
DEFINING THE PRESS EXEMPTION FROM CAMPAIGN FINANCE RESTRICTIONS

Six years before its name became synonymous with “one of the most reviled decisions of the Supreme Court in recent years,”¹ the nonprofit advocacy group Citizens United asked the Federal Election Commission (FEC) whether its documentary on presidential candidate John Kerry qualified as journalism.² The FEC’s opinion mattered because under the statutory “press exemption,” federal campaign finance restrictions do *not* apply to costs associated with producing news.³ At the time, a corporation like Citizens United could not spend money independently on communications that referred to a clearly identified federal candidate within thirty days before a primary election or sixty days before a general election — unless that corporation qualified for the press exemption.⁴ In 2004, the FEC concluded that Citizens United was *not* entitled to the press exemption for the costs associated with producing and airing the documentary.⁵

Citizens United was thus unable to take advantage of the press exemption when, in January 2008, it produced a documentary about Hillary Clinton to be advertised on television and distributed through video-on-demand.⁶ To air the advertisements and sell the documentary, Citizens United sued for declaratory and injunctive relief to invalidate the then-valid federal ban on (non-press) corporations using their general treasury funds to fund independent expenditures that clearly identified a candidate for federal office.⁷ That case, of course, went to the Supreme Court, which sided with Citizens United.⁸ Jus-

¹ Michael W. McConnell, Essay, *Reconsidering Citizens United as a Press Clause Case*, 123 YALE L.J. 412, 414 (2013) (referring to *Citizens United v. FEC*, 558 U.S. 310 (2010)).

² See FEC, Advisory Opinion 2004-30, at 2, 7 (Sept. 10, 2004).

³ See, e.g., 52 U.S.C.A. § 30101(9)(B)(i) (West 2015) (excluding from the definition of “expenditure” “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”); 11 C.F.R. §§ 100.73, 100.132 (2015). The press exemption originated in the 1974 amendments to the Federal Election Campaign Act, Pub. L. No. 93-443, 88 Stat. 1263 (1974). See Christopher P. Zubowicz, *The New Press Corps: Applying the Federal Election Campaign Act’s Press Exemption to Online Political Speech*, 9 VA. J.L. & TECH., art. 6, 2004, at 1, 3-4.

⁴ See FEC, Advisory Opinion 2004-30, at 5-6.

⁵ *Id.* at 7. The FEC based its conclusion on two facts: that Citizens United had produced only two documentaries in the sixteen years before requesting the advisory opinion and that the corporation planned to pay a broadcaster to air the documentary (rather than to receive compensation from a broadcaster). Because Citizens United was not acting within a press capacity in creating the documentary, its advertisements for the documentary also did not qualify for a press exemption. *Id.* at 7-8.

⁶ See *Citizens United*, 558 U.S. at 319-20.

⁷ See *id.* at 320-21.

⁸ See *id.* at 365-66.

tice Kennedy's opinion for the Court touched briefly on the statute's press exemption, concluding that its inclusion in the law did not mitigate the First Amendment concerns with a ban on corporate independent expenditures: "There is no precedent supporting laws that attempt to distinguish between corporations which are deemed to be exempt as media corporations and those which are not."⁹ The *Citizens United* majority did not decide whether Citizens United was eligible for the press exemption; instead, it held that the First Amendment did not permit Congress to limit the independent expenditures of *any* corporation.¹⁰ Justice Stevens, concurring in part and dissenting in part, asserted briefly: "Citizens United is not a media corporation."¹¹

But Citizens United was not satisfied with its victory for corporate independent expenditures. The *Citizens United* Court did not address whether the First Amendment protected the right of corporations to contribute directly to candidates. Non-press corporations remain prohibited from making contributions — including in-kind contributions like "coordinated communications"¹² — to federal candidates.¹³ And, under the statute, press corporations are exempt from the federal disclaimer and disclosure requirements.¹⁴ So six months after the Supreme Court decided *Citizens United*, the FEC revisited whether Citizens United's documentaries qualified for the press exemption. This time, noting that Citizens United had produced and distributed fourteen documentary films since 2004 and that a substantial portion of its annual budget had been devoted to producing and distributing these films, the FEC advised that Citizens United *was* entitled to the press exemption for the costs associated with making its documentaries.¹⁵

As the Citizens United story demonstrates, the FEC has encountered new controversy over how to apply the press exemption. On one side, some Commissioners are concerned that unless the FEC denies

⁹ *Id.* at 352.

¹⁰ *See id.* at 365–66.

¹¹ *Id.* at 474 (Stevens, J., concurring in part and dissenting in part).

¹² *See* 11 C.F.R. § 109.21 (2015).

¹³ *See, e.g.*, 52 U.S.C.A. § 30118 (West 2015); 11 C.F.R. §§ 114.1, 114.2.

¹⁴ *See, e.g.*, 52 U.S.C.A. § 30101(9)(B)(i) (exempting costs associated with producing news from the definition of "expenditure"); *id.* § 30101(4) (defining a "political committee" in terms of contributions collected and expenditures made); *id.* § 30120 (disclaimer requirements for political committees); *id.* § 30104 (disclosure requirements for political committees).

¹⁵ FEC, Advisory Opinion 2010-08, at 5 (June 11, 2010). The FEC explained that it changed its characterization of Citizens United as a press entity because "[s]ince 2004, the volume and frequency of Citizens United's film production have increased substantially," but maintained that the FEC "has not imposed a requirement that an entity seeking to avail itself of the press exemption first demonstrate that it has a track record of engaging in media activities." *Id.* at 5 n.9. Because Citizens United's documentaries now qualified for the press exemption, so did advertisements for those documentaries. *Id.* at 7 (citing *FEC v. Phillips Publ'g, Inc.*, 517 F. Supp. 1308, 1313 (D.D.C. 1981)).

the press exemption to some corporations (like a retail store that distributes a newsletter to customers), the press exemption will become a loophole through which any corporation could evade contribution prohibitions and disclosure and disclaimer requirements.¹⁶ On the other side, some Commissioners are concerned that the First Amendment does not permit the FEC to determine who is and is not press.¹⁷ Those Commissioners who want to deny the press exemption based on the corporation's functions (such as the retail store with a newsletter) therefore need an argument rooted in the First Amendment to persuade those who believe that the First Amendment's protection of freedom of speech *requires* the FEC to apply the press exemption broadly and neutrally to any corporation that disseminates information. This Note argues that the effort to break the FEC's stalemate over the press exemption can be informed by a long-simmering debate about the contours of the First Amendment, which reads: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."¹⁸ On one side, some read the Press Clause to work with the Speech Clause to protect an individual's right to express an opinion;¹⁹ on the other side, some view the Press Clause to work independently to protect the existence of a free and independent source of information as a check on government.²⁰ The independent Press Clause interpretation offers a First Amendment-based argument for permitting the FEC to distinguish between press and non-press corporations. An independent Press Clause elevates the statutory press exemption from legislative grace to constitutional requirement,²¹ rooting the responsibility to grant special protections to press corporations (but not all corporations) in the Constitution itself.

This Note proceeds in three Parts. Part I begins with a brief overview of the restrictions on corporate campaign contributions, then discusses the doctrinal evolution of the press exemption. Part II summa-

¹⁶ See, e.g., Wal-Mart Stores, Inc., MUR 5315 (FEC Sept. 12, 2003) (statement of Comm'r Scott E. Thomas).

