and post the signatures and addresses behind a password-protected wall. In this way signers could log in and see if their names were properly placed on the petition, and the technology could be used to check for duplicate and fraudulent signatures. To Justice Thomas, this approach meant the governmental process could be monitored without the information's release to the public.¹³²

¹²⁸ Ibid., 2823 (Alito, J., concurring).

¹²⁹ Ibid., 2825 (Alito, J., concurring).

¹³⁰ Ibid.

¹³¹ Ibid.

¹³² Ibid., 2840 (Thomas, J., dissenting).

While the court's vote in *Reed* was eight-to-one, the justices appeared to come closer to mirroring the more fractured opinions found in *American Library Association*, *Ashcroft I*, and *Ashcroft II*. The case included five concurrences, ranging from a relatively short and simply stated point about balancing competing constitutional protections made by Justice Breyer to Justice Alito's lengthy examination of ways online information could be used to harass people.¹³³ Justices Alito and Thomas considered the characteristics of the Internet and put forth ways the petition information could have been placed online and monitored so certain people could access information while other could not. Justice Scalia contended, in his terse concurrence, that he doubted signing a petition had anything to do with freedom of speech in the first place.¹³⁴ Taken together, the Court's opinion, five concurrences, and one dissent in *Reed* indicated that the individual justices had diverging ideas regarding how Internet questions regarding the First Amendment should be resolved.

Document Analysis

The following subsections utilize Altheide's method of document analysis to categorize representations that emerged through the analysis of the preceding Supreme Court decisions. The considerations related to the press clause or arguably related protections, as understood in terms of particular concerns that were emphasized in the courts' conceptual rationales. In Altheide's conceptualization of the central idea of his methodological approach, the "actual words and direct messages of documents carry the discourse that reflects certain themes, which in turn are held together and given

¹³³ Ibid., 2822 (Breyer, J., concurring); Ibid, 2822-2827 (Alito, J., concurring).

¹³⁴ Ibid., 2832 (Scalia, J., concurring).

meaning by a broad frame.”¹³⁵ As outlined in the introductory section, the themes that emerged in that analysis were: the Internet as (1) an idealized public sphere, (2) a vehicle connected to the speech clause and not the press clause, and (3) as a socially and technologically unique form of communication.

The Internet as an Idealized Public Sphere

The discourse in *Williams* and *Reed* conveyed an understanding of the Internet as a virtual public sphere, a place where people could step forward, via their computers, into a variety of discussions and communities. The narrative carried in these cases consistently articulated that the Court understood the Internet as a place that enabled people to gather and deliberate. The *Williams* decision, for example, emphasized that Williams stepped into a “public Internet chat room,” and that he sent a “public message in the chat room.”¹³⁶ The use of “public” in this context appeared to articulate an understanding of the Internet as a place where people choose to step from their private lives into the public sphere. The Court could have left “public” out of the two passages, stating simply that Williams signed into an “Internet chat room” and that he posted a message “in the chat room.” But “public” was included because it was a part of the Court’s broader understanding of the Internet as an idealized form of the public sphere.

Similarly, in the *Reed* ruling, the discourse represented the Internet as a space where people could vet signatures on referendum petitions, further indicating an understanding that people can step into public discussions in a variety of ways on the Internet. The Court wrote that the groups who sought the referendum petitions were

¹³⁵ Altheide, *Qualitative Media Analysis*, 31.

¹³⁶ 553 U.S. at 291.

interested in “preserving the integrity of the electoral process by combating fraud, detecting signatures, and fostering government transparency.”¹³⁷ In this sense, the discourse communicated an understanding of the Internet as a space where people can both gather information and engage with others regarding national issues. The issue at the center of the referendum petition controversy in *Reed* was Washington State’s decision to extend some marriage-like benefits to same-sex couples. The narrative in the case articulated an understanding of the petition drive as concerning a national issue that was being deliberated upon by the public and that posting the petition information online would contribute information to citizens in democratic society, who could then step forward into the online public sphere to deliberate with others.¹³⁸ Though the case centered on a state-related issue, the opinion conveyed an understanding that the petition information, if released and published on the Internet, would allow individuals from throughout the nation to carry information into discussions in the online public sphere. Justice Alito, in his concurring opinion, asserted that “anyone with a computer” could gather information about the individuals who signed the petition.¹³⁹ To that end, his concurring opinion conveyed an understanding that the Internet does not include geographic boundaries and that it allows people from diverse locations to discuss issues facing the nation. This understanding relates to the broader theme that a part of the Internet’s potential for an idealized public sphere is that it reduces the limitations regarding who can take part in deliberation in a democratic society.

In a related sense, the discourse in *Williams* conceptualized virtual spaces as something people chose to enter. This understanding was seen in that the narrative

¹³⁷ *Reed*, 130 S. Ct. at 2819.

¹³⁸ *Ibid.*, 2821.

¹³⁹ *Ibid.*, 2825 (Alito, J., concurring).

conveyed a recognition by the Court that Williams “signed into a public Internet chat room.”¹⁴⁰ The discourse characterized the exchange Williams had with the Secret Service agent as “an electronic exchange” where he stepped from his private life into public discussions.¹⁴¹ By conceptualizing Williams’s interaction in the chat room as an exchange of information, the opinion further articulated an understanding that Internet is a place where people conduct discussions in virtually public spaces. Furthermore, the discourse regarding this theme indicated that justices were careful to ensure that communication was not regulated in a way that weakened the idealized public sphere it saw the Internet as fostering. The opinion in *Williams* emphasized that the PROTECT Act “does not prohibit advocacy of child pornography, but only [penalizes] offers to provide or requests to obtain it.”¹⁴² In this sense, the Court was careful in its discourse to highlight that debate about the issue would not be diminished by the act.

The discourse in the *Reed* and *Williams* opinions communicated that the Court understood the Internet to be an idealized public sphere and that it would work to assure that no regulations would limit individuals’ access or ability to deliberate online. As part of this understanding, the narrative put forth by the Court in these cases communicated that it viewed the provision of information as central to the functioning of the public sphere and that the Internet made it possible for people in nearly any location to exchange information about issues and ideas.

¹⁴⁰ *Williams*, 553 U.S. at 291.

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*, 299.

The Internet as a Vehicle Connected to the Speech Clause and Not the Press Clause

The discourse in *Reed* and *Williams* characterized communication on the Internet as a form of speech, something relating to First Amendment free-speech protections, and not as a form of publishing, or something related to the press clause. This understanding could be seen in the legal concepts the justices chose to utilize in *Williams*, and to a lesser extent *Reed*. In *Williams*, for example, the Court wrote early in its opinion that “according to our First Amendment overbreadth doctrine, a statute is facially invalid if it prohibits a substantial amount of protected speech.”¹⁴³ The ruling in the case focused upon the fact that the PROTECT Act limited only “collateral speech,” which in *Williams* included communication that involved the distribution of child pornography, something that the Court has found lacks First Amendment protection.¹⁴⁴ The solicitation of child pornography, even when it was done through postings in chat rooms, was characterized in the narrative as form of speech. In the understandings put forth in the Court’s discourse, the online communicator, Williams in this case, was not publishing messages, he was speaking in a virtual space.

The discourse in *Reed* was not as explicit regarding this theme, mainly because the case focused on the free-speech rights of the petition signers, and no mention was made relating to concern for the rights, speech or press, of the groups that sought to gather and communicate the petitioners’ information. In that opinion, the justices communicated that they understood signing a petition to be a form of political speech, and articulated that having that speech placed online did not hinder the signers’ rights. In his concurring opinion, Justice Scalia contended that “petitioning the government and

¹⁴³ Ibid., 292.

¹⁴⁴ Ibid., 293.

participating in the traditional town meeting were precursors of the modern initiative and referendum.”¹⁴⁵ In this sense, the meanings conveyed in Justice Scalia’s concurring opinion related signing a petition to entering the town hall to speak about a public issue.

While the discourse regarding this theme was more clearly articulated in the Rehnquist Court’s cases, the narrative in *Williams* clearly conveyed an understanding that the Court conceptualized online communication as a form of speech. And while the *Reed* opinion did not convey similarly clear understandings regarding this theme, the meanings carried within the text did nothing to contradict it. The Court’s attention in *Reed* simply appeared to be focused on the petition-signers, not the groups who sought to place the information online.

The Internet as a Socially and Technologically Unique Form of Communication

The narrative in *Williams* and *Reed* carried a conceptualization of the Internet as a socially and technologically unique form of communication. In constructing this theme, the discourse continually drew the Internet’s distinctive characteristics into the center of the Court’s deliberations in the two cases. In *Williams*, for example, the Court declared, “The emergence of new technology and the repeated retransmission of picture files over the Internet could make it nearly impossible to prove that a particular image was produced using real children.”¹⁴⁶ Importantly, while the PROTECT Act that was at the center of the *Williams* case was created to prevent the communication of child pornography in general, the Court’s narrative communicated a primary concern regarding the capabilities of new technologies, including the Internet, for spreading

¹⁴⁵ *Reed*, 130 S. Ct. at 2834 (Scalia, J., concurring).

¹⁴⁶ *Williams*, 553 U.S. at 290-291.

child pornography, and for changing the way the government has sought to prosecute it in the past.

The overall focus of the discourse in the *Williams* decision was on the Internet, further constructing the theme that the justices conceptualized the Internet as unique on social and technological levels. Certainly, some of the attention the Internet received in *Williams* came from the facts of the case, which revolved around a chat-room interaction between Williams and a Secret Service agent. But the question before the Court was not specific to the Internet. The Court was asked to resolve if the PROTECT Act violated the First Amendment by making it illegal to claim to have child pornography, whether a person has the illegal material or not. This included communication through the mail or through interpersonal interactions, for example. The narrative focused on the Internet in the case, however, because the Court recognized the unique technological changes that were brought about by the Internet and the related social dangers to the newfound ease of spreading child pornography online. This point was highlighted in the final portion of the Court's opinion when it wrote, "Child pornography harms and debases the most defenseless of our citizens. Both the State and Federal Governments have sought to suppress it for many years, only to find it proliferating through the new medium of the Internet."¹⁴⁷

This theme was further constructed in the *Reed* opinion with the Court's discourse repeatedly emphasizing the plaintiffs' concern that if the referendum petition information that was at the center of the case were released, it would be posted on the Internet. The Court wrote, "Plaintiffs allege, for example, that several groups plan to post the petitions in searchable form on the Internet, and then encourage other citizens

¹⁴⁷ Ibid., 307.

to seek out the R-71 signers.”¹⁴⁸ No other form of media was discussed in the case, and in that sense the narrative continued to communicate an understanding of the Internet as something that was both socially and technologically unique. Certainly, the plaintiffs brought the concern about their names being published on the Internet into the case, but the narrative indicated that the Court chose in its opinion to focus on this concern, never mentioning that releasing the names via other media formats could also lead to at least some similar repercussions as those the plaintiffs listed regarding the Internet. Also, the laws in question in the case did not require the justices to consider the Internet. Neither the state’s referendum law, nor its open records law includes any Internet-specific language. The discourse contained within these cases indicated that the Court chose to make the Internet central to the case because it understood it to be a socially and technologically unique form of communication.

Furthermore, the unique nature of online technology was emphasized throughout the *Reed* opinion. In his concurring opinion, Justice Alito wrote, “If this information is posted on the Internet, then anyone with access to a computer could compile a wealth of information about all of those persons.”¹⁴⁹ Justice Thomas, in his dissent, suggested the state use Internet technology to limit access to the information. He wrote, “Washington could create a Web site, linked to the electronic referendum database, where a voter concerned that his name had been fraudulently signed could conduct a search using his unique identifier to ensure that his name was absent from the database.”¹⁵⁰ In both of these instances, the opinions conceptualized the Internet as possessing unique technological characteristics that could be utilized to influence society. The opinion in

¹⁴⁸ *Reed*, 130 S. Ct. at 2820.

¹⁴⁹ *Ibid.*, 2825 (Alito, J., concurring).

¹⁵⁰ *Ibid.*, 2841 (Thomas, J., dissenting).

Reed described the groups’ plans to post the information online as an intent “to broadcast the signers’ political views on the subject of the petition.”¹⁵¹ The use of the word “broadcast” in the opinion was in the context of spreading the message widely using the Internet. Instead of referring to broadcast as a medium, the discourse conveyed an understanding that the Court conceptualized the Internet as holding the potential to publish messages broadly to audiences.

Finally, in the *Reed* case, as was seen in *Williams*, the discourse communicated that the justices understood there to be a relationship between the unique technological aspects of the Internet and its potential for social impact. The *Reed* opinion conveyed an understanding that if the information were released online, it would be readily available to anyone, anywhere, not just those in Washington State. The Court wrote, “Plaintiffs explain that once on the Internet, the petition signers’ names and addresses ‘can be combined with publicly available phone numbers and maps,’ in what will effectively become a blueprint for harassment and intimidation.”¹⁵² Similarly, Justice Alito wrote, “In this case, two groups proposed to place on the Internet the names and addresses of all those who signed Referendum 71, and it is alleged that their express aim was to encourage ‘uncomfortable conversations.’”¹⁵³ In this sense, the justices conveyed an understanding in their discourse in this case that the unique technological characteristics of the Internet made it possible for people from anywhere in the world to compile information about the petition signers. For Justice Thomas, that concern was great enough that he dissented in the case. He wrote, “The state of technology today creates at

¹⁵¹ *Ibid.*, 2820.

¹⁵² *Ibid.*

¹⁵³ *Ibid.*, 2825 (Alito, J., concurring).

least some probabilities that signers of every referendum will be subjected to threats, harassment, or reprisals if their personal information is disclosed.”¹⁵⁴

The referendum petition information in *Reed* could have been released using any form of media once it was placed in the requesting groups’ hands. The plaintiffs identified concern regarding the fact that the information could be published online and the Court in its discourse in the case articulated an understanding that this was a valid concern. By recognizing this as a central concern, the narrative communicated an understanding that the justices saw the Internet as something socially and technologically unique. A similar idea could be seen in *Williams*, where the Court’s opinion, though it was dealing with a law that sought to limit exchanges of child pornography in every way, focused on how the Internet had changed the way child pornography was being communicated. Similarly, the discourse in these cases communicated that the Court understands the Internet as an idealized form of the public sphere, which carries vast potential to foster deliberation in society. In a related sense, the justices’ narrative indicated that they conceptualized messages that are communicated by individuals online as being related to speaking, rather than to publishing.

Conclusion

Starting with *Reno* in 1997 and ending with *Reed* in 2010, the Court has showed consistent concern for First Amendment freedoms in its considerations of the Internet and the nature of online communication. While the Court’s rulings generally have strongly supported the idea that the Internet was a form of communication that should receive the greatest possible protection from government regulation, the justices were

¹⁵⁴ Ibid., 2845 (Thomas, J., dissenting).

often fractured in their reasons for why or how those protections should be extended to the Internet and divided in how they interpreted government efforts to regulate online content. In *Ashcroft I*, with its eight-to-one vote, no justice fully signed on with Justice Thomas's opinion for the Court. Justices Scalia and O'Connor, along with Chief Justice Rehnquist, joined parts of Justice Thomas's opinion and then took part in three concurring opinions. Justices Souter and Ginsburg joined Justice Kennedy's concurring opinion. Similarly, *Reed* was an eight-to-one ruling but the decision included five concurring opinions and one dissent. *American Library Association* was decided by a six-to-three vote, but the decision included two diverging concurring opinions and two dissents. To this end, the Court showed agreement on the broader understandings about the First Amendment as it applied to Internet questions, but was often fractured in its reasoning and articulations for its decisions. The Court has also generally been consistent in its conceptualization that the Internet was an idealized public sphere, a vehicle connected to the speech clause and not the press clause, and as a socially and technologically unique form of communication. The variety of concurring and dissenting opinions in these cases, however, is noteworthy because they represent the first six cases where the Court ruled on First Amendment questions regarding the Internet. This is especially true with the first four cases, which dealt directly with legislation that was intended to regulate online communication. The diversity of concurring and dissenting opinions means that in many of the cases the Court did not present a strong, clear precedent for future Supreme Court and lower-court rulings to build upon. The next chapter examines the role of communication in a democratic

society, particularly as it applies to the unique characteristics that underlie the network-society era.

Chapter Four: Philosophical Conceptualizations of the Role of Communication in Democratic Society

Computerized networks are being utilized to redefine how communities organize, groups communicate, and people contribute knowledge to helping to solve problems in society.¹ The paradigmatic shift reflected in those trends has been termed the “network society” by scholars such as Castells, whose work focuses on sociological and communication technology concerns.² Broadly, the network society has changed the way people interact. The theoretical discussion of these changes in the way people communicate includes three connected streams of ideas: the role of communication in democracy, network theory, and the place of mediated communication in society. In terms of this study’s approach to proposing a framework for how future courts may interpret the press clause in the network society, considering the essential ideas asserted by scholars in each of these three areas of thought complements the analysis conducted in chapters Two and Three. To that end, this chapter begins with a discussion of communication-in-democracy theory that is centered upon what scholars have conceptualized as “the public sphere” and the central role that communication — especially journalism — plays in it. That discussion also considers the relationships among communication, freedom of expression, and knowledge generation in communities. After that, the network-theory section discussion considers identity and power structures in the twenty-first century, as well as the possibility of an emerging global public sphere. Finally, the discussion proceeds to the dynamics of twenty-first-

¹ Clay Shirky, *Here Comes Everybody: Revolution Doesn’t Happen When Society Adopts New Technology, It Happens When Society Adopts New Behaviors* (New York: Penguin Books, 2008), 22-23; Henry Jenkins, *Convergence Culture: Where Old and New Media Collide* (New York: New York University Press, 2006), 3.

² Manuel Castells, *Communication Power* (Oxford: Oxford University Press, 2009), 55.

century group organization, concerns about the problems networked communication has created for deliberation in democratic society, and user-generated versus journalistic content. With that broader discussion in place, this chapter will then move into applying Altheide's discourse analysis in a similar way as in chapters Two and Three, but here to key components of discourse from the greater body of theoretical texts discussed in this chapter.

Communication in Democracy

Philosophers Dewey and Habermas represent two of the principle modern thinkers regarding publics and the role of communication in communities.³ Writing mostly in the first half of the twentieth century, Dewey is considered one of America's greatest philosophers.⁴ Though his work spanned a relatively wide breadth of subjects, examinations of democracy and freedom were at the heart of his philosophical interests.⁵ About a decade after Dewey's death, Habermas started his inquiries into the role of communication in democratic society. Beginning in the second part of the twentieth century, Habermas emerged as one of the most influential theorists of his time.⁶ Though they wrote at different times and followed different lines of inquiry, the authors are similar in that they became leading scholars regarding the role of

³ Brian McNair, *Cultural Chaos: Journalism, News and Power in a Globalised World* (London: Routledge, 2006), 135; Robert J. Antonio and Douglas Kellner, "Communication, Modernity, and Democracy in Habermas and Dewey," *Symbolic Interaction* 15 (1992): 277.

