IN DEFENSE OF CITIZENS UNITED

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Citizens United v. FEC1 is one of the most reviled decisions of the Supreme Court in recent years. The President of the United States denounced it to the Justices’ faces at his 2011 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

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1 130 S. Ct. 876 (2010).

2 President Barack H. Obama, Address Before a Joint Session of Congress on the State of the Union (Jan. 27, 2010) (“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.”).


5 See, e.g., Editorial, Expose the Fat Cats, WASH. POST, July 15, 2012, at A20 (“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 (writing that the decision was shaped by “extreme view of the First Amendment: money equals speech, and independent spending by wealthy organizations and individuals poses no problem to the political system.”); Editorial, . . . and a $6 billion dollar political gusher, USA TODAY, Nov. 5, 2012, at 10A (“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.”).

I believe it is time for a more balanced evaluation.

Part of the problem is the opinion itself. It is overly long, and seems to stretch for unnecessarily broad interpretations of free speech law, beyond what the parties argued or the facts demanded. Already the Court has been forced to cut back on one of the broader possible implications. But that does not mean the decision was wrong. There is a more modest and persuasive ground on which the decision should have been based. Properly analyzed, I maintain, the case should not have been so controversial, and would not have the far-reaching consequences for campaign finance law that so concern its critics. In particular, the decision need not disturb the Court’s jurisprudence regarding campaign contributions. I do not mean that the contributions jurisprudence is or should be sacrosanct, just that Citizens United presents a different problem.

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 percent are winning; Our view: Occupy movement should coalesce around reversing Citizens United, BALTIMORE SUN, Sept. 18, 2012, at 16A.


8 See infra, Part I.

9 See Bluman v FEC, 585 U.S. _____ (2012).
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 avoid these pitfalls, would serve better to democratize elections, and would pass constitutional muster.10

My argument has two parts. In the first, I will argue that long-established principles of the First Amendment – and particularly 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, unanimously, in Mills v. Alabama,11 and neither the dissenters nor any critics of the decision dispute that conclusion. So 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,12 and Justice Stevens appears to embrace it in one sentence and a footnote in his Citizens United dissent,13 it is in conflict with the great weight of precedent,14 departs from the unequivocal historical meaning of the Clause both before and for more than 100 years after its enactment,15 and

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10 See [name withheld], A Constitutional Campaign Finance Plan, WALL ST. J. (Dec. 11, 1997); [name withheld], Redefine campaign finance ‘reform’, CHI. TRIB. (June 29, 1993).
12 See pages ____ below.
13 Citizens United, 130 S. Ct. at 952 n.57 (Stevens, J., dissenting).
14 See pages ____ below.
15 See pages ____ below.
– 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.\textsuperscript{16}

The second section 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*.\textsuperscript{17} 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.

\section*{I. FREEDOM OF THE PRESS}

Under the Bipartisan Campaign Reform Act (BCRA),\textsuperscript{18} 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.\textsuperscript{19} *Citizens United* is a non-profit corporation, which receives a (small) portion of its funding from contributions from for-profit corporations.\textsuperscript{20} It

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\begin{itemize}
  \item\textsuperscript{16} See pages ____ below.
  \item\textsuperscript{17} 424 U.S. 1 (1976).
  \item\textsuperscript{19} 2 U.S.C. § 441(b).
  \item\textsuperscript{20} *Citizens United*, 130 S. Ct. at 887.
\end{itemize}
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 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.

It is important to be clear about what question is properly presented by the case. Properly understood, the case is not about whether corporations are people, or whether all speaker-based restrictions on speech are subject to strict scrutiny. Nor is it about whether independent expenditures by self-interested actors in support of or opposition to candidates for office are corrupting (to which the answer should be “yes”), or whether the 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”). It is not even about whether “money is speech.” The case, instead, asks whether a group of people organized as a corporation is constitutionally entitled to disseminate to the public through media of mass communications an endorsement or denunciation of a candidate for public office within a certain number of days before an election.