¹⁷ See, e.g., Wal-Mart Stores, Inc., MUR 5315 (FEC Sept. 25, 2003) (statement of Vice Chairman Bradley A. Smith and Comm'rs Michael E. Toner and David M. Mason).

¹⁸ U.S. CONST. amend. I.

¹⁹ See, e.g., David Lange, *The Speech and Press Clauses*, 23 UCLA L. REV. 77, 88–99 (1975); McConnell, *supra* note 1; 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 (2012).

²⁰ See, e.g., C. Edwin Baker, *The Independent Significance of the Press Clause Under Existing Law*, 35 HOFSTRA L. REV. 955 (2007); Randall P. Bezanson, Essay, *Whither Freedom of the Press?*, 97 IOWA L. REV. 1259 (2012); Melville B. Nimmer, *Introduction — Is Freedom of the Press a Redundancy: What Does It Add to Freedom of Speech?*, 26 HASTINGS L.J. 639 (1975); John E. Nowak, Essay, *Using the Press Clause to Limit Government Speech*, 30 ARIZ. L. REV. 1 (1988); Potter Stewart, "Or of the Press," 26 HASTINGS L.J. 631 (1975); Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. REV. 1025 (2011).

²¹ See Bezanson, *supra* note 20, at 1273.

rizes the long-simmering debate on how to understand the Press Clause. Part III shows how the Press Clause offers the FEC Commissioners an argument rooted in the First Amendment that the Constitution not only permits a more narrow interpretation of the press exemption, but also elevates the statutory press exemption from legislative grace to constitutional requirement.

I. THE EVOLUTION (AND MUDDLING) OF THE PRESS EXEMPTION

A. *A Brief Overview of Restrictions on Corporate Campaign Contributions — What's the Press Exempt From?*

Federal law has prohibited corporations from contributing to federal candidates since 1907.²² In *Buckley v. Valeo*,²³ the Court upheld reasonable limits on individuals' contributions to federal candidates, finding that a contribution is only a "symbolic expression of support" and therefore imposing limits "does not in any way infringe the contributor's freedom to discuss candidates and issues."²⁴ While *Buckley* addressed only limits on individuals' contributions to campaigns, the Court has since identified two motivations for Congress to enact a total ban on corporations' making political contributions: first, mitigating "the enormous power corporations had come to wield in federal elections, with the accompanying threat of both actual corruption and a public perception of corruption," and second, protecting shareholders and members from having their investment dollars support causes they might oppose.²⁵

Since the 1947 Taft-Hartley Act,²⁶ federal law had also prohibited corporations from making *independent* expenditures to influence federal elections.²⁷ In *Buckley*, the Court distinguished direct contributions from independent expenditures, holding that a limit on individuals' expenditures directly silences speech because "virtually every means of communicating ideas in today's mass society requires the expenditure of money."²⁸ *Buckley* invalidated limits on individual ex-

²² *Citizens United v. FEC*, 558 U.S. 310, 433 (2010) (Stevens, J., concurring in part and dissenting in part).

²³ 424 U.S. 1 (1976) (per curiam).

²⁴ *Id.* at 21.

²⁵ See *Citizens United*, 558 U.S. at 433 (Stevens, J., concurring in part and dissenting in part); see also *United States v. CIO*, 335 U.S. 106, 113 (1948).

²⁶ Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141-187 (2012)).

²⁷ See *Citizens United*, 558 U.S. at 434 (Stevens, J., concurring in part and dissenting in part).

²⁸ 424 U.S. at 19.

penditures but did not address the constitutionality of limits on *corporations'* independent expenditures.²⁹

In *Citizens United*, the Court overruled precedents to invalidate the federal ban on corporate independent expenditures.³⁰ Still, *Citizens United* did not invalidate bans on corporate *contributions*.³¹ Federal law recognizes “coordinated communications” as in-kind contributions.³² Thus, corporations remain prohibited from paying for communications that have been coordinated with candidates for federal office. To be a “coordinated communication,” a public communication (such as a television advertisement) has to meet a three-pronged test: (1) it must be paid for by someone other than the candidate, the candidate’s authorized committee, or the candidate’s political party committee (the “paid-for” prong);³³ (2) it must satisfy one of the standards of the “content” prong, such as expressly advocating the election or defeat of a clearly identified candidate for federal office;³⁴ and (3) it must satisfy one of the standards of the “conduct” prong, such as being made with the “material involvement” of a candidate.³⁵

However, thanks to the press exemption,³⁶ press corporations do not need to worry about whether their public communications meet the “coordinated communications” test. Any press activity is automatically exempt from campaign finance restrictions. Thus, CNN may air an editorial that endorses a candidate for federal office (likely qualifying as express advocacy and satisfying the content prong³⁷), and that editorial can be based on a discussion with the candidate about the intended audience (potentially qualifying as “material involvement” with the candidate and satisfying the conduct prong³⁸). If a non-press corporation did the same, it would likely be an impermissible corporate

²⁹ See *id.* at 47–48; see also *Citizens United*, 558 U.S. at 436 (Stevens, J., concurring in part and dissenting in part).

³⁰ See *Citizens United*, 558 U.S. at 322, 365–66 (majority opinion).

³¹ See *id.* at 357 (“The *Buckley* Court . . . sustained limits on direct contributions in order to ensure against the reality or appearance of corruption. That case did not extend this rationale to independent expenditures, and the Court does not do so here.”). There are those who believe the Court is heading for invalidating the ban on corporate contributions. See, e.g., Michael S. Kang, *After Citizens United*, 44 IND. L. REV. 243, 250 (2010) (“[T]he basic logic of *Citizens United* might apply just as well to corporate contributions as to corporate independent expenditures.”). *But see* Iowa Right to Life Comm., Inc. v. Tooker, 134 S. Ct. 1787 (2014) (mem.) (denying petition for writ of certiorari asking the Supreme Court to invalidate the ban on corporate political contributions at least as applied to nonprofit corporations).

³² See 11 C.F.R. § 109.21 (2015).

³³ *Id.* § 109.21(a)(1).

³⁴ See *id.* § 109.21(a)(2), (c).

³⁵ See *id.* § 109.21(a)(3), (d).

³⁶ See, e.g., 52 U.S.C.A. § 30101(9)(B)(i) (West 2015); 11 C.F.R. §§ 100.73, 100.132.

³⁷ See 11 C.F.R. § 109.21(c)(3).