⁴ Alan Ryan, *John Dewey and the High Tide of American Liberalism* (New York: W.W. Norton & Company, 1995), 19; Robert B. Westbrook, *John Dewey and American Democracy* (Ithaca, N.Y.: Cornell University Press, 1991), ix.

⁵ Westbrook, *John Dewey and American Democracy*, x.

⁶ Lasse Thomassen, *The Derrida-Habermas Reader* (Chicago: University of Chicago Press, 2006), 1; Peter Dews, *Autonomy & Solidarity: Interviews with Jürgen Habermas* (London: Verso, 1992), 1.

communication in democratic society.⁷ Philosopher Richard Rorty, who was heavily influenced by Dewey's pragmatism, contended that both Dewey and Habermas could be considered distinct in that they focused on ideas based on shared social effort.⁸ He contrasted their approaches with philosophers such as Martin Heidegger and Michael Foucault, who focused on the private, individual, and internal processes of understanding and meaning.⁹ While those who were more internally focused thinkers sought understandings of self-created, autonomous existence, Habermas and Dewey focused on "the effort to make our institutions and practices more just and less cruel."¹⁰ Importantly, Rorty's insight into the fundamental differences between the approaches of other thinkers and those of Dewey and Habermas is a key reason the essential ideas of the latter two are examined in this chapter. Dewey and Habermas are distinct among modern philosophers in the way they understood and examined communication in democratic society.

The Centrality of Communication in the Public Sphere

Habermas's conceptualization of what he most prominently described as the "public sphere" centered on the necessity of communication that is focused on creating knowledge and understanding in society.¹¹ He articulated the public sphere as an

⁷ Antonio and Kellner, "Communication, Modernity, and Democracy in Habermas and Dewey," 277-278. The authors argue the connection between Dewey and Habermas has been under-researched and that Habermas's work follows in Dewey's footsteps.

⁸ Richard Rorty, *Contingency, Irony, and Solidarity* (Cambridge: Cambridge University Press, 1989), xiii xiv.

⁹ *Ibid.*, xiii-xiv

¹⁰ *Ibid.*, xiv.

¹¹ Jürgen Habermas, *On the Pragmatics of Communication* (Cambridge, Mass.: MIT Press, 1998), 412-413.

essential space reserved for communication in democratic society.¹² To that end, Habermas's understanding of the public sphere is that it requires certain nurturing and protective elements. Those elements include people who are invested in working together to solve the problems faced by society, independent media that provide the fodder for informed discussion about those problems, and a clear division between governmental and private roles in society.¹³ For Habermas, the public sphere flourishes when these elements are present. Habermas contended, however, that when these elements wane, communication, within his public-sphere framework, struggles. Habermas formulated that if members of the public cease to engage in working with others to solve society's problems,¹⁴ if the independent media provide too little attention to the information needed for rational discussion,¹⁵ or if the government trespasses into the space the public sphere occupies between the state and people's private lives,¹⁶ then the public sphere will cease to function properly.

While Habermas's initial work on the public sphere was published in 1961,¹⁷ its key aspects remain relevant to the discussion regarding communication in a democratic society. Castells, for example, used Habermas's conceptualization of the public sphere to examine communication networks and global society.¹⁸ Howard Rheingold, one of the pioneers in virtual communities and other online-communication scholarship,

¹² Manuel Castells, "The New Public Sphere: Global Civil Society, Communication Networks, and Global Governance," *The Annals of the American Academy of Political and Social Sciences* 616 (2008), 78.

¹³ Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Bourgeois Society*, trans. Thomas Burger and Frederick Lawrence (Cambridge, Mass.: MIT Press, 1999), 14-26.

¹⁴ *Ibid.*, 136.

¹⁵ *Ibid.*, 169-170.

¹⁶ *Ibid.*, 142.

¹⁷ The book was not translated into English until 1989.

¹⁸ Castells, "The New Public Sphere: Global Civil Society, Communication Networks, and Global Governance," 78.

incorporated the concept of the public sphere into an examination of how new technology can be used to encourage civic engagement in young people.¹⁹ Habermas himself has continued to apply and refine the concept. In 2006, Habermas emphasized that an independent public sphere remains an integral part of modern democracy.²⁰ He also concluded that the same forces that he initially outlined as factors that weaken the public sphere remained persistent threats to deliberation. Habermas postulated that the goal-oriented voices, those that seek to persuade rather than conduct communication for the purpose of reaching an understanding, have “colonized” the public sphere, limiting the public’s ability to come together to solve its problems through communication.²¹ The philosopher’s concern regarding the problems created by strategic forms of communication relates to one of his central contributions to how communication is understood: the theory of communicative action. Habermas explained that communication that is oriented toward reaching understanding is the central and purest form communication.²² Other forms of communication are viewed as “derivatives” of communication aimed at agreement.²³ Central to his theory is the requirement that “participants in communication be prepared to reach an understanding and that they

¹⁹ Howard Rheingold, “Using Participatory Media and Public Voice to Encourage Civic Engagement,” in *Civic Online Life: Learning How the Media Can Engage Youth*, ed. W. Lance Bennett (Cambridge, Mass.: MIT Press, 2008).

²⁰ Jürgen Habermas, “Political Communication in Media Society: Does Democracy Still Enjoy an Epistemic Dimension? The Impact of Normative Theory on Empirical Research,” *Communication Theory* 16, no. 4 (2006): 412.

²¹ *Ibid.*, 422.

²² Habermas, *On the Pragmatics of Communication*, 21.

²³ Habermas, *On the Pragmatics of Communication*, 21; Jürgen Habermas, *The Theory of Communicative Action, Vol. 1: Reason and the Rationalization of Society*, trans. Thomas McCarthy (Boston: Beacon Press, 1984), 397.

raise claims of truth, truthfulness, and rightness, and reciprocally impute their satisfaction.”²⁴

Habermas also examined the role of the mass media in a modern democracy in his more recent work. He contended that the press can only facilitate deliberation in a democracy when the press is self-regulated and its sources allow “feedback between an informed elite discourse and a responsive civil society.”²⁵ He recognized elitist and commercial concerns that envelope the media while emphasizing that journalists are a required part of his understanding of how the public sphere functions.²⁶ He asserted that when people receive information and are able to deliberate, they are more likely to change their minds and make more informed choices. When people do not have access to the type of information journalism has traditionally provided, the type that Habermas envisioned as nourishing the public sphere, people are more likely to become polarized.²⁷ Habermas emphasized that an independent press remains one of the key components to the institutional design needed for democratic deliberation to operate.²⁸ To Habermas, the media provide information to the public sphere, which acts as a connector between face-to-face discussions among the public and those who are a part of the political system.²⁹ The flow operates in both directions as politicians and interest groups seek legitimacy in their work through communicating messages to the public sphere and the public sphere, along with community advocacy groups, raises concerns and issues to be addressed by the politicians, who occupy the center of Habermas’s

²⁴ Habermas, *On the Pragmatics of Communication*, 53.

²⁵ Habermas, “Political Communication in Media Society,” 411-412.

²⁶ *Ibid.*, 416.

²⁷ *Ibid.*, 414.

²⁸ *Ibid.*, 412.

²⁹ *Ibid.*, 415.

model.³⁰ In discussing the growth of citizen publishers on the Internet, Habermas argued that their work produced information, but it did not provide the same type of informational support to the public sphere that traditional media supplied.³¹ He wrote that the many citizen publishers create fragmentation and turn “politically focused mass audiences into a huge number of isolated issue publics.”³²

Temporal Publics in Democratic Societies

Habermas’s conceptualization of the public sphere focuses on a largely stable, constant body of deliberative communication in democratic society. He characterized the emergence of “the public sphere” as the “sphere of public authority.”³³ Similarly, in more recent work, he explained a communication dynamic that included “securing the diversity of independent media, and a general access of inclusive mass audiences to *the* public sphere.”³⁴ Dewey provided a different, more-temporal and plural model of the formation of “publics” in democratic society. To Dewey, publics form around problems, issues, or interests.³⁵ When the concerns that lead to the creation of a public are alleviated, solved, or pass, the public is likely to dissolve.

This approach from Dewey relates to his fundamental understanding of the difference between “public” and “private.” Dewey postulated that interactions between parties that do not have consequences for others are private.³⁶ An action becomes public when its consequences go beyond those immediately concerned and affect the welfare

³⁰ Ibid., 415-416.

³¹ Ibid., 423.

³² Ibid., 423.

³³ Habermas, *The Structural Transformation of the Public Sphere*, 18.

³⁴ Habermas, “Political Communication in Media Society,” 412 (emphasis added).

³⁵ John Dewey, *The Public and its Problems* (Athens, Ohio: Ohio University Press, 1954), 35.

³⁶ Ibid., 12.

of others.³⁷ He asserted, “Those indirectly and seriously affected for good or for evil form a group distinctive enough to require recognition and a name. The name selected is The Public.”³⁸ In relation with these ideas, Dewey argued that it is essential and inherent in people’s nature to associate.³⁹ These associations take the form of publics when “indirect, extensive, enduring and serious consequences of conjoint and interacting behavior call a public into existence having a common interest in controlling these consequences.”⁴⁰ A governed state is formed in response to publics, groups of people concerned about coming to an understanding about a problem or issue. More directly, publics sometimes create governments or governmental functions to address those concerns.⁴¹ It is noteworthy that these governmental entities can outlast their use, kept in place perpetually, long after the reasons for their formation have passed and the public or publics that formed them dissipate.⁴² Political forms, Dewey emphasized, can even work to limit future deliberation that new publics embark upon because the public “cannot use inherited political agencies.”⁴³

Dewey did not view forms and vehicles of government, such as courts and legal documents, legislators and presidents, as the constituent driving forces of democracy. Dewey viewed democracy as a way of life, and was concerned that many saw democracy as something distant and removed from their lives.⁴⁴ In this sense, Dewey’s conceptualization can be seen as relating with Habermas’s articulation of the public

³⁷ Ibid., 13.

³⁸ Ibid., 35.

³⁹ Ibid., 11.

⁴⁰ Ibid., 126.

⁴¹ Ibid., 27.

⁴² Ibid., 30-31.

⁴³ Ibid.

⁴⁴ John Dewey, “Creative Democracy,” in *The Essential Dewey, Vol. 1: Pragmatism, Education, Democracy*, ed. Larry A. Hickman and Thomas M. Alexander (Bloomington, Ind.: Indiana University Press, 1998), 341.

sphere. Habermas viewed the engagement of the middle class in the seventeenth century as a key ingredient in the creation of the public sphere. He also saw the development of a consumer culture, versus an engaged body of people, as one of the downfalls of the public sphere.⁴⁵ Similarly, Dewey wrote in favor of engagement, via understanding-based communication. He contended:

Democracy as a way of life is controlled by personal faith in personal day-by-day working together with others. Democracy is the belief that even when needs and ends or consequences are different for each individual, the habit of amicable cooperation — which may include, as in sport, rivalry and competition — is itself a priceless addition to life.⁴⁶

In this sense, communication is integral to Dewey's conceptualization of publics, and deliberation within publics is central to democratic self-governance.⁴⁷

Knowledge Through Communication

It is not enough that publics are free to form — they have to communicate.⁴⁸ Only through communication, Dewey argued, can publics contribute to society.⁴⁹ This concept relates to Dewey's broader ideas regarding the nature and place of knowledge in individuals and society. He contended that man's "quest for certainty can be fulfilled in pure knowing alone."⁵⁰ To this end, he stated that superstition, philosophy, and science are each by themselves incapable of providing certainty and security for man.⁵¹ Only knowledge, gleaned from communication, can guide publics.⁵² In this realm, Dewey's ideas provide support for the value of both interpersonal and mass communication in society. Dewey identified the importance of "free gatherings of

⁴⁵ Habermas, *The Structural Transformation of the Public Sphere*, 169.

⁴⁶ Dewey, "Creative Democracy," 342.

⁴⁷ Dewey, *The Public and its Problems*, 184.

⁴⁸ Dewey, "Creative Democracy," 342.

⁴⁹ Dewey, *The Public and its Problems*, 142.

⁵⁰ John Dewey, *The Quest for Certainty* (New York: Minton, Balch & Company, 1929), 8.

⁵¹ *Ibid.*, 13-16.

⁵² John Dewey, "The Inclusive Philosophic Ideal," in *The Essential Dewey, Vol. 1*, 313.

neighbors” and “gatherings of friends in living rooms” as central to publics’ abilities to solve problems.⁵³ The conversations that occur at these gatherings related to Dewey’s broader understanding of how the emergence of knowledge occurs through communication. These ideas also relate, though the wording and setting are quite different, with the coffeehouse conversations discussed by Habermas in his explication of the formation of the public sphere.⁵⁴ In both cases, comings together by groups of people, for the purpose of understanding, were used to discuss ideas and issues facing those communities.

These gatherings, and their role in forming knowledge, both on personal and public levels, are conceptually different than the traditional Miltonian-based marketplace of ideas. British author and philosopher John Milton’s discussion of the free exchange of ideas was based on competition between truth and falsity. Milton wrote, “Where there is much to learn, there of necessity will be much arguing, much writing, many opinions; for opinion in good men is but knowledge in the making.”⁵⁵ Habermas’s and Dewey’s understandings related with Milton’s view regarding deliberative communication as a driver for knowledge among groups of people. They depart somewhat, however, regarding the “arguing” and “competition” aspects of the idea. Habermas and Dewey conceptualized knowledge as emanating from amicable discussion among people who share common problems, issues, or interests, for the purposes of solving problems or garnering knowledge through association.⁵⁶ The pivotal difference between the marketplace of ideas and the discursive models outlined

⁵³ Dewey, “Creative Democracy,” 342.

⁵⁴ Habermas, *The Structural Transformation of the Public Sphere*, 42.

⁵⁵ John Milton, *Areopagitica and of Education*, ed. George H. Sabine (Arlington Heights, Ill.: Harlan Davidson, 1951), 45.

⁵⁶ Dewey, *The Public & its Problems*, 150.

by Habermas and Dewey is the matter of competition between ideas.⁵⁷ Rather than ideas independently presenting themselves for consideration in the marketplace, Habermas explained that reaching understanding presents the opportunity for all involved to communicate and to reach a new definition of the issue or problem.⁵⁸

Mass communication also plays a role in Dewey's and Habermas's conceptualizations of how publics operate and, within that operation, how knowledge emerges through interactions between individuals. They viewed the media as providing the initial fodder publics utilize to begin deliberation about issues and problems. Dewey wrote that "public policy cannot be generated unless it be informed by knowledge, and this knowledge does not exist except when there is systematic, thorough, and well-equipped search and record."⁵⁹ Dewey, however, saw much of the media's ability to connect people as unrealized. He found that the tools for communication had evolved significantly in the early part of the twentieth century, but the way the new technologies were being utilized was not conducive to sharing knowledge for the purpose of meaningful deliberation.⁶⁰ Dewey lamented that events were being reported without connections or context regarding how they related to other ideas.⁶¹ Dewey's placement of the mass media as central to informing publics carries some similarity to Habermas's placement of the early press as a necessity to informing the emerging merchant class in the seventeenth century.⁶² Habermas wrote that "media professionals" are needed for the public sphere to function.⁶³ He also recognized that journalists are subject to

⁵⁷ John Dewey, "Renascent Liberalism," in *The Essential Dewey, Vol. 1*, 328.

⁵⁸ Habermas, *On the Pragmatics of Communication*, 24.

⁵⁹ Dewey, *The Public & its Problems*, 179.

⁶⁰ Ibid.

⁶¹ Ibid., 180.

⁶² Habermas, *The Structural Transformation of the Public Sphere*, 16.

⁶³ Habermas, "Political Communication in Media Society," 416.

influence by interest groups such as politicians, lobbyists, and “moral entrepreneurs.”⁶⁴ Habermas, however, did not describe this as a problem as much as a matter of fact. He wrote, for example, “Media professionals produce an elite discourse, fed by actors who struggle for access to and influence on the media.”⁶⁵ Despite his concerns, in his early investigations of the public sphere and his later writings, Habermas made journalism a key part of his ideas regarding how the public sphere is nourished with information. In the context of this section, Dewey and Habermas both place the media in a key role because their conceptualization of deliberative communication is based on the idea that knowledge emerges from informed interactions with others, and therefore, deliberation among people requires a baseline of relevant information.

Concepts of Freedom in Communities

The vital functions in a democracy of publics, groups of people who come together to generate knowledge to solve problems or pursue common interests, cannot occur without the freedoms to communicate and gather. To this end, Habermas and Dewey emphasized the need to protect both interpersonal and mediated communication. Dewey wrote, “The heart and final guarantee of democracy is in free gatherings of neighbors on the street corner to discuss back and forth what is read in uncensored news of the day, and in gatherings of friends in the living rooms of houses and apartments to converse freely with one another.”⁶⁶ Similarly, Habermas made the autonomy to think and communicate a central part of his requirements for the functioning of a modern democracy. In regard to government, he asserted that the only regulation should be that which secures the independence of the public sphere from the state and the “diversity of

⁶⁴ Ibid.

⁶⁵ Ibid., 417.

⁶⁶ Dewey, “Creative Democracy,” 342.

independent mass media, and a general access of inclusive mass audiences to the public sphere.”⁶⁷ Dewey and Habermas were not solely concerned with government interference with freedom of expression and the flows of information throughout society. They also feared society itself would choose to choke off or devalue the knowledge-fostering communication needed for democracy to function. Dewey wrote, “Merely legal guarantees of the civil liberties of free belief, free expression, free assembly are of little avail if in daily life freedom of communication, the give and take of ideas, facts, experiences, is choked by mutual suspicion, by abuse, by fear and hatred.”⁶⁸ In another work, Dewey argued, “It is false that freedom of inquiry and of expression are not modes of action. They are exceedingly potent modes of action.”⁶⁹ To that end, Dewey and Habermas cautioned against both government-originated attacks on the freedom to communicate as well as internal, societal limitations on inquiry and the flow of information.

Networks, Communication, and Community

The ways that Dewey and Habermas conceptualized communication, community, and social action bears commonalities with the second stream of philosophical conceptualizations of communication in a democratic society in this chapter, which examines the way that computerized network communication is understood by scholars. Online communication has shifted the ways individuals in communities identify themselves and the ways that power relationships function on local, national, and global levels. This section focuses on Castells’s ideas because they have shown themselves to be central to understanding how communication and

⁶⁷ Habermas, “Political Communication in Media Society,” 412.

⁶⁸ Dewey, “Creative Democracy,” 342.