As Justice Stevens commented in his dissenting opinion, the “natural textual home” for the arguments in the case is the freedom of the press.\(^\text{21}\) 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.”\(^\text{22}\) 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*,

\(^{21}\) *Citizens United*, 130 S. Ct. at 952 n.57 (Stevens, J., dissenting).
\(^{22}\) *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 Society 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).
United, a focus on freedom of the press – rather than “speech” more generally – fosters analytical clarity for two reasons. First, it helps to differentiate the act of publishing one’s opinions about a public official or candidate from the act of contributing 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 simplifies 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 Co., and no one, even in dissent, has ever suggested that corporate status mattered in those cases. I take that as settled and correct law. The harder question is what implication that principle has for corporations that seek to publish their opinions to the public, but are not formally or regularly engaged in the business of journalism.

I begin my analysis with Mills v. Alabama, 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, though an amicus

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25 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 electioneering restrictions that distinguished 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 pages ___, below. The Supreme Court has cited Mills as support for the
curiae brief written by Floyd Abrams gave it proper attention. Despite 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, 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.” 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.” The Birmingham Post-Herald, which was owned by a corporation, violated the law. It published an editorial on election day

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27 17 ALA. CODE §§ 268-286 (1940).
28 § 285.
denouncing the Mayor, who was running for reelection, and urging support for a proposition creating an alternative structure of city government. The editor was prosecuted, and the state supreme court upheld the law. The United States Supreme Court held that the ordinance violated the freedom of the press. Justice Black wrote for the unanimous Court:

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.

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

According to the Court, it is “difficult to conceive of a more obvious and flagrant abridgement 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.” 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 is a for-profit corporation; (2) *Citizens United* involved a film documentary, while *Mills* involved a

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31 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.
33 *Mills*, 384 U.S. at 219 (citing Lovell v. 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).
34 *Id.*
newspaper; (3) BCRA prohibits publication of opinion about candidates within sixty days of the election, while the Alabama Corrupt Practices Act did so only for the day of the election; and (4) 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 three differences have no legal significance. Only the fourth is a matter for serious consideration.

Although I am unaware of any litigated cases on the point, it probably does not matter whether a newspaper or documentary producer is non-profit. Because the Press Clause forbids the licensing of the press, it would seem to follow that the government has no authority to regulate the financial structure or source of funds of an organization as a condition to the right to publish.35 Some of the nation’s leading journals, which surely qualify for freedom of the press if anything does, lose money and are supported in significant part by the contributions of supporters or a corporate backer. These include National Review,36 The Nation,37 The Weekly Standard,38 First Things,39 the Washington Times,40 Slate,41 and Salon.42 Newsweek magazine apparently

35 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.
36 Gary Shapiro, An ‘Encounter’ with Conservative Publishing, N.Y. SUN, Dec. 9, 2005, at 21 (noting that the magazine had lost “about $25 million over 50 years” and was reliant on the funding of private donors).
40 Dante Chinni, The Other Paper, COLUM. JOURNALISM REV., Sept-Oct. 2002, at 47 (estimating that the Unification Church, which owns the paper, had spent nearly $2 billion running the paper since 1982).
survived for its final year of print publication on the resources of its owner, the spouse of a Democratic politician. 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. In any event, 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 less – right to make expenditures that would affect elections. That is the teaching of *FEC v. Massachusetts Citizens for Life*.

If a for-profit corporation like the Birmingham Post Co. has a constitutional right to run an editorial that might influence an election, it would be strange to say that a non-profit publication would 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. No party or amicus in the *Citizens United* litigation suggested that the cinematic character of the medium made any difference to the constitutional analysis. 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 – a shocking admission that may have contributed to the call for reargument. During the reargument, Solicitor

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43 Tanzina Vega & Jeremy W. Peters, *An Audio Pioneer Buys Beleaguered Newsweek*, N.Y. TIMES, Aug. 3, 2010, at B1 (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).
44 479 U.S. 238 (1986).
45 Joseph Burstyn, Inc., v. Wilson, 343 U.S. 395 (1952). 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.
46 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.
48 See Adam Liptak, *Justices Consider Interplay Between First Amendment and Campaign Finance Laws*, N.Y. -10-
General Elena Kagan resisted the books hypothetical but admitted that the government’s constitutional theory would embrace pamphlets. 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. 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 black-out period – 60 days versus one day – likewise could not support a different outcome. If anything, the 60-day period in Citizens United is more speech-restrictive than the one-day period at issue in Mills, and ought to be more suspect. 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

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49 Transcript of Oral Reargument at 65-66, Citizens United, 130 S. Ct. 876 (No. 08-205), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-205%5BReargued%5D.pdf ("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.").