³⁸ See *id.* § 109.21(d)(2).

contribution to the candidate in violation of 52 U.S.C. § 30118³⁹ — the prohibition on corporate contributions that *Citizens United* left intact. Additionally, press corporations do not have to post a disclaimer on their public communications (as required of non-press corporations under 52 U.S.C. § 30120),⁴⁰ nor do they have to file disclosure reports with the FEC (as required of non-press corporations under 52 U.S.C. § 30104).⁴¹

B. *The Press Exemption in Court*

When Congress first enacted a press exemption to campaign finance law in 1974, the House Report described the exemption as intended to protect First Amendment values: “[I]t is not [Congress’s] intent . . . to limit or burden in any way the first amendment freedoms of the press and of association. Thus, [the exemption] assures the unfettered right of the newspapers, TV networks, and other media to cover and comment on political campaigns.”⁴²

In applying the press exemption, the FEC has relied on the guidance set forth by the Southern District of New York in 1981 in *Reader’s Digest Ass’n v. FEC*.⁴³ In that case, the Reader’s Digest Association, a magazine publisher and corporation, had created and disseminated to other media outlets a computer reenactment of Senator Ted Kennedy’s car accident at Chappaquiddick.⁴⁴ When the FEC launched an investigation into whether distributing the video constituted a then-impermissible corporate political expenditure, the Reader’s Digest Association sued to enjoin the FEC from continuing with the investigation.⁴⁵ The court read the statute’s explicit press exemption to “bar the FEC from even investigating incidents that are exempted exercises of the press’ prerogatives” and identified an underlying First Amendment concern that “freedom of the press is substantially eroded by investigation of the press.”⁴⁶ At the same time, the court noted that media companies are still capable of violating campaign finance law, finding that the exemption would not apply if “a partisan newspaper hired an army of incognito propaganda distributors to stand on street corners denouncing allegedly illegal acts of a candidate . . . in a manner unrelated to the sale of its newspapers.”⁴⁷

³⁹ 52 U.S.C.A. § 30118.

⁴⁰ *Id.* § 30120.

⁴¹ *Id.* § 30104.

⁴² H.R. REP. NO. 93-1239, at 4 (1974).

⁴³ 509 F. Supp. 1210 (S.D.N.Y. 1981).

⁴⁴ *Id.* at 1211.

⁴⁵ *Id.*

⁴⁶ *Id.* at 1214.

⁴⁷ *Id.*

The court held that the FEC is authorized to investigate campaign violations by media companies only under a two-step process: initially, the FEC may not investigate the “substance” of the complaint, but only whether the press exemption applies at all — that is, “whether the press entity is owned by the political party or candidate and whether the press entity was acting as a press entity in making the distribution complained of.”⁴⁸ The FEC may investigate the substance of a violation at step two only if it finds probable cause to believe that the press exemption does not apply.⁴⁹ Applying its two-step framework to the facts of the case, the court held that the FEC could continue to investigate only the “limited question whether in disseminating the tape, [Reader’s Digest Association] was acting in the context of the distribution of a news story through its facilities or whether it was acting in a manner unrelated to its publishing function.”⁵⁰ In *FEC v. Phillips Publishing, Inc.*,⁵¹ a district court applied *Reader’s Digest* to enjoin the FEC from investigating whether a newsletter-publishing corporation’s subscriber solicitations were impermissible corporate contributions.⁵² In the court’s view, a press entity is acting within its usual press functions in mailing an advertisement seeking new subscribers.⁵³

The Supreme Court has had few opportunities to scrutinize the press exemption. Its most thorough analysis of the press exemption was in *FEC v. Massachusetts Citizens for Life, Inc.*⁵⁴ (*MCFL*). In that case, a nonprofit corporation, MCFL, which regularly published a newsletter, circulated a “Special Edition” voter guide that expressly advocated for the election or defeat of clearly identified candidates for federal office.⁵⁵ The Court held, among other things, that MCFL’s voter guide did *not* qualify for the press exemption because “[i]t was not published through the facilities of the regular newsletter . . . [nor] distributed to the newsletter’s regular audience The MCFL masthead did not appear . . . [and the guide] contained no volume and issue number identifying it as one in a continuing series of issues.”⁵⁶ The Court’s analysis thus focused on factors that would indicate that the communication was part of MCFL’s regular publishing routine as opposed to a one-time communication to influence an election. The Court justified its focus on “considerations of [the newsletter’s] form” because to hold otherwise “would open the door for those corporations

⁴⁸ *Id.* at 1215.

⁴⁹ *Id.* at 1214–15.

⁵⁰ *Id.* at 1215.

⁵¹ 517 F. Supp. 1308 (D.D.C. 1981).

⁵² *Id.* at 1313–14.

⁵³ *Id.*

⁵⁴ 479 U.S. 238 (1986).

⁵⁵ *See id.* at 243–44.

⁵⁶ *Id.* at 250–51.

and unions with in-house publications to engage in unlimited spending directly from their treasuries to distribute campaign material to the general public” and therefore undermine the prohibition on corporate contributions.⁵⁷

C. The FEC's Implementation of the Press Exemption

The FEC's application of the press exemption has been relatively uncontroversial in terms of the scope of activities permitted for a press corporation, but extremely controversial in terms of whether a corporation would qualify as press in the first place. When the corporation at issue is a traditional media corporation — like a newspaper or a cable television channel — the FEC has rarely found its conduct to be outside the scope of the press exemption. But when it comes to whether a corporation would qualify as a press corporation, the FEC has come to a stalemate over the meaning of the First Amendment.

1. *Most traditional media corporations' activities fall within the press exemption.* — Since *Reader's Digest*, the FEC has nearly always concluded that content disseminated by traditional media companies falls within the press exemption. In a 1982 Advisory Opinion, the FEC advised a TV station owned by Turner Broadcasting System, a corporation, that donating two hours of free cablecast time on one of its channels to both the Democratic National Committee and the Republican National Committee fell within the press exemption — and therefore was not an impermissible corporate contribution.⁵⁸ The Commission concluded that the proposed programming was “commentary” and therefore not an expenditure under the press exemption because “providing two hours of free time to both major political parties to discuss issues, to attempt to show the differences between the two parties and to encourage support of political parties is a vital part of covering and commenting upon political campaigns.”⁵⁹

In 1996, the FEC advised Bloomberg L.P., an online financial information network, that its proposal to host virtual town hall events in which Bloomberg customers, not professional reporters, could ask questions directly of federal candidates fell within the press exemption.⁶⁰ In the same year, the FEC advised C-SPAN that it could air

⁵⁷ *Id.* at 251.

⁵⁸ FEC, Advisory Opinion 1982-44, at 2-3 (Aug. 27, 1982). Note that it is a “coordinated communication” to republish campaign materials under 11 C.F.R. § 109.21(c)(2), (d)(6) (2015). A nonmedia corporation that offered to pay for two hours of free cablecast time would thus likely be making an impermissible corporate contribution.

⁵⁹ FEC, Advisory Opinion 1982-44, at 3; *see also* FEC, Advisory Opinion 1996-41 (Oct. 4, 1996) (advising a corporation that owns and operates seven television stations that it may, under the press exemption, air interviews with candidates in which each candidate is asked the same question and given five uninterrupted minutes to respond).

⁶⁰ *See* FEC, Advisory Opinion 1996-16 (May 23, 1996).

candidate video biographies and campaign commercials within its press functions as long as it maintained editorial control over the context in which those videos were presented.⁶¹ Two years later, the FEC advised another cable television system operator that it could offer several candidates “sufficient free time to accommodate up to 750 thirty-second spot advertisements for each of the eight weeks preceding the general election” as part of its press functions.⁶² A reality show featuring fake “candidates” competing in a campaign simulation was advised that it would be within the press exemption to invite real candidates on the show “to enhance the competition between the contestants.”⁶³ The Commission decided by a vote of 4–2 that a nationally syndicated radio program was acting within its press capacity in permitting a sitting member of Congress to guest host the program with no other change in “format[], distribution, or other aspects of production.”⁶⁴

The FEC has only twice in recent years found that a media company’s activities were outside of the scope of the press exemption. In 1994, the FEC found that while a cable television provider was acting within its press exemption when it aired an editorial advocating for the defeat of a federal candidate, it was not acting within its press exemption when it included flyers opposing that candidate with its subscribers’ cable bills.⁶⁵ When comedian Stephen Colbert established his own political action committee (PAC), the FEC advised his employer, Viacom, that it must report costs associated with producing independent expenditure advertisements and administering the committee as in-kind contributions to the PAC because these activities were not part of its normal press functions.⁶⁶ These two examples notwithstanding, the FEC has almost always found a traditional media corporation to be acting within its press exemption.

