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MICHAEL W. MCCONNELL

Reconsidering *Citizens United* as a Press Clause Case

ABSTRACT. The central flaw in the analysis of *Citizens United* by both the majority and the dissent was to treat it as a free speech case rather than a free press case. The right of a group to write and disseminate a documentary film criticizing a candidate for public office falls within the core of the freedom of the press. It is not constitutional for the government to punish the dissemination of such a documentary by a media corporation, and it therefore follows that it cannot be constitutional to punish its dissemination by a non-media corporation like *Citizens United* unless the freedom of the press is confined to the institutional media. Precedent, history, and pragmatics all refute the idea that freedom of the press is so confined.

The result in *Citizens United* was therefore almost uncontrovertibly correct. No one disputes that corporations, such as the New York Times Company, can editorialize during an election, and other groups performing the press function have the same right, even if they are not part of the traditional news media industry. A holding based on the Press Clause, though, would not have implied any change in constitutional doctrine about campaign contributions, which are not an exercise of the freedom of the press.

AUTHOR. Richard & Frances Mallery Professor and Director of the Constitutional Law Center, Stanford Law School; Senior Fellow, Hoover Institution; former Circuit Judge, United States Court of Appeals for the Tenth Circuit. The author wishes to thank William Baude, Nathan Chapman, Chad Flanders, Barry Friedman, Joshua Hawley, Lawrence Lessig, William Nelson, Burt Neuborne, Richard Pildes, Nicholas Quinn Rosenkranz, Adam Samaha, Geoffrey Stone, David Strauss, Eugene Volokh, Derek Webb, and participants in faculty workshops at NYU, Stanford, and William & Mary for helpful comments. Special thanks to Paul Harold for outstanding research assistance.

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INTRODUCTION

Citizens United v. FEC[1] is one of the most reviled decisions of the Supreme Court in recent years. The President of the United States denounced the decision to the Justices' faces at his 2010 State of the Union address.[2] His 2008 opponent, John McCain, called it the "worst decision ever."[3] The Democratic Party is pledged to reverse it by constitutional amendment if necessary.[4] Prominent newspapers attribute to it virtually every excess of the campaign finance system, whether or not the practices were authorized by the decision or would have been lawful even without it.[5] It has become shorthand for corporate domination of politics.[6] It has few defenders among legal scholars.[7]

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1. 558 U.S. 310 (2010).

2. Barack H. Obama, President of the United States, Remarks by the President in State of the Union Address (Jan. 27, 2010), http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address ("With all due deference to separation of powers, last week the Supreme Court reversed a century of law that I believe will open the floodgates for special interests–including foreign corporations–to spend without limit in our elections. I don't think American elections should be bankrolled by America's most powerful interests, or worse, by foreign entities. They should be decided by the American people. And I'd urge Democrats and Republicans to pass a bill that helps to correct some of these problems.").

3. Alice Robb, *McCain Addresses Oxford*, OXONIAN GLOBALIST, Oct. 11, 2012, http://toglobalist.org/2012/10/mccain-addresses-oxford.

4. *Moving America Forward: 2012 Democratic National Platform*, DEMOCRATIC NAT'L CONVENTION 12 (2012), http://assets.dstatic.org/dnc-platform/2012-National-Platform.pdf ("We support campaign finance reform, by constitutional amendment if necessary.").

5. *See, e.g.*, Editorial, *The $6 Billion Presidential Contest*, USA TODAY, Nov. 4, 2012, http://www.usatoday.com/story/opinion/2012/11/04/presidential-election-6-billion/1681827 ("The floodgates opened with the Supreme Court's *Citizens United* ruling in 2010 and a subsequent lower court decision. Just about every post-Watergate reform has been undermined, and money is sloshing around this campaign like the waters of Superstorm Sandy."); Editorial, *Expose the Fat Cats*, WASH. POST, July 14, 2012, http://articles.washingtonpost.com/2012-07-14/opinions/35487396_1_secret-money-full-disclosure-fat-cats ("The Supreme Court's 2010 *Citizens United* decision opened the door to unlimited donations by corporations, wealthy individuals and labor unions."); Editorial, *When Other Voices Are Drowned Out*, N.Y. TIMES, Mar. 25, 2012, http://www.nytimes.com/2012/03/26/opinion/when-other-voices-are-drowned-out.html (arguing that the decision was shaped by an "extreme view of the First Amendment: money equals speech, and independent spending by wealthy organizations and individuals poses no problem to the political system").

6. *See, e.g.*, E.J. Dionne, Jr., *How to Beat* Citizens United, WASH. POST, Apr. 22, 2012, http://articles.washingtonpost.com/2012-04-22/opinions/35453992_1_contribution-limits-campaign-finance-law-state-address; Editorial, *Occupy Anniversary: The 1 Percent Are Winning*, BALT. SUN, Sept. 18, 2012, http://articles.baltimoresun.com/2012-09-17/news/bs-ed-occupy-anniversary-20120917_1_protest-movement-tea-party-movement

Part of the criticism is well-deserved. The opinion is overly long and unfocused. It seems to stretch for unnecessarily broad interpretations of free speech law, beyond what the parties argued or what the facts demanded. On its own motion, the Court ordered reargument of the case on theories broader than those put forward by the plaintiffs, entailing the overruling of precedents that the plaintiffs had sought to distinguish.[8] The opinion itself was written with a broad brush, turning its back on several plausible narrower grounds for decision. At the first oral argument, counsel for Citizens United suggested the Court resolve the case on statutory grounds, namely that the ninety-minute documentary was not "express advocacy" under the Bipartisan Campaign Reform Act (BCRA).[9] At the reargument, Justice Stevens suggested that non-profit corporations be allowed to broadcast electioneering publications, so long

-public-encampments (stating in a sub-headline the newspaper's view that the Occupy Wall Street protest movement "should coalesce around reversing Citizens United"); Editorial, *The Wall Between Contractors and Politics*, N.Y. TIMES, Mar. 26, 2012, http://www.nytimes.com/2012/03/26/opinion/the-wall-between-contractors-and-politics.html.

7. For academic criticism, see, for example, Richard L. Hasen, Citizens United *and the Illusion of Coherence*, 109 MICH. L. REV. 581 (2011), which argues that the Court's holding is too extreme to be consistently and coherently applied; Ronald Dworkin, *The "Devastating" Decision*, N.Y. REV. BOOKS, Feb. 25, 2010, http://www.nybooks.com/articles/archives/2010/feb/25/the-devastating-decision, which calls the decision "appalling"; Lawrence Lessig, *Democracy After* Citizens United, BOS. REV., Sept. 4, 2010, http://bostonreview.net/lessig-democracy-after-citizens-united, which denounces the decision as "First Amendment Lochnerism"; and Jeffrey Toobin, *Bad Judgment*, NEW YORKER NEWS DESK (Jan. 22, 2010), http://www.newyorker.com/online/blogs/newsdesk/2010/01/campaign-finance.html, which argues that the decision was "egregious" and based on "bizarre legal theories." Among the rare defenders are Floyd Abrams, *Protecting the Heart of the First Amendment, Defending* Citizens United, 9 FIRST AMEND. L. REV. 193 (2011); Richard A. Epstein, Citizens United v. FEC*: The Constitutional Right that Big Corporations Should Have but Do Not Want*, 34 HARV. J.L. & PUB. POL'Y 639 (2011); Joel M. Gora, *The First Amendment . . . United*, 27 GA. ST. U. L. REV. 935 (2011); Ilya Shapiro & Caitlyn W. McCarthy, *So What if Corporations Aren't People?*, 44 J. MARSHALL L. REV. 701 (2011); and John O. McGinnis, Citizens United—*The Most Important Decision of the Roberts Court*, SCOTUSREPORT (July 10, 2012, 9:32 AM), http://www.scotusreport.com/2012/07/10/citizens-united-the-most-important-decision-of-the-roberts-court.

8. *See* Citizens United v. FEC, 557 U.S. 932 (2009) (per curiam) (ordering parties to file supplemental briefs on whether the Court should overrule *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990), and the part of *McConnell v. FEC*, 540 U.S. 93 (2003), that "addresses the facial validity of § 203 of the Bipartisan Campaign Reform Act of 2002, 2 U.S.C. § 441b (2006)").

9. Transcript of Oral Argument at 15-19, Citizens United v. FEC, 558 U.S. 310 (2010) (No. 08-205), http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-205.pdf.

as they were funded only by individual contributions.[10] Perhaps most persuasively, it is likely that a pay-per-view offering is not a "broadcast" communication within the meaning of BCRA—although the advertisements for the movie presumably were. Instead, the Court embraced a theory with wider, and perhaps unforeseeable, implications—that speech restrictions treating some speakers differently from others are suspect.[11] Already the Court has been forced to cut back on one of the broader possible implications of that theory, holding that it does not extend to non-citizens.[12] But the most important flaw—a flaw to which the parties and the lower courts contributed—was to analyze the case under the wrong clause of the First Amendment.

It is important to underscore that *Citizens United* was about the production and dissemination of a documentary film critical of a candidate for office, and not about contributions to a candidate, party, political organization, or political action committee (PAC). As Justice Stevens commented in his dissenting opinion, the "natural textual home" for the right to produce and disseminate a documentary is the freedom of the press.[13] Whether the government may forbid publication of opinions about officials and candidates is at the very core of the Press Clause. To be sure, in recent decades, the Supreme Court has tended to collapse the various expressive freedoms of the First Amendment (apart from the Religion Clauses) into an undifferentiated "freedom of expression," or more often, simply "freedom of speech."[14] But there are historical and practical reasons why the freedoms of speech, press, assembly, and petition were separately enumerated.

In the particular context of *Citizens United*, a focus on freedom of the press—rather than "speech" more generally—would foster analytical clarity in two ways. First, it would help to differentiate the act of publishing one's opinions about a public official or candidate from the act of contributing

10. Transcript of Oral Reargument at 43-45, *Citizens United*, 558 U.S. 310 (No. 08-205), http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-205[Reargued].pdf.

11. *See infra* Section II.A.

12. *See* Bluman v. FEC, 132 S. Ct. 1087 (2012) (per curiam) (declining to extend the *Citizens United* holding to non-citizens).

13. *Citizens United*, 558 U.S. at 431 n.57 (Stevens, J., concurring in part and dissenting in part).

14. *See, e.g.*, FCC v. Fox Television Stations, Inc., 132 S. Ct. 2307 (2012) (analyzing the regulation of broadcast media under free speech principles with no mention of freedom of the press); Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971 (2010) (collapsing expressive association into public forum analysis); McDonald v. Smith, 472 U.S. 479 (1985) (holding that the right of petition is subject to the same limitations applicable to free speech claims).

money to a candidate or political party. The former is an exercise of freedom of the press; the latter is not. Second, focusing on freedom of the press would simplify the analysis as to whether for-profit businesses should be understood as within the scope of the freedom. Whatever doubts there may be about a business corporation's right to speak, assemble, petition, exercise religion, or object to an establishment of religion, there can be little doubt that a business corporation can operate a newspaper or produce and distribute a film. The vast majority of the Court's press cases involve for-profit corporations, such as the New York Times Company or the Cleveland Plain Dealer,[15] and no one, even in dissent, has ever suggested that corporate status mattered in those cases.[16] I take that as settled and correct law.

If the Court had analyzed the case under the Press Clause, it could have avoided muddying the waters of campaign finance law governing contributions, which presents different constitutional considerations, and it would have sidestepped the controversy over whether for-profit corporations, in general, have constitutional rights. Instead, the Court's analysis would have been confined to the less fraught question of whether the protections of the Press Clause apply to corporations that are not regularly engaged in the business of journalism. That is an entirely different question than the ones it spent so many pages discussing. If the case had been analyzed under the Press Clause, it should not have been so controversial, and would not have the far-reaching consequences for campaign finance law that so concern its critics. Properly analyzed, the decision in *Citizens United*—though not its reasoning—is almost incontrovertibly correct.

Unlike some defenders of *Citizens United*, I am not hostile to efforts to reform our system of campaign finance, which is a disgrace. I believe the current system favors incumbents and breeds an unhealthy collaboration between government and powerful entrenched economic interests, both labor and corporate, at the expense of small business, ordinary citizens, free enterprise, and the forces of economic change. I find the majority's sunny dismissal of the corrupting influence of independent expenditures wholly unpersuasive. In the past I have proposed campaign finance reforms that

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15. The Plain Dealer is owned by Advance Publications, Inc.