50 Id. at 66 ("[CHIEF JUSTICE ROBERTS:] if 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 441b only applies to video and not to print.").

51 Charles Hyneman & Donald Lutz, eds., American Political Writing During the Founding Era (Liberty Press, 1983) (two volumes) contains 76 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. Perusal of the information about the authors indicates that few were written by printers or journalists (an exception being Benjamin Franklin). Ellis Sandoz, editor of the two-volume Political Sermons of the American Founding Era (Liberty Press 1991), comments in the forward that a large portion of the political pamphlets published during this time were reprints of sermons.

52 I have doubts that the Court was correct to extend full First Amendment protection to interactive games, in which the gamer engages in simulated conduct that is not communicative (except, maybe, to himself).
candidates for office or, in the case of the Alabama statute, candidates or propositions. But even if they were content-neutral, it would be difficult to claim that the 60-day black-out period imposed by BCRA permitted more adequate alternative avenues for the expression than 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.

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 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.

To put the point more formally: Putting aside for the moment the statutory exception for media corporations, BCRA makes it illegal for corporations or labor unions to engage in electioneering activity, which includes the dissemination of endorsements or attacks on candidates for office. We know from Mills that some corporations have a constitutional right, under the Press Clause, to do just that. So BCRA (minus its media exception) is unconstitutional at least as applied to those companies. If the protections of the Press Clause apply only to companies regularly
engaged in the journalism business, then BCRA is not unconstitutional under the Press Clause on its face, but only as applied to the protected class of media corporations. If, however, the Press Clause protects the activity of publishing one’s ideas and opinions to the general public, rather than protecting a particular class of businesses, then BCRA § 441(b) is unconstitutional on its face. No entity – whether or not in the regular business of journalism – may be forbidden to exercise the freedom to disseminate opinions about candidates to the public.

The media exception does not save the statute from the finding of unconstitutionality, because it is narrower in scope than the Press Clause under either interpretation. The definition in BCRA is as follows: “The term ‘expenditure’ does not include—any news story, 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.” 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 internet, to films, to handbills, or to other non-periodical communications. And it does not apply to the myriad of communications that non-media entities might seek to engage in. The exception is narrower than any plausible definition of the constitutional term, “press.” So the central question in the case should have been: Does the freedom of the press extend only to the institutional press, or does it protect the right of anyone to publish their opinions to the public?

Despite the length of its opinions, the Court devoted surprisingly little attention to this

question. As one commentator noted, the majority’s assertion that the institutional press has no more rights under the Press Clause than others was “almost offhanded,” offering “virtually no substantive discussion of the reasons for this conclusion.” The similarly lengthy dissent responded with one conclusory sentence accompanied by a short footnote, to which Justice Scalia responded with a slightly longer footnote in his concurrence. 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. If the New York Times Co. does not enjoy Press Clause rights, who does? It is essential to the dissenting position to show that one class of corporations, namely media corporations, have special rights under the First Amendment.

The entirety of the dissenters’ analysis appears in footnote 57, which I quote in its entirety:

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, see ante, at 906 – 907; ante, at 926 – 928 (SCALIA, J., concurring), 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 accepts that much, the intellectual edifice of the majority

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56 Citizens United, 130 S. Ct. at 952 n.57 (Stevens, J., dissenting).
57 Id. at 928 n.6 (Scalia, J., concurring).
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.” 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, have urged this view, as have media organizations such as the Reporters Committee for Freedom of the Press. The Supreme Court, however, has never accepted this view and has often rejected it, 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.