⁶⁹ Dewey, “Renascent Liberalism,” 326.

community operate in the “network society.”⁷⁰ To Castells, the term “network society” refers to the social structure that has emerged as a result of the formation of global-digital networks.⁷¹ He contended that the social structure is constructed around digital communication networks and that such networks do not determine social structure.⁷² The network society, to Castells, fundamentally refers to an information revolution and, as a result, an emerging global-social structure that is influencing the way people live on every level.⁷³ Castells argued that the characteristics of the network-society revolution are different than those of previous eras. He postulated that the network society is uniquely characterized by the facts that information is the primary raw material of the new era, that new technologies are being used pervasively in society, that computerized networks have created unprecedented levels of interaction among people, that new technologies are relatively flexible in the ways that they can be used, and that new technologies have converged into integrated systems.⁷⁴ These characteristics of the network era separate it from its predecessors and influence the way people communicate, Castells contended.

While a flood of scholarship has emerged regarding how networked communication is understood and its effects on society, Castells’s ideas provide a unique perspective in that he is involved in sociological, public policy, and community-planning aspects of understanding how network technology is changing people’s lives.⁷⁵

⁷⁰ Johan Muller, Nico Cloete, and Shireen Badat, *Challenges of Globalisation: South African Debates with Manuel Castells* (Cape Town: Maskew Miller Longman, 2001), v-viii.

⁷¹ Castells, *Communication Power*, 4.

⁷² Ibid.

⁷³ Castells, *The Rise of the Network Society*, 1.

⁷⁴ Ibid., 70-71.

⁷⁵ “Manuel Castells,” USC Annenberg School for Journalism and Communication, accessed February 25, 2013, <http://annenberg.usc.edu/Faculty/Communication-%20and%20Journalism/CastellsM.aspx>.

The areas from which he draws his ideas for how the network era is to be understood are uniquely suited to the broader questions of this dissertation. No other scholar has focused as directly or prolifically on the impact of the network society on communities and communication.⁷⁶ In addition, this section utilizes media scholar Brian McNair's ideas to consider ways in which the discursive concepts put forth by Dewey and Habermas can be related to the idea of a global-public sphere that is emerging through the advancement of the network society. This section in particular focuses on the role McNair visualized for journalism in the network era. McNair asserted a slightly different visualization of Habermas's concept of the public sphere, proposing a global-social structure that includes many public spheres that are tied together by a three-tiered media system. McNair's broader discussion of communication in a globalized world is based on the "chaos paradigm," which refers to the non-linear, decentralized, interconnected, and largely contingent nature of how information is exchanged in the network society.⁷⁷

Government and Communication Power Dynamics

Castells approached power dynamics in the network era from the position that all social structures are based on power relationships.⁷⁸ The "power" he referred to, in this instance, is not necessarily related to force or the threat of force. Power, as Castells defined it, can be exercised as violence or communication, coercion and persuasion, or

⁷⁶ Peter Monge and Noshir Contractor, for example, have examined the economic, political, societal, and cultural changes that have occurred as a result of the emergence of the network society. Their focus, however, has been more on organizational communication than on the discursive ideas that are tied to Castells's work. See Peter R. Monge & Noshir S. Contractor, *Theories of Communication Networks* (Oxford: Oxford University Press, 2003).

⁷⁷ McNair, *Cultural Chaos*, xi-xii.

⁷⁸ Castells, *Communication Power*, 13.

political and cultural framing.⁷⁹ The power is made a part of institutions and organizations, and a part of government. To that end, Castells's consideration of power dynamics in the network society started by examining Habermas's ideas regarding how power is legitimized in democratic society.⁸⁰ He supported Habermas's position that communicative action is the source of meaning-creation in society.⁸¹ Castells argued a democratic state maintains its power through legitimacy and that legitimacy is preserved by a flow of communication from the discursive process within the public sphere to representatives of the people who move to exercise power. He wrote that power, in this instance, "is what ensures democracy and ultimately creates the conditions for legitimate exercise of power."⁸²

Networked communication is changing some of these fundamental dynamics. Castells contended that the network society is one in which the social structure is built around a computerized network of communication tools and information.⁸³ The network society, to Castells, is a global society, and its boundaries are not based on physical, geographic lines, as in societies of the past.⁸⁴ As a result, a unique power exchange occurs. On one hand, nations have lost power in the network society because their governments are established on the basis of geographically outlined boundaries, but the meaning-making and communication functions that are central to government are now global.⁸⁵ Also, the global nature of the network revolution has reduced the powers governments have to control the flow of information, communication, technology,

⁷⁹ Ibid., 50.

⁸⁰ Ibid., 12.

⁸¹ Ibid., 12.

⁸² Ibid.

⁸³ Ibid., 24.

⁸⁴ Ibid., 25.

⁸⁵ Ibid., 25-26.

capital, goods, and services across their borders and to their people.⁸⁶ Fluctuations in economic markets, for example, are no longer primarily tied to national financial considerations. Managing these global fluctuations is often out of the control of national governments. On the other hand, governments continue to have substantial influence on how societies form and operate — even a networked society that has no physical boundaries.⁸⁷ Castells theorized that the result of the continuing interplay between governments losing their power and influence on communication in society and their attempts to retain it will lead to the creation of the network state.⁸⁸

Philosophically, Castells identified the network state as the fruition of Habermas's ideas regarding communication in society.⁸⁹ Part of this relationship with Habermas's ideas is the result of the increasing role communication can play when citizens have more power in how they are governed.⁹⁰ The information and communication bases of the move to the network era shifts some of the power from the institutions in society to citizens.⁹¹ In an attempt to retain power, governments have formed pacts among nations. Examples include the European Union and the North American Free Trade Agreement, where some sovereignty was given up to protect an area of weakening power. By banding together, nations can help protect financial or military power, but they also lose some power to represent their immediate, physical constituencies.⁹² Castells wrote, "In the past ten years, nation-states have moved from

⁸⁶ Manuel Castells, *The Power of Identity: Economy, Society, and Culture* (Malden, Mass.: Wiley-Blackwell, 2010), 301.

⁸⁷ Castells, *Communication Power*, 27.

⁸⁸ *Ibid.*, 39.

⁸⁹ Castells, *The Power of Identity*, 350.

⁹⁰ Castells, *Communication Power*, 40.

⁹¹ Castells, *The Power of Identity*, 22; Castells, *Communication Power*, 40.

⁹² Castells, *The Power of Identity*, 419; Castells, *Communication Power*, 39-40.

sovereignty to social actors in a network. They play for their interests in a global system of interaction.”⁹³

The power shift governments face affects communication in society in two ways: some of the power has gone to powerful media entities that have concentrated their ownership, and some of the power has gone to the people who were once thought of as the audience.⁹⁴ In both cases, the conceptual elements that form these groups are not tied to national boundaries. Therefore, these groups, unlike physically bordered nations, are not hindered by globalization. Media companies have taken advantage of deregulation in many parts of the world to form large conglomerates.⁹⁵ Castells contended that the move toward large conglomerates that own the majority of the media outlets, along with other moves to control the Internet for economic purposes, are limiting free expression in ways that are more dangerous than governmental uses of power.⁹⁶ He wrote, “While the attention of the world was focused on free expression on the Internet, the transformation of the communication infrastructure into a series of ‘walled gardens’ . . . [has] imposed fundamental constraints upon the expansion of the new digital culture.”⁹⁷

While governmental and economic shifts in power have influenced the network society, the change in information usage and communication capability for individuals has been most profound. The revolution that brought about the network-society era was based on information technology.⁹⁸ The revolution went beyond a set of centralized

⁹³ Castells, *The Power of Identity*, 365.

⁹⁴ Castells, *Communication Power*, 70.

⁹⁵ *Ibid.*, 100.

⁹⁶ *Ibid.*, 107.

⁹⁷ *Ibid.*

⁹⁸ Castells, *The Rise of the Network Society*, 29.

information and created a cycle of information creation and processing using communication devices. Castells described this as a “feedback loop between innovation and the uses of innovation.”⁹⁹ The feedback loop has placed the power to choose and communicate messages in the hands of individuals. In this sense, according to Castells’s ideas regarding power, if communication is central to control and power in society, much of that power has been transferred to individuals. He wrote, “With the diffusion of the Internet, a new form of interactive communication has emerged, characterized by the capacity of sending messages from many to many, in real time or chosen time.”¹⁰⁰ Castells asserted that the shifts in power taking place in the network society have allowed citizens to take some measure of control in communication. He declared, “Social actors and individual citizens around the world are using the new capacity of communication networking to advance their projects, to defend their interests, and to assert their values.”¹⁰¹

Identity in the Network Society

Individual and group identities play a vital role in the shifts in power structures and overall changes brought about by the network-society era. The network is global in reach and influence and, as a result, a unique interplay between local and global influence is playing out in communities around the world. Members of physically localized communities reach out for information found on the globalized network and, at the same time, defensively turn inward, to local communities, for identity and protection from the societal shifts the network society’s emergence has helped to

⁹⁹ Ibid., 31.

¹⁰⁰ Castells, *Communication Power*, 55.

¹⁰¹ Ibid., 57.

create.¹⁰² Castells asserted that while the Internet creates uncertainty, groups shrink “the size of human experience to a dimension that can be managed and defended by people feeling lost in the whirlwind of a destructured world.”¹⁰³ This move toward localized identities addresses one of two shifts in how people view themselves as a result of the emergence of the network society. People are forming “communes,” or groups that use “resistance identities,” to define the world around them.¹⁰⁴ Resistance identities, to Castells, form in individuals as a type of defense against rapid, uncontrolled shifts in the society around them.¹⁰⁵ He postulated that the globalized nature of the network society has intensified the construction of resistance identities around the world. Resistance identities, Castells wrote, are built utilizing carefully selected and commonly rewritten local histories, religious beliefs, and ethnic influences.¹⁰⁶ Communes represent collectives that are formed by those who share common resistance identities.¹⁰⁷ At the same time these defensive identities and communes are forming, others are reaching across geographic boundaries to encounter previously unavailable information and to form virtual communities with those who share common interests.¹⁰⁸

The underlying uncertainty that is caused by fundamental changes in economics, social institutions, culture, media, and education, and is driven by expanding network-communication technologies has caused many to redefine their identities in ways that reconstruct the world using specifically and intentionally defined building materials

¹⁰² Castells, *The Power of Identity*, 68-69.

¹⁰³ *Ibid.*, xxiii.

¹⁰⁴ *Ibid.*, 8.

¹⁰⁵ *Ibid.*, xxvi.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*, 9.

¹⁰⁸ *Ibid.*, 22.

from history, nationalism, religion, and culture.¹⁰⁹ Castells wrote that, in a world of “uncontrolled, confusing change, people tend to regroup around primary identities: religious, ethnic, territorial, national.”¹¹⁰ These identities are different than primary understandings in that they form a defensive response to uncertainty. They are created as castles to protect against a changing, hostile world.¹¹¹ These identities are a *reaction* to perceived threats and uncertainty. Castells concluded, “Identity is becoming the main, and sometimes the only, source of meaning in a historical period characterized by widespread destructuring of organizations, delegitimation of institutions, fading away of major social movements, and ephemeral cultural expressions.”¹¹²

On the community level, these resistance identities lead to the formation of communes. Communes pull from the same materials that are traditionally understood by scholars as the building blocks of identity. To that end, Castells asserted, “These defensive reactions become sources of meaning and identity by constructing new cultural codes out of historical materials.”¹¹³ Communes are not formed on the basis of reason or fact, but are formed on beliefs, Castells postulated.¹¹⁴ Castells related the formation of these resistance communes to the growth of religious fundamentalism around the world. He also explained that these communes are a threat to democratic government because they represent groups that are turning inward, away from communication that is based on creating understanding in society. Castells argued these commune groups “cannot, and will not sustain democracy (that is, liberal democracy)

¹⁰⁹ Ibid., 8-9.

¹¹⁰ Castells, *The Rise of the Network Society*, 3.

¹¹¹ Castells, *The Power of Identity*, 68.

¹¹² Castells, *The Rise of the Network Society*, 3.

¹¹³ Castells, *The Power of Identity*, 69

¹¹⁴ Ibid.

because the very principles of representation between the two systems (national citizenship, singular identity) are contradictory.”¹¹⁵ In this sense, democracy is undermined by the formation of communes that emerge as a result of uncertainty that is partially created by the weakening of traditional governmental power structures.

Castells’s ideas regarding how democracy can be reformed and how the defensive walls of communes can be lowered relate to virtual communities and the creation of relationships between people using network technology. He asserted that the same technologies that have contributed to uncertainty and defensive identities can be used to bring people together and to encourage participation in government.¹¹⁶ Castells argued that local governments in democratic nations have shown the ability to use technology to increase connections between groups and the problems in their communities.¹¹⁷ The Internet allows people to have access to information and to share it in ways that facilitate communication about issues, problems, and interests. In this sense, the Internet helps to facilitate Dewey’s and Habermas’s ideas regarding communication in democracy. The new technologies also bypass the media’s traditional gatekeeping role.¹¹⁸ Castells wrote, “Access to the Internet, which bypasses the controlled world of the mass media, has democratized information, making it less dependent on money and political bureaucracies.”¹¹⁹ This conclusion, however, does not mean the media no longer play a central role in Castells’s conceptualization of the network society. Media organizations occupy central roles in communication networks,

¹¹⁵ Ibid., 403.

¹¹⁶ Ibid., 415.

¹¹⁷ Ibid.

¹¹⁸ Ibid.

¹¹⁹ Castells, *The Rise of the Network Society*, xxxiii-xxxiv.

but alongside them are virtual communities that form around interests.¹²⁰ In many ways, the communities resemble the publics Dewey described,¹²¹ because, as Castells characterized them, they are “fragmented, localistic, single-issue oriented and ephemeral.”¹²² Virtual communities create horizontally oriented communication dynamics that Castells conceptualized as being “built around people’s initiatives, interests, and with desires that are multimodal and incorporate many kinds of documents.”¹²³

Networks as the Carriers of the Global Public Sphere

McNair took many of the concepts that were put forth by Castells regarding the network society and related them to Habermas’s conceptualization of the public sphere in order to assert the possibility of an emerging global-public sphere.¹²⁴ Like Castells, McNair argued that the globalized nature of the network society has undermined political, social, and journalistic institutions.¹²⁵ He also recognized that the network society has both connected people to information in new ways and caused ideological divides.¹²⁶ Finally, McNair argued democracy and the media are historically tied to one another — as one experiences expansion and freedom, the other does as well.¹²⁷ These understandings regarding the network and the relationship between democracy and journalism undergird McNair’s ideas regarding the global-public sphere.

In constructing his global model, McNair departed from Habermas’s initial conceptualization of the public sphere, postulating that it is not a singular realm, but

¹²⁰ Castells, *Communication Power*, 419.

¹²¹ Dewey, *The Public and its Problems*, 35.

¹²² Castells, *The Rise of the Network Society*, 3.

¹²³ Castells, *Communication Power*, 67.

¹²⁴ McNair, *Cultural Chaos*, 140-141.

¹²⁵ *Ibid.*, 9-11.

¹²⁶ *Ibid.*, 9-10.

¹²⁷ *Ibid.*, 56-57.

rather that there are many public spheres within a broader public sphere.¹²⁸ McNair asserted that the public sphere comprises “a virtual, cognitive multiverse of spheres within spheres; sets of cultural institutions serving overlapping, intersecting, interconnected communities . . . linked by their shared consumption of the information contained in particular media.”¹²⁹ In McNair’s understanding of public spheres, the media play a substantial, connective role that in some ways is elevated in comparison to what Habermas asserted in his original articulation of the idea. The media, to McNair, act as tying agents, pipelines that cross physical boundaries. The theorist articulated three media-based vehicles that work together to make a global-public sphere possible: (1) national-public spheres, (2) transnational-satellite news, and (3) the Internet.

The national-public spheres, in McNair’s formulation, are fed and linked by traditional-print and broadcast-media outlets.¹³⁰ McNair contended that the media on this level, in their diversity of styles and forms, combine to create a singular national-public sphere.¹³¹ He wrote, “National media (including local and regional) remain the dominant providers of information within nation-state boundaries, and will do so for some time to come.”¹³² The transnational-satellite-news networks, such as CNN and Al Jazeera, make up the second tier of McNair’s media-based conceptualization of the global-public sphere. These news sources play a connective role in that their information is geared toward international audiences.¹³³ They are not, however, connective in the sense that they are a network or operate in the more-horizontal

¹²⁸ Ibid., 137.

¹²⁹ Ibid.

¹³⁰ Ibid., 141.

¹³¹ Ibid., 137.

¹³² Ibid., 141.

¹³³ Ibid., 142.

dynamic of network communication. McNair wrote this type of media are “conveyor belts of always-on information, running in parallel.”¹³⁴ The third tier, the Internet, represents the true global-connective tissue in McNair’s scheme. The Internet brings together websites from traditional news outlets and citizen publishers, and the messages on the sites are created in nation-states but the content connects “communication environments, or public spheres of those locations, to the world wide web, which encloses everything within it in a network of independent voices.”¹³⁵ Though the three tiers work together to create McNair’s vision of the global-public sphere, the Internet tier serves two roles. The first two tiers, and the Internet tier, are conceptualized as providing the baseline of information public spheres need, locally and globally, to facilitate communication regarding problems and issues. The Internet tier, however, also mimics the coffeehouses Habermas discussed in that it provides a forum for discussion.¹³⁶

McNair did not claim the global-public sphere is fully formed. Much as Habermas outlined forces that led to the demise of the eighteenth-century public sphere he examined, McNair asserted that certain conditions could quash the global-public sphere’s formation — or encourage its growth. He contended that people must have access to information, the information must be of high-enough quality to provide the baseline of knowledge needed, and the public must be capable of absorbing the flood of information created by the network society.¹³⁷ Only the third concern is distinct from Habermas’s original concerns. McNair, who comes from a critical approach that is not

¹³⁴ Ibid.

¹³⁵ Ibid., 143.

¹³⁶ Habermas, *The Structural Transformation of the Public Sphere*, 42.

¹³⁷ McNair, *Cultural Chaos*, 153.

too distant from Castells's views, focused much of his attention on access and media freedoms, asserting that elites in society who have lost control of media messages and other forms of control in the network society might seek to regulate and limit the flow of information, use coercive techniques to limit offending voices, or use persuasive messages to flood the sphere with manipulative communication.¹³⁸ Again, these concerns relate to Habermas's key assertions regarding the necessity for a free flow of information in order for the public sphere to flourish.

Communication in the Network Era

The third stream of philosophical conceptualizations regarding the role of communication in a democratic society in this chapter is concerned with mediated communication in the twenty-first century. The authors in this stream built upon Dewey's and Habermas's ideas regarding the formation of publics and the role of communication in democratic society and applied them to the network-society setting. Jenkins and Clay Shirky examined the characteristics of groups and group efforts online. Jenkins, a media-studies scholar, has focused most of his research on the relationship between people's media use and popular culture.¹³⁹ Of specific value to this section are Jenkins's ideas regarding how people who have an interest in a topic or issue have used online tools to join or create communities. Jenkins focused on the characteristics of online fan communities but considered how the characteristics of these communities could translate into deliberation regarding political matters in the network-society era. Like Jenkins, Shirky has focused much of his writing on the formation of online communities and the influences these communities are having on

¹³⁸ Ibid., 188.