16. *See, e.g.*, Masson v. New Yorker Magazine, Inc., 501 U.S. 496 (1991); City of Lakewood v. Plain Dealer Publ'g. Co., 486 U.S. 750 (1988); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988); Globe Newspaper Co. v. Superior Court for Norfolk Cnty., 457 U.S. 596 (1982); Wolston v. Reader's Digest Ass'n, 443 U.S. 157 (1979); N.Y. Times Co. v. Jascalevich, 439 U.S. 1331 (1978); N.Y. Times Co. v. United States, 403 U.S. 713 (1971); N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

would avoid these pitfalls, serve better to democratize elections, and pass constitutional muster.[17]

This Essay, however, is not about campaign finance reform. It is about the right to publish criticisms of public officials. It addresses how the facts of *Citizens United* would be analyzed under the Press Clause. The argument has two parts. In Part I, I will argue that long-established principles of freedom of the press strongly support the conclusion that the organization called Citizens United had the constitutional right to prepare and disseminate a documentary critical of a public official and candidate, even during the election season. There is no serious doubt that some corporations—media corporations—have a constitutional right under the Press Clause to editorialize about candidates while the voters are making up their minds. The Supreme Court so held, without dissent on the merits, in *Mills v. Alabama*,[18] and neither the *Citizens United* dissenters nor any critics of that decision dispute either the reasoning or the result of *Mills*. With that backdrop, the dispositive question becomes whether the protections of the Press Clause are confined to a certain set of *actors*, namely the institutional press (however defined), or whether it protects an *activity*: publishing information and opinions to the general public. Only if the former, narrower, interpretation is valid can *Citizens United* be wrongly decided. Although the narrow interpretation has received some support in recent years,[19] and Justice Stevens appears to embrace it in one sentence and a footnote in his *Citizens United* dissent,[20] it is in conflict with the great weight of precedent,[21] departs from the unequivocal historical meaning of the Clause both before and for more than a hundred years after its enactment,[22] and—perhaps most decisively—requires a legally enforceable line between "press" and others, which is inherently unworkable and probably would not even produce a different result in *Citizens United* itself.[23]

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17. *See* Michael W. McConnell, *A Constitutional Campaign Finance Plan*, WALL ST. J., Dec. 11, 1997, http://online.wsj.com/article/SB122704402303138515.html; Michael W. McConnell, *Redefine Campaign Finance 'Reform*,' CHI. TRIB., June 29, 1993, http://articles.chicagotribune.com/1993-06-29/news/9306290305_1_reform-limits-and-public-financing-incumbents.

18. 384 U.S. 214 (1966); *see infra* Part I.

19. *See infra* notes 83-84 and accompanying text.

20. Citizens United v. FEC, 558 U.S. 310, 431 & n.57 (2010) (Stevens, J., concurring in part and dissenting in part).

21. *See infra* Subsection I.C.1.

22. *See infra* Subsection I.C.2.

23. *See infra* Subsection I.C.3.

Part II briefly explores the implications of deciding the case this way for campaign finance reform more generally. The freedom of the press rationale for *Citizens United* would confine its effect to the right of groups to publish their own views about candidates and would not extend to contributions, which would continue to be governed by the somewhat illogical and counterproductive rules of *Buckley v. Valeo*.[24] The Press Clause rationale would provide no occasion for the majority's broader holding prohibiting all speaker-based distinctions, which would seem to portend invalidation of long-standing laws prohibiting corporate contributions to campaigns. Indeed, the freedom of the press rationale provides a more solid basis for the *Buckley* distinction than *Buckley* itself provided. Nonetheless, reformers might well wish to question whether the distinction between contributions and independent expenditures does more harm than good, and explore other avenues for improving the system.

I. THE FREEDOM OF THE PRESS PROTECTS THE RIGHT OF A GROUP LIKE CITIZENS UNITED TO PRODUCE AND DISTRIBUTE A DOCUMENTARY CRITICIZING A PUBLIC OFFICIAL

A. The Citizens United *Decision*

Under the Bipartisan Campaign Reform Act of 2002 (BCRA),[25] it is illegal for corporations or labor unions to use their own funds to broadcast their opinions for or against candidates for public office within sixty days of the election.[26] Citizens United is a non-profit corporation, which receives a (small) portion of its funding from for-profit corporations.[27] It produced a documentary film criticizing then-Senator Hillary Clinton and disseminated the film while she was a candidate for President of the United States. Anticipating that the Federal Election Commission (FEC) would bring charges and impose penalties, Citizens United sought declaratory and injunctive relief on the ground that its conduct was protected by the First Amendment.

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24. 424 U.S. 1 (1976) (per curiam).

25. Pub. L. No. 107-155, 116 Stat. 81 (codified in scattered sections of 2 U.S.C., 18 U.S.C., 28 U.S.C., 36 U.S.C., and 47 U.S.C.).

26. 2 U.S.C. § 441(b) (2012).

27. Citizens United v. FEC, 558 U.S. 310, 319 (2010).

In an opinion by Justice Kennedy, a five-Justice majority of the Supreme Court ruled in favor of Citizens United. Focusing on the fact that BCRA bans political speech by some entities (corporations and labor unions) and not others (individuals, unincorporated groups, PACs, news media, etc.), the Court decided the case on the basis of the "principle . . . that the Government may not suppress political speech on the basis of the speaker's corporate identity."[28] The Court concluded that the government's proffered justifications —anti-distortion,[29] anti-corruption,[30] and shareholder-protection[31]—failed the strict scrutiny demanded of speaker-based restrictions. The Court reaffirmed the distinction between contributions and independent expenditures, first propounded in *Buckley v. Valeo*,[32] and solidified *Buckley*'s more tentative conclusion that independent expenditures do not present the serious dangers of corruption presented by contributions.[33]

The four-Justice dissent, written by Justice Stevens, was a full-throated eighty-six page rebuttal of the majority's approach and reasoning, particularly the majority's "conceit that corporations must be treated identically to natural persons in the political sphere."[34] The dissent did not offer a theory as to which constitutional rights—or even which First Amendment or Speech Clause rights—may be exercised by corporations and which may not. The dissent maintained that BCRA is not truly a ban on speech, and defended the government's anti-distortion, anti-corruption, and shareholder-protection rationales as sufficient to justify restrictions on corporate expenditures.[35]

The decision was greeted by a torrent of abuse, much of it of the bumper-sticker variety. Serious analysis requires us to go beyond the overblown abstractions that have dominated popular discussion. The outcome of *Citizens*

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28. *Id.* at 365; *see id.* at 394 (Stevens, J., concurring in part and dissenting in part) ("The basic premise underlying the Court's ruling is its iteration, and constant reiteration, of the proposition that the First Amendment bars regulatory distinctions based on a speaker's identity, including its 'identity' as a corporation.").

29. *Id.* at 349-56 (majority opinion).

30. *Id.* at 356-61.

31. *Id.* at 361-62.

32. Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam).

33. *Citizens United*, 558 U.S. at 357 ("[W]e now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.").

34. *Id.* at 394 (Stevens, J., concurring in part and dissenting in part).

35. *Id.* at 447-78.

United, for example, did not turn on whether corporations are people.[36] They are not. Corporations are, however, associations of people vested with legal personality for many purposes. They routinely exercise many constitutional rights, including under the First Amendment. Moreover, although the First Amendment rights of petition and assembly are explicitly limited to "the people," the freedoms of speech and press are not.[37]

Nor did the case turn on whether "money is speech."[38] It is not. But we need to use things, including money (and paper, and sidewalks, and telephones, and shoe leather), to make our views known, and governmental restrictions on the use of resources *for the purpose of communicating a message* are properly understood as restrictions on speech. If the city council passed an ordinance forbidding anyone to use the subway to attend a protest demonstration, no one would defend the ordinance on the ground that "subways are not speech." Laws prohibiting the use of certain things to enable speech are restrictions on speech.

Turning to more serious issues, proper analysis of the *Citizens United* problem does not really hinge on whether independent expenditures by self-interested actors in support of or opposition to candidates for office may be corrupting (to which the answer should be "yes"),[39] or whether the

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36. *See id.* at 466 ("[C]orporations have no consciences, no beliefs, no feelings, no thoughts, no desires. Corporations help structure and facilitate the activities of human beings, to be sure, and their 'personhood' often serves as a useful legal fiction. But they are not themselves members of 'We the People' by whom and for whom our Constitution was established."); David Kairys, *Money Isn't Speech and Corporations Aren't People*, SLATE (Jan. 22, 2010, 6:03 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2010/01/money_isnt_speech_and_corporations_arent_people.html ("Kennedy depends on two legal theories that blossomed as constitutional principles in the mid-1970s: money is speech and corporations are people. Both theories are strange, if not simply wrongheaded . . . .").

37. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

38. Editorial, *Justice Alito,* Citizens United *and the Press*, N.Y. TIMES, Nov. 19, 2012, http://www.nytimes.com/2012/11/20/opinion/justice-alito-citizens-united-and-the-press.html (criticizing "the false equivalence of money and speech put forward by *Citizens United*"); Toobin, *supra* note 7 (criticizing the opinion's "bizarre legal theories that (1) corporations have the same rights as human beings, and (2) spending money is the same thing as speaking").

39. Michael S. Kang, *After* Citizens United, 44 IND. L. REV. 243, 244 (2010) ("*Citizens United* reinforces and depends upon the greatest absurdity of campaign finance law—that independent expenditures pose no threat of campaign finance corruption.").

government may regulate speech in order to prevent what those in power regard as "distortion" of public discourse (to which the answer should be "no").[40] The sole question properly presented was whether a group outside the news industry is constitutionally entitled to disseminate to the public through mass communications media a commentary about a candidate for public office within a certain number of days before an election. That is a much more narrowly focused question.

B. The Analogy to Mills v. Alabama

I begin my analysis with *Mills v. Alabama*,[41] an uncontroversial case from the 1960s, which—like *Citizens United*—involved the government's attempt to punish the publication of criticisms of candidates for office during the period immediately before an election. The parties in *Citizens United* largely overlooked *Mills* and the Court did not mention it,[42] though two amicus curiae briefs, one written by renowned press lawyer Floyd Abrams and one by the Reporters Committee for Freedom of the Press, cited and relied on it.[43] Despite

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40. Richard L. Hasen, Citizens United *and the Orphaned Antidistortion Rationale*, 27 GA. ST. U. L. REV. 989, 990 (2011) ("[B]oth the *Citizens United* prime dissenter and plaintiff [have] described the decision in terms of its effect on political equality . . . ."); Suzanna Sherry, *The Four Pillars of Constitutional Doctrine*, 32 CARDOZO L. REV. 969, 1005 (2011) ("Whether [*Citizens United*] also embodies sound principles of constitutional aspiration and human understanding depends on examining the deeper premises on which it rests: that corporations are entitled to First Amendment protection, that campaign expenditures are equivalent to speech, and that the government may not 'equalize' citizens' voices.").

41. 384 U.S. 214 (1966).

42. The only merits brief of a party citing *Mills* was the FEC's supplemental reply brief. In it, the government observed that the Court had "previously upheld federal and state electioneering restrictions that distinguish[ed] between media commentary and other corporate electoral advocacy" and cited *Mills* for its recognition of the "special role" of the press. Supplemental Reply Brief for the Appellee at 10, Citizens United v. FEC, 558 U.S. 310 (2010) (No. 08-205). As will become clear, that is an unwarranted reading of the case. *See infra* notes 86-98 and accompanying text. The Supreme Court has cited *Mills* as support for the opposite proposition—that there is no special constitutional privilege for the institutional press that does not extend to pamphleteers and other nonprofessional disseminators of opinion. *See* Branzburg v. Hayes, 408 U.S. 665, 704-05 (1972) ("The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." (quoting Lovell v. City of Griffin, 303 U.S. 444, 452 (1938) and citing, inter alia, *Mills*, 384 U.S. at 219)).

43. Brief for Senator Mitch McConnell as Amicus Curiae Supporting Petitioners at 2-3, *Citizens United*, 558 U.S. 310 (No. 08-205) (written by Floyd Abrams); Supplemental Brief for the Reporters Committee for Freedom of the Press as Amicus Curiae Supporting Petitioners at

this neglect, it is the closest case to *Citizens United* as a factual matter. I begin with *Mills* not out of stare decisis fetishism—as if a single, largely forgotten decision should "govern" the outcome—but because I believe almost all readers will agree it was correctly decided and correctly reasoned. My method is to begin from the uncontroversial common ground represented by this old case, isolate the respects in which *Citizens United* is factually different, and explore whether those differences warrant a denial of constitutional protection to the Citizens United documentary.

Mills involved the Alabama Corrupt Practices Act,[44] which made it a crime "to do any electioneering or to solicit any votes . . . for or against the election or nomination of any candidate, or in support of or in opposition to any proposition that is being voted on on the day on which the election affecting such candidates or propositions is being held."[45] The purpose of the law, according to the state courts, was to "protect[] the public from confusive [sic] last-minute charges and countercharges and the distribution of propaganda in an effort to influence voters on an election day; when as a practical matter, because of lack of time, such matters cannot be answered or their truth determined until after the election is over."[46] The *Birmingham Post-Herald*, which was owned by a corporation,[47] violated the law. It published an editorial on election day denouncing the Mayor, who was running for reelection, and urging support for a proposition creating an alternative structure of city government.[48] The editor was prosecuted, and the state supreme court upheld the law.[49] The United States Supreme Court held that the ordinance violated the freedom of the press. Justice Black wrote for the Court:

1, 8-9, *Citizens United*, 558 U.S. 310 (No. 08-205). Abrams began his brief with a discussion of the case, noting that a citation of the unanimous ruling in *Mills* "should suffice" to decide the case.