2. *For corporations that are not obviously media corporations, the FEC has been inconsistent on whether it may scrutinize form to determine whether the press exemption applies.* — In the past, the FEC has scrutinized the form of a communication from a nonmedia corporation to determine whether the press exemption applies. For example, in defining the scope of the press exemption, the FEC has distin-

⁶¹ See FEC, Advisory Opinion 1996-48 (Dec. 6, 1996). The airing is another example of “re-publishing” campaign materials that would be impermissible under 11 C.F.R. § 109.21(c)(2), (d)(6) but for C-SPAN’s press exemption.

⁶² FEC, Advisory Opinion 1998-17, at 1 (Sept. 10, 1998); see also *id.* at 3.

⁶³ FEC, Advisory Opinion 2003-34, at 2 (Dec. 19, 2003).

⁶⁴ See The Honorable Robert K. Dornan, MUR 4689, at 2 (FEC Dec. 20, 1999) (statement of Vice Chairman Darryl R. Wold and Comm’rs Lee Ann Elliott, David M. Mason, and Karl J. Sandstrom).

⁶⁵ See Multimedia Cablevision Co., MUR 3657, at 23–26 (FEC May 25, 1994) (Gen. Counsel’s Report).

⁶⁶ See FEC, Advisory Opinion 2011-11, at 1–2 (June 30, 2011).

guished between a regular periodical publication that “deriv[es] revenues from subscriptions or advertising”⁶⁷ and “a free communication” that seeks to recruit supporters for a political organization not affiliated with a candidate or party.⁶⁸ The regular periodical falls within the press exemption even if it includes commentary that endorses a candidate for federal office and solicits contributions for that candidate’s campaign.⁶⁹ The free, one-time communication does not.⁷⁰ Nor does the press exemption apply to a nonprofit political committee’s “voter guide,” distributed for free before an election, that distinguishes among candidates for federal office on their policy positions and expressly advocates for the election or defeat of those candidates.⁷¹ The FEC advised a candidate who published a nonpartisan, subscriber-supported newsletter between her (unsuccessful) congressional campaigns that she could continue to publish the newsletter, but an edition of that newsletter would be considered a contribution to her campaign if the newsletter made “direct or indirect reference” to her campaign, published articles or editorials “referring to [the candidate’s] views on public policy issues, or those of [her] opponent, or referring to issues raised in the campaign,” or expanded its distribution “significantly beyond its present audience, or in any manner that otherwise indicates utilization of the newsletter as a campaign communication.”⁷²

More recently, the Commissioners have been divided on applying the press exemption. In 2014, Congressman Paul Ryan wrote a book about American politics and asked the Commission, among other things, whether the book and its publisher were exempt from Commission regulations under the press exemption. The Commission failed to

⁶⁷ See FEC, Advisory Opinion 1988-22, at 3 (July 5, 1988); see also FEC, Advisory Opinion 1980-109, at 1 (Oct. 6, 1980).

⁶⁸ FEC, Advisory Opinion 1988-22, at 3.

⁶⁹ FEC, Advisory Opinion 1980-109, at 2; see also FEC, Advisory Opinion 1987-8 (May 4, 1987) (advising that a nonmedia corporation’s sponsorship of a series of interviews supervised by a media company that would be published in a periodical magazine, distributed in a TV series, and compiled in a book to be distributed as a courtesy would fall under the press exemption).

⁷⁰ FEC, Advisory Opinion 1988-22, at 3; see also FEC, Advisory Opinion 1982-58 (Feb. 18, 1983) (advising that the press exemption did not apply to a political committee’s “in-house” magazine); FEC, Advisory Opinion 1980-90 (Sept. 9, 1980) (advising that the press exemption did not apply to expenses incurred by a corporation in filming candidates for federal office discussing their views on issues and distributing those videos to media outlets).

⁷¹ See FEC, Advisory Opinion 1989-28, at 6 (Feb. 14, 1990).

⁷² FEC, Advisory Opinion 1990-5, at 4 (Apr. 27, 1990); see also *Forbes*, MUR 4305, at 3-4 (FEC May 26, 1999) (statement of Vice Chairman Darryl R. Wold and Comm’rs Lee Ann Elliott, David M. Mason, and Karl J. Sandstrom) (explaining their vote to dismiss complaint against Malcolm S. Forbes, Jr., a candidate for President, who continued to publish his column in *Forbes* magazine, because “[n]one of the columns mentioned directly or indirectly that Mr. Forbes was a candidate for President, mentioned any other candidate for President, referred in any way to the presidential campaign, or solicited any contributions in connection with the presidential campaign,” *id.* at 3, and therefore the columns were covered by the press exemption).

find a majority of four votes to answer that question.⁷³ In a concurring statement, three Commissioners argued that the press exemption should apply to publishing books because although the word “books” does not appear in the statutory language defining the press exemption,⁷⁴ Congressman Ryan’s publisher, “with a long track record of publications on public affairs topics,” was a press entity for the purposes of the press exemption.⁷⁵

Several Commissioners oppose scrutinizing the form of media in order to determine whether the press exemption applies. In 2001, Commissioner David M. Mason argued in concurrence that the press exemption precluded the FEC from regulating the format of candidate debates sponsored by media corporations.⁷⁶ In 2002, four Commissioners signed a Statement of Reasons that read: “The statutory language of [the press exemption] is categorical, and therefore precludes the Commission from creating requirements which a debate must meet in order to qualify for the press exemption.”⁷⁷ Still, those Commissioners also noted that the debates at issue complied with the FEC’s debate regulations.⁷⁸

The press exemption again split the Commission in 2003, after Sam’s Club, a retail corporation, circulated a mailing that featured photos of Elizabeth Dole (supplied by her U.S. Senate campaign) to its

⁷³ See FEC, Advisory Opinion 2014-06, at 6, 8 (July 24, 2014). While FEC Advisory Opinions do not carry the force of law, the Commission does not sanction anyone who reasonably relies in good faith on an advisory opinion. See 52 U.S.C.A. § 30108(c) (West 2015). When the FEC fails to find a majority on an advisory opinion, it is unlikely to find a majority on the vote of whether to sanction a party that engages in the activity described in the advisory opinion request. See Nicholas Confessore, *Election Panel Enacts Policies by Not Acting*, N.Y. TIMES (Aug. 25, 2014), <http://www.nytimes.com/2014/08/26/us/politics/election-panel-enacts-policies-by-not-acting.html>.

⁷⁴ See 52 U.S.C.A. § 30101(9)(B)(i).

⁷⁵ FEC, Advisory Opinion 2014-06, at 1 (concurring statement of Chairman Lee E. Goodman and Comm’rs Matthew S. Petersen and Caroline C. Hunter) (“The constitutional guarantee of freedom of the press embraces the circulation of books as well as their publication.” (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 65 n.6 (1963))).