¹³⁹ Jenkins, *Convergence Culture*, 353.

society, especially traditional institutions.¹⁴⁰ The authors put forth insights regarding how people are using new technologies to organize, communicate, and realize their abilities to contribute to society. They did not assert that networked communication has not occurred before but rather sought to highlight how people are using new technologies to network in societally changing ways.

Cass Sunstein, a legal and political-science scholar who has focused much of his research attention on the Constitution and the Supreme Court, contributed a different perspective regarding the effects of online group action. He outlined problems that come with the unique possibilities for communication that are a part of the network-society era. Sunstein did not disparage the emergence of online communities, but articulated a set of constructive concerns that were uniquely informed by his extensive research into the workings of the American legal system.¹⁴¹ Much like Castells and McNair, Shirky, Jenkins, and Sunstein each considered, from different perspectives, how people are using new technologies to shift power structures and identities in democratic society. The ideas regarding power structures and identities found in the second stream of theoretical conceptualizations of the role of communication in a democratic society and the ideas put forth by the authors in the third stream focus on the future of democracy and the advantages and disadvantages of the empowerment and choice made available to individuals in the network society.

¹⁴⁰ Shirky, *Here Comes Everybody*, 21-24. See also Clay Shirky, *Cognitive Surplus: How Technology Makes Consumers into Collaborators* (New York: The Penguin Group, 2010); Clay Shirky, "A Group is its Own Worst Enemy," in *The Best Software Writing I*, ed. Joel Spolsky (New York: Springer-Verlag, 2005):183-209.

¹⁴¹ See for example: Cass R. Sunstein, *Democracy and the Problem of Free Speech* (New York: Free Press, 1993); Cass R. Sunstein, "Interest Groups in American Public Law," *Stanford Law Review* (1985): 29-87; Cass R. Sunstein, *One case at a time: Judicial Minimalism on the Supreme Court* (Cambridge, Mass.: Harvard University Press, 2001).

Twenty-First Century Communicative Structures

The Internet has connected people in new ways and has alleviated many of the traditional barriers to organization.¹⁴² Shirky, much as Dewey contended several decades before, argued that people inherently organize because communication is part of human nature.¹⁴³ For this reason, Shirky asserted that shifts in communication equal shifts in the way society operates.¹⁴⁴ Online communication has allowed people to interact more quickly across greater distances than in the past and it has changed the way people organize, he concluded.¹⁴⁵ The shift has changed society by undermining traditional institutions that have historically been relied upon to foster community.¹⁴⁶ Shirky wrote, “For most of modern life, our strong talents and desires for group effort have been filtered through relatively rigid institutional structures because of the complexity of managing groups.”¹⁴⁷ The structures were created, Shirky postulated, to help solve the problems of community organization with the tools that were available at the time. Shirky argued new tools have become available that make these socializing institutions less central to community.¹⁴⁸ In this sense, Shirky’s and Jenkins’s ideas relate with Castells’s observations regarding how social institutions are being weakened as a result of new technology. Shirky and Jenkins went beyond Castells’s recognition that social institutions are being undermined and circumvented to consider *how* people are using new technologies to organize.

¹⁴² Shirky, *Here Comes Everybody*, 11-12.

¹⁴³ *Ibid.*, 14-15.

¹⁴⁴ *Ibid.*, 17.

¹⁴⁵ *Ibid.*, 12.

¹⁴⁶ Jenkins, *Convergence Culture*, 27; Shirky, *Here Comes Everybody*, 22.

¹⁴⁷ Shirky, *Here Comes Everybody*, 21.

¹⁴⁸ *Ibid.*, 22.

Jenkins explained that online communities, much like the publics described by Dewey, are voluntary and temporary and are formed to solve a problem or address a shared interest.¹⁴⁹ Jenkins added that the Internet has provided the means for people to form interest- or issue-based communities across any distance, putting the focus on the enterprise that binds the group, not on the limitations of who is near enough to contribute. He concluded that online communities are distinct from physical groups because they are based on knowledge and interest. A “knowledge community,” to Jenkins, is formed to take advantage of the aggregate power of the group.¹⁵⁰ The communities form to gather information and process knowledge.¹⁵¹ Within a knowledge community there is a “collective intelligence,” which is “the sum total of information held individually by the members of the group that can be accessed in response to a specific question.”¹⁵² Within the dynamic of knowledge communities, and the collective intelligences they hold, is a shift in paradigms regarding how information is viewed and communicated. Traditionally, the “expert paradigm” has placed the information holder, such as a journalist, in a vertically higher position than the receiver.¹⁵³ Jenkins postulated that knowledge communities are based on a more-horizontal model where it is assumed “each person has something to contribute, even if they will only be called upon on an ad hoc basis.”¹⁵⁴ Knowledge communities are also more disorganized and undisciplined than groups that interact using the expert paradigm.¹⁵⁵ Jenkins asserted, “What holds a collective intelligence together is not the possession of knowledge,

¹⁴⁹ Jenkins, *Convergence Culture*, 27.

¹⁵⁰ Ibid.

¹⁵¹ Ibid., 28.

¹⁵² Ibid., 27.

¹⁵³ Ibid., 53.

¹⁵⁴ Ibid.

¹⁵⁵ Ibid., 54.

which is relatively static, but the social process of acquiring knowledge, which is dynamic and participatory, continually testing and reaffirming the group's social ties."¹⁵⁶ The social ties found in these communities are not, comparatively, as strong as those found in the past in social institutions, such as families or religious organizations. The communities do not require a strong commitment, and if people no longer find their needs met, they leave. Importantly, Jenkins explained that people do not simply leave a group and disappear, they move to another knowledge community.¹⁵⁷ Using wording that shared similarities with Dewey's understanding of publics, Jenkins wrote, "Because they are tactical, they tend not to last beyond the tasks that set them in motion."¹⁵⁸

While Jenkins primarily discussed knowledge communities in connection with fandom, he postulated that they have the potential to contribute to democratic deliberation.¹⁵⁹ Harnessing the abilities of knowledge communities requires a shift in focus from thinking mainly of an individualized informed citizen to a more-collaborative model.¹⁶⁰ This approach lines up with Dewey's understanding of how knowledge is created through communication.¹⁶¹ To explain his idea, Jenkins outlined the concept of the "monitorial citizen," which is based on the idea that the average person cannot keep up with all of the political information being made available in the network era.¹⁶² The idea relates with knowledge-communities concept because it assumes that not everyone can know everything, but each person has something to

¹⁵⁶ Ibid.

¹⁵⁷ Ibid., 57.

¹⁵⁸ Ibid.

¹⁵⁹ Ibid., 29.

¹⁶⁰ Ibid., 219.

¹⁶¹ Dewey, *The Quest for Certainty*, 8.

¹⁶² Jenkins, *Convergence Culture*, 237. Jenkins referred to Michael Schudson's conceptualization of the monitorial citizen. Schudson introduced the idea in *The Good Citizen: A History of American Civic Life* (New York: The Free Press, 1998).

contribute.¹⁶³ The monitorial-citizen concept helps explain how people use new technologies to participate in democratic societies. People are not information-gatherers as much as observers who act when called upon.¹⁶⁴ Jenkins cautioned, however, that this approach required citizens to develop greater critical thinking skills regarding the messages they encounter.

Information Blindness

Jenkins's caution regarding the critical skills that citizens apply to messages they encounter as they monitor the flood of information around them in the network era relates to Sunstein's concerns regarding how democracy can function when people only encounter self-selected messages. Sunstein made the case that the Internet and other new technologies have the potential to improve democratic society, but they also create dangers. Primarily, he listed two requirements for democracies in the network era: citizens must encounter ideas they did not select or intend to encounter, and people must share a range of common experiences.¹⁶⁵ Sunstein lamented that new technologies allow information customization to the point that people only encounter ideas similar to their own. Historically, "general intermediaries" in society — traditional media outlets such as newspapers, for example — helped protect against both of Sunstein's concerns.¹⁶⁶ Sunstein wrote, "People who rely on such intermediaries have a range of chance encounters, involving shared experiences with diverse others, and also exposure to materials and topics that they did not seek out in advance."¹⁶⁷ Much as other authors

¹⁶³ Jenkins, *Convergence Culture*, 238.

¹⁶⁴ *Ibid.*, 237.

¹⁶⁵ Cass R. Sunstein, *Republic.com 2.0* (Princeton, N.J.: Princeton University Press, 2007), 6.

¹⁶⁶ *Ibid.*, 8.

¹⁶⁷ *Ibid.*, 8-9.

stated, the influence of these traditional-media outlets has waned.¹⁶⁸ People skip past stories and ideas they once had to encounter in general intermediaries, such as the assortment of news in the nightly news broadcast, and focus on information that only strengthens preexisting beliefs.¹⁶⁹ Sunstein wrote, “Members of a democratic public will not do well if they are unable to appreciate the views of their fellow citizens, or if they see one another as enemies or adversaries in some kind of war.”¹⁷⁰

Much like Jenkins, and Dewey before him, Sunstein argued collective deliberation is an important part of democratic government.¹⁷¹ Sunstein asserted that this perspective is different than Supreme Court Justice Oliver Wendell Holmes’s marketplace-of-ideas approach. The marketplace approach is more individual-based and is focused on protecting against government censorship.¹⁷² Sunstein argued more is needed in the network era. He explained, citing Dewey, that the government-by-discussion perspective goes beyond protection from censorship to taking part in deliberations to solve the problems of society. Sunstein wrote, “Each of us has rights and duties as citizens, not simply as consumers. . . . Active citizen engagement is necessary to promote not only democracy but social well-being too.”¹⁷³ To Sunstein, individual self-government is not enough; citizens must be engaged with others, something network technology has made more possible than in the past.¹⁷⁴ The consumer-focused marketplace approach, Sunstein argued, encourages polarization,

¹⁶⁸ Sunstein, *Republic.com 2.0*, 9; Shirky, *Here Comes Everybody*, 22; Castells, *The Rise of the Network Society*, xxxiii-xxxiv.

¹⁶⁹ Sunstein, *Republic.com 2.0*, 21.

¹⁷⁰ *Ibid.*, xi.

¹⁷¹ *Ibid.*, 40.

¹⁷² *Ibid.*, 39-40.

¹⁷³ *Ibid.*, 43.

¹⁷⁴ *Ibid.*, 42.

fragmentation, and “cybercascades,” which are untruths that are accepted as truths across the Internet because so many believe them.¹⁷⁵ His approach encouraged community engagement in political deliberation.¹⁷⁶

User-Generated Versus Journalistic Content

The communities that form online, whether they are called knowledge communities or publics, are nourished by information. They are inherently communication-based, since communication is at the center of community.¹⁷⁷ Shirky argued that the definition of what is news has been changed from an institutional understanding based on a professional class of gatekeepers to “part of a communications ecosystem, occupied by a mix of formal organizations, informal collectives, and individuals.”¹⁷⁸ He found that user-generated messages account for a large part of the shift in communication dynamics. User-generated messages are defined by their group-oriented nature and how they are entirely composed and communicated by amateurs.¹⁷⁹ Shirky contended these messages, such as Facebook posts, are often viewed as self-centered, mundane, and of little use to society.¹⁸⁰ He argued that the reason the messages seem useless to many observers is because the communicator is not “talking to you.”¹⁸¹ The messages are narrowly tailored to small communities. Shirky wrote, “We misread these seemingly inane posts because we’re so unused to seeing written material in public that isn’t intended for us.”¹⁸² User-generated content, to

¹⁷⁵ Ibid., 44.

¹⁷⁶ Ibid., 42-44.

¹⁷⁷ Jenkins, *Convergence Culture*, 54; Dewey, *The Quest for Certainty*, 8; Habermas, *On the Pragmatics of Communication*, 21; Castells, *The Rise of the Network Society*, 357.

¹⁷⁸ Sunstein, *Republic.com 2.0*, 66.

¹⁷⁹ Shirky, *Here Comes Everybody*, 83.

¹⁸⁰ Ibid., 85.

¹⁸¹ Ibid., 84-85.

¹⁸² Ibid., 85.

Shirky, is a fundamental part of community activity in the network era.¹⁸³ Shirky compared the small, online conversations that make up much of user-generated content to people speaking to one another at a table in a crowded restaurant or mall food court. He wrote, “They are in the public, and you could certainly sit at the next table over and listen in on them if you wanted to.”¹⁸⁴ To Shirky, community deliberation often occurs at these small-scale levels using user-generated content.

Shirky’s understanding of mediated communication in the network era left little room for traditional media. Newspapers, magazines, and broadcast media were framed as relics that were created to solve the problem of informing the public when different technological limitations existed. Shirky wrote, “The media industries have suffered first and most from the recent collapse in communications costs. It used to be hard to move words, images, and sounds from creator to consumer, and most media businesses involve expensive and complex management of that pipeline problem.”¹⁸⁵ Shirky also identified the traditional media’s editorial process as a holdover from when information was a scarce resource.¹⁸⁶ The network society, he concluded, allows for a system in which publishers send out information and then filter it. Shirky asserted that people have always talked about information, whether they read it in a newspaper or other media source or heard it from someone else. The difference, to Shirky, is people now have the capability of sharing information and talking about it at the same time.¹⁸⁷ By publishing information before filtering it, and discussing it, communities can deliberate

¹⁸³ Ibid., 83-84.

¹⁸⁴ Ibid., 85.

¹⁸⁵ Ibid., 59.

¹⁸⁶ Ibid., 98.

¹⁸⁷ Ibid., 99.

to solve problems or reach understandings, concepts that relate directly with Habermas's and Dewey's foundational ideas regarding democratic communication.¹⁸⁸

Overall, the preceding discussion examined philosophical conceptualizations of communication in democratic society as they relate to this study's broader approach toward proposing a framework for how future courts should interpret the press clause in the network society. These central thinkers postulated that informed deliberation is central to the functionality of a democracy.¹⁸⁹ Within this overall focus, Dewey and Habermas laid out the necessary components for people in democratic society to come together, communicate ideas, and ultimately solve problems. Their discussion of those components emphasized that individuals must be active in their self-government, have access to information that is created by an independent media, and have access to spaces in which they can encounter one another and exchange ideas.¹⁹⁰ Other philosophers put forth understandings regarding how computerized, networked communication has fundamentally altered the way people interact. Castells outlined the changes in power and identity that have arisen as a result of the shift to the network-society social structure that has emerged in recent decades.¹⁹¹ Within this realm, Jenkins and Shirky focused on how online communication allows more people to participate in deliberation and, therefore, contribute their distinct knowledge to solve problems within a variety of communities.¹⁹² Together, these three streams of philosophical

¹⁸⁸ Ibid., 100.

¹⁸⁹ Dewey, *The Public and Its Problems*, 157; Habermas, "Political Communication in Media Society," 413. Charles C. Self, "Hegel, Habermas, and Community: The Public in the New Media Era," *International Journal of Strategic Communication* 4 (2010): 78, 82.

¹⁹⁰ Dewey, "Renascent Liberalism," 326; Dewey, "Creative Democracy," 341; Habermas, "Political Communication in Media Society," 411-412.

¹⁹¹ Castells, *Communication Power*, 25-26; Castells, *The Power of Identity*, 68-69.

¹⁹² Jenkins, *Convergence Culture*, 27-28; Shirky, *Here Comes Everybody*, 12.

conceptualizations showed themselves to be woven together as part of a broader understanding that communication is central to democratic society.

Document Analysis

The sections that follow use Altheide's method of discourse analysis in a similar way to how it was employed in chapters Two and Three, but here the central components of discourse from each of the three streams of theoretical texts are discussed. The theoretical texts were analyzed concerning representations related to communication in democratic society and related considerations regarding particular concerns emphasized by the philosophers' and scholars' conceptual understandings. The remainder of this chapter is broken into three sections, which correspond with the organization of the first part of the chapter. The sections include Communication in Democracy; Networks, Communication, and Community; and Communication in the Network Era. Each section discusses the three themes that emerged through applying Altheide's process of document analysis. Altheide defined themes as "mini-frames," or central ideas within a text.¹⁹³ He conceptualized a frame as "a kind of super theme" that carries a primary idea in a set of documents.¹⁹⁴

The themes identified through that analysis focused upon representations that framed the essential elements of those subjects in terms of (1) journalism as understood to be part of communication in a democratic society more broadly, (2) the roles of individuals in a democracy as engaged and reflective, and (3) individuals' contributions to resolving societal problems as contingent to the groups in which they participate.

¹⁹³ ¹⁹³ David L. Altheide, *Qualitative Media Analysis* (Thousand Oaks, Calif.: Sage Publications, 1996), 30-31.

¹⁹⁴ Ibid.

Method and Sampling Rationale

As detailed in Chapter One, this study is guided by Altheide's methodological approach to qualitative document analysis. Utilization of "progressive theoretical sampling" allows materials for document analysis to be chosen based on "an emerging understanding of the topic under investigation."¹⁹⁵ In employing progressive theoretical sampling, the researcher begins by selecting a relatively large group of relevant documents. Its focus on capturing "the meanings, emphasis, and themes of messages"¹⁹⁶ can in some studies involving a wide set of relevant messages require the researcher to consider "practical limitations" on formally analyzing the entire mass of discourse involved.¹⁹⁷

The discussion of ideas regarding essentially relevant philosophical conceptualizations of communication in a democratic society provided in the first half of this chapter represents an initially thorough reading of a wider set of relevant documents that relate to this study's broader concerns regarding how the courts should interpret the press clause in the network era. That initial reading, prior to formally applying that latter steps involved in Altheide's discourse analysis, highlighted the broad emphasis throughout the body of discourse on the significance of communication in a democratic society, focusing particularly on the factors of information, engagement, access, and the interplay of identity and power in shaping such communication. Proceeding with Altheide's method of qualitative theoretical sampling, the central idea from the reading and the conceptual pieces related to it were drawn upon for the fundamental criteria in identifying articles, chapters, and passages most essential to

¹⁹⁵ Ibid., 33.

¹⁹⁶ Ibid.

¹⁹⁷ Ibid.

philosophical conceptualizations of communication in democratic society. This sampling process is grounded in a manner methodologically consistent with Altheide's emphasis that such selections be "based on [an] emerging understanding of the topic under investigation."¹⁹⁸ Through the process of identifying the central idea from the larger body of readings, twelve articles, chapters, and passages were selected. Those selections focused on the key elements that were most consistently articulated as central to philosophical conceptualizations of communication in a democratic society.