44. 17 ALA. CODE §§ 268-86 (1940).

45. *Id.* § 285.

46. *Mills*, 384 U.S. at 219-20 (quoting State v. Mills, 176 So. 2d 884, 890 (Ala. 1965)).

47. *See* Birmingham Post Co. v. Sturgeon, 149 So. 74, 75 (Ala. 1933) ("The defendant, The Birmingham Post, is a corporation engaged in the business of publishing and distributing newspapers."); Birmingham Post Co. v. Montgomery, 176 So. 375, 375 (Ala. Ct. App. 1937) (referring to "the single appellant Birmingham Post Company, a corporation").

48. Fittingly, perhaps, the editorial also accused the Mayor of "propos[ing] to set himself up as news censor at City Hall." Editorial, *Do We Need Further Warning?*, BIRMINGHAM POST-HERALD, Nov. 6, 1962, *reprinted in Mills*, 176 So. 2d at 886.

49. *Mills*, 176 So. 2d 884.

> The Constitution specifically selected the press, which includes not only newspapers, books, and magazines, but also humble leaflets and circulars, to play an important role in the discussion of public affairs. Thus the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve. Suppression of the right of the press to praise or criticize governmental agents and to clamor and contend for or against change, which is all that this editorial did, muzzles one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free. The Alabama Corrupt Practices Act by providing criminal penalties for publishing editorials such as the one here silences the press at a time when it can be most effective. It is difficult to conceive of a more obvious and flagrant abridgment of the constitutionally guaranteed freedom of the press.[50]

If *Mills* was correctly decided, what does that say about *Citizens United*?

According to the Court, "[i]t is difficult to conceive of a more obvious and flagrant abridgment of the constitutionally guaranteed freedom of the press" than to outlaw dissemination of a critique of a candidate during the "time when it can be most effective."[51] That seems to describe BCRA no less than the Alabama Corrupt Practices Act, and the anti-Hillary Clinton documentary no less than the anti-Mayor editorial. But there are factual distinctions between the two cases:

1. Citizens United is a non-profit corporation, while the *Birmingham Post-Herald* was a for-profit corporation;
2. *Citizens United* involved a film documentary, while *Mills* involved a newspaper;
3. BCRA prohibits the publication of opinions about candidates within sixty days of the election, while the Alabama Corrupt Practices Act did so only for the day of the election;

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50. *Mills*, 384 U.S. at 219 (citing *Lovell v. City of Griffin*, 303 U.S. 444 (1938), for the proposition that freedom of the press protects "humble leaflets and circulars" as well as institutions of the news media).

51. *Id.*

4. BCRA permits regulated parties to publish commentaries on candidates if they establish separate funds for that purpose and do not use their own money, while the Alabama Corrupt Practices Act did not; and

5. Citizens United is not a "media corporation" within the definition in BCRA, while the *Birmingham Post-Herald*, a newspaper, was a classic member of the institutional press.

There is no difference in one important respect: the editorialists in both cases were corporations. Surely the first four differences have no legal significance. Only the last raises any real doubts.

First, for purposes of freedom of the press, it does not matter whether the publisher of a newspaper, magazine, or documentary makes a profit on the publication. One of the Court's earliest cases elaborating on the constitutional privilege announced in *New York Times Co. v. Sullivan*[52] involved a non-profit ideological organization—namely, the John Birch Society—which published a magazine allegedly defamatory of a public official.[53] Notwithstanding the John Birch Society's ideological motivation for publishing the magazine and its non-profit status, the Court held that it was a "media defendant" for purposes of constitutional protection against libel suits brought by public figures.[54] Even earlier, the Court had narrowly construed the Federal Corrupt Practices Act not to cover a weekly periodical published by a labor union, which endorsed candidates for office, out of concern that this would be unconstitutional.[55] The parallels to Citizens United's documentary are evident.

More fundamentally, because the Press Clause forbids the licensing of the press, it follows that the government has no authority to condition the right to publish on the financial structure or source of funds of an organization.[56] "No licensing" means no limitation on who can exercise the freedom. Some of the nation's leading journals, which surely qualify for freedom of the press, lose money and are supported in significant part by the contributions of supporters

52. 376 U.S. 254 (1964).

53. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

54. *Id.*

55. United States v. CIO, 335 U.S. 106, 121 (1948).

56. This suggests that the government's attempt in oral argument to claim that it was not "banning" speech but regulating how it may be funded was beside the point, if the case is analyzed under the Press Clause.

or a corporate backer. These include *National Review*,[57] *The Nation*,[58] *The Weekly Standard*,[59] *First Things*,[60] *The Washington Times*,[61] *Slate*,[62] and *Salon*.[63] *Newsweek* magazine apparently survived for its final year of print publication on the resources of its owner, the spouse of a Democratic politician.[64] It would be shocking to think that any of these publications could be told to be silent about candidates for two months before an election, merely because they do not turn a profit. Perhaps significantly, in its deliberations over a proposed "press shield" bill, the Senate Judiciary Committee recently rejected any limitation of the protection to professional or to profit-making journalistic businesses.[65]

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57. Gary Shapiro, *An 'Encounter' with Conservative Publishing*, N.Y. SUN, Dec. 9, 2005, http://www.nysun.com/on-the-town/encounter-with-conservative-publishing/24259 (noting that the magazine "had lost about $25 million over 50 years" and was reliant on the funding of private donors).

58. *See* Mattathias Schwartz, *Unconventional Wisdom*, SALON, June 9, 2005, http://www.salon.com/2005/06/09/navasky (noting *The Nation*'s previous financial struggles and dependence on private investors).

59. Dirk Smillie, *The Stealth Media Mogul*, FORBES, June 29, 2009, http://www.forbes.com/2009/06/28/anschutz-weekly-standard-business-media-examiner.html (estimating that *The Weekly Standard* loses $5 million annually).

60. *First Things* is published by the Institute on Religion and Public Life, a 501(c)(3) organization. *Donate*, FIRST THINGS, http://www.firstthings.com/donate (last visited Sept. 2, 2013).

61. Dante Chinni, *The Other Paper*, COLUM. JOURNALISM REV., Sept.-Oct. 2002, at 47 (estimating that the founder of the Unification Church, which owns the paper, had spent nearly $2 billion running the paper).

62. Nick Summers, *Jacob Weisberg Was a Web Pioneer. But He Doesn't Much Care for What Works on the Web Now. Can Slate Recover?*, N.Y. OBSERVER (Nov. 10, 2010), http://observer.com/2010/11/jacob-weisberg-was-a-web-pioneer-but-he-doesnt-much-care-for-what-works-on-the-web-now-can-slate-recover (quoting the editor of *Slate*, David Plotz, as reporting that "Slate is not a profitable magazine").

63. Russell Adams, *Salon.com Opens Parlor to Possible Partner*, WALL ST. J., Nov. 28, 2010, http://online.wsj.com/article/SB10001424052748704563204575640921476693184.html (noting a loss of more than $15 million over five years).

64. Tanzina Vega & Jeremy W. Peters, *An Audio Pioneer Buys* Newsweek, N.Y. TIMES, Aug. 2, 2010, http://www.nytimes.com/2010/08/03/business/media/03newsweek.html (noting that the magazine lost $30 million in 2009 and was sold for $1 and an agreement to assume the magazine's $50 million of liabilities).

65. S. 987, 113th Cong. § 11(2) (2013); *see* Kurt Wimmer & Jeff Kosseff, *Senate Judiciary Committee Approves Media Shield Law*, INSIDEPRIVACY (Sept. 13, 2013), http://www.insideprivacy.com/united-states/senate-judiciary-committee-approves-media-shield-law

Moreover, if the for-profit or non-profit status of the entity that distributes a publication does matter, under the Supreme Court's jurisprudence, non-profit advocacy groups have greater—not fewer—rights to make expenditures that would affect elections. That is the teaching of *FEC v. Massachusetts Citizens for Life, Inc.*[66] If a for-profit corporation like the Birmingham Post Company has a constitutional right to run an editorial that might influence an election, it would be strange to say that a non-profit publication does not.

The difference in medium of communication also surely is irrelevant. Despite initial uncertainty, films have long been held to enjoy full First Amendment protection.[67] No party or amicus in the *Citizens United* litigation suggested that the cinematic character of the medium made any difference to the constitutional analysis.[68] During the first oral argument in the case, Deputy Solicitor General Malcolm Stewart told the Court that the government's constitutional theory would apply to books containing criticisms or endorsements of candidates[69]—a startling admission that may have contributed to the call for reargument.[70] During the reargument, Solicitor General Elena Kagan resisted the books hypothetical[71] but admitted that the

("[T]he bill's protections are not limited to people who produce journalism for financial gain.").

66. 479 U.S. 238 (1986).

67. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) (holding that films are protected by the First Amendment and overturning the Court's decision in *Mut. Film Corp. v. Indus. Comm'n of Ohio*, 236 U.S. 230 (1915)). It is perhaps worth noting that the distributor of the film in *Burstyn* was a corporation, a fact the Court did not treat as having any legal significance.

68. It mattered to the definition of electioneering under the statute, and to the applicability of the statutory exception for media corporations, which will be considered below, but not to the constitutional analysis.

69. Transcript of Oral Argument, *supra* note 9, at 29-30.

70. *See* Adam Liptak, *Justices Seem Skeptical of Scope of Campaign Law*, N.Y. TIMES, Mar. 25, 2009, http://www.nytimes.com/2009/03/25/washington/25scotus.html ("Several of the court's more conservative justices reacted with incredulity to a series of answers from a government lawyer about the scope of Congressional authority to limit political speech. The lawyer, Malcolm L. Stewart, said Congress has the power to ban political books, signs and Internet videos, if they are paid for by corporations and distributed not long before an election.").

71. Transcript of Oral Reargument, *supra* note 10, at 65-66 ("We went back, we considered the matter carefully, and the government's view is that although 441b does cover full-length books, that there would be [a] quite good as-applied challenge to any attempt to apply 441b in that context. And I should say that the FEC has never applied 441b in that context. So for 60 years a book has never been at issue.").

government's constitutional theory would embrace pamphlets.[72] Because pamphlets were a principal medium of political advocacy at the time of adoption of the First Amendment, this was not a comforting reformulation. As the technology for dissemination of ideas and opinions to the public has advanced, from the printing press to radio to television to film to the internet, blogs, Twitter, and video games, the Supreme Court has quite properly (in my opinion) extended the principle of freedom of the press to the various media for the dissemination of opinion and information to the general public.[73] I doubt many critics of *Citizens United* are critical on this point. So the fact that the case involved a film instead of a newspaper should not lead to a different result.

The differences in duration of the blackout period—sixty days versus one day—likewise could not support a different outcome. If anything, the sixty-day period in *Citizens United* is more speech-restrictive than the one-day period at issue in *Mills*, and ought to be more suspect. Note that neither BCRA nor the Alabama Corrupt Practices Act is a content-neutral time, place, or manner regulation; the laws are directed only at a particular subject matter, namely the qualities of candidates for office or, in the case of the Alabama statute, candidates or propositions. But even if they were content-neutral, it would be

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72. *Id.* at 66 ("[CHIEF JUSTICE ROBERTS:] [I]f you say that you are not going to apply it to a book, what about a pamphlet? GENERAL KAGAN: I think a—a pamphlet would be different. A pamphlet is pretty classic electioneering, so there is no attempt to say that 441 b only applies to video and not to print.").

73. Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2733 (2011) (extending "First Amendment protection" to video games and noting that "whatever the challenges of applying the Constitution to ever-advancing technology, the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary when a new and different medium for communication appears" (internal quotation marks omitted)); Reno v. ACLU, 521 U.S. 844, 870 (1997) (concluding that "our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to [the Internet]"); United States v. Paramount Pictures, Inc., 334 U.S. 131, 166 (1948) ("We have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment."); *see also Citizens United*, 558 U.S. at 364 ("Rapid changes in technology—and the creative dynamic inherent in the concept of free expression—counsel against upholding a law that restricts political speech in certain media or by certain speakers. Today, 30-second television ads may be the most effective way to convey a political message. Soon, however, it may be that Internet sources, such as blogs and social networking Web sites, will provide citizens with significant information about political candidates and issues." (citations omitted)). I have doubts that the Court was correct in *Brown* to extend full First Amendment protection to the marketing to minors of violent interactive games, in which the gamer engages in simulated conduct that is not communicative (except, maybe, to himself), but not because of the difference in technology or medium.

difficult to claim that the sixty-day blackout period imposed by BCRA permitted alternative avenues for the expression superior to the one-day period imposed by the Corrupt Practices Act. Both statutes "silence[] the press at a time when it can be most effective," as the Court observed in its opinion in *Mills*.[74]

A fourth difference is that BCRA allows the regulated entities to publish editorials if they form separate funds (PACs), which could raise money from friends and supporters to pay for the publication.[75] The Alabama Corrupt Practices Act contained no such exemption. Even if it had, however, this would not have altered the result in *Mills*. It is not possible for a newspaper to run its editorials under a separate organizational authority. A newspaper, like other First Amendment entities, is entitled to speak in its own name, with its own reputation and its own resources.[76] Other groups, similarly, are permitted to exercise First Amendment rights without having to solicit contributions from third parties.