⁷⁶ See *Manchester Union Leader Newspaper*, MUR 4956, at 2–3 (FEC Feb. 13, 2001) (statement of Comm’r David M. Mason). 11 C.F.R. § 110.13(b) permits media corporations and non-profit organizations to stage debates provided that “[s]uch debates include at least two candidates” and “[t]he staging organization(s) does not structure the debates to promote or advance one candidate over another.” 11 C.F.R. § 110.13(b) (2015). The regulation also requires organizations to “use pre-established objective criteria to determine which candidates may participate in a debate.” *Id.* § 110.13(c). The majority of the Commission had dismissed the complaint against *Manchester Union Leader Newspaper* because it complied with these regulations. See *Manchester Union Leader Newspaper*, MUR 4956, at 40 (FEC Oct. 25, 2000) (First Gen. Counsel’s Report); *Manchester Union Leader Newspaper*, MUR 4956 (FEC Nov. 29, 2000) (Certification).

⁷⁷ *Boston Globe*, MUR 5224, at 2 (FEC Sept. 3, 2002) (statement of Chairman David M. Mason, Vice Chairman Karl J. Sandstrom, and Comm’rs Bradley A. Smith and Michael E. Toner).

⁷⁸ *Id.* at 2–3.

customers two weeks before the North Carolina Republican primary.⁷⁹ While the Commission voted to use its prosecutorial discretion to dismiss the case,⁸⁰ Commissioner Scott E. Thomas dissented, arguing, among other things, that the press exemption did not apply to a mailing that “appear[ed] to be nothing more than a sophisticated advertising brochure sent by Sam’s Club to its customers.”⁸¹ Commissioner Thomas wanted to investigate the complaint further in part because he worried that “[i]f advertising brochures distributed by corporations are considered exempt from the [corporate contribution] prohibition simply because a corporation asserts the press exemption, then the ban on corporate contributions will mean very little.”⁸² By contrast, three of the Commissioners would have preferred to dismiss the complaint on the merits as falling squarely within the press exemption.⁸³ These Commissioners argued that the First Amendment precluded the FEC from deciding whether Sam’s Club’s regular mailing was a press entity.⁸⁴ They objected that there was no satisfactory way for the Commission to decide which corporations were eligible for the press exemption.⁸⁵

Thus, the FEC is split on the press exemption: some Commissioners argue for a narrower interpretation of which corporations qualify for the press exemption in order to avoid opening a loophole through which to circumvent corporate campaign finance regulations; other

⁷⁹ See *Wal-Mart Stores, Inc.*, MUR 5315, at 1 (FEC Sept. 12, 2003) (statement of Comm’r Scott E. Thomas).

⁸⁰ See *Wal-Mart Stores, Inc.*, MUR 5315, at 1 (FEC Sept. 25, 2003) (statement of Vice Chairman Bradley A. Smith and Comm’rs Michael E. Toner and David M. Mason).

⁸¹ *Wal-Mart Stores, Inc.*, MUR 5315, at 3 (FEC Sept. 12, 2003) (statement of Comm’r Scott E. Thomas).

⁸² *Id.*

⁸³ *Wal-Mart Stores, Inc.*, MUR 5315, at 1 (FEC Sept. 25, 2003) (statement of Vice Chairman Bradley A. Smith and Comm’rs Michael E. Toner and David M. Mason) (“[W]e should dismiss cases that present us with nothing more than a feature in a periodical about a candidate, unless the evidence shows that the periodical is owned or controlled by a candidate, political committee or political party.”).

⁸⁴ See *id.* at 4–5.

⁸⁵ *Id.* at 3. Vice Chairman Toner and Commissioners Mason and Smith reiterated their objections to distinguishing among press corporations in their Statement of Reasons concurring in the dismissal of *Jerry Falwell Ministries*. See *Jerry Falwell Ministries, Inc.*, MUR 5491, at 3 (FEC July 22, 2005) (statement of Vice Chairman Michael E. Toner and Comm’rs David M. Mason and Bradley A. Smith). In 2006, Chairman Toner, joined by Commissioners Mason and Hans A. von Spakovsky, once again concurring in a dismissal, argued that the format and content of a radio program — such as how long it had been on the air or whether the candidate-host discussed his candidacy — was irrelevant to whether the press exemption applied (and that it was unconstitutional for the General Counsel’s Report to analyze such factors). See *Dave Ross*, MUR 5555, at 3–5 (FEC Mar. 17, 2006) (statement of Chairman Michael E. Toner and Comm’rs David M. Mason and Hans A. von Spakovsky); see also *The Jon and Ken Show*, MUR 5569 (FEC Mar. 17, 2006) (statement of Chairman Michael E. Toner and Comm’rs David M. Mason and Hans A. von Spakovsky).

Commissioners believe that the First Amendment precludes the FEC from deciding who is and is not press.

II. WHAT DOES THE FIRST AMENDMENT'S PRESS CLAUSE PROTECT?

Because the FEC has failed to find a majority of Commissioners to address, for example, whether Paul Ryan's book publisher or the Sam's Club newsletter qualifies for the press exemption, the scope of the exemption has become a muddle. That muddle echoes another debate, about the meaning of the First Amendment's Press Clause, which offers an interpretation of the First Amendment that could break the FEC's stalemate over the scope of the press exemption. This Part offers context for the larger First Amendment debate on the meaning of the Press Clause, both in scholarly literature and in the courts, while Part III demonstrates how the constitutional Press Clause should shape the interpretation of the press exemption.

A. *Text and History of the Press Clause*

The First Amendment reads: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." ⁸⁶ Textually, the presumption against superfluous language ⁸⁷ suggests that the Founders contemplated a unique "freedom of the press" separate from "freedom of speech." Speaking at Yale Law School in 1974, Justice Potter Stewart endorsed this reading, noting the historical evidence that "[b]etween 1776 and the drafting of our Constitution, many of the state constitutions contained clauses protecting freedom of the press while at the same time recognizing no general freedom of speech," ⁸⁸ and arguing that "[b]y including both guarantees in the First Amendment, the Founders quite clearly recognized the distinction between the two." ⁸⁹ Thus, Justice Stewart argued, the Press Clause is no "constitutional redundancy." ⁹⁰ For Justice Stewart, the Press Clause is "a *structural* provision of the Constitution." ⁹¹ He argued that the "primary purpose" of a separate freedom of the press was to protect "organized, expert scrutiny of government" by "creat[ing] a fourth institution outside the Government as an additional check on the three official branches," a "Fourth Estate." ⁹² Justice Stewart's view would thus require courts

⁸⁶ U.S. CONST. amend. I.

⁸⁷ See generally JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION 228–31 (2d ed. 2013).

⁸⁸ Stewart, *supra* note 20, at 633–34.

⁸⁹ *Id.* at 634.

⁹⁰ *Id.* at 633.