The sample selected through that process includes two works from Habermas. A portion from the first chapter of *The Structural Transformation of the Public Sphere* was selected because it includes the philosopher's initial articulation of the basic principles of the public sphere, which entail an accounting of information, engagement, and access concepts as he articulated them.¹⁹⁹ A 2006 article by Habermas was also included because it brings together more recent understandings from the philosopher regarding the key elements of his ideas and relates them with the interplay between media and democracy.²⁰⁰ A substantial portion of the chapter titled "Searching for the Great Community" from Dewey's *The Public and its Problems*, was also chosen because it includes a foundational articulation of his conceptualization of community and the role of communication in society.²⁰¹ Dewey's essay "Creative Democracy — The Task Before Us" was chosen for similar reasons. It explores how he conceptualized democracy and its relation to communication.²⁰²

¹⁹⁸ Ibid.

¹⁹⁹ Habermas, *The Structural Transformation of the Public Sphere*, 14-26.

²⁰⁰ Habermas, "Political Communication in Media Society," 411.

²⁰¹ Dewey, *The Public and its Problems*, 143-170.

²⁰² Dewey, "Creative Democracy," 340.

Three passages from Castells's books were selected for this chapter's sample. The first part of the chapter titled "Communication in the Digital Age" from *Communication Power*, outlines the understandings that Castells articulated regarding the roles of interpersonal communication, mass communication, and mass self-communication in the network society.²⁰³ Two passages from the chapter titled "Information Politics and the Crisis of Democracy" from *The Power of Identity*, were also selected. In the two passages, Castells put forth his essential arguments on how shifts in communication are influencing democratic processes and how people identify themselves in democratic society.²⁰⁴ Also, the chapter titled "From Blogosphere to Public Sphere" from *Cultural Chaos: Journalism, News and Power in a Globalized World* by McNair was included because it evaluates the possibility of a global-public sphere and, in doing so, outlines his understanding of the role of the media in society in the network era.²⁰⁵

Two passages from Jenkins's *Convergence Culture*, both from the chapter titled "Spoiling *Survivor*: The Anatomy of a Knowledge Community," were selected for this sample because they detail his essential understanding of how individuals contribute to communities and how communities operate online.²⁰⁶ Finally, a complete chapter and a passage from another chapter in Shirky's *Here Comes Everybody* were selected. The chapter titled "Publish, Then Filter" was selected because it provides his essential conceptualization of the roles and uses traditional-media content and user-generated

²⁰³ Castells, *Communication Power*, 54-72.

²⁰⁴ Castells, *The Power of Identity*, 367-370, 402-418.

²⁰⁵ McNair, *Cultural Chaos*, 135-154.

²⁰⁶ Jenkins, *Convergence Culture*, 25-31, 50-58.

content fulfill in the network society.²⁰⁷ The second half of the chapter titled “It Takes a Village to Find a Phone” was selected for its articulation of Shirky’s argument that the elimination of traditional barriers to communication has enabled people to organize in order to solve problems and pursue interests in new ways.²⁰⁸

Communication in Democracy

This subsection discusses the representations that emerged in the application of Altheide’s method of document analysis to the texts discussed just above regarding communication in democracy. The representations related to communication in a democratic society and similar considerations regarding particular concerns that were most consistently reflected in the conceptual understandings emphasized in those texts are examined. The texts discussed in this section include, as outlined just above, a portion of the first chapter of *The Structural Transformation of the Public Sphere* and the article “Political Communication in Media Society,” both by Habermas, and a portion of Chapter Five of *The Public and its Problems*, and the essay “Creative Democracy — The Task Before Us,” both by Dewey. In Altheide’s articulation of the heart of the methodological approach, the “actual words and direct messages of documents carry the discourse that reflects certain themes, which in turn are held together and given meaning by a broad frame.”²⁰⁹ As introduced at the beginning of this chapter, the themes that this application of Altheide’s document analysis identified focused upon representations that framed the essential elements of those subjects in terms of (1) journalism as understood to be part of communication in a democratic society more broadly, (2) the roles of individuals in a democracy as engaged and

²⁰⁷ Ibid., 81-108.

²⁰⁸ Shirky, *Here Comes Everybody*, 6-24.

²⁰⁹ Altheide, *Qualitative Media Analysis*, 31.

reflective, and (3) individuals' contributions to resolving societal problems as contingent to the groups in which they participate.

Journalism as a Part of Communication in a Democratic Society More Broadly

The body of discourse articulated an understanding of communication as occupying a central role in informing citizens within democratic society. It did not, however, represent journalistic media as acting as the sole providers of information that individuals require to inform themselves so they can deliberate with others in society. Instead, the framing emphasized communication as occurring in democratic society in two primary ways: via journalistic messages and through more personalized forms of communication, such as interpersonal communication and non-public newsletters and mailings. This dynamic was evident in the understandings that were communicated in this set of texts. Habermas's work, in outlining the conditions that led to the creation of the public sphere, asserted that before there were "public" media — which were discussed in terms of messages intended for all who encountered them — there were newsletters and regular mail routes that circulated information intended for specific groups, which in this case were primarily the emerging merchant class. Habermas wrote, "The traditional letter carrying by merchants was for this reason organized into a kind of guild-based system of correspondence for their purposes."²¹⁰ As indicated, the intent of the messages was to inform a select few and no one else. To that end, Habermas concluded, "The recipients of private correspondence had no interest in their contents becoming public."²¹¹ Habermas's discourse conveyed an understanding that

²¹⁰ Habermas, *The Structural Transformation of the Public Sphere*, 16.

²¹¹ *Ibid.*, 20.

the public press, something that resembled journalism, developed differently than the non-public correspondences between merchants and guilds. He asserted that “the press, in turn developed a unique explosive power. The first journals, in a strict sense, ironically called ‘political journals,’ appeared weekly at first, and daily as early as the middle of the seventeenth century.”²¹² These “political” journals, in the understanding put forth in Habermas’s work, were meant to be for the public. In describing the two forms of communication, the discourse conveyed a recognition that relationships exist between them, but overall both were understood as contributing information to society in distinctive ways. The two modes of communication provide information, Habermas asserted in the text, for different purposes and through different formats. In this sense, the framing characterized the early public sphere as developing with journalism and sharing an informing role with another, less-public form of communication.

In a conceptualization that is similar to the understandings articulated in Habermas’s discourse, Dewey’s work conveyed an understanding that journalism shared the informing role in society with other forms of communication. Dewey’s body of discourse within this area conceptualized that the guild-focused, intentionally private messages found in Habermas’s articulation of the underlying conceptual basis of this theme were replaced by interpersonal communication. Dewey’s articulation that journalism and interpersonal communication both played roles in informing people in a democratic society was evidenced when he wrote, “I am inclined to believe that the heart and final guarantee of democracy is in free gatherings of neighbors on the street corner to discuss back and forth what is read in uncensored news of the day, and in gatherings of friends in the living rooms of houses and apartments to converse freely

²¹² Ibid.

with one another.”²¹³ In asserting this concept, Dewey’s narrative communicated the idea that citizens use journalistic information to inform their discussions with others in efforts to solve problems in society. Along with that understanding, however, it can also be seen that “gatherings of friends” was conceptualized as another form of information-exchange that plays a role in informing members of society. This was conveyed in his discourse when he contended that the “free play of facts and ideas which are secured by effective guarantees of free inquiry, free assembly and free communication” are of central importance to democratic society.²¹⁴ In this sense, “journalism,” or words that are commonly associated with journalistic practices, was not utilized to describe communication processes in society. More general terms were employed, such as “communication” and “assembly.” To that end, Dewey’s discourse conveyed a similar understanding that communication in general, not specifically journalism, fulfills a central role in society. He wrote:

Without freedom of expression, not even methods of social inquiry can be developed. For tools can be evolved and perfected only in operation; in application to observing, reporting and organizing actual subject-matter; and this application cannot occur save through free and systematic communication.²¹⁵

In the passage, Dewey asserted that “communication,” not specifically journalism, plays a vital role in society. In the cases of both Habermas’s and Dewey’s conceptualizations of this theme, they did not communicate understandings that journalism is unimportant or of lesser value to other forms of communication. In fact, Habermas’s discourse emphasized that the public sphere required “professionals of the

²¹³ Dewey, “Creative Democracy,” 342.

²¹⁴ Ibid.

²¹⁵ Dewey, *The Public and its Problems*, 167.

media system — especially journalists” to function.²¹⁶ The overall meanings that were carried by these texts, however, characterized journalism as an important informing tool in society, but not the only one. Habermas’s work, especially in the following passage, outlined how he conceptualized communication in the public sphere:

Mediated communication need not fit the pattern of fully fledged deliberation. Political communication, circulating from the bottom up and the top down throughout a multilevel system (from everyday talk in civil society, through public discourse and mediated communication in weak politics, to the institutionalized discourses at the center of the political system), takes on quite different forms in different arenas.²¹⁷

In this sense, Habermas’s writing communicated that he understood journalistic communication as part of a system that included other forms of communication. The meanings conveyed in this section indicated that journalism is understood as part of a communication system that is vital to communication in democratic society.

The Roles of Individuals in a Democracy as Engaged and Reflective

The discourse contained within this set of documents characterized democracy as requiring individuals to be thoughtfully engaged in deliberations with others within society. The meanings put forth in the texts placed an emphasis on the need for members of communities to meaningfully step forward into society with the intent of contributing ideas and considering the ideas of others. Habermas’s foundational articulation of the concept of the public sphere asserted that the thoughtful engagement of individuals is a requirement for the sphere to function. He wrote that the public sphere is a “forum in which the private people, come together to form a public, readied

²¹⁶ Habermas, “Political Communication in Media Society,” 416.

²¹⁷ Ibid., 415.

themselves to compel public authority to legitimate itself before public opinion.”²¹⁸ The text repeatedly referred to democracy as a “deliberative process” and a “deliberative model,”²¹⁹ and emphasized the “cooperative search of deliberative citizens for solutions to political problems.”²²⁰ In this sense, Habermas’s work conveyed meanings that individuals must deliberately choose to deliberate with others. The understandings conveyed in Dewey’s discourse similarly conceptualized that democracy is an idea, and not a set of mechanisms or governmental institutions. He wrote, “Democracy is a personal way of individual life.”²²¹ The concept of engagement in democratic processes was not framed as relating to voter turnout or to people taking part in the mechanics of government; rather, it was communicated as an idea that demands that people come together with others to discuss and consider problems and issues. Dewey wrote that citizens in a democracy must “get rid of the habit of thinking of democracy as something institutional and external and to acquire the habit of treating it as a way of personal life.”²²² In relation to this concern, Dewey’s discourse emphasized deliberation, and characterized democracy as a “deliberate and determined endeavor”²²³ and as a process that required “rational consideration.”²²⁴

To that end, Dewey communicated that democracy not only requires engagement, but also within that engagement, something that is a way of life that necessitates that individuals step forth with the intent of listening, considering, and discussing. The meanings carried within the narrative emphasized that freedom of

²¹⁸ Habermas, *The Structural Transformation of the Public Sphere*, 25-26.

²¹⁹ Habermas, “Political Communication in Media Society,” 411-412.

²²⁰ *Ibid.*, 413.

²²¹ Dewey, “Creative Democracy,” 341.

²²² *Ibid.*, 343.

²²³ *Ibid.*, 341.

²²⁴ Dewey, *The Public and its Problems*, 158.

expression and other governmental protections are not enough to assure that the idea of democracy will flourish. Dewey wrote, “The belief that thought and its communication are now free simply because legal restrictions which once obtained have been done away with is absurd.”²²⁵ The texts asserted that communication in democracy requires freedom of expression, but freedoms are not by themselves enough. Citizens must make use of those freedoms by deliberately stepping forward and engaging in democratic processes.

Individuals’ Contributions to Resolving Problems as Contingent to Group Participation

The discourse contained within the texts underlined an understanding that group activity is the ideal method through which the problems facing society could be addressed and solved. Dewey and Habermas constructed this theme upon two primary assertions. The texts emphasized that knowledge is generated through communication among members of society, and that each person, as an individual, has the ability to contribute to discussions regarding societal problems. These two intertwined characterizations of the theme were communicated as being central to how the philosophers conceptualized group participation. To that end, Dewey wrote, “Knowledge is a function of association and communication.”²²⁶ Similarly, Habermas articulated his understanding of the emergence of the public sphere as something that included the “critical judgment of the public making use of its reason.”²²⁷

The body of discourse placed an emphasis upon the role of the individual and his or her unique contributions to deliberation, and the subsequent benefits received

²²⁵ Ibid., 168.

²²⁶ Ibid., 158.

²²⁷ Habermas, *The Structural Transformation of the Public Sphere*, 24.

from participating in collective action. The understandings Dewey communicated related liberty to working in association with others. He wrote, “Liberty is that secure release and fulfillment of personal potentialities which take place only in rich and manifold association with others: the power to be an individualized self making a distinctive contribution.”²²⁸ To this end, the text communicated that liberty did not mean being free from social ties. Instead, the meanings that were conveyed conceptualized individuals as realizing their potential by interacting with others. In this way, Dewey indicated that the individual, his or her values and unique traits, are not to be lost in the efforts of a community. Instead, individuality was characterized within the narrative as relating to the primary contribution each person can make in society. This understanding can be read in relation to the preceding theme that individuals must engage in discussions with others in society in a deliberative way. Dewey communicated that something would be lost if each person did not engage purposively in deliberations in society because each person has something unique to contribute. He wrote that “to learn to be human is to develop through the give-and-take of communication an effective sense of being an individually distinct member of a community.”²²⁹

The meanings Dewey communicated regarding this theme related with Habermas’s work, which asserted that one of the key shifts in society during the seventeenth-century period that marked the emergence of the public sphere in Europe was that the older model of the nobility managing the people and production of estates was replaced by a class of people who gathered to make decisions regarding what was

²²⁸ Dewey, *The Public and its Problems*, 151.

²²⁹ *Ibid.*, 154.

best for them. He wrote, “Civil society came into existence as the corollary of a depersonalized state authority. Activities and dependencies hitherto relegated to the framework of the household economy emerged from this confinement into the public sphere.”²³⁰ In making this observation, Habermas conveyed an understanding of this shift toward group efforts to solve societal problems is significant. To that end, his discourse contended that people coming together to communicate is a central element of the public-sphere idea.

In a related sense, Dewey’s discourse represented the need for communication as both an imperative and a challenge to the effectiveness of group efforts to solve problems in society. Dewey wrote, “Participation in activities and sharing in results are additive concerns. They demand *communication* as a prerequisite.”²³¹ Habermas’s work conveyed a similar concern, asserting, “Deliberation is a demanding form of communication, though it grows out of inconspicuous daily routines of asking for and giving reasons.”²³² The meanings conveyed within the narrative contended that in order for the benefits of group deliberation to be realized, individuals must adopt daily habits that include purposeful engagement with others. Dewey’s work carried a concern that the demands of communication in society would weaken the ability of groups to come together to deliberate and solve problems. His writing referred to the public as “inchoate” and communicated that the greatest challenge for deliberation in society is “discovering the means by which a scattered, mobile, and manifold public may so recognize itself as to define and express its interests.”²³³ In addition to these ideas, the

²³⁰ Habermas, *The Structural Transformation of the Public Sphere*, 19.

²³¹ Dewey, *The Public and its Problems*, 152 (emphasis included).

²³² Habermas, “Political Communication in Media Society,” 413.

²³³ Dewey, *The Public and its Problems*, 146-147.

discourse carried concern regarding how different groups within society would communicate with each other. He wrote, “Since every individual is a member of many groups, this specification cannot be fulfilled except when different groups interact flexibly and fully in connection with other groups.”²³⁴

While the overall meanings that were conveyed by the texts in this section recognized that deliberative-group efforts to solve problems in society are not without their challenges, the narrative carried a clear understanding that collective deliberation is a centrally important component in democratic society. The texts characterized each individual as offering something distinctive to a form of group deliberation that is essentially valuable. As part of this understanding, the texts included an emphasis on the need for individuals to purposively engage in deliberation with others. Finally, Dewey and Habermas asserted in this body of discourse that information that helped to inform deliberations among people arises from journalistic media and other forms of communication. The next subsection discusses the manner in which this process of document analysis identified similar themes in the discourse put forth by McNair and Castells on the influence of the emergence of the network society on community and communication.

Networks, Communication, and Community

This subsection discusses the representations that emerged through the application of Altheide’s method of document analysis to the texts that were discussed in the first half of this chapter regarding networks, communication, and community. The representations related to communication in a democratic society and related considerations regarding particular concerns that were most consistently reflected in the

²³⁴ Ibid., 147.

conceptual understandings emphasized in those texts. The texts discussed in this section, as outlined earlier in the chapter, include two passages from Chapter Six of *The Power of Identity*, and a passage from Chapter Two of *Communication Power*, both books by Castells. The section also discusses Chapter Nine of McNair's *Cultural Chaos*. In Altheide's articulation of the heart of the methodological approach, the "actual words and direct messages of documents carry the discourse that reflects certain themes, which in turn are held together and given meaning by a broad frame."²³⁵ As introduced at the beginning of this chapter, the themes that this application of Altheide's document analysis identified focused upon representations that framed the essential elements of those subjects in terms of (1) journalism as understood to be part of communication in a democratic society more broadly, (2) the roles of individuals in a democracy as engaged and reflective, and (3) individuals' contributions to resolving societal problems as contingent to groups in which they participate.

Journalism as a Part of Communication in a Democratic Society More Broadly

The discourse within the texts in this subsection communicated an understanding that the provision of information to citizens in a democratic society is maintained by different but merging forms of communication. Broadly, the discourse characterized journalism as occupying a valuable role in society, but also credited other forms of communication, such as blogs and personal websites, along with interpersonal interactions, as contributing information to individuals in society. McNair's work put forth an understanding of the word "media" as referring to all mediated communication and, therefore, not as a term that specifically related to journalistic communication. He

²³⁵ Altheide, *Qualitative Media Analysis*, 31.

wrote, for example, that “it is possible to speak of a truly global community of media users and producers, linked by their shared consumption of movies, pop music, journalism and other cultural commodities.”²³⁶ By contending this, McNair’s text communicated that he understood journalistic media and other forms of communication as contributing information to the public. In a related way, the discourse carried by Castells’s texts characterized journalism as part of a broader communication structure. He wrote, “The combination of online news with interactive blogging and e-mail, as well as RSS feeds from other documents on the web, have transformed newspapers into a component of a different form of communication: what I have conceptualized above as mass self-communication.”²³⁷ In listing journalism as a “component,” the narrative indicated that journalism works with other forms of communication to inform citizens.

In the understanding put forth in Castells’s narrative, communication takes three forms: interpersonal communication, mass communication, and mass self-communication. The three forms were conceptualized as being coexistent and complementary to each other. Much like the discourse that was communicated by Dewey and Habermas in the previous section, the texts in this body of discourse indicated that journalism is important, but is only part of the communication spectrum, because people use all three forms of communication to inform themselves and to share information with others. Castells wrote that “individual citizens around the world are using the new capacity of communication networking to advance their projects, to defend their interests, and to assert their values.”²³⁸

²³⁶ McNair, *Cultural Chaos*, 136.

²³⁷ Castells, *Communication Power*, 65.

²³⁸ *Ibid.*, 57.