C. Media Organizations

That brings us to the only potentially significant difference: that Citizens United is not part of the journalism profession. That fact might matter—if the Press Clause confines its protection to organs of professional journalism. If the Press Clause is so confined, then it might be constitutional to prohibit non-journalists from publishing their views on candidates during the election cycle, even though members of the institutional press enjoy the right to do so under a clause that applies only to them. This is the only logical way to square opposition to the result in *Citizens United* with the uncontroversial First Amendment right of corporate-owned newspapers to run editorials endorsing or opposing candidates in the days before an election. If *Mills* is right—which seems uncontroversial—the only way *Citizens United* can be wrong is if the Press Clause protects the right of the "news media" (however defined) to disseminate their opinions of candidates during the election season, and no one else. This seems to be the constitutional vision of the Congress that enacted BCRA, if it had one.

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74. Mills v. Alabama, 384 U.S. 214, 219 (1966).

75. *Citizens United*, 558 U.S. at 415 (Stevens, J., concurring in part and dissenting in part).

76. *See* FCC v. League of Women Voters, 468 U.S. 364 (1984).

Despite the length of their opinions, the Justices devoted surprisingly little attention to this seemingly dispositive question.[77] To be sure, the majority briefly asserted that the institutional press has no more rights under the Press Clause than others, but it offered no real explanation or justification. As one commentator noted, the assertion was "almost offhanded," "offer[ing] virtually no substantive discussion of the reasons for this conclusion."[78] The similarly lengthy dissent took the opposite view, but with no more explanation. Indeed, the dissent's treatment of this issue was confined to one conclusory sentence accompanied by a short footnote,[79] to which Justice Scalia's concurrence responded with a slightly longer footnote.[80] It is particularly strange that the dissent made so little of the issue, since the special constitutional status of the institutional press provides the only logical theory under which the majority could be wrong (assuming *Mills* is right). Long passages in the dissenting opinion read as if the dissenters believe that corporations have no constitutional rights at all, or at least no free speech rights, but it is extraordinarily improbable that the dissenters believe that corporations have no Press Clause rights. Surely the New York Times Company enjoys Press Clause rights, even though it is a corporation.

The entirety of the dissenters' analysis appears in footnote 57, which I quote in full:

> In fact, the Free Press Clause might be turned against Justice Scalia, for two reasons. First, we learn from it that the drafters of the First Amendment did draw distinctions—explicit distinctions—between types of "speakers," or speech outlets or forms. Second, the Court's strongest historical evidence all relates to the Framers' views on the press, yet while the Court tries to sweep this evidence into the Free Speech Clause, the Free Press Clause provides a more natural textual home. The text and history highlighted by our colleagues suggests why one type of corporation, those that are part of the press, might be able to claim special First Amendment status, and therefore why some kinds of "identity"-based distinctions might be permissible after all. Once one

77. *Citizens United*, 558 U.S. at 352-54.

78. Randall P. Bezanson, *Whither Freedom of the Press?*, 97 IOWA L. REV. 1259, 1263 (2012).

79. *Citizens United*, 558 U.S. at 431 n.57 (Stevens, J., concurring in part and dissenting in part).

80. *Id.* at 390 n.6 (Scalia, J., concurring).

> accepts that much, the intellectual edifice of the majority opinion crumbles.[81]

If Justice Stevens is correct that the Free Press Clause "might" single out "one type of corporation, those that are part of the press" for "special First Amendment status," he would be correct that "the intellectual edifice of the majority opinion crumbles."[82] Unfortunately, he provides no support in precedent or history for that proposition, and does not explain how the distinction would work in practice, or even how it would apply in this case.

The notion that the Press Clause might protect only a certain class of businesses, namely those in the business of purveying news and opinion, is not crazy. Some thoughtful legal figures, Justice Potter Stewart most prominently among them,[83] have urged this view, as have organizations such as the Reporters Committee for Freedom of the Press, which represent the institutional interests of the journalism profession.[84] The Supreme Court, however, has never accepted this view and has often rejected it,[85] and it presents seemingly insurmountable historical and pragmatic difficulties. To decide *Citizens United* in favor of the FEC on this ground—the only available logical ground—would have required a departure from established law, and certainly more than a conclusory footnote.

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81. *Id.* at 431 n.57 (Stevens, J., concurring in part and dissenting in part).

82. *Id.*

83. *See* Potter Stewart, *"Or of the Press,"* 26 HASTINGS L.J. 631, 635 (1975) ("None of us—as individuals—has a 'free speech' right to refuse to tell a grand jury the identity of someone who has given us information relevant to the grand jury's legitimate inquiry. Only if a reporter is a representative of a protected *institution* does the question become a different one.").

84. *See* Supplemental Brief for the Reporters Committee, *supra* note 43, at 12.

85. *See, e.g.*, Bartnicki v. Vopper, 532 U.S. 514, 525 n.8 (2001) (drawing "no distinction" between the media and non-media respondents in a case about the disclosure of illegally intercepted communications); First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 782 (1978) (noting that "the press does not have a monopoly on either the First Amendment or the ability to enlighten"); Pennekamp v. Florida, 328 U.S. 331, 364 (1946) (Frankfurter, J., concurring) ("[T]he purpose of the Constitution was not to erect the press into a privileged institution but to protect all persons in their right to print what they will as well as to utter it."); Murdock v. Pennsylvania, 319 U.S. 105, 111 (1943) (referring, in a case about Jehovah's Witnesses, to "[t]he right to use the press for expressing one's views"); Lovell v. City of Griffin, 303 U.S. 444, 452 (1938) ("The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion."); Associated Press v. NLRB, 301 U.S. 103, 132 (1937) ("The publisher of a newspaper has no special immunity from the application of general laws.").

1. Precedent

Again we begin with *Mills v. Alabama*, a decision that preceded the controversy over campaign finance reform. In *Mills*, the Court recited the then-standard position that "the press," within the meaning of the First Amendment, "includes not only newspapers, books, and magazines, but also humble leaflets and circulars."[86] For this proposition, the opinion cited *Lovell v. City of Griffin*.[87] The defendant in *Lovell* was a Jehovah's Witness who was prosecuted and fined for handing out religious tracts on city sidewalks in violation of a city ordinance. Interestingly, her lawyers, who were among the leading civil liberties lawyers of the day,[88] invoked the freedom of the press and the free exercise of religion, and did not think to mention freedom of speech. The Court noted that the ordinance applied across the board to "circulars, handbooks, advertising, or literature of any kind," and commented that although newspapers would appear to come within its language, the record did not indicate whether the ordinance had ever been applied to newspapers.[89] The Court then proceeded to strike the ordinance down on its face, meaning in all of its applications. This necessarily included circulars, advertising, and literature other than newspapers, meaning other than the products of the institutional press. Chief Justice Hughes wrote for a unanimous Court:

> The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest. The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.[90]

As Justice Frankfurter stated in a concurring opinion in another case: "[T]he purpose of the Constitution was not to erect the press into a privileged

86. Mills v. Alabama, 384 U.S. 214, 219 (1966).

87. 303 U.S. 444.

88. Lovell was represented by Olin R. Moyle, who argued ten Supreme Court cases from 1937 to 1939, and future Attorney General Francis Biddle represented the amicus ACLU.

89. *Lovell*, 303 U.S. at 450.

90. *Id.* at 452.

institution but to protect all persons in their right to print what they will as well as to utter it."[91] No Supreme Court decision has ever held otherwise.

According to the leading recent article on this subject, by Professor Eugene Volokh, it was not until the 1970s that some courts—all of them lower courts—for the first time extended special protections under the Press Clause to the institutional press, and these decisions remained a minority.[92] At the Supreme Court level, although some individual Justices—Stewart, Douglas, and now Stevens and his fellow *Citizens United* dissenters—have flirted with the idea that the institutional press has superior rights under the Clause,[93] this view has never commanded a majority. Based on some combination of history and workability, Court majorities have rejected the idea of constitutional special protections for the journalism business in the context of libel law,[94] reporters' privilege,[95] access to judicial proceedings,[96] searches of newspaper offices,[97] antitrust,[98] invasions of privacy,[99] and employment discrimination.[100] The

91. Pennekamp v. Florida, 328 U.S. 331, 364 (1946) (Frankfurter, J., concurring).

92. Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 U. PA. L. REV. 459, 522-23 (2012).

93. *See, e.g.*, Citizens United v. FEC, 558 U.S. 310, 431 & n.57 (2010) (Stevens, J., concurring in part and dissenting in part); Branzburg v. Hayes, 408 U.S. 665, 721-34 (1972) (Douglas, J., dissenting); Stewart, *supra* note 83, at 635.

94. The Supreme Court has repeatedly applied the actual malice standard of *New York Times Co. v. Sullivan* to non-media defendants. *See* St. Amant v. Thompson, 390 U.S. 727 (1968) (applying the standard to a candidate for public office); Rosenblatt v. Baer, 383 U.S. 75 (1966) (applying the standard to a newspaper contributor); N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964) (applying the standard to the newspaper and its non-media co-defendants).

95. *Branzburg*, 408 U.S. at 690 (denying the reporter's privilege in the context of grand jury investigations).

96. Richmond Newspapers v. Virginia, 448 U.S. 555, 577 n.12 (1980) (grounding the public's right of access to court proceedings in the freedoms of speech, press, and assembly); *see also* Houchins v. KQED, Inc., 438 U.S. 1, 14 (1978) (refusing to recognize a special right of access to prisons).

97. Zurcher v. Stanford Daily, 436 U.S. 547, 563-67 (1978).

98. Associated Press v. United States, 326 U.S. 1, 7 (1945).

99. Bartnicki v. Vopper, 532 U.S. 514, 525 n.8 (2001) (drawing "no distinction" between the media and non-media respondents in a case about the disclosure of illegally intercepted communications).

100. Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 388 (1973).

Court permits legislatures to pass special laws protecting the journalism business, but it has not interpreted the First Amendment to require them.[101]

New York Times Co. v. Sullivan,[102] the most iconic of all free press decisions, offers powerful support for this conclusion. In *Sullivan*, a group of ministers and civil rights activists (not journalists) placed a paid advertisement in a newspaper, which was itself a corporation, criticizing the conduct of a local official.[103] The official sued both the newspaper corporation and the individuals for libel. The Supreme Court granted separate petitions for certiorari filed by the individuals and the company, and held that the "freedom of speech and of the press" extends to both sets of defendants, and does so in the same way.[104] The Court addressed and rejected the argument that the message was not entitled to full protection because it appeared in a paid advertisement, rather than the news or commentary section of the newspaper, calling the distinction "immaterial."[105] The Court explained that to deny constitutional protection to paid advertisements containing information and commentary on public officials "might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities—who wish to exercise their freedom of speech even though they are not members of the press."[106] It might have been more precise to say that these persons who are "not members of the press" nevertheless can exercise the "freedom of the press"—as the historical sources[107] and precedents[108] the Court cited put it—but *Sullivan* provided no occasion to tease out the differences, if any, between the rights. The *Sullivan* Court consistently

101. In this respect, there are some, albeit inexact, parallels to the way the Court has construed the Free Exercise Clause. *See* Bezanson, *supra* note 78, at 1268.

102. 376 U.S. 254 (1964).

103. The advertisement did not actually mention the official by name, but the courts below concluded that the reference to him was sufficiently evident to warrant his suit.

104. *Sullivan*, 376 U.S. at 265-66.

105. *Id.* at 266.

106. *Id.*

107. The Court relied on the successful opposition to the Sedition Act led by Madison and Jefferson. In this section of the opinion, both the quoted sources and the Court's own restatements refer to "the freedom of the press." *Id.* at 275-77.

108. *Id.* at 266. The Court cited *Lovell v. City of Griffin*, 303 U.S. 444 (1938), which as we have seen treated pamphleteering as an exercise of the freedom of the press, and *Schneider v. New Jersey*, 308 U.S. 147, 164 (1939), which used the formulation: "freedom of speech and press."

referred to the relevant right as "the freedom of speech and of the press,"[109] with two references to the "freedom of expression,"[110] thus obviating the need to address any differences. The bottom line was that the publication of criticism of a public official is protected whether published by a for-profit media corporation or by persons who are "not members of the press" in the form of a paid advertisement. That covers both bases of the *Citizens United* problem: the freedom to publish criticisms of public officials and candidates is not lost by virtue of either corporate status or non-membership in the institutional news media.