⁹¹ *Id.*

⁹² *Id.* at 634.

to identify organizations that are providing “organized, expert scrutiny of government” for special protection from government interference — interference that would include investigations of potential campaign finance violations.⁹³

By contrast, Professor Eugene Volokh has offered historical evidence that the Press Clause was not meant to protect an “industry,” but rather a “technology.”⁹⁴ In particular, Volokh has cited historical evidence that the right of freedom of the press was considered at the time of the Founding to be every individual’s right to express his opinion.⁹⁵ Volokh has also pointed out that the newspaper industry at the time of the Founding bore little resemblance to modern professional journalism; many “important authors of the time” — including the authors of the *Federalist Papers* — were not professional journalists.⁹⁶ For Volokh, this is originalist evidence that “freedom of the press” was not intended to be an institutional check on government power but an individual right of expression.⁹⁷ Grammatically, Volokh has argued, the Press Clause’s pairing with the Speech Clause suggests that the phrase “freedom of” serves a parallel meaning for each clause: namely, “freedom to use the faculty of” speech or press.⁹⁸ And he argues that his reading is not redundant because under the Framers’ understanding, “speech” referred to oral expression and “press” referred to printed expression.⁹⁹ Under Volokh’s view, then, the Press Clause protects the same activity that we have come to understand the Speech Clause to protect, and if the statutory press exemption offers special benefits beyond what the First Amendment requires, those benefits are not a constitutional requirement.

B. Function and Structure of the Press Clause

Other scholars have agreed with Justice Stewart that an understanding of the Constitution’s structure points to an interpretation of the Press Clause as protecting a Fourth Estate check on governmental power.¹⁰⁰ Professor Sonja R. West offers a narrow definition of the press based on its “unique functions,”¹⁰¹ namely, “gather[ing] and con-

⁹³ Cf. *Reader’s Digest Ass’n v. FEC*, 509 F. Supp. 1210, 1214 (S.D.N.Y. 1981) (holding that an FEC investigation of the press for campaign finance violations would chill First Amendment freedoms).

⁹⁴ See Volokh, *supra* note 19, at 465–72. For another analysis that argues that the Framers did not intend to carve out separate rights for the press, see Lange, *supra* note 19, at 88–99.

⁹⁵ See Volokh, *supra* note 19, at 465–68.

⁹⁶ *Id.* at 468; see also *id.* at 468–69.

⁹⁷ See *id.* at 468–69.

⁹⁸ *Id.* at 472; see also *id.* at 472–74.

⁹⁹ See *id.* at 475–77.

¹⁰⁰ See, e.g., sources cited *supra* note 20.

¹⁰¹ West, *supra* note 20, at 1069.

vey[ing] information to the public about newsworthy matters . . . [and] serv[ing] as a check on the government by conveying information to the voters about ‘what [their] Government is up to.’”¹⁰² She argues that such a definition is necessary to secure broader press rights “such as certain investigative immunities” that would be “impossible” to extend “to all members of the public.”¹⁰³ West’s description of the unique functions of the press, like Justice Stewart’s, would thus place a constitutional limit on the extent to which the government may interfere with these unique functions above and beyond what the Speech Clause already protects.

Professor Randall P. Bezanson has identified a functional need that an independent Press Clause fills, pointing out examples of special benefits conferred to the press: “special access to government press conferences, press access to crime scenes, postal rate differentiation, special tax treatment (e.g., paper and ink taxes, use taxes, and the like), differential access to information in government and government officers’ hands (members of Congress, the President, governors, the military, etc.), and so forth.”¹⁰⁴ Bezanson compares the question of which benefits the Press Clause mandates to the question of which religious accommodations are required by the Establishment Clause.¹⁰⁵ Without an independent Press Clause, he argues, accommodations for the press are only “matters of legislative and executive grace that can be conferred or withdrawn at the government’s will.”¹⁰⁶ Thus, under Bezanson’s view, the press exemption from campaign finance regulations is required only if the Press Clause serves to protect the Fourth Estate as a check on government power; if the Press Clause protects only individual expression, the press exemption is a statutory right that can be repealed.

C. *Mixed Precedents Addressed the Press Clause in Dicta*

In his opinion for the Court in *Citizens United*, Justice Kennedy asserted that “[t]here is no precedent supporting laws that attempt to distinguish between corporations which are deemed to be exempt as media corporations and those which are not.”¹⁰⁷ While Justice Kennedy is correct that the Court has yet to hold that the Press Clause independently protects specific rights for the Fourth Estate, dicta from past precedents are more mixed. Professor Michael W. McConnell has

¹⁰² *Id.* at 1069–70 (final alteration in original) (quoting *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 780 (1989)).

¹⁰³ *Id.* at 1031.

¹⁰⁴ Bezanson, *supra* note 20, at 1268.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 1273.

¹⁰⁷ *Citizens United v. FEC*, 558 U.S. 310, 352 (2010).

identified a number of precedents in which the Court, in dicta, has denied that the press enjoy any special constitutional rights.¹⁰⁸ Bezanson has identified cases in which the Court, again “often in dicta,” has recognized special benefits for those who serve a press function.¹⁰⁹

For example, in *Bartnicki v. Vopper*,¹¹⁰ an opponent gained access to an illegally obtained recording of teachers’ union negotiations and shared the tape with a radio commentator, who broadcast its contents.¹¹¹ Although the Court drew “no distinction” between the radio station and the opponent,¹¹² it relied on the importance of “the publication of truthful information of public concern”¹¹³ in invalidating the civil liability statutes at issue as inconsistent with the First Amendment. Thus, the First Amendment protected the dissemination of information of “public concern,” namely, the government’s negotiation with the teachers’ union — suggesting that it was the role of the press as a check on government that motivated the Court’s balancing of the privacy and public interests in the case. In *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*,¹¹⁴ the Court invalidated a paper and ink tax that “single[d] out the press” as inconsistent with the First Amendment.¹¹⁵ In *First National Bank of Boston v. Bellotti*,¹¹⁶ the Court invalidated a state ban on corporations making expenditures for the purpose of influencing the vote on state referenda, writing in dicta that “the press does not have a monopoly on either the First Amendment or the ability to enlighten”¹¹⁷ — but the issue was that the corporations were denied the right to speak, not whether the press were entitled to special rights above and beyond the freedom of speech. The Court has yet to resolve definitively whether the Press Clause carries independent meaning.

D. The Licensing Horrible

A common theme in objections to reading the Press Clause to protect a Fourth Estate rather than individual expression is that such a reading will require the government to decide *who* is the press; as Chief Justice Burger put it, “[t]he very task of including some entities within the ‘institutional press’ while excluding others . . . is reminiscent of the abhorred licensing system . . . [that] the First Amendment

¹⁰⁸ See McConnell, *supra* note 1, at 431 & n.85.

¹⁰⁹ See Bezanson, *supra* note 20, at 1263 & n.16.

¹¹⁰ 532 U.S. 514 (2001).

¹¹¹ See *id.* at 518–19.

¹¹² *Id.* at 525 n.8.

¹¹³ *Id.* at 534.

¹¹⁴ 460 U.S. 575 (1983).

¹¹⁵ *Id.* at 592.

¹¹⁶ 435 U.S. 765 (1978).