McNair's discourse, using a different model than Castells, characterized this understanding in terms of a three-tiered media system that contributes to the formation of a global-public sphere. In this sense, the journalistic media's role in society was represented as more distinctively separate from other modes of communication than Castells asserted in his work. McNair's discourse characterized local and regional television, radio, and newspapers as informing citizens about their immediate geographic areas, which allows deliberation to occur on the community level. The satellite-news outlets were conceptualized as crossing international boundaries that "enveloped the public spheres of nation-states."²³⁹ On a separate, third tier, McNair represented online journalism, blogs, and other personal web-based communications as working together to connect the various sub-spheres that he understood as making up a global-public sphere. The broader meanings that were carried by the texts regarding this model, characterized journalism-based media and other forms of mediated communication as having specific, often geographically oriented, roles in informing citizens.

The Roles of Individuals in a Democracy as Engaged and Reflective

The meanings that were carried by the texts indicated that new technologies are fostering deliberation and engagement, but also included concerns regarding whether individuals are choosing to take part in deliberation within central spaces in society regarding matters of public concern, or if they are turning to personal-interest groups that are not connected to broader deliberations in society. While the growth of new ways that individuals can engage in deliberation with others was emphasized within the

²³⁹ McNair, *Cultural Chaos*, 142.

discourse, the changes that created these opportunities was characterized as creating threats to democratic citizens' engagement. In addressing these factors in light of his idea of an emerging global-public sphere, McNair wrote, "Does the transnational public sphere allow individuals and organizations to exercise effective communicative power on national, transnational and global decision-making bodies?"²⁴⁰ By posing this question, the discourse communicated an understanding that individuals must "exercise" power and that the changes brought about by the network society raised questions about how citizens engage in deliberation.

This body of discourse focused on particular concerns regarding whether individuals in the network-society era are choosing to engage in deliberation with their broader communities rather than only communicating with personal-preference groups. The narrative carried an understanding that networked communication technologies allow individuals to engage in a variety of ways, and, with that understanding, the discourse also conveyed concerns that people are turning to small, fragmented, personal-preference groups, rather than stepping intentionally into a public sphere where diverse people can interact regarding societal problems. Castells wrote, "On-line politics could push the individualization of politics, and of society, to a point where integration, consensus, and institution building would become dangerously difficult to reach."²⁴¹ To that end, the discourse reflected concern that democratic government will struggle to function if individuals do not purposively engage in what the texts characterized as a broad, public deliberation. In a related manner, the narrative represented an understanding that individuals have always engaged in fragmented sub-

²⁴⁰ McNair, *Cultural Chaos*, 140.

²⁴¹ Castells, *The Power of Identity*, 416.

spheres of communication. McNair wrote, “The public sphere is now, and always has been segmented into sub-spheres organized by demography, political viewpoint, lifestyle and ethnicity, to name just four categories of readership into which media are typically grouped.”²⁴² The sub-spheres were discussed in terms of overlapping and intersecting spaces in which people identify and communicate with different groups. All of these understandings, however, were grounded in an assertion that was carried in the texts that people within these sub-spheres make decisions to step forward into the many discussions going on around them.²⁴³ Instead of sharing the concern communicated within Castells’s work regarding fragmented, inward-turning citizens, McNair’s discourse considered whether people are receiving the education they need or have the requisite media literacy to purposively engage in deliberation in their communities. He wrote, “Today literacy in print and audio-visual media is a prerequisite of the public sphere’s accessibility.”²⁴⁴ In this sense, the concern put forth by McNair was distinctive because it considered whether other parts of society, such as educational institutions, are in place to ensure that people can engage.

Castells’s discourse, in a related concern, focused on how people are using new technologies to engage in deliberation. Within the understandings contained in the narrative, Castells included assumptions of engagement, and that the new technologies are facilitating different forms of engagement than have been seen in the past. The texts represented online technologies as allowing messages that are “self-generated in content, self-directed in emission, and self-selected in reception by many who

²⁴² McNair, *Cultural Chaos*, 137.

²⁴³ Ibid.

²⁴⁴ Ibid., 138.

communicate with many.”²⁴⁵ Networks were discussed in terms of being built around “people’s initiatives, interests, and desires.”²⁴⁶ Castells, in these passages, conveyed an understanding that online technologies are enabling engagement in new ways.

The meanings that were conveyed in these texts characterized engagement in society as both enabled and endangered by the emergence of the network society. In exploring both aspects of this idea, the texts articulated that individual engagement and deliberation are important parts of democratic societies.

Individuals’ Contributions to Resolving Problems as Contingent to Group Participation

McNair’s and Castells’s texts constructed the theme that knowledge is generated through communication, which emanates from individuals who form groups to address problems in society. Castells, for example, wrote, “Meaning can only be understood in the context of social relationships in which information and communication are processed.”²⁴⁷ In the same passage, Castells defined communication as “the sharing of meaning through the exchange of information.”²⁴⁸ Similarly, the public sphere, as characterized in McNair’s work, was understood as something that “encompasses the set of media outlets by means of which particular groups of individuals are provided with the information they need to participate in political processes that affect their lives.”²⁴⁹ The representations that were communicated within these texts regarding this theme are similar to those that were articulated in Dewey’s and Habermas’s discourse.

²⁴⁵ Castells, *Communication Power*, 70.

²⁴⁶ *Ibid.*, 67.

²⁴⁷ *Ibid.*, 54.

²⁴⁸ *Ibid.*

²⁴⁹ McNair, *Cultural Chaos*, 137.

McNair's and Castells's narrative, however, focused more on the role of online communication in enabling individuals to take part in deliberative processes in society.

The meanings communicated by these authors conveyed an understanding that they saw the emergence of the network society as enhancing the potential for individuals in society to step forward and take part in deliberations with others regarding problems in society. Castells wrote that "on-line information access and computer-mediated communication facilitate the diffusion and retrieval of information, and offer possibilities for interaction and debate in an autonomous, electronic forum, bypassing the control of the media."²⁵⁰ In this sense, the discourse carried an emphasis that people can use new technologies to gather and communicate information, therefore engaging in group deliberations, which were understood as the avenue through which understanding and meaning are created.²⁵¹ The discourse put forth in Castells's work characterized online communication as allowing individuals to communicate with others to solve problems in society on global levels. He wrote that "social actors and individual citizens around the world are using the new capacity of communication networking to advance their projects, to defend their interests, and to assert their values."²⁵² In representing group participation in this way, the value of individuals working together to resolve problems was related with the idea that online communication is making this practice possible on a global level. By discussing this concept in terms of the possibility of a global-public sphere, McNair's work communicated a similar understanding in that it contended that the global

²⁵⁰ Castells, *The Power of Identity*, 415.

²⁵¹ Castells, *Communication Power*, 54.

²⁵² *Ibid.*, 57.

communication system enabled by the Internet allows individuals to take part in public debate across international boundaries.²⁵³

The narrative put forth by McNair asserted that online communication carries the potential to allow individuals to come together on a global level to deliberate upon problems. Included in this characterization was the implication that solutions to problems will emanate from global communication. This conceptualization was also reflected in other parts of McNair's text, which framed understanding and meaning as benefits that emerge from individuals' taking part in interactions with others within the public sphere. He wrote, "A healthy public sphere must be able to accommodate a plurality of voices and perspectives broadly representative of the public it serves."²⁵⁴ In this sense, the meanings conveyed in the narrative characterized the public sphere as a place that brings together a diversity of voices; so many ideas can be considered in regard to the societal problems. This idea was further articulated in the text when McNair explained that the public sphere was needed for "creating a common space for knowledge formation and debate."²⁵⁵

In carrying understandings that knowledge and meaning are created through communication among groups of individuals, the texts in this subsection focused on the ways in which online communication is changing how such deliberation occurs and on how traditional conceptualizations of the public sphere are understood as calling for diverse exchanges of ideas among groups of people in regard to solving societal problems. The exchanges of ideas that are represented in this narrative relate to how online communication both empowers and endangers deliberation in society. The

²⁵³ McNair, *Cultural Chaos*, 140.

²⁵⁴ *Ibid.*, 138.

²⁵⁵ *Ibid.*, 149.

narrative further conveyed the understanding that the information individuals use to inform themselves comes from journalistic and other forms of communication. The next subsection discusses the manner in which this process of document analysis identified similar themes, this time within the narrative put forth by Shirky and Jenkins in regard to how online communication allows more individuals to engage in deliberation and to contribute to solving problems in society.

Communication in the Network Era

This subsection discusses the characterizations that emerged through the application of Altheide's method of document analysis to the texts that were discussed in the first half of this chapter regarding communication in the network era. The representations related to communication in a democratic society and related considerations regarding particular concerns that were most consistently reflected in the conceptual understandings emphasized in those texts. The texts discussed in this section, as outlined earlier in the chapter, include two passages from Chapter Two of Jenkins's *Convergence Culture*, and a passage of Chapter One and all of Chapter Four of Shirky's *Here Comes Everybody*. In Altheide's articulation of the heart of the methodological approach, the "actual words and direct messages of documents carry the discourse that reflects certain themes, which in turn are held together and given meaning by a broad frame."²⁵⁶ As introduced at the beginning of the chapter, the themes that this application of Altheide's document analysis identified focused upon representations that framed the essential elements of those subjects in terms of (1) journalism as understood to be part of communication in a democratic society more broadly, (2) the roles of individuals in a democracy as engaged and reflective, and (3)

²⁵⁶ Altheide, *Qualitative Media Analysis*, 31.

individuals' contributions to resolving societal problems as contingent to the groups in which they participate.

Journalism as a Part of Communication in a Democratic Society More Broadly

The meanings carried within the texts communicated an understanding that the traditional media's role has changed since the emergence of the network society and that journalism-oriented communication operates alongside the virtual interactions that occur in a variety of forms across the Internet. Specifically, the narrative represented both the small-group conversations on the Internet and journalism-based messages as different means to informing citizens in the network society. Shirky wrote, "The two patterns shade into each other, and now small group communications and large broadcast outlets all exist as part of a single interconnected ecosystem."²⁵⁷ While the discourse characterized journalistic communication and small-group communication as both working to inform individuals in the network-society era, it represented the small-group interactions that occur online as becoming increasingly important. Jenkins, for example, wrote that "knowledge communities [are] central to the task of restoring democratic citizenship."²⁵⁸ The Internet, as conceptualized in Shirky's work, was characterized as shifting greater communicative power to small groups. Shirky wrote, "Now that there is competition to traditional institutional forms for getting things done, those institutions will continue to exist, but their purchase on modern life will weaken as novel alternatives for group action arise."²⁵⁹ In this sense, the narrative framed

²⁵⁷ Shirky, *Here Comes Everybody*, 99.

²⁵⁸ Jenkins, *Convergence Culture*, 29.

²⁵⁹ Shirky, *Here Comes Everybody*, 22.

representations regarding the changes brought about by the network society as including a shift in the importance of small-group communication.

Journalistic messages were conceptualized as playing a lesser role than they did in the mass-media era. Shirky's work outlined this understanding within the framework of how a group came together to solve a problem, which, in this case, was finding a stolen cell phone. The passage represented journalistic media as a type of connector that can be used to call attention to otherwise small-group-based interactions. Regarding efforts to recover the lost cell phone, Shirky wrote:

People became interested in the story, and they forwarded it to friends and colleagues, who became interested in turn and forwarded it still further. This pattern of growth was both cause and effect for mainstream media getting involved — it's unlikely that *The New York Times* or CNN would have covered the story of a lost phone, but when it was wrapped in the larger story of national and even global attention, they picked it up, which led to still more visitors to Evan's site and still more media outlets tuning in.²⁶⁰

The narrative, especially in the preceding passage, carried the understanding that traditional media, in this case *The New York Times* and CNN, use their abilities to reach larger audiences to bring awareness, and greater participation and interaction to the non-journalistic communication that occurs online. In a similar sense, in Jenkins's work, mass-media-era communication was discussed in terms of being more individualistic than the more community-focused interactions that are enabled by the Internet. The narrative also indicated that small-group, online interactions occupy an increasingly important role in communication in the network society. Jenkins, for example, wrote, "The age of media convergence enables communal rather than individualistic, modes of reception."²⁶¹ In this sense, the narrative carried an understanding that traditional,

²⁶⁰ Ibid., 9.

²⁶¹ Jenkins, *Convergence Culture*, 26.

journalistic media are “individualistic” and that online, small-group communication is more community-based.

In regard to journalistic communication, this body of discourse conveyed an understanding that traditional media provide layers of information filtering for audience members, greater depth of knowledge regarding the information provided, and more expertise in how information is communicated to audiences. Jenkins’s work framed journalists as “experts,” defining them as people who “have often gone through some kind of ritual that designates them as having mastered a particular domain.”²⁶² The discourse identified online groups as not possessing the same characteristics, instead representing them as having erratic memberships and often-temporary existences.²⁶³ The small groups that share user-generated content and other messages online also lack the structure of journalistic operations. The narrative, however, did not frame these characteristics of online, small-group communication as entirely negative or as issues that would take away from web-based technology’s value as a communication tool in society. Shirky’s discourse discussed this idea in terms of the public benefitting from the filtering journalists employ when preparing information, “because we have historically relied on the publisher’s judgment to help ensure minimum standards of quality.”²⁶⁴ The text went on to explain, however, that such an approach was no longer needed in the network era. Instead, Shirky’s work contended that, in the network era, information should be published and then filtered by audiences.²⁶⁵ In this sense, these texts conveyed a recognition that journalistic media are only one type of communication

²⁶² Ibid., 54.

²⁶³ Ibid., 27.

²⁶⁴ Shirky, *Here Comes Everybody*, 97.

²⁶⁵ Ibid., 98.

utilized by citizens to gather information in the network society. The narrative carried by these texts specifically identified changes brought about by the shift to the network society as lessening journalistic communication's role and as elevating the importance of online, small-group interactions.

The Roles of Individuals in a Democracy as Engaged and Reflective

The discourse within these texts framed the network society in terms of a new era of individual engagement in society via interaction with online communities that represent varying interests and focus on different issues. The meanings conveyed within the texts carried an understanding that people are using the Internet to purposively engage in discussions with others. Jenkins's work characterized this concept in terms of people "harnessing their individual expertise toward shared goals and objectives," for example.²⁶⁶ Shirky's discourse framed the effort to mobilize a group online to find and recover a stolen cell phone as exemplifying the "power of group action."²⁶⁷ In both of these examples, the narrative characterized the Internet as facilitating individual engagement.

Shirky's and Jenkins's discourse highlighted assertions of the Internet's power to enable people to voluntarily come together to engage in discussions. In this sense, the discourse within the texts did not articulate specific ideas regarding engagement as being something reflective. Instead, deliberation and the resulting resolution of problems were integrated into the understandings that were communicated regarding the value of people coming together to solve problems. Jenkins's text related engagement and democracy by contending, "The knowledge [that] gets produced and evaluated is

²⁶⁶ Jenkins, *Convergence Culture*, 27.

²⁶⁷ Shirky, *Here Comes Everybody*, 7.

more democratic.”²⁶⁸ Jenkins also wrote, “We can see such knowledge communities as central to the process of grassroots convergence.”²⁶⁹ Through assertions such as these, Jenkins’s discourse articulated an understanding of engagement as a central part of deliberation in a democratic society.

The narrative conceptualized engagement from the perspective that individuals in the network society use new technologies to purposively move in and out of different groups. Shirky’s work characterized traditional institutions in society as having been created to provide forums for and to help enable public engagement in societal affairs.²⁷⁰ The institutions, through the geographic and other physical requirements necessary to maintain order within them, placed barriers at times on who could be involved and to what extent. The Internet, as conceptualized in the narrative, removed those barriers, allowing individuals to be “free to explore new ways of gathering together and getting things done.”²⁷¹ The understandings conveyed within Jenkins’s work articulated a similar conceptualization of the opportunities the Internet creates for engagement. He wrote, “These new communities are defined through voluntary, temporary, and tactical affiliations, reaffirmed through common intellectual enterprises and emotional investments.”²⁷² To that end, Jenkins’s discourse emphasized that people are not only engaging in discussions, but are exercising greater freedom and intentionality in the groups through which they choose to affiliate and deliberate with.

Within the idea that people have more power to choose the groups they engage in, the meanings that are carried within these texts characterized online communication

²⁶⁸ Jenkins, *Convergence Culture*, 29.

²⁶⁹ *Ibid.*, 57.

²⁷⁰ Shirky, *Here Comes Everybody*, 21.

²⁷¹ *Ibid.*, 22.

²⁷² Jenkins, *Convergence Culture*, 27.

as enabling engagement in ways that were not possible in the eras that preceded the network society. This body of discourse conceptualized individuals as being capable of engaging at new levels because of technological changes and that people are taking advantage of these opportunities to take part in discussions regarding issues, problems, and interests in society.

Individuals' Contributions to Resolving Problems as Contingent to Group Participation

This body of discourse communicated an understanding that when people come together, they are more able to solve problems than when they are working alone. Within the texts in this section, the authors' conceptualization of this theme was interwoven with an understanding of the Internet as facilitating the ability of individuals to work with others to take advantage of each person's knowledge and abilities to solve problems or pursue interests. In this sense, the discourse emphasized that each individual, as a unique person, had the ability to contribute something of value. That contribution might not, however, be constant. Jenkins wrote, "A collective intelligence . . . assumes that each person has something to contribute, even if they will only be called upon on an ad hoc basis."²⁷³ To that end, the narrative characterized collective effort as something that upholds each person's individuality.

In articulating the idea of using group effort to solve problems, Jenkins's work asserted that "people harness their individual expertise toward shared goals and objectives."²⁷⁴ Jenkins's text identified this idea "collective intelligence," which "refers to the ability of virtual communities to leverage the combined expertise of their

²⁷³ Ibid., 53.

²⁷⁴ Ibid., 27.

members. What we cannot know or do on our own, we may now be able to do collectively.”²⁷⁵ In this sense, this body of discourse discussed the Internet as having enabled individuals to contribute their unique knowledge bases to solving problems in ways that were not possible before the emergence of the network society. The narrative characterized online communication as not being limited by the physical time-and-space boundaries that hindered individuals’ access to groups in previous eras. In a similar way, the meanings carried by Shirky’s work represented this change in terms of cost. The cost, in time and money, of creating or joining a group has dropped substantially as a result of online communication tools. Shirky wrote that “getting the free and ready participation of a large, distributed group with a variety of skills . . . has gone from impossible to simple.”²⁷⁶

The texts conveyed an understanding that the characteristics of the Internet not only make it easier for individuals to participate in working with groups to solve problems, but that the dynamics of communication on the Internet create a more-horizontal structure for interaction between individuals. In the understandings put forth by Shirky, institutions that were created to help harness the ability of individuals to work together to accomplish tasks, such as a corporation or an army, helped to channel and guide the effort, but also at times limited individuals’ abilities to contribute and the opportunities for outsiders to take part.²⁷⁷ The more-horizontal structure of online communication that was discussed in these texts characterized solving problems as a group as being more open-ended and diverse.²⁷⁸ Jenkins’s discourse conceptualized the

²⁷⁵ Ibid.