2. History

This interpretation of the reach of the Press Clause is consistent with its history.[111] The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press."[112] The verb "abridging," coupled with the definite article "the," indicates that the framers of the Amendment believed there was something called "the freedom of the press," which antedated the Amendment. Whether that freedom should be given a narrow, British, Blackstonian construction, as some of the Federalists urged in the 1790s, or whether it should be given a broader, Americanized, Whiggish construction, as Jefferson and others argued, need not detain us for the present purposes, for there was no apparent disagreement between these camps over *who* is protected by the freedom. Blackstone described the liberty of the press as the "undoubted right" of "[e]very freeman" to "lay what sentiments he pleases

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109. *Sullivan*, 376 U.S. at 268 ("The question before us is whether this rule of liability, as applied to an action brought by a public official against critics of his official conduct, abridges the freedom of speech and of the press that is guaranteed by the First and Fourteenth Amendments.").

110. *Id.* at 269, 271-72. The Court also quotes from a lecture given by Justice Douglas on the freedom of expression. *See id.* at 302 (quoting WILLIAM O. DOUGLAS, THE RIGHT OF THE PEOPLE 41 (1958)).

111. I lean heavily on Volokh's article, *supra* note 92, in this section of this Essay. Professor Randall Bezanson has criticized Volokh's article, contending on non-historical grounds that there remains a need for a separate constitutional law of freedom of the press, aside from freedom of speech. *See* Bezanson, *supra* note 78, at 1262-63. But neither Bezanson nor any other scholar, as of now, has cast doubt on Volokh's historical research or located any contrary sources. *See id.* at 1261 ("Professor Volokh, of course, is exactly right when judged by the spare and spartan doctrine of textualism and originalism.").

112. U.S. CONST. amend. I.

before the public."[113] The Jeffersonians agreed. The author of a book-length commentary on the Constitution, Jeffersonian legal scholar St. George Tucker,[114] wrote that "the freedom of the press" means that "[e]very individual, certainly, has a right to speak, or publish, his sentiments on the measures of government."[115] The author of the first major constitutional treatise, a Federalist, Chancellor James Kent, took the same position: "every citizen may freely speak, write, and publish his sentiments."[116] Joseph Story agreed, describing the freedom of the press in these terms: "every man shall have a right to speak, write, and print his opinions upon any subject whatsoever, without any prior restraint."[117] So did state constitutions and state supreme courts.[118] Anyone who went to a printer and paid him to print a pamphlet or book, or placed an advertisement in a publication, was entitled to exercise the freedom. There were no apparent dissenters from this proposition in the decades before or after the First Amendment.[119]

This near-universal assertion of the broad right of "every citizen" to publish his sentiments is unsurprising, since at the time of the founding there were no professional journalists in the modern sense of the word. Much of the editorial content of newspapers was written by lawyers, farmers, schoolteachers, ministers, statesmen, and other citizens who were not journalists. *The Federalist*—written by three non-journalists and published in New York newspapers as occasional essays—is the most famous example, but there were

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113. 4 WILLIAM BLACKSTONE, COMMENTARIES *151. The disagreement between some Federalists and most Jeffersonians was over the scope of subsequent punishment for libelous or seditious speech, not over who enjoyed the right.

114. On the importance of Tucker's work, see Charles T. Cullen, *St. George Tucker, John Marshall, and Constitutionalism in the Post-Revolutionary South*, 32 VAND. L. REV. 341, 341-43 (1979); and Davison M. Douglas, *Foreword: The Legacy of St. George Tucker*, 47 WM. & MARY L. REV. 1111, 1113 (2006).

115. 2 HENRY ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA app. at 28-29 (Philadelphia, William Young Birch & Abraham Small 1803).

116. 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 14 (London, O. Halsted 1827) (quoting an unidentified source).

117. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 732 (Boston, Hilliard, Gray & Co. 1833).

118. *See* Volokh, *supra* note 92, at 466-68 & nn.19-28.

119. Professor Volokh discusses two early sources, from 1812 and 1843, that contain stray language that could be read as confining freedom of the press to members of the profession, but he persuasively rebuts that interpretation. *Id.* at 471-72.

hundreds of others.[120] When the Founders spoke of the importance of "the press," they were not talking about professional news media, but about the printing press, meaning the ability of people to disseminate ideas easily and inexpensively to a broad public. The licensing of the press, which was the great evil against which the Amendment was directed, applied to books and pamphlets as much as to newspapers.[121] Indeed, pamphlets were among the most important publications for the influencing of public opinion. Thomas Paine's *Common Sense*, which he self-published, is a famous example.[122] A 1753 essay entitled *Of the Use, Abuse, and Liberty of the Press*, by the future Constitutional Convention delegate William Livingston, stated that one of the great benefits of the printing press was that "the Press" could be used by "Writers of every Character and Genius," including "[t]he Patriot," "[t]he Divine," "the Philosopher, the Moralist, the Lawyer, and men of every other Profession and Character, whose Sentiments may be diffused with the greatest Ease and Dispatch."[123]

Moreover, as Professor Volokh points out, two of the most notorious prosecutions for abuse of the freedom of the press in the era of adoption of the First Amendment were brought against persons who were not professional journalists, but who nonetheless invoked the protections of freedom of the press.[124] These were the Dean of St. Asaph, a clergyman who was the defendant in a leading eighteenth-century British case on freedom of the press, and

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120. 1 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA 1760-1805 (Charles S. Hyneman & Donald S. Lutz eds., 1983) contains seventy-six items, originally published as pamphlets, books, or essays in newspapers. Often, an essay was published first in a newspaper and later as a free-standing pamphlet. Few of the works in the book were written by printers or journalists (an exception being Benjamin Franklin). Ellis Sandoz comments that the political pamphlets published during this time "often" were reprints of sermons. Ellis Sandoz, *Foreword* to POLITICAL SERMONS OF THE AMERICAN FOUNDING ERA 1730-1805, at xiii (Ellis Sandoz ed., 1991).

121. *Cf.* 8 DAVID HUME, THE HISTORY OF ENGLAND FROM THE INVASION OF JULIUS CAESAR TO THE REVOLUTION IN 1688, at 332 (London, T. Cadell 1782) (noting that the power of licensure over books was a source of tension between the Stuart royals and Parliament in the years prior to the English Civil War).

122. THOMAS PAINE, COMMON SENSE: ADDRESSED TO THE INHABITANTS OF AMERICA (Peter Eckler Publ'g Co. 1922) (1776).

123. Volokh, *supra* note 92, at 469 (quoting William Livingston, *Of the Use, Abuse, and Liberty of the Press*, INDEP. REFLECTOR, Aug. 30, 1753, *reprinted in* THE INDEPENDENT REFLECTOR 336, 336-37 (Milton M. Klein ed., 1963)).

124. *Id.* at 474 n.52 (observing that freedom of the press and the associated "licentiousness of the press" applied not only to "members of the press-as-industry" but also to "people who were using the press-as-technology").

Thomas Cooper, defendant in one of the most famous Sedition Act prosecutions. Volokh has identified twelve American and three British cases between 1784 and 1840 in which persons who were not professional journalists explicitly invoked the freedom of the press in defense to prosecutions for libel or similar offenses.[125] Some of these cases, importantly, involved the purchasers of advertisements.[126] Sometimes these non-journalists won and sometimes they lost—but no court questioned the applicability of the freedom of the press to their cases.[127] To confine freedom of the press to professional journalism, as the *Citizens United* dissenters advocated, would require shrinking—"abridging"—the scope of the Clause, making its coverage narrower than at the time of the Framing. This is almost unheard of in Bill of Rights jurisprudence.

3. Pragmatic Reasons

Even aside from precedent and history, there are powerful pragmatic reasons to reject the argument that the First Amendment imparts a special privilege to the institutional press. There is no coherent way to distinguish the institutional press from others who disseminate information and opinion to the public through communications media. This was a principal element of the reasoning of the Court in *Branzburg v. Hayes*, rejecting a reporter's claim of a constitutional right not to divulge confidential sources:

> 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 is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods. Freedom of the press is a "fundamental personal right" which "is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. . . . The press in its historic connotation comprehends every sort of publication which affords a

125. *Id.* at 483-98.

126. *See* Commonwealth v. Thomson (Bos. Mun. Ct. 1839), *reprinted in* REPORT OF THE TRIAL OF DR. SAMUEL THOMSON 3-5 (Boston, Henry P. Lewis 1839); People v. Simons, 1 Wheel. Cr. Cas. 339, 340 (N.Y. Ct. Gen. Sess. 1823).

127. *See* Volokh, *supra* note 92, at 483-98.

> vehicle of information and opinion." The informative function asserted by representatives of the organized press in the present cases is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists. Almost any author may quite accurately assert that he is contributing to the flow of information to the public, that he relies on confidential sources of information, and that these sources will be silenced if he is forced to make disclosures before a grand jury.[128]

Anyone arguing for a special constitutional right for media corporations to engage in electioneering or editorializing must confront this difficulty.

There are two attributes of the institutional news media most commonly said to distinguish them from other entities that merely use the press, both of which have played a part in recent congressional legislative deliberation. First, the news media are in the *business* of generating and disseminating news and commentary—they make money from it, through subscriptions, sales, and advertising revenue—while other speakers pay for the privilege of using the press. For this reason, an early version of proposed "press shield" legislation in Congress limited protection to "a person who, for financial gain or livelihood, is engaged in journalism," along with the organizations for which the journalist works.[129] Second, the news media publish their materials on a regular or periodical basis, rather than episodically. Another early version of the "press shield" legislation thus limited its protections to those "'regularly' engage[d]" in journalism.[130] While these attributes do, more or less, distinguish the "news media" as a matter of ordinary speech, they cannot serve to demarcate "the press" for purposes of legal interpretation of the First Amendment.

There is no reason to believe that companies that make money on their publications or writers who earn their living from writing have a monopoly on the provision of the information and commentary on public affairs the Press Clause protects. At the time of adoption of the First Amendment, it was common for citizens of a variety of professions to use the press to express their

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128. 408 U.S. 665, 703-05 (1972) (quoting Lovell v. City of Griffin, 303 U.S. 444, 450, 452 (1938) and citing Mills v. Alabama, 384 U.S. 214, 219 (1966)). Justice Powell's concurring opinion appears to countenance some degree of protection for sources "where legitimate First Amendment interests require protection." *Id.* at 710 (Powell, J., concurring). But he also joined Justice White's opinion, producing the crucial fifth vote and making it the majority.

129. H.R. 1962, 113th Cong. § 4(2) (2013).

130. H.R. REP. NO. 110-383, at 3 (2007).

views to the public.[131] That is even truer today, when the Internet provides a ready platform for citizen journalists and commentators to contribute to public discourse. Some media critics believe that the proliferation of voices has diminished the common ground we enjoyed in the days of three homogeneous networks,[132] but it would be odd to interpret the Press Clause, whose core meaning is that the government may not select the authors who inform the public, as a vehicle for reducing this diversity and imposing professional standards as a condition of publishing to the public. Many organizations whose primary purpose is something other than journalism—including the American Bar Association, the National Geographic Society, the Christian Science Church, the Smithsonian, Boy Scouts of America, and Americans United for Separation of Church and State—also publish popular newspapers or magazines, which surely are entitled to Press Clause protection. Indeed, in a prominent sequel to *New York Times v. Sullivan*, the Supreme Court treated the publisher for an ideological group, the John Birch Society, as a "media" defendant.[133] It is difficult to see why Citizens United's documentary would have any lesser legal status.

The regular or periodical status of publications also cannot serve as a limiting principle under the Press Clause. This would exclude not only the lonely pamphleteer so beloved by Supreme Court opinions, but also books, which the Court has squarely held are protected by the Press Clause.[134] It would also exclude documentary films, tweets, YouTube clips, and many blogs. It would retroactively exclude Tom Paine, Publius, and the Federal Farmer. And such a limit would disserve the very purposes of the First Amendment, by reducing rather than expanding the range of outlets for mass communication.

BCRA itself exempts media corporations from its prohibition of editorializing during the campaign season. This may reflect Congress's view that such an exception is necessary under the Press Clause, or it may reflect the political power of media corporations. BCRA defines the media exception as follows: "The term 'expenditure' does not include—any news story,

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131. *See supra* notes 120-126 and accompanying text.

132. *See* CASS SUNSTEIN, REPUBLIC.COM (2001); Markus Prior, *News vs. Entertainment: How Increasing Media Choice Widens Gaps in Political Knowledge and Turnout*, 49 AM. J. POL. SCI. 577 (2005).