Again we begin with *Mills v. Alabama*, a unanimous decision that preceded the

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58 Id. at 952 n.57 (Stevens, J., dissenting).
59 Id.
62 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 disclosure of illegally intercepted communications); First Nat. Bank of Boston 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” and that ); 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. 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. Nat'l Labor Relations Bd., 301 U.S. 103, 132 (1937) (“The publisher of a newspaper has no special immunity from the application of general laws.”).
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.”63 For this proposition, the opinion cited *Lovell v. Griffin*.64 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,65 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.66 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 connotation comprehends every sort of publication which affords a vehicle of information and opinion.67

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 institution but to protect all persons in their

64 *Lovell*, 303 U.S. 444 (1938).
65 Her lawyers included Olin R. Moore, who argued 10 Supreme Court cases from 1937 to 1939, and future-Attorney General Francis Biddle.
66 *Lovell*, 303 U.S. at 450.
67 *Id.* at 452.
right to print what they will as well as to utter it.”

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. 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, 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, reporters’ privilege, access to judicial proceedings, searches of newspaper offices, antitrust, and employment discrimination. The Court permits legislatures to pass special laws protecting the journalism business, but it has not interpreted the First Amendment to require them.

*New York Times v. Sullivan,* 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. 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, or of the press” extends to both

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70 In this respect, the Court has construed the Press Clause much as it has construed the Free Exercise Clause. See Bezanson, *supra* note 55, at 1268.
72 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.
sets of defendants, in the same way. 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.”73 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.”74 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 sources75 and precedents76 the Court cited put it – but Sullivan was not the occasion to tease out the differences, if any, between the rights. The Sullivan Court consistently referred to the relevant right as “the freedom of speech and of the press,”77 with one reference to the “freedom of expression,”78 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

73 Sullivan, 376 U.S. at 266.
74 Id.
75 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.” Sullivan, 376 U.S. at 276-77.
76 The Court cited Lovell v. Griffin, which as we have seen treated pamphleteering as an exercise of the freedom of the press, and Schneider v. State, 308 U.S. 147, 164 (1939), which used the formulation: “freedom of speech and of the press.”
77 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.”).
78 Id. at 269. The Court also quotes from a lecture given by Justice Douglas on the freedom of expression. Id. at 302 (quoting William O. Douglas, The Right of the People 41 (1958)).
institutional news media.

This interpretation of the reach of the Press Clause is consistent with its history.\textsuperscript{79} The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech, or of the press.”\textsuperscript{80} 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 on this point there was no apparent disagreement. Blackstone described the liberty of the press as the “undoubted right” of “every freeman” to “lay what sentiments he pleases before the public.”\textsuperscript{81} The Jeffersonians agreed. The author of the first treatise on the Constitution, Jeffersonian legal scholar St. George Tucker, 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.”\textsuperscript{82} The author of the second major constitutional treatise, a Federalist, Chancellor James Kent, took the same position: “every citizen may freely

\textsuperscript{79} I lean heavily on Volokh’s article, supra note __, in this section of this essay. Professor Randall Bezanson has criticized Volokh’s article, contending that there remains a need for a separate constitutional law of freedom of the press, aside from freedom of speech – a proposition with which I do not disagree. \textit{See} Bezanson, \textit{supra} note __, at 1263. But neither Bezanson nor any other scholar, as of now, has cast doubt on Volokh’s historical researches, or located any contrary sources. \textit{See id.} at 1261 (“Professor Volokh, of course, is exactly right when judged by the spare and spartan doctrine of textualism and originalism.”).

\textsuperscript{80} U.S. CONST. amend. I.

\textsuperscript{81} 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.

\textsuperscript{82} 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 ap. 28 (1803).
speak, write, and publish his sentiments.”83 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.”84 So did state constitutions and state supreme courts.85 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 are no apparent dissenters from this proposition.86

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 hundreds. A 1753 essay entitled Of the Use, Abuse, and Liberty of the Press, by the future delegate to the Constitutional Convention William Livingston, stated that one of the great benefits of the invention 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.”87 The licensing of the press, which was the great evil against which the Amendment was directed,

83 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 14 (1827).
84 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 732 (1833).
86 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.
87 Quoted in Volokh, supra note 12, at 469.
applied to books and pamphlets as much as to newspapers. 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.

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 used the press to publish and disseminate their own views to the public. 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 Thomas Cooper, defendant in one of the most famous of the 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. Some of these cases, importantly, involved the purchasers of advertisements. Sometimes these non-journalists won and sometimes they lost – but no court questioned the applicability of the freedom of the press to their cases.