²⁷⁶ Shirky, *Here Comes Everybody*, 18.

²⁷⁷ Ibid., 19.

²⁷⁸ Jenkins, *Convergence Culture*, 52.

traditional, pre-network-society approach to managing groups of people to complete tasks as the “expert paradigm.” The expert paradigm requires that those solving the problem have professional-like credentials, and it creates in-group and out-group dynamics in which those who do not meet certain criteria cannot participate. Jenkins wrote, “What holds a collective intelligence together is not the possession of knowledge, which is relatively static, but the social process of acquiring knowledge, which is dynamic and participatory, continually testing and reaffirming the group’s social ties.”²⁷⁹ In articulating this idea, Jenkins’s discourse represented group activity as an efficient way to solve problems and something that has been substantially empowered by the emergence of the network society.

Overall, in constructing this theme, the authors articulated an understanding of the Internet and the dynamics of how communication is conducted online as a phenomenon that enhances the ability of individuals to use their individual knowledge bases and talents to form or participate in groups in efforts to solve problems or deliberate on issues. In a related sense, the thematic emphasis of Shirky and Jenkins consistently reflects assertions that online communication is empowering individuals to engage in deliberation in new ways. The discourse within this subsection also contended that the information individuals are using to inform themselves is originating more from online, small-group interactions than from journalistic media. In the understandings proposed in this body of discourse, the small-group interactions are transforming the provision of information needed for deliberation and engagement with others into a unified process.

²⁷⁹ Ibid., 54.

Conclusion

The authors in this chapter focused on philosophical conceptualizations of communication in democratic society. While the authors' ideas can all be broadly tied to the notion that informed deliberation plays a central role in democratic society, their areas of interest and focus within this broader idea varied. Dewey and Habermas outlined foundational understandings regarding the formation of publics and the necessity that individuals within a democracy have access to information and to a space where they can meet to discuss the challenges facing their communities. Castells and McNair built upon Dewey's and Habermas's ideas. McNair proposed that a global-public sphere, tied together by traditional media and online communities, is emerging. Castells examined the shifting interplay between interpersonal communication, mass communication, and mass self-communication. Shirky and Jenkins focused on how online communication has lowered and removed barriers that have traditionally limited individuals from taking part in deliberations with others regarding issues or their interests. While these three streams of discourse were separated for the purposes of the analysis in this chapter, they are linked in that they share a broader understanding that communication is central to democratic society.

The next chapter draws upon the themes that emerged in the respective document analyses that have been summarized in chapters Two through Four. Moving on through that process, as detailed in Chapter One, this study proceeds to advance its objective of constructing a unified framework from which the courts can ground questions concerning the press clause in the network society in a conceptual rationale

that integrates historical understandings with those of a dramatically transformed media environment.

Chapter Five: Conclusions

The emergence of the network society has raised substantial questions regarding how the press clause of the First Amendment should be interpreted in an era when anyone with an Internet connection and a computer or mobile device has the ability to communicate messages to potentially large audiences. In this study's effort to consider how the press clause can most meaningfully be understood in the network-society era, the analyses presented in the preceding chapters focused upon thematic theoretical insights derived from three distinct bodies of discourse using Altheide's method of document analysis. The lower-court cases that considered questions involving citizen publishers' claims for protections that have traditionally been reserved for journalists, the United States Supreme Court decisions that examined Internet questions that relate to the First Amendment, and the philosophical conceptualizations of the role of communication in a democratic society each provided insights and understandings that are central to this study's ultimate objective. Addressing that objective — articulating a unified framework in which the courts can ground complicated questions concerning interpretations of the press clause in the network society through a conceptual rationale that integrates historical understandings with those of a dramatically transformed media environment — is the focal point of this chapter.

It begins by bringing together and briefly summarizing all of the themes that emerged through the document analyses of the philosophical and legal bodies of discourse presented in chapters Two, Three, and Four, before addressing each of the five research questions that guided this study. After that, this chapter proposes a

framework for how the press clause may be most justifiably interpreted in the network-society era in terms of the guidance provided by this study's analysis when considered in relation to historical understandings of the press clause.

Thematic Insights from Conceptual Rationales of the Lower Courts

Chapter Two's analysis considered lower-court decisions in which judges developed conceptual rationales for deciding cases involving bloggers or other citizen publishers arguing for protections historically more associated with the institutional press under the press clause. The themes identified through that analysis focused upon representations that framed the essential elements of those rationales in terms of: (1) concern with the way a message is delivered more than with the content of a message, (2) concern with whether messages are delivered according to accepted rules of journalism, (3) concern with exercise of the First Amendment's speech clause more than with exercise of its press clause, and (4) preference for organizations and groups over individual citizen publishers.

Concern with the way a message is delivered more than with the content of the messages: In the courts' evaluations of the citizen publishers' claims in those cases, judges emphasized that the vehicle through which a message was sent, rather than the content of the actual message, was of greater importance in determining whether or not privileges that have traditionally been associated with journalism should be extended to online communicators. In evaluating the vehicles of communication utilized by citizen publishers, the courts commonly drew upon their understandings of such vehicles as characteristic with traditional media outlets. As that concern was expressed in *Too Much Media v. Hale*, "New Jersey's Shield Law provides broad protection to the news

media and is not limited to traditional news outlets. . . . But to ensure that the privilege does not apply to every self-appointed newsperson, the Legislature requires that other *means* of disseminating news be ‘similar’ to traditional news sources.”¹ Overall, the manner in which the courts articulated their conceptual rationales in these cases relatively consistently reflected an understanding in which the content of the message, regardless of its potential for informing discussion in a democratic society, was not represented as a central factor in assessing the petitions of citizen publishers who sought protections traditionally reserved for journalists. And what was represented as a central factor was whether the messages involved were communicated through vehicles that resembled those of traditional media outlets.

Concern with whether messages are delivered according to accepted rules of journalism. In that thematic emphasis, the framing in this body of discourse emphasized evidence of journalism practices and processes as significant — whether, for example, citizen publishers gathered information, employed editorial decision-making, had their work vetted by editors, conducted interviews, attributed information, and produced original content.² In opinion after opinion, the conceptual rationales in which decisions were grounded found dispositive significance — as, for example, in *Too Much Media* — in considerations such as the fact that the “defendant has exhibited none of the recognized qualities traditionally associated with the news process, nor has she demonstrated connector or affiliation with any news entity.”³

¹ 206 N.J. 209, 216 (N.J. 2011) (emphasis added).

² *O’Grady v. Superior Court of Santa Clara County*, 139 Cal. App. 4th 1423, 1458 (Cal. Ct. App. 6th Dist. 2006); *Kaufman v. Islamic Society of Arlington*, 291 S.W.3d 130, 137 (Tex. App. 2009); *Obsidian Financial Group v. Cox*, 2012 U.S. Dist. LEXIS 43125, 20 (P.D. Or., 2012).

³ 413 N.J. Super. 135, 160 (N.J. Super. Ct. App. Div. 2010).

Concern with exercise of the First Amendment's speech clause more than with exercise of its press clause: This body of legal discourse also consistently represented citizen publishers' work as a form of speaking in a virtual space, rather than a type of publication and thus a form of expression most squarely grounded in the protections of the speech clause. In *Nexus v. Swift*, for example, the opinion declared that it found “nothing in the text or implication of the statute [concerning state protections granted for communication considered “public participation”] to suggest that it demarcates Internet speech from other forms of speech. Internet speech is speech protected by the First Amendment.”⁴ Similarly, in *Bailey v. State*, the opinion emphasized that the “press exemption does not prohibit speech, but only reduces the requirements which the press must meet in order to speak.”⁵ Beyond framing individual citizen publishers' messages as relating more to traditional understandings of the speech clause, it was noteworthy that even the expressions of groups of citizen publishers who shared characteristics with traditional media — such as the two large-audience websites in the *O'Grady v. Superior Court* case or the online magazine in the *Kaufman v. Islamic Society of Arlington* case — was also seen as relating to the speech clause and not the press clause.⁶

Preference for organizations and groups over individual citizen publishers: The understandings emphasized in this body of discourse consistently represented citizen publishers as *speakers* and their messages as “posts” or “statements,” rather than in journalistic terms as stories. Conversely, *groups* involved in these cases were represented in comparable ways to news organizations, with their messages being referred to as “articles” and “reports.” When considered in relation to each other, the

⁴ 785 N.W.2d 771, 786 (Minn. Ct. App. 2010).

⁵ 900 F. Supp. 2d 75, 87 (D. Me. 2012).

⁶ *O'Grady*, 139 Cal. App. 4th at 1460; *Kaufman*, 291 S.W.3d at 138-139.

themes that emerged through the document analysis of this body of discourse strongly suggest that the rationales in which lower courts ground their decisions concerning citizen publishers seeking privileges traditionally granted to journalists are likely to be conceptualized in terms that emphasize the degree to which citizen publishers gather and communicate their work in manners similar to judicial understandings of journalism.

Thematic Insights from Supreme Court Internet First Amendment Reasoning

Chapter Three's analysis considered Supreme Court decisions in which justices articulated conceptual rationales they have developed for deciding Internet questions that relate to the First Amendment. The themes identified through that analysis focused on representations that framed the essential elements of those rationales in terms of the Internet as: (1) an idealized public sphere, (2) a vehicle connected to the speech clause and not the press clause, and (3) a socially and technologically unique form of communication.

The Internet as idealized public sphere: This body of legal discourse consistently represented the Internet in terms conceptually consistent with understandings of public-sphere theory as a phenomenon enabling deliberation in society. In *Reno v. ACLU*, for example, the Court spoke in terms of “the vast democratic fora of the Internet” as a form of communication characterized to be not at all “subject to the type of government supervision and regulation that has attended the broadcast industry.”⁷ The *Reno* opinion declared the Internet to be a “unique new medium” that allows people to interact and deliberate in new ways.⁸ It declared that via

⁷ 521 U.S. 844, 868 (1997).

⁸ *Ibid.*, 851.

the Internet, “any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox,” and through “Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer.”⁹ Those considerations led the Court to categorize the Internet as such an ideal forum that “our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium.”¹⁰ The Court’s emphasis on protecting engagement, access, and deliberation in its Internet First Amendment cases can be read as resonant of Habermas’s understanding of the public sphere, which he conceptualized as providing a space in society where individuals can come together to engage in deliberation about matters of concern.¹¹

The Internet as a vehicle connected to the speech clause and not the press

clause: Supreme Court discourse on this subject also represented the Internet as relating to the speech clause rather than the press clause, asserting an understanding that framed online communicators not as *publishing* messages but as *speaking* in a virtual space. The *Reno* opinion compared the online speaker to a “town crier” and characterized the Internet as more powerful than a “soap box.”¹² Similarly, the Court, in all of the cases, primarily referred to Internet communications as forms of speech. The Court employed terms such as “Web speakers” and “collateral speech,” rather than representations of messages as being published or written.¹³

⁹ Ibid., 870.

¹⁰ Ibid.

¹¹ Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Bourgeois Society*, trans. Thomas Burger and Frederick Lawrence (Cambridge, Mass.: MIT Press), 16-26.

¹² 521 U.S. at 870.

¹³ *Ashcroft v. ACLU (Ashcroft II)*, 542 U.S. 656, 674 (2004) (Stevens, J., concurring).

The Internet as a socially and technologically unique form of communication:

This body of legal discourse also consistently represented the Internet as a distinct form of media.¹⁴ As the opinion in *Reno* declared: “Taken together, these tools constitute a unique new medium — known to its users as ‘cyberspace’ — located in no particular geographical location but available to anyone anywhere in the world, with access to the Internet.”¹⁵ This idea was also demonstrated, for example, by the way the Court’s opinions placed the Internet at the center of the *United States v. Williams* and *Doe v. Reed* cases, despite the fact that none of the laws in question in those cases dealt specifically with online communication. In this sense, the Court expressed an understanding that the Internet required new approaches and new considerations regarding regulation of a socially and technologically distinct form of communication. When considered in relation to each other, the themes that emerged through the document analysis of this body of discourse suggest that the rationales in which the Supreme Court grounds its decisions concerning Internet issues involving the First Amendment are likely to be conceptualized in terms that consider the Internet as a new form of public sphere — apparently independent of any restrictive interpretation of the press clause — through which individuals can come together to deliberate with maximum speech-clause protections.

Thematic Insights from Philosophical Concepts of Democratic Communication

Influential philosophical conceptualizations of the role of communication in a democratic society were considered in the analysis conducted in Chapter Four. The themes identified through that analysis focused upon representations that framed the

¹⁴ *Reno*, 521 U.S. at 868; *Ashcroft v. ACLU (Ashcroft I)*, 535 U.S. 564, 594 (2002) (Kennedy, J., concurring).

¹⁵ 521 U.S. at 851.

essential elements of those conceptualizations in terms of: (1) journalism as understood to be part of communication in a democratic society more broadly, (2) the roles of individuals in a democracy as engaged and reflective, and (3) individuals' contributions to resolving societal problems as contingent to the groups in which they participate.

Journalism as understood to be part of communication in a democratic society more broadly: This body of philosophical discourse advanced understandings of journalistic communication as providing a valuable contribution to democratic society, but a contribution that is only a part of the overall informational process. The discourse of Dewey and Habermas represented gatherings between individuals and internally focused written messages, such as letters and newsletters, as working with journalistic messages to provide the information individuals need to take part in democratic communication.¹⁶ Castells represented journalistic media as a “component” of a broader communication mosaic that also includes interpersonal and mass self-communication.¹⁷ The discourse of Shirky and Jenkins served to effectively place journalistic media in a lesser role, one in which journalistic communication was characterized as a type of megaphone that can be used to connect conversations occurring in virtual and physical worlds regarding issues and problems in society.¹⁸

The roles of individuals in a democracy as engaged and reflective: This body of philosophical discourse also advanced understandings of individuals using information to engage in deliberation with others regarding problems and issues in society,

¹⁶ Habermas, *The Structural Transformation of the Public Sphere*, 16; John Dewey, “Creative Democracy,” in *The Essential Dewey, Vol. 1: Pragmatism, Education, Democracy*, ed. Larry A. Hickman and Thomas M. Alexander (Bloomington, Ind.: Indiana University Press, 1998), 341, 342.

¹⁷ Manuel Castells, *Communication Power* (Oxford: Oxford University Press, 2009), 65.

¹⁸ Clay Shirky, *Here Comes Everybody: Revolution Doesn't Happen When Society Adopts New Technology, It Happens When Society Adopts New Behaviors* (New York: Penguin Books, 2008), 9.

emphasizing that individuals in a democracy *should* be engaged and reflective. Dewey's work characterized democracy as a way of life requiring intentional engagement, not a set of governmental mechanisms.¹⁹ The discourse of Castells, Shirky, and Jenkins represented engagement as something that comes almost automatically as a result of networked technology, asserting that people are using new technologies to engage in deliberations that make purposive democratic activity, as envisioned by Dewey, more possible than in the past.

Individuals' contributions to resolving societal problems as contingent to the groups in which they participate: Advancing understandings of knowledge as emerging through communication in society, this body of discourse emphasized representations in which each individual is seen as making a contribution to knowledge-yielding deliberations in a democratic society. This idea is central to Habermas's conceptualization of the public sphere, which focuses on the creation of a space where people together can generate knowledge and, ultimately through communication and the creation of understanding, solve problems and address issues in their communities, a "forum in which the private people, come together to form a public."²⁰ In Jenkins's articulation, "A collective intelligence . . . assumes that each person has something to contribute, even if they will only be called upon on an ad hoc basis."²¹ Dewey represented communication in communities as allowing each individual to realize his or her potential through engaging in group deliberation.²² When considered in relation to each other, the themes that emerged through the document analysis of this body of

¹⁹ John Dewey, *The Public and its Problems* (Athens, Ohio: Ohio University Press, 1954), 148.

²⁰ Habermas, *The Structural Transformation of the Public Sphere*, 24-26.

²¹ Jenkins, *Convergence Culture*, 53.

²² *Ibid.*, 154.

discourse highlight the manner in which these influential conceptualizations of the role of communication in a democratic society focus on its mosaic essence. Journalists and individuals are both elements of that mosaic who are crucial to generation of knowledge derived through conditions that allow all individuals to freely engage with all others and generate the greater collective intelligence that emerges through such a process.

Conclusions from Research Questions

- *What understandings are dominant in this study's analysis of the relevant bodies of legal and philosophical discourse?*

The analysis of the bodies of discourse in this study revealed understandings in which journalistic communication is represented as legally and philosophically distinct from other forms of communication. The philosophical and legal bodies of discourse did not, however, elevate journalism-related messages above those of others in terms of their value to society, but rather recognized that certain professional practices and processes are considered intrinsic to journalistic communication — qualities which distinguish it from other forms of communication. In the philosophical literature, this understanding represents journalism as part of the broader system of communication utilized by citizens to gather information so they can take part in deliberations with others in a democratic society. That body of discourse further reflected understandings that online communication creates new opportunities for individuals to gather and share information, but such engagement with information and with others on the Internet was not represented as equivalent to journalism. Rather, scholars such as Castells and Shirky

articulated conceptualizations in which journalism and other forms of communication are seen as both distinct from and interacting with one another.²³

The discourse in the lower-court rulings reflected conceptual rationales in which citizen publishers arguing for constitutional protections traditionally associated with the institutional press are more likely to succeed in that effort if their messages are prepared and communicated in ways that are similar to those traditionally associated with journalists. By considering citizen publishers' claims for press-related protections in terms of judicial understandings of journalistic composition and communication practices, that body of discourse represented journalism as a distinctive form of communication that is not characteristic of everyone who communicates. The lower-courts' discourse also framed consideration of claims for press-related protections made by citizen publishers in terms of the First Amendment's speech-clause provisions and not those of its press clause, representing the expression in question as a form of virtual speech, rather than publication.

The discourse of the Supreme Court in Internet First Amendment cases also framed consideration of online communication in terms of the speech clause, rather than the press clause, suggesting similar understandings of journalism as a form of communication distinct from the broader body of communication conveyed by individuals using the Internet to gather information and send messages. Historically, the Court has considered the press clause as relevant only to cases involving the institutional press as traditionally understood.²⁴ By declining to bring the press clause

²³ Castells, *Communication Power*, 54-55; Shirky, *Here Comes Everybody*, 9-10.

²⁴ See for example: *Near v. Minnesota*, 283 U.S. 697 (1931); *New York Times v. United States*, 403 U.S. 713 (1971); *Saxbe v. Washington Post*, 417 U.S. 843 (1974); *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978); and *Branzburg v. Hayes*, 408 U.S. 665 (1972).

into its jurisprudence considering Internet questions involving the First Amendment, the Court's discourse framed the broader, more general communication engaged upon by individuals online as something distinct from journalism. Thus the Supreme Court's discourse further contributed to a dominant understanding of journalism as distinct from other forms of communication.