133. Gertz v. Robert Welch, Inc., 418 U.S. 323, 325, 347 (1974).

134. Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 65 n.6 (1963) ("The constitutional guarantee of freedom of the press embraces the circulation of books as well as their publication . . . .").

commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate."[135] The exception rescues only broadcast stations, magazines, newspapers, and other periodical publications. It does not apply to books or pamphlets, as counsel for the United States admitted, or to the Internet, to films, to handbills, or to other non-periodical communications. Even if the Press Clause extends protection only to the institutional "press," this definition is surely underinclusive. It would be subject to an as-applied challenge by entities constitutionally entitled to protection under the Press Clause but not included within the statutory definition. If the Press Clause refers instead to the right of any person to use the technology of the press to disseminate opinions—as history and precedent indicate—this provision of BCRA is facially unconstitutional, because everyone has a constitutional right to publish their views about officials and candidates during the election season.

Congress has more recently confronted the difficulties of defining "the press" in its consideration of legislation to shield the press from forced disclosures of sources and other investigative materials.[136] To be sure, the problem in that context is not identical to the problem in the campaign speech context. Press shield legislation would expand protection beyond that required by the First Amendment, while restrictions on the publication of opinions about candidates for office would shrink it. When expanding protection, legislatures are entitled to draw lines that might not be permissible in the case of abridgements.

The substance is different in the two contexts, as well. Press shield laws focus on the newsgathering function, while the campaign context relates to publication of opinion. Definitions crafted for the former purpose are unlikely to be apt for the latter. Nonetheless, the difficulties encountered in drafting a definition of "press" for press shield purposes are suggestive.

A bill passed by the Senate Judiciary Committee in September 2013 would protect a person who "regularly gathers, prepares, collects, photographs, records, writes, edits, reports or publishes" any "news or information concerning local, national, or international events or other matters of public

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135. 2 U.S.C. § 431(9)(B)(i) (2012).

136. *See* HENRY COHEN, CONG. RESEARCH SERV., RL32806, JOURNALISTS' PRIVILEGE TO WITHHOLD INFORMATION IN JUDICIAL AND OTHER PROCEEDINGS: STATE SHIELD STATUTES (2007); KATHLEEN ANN RUANE, CONG. RESEARCH SERV., RL34193, JOURNALISTS' PRIVILEGE: OVERVIEW OF THE LAW AND LEGISLATION IN RECENT CONGRESSES (2011).

interest," with exceptions related to foreign governments and terrorism.[137] Some congressmen advocated limiting protection to persons who are "engaged in journalism" for "financial gain or livelihood."[138] These versions reflect the two commonsensical definitions of the institutional press that we have already rejected as constitutional limits: financial gain and regularity.[139] Both arouse opposition, either for being too broad or for being too narrow. Because press shield legislation would extend immunities to the press beyond what the First Amendment has been held to require, it probably does not violate the Constitution to confine those immunities to a subset of entities entitled to protection under the Press Clause.[140] In the context of editorializing about candidates, however, a narrow definition would abridge constitutional liberty. Any law limiting the right of editorializing to paid professionals or "regular" journalists would amount to licensing.

Congress is not the only institution struggling with how to define the press. In a recent opinion, the United States District Court for the District of Oregon put forward a multi-factor test to distinguish news media organizations from others.[141] The case, a defamation suit, involved a self-styled "investigative blogger."[142] The court held that the outcome depended in part on whether the blogger was a "media defendant" or "journalist" for purposes of First Amendment protection under *Gertz v. Robert Welch, Inc.*[143] The court concluded "no," providing the following analysis:

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137. Free Flow of Information Act of 2013, S. 987, 113th Cong. § 11(2)(A).

138. Free Flow of Information Act of 2013, H.R. 1962, 113th Cong. § 4(2).

139. See *supra* notes 131-133 and accompanying text.

140. It might be argued under the majority's approach in *Citizens United* that it is unconstitutional to draw lines among potential speakers or publishers, but I regard this as an overreading. Extension of benefits is not the same, constitutionally, as restriction of rights.

141. Obsidian Fin. Grp., LLC v. Cox, No. CV–11–57–HZ, 2011 WL 5999334 (D. Or. Nov. 30, 2011). The decision is on appeal to the Ninth Circuit.

142. *Id.* at *5.

143. *Id.* at *5, *7. *See* 418 U.S. 323, 347 (1974). Lower courts have split over whether the *Gertz* holding applies to non-media defendants. *Compare* Jacron Sales Co. v. Sindorf, 350 A.2d 688, 695 (Md. 1976) ("[T]he *Gertz* holding should apply to media and non-media defendants alike . . . ."), *with* Denny v. Mertz, 318 N.W.2d 141, 153 (Wis. 1982) ("[W]e do not read *Gertz* as requiring that the protections provided therein apply to non-media defendants . . . ."). The district court assumed that the *Gertz* holding applied only to media defendants.

> Defendant fails to bring forth any evidence suggestive of her status as a journalist. For example, there is no evidence of (1) any education in journalism; (2) any credentials or proof of any affiliation with any recognized news entity; (3) proof of adherence to journalistic standards such as editing, fact-checking, or disclosures of conflicts of interest; (4) keeping notes of conversations and interviews conducted; (5) mutual understanding or agreement of confidentiality between the defendant and his/her sources; (6) creation of an independent product rather than assembling writings and postings of others; or (7) contacting "the other side" to get both sides of a story. Without evidence of this nature, defendant is not "media."[144]

Presumably, a similar test could be used to determine whether the Press Clause protects the blogger's right to blog about the virtues or flaws of a candidate for office.

The definition, though, is deeply inconsistent with the idea of freedom of the press. To require "education in journalism," credentials, and proof of adherence to professional standards is essentially to require a license. The Press Clause forbids that. To exclude publishers of material created by others would render the advertisement at issue in *New York Times v. Sullivan*—which was written by a group of ministers and civil rights leaders—outside the protection of the Clause. It was common for newspapers at the time of the Founding to publish material from a variety of sources, such as *The Federalist* essays and their Anti-Federalist counterparts. *Reader's Digest* would seem to be within the category of "news media," but it does not generate its own content. Moreover, whether the writer keeps notes of conversations and enters into agreements of confidentiality with sources is not applicable to opinion journalism. As to "contacting 'the other side,'" this suggests that biased or opinionated journalism is not constitutionally protected. Who is to be the judge of that?

The Reporters Committee for Freedom of the Press put forward a simpler definition of the press in its amicus brief in *Citizens United*: "entities that have the intent to gather and disseminate news, commentary and other information."[145] It is not evident who this definition excludes, beyond those

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144. *Obsidian Finance*, 2011 WL 5999334, at *5.

145. Supplemental Brief for the Reporters Committee, *supra* note 43, at 12. This definition appears to have been incorporated from the Committee's proposals for "press shield" legislation, without attention to the potential difference in context. *E.g.*, *Comments on Proposed Assembly Bill 333 Establishing a Privilege for Reporters and Whistleblowers*, REPORTERS COMM. FOR FREEDOM OF THE PRESS 4-5 (July 21, 2009), http://www.rcfp.org

who acquire information before they decide to write about it—a limitation relevant to the "press shield" issue but not to the right to editorialize. Presumably, every "entity" that pays for advertising praising or attacking a candidate "intends" to disseminate "commentary." Citizens United, for example, prepared a documentary, which was an extended negative commentary on then-Senator Clinton. Is that outside the definition? If "the press" is given a functional definition, as it should be, then any entity that performs the function of writing and disseminating news and opinion is part of it. Read literally, the Reporters Committee definition encompasses the Citizens United movie; indeed it encompasses standard television campaign ads by independent groups. Whatever else might be said of these, they contain "commentary" and "other information." This definition thus supports, rather than undermines, the *Citizens United* ruling.

The Reporters Committee's definition, interestingly, does not limit "the press" to entities that make money, or intend to make money, from their publications, or to periodicals, or to entities that engage in publishing on a regular basis. Apparently the Committee recognized that amateurs and occasional participants have the same rights as professionals and full-timers.

It is possible, though unlikely, that the Reporters Committee is using the words "news, commentary, and other information" in some sort of normative journalistic sense, meaning *responsible and objective* news, commentary, and other information.[146] If so, the definition puts the courts in the business of

/news/documents/20090724-commentsonproposedwisconsinshieldlaw.pdf (arguing that "the proper test to apply is whether the newsperson had the intent to gather and disseminate news to the public at the inception of the reporting process"); Letter from the Reporters Committee for Freedom of the Press to John Ashcroft, U.S. Att'y Gen. (Jan. 14, 2002), http://www.rcfp.org/news/documents/20020114Leggett.pdf (arguing the same).

146. In deliberations over proposed "press shield" legislation in Congress, one congressman expressed concern that "protections for the mainstream press" should not be "so broad" as to "extend to tabloids that thrive on gossip and misinformation." *Free Flow of Information Act of 2007: Hearing on H.R. 2102 Before the H. Comm. on the Judiciary*, 110th Cong. 10 (2007) (statement of Rep. Lamar Smith, Ranking Member, H. Comm. on the Judiciary); *see also* 155 CONG. REC. H4207 (daily ed. Mar. 31, 2009) (statement of Rep. Steve King, Member, H. Comm. on the Judiciary) (insisting on a certain "level of professionalism" to warrant protection). It is perhaps worth noting that even "tabloids" and amateurs can perform the function of informing the public, sometimes more courageously than the mainstream press, as one former major party candidate for Vice President of the United States learned to his regret. *See* Howard Kurtz, *Inquiring Minds Want to Know: Can a Tabloid Win a Pulitzer?*, WASH. POST, Jan. 22, 2010, http://articles.washingtonpost.com/2010-01-22/news/36819321_1_campaign-videographer-rielle-hunter-enquirer-first (noting that the National

judging journalistic quality, which the prohibition on press licensing would seem to forbid. Surely *Hillary: The Movie* did not forfeit constitutional protection because it was so one-sided. Not a few undoubted organs of the news media would be endangered under that criterion.

The *New York Times* editorial board recently ran an editorial responding to a speech by Justice Samuel Alito in which the Justice pointed out that "corporations have free speech rights and that, without such rights, newspapers would have lost the major press freedom rulings that allowed the publication of the Pentagon Papers and made it easier for newspapers to defend themselves against libel suits in *New York Times v. Sullivan*."[147] The editorialists called the argument "specious[]," explaining that

> [i]t is not the corporate structure of media companies that makes them deserving of constitutional protection. It is their *function*—the vital role that the press plays in American democracy—that sets them apart. . . . The *Citizens United* majority never explained why any corporation that does not have a press function warrants the same free speech rights as a person.[148]

But it is precisely the "function" of preparing and disseminating a documentary containing commentary on a matter of public concern that the Court's decision protected. The Court did not hold that Citizens United was protected *because* it was a corporation, but—following the same logic as the *New York Times* editorial—the Court held Citizens United was protected *notwithstanding* its corporate structure. The editorialists do not explain in what sense the "function" of preparing and disseminating a documentary differs from their own activity—unless they think their full-time professional positions set them apart from other Americans who wish to comment on public affairs.

It bears mention that if no coherent distinction can be drawn between the institutional press and other persons who wish to disseminate information and opinion to the public, the effort to amend the Constitution to reverse the *Citizens United* decision is misguided. The principle at the heart of *Citizens United*, understood as freedom of the press, is not merely an artifact of the positive law of text, history, and precedent, but is a natural implication of the underlying liberty. We cannot overrule *Citizens United* by constitutional

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Inquirer broke the story of Democratic Party Vice Presidential nominee John Edwards's adulterous affair).

147. Editorial, *supra* note 38. The quotation is from the editorial, not from the Justice.

148. *Id.*

amendment without either endangering the right of the press to editorialize or drawing a line for the first time between a privileged class of recognized journalists who enjoy the freedom to publish, and the rest of us who do not.

In conclusion, if the freedom of the press includes the right to publish criticism or praise of a candidate in the days or weeks prior to an election (as it does), and if corporations, including for-profit corporations like the New York Times Company, can exercise the freedom of the press (as they can), and if there is no basis in history, precedent, or logic for distinguishing between the institutional press and other persons or groups who wish to publish their opinions about candidates for public office, the result—even if not the reasoning—of *Citizens United* has to be correct. Under this approach to the case, it was not necessary for the Justices on both sides of the issue to delve into dubious quasi-empirical inquiries relating to the prevention of corruption, the protection of stockholders, or leveling the playing field, since none of those concerns overrides the right of the press to editorialize. As the Court said in its concluding sentence in *Mills*: "[N]o 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."[149]

II. THE FREEDOM OF THE PRESS DOES NOT PROTECT THE RIGHT OF ANYONE TO MAKE CONTRIBUTIONS TO CAMPAIGNS

One implication of this way of analyzing *Citizens United* is that it establishes only the right of an entity under the Press Clause to *publish* or *disseminate* opinions about officials and candidates for office. It says nothing about the right to contribute to candidates, political parties, or PACs. The right to publish belongs to everyone—to natural persons like Thomas Paine, to for-profit corporations like the New York Times Company, and to non-media corporations like Citizens United—but contributing to candidates is not an exercise of the freedom of the press. For purposes of this essay, I take no position on how to classify contributions as a First Amendment matter. Contributing to candidates may be an exercise of the freedom of expressive association; it may be an instance of expressive conduct; it may be the use of a thing for expressive purposes. Limitations on contributions may be a "direct" limitation on the communication of a message, triggering strict scrutiny under

149. Mills v. Alabama, 384 U.S. 214, 220 (1966).

the Speech Clause, or something less. But contributing to a candidate is not the use of "the press"—or modern technological advances on "the press"—to disseminate news and opinion to the public. It therefore falls outside the Press Clause.