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:

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88 8 DAVID HUME, THE HISTORY OF ENGLAND 332 (1782).
89 Volokh, supra note 12, at 474 n.52.
91 See Volokh, supra note 12, at 483-98.
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 vehicle of information and opinion. [Citing Lovell v. Griffin, 303 U.S. 444, 450, 452 (138), and Mills v. Alabama, 34 U.S. 214, 219 (1966).] 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.92

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, without being “members of the press.” 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. Second, the news media publish their materials on a regular or periodical basis, rather than episodically. While these attributes do, more or less, distinguish the “news media” as a matter of ordinary speech, however, 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

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92 408 U.S. 665, 703-05 (1972) (citations omitted). Justice Powell’s concurring opinion appears to countenance some degree of protection for sources “where legitimate First Amendment interests require protection.” But he also joined Justice White’s opinion, producing the crucial fifth vote and making it the majority.
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 views to the public. 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, 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. Some authors self-publish; whether they will make money eventually, or not, is hard to say. Large conglomerate corporations like General Electric and Time Warner own media outlets. Wealthy individuals often purchase and publish publications out of an interest in promoting their point of view or providing a civic service. As already noted, many prominent magazines are supported by contributions by their supporters. Professional journalists often work for non-media organizations, and news media organizations often employ or pay non-journalists for content. It is hard to see how the professional or profit-making status of the press could possibly serve as a legal line.

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.\textsuperscript{94} 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.

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.\textsuperscript{95} The case, a defamation suit, involved a self-styled “investigative blogger.” The court held that the outcome depended on whether the blogger was a “media defendant” or “journalist” for purposes of First Amendment protection under \textit{Gertz}. The court concluded “no,” providing the following analysis:

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.”\textsuperscript{96}

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.

\textsuperscript{94} 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.”).


\textsuperscript{96} \textit{Id.} at *5.
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. 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.”

It is not entirely clear why the focus is on the entity’s “intent” rather than its actions. But more importantly, it is not evident who this definition excludes. 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. Why is that outside the definition? If “the press” is given a functional definition, as it should, then any entity that performs the function of writing and disseminating news and opinion is part of it. Read literally, the Reporters

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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 holding in the case.

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. If so, the definition puts the courts in the business of 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.” 98 The editorialists called the argument “specious,” explaining that “[i]t is not the corporate structure of media companies that

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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.”99 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.

In conclusion, if the freedom of the press includes the right to publish criticism or praise of a candidate for office in the days or weeks prior to an election (as it does), and if corporations, including for-profit corporations like the New York Times, 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 of person who wish to publish their opinions about

99 Id.
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 is not necessary 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.”

**II. THE DISTINCTION BETWEEN CONTRIBUTIONS AND EXPENDITURES**

One implication of this way of analyzing *Citizens United* is that it establishes only the right of an entity to publish *its own 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 business corporations like the New York Times Co., and to non-media corporations like Citizens United – but contributing to candidates is not an exercise of the freedom of the press. This is not to claim that there is no constitutional right to contribute to campaigns – just that the Court could have decided *Citizens United* while leaving the jurisprudence of contributions untouched. From the point of view of judicial minimalism, that would have been a virtue.

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

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“[p]rohibited.”101 This proposition is plausible within a certain domain, but it is newly-minted and seems overbroad. 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,102 and limiting the use of university classrooms to student groups.103 Applying the rational basis test, the Court unanimously upheld a tax rule allowing veterans groups to lobby, but not other groups entitled to receive tax-deductible contributions.104 The public forum doctrine conspicuously forbids restrictions based on viewpoint, but not on speaker identity.105 The Court has been vigilant to prohibit discrimination on the basis of viewpoint and sometimes subject matter,106 but has never before placed speaker-based discrimination in the same suspect category. It may be possible to reconcile some of these results with a prohibition on speaker-based restrictions, but it 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 core 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 and communicative impact of the message. The Speech Clause comprises a variety of doctrines such as public forum, expressive

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101 130 S. Ct. at 898-99.
105 Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37 91983) (allowing one union, but not another, to disseminate materials within a school).
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 from making contributions to political campaigns – a restriction going back more than a hundred years\(^{107}\) and upheld as recently as *FEC v. Beaumont* in 2003.\(^ {108} \) Restrictions on contributions are treated as restrictions on speech – albeit “marginal”\(^ {109} \) – and if the government may not “allow[] speech by some by not others” it is hard to see how it can allow contributions by individuals and not by corporations and labor unions. To be sure, every court of appeals confronted with this post-*Citizens United* challenge to the corporate contribution ban has rejected it,\(^ {110} \) 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.\(^ {111} \) Again, the conclusion that corporations have a free speech right to make contributions to candidates 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.