• Are there significant commonalities among dominant understandings identified in the respective bodies of legal and philosophical discourse?

The strongest commonality across the bodies of philosophical and legal discourse related to the articulation of understandings in which online communication was represented as similar to speaking and falling within the constitutional purview of the speech clause — rather than similar to publishing and of press-clause concern. The bodies of discourse from the Supreme Court and lower-court cases strongly reflected that commonality, as discussed to some extent just above. While the discourse from the philosophical literature did not express this distinction in terms of the speech and press clauses specifically as such, it can be read as advancing a similar understanding in terms of the manner in which online communication was framed as separate from the work of journalists. The philosophical discourse conveyed the idea that online communication is more similar to individuals coming together in a virtual space than like citizens using Internet technology to produce journalism-related content.

The dominant understandings in the bodies of philosophical and Supreme Court discourse also reflected commonality in terms of their respective conceptualization of the Internet as an idealized form of the public sphere. The philosophical texts advanced that understanding through the ways the authors highlighted both the lower barriers to

engagement and information access that characterize online communication and the assertion that the lower barriers result in greater interaction, via online communities, among individuals.²⁵ Similarly, in the understandings advanced by the Supreme Court, the Internet is represented as providing a completely new type of forum or fora through which people can come together to deliberate. The Court referred to such online discussions as “the vast democratic fora,” and highlighted the manner in which the phenomenon provides people greater opportunities than ever to step forward into conversations in public spaces on the Internet.²⁶

The bodies of philosophical and lower-court discourse also shared overlapping understandings suggesting that group efforts reflect greater value than work done by individuals. The philosophical discourse emphasized understandings in which greater knowledge emerges from individuals coming together to deliberate regarding problems or issues in their communities. The work of Dewey, for example, was highlighted by assertions that democracy cannot function without individuals purposively engaging in deliberations with other individuals.²⁷ These arguments can be seen to some extent as reflecting commonality with the discourse of the lower courts in which claims for press-related protections were framed as more greatly justified when raised by groups of citizen publishers, on the reasoning that groups (such as online magazines, for example) include layers of editing, evidence of editorial decision-making, and more journalistic organization in their content than individual citizen publishers typically do.²⁸

²⁵ See for example: Brian McNair, *Cultural Chaos: Journalism, News and Power in a Globalised World* (London: Routledge, 2006), 143; Shirky, *Here Comes Everybody*, 21-22; and Jenkins, *Convergence Culture*, 27.

²⁶ *Reno*, 521 U.S. at 868-869; *Williams*, 553 U.S. at 291-292.

²⁷ Dewey, “Creative Democracy,” 342.

²⁸ See for example: *O’Grady*, 139 Cal. App. 4th at 1423; *Kaufman*, 291 S.W.3d at 130; *Too Much Media*, 206 N.J. at 209; and *Obsidian*, 2012 U.S. Dist. LEXIS 43125 at 1.

• *Are there significant conflicts among dominant understandings identified in the respective bodies of legal and philosophical discourse?*

A conflict can be seen between the understandings emphasized by the lower courts concerning the ways messages are composed and delivered and the understandings highlighted in the philosophical and Supreme Court bodies of discourse regarding the value of information and deliberation in society. By constructing understandings in which the content of the messages was less relevant than the manner in which the information was composed and delivered, the lower courts can be argued to have established a conceptual rationale for holding citizen publishers to a different set of expectations than those applied to journalists. As discussed, the bodies of philosophical and Supreme Court bodies of discourse consistently represented the Internet as an idealized form of the public sphere. The philosophical discourse also conceptualized both journalism-related messages and other forms of communication as providing information needed for individuals to engage in deliberations with others in a democratic society. By establishing a conceptual rationale that suggests a basis for holding citizen publishers to a standard that does not seem to account for the potential contributions of their messages, the lower courts' rulings conflict with that of the body of philosophical and Supreme Court discourse, in which no distinction was articulated between protections extended to journalism-related messages and other forms of communication.

• *To the extent that significant commonalities and conflicts can be identified in the respective bodies of legal and philosophical discourse, how do they critically relate to historical understandings of the press clause?*

Substantial relationships were found between historical understandings of the press clause and some of the commonalities and conflicts identified among the bodies of discourse that were the focus of this study. Specifically, the fact that all of the bodies of discourse carried understandings in which individuals' online communications were represented as related to speaking and the speech clause rather than to publication and the press clause can be seen as critically related to historical understandings articulated by the Supreme Court and legal scholars regarding the meaning of the press clause. Similarly, the conflict discussed just above regarding the understandings related to composition and delivery of messages versus their content also relates with historical understandings of the press clause.

The broad narratives that are represented by the bodies of discourse focused upon in this study and historical understandings of the press clause discussed in Chapter One rather consistently advance understandings that assert the press clause was created to protect the press as an institution. The Supreme Court emphasized the role of the press and the press clause, for example, in cases such as *New York Times v. United States* (the "Pentagon Papers" case) and *Near v. Minnesota*.²⁹ In both cases, the Court was asked to address significant questions regarding the extent of protections provided to the institutional press by the press clause. Cases such as those have led many legal scholars, including Justice Potter Stewart, to postulate that the press clause was enacted

²⁹ *New York Times*, 403 U.S. at 715-716 (1971) (Black, J., concurring); *Near*, 283 U.S. at 697. The *Near* case emanated from a state law that halted "nuisance" publications.

to protect the media as an industry.³⁰ That idea is supported by decisions such as *Schenck v. United States* and *Abrams v. United States*, both post-World War I sedition cases, in which the Court adjudicated the constitutional questions before it regarding whether individuals could be punished by the government for distributing anti-war material as matters relating to the speech clause.³¹ The cases involved information that was distributed in printed form by individuals, rather than by media organizations, so the Court did not invoke the press clause in reaching its rulings. Similarly, the bodies of discourse that were the focus of this study's document analysis consistently advanced understandings in which messages that are communicated by individuals on the Internet were represented as forms of speech because they do not relate to a traditional media outlet or generally to traditional journalistic practices and processes. In this sense, the understandings that were dominant in those bodies of the philosophical and legal discourse critically relate to historical understandings of the press clause.

The conflict that was identified regarding the understandings related to composition and delivery of messages versus their content also relates to historical understandings of the press clause. That conflict is rooted in the fact that a number of federal and state laws have been created that specifically provide journalists with protections generally not available to other citizens (as examples involved in case discussions in Chapter Two illustrate). In terms of constitutional protections, however, the Supreme Court has generally declared that the press clause does not provide journalists greater rights than those of individual citizens. As detailed in Chapter One,

³⁰ Potter Stewart, "Or of the Press," *Hastings Law Journal* 26 (1975): 633-634; C. Edwin Baker, "The Independent Significance of the Press Clause Under Existing Law," *Hofstra Law Review* 35 (2007): 957-958; and Melville B. Nimmer, "Introduction — Is Freedom of the Press a Redundancy: What Does it Add to Freedom of Speech," *Hastings Law Journal* 26 (1975): 639.

³¹ *Schenck v. United States*, 249 U.S. 47 (1919); *Abrams v. United States*, 250 U.S. 616 (1919).

in a series of contentious decisions in the 1970s, the Supreme Court concluded that the press clause does not provide journalists any more protections or access to information than other citizens.³² What can be read as a conflicting narrative in the discourse of the lower courts that is the focus of this study's document analysis, however, derives from the courts' efforts to adjudicate cases brought before them in which specific state and federal statutory provisions that do in fact provide news media with such protections were central to the questions being litigated. Thus that crucial difference between constitutional and statutory questions can be seen as perhaps inevitably leading the discourse of the lower courts to focus on the way messages were composed and delivered, rather than on their content.

• *What does this analysis suggest regarding how understandings dominant in this study's examination of the relevant bodies of legal and philosophical discourse can provide grounding for interpreting the press clause in the network society?*

The philosophical and legal bodies of discourse in this study articulated a dominant understanding in which journalism is represented as distinct from other forms of communication and in which journalists operate with other types of messengers as essential contributors to deliberation in a democratic society. Also significant was the advancement of the dominant understanding in which individuals' online communications are represented as relating to the speech clause of the First

³² *Branzburg v. Hayes*, 408 U.S. 665 (1972), dealt with a newspaper reporter's claim that the press clause protected him from having to reveal his confidential sources to a grand jury. In its opinion, the Court explained that the press clause applied to lecturers, novelists, dramatists, scholars, and the "lonely pamphleteer." Two years later, in *Pell v. Procunier*, 417 U.S. 817 (1974), a case in which reporters argued against a prison policy that banned requests for interviews with specific inmates, the Court concluded, "The Constitution does not . . . require government to accord the press special access to information not shared by members of the public generally."

Amendment, rather than the press clause. All these dominant understandings can provide grounding for interpreting the press clause in the network society.

By articulating understandings that emphasized the manner in which journalism involves certain practices and processes that are distinctive from other forms of communication in democratic society, the bodies of discourse in this study highlighted potential elements through which to integrate historical understandings of the press clause with those of a dramatically transformed media environment. In a related sense, the dominant understandings suggest that journalism's distinctive contribution in society may likely be best understood as part of the information and deliberation-enabling communication that is needed in a democratic society, particularly in the network age when other forms of communication, such as virtual communities and interpersonal interactions, appear increasingly likely to be legally recognized as providing similarly valuable but different contributions. That suggests that future conceptualizations of the press clause can be argued as justified in avoiding limits on the First Amendment rights of other types of communicators who may not be formally part of the institutional press but whom technology now has enabled to communicate with audiences in ways that are similar to the manner in which the press does.

Finally, the bodies of philosophical and legal discourse contended that individual online communicators' messages related to the speech clause. This insight provides direction regarding how the press clause should be interpreted in the network society because it further indicates, along with support from legal scholars, that the press clause can be best understood as protecting communication that includes processes and practices with commonalities historically associated with journalism.

While the bodies of discourse conveyed understandings that journalism and other forms of communication work together to inform deliberation in a democratic society, and are therefore both valuable, they also asserted that journalism's processes and practices make it distinctive, providing a grounding that democratic deliberation requires a form of communication that follows processes and practices that have traditionally been associated with journalism.

A Proposed Framework for Interpreting the Press Clause in the Network Society

The bodies of philosophical and legal discourse that formed the foundation for the analysis upon which this study has focused advanced understandings that represent communication as central to democratic society. The highlighted understandings emphasized in the bodies of discourse represented journalism and other forms of communication, such as interpersonal and online communication, as working in different ways toward the same goal of informing democratic deliberation. As also discussed, the bodies of discourse advanced representations of journalism as distinctive in regard to certain practices and processes that distinguish it from other forms of communication. Finally, the bodies of philosophical and legal discourse analyzed in this study framed the online communications of individuals who are not formally part of the institutional press in terms of the First Amendment's speech-clause provisions rather than those of the press clause. Therefore, this proposal for a unified framework in which the courts can ground complicated questions concerning interpretations of the press clause in the network society draws particularly upon those understandings in asserting a conceptual rationale that seeks to integrate historical understandings with those of a dramatically transformed media environment.

In order to integrate those understandings with the historical understandings of the press clause summarized above and detailed in Chapter One, the framework proposed here centers on the assertion that courts seeking to interpret the press clause in the network society in a manner consistent with those unified understandings must focus most essentially and fundamentally on *the process through which the messages in question were composed and delivered*.

Thus, this study proposes a process-based framework through which the Supreme Court should conceptualize the press clause in the network-society era. As emphasized, this dissertation's collective analysis clearly highlights the understanding that journalism is distinctive and that it works with other forms of communication to inform deliberation in society. By focusing on the process through which messages were composed and delivered — rather than on their content or their creator — the courts can ensure that the distinctive nature of journalism as emphasized in the bodies of discourse focused upon in this study remains a vital part of the informational mosaic also emphasized as critical in a democratic society.

The process-based approach cannot be rigid in the sense that a group of steps or actions must have been taken by the person who is claiming press-clause protections. Rather, the Court should utilize a list of journalistic processes as a guide in its rulings, requiring that a majority of the elements outlined be present. Such an approach is consistent with how the Supreme Court has conceptualized the press clause in that it has often considered journalistic processes and practices when making rulings.³³ The

³³ *Saxbe v. Washington Post*, 417 U.S. 843 (1974); *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978); *Curtis Publishing v. Butts*, 388 U.S. 130 (1967); and *Herbert v. Lando*, 441 U.S. 153 (1979) all represent instances when the Court incorporated considerations of journalistic practices and processes into its deliberations.

approach is also supported by the lower courts' rationales in that the judges consistently articulated that whether a message was delivered according to accepted rules of journalism was a central concern in their deliberations.³⁴ Such concerns would likely include, though not necessarily be limited to, whether:

- The material involved in the message was original and not copied from another source.
- Preparing the message incorporated interviews or other primary sources.
- The author made direct observations of events relating to the message.
- The message included attributed information.
- Another person edited the message before it was communicated.
- The message is accurate or that efforts were made to verify the accuracy of information.
- The author acted independently, having not been influenced by the interests of a political faction, corporation, or other organization, in composing the message.

Since historically, as discussed, the Supreme Court has declined to interpret the press clause so as to provide journalists greater protections than others, utilizing an approach along these lines would maintain consistency with that cornerstone of press-clause jurisprudence. In cases such as *Branzburg*, *Pell*, and *Saxbe*, for example, the Court emphasized that it did not understand the press clause as extending rights to journalists that were otherwise not available to others. In *Branzburg* the Court wrote, "Citizens generally are not constitutionally immune from grand jury subpoenas; and

³⁴ See for example, *O'Grady*, 139 Cal. App. 4th at 1468; *Forensic Advisors v. Matrixx Initiatives*, 170 Md. App. 520, 528 (Md. Ct. Spec. App. 2006); and *Too Much Media*, 206 N.J. at 222-223.

neither the First Amendment nor any constitutional provision protects the average citizen from disclosing to a grand jury information that he has received in confidence.”³⁵ Furthermore, in *Pell*, the Court concluded that “Newsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public.”³⁶ The process-based approach does not provide rights to journalists that are not otherwise available to others. In this sense, such a framework also crucially avoid limiting the First Amendment rights of other types of communicators who may not be formally part of the institutional press but whom technology now has enabled to communicate with audiences in ways that are similar to the manner in which the press does.

Such an approach also avoids problems that would be created by a framework that is based on *who* is or is not a journalist. Bills proposing a federal shield law have failed to succeed during the past ten years because of a lack of a consensus in Congress regarding *who* would be protected by such a law.³⁷ The most recent congressional effort to author a federal shield law advanced through the Senate Judiciary Committee only after a complex and limiting definition of who is a journalist was written.³⁸ The law, for example, defines a “covered journalist” as someone who was paid by a news service for one year within the past two decades or for three months during the past five years or a person who has “substantially contributed . . . to a significant number of articles, stories, programs, or publications by a medium” outlined within the law.³⁹ A process-based

³⁵ *Branzburg*, 408 U.S. at 682.

³⁶ *Pell*, 417 U.S. at 834.

³⁷ William E. Lee, “The Demise of the Federal Shield Law,” *Cardozo Arts & Entertainment Law Journal* 30, 35-37 (2012).

³⁸ Sari Horwitz, “Media Shield act moves on to the full Senate,” *Washington Post*, September 12, 2013.

³⁹ Free Flow of Information Act of 2013, S. 987, 113th Cong. (2013).

framework not only avoids the pitfalls of such attempts to define *who* is a journalist, but for the same reasons maintains consistency with historical press-clause understandings in that efforts to make such determinations long have been recognized by the courts as problematic.⁴⁰ The Court firmly articulated the constitutional concerns associated with defining who is and is not a journalist in *Branzburg*, when it concluded:

We are unwilling to embark the judiciary on a long and difficult journey to such an uncertain destination. The administration of a constitutional newsman's privilege would present practical and conceptual difficulties of a high order. Sooner or later, it would be necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press.⁴¹

Thus, integral to this proposed framework is the assertion that it should not include consideration of characteristics such as whether the messenger has a journalism education, works for a traditional news entity, etc. The process-based approach neither denies nor contradicts any historical understandings of potential press-clause protections, while ensuring that those protections as interpreted in the network society will encompass both the institutional press as well as individuals working outside it but contributing what this analysis emphasized as relevant bodies of discourse as essential to deliberation in a democratic society.

Limitations

Any study such as this one includes limitations. A central portion of this study addresses philosophical conceptualizations of communication in a democratic society. While the philosophical discourse chosen for this study represents influential thinkers whose ideas bear undeniably significant relevance to the topic of this dissertation, the breadth of philosophical considerations regarding communication in a democratic

⁴⁰ See for example, *Branzburg*, 408 U.S. at 704; *O'Grady*, 139 Cal. App. 4th at 1457.

⁴¹ *Branzburg*, 408 U.S. at 703-704.

society is wide. Constructing the study required that some philosophers who could have been argued as also relevant were not among those who were included in the analysis, due to considerations discussed in Chapter Four. While this can be asserted as a limitation, it also provides potential opportunities to examine the central ideas in this study through the concepts put forth by other philosophers in the future. Similarly, while this study involved rigorous and extensive search efforts to identify the body of relevant lower-court and Supreme Court cases that were utilized in the document analysis, it is at least theoretically possible that relevant rationales may also exist in the discourse of some cases that were not identified for this study — given that courts on at least some occasions may draw upon rationales within the text of opinions for rulings with case names and/or summaries that seem unrelated to the focus of this study. Finally, any study of this sort will bear some influences resulting from the author's necessary role in the qualitative methodological approach employed here. While Altheide's method of document analysis represents a widely respected and relatively systematic approach, it is always possible that alternative readings of the bodies of discourse focused upon in this study could be developed through other methodological approaches.

Conclusion

The emergence of the network-society era has shifted the way people communicate in a democratic society. It has allowed individuals to communicate messages to audiences of varying sizes and, in doing so, created uncertainty regarding how the protections of the press clause should be understood. This dissertation contributes a well-supported framework that seeks to pull the discussion away from the

traditionally problematic questions that emerge with approaches that focus on determining *who* is and is not a journalist. Instead, a process-oriented framework that is based upon how a message is composed and delivered, rather than on *who* communicated it is proposed. The framework in this dissertation was designed both theoretically and methodologically to arrive at conclusions that provide a conceptual basis in which courts can ground such challenging questions concerning interpretations of the press clause in the network society.

The process-based framework put forth in this dissertation draws upon narratives represented within lower-court rulings concerning instances in which citizen publishers argued for protections that have traditionally been reserved for journalists, Supreme Court decisions in which justices articulated rationales they developed for deciding Internet questions relating to the First Amendment, and essential theoretical conceptualizations of the role of communication in democratic society, as well as historical understandings of the press clause. The thematic insights that emerged through the analysis of these bodies of discourse resulted in a framework that aligns with historical conceptualizations of the press clause and the characteristics of the network era.

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