¹¹⁷ *Id.* at 782.

was intended to ban.”¹¹⁸ In *Citizens United*, Justice Kennedy wrote that, “[w]ith the advent of the Internet and the decline of print and broadcast media, . . . the line between the media and others who wish to comment on political and social issues becomes far more blurred” — and it was therefore impossible for courts to enforce a press exception to restrictions on corporate independent expenditures.¹¹⁹ McConnell has argued that since the First Amendment prohibits the government from conferring privileges only to *some* corporations, *Citizens United* could have been resolved by holding that Citizens United was entitled to the press exemption, which would have avoided expanding the Speech Clause to cover corporate independent expenditures.¹²⁰

But not every court has viewed distinguishing between “a local nonprofit news outlet . . . [and] General Motors”¹²¹ as impermissible licensing of the press. These courts’ ability to draw a line between a corporation that is acting as press and one that is not could inform the question of whether the Press Clause requires that the government confer special benefits to some corporations above and beyond what the Speech Clause requires. Notably, although its holding about the scope of the Speech Clause was overturned in *Citizens United*, the Court in *Austin v. Michigan State Chamber of Commerce*¹²² was able to identify media corporations as ones that “differ significantly from other corporations in that their resources are devoted to the collection of information and its dissemination to the public.”¹²³ In *Citizens United v. Gessler*,¹²⁴ the Tenth Circuit, rather than invalidating Colorado’s press exemption, applied Colorado’s distinction between press and non-press corporations — and concluded that Citizens United fell in the “press” category.¹²⁵ The *Reader’s Digest* court instructed the FEC that the First Amendment permitted it only to investigate in the first instance “whether the press entity was acting as a press entity” — holding that the First Amendment permitted, and in applying the press exemption required, some preliminary scrutiny of when corporations are acting as press and when they are not in order to protect those acting in their press capacity from an intrusive investigation.¹²⁶

¹¹⁸ *Id.* at 801 (Burger, C.J., concurring).

¹¹⁹ *Citizens United v. FEC*, 558 U.S. 310, 352 (2010).

¹²⁰ See McConnell, *supra* note 1.

¹²¹ *Citizens United*, 558 U.S. at 474 (Stevens, J., concurring in part and dissenting in part).

¹²² 494 U.S. 652 (1990), *overruled by Citizens United*, 558 U.S. 310.

¹²³ *Id.* at 667.

¹²⁴ 773 F.3d 200 (10th Cir. 2014).

¹²⁵ See *id.* at 215–17.

¹²⁶ *Reader’s Digest Ass’n v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981).

III. THE FIRST AMENDMENT ARGUMENT FOR DISTINGUISHING PRESS AND NON-PRESS CORPORATIONS

The Commission has split on how to apply the press exemption. On one view, some Commissioners want to scrutinize whether a corporation seeking the press exemption is performing a press function in order to avoid opening up a loophole to circumvent the corporate contribution ban.¹²⁷ On the other view, some Commissioners believe that the First Amendment prohibits the government from determining what is and is not journalism.¹²⁸ The Commissioners concerned that the First Amendment prohibits the FEC from determining who is and is not a press corporation thus seem unlikely to be persuaded only by the argument that a narrower application is necessary to prevent a loophole — that loophole may be the price of free speech. To overcome these Speech Clause concerns, the Commissioners that want to apply the press exemption only to some corporations must engage the First Amendment. The Press Clause offers an argument rooted in the First Amendment that the Constitution permits the FEC to distinguish “a local nonprofit news outlet . . . [from] General Motors”¹²⁹ — because the nonprofit news outlet is uniquely protected by the Constitution. While *Citizens United* held that the Speech Clause already protects corporations’ political speech rights,¹³⁰ the Press Clause should be read to elevate the protections given to the press — namely, exemptions from prohibitions on coordination with candidates and disclaimer and disclosure requirements — from legislative grace to constitutional re-

¹²⁷ See, e.g., Neil Pandey-Jorin, Comment, *Is Everyone Now a Journalist?: How the FEC’s Application of the Media Exemption to Bloggers Weakens FEC Regulation*, 60 ADMIN. L. REV. 409, 412 (2008) (“[A] Media Exemption for all bloggers creates a loophole for any blogger wishing to eviscerate FEC regulations pertaining to public disclosure and contribution limits.”); Mark Arsenault, *Ruling Widens the Meaning of “Media,”* BOS. GLOBE (July 5, 2010), http://www.boston.com/news/nation/washington/articles/2010/07/05/fec_finds_partisan_film_group_free_from_disclosure_rules (“[The Campaign Legal Center] warns of a proliferation of partisan advocates undermining the law by producing ‘documentaries’ that are merely long campaign ads, then advertising them without disclosing their activities.”).

¹²⁸ See, e.g., Dave Ross, MUR 5555, at 4–5 (FEC Mar. 17, 2006) (statement of Chairman Michael E. Toner and Comm’rs David M. Mason and Hans A. von Spakovsky) (arguing that the press exemption does not require the FEC to examine the content of the radio program at issue, such as how long it had been on the air or whether the candidate-host had discussed his candidacy); The John and Ken Show, MUR 5569, at 3 (FEC Mar. 17, 2006) (statement of Chairman Michael E. Toner and Comm’rs David M. Mason and Hans A. von Spakovsky) (“Some facts that may be tempting to consider do not affect whether the press exemption applies.”); Wal-Mart Stores, Inc., MUR 5315, at 3 (FEC Sep. 25, 2003) (statement of Vice Chairman Bradley A. Smith and Comm’rs Michael E. Toner and David M. Mason) (“We see no justification for a narrower application of the [press] exemption grounded in a notion that some publishers are bona fide while others are not.”).

¹²⁹ *Citizens United v. FEC*, 558 U.S. 310, 474 (2010) (Stevens, J., concurring in part and dissenting in part).

¹³⁰ *Id.* at 341 (majority opinion).

quirement.¹³¹ And an independent Press Clause would add an additional check by making the FEC's decisions about who is and who is not press subject to stronger judicial review.

That the statutory press exemption carries the risk of opening a loophole to skirt campaign finance regulations is undisputed. In 1986, the Supreme Court noted that a broad press exemption could open a loophole that would swallow regulations of corporate campaign finance by "open[ing] the door for those corporations and unions with in-house publications to engage in unlimited spending directly from their treasuries to distribute campaign material to the general public."¹³² One can imagine many ways that creative corporations could exploit such a loophole. Wal-Mart's republishing of Elizabeth Dole's campaign materials in its regular mailing to Sam's Club members is one possible example.¹³³ Alternatively, corporations could donate in secret to another corporation formed under Internal Revenue Code § 501(c)(4) (say, "The Anonymous Shell Corporation"¹³⁴), which does not have to disclose its donors. The Anonymous Shell Corporation could then spend its secret money starting a newsletter or making documentaries and claim the press exemption in order to coordinate with a candidate in producing those materials.¹³⁵

To the extent that some Commissioners are concerned about protecting the First Amendment rights of corporations in applying the press exemption, the Speech Clause already limits Congress's ability to regulate corporate political speech. Commissioner Steven T. Walther recognized in 2010 the backstop role that the Speech Clause plays when he wrote in opposition to the FEC's decision to advise Citizens United that it was eligible for the press exemption.¹³⁶ Commissioner Walther noted that he had supported a broad interpretation of the press exemption in the past "because concluding that a communication

¹³¹ See Bezanson, *supra* note 20, at 1273.

¹³² *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 251 (1986).

¹³³ See *Wal-Mart Stores, Inc.*, MUR 5315, at 3 (FEC Sep. 12, 2003) (statement of Comm'r Scott E. Thomas) ("If advertising brochures distributed by corporations are considered exempt from the [corporate contribution] prohibition simply because a corporation asserts the press exemption, then the ban on corporate contributions will mean very little.")

¹³⁴ See *The Colbert Report: Colbert Super PAC — Trevor Potter & Stephen's Shell Corporation* (Comedy Central television broadcast Sept. 29, 2011), <http://www.cc.com/video-clips/3yzu4u/the-colbert-report-colbert-super-pac---trevor-potter---stephen-s-shell-corporation> (describing how to create "The Anonymous Shell Corporation" to keep donors secret and circumvent disclosure requirements).