The distinction between contributions and independent expenditures has been central to the


\(^{110}\) Minnesota Citizens Concerned for Life *v.* Swanson, 692 F.3d 864 (8th Cir. 2012) (en banc); United States *v.* Danielczyk, 683 F.3d 611, 617 (4th Cir. 2012); Ognibene *v.* Parkes, 671 F.3d 174, 183-84 (2d Cir. 2012); Thalheimer *v.* City of San Diego, 645 F.3d 1109, 1124-27 (9th Cir. 2011); Green Party of Conn. *v.* Garfield, 616 F.3d 189, 199 (2d Cir. 2010).

\(^{111}\) *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.”); *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 183-84 (“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 1124-27 (discussing *Beaumont*); *Garfield*, 616 F.3d at 198-99 (applying *Beaumont*).
logic (or illogic) of campaign finance law since *Buckley v. Valeo*. According to the *Buckley* Court, limits on campaign contributions were “merely ‘marginal’ speech restrictions, subject to relatively complaisant review under the First Amendment,” while limits on independent expenditures were “direct restraint[s]” on speech. The Court has therefore generally upheld restrictions on the former and invalidated restrictions on the latter. This rough-and-ready compromise, which pleases no one, has lasted more than 35 years.

The contribution/expenditure distinction seems perverse from almost any point of view. It 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 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 District Court, 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.” 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 tendencies. Why magnify the voices that are most likely to debase the debate? It is almost impossible to imagine that a rational Congress

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114 *Buckley*, 424 U.S. at 620.
would have enacted a campaign reform statute in this perverse form.\textsuperscript{117}

A six-Justice majority of the Justices now condemns the distinction, but one wing of the Court (Scalia, Kennedy, and Thomas) would erase the distinction by extending constitutional protection to contributions, and the other (Ginsburg, Sotomayor, and Kagan) would erase the distinction by stripping constitutional protection from independent expenditures. Together, these coalitions comprise a majority for the proposition that the distinction should be abandoned, but they cancel each other out, leaving a durable plurality in support of both halves of a distinction that at most three of the Justices (Roberts, Alito, and Breyer) are willing to defend.

The Supreme Court noted probable jurisdiction in a case involving contribution limits, \textit{McCutcheon v. Federal Election Commission},\textsuperscript{118} which will be briefed and argued in the October 2013 Term. Presumably, this will require the Court to harmonize \textit{Citizens United} with \textit{Buckley v. Valeo}, or perhaps revisit the latter – or, which is always a possibility, to find itself unable to harmonize the precedents but also unable to muster a majority in favor of any of the coherent alternatives, in which case the field will remain in a doctrinal muddle. The Press Clause offers a sounder basis than anything in \textit{Buckley} or the \textit{Citizens United} opinion, to harmonize the cases.

The \textit{Buckley} Court put forward two reasons for the sharp distinction between contributions and 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 “the quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on

\begin{footnotesize}
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\item \textsuperscript{117} In my opinion, Buckley is one of the most bizarre applications of the severability doctrine in the Court’s history.
\item \textsuperscript{118} No. 12-536.
\end{itemize}
\end{footnotesize}
the undifferentiated symbolic act of contributing." 119 This is absurd. Of course, more money buys 
more speech – more air time, 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 so. To say that contribution limits impose no significant 
restraint on speech is like saying that a 15-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.com. 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.” 120 That was a 
dubious claim at the time of Buckley, and is even harder to believe today. The district court in 
Citizens United heard powerful 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

119 Buckley, 424 U.S. at 21.
120 Id. at 46.
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.121

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 are non-corrupting in a way that distinguishes them from contributions. There may be a difference in degree, but there is no difference in kind. The Citizens United majority was 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. The Court’s reliance on this rationale made the Citizens United decision appear naïve, or obtuse.