A. Contrasting the Press Clause Approach to the Majority's Prohibition on Speaker-Based Distinctions

This Press Clause approach to *Citizens United* has the judicial minimalist virtue of not deciding, in one massive proceeding, the full range of campaign finance constitutional issues. It would permit the Court to grapple with the questions of contributions and contribution disclosure requirements on their own terms. Those issues, properly understood, involve separate free speech and association doctrines far afield from the Press Clause. Of course, if the Court were to conclude that restrictions on campaign contributions are a direct and significant abridgement of freedom of speech, which some Justices and many scholars have argued, any distinction between contributions and expenditures, or between freedom of speech and freedom of the press, would largely dissolve. But, it is possible that the Court could reaffirm contribution limits under the theory that, as exercises of expressive conduct or expressive association, they are entitled to less than strict scrutiny, even while recognizing that independent expenditures taking the form of broadcast editorials are protected under the Press Clause. For better or worse, that would essentially maintain something close to the doctrinal status quo with respect to contribution limits. The Press Clause approach I have set forth here is compatible with either alternative.

The majority's opinion, by contrast, rested on the broad proposition that "restrictions distinguishing among different speakers, allowing speech by some but not others" are "[p]rohibited."[150] In other words, speech-restrictive laws discriminating on the basis of speaker identity are suspect, just as laws discriminating on the basis of content or viewpoint are suspect. This proposition is plausible and even attractive within a certain domain, but it is newly minted and seems overbroad.

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150. 558 U.S. at 340; *see also id.* at 394 (Stevens, J., concurring in part and dissenting in part) ("The basic premise underlying the Court's ruling is its iteration, and constant reiteration, of the proposition that the First Amendment bars regulatory distinctions based on a speaker's identity, including its 'identity' as a corporation.").

According to the Court, *Buckley* and *Bellotti* established the "principle" that "the Government may not suppress political speech on the basis of the speaker's corporate identity."[151] In my opinion, that is not quite correct. *Bellotti* (and to a lesser extent *Buckley*) held that corporations, no less than individuals, have certain rights to participate in campaigns.[152] But this conclusion did not rest on the illegitimacy of the *distinction* between corporations and individuals. It rested on the right of corporations, among others, to exercise First Amendment rights and the inadequacy of the government's justifications for attempting to abridge that right. In other words, "corporate identity" was not a sufficient constitutional justification to "suppress political speech."[153] This is not the same as holding that the very distinction between corporations and individuals with respect to speech demands strict scrutiny.

In its Speech Clause decisions, the Court has been vigilant to prohibit discrimination on the basis of viewpoint and sometimes subject matter,[154] but has never before placed speaker-based discrimination in the same suspect category. In the campaign finance context, the Court has distinguished between non-profit and for-profit groups,[155] and between foreign nationals and U.S. citizens,[156] without any Justice suggesting that restrictions based on speaker identity were suspect. The Court has upheld laws forbidding federal employees from engaging in electioneering, which is a form of speech at the heart of the First Amendment,[157] and laws limiting the use of university classrooms to student groups.[158] Labor laws impose restrictions on the right of employers to speak that do not apply to unions.[159] Applying the rational basis

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151. *Id.* at 365 (majority opinion).

152. First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 782 & n.18 (1978).

153. *See id.* at 784-86 (noting that the Massachusetts law at issue "single[d] out a specific kind of ballot question—individual taxation—about which corporations could never make their ideas public"). This language suggests that the Court may have viewed the law as a content-based regulation.

154. *E.g.*, Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995); Police Dep't of Chi. v. Mosley, 408 U.S. 92 (1972).

155. FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238 (1986).

156. Bluman v. FEC, 132 S. Ct. 1087 (2012) (per curiam).

157. U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548 (1973).

158. Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 2986 (2010).

159. For an employer to express the view that unionization would have bad consequences for workers is often treated as retaliatory or coercive speech. *See* Paul D. Snitzer, *Employer Free Speech—The Emergence of a Conflict Between the Board and the Circuits*, 11 LAB. LAW. 247 (1995).

test, the Court unanimously upheld a tax rule allowing veterans groups to lobby, but not other groups entitled to receive tax-deductible contributions.[160] The public forum doctrine conspicuously forbids restrictions based on viewpoint, but not on speaker identity.[161] It may be possible to reconcile some of these results with a prohibition on speaker-based restrictions, and some of them may be wrongly decided, but the analytical path is not straightforward.

The Supreme Court's intuition that speaker-based restrictions are out of place in the context of *Citizens United* is better explained as a construction of the Press Clause, where the principle would be confined to the specific question of who is permitted to disseminate information and opinion to the public through media of mass communication. The heart of the Press Clause is its prohibition on licensing; another way to express the prohibition on licensing is that the government may not pick and choose who can publish. The Speech Clause, by contrast, is focused on the dangers of regulating on the basis of the content or communicative impact of the message. The Speech Clause comprises a variety of doctrines such as public forum, expressive conduct, time-place-and-manner restrictions, public employee speech, and neutrality in access to subsidies, which have not traditionally been thought to preclude all speaker-based distinctions.

A prohibition on all speaker-based discrimination would seem to render unconstitutional BCRA's provision barring corporations and unions, but not individuals or other forms of associations, from making contributions to political campaigns—a restriction going back more than a hundred years[162] and upheld as recently as *FEC v. Beaumont* in 2003.[163] If the Court has been correct to treat restrictions on contributions as restrictions on speech—albeit "marginal"[164]—and if the government may not "allow[] speech by some but not others,"[165] it would seem to follow that it is unconstitutional for Congress or the states to allow contributions by individuals and not by corporations and labor unions. To be sure, every court of appeals confronted with this post-

160. Regan v. Taxation with Representation of Washington, 461 U.S. 540 (1983).

161. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983) (allowing one union, but not another, to disseminate materials within a school).

162. Tillman Act of 1907, ch. 420, 34 Stat. 864 (codified as amended at 2 U.S.C. § 441b (2012)).

163. 539 U.S. 146 (2003).

164. *Id.* at 161 (quoting Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam)).

165. Citizens United v. FEC, 558 U.S. 310, 340 (2010).

Citizens United challenge to the corporate contribution ban has rejected it,[166] but it is hard to square *Citizens United*'s broad speaker-equality rationale with any such restrictions. The lower courts sustain these restrictions not by a logical distinction from *Citizens United* but because *Beaumont* is the precedent most closely on point.[167] Again, the conclusion that prohibitions on corporate campaign contributions are laws abridging the freedom of speech may be correct—Justices Scalia and Thomas have made serious arguments to that effect—but it was not necessary for *Citizens United* to reopen that issue.

B. Contributions, Expenditures, and Publications

The distinction between contributions and independent expenditures has been central to the logic (or illogic) of campaign finance law since *Buckley v. Valeo*.[168] According to the *Beaumont* Court's reading of *Buckley*, limits on campaign contributions are "merely 'marginal' speech restrictions subject to relatively complaisant review under the First Amendment,"[169] while limits on independent expenditures are more "direct restraint[s]" on speech.[170] This distinction, rather than any of the details of the regulatory schemes, explains the results of the Court's campaign finance cases. In every case but one,[171] the

166. *See, e.g.*, Minn. Citizens Concerned for Life, Inc. v. Swanson, 692 F.3d 864 (8th Cir. 2012) (en banc); United States v. Danielczyk, 683 F.3d 611, 615-19 (4th Cir. 2012); Ognibene v. Parkes, 671 F.3d 174, 183-84 (2d Cir. 2011); Thalheimer v. City of San Diego, 645 F.3d 1109, 1124-26 (9th Cir. 2011); Green Party of Conn. v. Garfield, 616 F.3d 189, 202-07 (2d Cir. 2010).

167. *Swanson*, 692 F.3d at 879 ("Rightly or wrongly decided, *Beaumont* dictates the level of scrutiny and the potential legitimacy of the interests Minnesota advances by prohibiting corporate contributions to political candidates and committees." (footnote omitted)); *Danielczyk*, 683 F.3d at 615 ("*Beaumont* clearly supports the constitutionality of §441b(a) and *Citizens United*, a case that addresses corporate independent expenditures, does not undermine *Beaumont*'s reasoning on this point."); *Ognibene*, 671 F.3d at 183 ("Contrary to Appellants' exhortations, however, *Citizens United* applies only to independent corporate expenditures. It reaffirms existing precedent on the propriety of contribution limits."); *id.* at 194-95 (applying *Beaumont*); *Thalheimer*, 645 F.3d at 1124-26 (discussing *Beaumont*); *Garfield*, 616 F.3d at 198-99 (applying *Beaumont*).

168. 424 U.S. 1.

169. FEC v. Beaumont, 539 U.S. 146, 161 (2003) (citing *Buckley*, 424 U.S. at 1).

170. *See Buckley*, 424 U.S. at 21.

171. *Randall v. Sorrell*, 548 U.S. 230 (2006), is the exception.

Court has upheld restrictions on contributions,[172] while it invariably invalidates restrictions on independent expenditures.[173] This rough-and-ready compromise, which pleases no one, has lasted more than thirty-five years.

The *Buckley* Court put forward two reasons for the sharp distinction between contributions and independent expenditures, one based on the impact of the regulation on the speaker and the other on the governmental interest. Neither is persuasive. According to the Court, contribution limits impose no significant restraint on speech rights because "[t]he quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing."[174] This is absurd. Of course, more money buys more speech, more airtime, more messages, more staff to call more voters, more everything. It may well be true that the marginal impact of more spending at the high end is exiguous, but neither candidates nor donors apparently think their efforts have reached that ceiling.

To say that contribution limits impose no significant restraint on speech is like saying that a fifteen-minute limitation on labor picketing would be fine, on the theory that once the picketer has engaged in the "symbolic act of picketing" there is no point in keeping it up. Contributing to a campaign is not a binary show of allegiance like putting a bumper sticker on your car. The point of a contribution is to enable the campaign to purchase more advertising. The expressive element is not the mere act of contributing; most often, no one else knows about the contribution unless they look the contributor up on *OpenSecrets.org*. The point of the contribution is to enable one's candidate to purchase more advertising, and caps on contributions plainly limit that.

On the governmental interest side, the *Buckley* Court hypothesized that "the independent advocacy restricted by the provision does not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions."[175] That was a dubious claim at the time of *Buckley*, and is even harder to believe today.

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172. *E.g.*, *Beaumont*, 539 U.S. 146; Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000); Cal. Med. Ass'n. v. FEC, 453 U.S. 182 (1981).

173. Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604 (1996); FEC v. Nat'l Conservative Pol. Action Comm., 470 U.S. 480 (1985); First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765 (1978).

174. *Buckley*, 424 U.S. at 21.

175. *Id.* at 46.

The district court in *McConnell* heard compelling testimony from participants in campaigns to the effect that independent expenditures are well known to the candidates and have much the same impact on them as direct contributions. Judge Kollar-Kotelly made the following factual finding:

> The factual findings of the Court illustrate that corporations and labor unions routinely notify Members of Congress as soon as they air electioneering communications relevant to the Members' elections. The record also indicates that Members express appreciation to organizations for the airing of these election-related advertisements. Indeed, Members of Congress are particularly grateful when negative issue advertisements are run by these organizations, leaving the candidates free to run positive advertisements and be seen as "above the fray." Political consultants testify that campaigns are quite aware of who is running advertisements on the candidate's behalf, when they are being run, and where they are being run.[176]

This finding does not support a distinction between corporations and other donors, but it does cast doubt on the *Buckley* Court's empirical speculation that independent expenditures, unlike contributions, are non-corrupting.

Indeed, in some ways independent expenditures may be more corrupting than direct contributions to candidates' campaigns or political parties. Typically, the "independent" campaign groups are organized and led by close associates of the candidate, often former campaign officials or aides. Even without "coordinating" their efforts with the campaign, they can make known to the candidate who is writing checks. And often, contributions to these organizations need not be publicly disclosed. That means that the candidate knows who is supporting him—but no one else does. The law may have created the worst of both worlds—at least contributions to the candidate or the political party are disclosed.

The *Citizens United* majority was therefore wrong, in my opinion, to embrace and perpetuate the *Buckley* Court's admittedly provisional argument ("independent advocacy . . . *does not presently appear* to pose dangers . . .") on this point.[177] The Court's reliance on this rationale made the *Citizens United* decision appear naïve or obtuse.