¹³⁵ Candidates in the 2016 presidential cycle have been creative about outsourcing their traditional campaign functions to organizations that do not have to abide by federal campaign finance restrictions. See, e.g., Nick Corasaniti, *Carly Fiorina's "Super PAC" Aids Her Campaign, in Plain Sight*, N.Y. TIMES (Sept. 30, 2015), <http://www.nytimes.com/2015/10/01/us/politics/as-carly-fiorina-surges-so-does-the-work-of-her-super-pac.html>.

¹³⁶ See *FEC*, Advisory Opinion 2010-08, at 2-3 (June 10, 2010) (statement of Comm'r Steven T. Walther).

was not eligible for the press exemption had the consequence that costs related to the communication were treated as a prohibited corporate expenditure,¹³⁷ but now favored a narrower application of the exemption because after *Citizens United* recognized that the First Amendment guarantees the right to speak, “the consequence of not extending the press exemption is no longer a complete silencing of the speaker, but rather . . . disclosure of information about the flow of funds that are being spent for the purpose of influencing an election.”¹³⁸

Today, the FEC operates under *Buckley*’s conclusion that reasonable disclosure requirements are permissible under the First Amendment,¹³⁹ and, in particular, under the still-enduring ban on corporate contributions. Thus, under existing constitutional law, the Speech Clause does not limit Congress’s ability to prohibit corporate campaign contributions and to place reasonable disclosure and disclaimer requirements on corporate independent expenditures. The Speech Clause therefore offers no recourse to a corporation *denied* the press exemption — the New York Times Company could claim no constitutional right under the Speech Clause alone to an exemption from contribution prohibitions and disclosure and disclaimer requirements that the Court has held to be reasonable for all other corporations. Operating only under the Speech Clause, then, the press exemption is a matter of legislative grace, rather than constitutional requirement.¹⁴⁰ So long as the FEC is acting within its statutory discretion¹⁴¹ and is not defining the press exemption in a way that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,”¹⁴² its discretion rules. And notwithstanding its understanding that the press exemption is rooted in First Amendment values,¹⁴³ Congress could at any time repeal the exemption and let the Speech Clause do all the work of protecting the free expression of press corporations. Without an independent Press Clause, there is no constitutional prohibition on Congress’s ability to restrict newspapers’ coordination with candidates or require that media corporations file reports with the FEC on their press activities and post disclaimers on editorials.

The *Reader’s Digest* court recognized a First Amendment limitation on the FEC’s ability to investigate press entities for alleged violations of campaign finance law because “freedom of the press is substantially

¹³⁷ *Id.* at 2.

¹³⁸ *Id.* at 3.

¹³⁹ See *Buckley v. Valeo*, 424 U.S. 1, 84 (1976) (per curiam).

¹⁴⁰ See *Bezanson*, *supra* note 20, at 1273.

¹⁴¹ See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

¹⁴² 5 U.S.C. § 706(2)(A) (2012).

¹⁴³ See H.R. REP. NO. 93-1239, at 4 (1974).

eroded by investigation of the press.”¹⁴⁴ In holding that the FEC’s authority to investigate the substance of alleged campaign finance violations is limited until the FEC determines that the press exemption does not apply, the *Reader’s Digest* court noted the potential chilling effect of FEC investigations on a functioning, free press “[i]f a newspaper relying on a secret source were publishing a series of articles containing derogatory information about the incumbent President during his campaign for reelection, and the FEC undertook to investigate the newspaper asking among other questions the source of the information published.”¹⁴⁵ That court’s analysis suggests that something more than legislative grace is protecting the press from even FEC investigations into campaign finance violations.

The Press Clause offers constitutional permission to distinguish the New York Times Company from Wal-Mart in order to protect the *New York Times* from FEC investigations and sanctions. Only an independent Press Clause could *guarantee* some corporations — but not others — exemption from the contribution ban and disclosure and disclaimer requirements. If, after *Citizens United*, “the First Amendment does not allow political speech restrictions based on a speaker’s corporate identity,”¹⁴⁶ it may still *require* political speech *protections* based on a speaker’s corporate identity — that is, its identity as a press corporation.¹⁴⁷ And, to the extent that the Court has identified eliminating quid pro quo corruption as the only compelling interest for campaign finance regulations, a Press Clause that requires extra protections based on the speaker’s identity as a press corporation may even more narrowly tailor Congress’s intervention: a non-press corporation might have more special interests that motivate its expenditures than a press corporation, which has the more limited mission of “collection of information and its dissemination to the public.”¹⁴⁸

Mitigating the concern that the government would be regulating who is and is not a press corporation is the fact that an independent Press Clause strengthens judicial review over those decisions. If the FEC’s discretion in applying the press exemption is governed by statute alone, its decisions would likely be reviewed under the deferential *Chevron* framework.¹⁴⁹ But if the Press Clause protects the reporting functions of a free press from the interference of campaign finance regulations, courts would have independent authority and responsibil-

¹⁴⁴ *Reader’s Digest Ass’n v. FEC*, 509 F. Supp. 1210, 1214 (S.D.N.Y. 1981).

¹⁴⁵ *Id.*

¹⁴⁶ *Citizens United v. FEC*, 558 U.S. 310, 347 (2010).

¹⁴⁷ See Bezanson, *supra* note 20, at 1268–69.

¹⁴⁸ *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 667 (1990), *overruled by Citizens United*, 558 U.S. 310.

¹⁴⁹ See, e.g., *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

ity to determine whether the press exemption applies. The Supreme Court in *MCFL* gave a preview of what such review might look like when it examined the regularity of publication, the size of the regular audience, and the staff employed to distribute the publication at issue in holding that a “Special Edition” voter guide was not eligible for the press exemption.¹⁵⁰ The *Austin* Court defined the press as corporations whose “resources are devoted to the collection of information and its dissemination to the public.”¹⁵¹ West offers a similar test based on the “unique functions of the press,”¹⁵² namely, “gather[ing] and convey[ing] information to the public about newsworthy matters . . . [and] serv[ing] as a check on the government by conveying information to the voters about ‘what [their] Government is up to.’”¹⁵³ While defining what exactly such a test should look like is beyond the scope of this Note, rooting this test in the Constitution rather than a statute allows courts to play a more aggressive oversight role in determining what the unique functions of the press are.

CONCLUSION

The debate within the Federal Election Commission over the scope of the press exemption has pitted the integrity of campaign finance regulations against the First Amendment. The Press Clause offers a way to understand the First Amendment that preserves the freedom of the press while policing potential loopholes in campaign finance law. Under such a regime, close questions — like whether *Citizens United* is a press corporation — will inevitably come up, but those questions will be subject to the check of judicial review. More importantly, the Constitution, not the whims of Congress and the FEC, would exempt press corporations from burdensome campaign finance regulations as they fulfill their constitutional role of providing “organized, expert scrutiny” of elections.¹⁵⁴

¹⁵⁰ See *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 250–51 (1986).

¹⁵¹ *Austin*, 494 U.S. at 667.

¹⁵² West, *supra* note 20, at 1069.

¹⁵³ *Id.* at 1069–70 (final alteration in original) (quoting *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 780 (1989)).

¹⁵⁴ See Stewart, *supra* note 20, at 634.