The Press Clause, by contrast, provides a coherent basis for distinguishing between contributions and independent expenditures. Independent expenditures taking the form of published advocacy for or against a candidate are an exercise of freedom of the press; contributions to a candidate, a campaign, or a party are not. There are some forms of independent expenditure that do not constitute publishing one’s opinions to the public (like hiring buses to get voters to the polls or paying for legal expenses122), but the vast majority of independent expenditures fall squarely within the definition of freedom of the press as the dissemination of

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121 McConnell, 251 F. Supp. 2d at 623.
122 Reportedly, billionaire George Soros contributed $5 million during the last election cycle to research and develop new ways to get Democratic-learning voting groups to the polls. See Ernest Istook, Liberal Stealth Groups Paved Obama Win, The Foundry (Nov. 29, 2012), 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 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.
opinion or information to the public through media of communications. The distinction drawn in
Buckley between expenditures and contributions is difficult to justify under freedom of speech
principles, but nicely tracks the contours of freedom of the press.

This approach 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 question of contributions and disclosure requirements on their own terms. Those
issues, properly understood, involve separate free speech doctrines far afield from the Press
Clause, which could and should be analyzed independently of Citizens United.

It may seem mysterious that Congress could exclude corporations and labor unions from
engaging in one form of electoral activity (contributing to candidates and campaigns), but not
another (making independent expenditures). But it should not. On the heuristic assumption that the
Buckley Court was correct that contributions by individuals can be capped at some level -- $5000,
for example -- it is logical that contributions by groups (including corporations and labor unions)
can be prohibited, since allowing contributions by groups would enable individuals to contribute
multiple times, through all the groups they belong to. If everyone gets to make only $5000 in
contributions, allowing them to contribute an additional sum to an organization, which then makes
contributions, would defeat the purpose. So would allowing businesses that they own to make
contributions, or unions to which they pay dues. There is no need to rely on dubious assumptions
about the heightened danger of corruption from corporations, the supposed interest in protecting
shareholders from their own corporations, or the desire of some to even the playing field by
silencing economic interests. If individual contributions can be capped, the government has a
legitimate interest in denying groups of individuals the ability to circumvent the caps.
The argument would imply that Citizens United was constitutionally entitled to make and publish its documentary, or to pool its money with like-minded entities for publication of commentary or editorial, but could constitutionally have been prohibited from contributing to a candidate, campaign, or party. The for-profit corporations that contributed to Citizens United could have been forbidden to do so – but the receipt of their contributions does not strip Citizens United of its right to exercise the freedom of the press.

Advocates of contribution restrictions have put forward two doctrinal arguments as to why contribution limitations are not direct speech restrictions, and thus may be regulated with less than strict scrutiny. The Buckley Court rejected one of these arguments, and seemed to accept the other. The first argument, rejected by the Court, is that giving money to candidates is expressive conduct, like burning a draft card. The argument goes like this: Campaign finance laws make it illegal to give money to candidates (above a certain limit) for any reason, expressive or otherwise, just as laws prohibiting destruction of draft cards apply to the willful destruction of draft cards whether for expressive purposes or not. Campaigns typically use the donations to buy speech, but they do not have to. Sometimes they hoard cash to scare off future challenges; sometimes they use it to hire administrative staff or do opposition research or even give it to other candidates. When a donor contributes to a campaign, this is a form of conduct that sometimes – usually, but not always – is expressive. It follows that contributions can be regulated so long as the restrictions serve an “important or substantial government interest” that is “unrelated to the suppression of speech” (meaning not based on the communicative impact of the speech) and prohibits no more speech than is essential to further that interest.123 Advocates say that the anti-corruption rationale for

123 United States v. O’Brien, 391 U.S. 367, 377 (1968). I have simplified the test somewhat. For a strong presentation of the view that contribution limitations satisfy the O’Brien test, see Eugene Volokh, Why Buckley v. Valeo Is
contribution limits is not based on the communicative impact of the speech and satisfies this test.