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176. McConnell v. FEC, 251 F. Supp. 2d 176, 623 (D.D.C. 2003) (Kollar-Kotelly, J., concurring in part and dissenting in part) (citations omitted), *aff'd in part and rev'd in part*, 540 U.S. 93 (2003).

177. *Buckley*, 424 U.S. at 46 (emphasis added).

C. Significance of the Press Clause

The Press Clause, by contrast, provides a coherent basis for distinguishing between contributions and at least some independent expenditures—those taking the form of published advocacy for or against a candidate. Such expenditures are an exercise of freedom of the press; contributions to a candidate, a campaign, or a party are not. To be sure, the line between press and contributor does not perfectly track *Buckley*'s line between independent expenditures and contributions. Some forms of independent expenditure do not constitute publishing one's opinions to the public—for example, paying for legal expenses or opposition research, financing computer systems for the analysis of data, or hiring buses to get voters to the polls. Reportedly, billionaire George Soros contributed $5 million during the last election cycle to research and develop new ways to get Democratic-leaning voting groups to the polls.[178] Expenditures of this sort are not exercises of the freedom of the press, and there is no apparent reason why they should not be as regulated (or unregulated) as contributions to candidates.

Other activities now defined as being on the "independent expenditure" side of the *Buckley* line may not be exercises of the freedom of the press. For example, in *SpeechNow.org v. FEC*,[179] the D.C. Circuit held that contributions to non-profit organizations that make independent expenditures in support of candidates cannot be subject to contribution limits or disclosure requirements. (This decision, far more than *Citizens United*, is responsible for recent erosions of limits on campaign money.) If the proper line is between contributions to candidates and independent expenditures, this decision is a logical extension of *Buckley*. But contributions to PACs are no more an exercise of the freedom of the press than contributions to candidates. Persons may pool their money to buy advertisements, as in *Sullivan*, and remain within the contours of press freedom, but when they give money to others with no control over the

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178. *See* Ernest Istook, *Liberal Stealth Groups Paved Obama Win*, FOUNDRY (Nov. 29, 2012, 10:30 AM), http://blog.heritage.org/2012/11/29/liberal-stealth-groups-paved-obama-win. Independent expenditures of this sort would presumably not be protected by freedom of the press. Nor, however, do they come within the statutory prohibitions of BCRA, even though they are known to the candidates and no doubt are appreciated by them, and thus raise the same dangers of corruption that are presented by electioneering expenditures. BCRA would appear to be underinclusive from the point of view of the anti-corruption rationale, targeting only those forms of independent expenditure that involve public commentary.

179. 599 F.3d 686 (D.C. Cir. 2010).

messages that will be purchased, it would stretch the definition to say they were engaged in the function of the "press."

Nonetheless, the vast majority of independent expenditures fall squarely within the definition of freedom of the press as they constitute the dissemination of opinion or information to the public through media or communications. The distinction drawn in *Buckley* between expenditures and contributions is difficult to justify under freedom of speech principles, but loosely tracks the contours of freedom of the press.

Even apart from the formal textual argument—that producing and distributing a documentary like the one in *Citizens United* is an exercise of freedom of the press, while giving money to a campaign is not—an approach based on the Press Clause also has functional appeal. It roughly tracks the distinction between attempts to *persuade the public*, which are and should be constitutionally protected, and attempts to *make officeholders grateful*, which are not (or the flip side, attempts by officeholders to extract money from those they regulate, which are likewise not protected). Americans have a First Amendment right to do what we can to sway public opinion, but not to buy privileged access to our leaders by giving money to their campaigns. Reliance on the Press Clause is thus a first step toward aligning legal doctrine with the underlying purposes of the First Amendment.

Professor Lawrence Lessig has recently made a similar point, though without reference to the Press Clause. He argues that contributions to candidates (and probably also to super PACs) produce the kind of officeholder "dependence" that the Framers would have labeled "corruption," but that direct expenditures like those involved in *Citizens United*, even by corporations, "have their effect by affecting how people view political contests" and are properly protected by the First Amendment.[180] On this ground, he says that *Citizens United* "might be correct."[181] The difference between his argument and mine is that he focuses on whether there is a compelling interest supporting speech regulation, while I focus on whether independent advocacy is protected under the Press Clause.

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180. Lawrence Lessig, *What an 'Originalist' Would Understand 'Corruption' to Mean: The 2013 Jorde Lecture*, 102 CALIF. L. REV. (forthcoming 2014) (manuscript at 27, 30), http://ssrn.com/abstract=2257948.

181. *Id.* at 30.

D. Perverse Consequences of the Contribution-Expenditure Distinction

While reliance on the Press Clause as the basis for protecting the publication of commentary about candidates would shore up something close to the *Buckley* line as a matter of constitutional doctrine, it would not make that line any less perverse as a practical matter. Allowing unlimited expenditures by candidates while restricting contributions to relatively small increments has three pernicious consequences. First, it gives an unfair advantage to two types of candidates, incumbents and rich people, while disadvantaging non-rich challengers. Running for office is expensive, and raising money is expensive. Challengers will find it hard to raise sufficient funds from large numbers of small contributors. Their best hope—wealthy supporters with an ideological interest in their candidacy—is cut off. Incumbents, by contrast, can tap into networks of lobbyists and others whose economic interests are affected by their public actions, starting with a fundraising reception the day after they win office, and wealthy individuals (so-called "self-funders") can write a check to their own campaign to get it started.

Second, this combination of rules has the effect of driving money away from candidates and political parties, which are the most accountable entities to the public, and toward special interest groups and faceless organizations, which are less so. Candidates and parties are at least somewhat inclined to avoid the extremes, and may pay a price if their ads are overly harsh and negative. Special interest groups and super PACs are less likely to feel these constraints. As Judge Kollar-Kotelly found as a fact, based on the record in the D.C. District Court in *McConnell*, candidates are "grateful" when independent groups take on the burden of running the negative ads, because it enables them to appear to be "above the fray."[182] I am skeptical of any governmental effort to police campaign speech to make it less negative, vitriolic, or immoderate, but there is little to be said for laws that exacerbate these vices. Why magnify the voices that are most likely to debase the debate?

The *Buckley* decision has thus done great damage to the nation's political life, by advantaging incumbents and self-funders, weakening candidates and political parties, and magnifying the voices of faceless political organizations and special interest groups. This was not the law Congress passed. If expenditure limits were low or contribution limits high, these effects would not be so pronounced.

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182. McConnell v. FEC, 251 F. Supp. 2d 176, 623 (D.D.C. 2003) (Kollar-Kotelly, J., concurring in part and dissenting in part), *aff'd in part and rev'd in part*, 540 U.S. 93 (2003).

Quite apart from its constitutional holdings, the *Buckley* Court may be criticized for its severability analysis. When a court strikes down part, but not all, of a statute, its duty is to allow the partial statute to go into effect only if this would effectuate likely congressional intent.[183] It is almost impossible to imagine that a rational public-interested Congress would have enacted a campaign reform statute in this perverse form. Very few people on either side of the campaign finance controversy think that the combination of contribution limits and no expenditure limits is wise public policy. The Court should not have imputed that intent to Congress, but should have struck the entire statute and allowed Congress to decide what mix of policies to enact.

The distinction between contributions and expenditures survives in the Supreme Court only because the two sides of the debate are at odds about how to resolve it. At least six of the Justices now condemn the distinction between contributions and expenditures, but one wing of the Court (Scalia, Kennedy, and Thomas) would erase the distinction by extending constitutional protection to contributions,[184] and the other (Ginsburg, Breyer, Sotomayor, and Kagan) would erase the distinction by stripping constitutional protection from independent expenditures.[185] This produces a standoff. Together, these coalitions comprise a majority for the proposition that the distinction between contributions and expenditures should be abandoned, but they cancel each other out, leaving a durable plurality in support of a distinction that at most two of the Justices (Roberts and Alito),[186] and perhaps not all of those, are willing to defend.

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183. *See* Nat'l Fed. Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012) (striking down the Medicaid expansion but allowing the statute to go into effect on a voluntary basis); United States v. Booker, 543 U.S. 220 (2005) (striking down the mandatory Sentencing Guidelines but allowing the statute to remain in effect subject to district court departures).

184. *See* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 409-10 (2000) (Kennedy, J., dissenting) (stating that he would "overrule" *Buckley* and suggesting that he would extend protection to contributions, or at least defer to legislatures to come up with such limits); *id.* at 410 (Thomas, J., dissenting, joined by Scalia, J.) (stating that he would "overrule" *Buckley* and "subject campaign contribution limitations to strict scrutiny").

185. All three Justices joined Justice Breyer's dissent in *American Tradition Partnership v. Bullock*, which claimed that independent expenditures could be as corrupting as direct contributions. 132 S. Ct. 2490, 2491-92 (2012) (Breyer, J., dissenting).

186. In *Randall v. Sorrell*, Chief Justice Roberts and Justice Breyer declined to revisit *Buckley* on stare decisis grounds. 548 U.S. 230, 242-44 (2006) (plurality opinion). Justice Alito refused to join that portion of the plurality opinion because the respondents had not briefed the issue. *Id.* at 263-64 (Alito, J., concurring). Since *Randall*, Justice Breyer has dissented in *Citizens United* and *Bullock*, suggesting that he may now be willing to overrule *Buckley*.

As a constitutional doctrinal matter, recognition of the Press Clause underpinnings to the expenditure side of this mess will not force reconsideration on the contribution side, but it could affect the Court's thinking about contributions in a more indirect way. As we have seen, the Press Clause offers a sounder doctrinal basis for distinguishing between contributions and (most) expenditures, and thus seems to shore up something close to the *Buckley* distinction. But if it becomes clear that the Court cannot sanction abridgement of the right to publish opinions about public officials and candidates—as the analysis in Part I indicates—then the pro-reform wing of the Court is going to have to engage in a difficult calculus. As a policy matter, they favor restrictions on both contributions and expenditures. But if restrictions on independent expenditures in the form of publication of opinions about candidates are impossible to square with fundamental principles of freedom of press, reform-minded Justices have to decide whether contribution limits alone do more harm than good. Under anything stronger than rational basis scrutiny, contribution limits can be sustained only if they can be proven to contribute substantially to achievement of an important governmental purpose, according to the verbal formula of intermediate scrutiny. I think it is manifest that contribution limits without independent expenditure limits do not accomplish their intended purpose; on the contrary, they magnify the influence of incumbents, wealthy candidates, special interests, and unaccountable groups at the expense of challengers, candidates, and parties. The current regime does not stanch the flow of money into politics, with its attendant corruption and extortionate effects, but only channels the money away from candidates and parties toward super PACs and single-issue ideological organizations, which are worse.

If it is not possible to prohibit the publication of commentary on candidates without violating established principles under the Press Clause, then it is not constitutionally possible to resolve the *Buckley* distinction by eliminating protection for independent expenditures on political advocacy. Supporters of campaign finance regulation may be forced to look for alternative ways to improve our dysfunctional system. These likely involve raising contribution limits, reviving political parties, simplifying and speeding up the enforcement process, and facilitating relatively small but numerous contributions by means such as tax credits. *Citizens United* does not, in itself, conflict with *Buckley*, but it exposes the dysfunctional dynamic at the heart of *Buckley*'s distinction between contributions and expenditures. If a proper understanding of the *Citizens United* problem serves to disabuse reform advocates of the futile hope of having all they wish, maybe it will inspire them to move toward solutions of more pragmatic value to the democratic process.

CONCLUSION

Citizens United is a highly controversial, indeed reviled, decision, but it should not be. If the case had been analyzed under the Press Clause, the outcome of the case would have hinged on the doctrinal question whether the Press Clause protects the publication of commentary about public figures by entities that are not part of the journalism profession, as it already uncontroversially protects such commentary by the institutional press. No one doubts that media corporations like the New York Times Company have a constitutional right to publish critiques of candidates for office during the election campaign season. The proper question for the Court in *Citizens United* was whether this undoubted right extends to non-media groups like Citizens United. I have argued that precedent and history strongly support the principle that the freedom of the press extends to all who wish to use media of mass communications to express news and opinion to the public, whether they are professional journalists or not, and that the attempt to define a privileged subclass of protected media is both practically impossible and contrary to the anti-licensing logic of the Press Clause. If that is so, the result—though not the analysis—of *Citizens United* is correct.

If we approach these issues from the standpoint of the Press Clause, the question resolved in *Citizens United* need not disturb the jurisprudence of campaign finance restrictions on contributions. Indeed, a Press Clause analysis provides a sounder doctrinal basis for something close to the holding of *Buckley v. Valeo* than *Buckley* itself articulated. As a practical matter, though, once we recognize that the Press Clause does not permit Congress or the states to abridge the right of anyone to publish commentary on candidates for public office during an election campaign season, reformers might well conclude that the *Buckley* regime of contribution limits without expenditure controls does more harm than good. The correctness of *Citizens United* should be a spur to thinking about what real campaign finance reform would look like.