The Buckley Court rejected this expressive conduct analysis, but its reasons are not clear.\(^1\) Perhaps it was because a category of conduct that is almost, even if not entirely, communicative should be treated as speech rather than conduct; perhaps it is because the restrictions were in fact designed to suppress speech; perhaps it is because the restrictions are not narrowly tailored to achieve their ostensible goals. The last point may be especially powerful. If independent expenditures either cannot or are not limited, strict limits on donations to campaigns and political parties likely make the corruption problems worse, not better.

The Buckley Court accepted the argument that contribution limitations impinge on the freedom of expressive association, rather than on speech itself. In the Court’s words: “The Act's contribution . . . limitations also impinge on protected associational freedoms. Making a contribution, like joining a political party, serves to affiliate a person with a candidate. In addition, it enables like-minded persons to pool their resources in furtherance of common political goals.”\(^2\) The Court evidently inferred that, as an exercise of freedom of association rather than direct freedom of speech, contributions are entitled to less constitutional protection than expenditures. Unfortunately, it did not explain why. It is difficult to see why the government has any more legitimate an interest in preventing a group of people from pooling their resources in support of speech than in preventing the same kind of speech by individuals. Perhaps the lower standard of review is attributable to the fact that freedom of association is not specifically enumerated in the

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\(^1\) Buckley, 424 U.S. at 15-17.

\(^2\) Id. at 22. I have deliberately elided the quote. The ellipses in the text occur where the Court says “and expenditure.” It makes no sense to say that expenditure limits are associational, and elsewhere in the opinion the Court treats expenditures as direct speech. To avoid confusion, I have elided these two words. My intention is not to mislead, but to avoid distraction.
First Amendment, but the Court did not say that. The closest the Court comes to an explanation is in this sentence: “The Act's contribution ceilings thus limit one important means of associating with a candidate or committee, but leave the contributor free to become a member of any political association and to assist personally in the association's efforts on behalf of candidates.” That is not a convincing explanation. Ordinarily we do not allow the government to infringe one aspect of a protected freedom on the ground that other aspects have been left untouched. Nonetheless, this doctrinal distinction has survived for almost 40 years, and nothing in Citizens United, understood as a Press Clause case, disturbs it.

The associational character of limits on contributions does, however, cast light on one otherwise puzzling feature of campaign finance law: the Court has held that the freedom of speech protects the freedom to speak anonymously, but it hold that the freedom of association does not preclude the state from requiring disclosure of the membership of an association unless there is factual evidence that revelation of the names of the participants will expose them to economic or political reprisals. It would seem to follow that, except when such evidence exists, the government is allowed to compel disclosure of contributions even though it cannot require persons engaging in direct individual speech to reveal their identities. Again, this is unaffected by Citizens United.

The point of this brief discussion is not to resolve any of these difficult issues raised by

126 Id. at 22.
127 Talley v California, 362 U.S. 60 (1960; McIntyre v. Ohio Elections Comm’n, 514 U.S. 334 (1995). The Talley opinion relies on Lovell, which as we have seen was a Free Press case on behalf of leafletters.
129 The factual premise that contributions do not ordinarily give rise to reprisals may turn out to be as naïve as the assumption that independent expenditures do not ordinarily have a corrupting influence. Governments wield vast discretionary authority, and it would take an uncommonly optimistic view of human nature to think that officials are not influenced by knowing that the persons they regulate supported their party, or their opponent. But I am focusing here on conceptual arguments rather than quasi-empirical questions.
campaign finance cases, but to show that *Citizens United*, properly analyzed, leaves open the possibility of enforcing a significant part of campaign finance laws. That is not to say those laws are invulnerable to a different kind of challenge, just not to the Press Clause challenge that *Citizens United* should have been based on. In that sense, the freedom of the press rationale is more modest than speaker equality rationale embraced by the Court.

There may be a broader indirect effect, though. If it is not possible to prohibit independent expenditures 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. Advocates of campaign finance regulation are forced to face the question whether the middle-ground position in *Buckley* does more harm than good from their point of view – and perhaps whether they should look for alternative ways to improve our dysfunctional system. This likely involves raising contribution limits, reviving political parties, 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.