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# The Media Exemption Puzzle of Campaign Finance Laws

Sonja R. West

*University of Georgia School of Law, srwest@uga.edu*



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## ESSAY

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### THE MEDIA EXEMPTION PUZZLE OF CAMPAIGN FINANCE LAWS

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SONJA R. WEST<sup>†</sup>

In the 2010 case of *Citizens United v. Federal Election Commission*, the United States Supreme Court held that a federal law that placed some restrictions on corporate campaign expenditures was unconstitutional.<sup>1</sup> In dissent, Justice John Paul Stevens argued that in order to reach this conclusion the majority had purposefully constructed a “newly-minted First Amendment rule” designed to block any and all congressional attempts to regulate this type of spending.<sup>2</sup> He claimed, in essence, that the Court had trapped Congress in a legislative box—a box that in campaign finance law is known as the media exemption problem.

The problem is this: When attempting to address concerns about corporate campaign expenditures (i.e., corporate political speech), Congress essentially has two options. The first option is to exempt media corporations from campaign expenditure regulations. Yet if Congress does this, then the Court claims that Congress has engaged in unconstitutional speaker discrimination by treating one group of speakers differently from another. The other option, however, is to regulate the campaign expenditures of all corporations, including media corporations. But if Congress tries this approach, the Court accuses it of violating basic press freedoms by interfering with the speech rights of the media. Thus, in the words of Justice Stevens, under the majority’s constitutional framework, Congress is “damned if it does and damned if it doesn’t.”<sup>3</sup>

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<sup>†</sup> Associate Professor of Law, the University of Georgia School of Law. I would like to thank T.J. Striipe and the University of Georgia Law School librarians for their research assistance.

<sup>1</sup> 558 U.S. 310, 372 (2010).

<sup>2</sup> *Id.* at 474 n.75 (Stevens, J., concurring in part and dissenting in part).

<sup>3</sup> *Id.*; *see also id.* (“If the legislature gives media corporations an exemption from electioneering regulations that apply to other corporations, it violates the newly minted First Amendment rule against identity-based distinctions. If the legislature does not give media corporations an exemption,

More specifically, here is how the media exemption problem worked in *Citizens United*: That case involved a federal law prohibiting corporations and unions from using their general treasury funds to make independent expenditures for speech expressly advocating for or against a candidate.<sup>4</sup> Like many campaign finance laws throughout the country, this law included an exemption for the media's news stories, commentaries, and editorials.<sup>5</sup>

In the view of the majority, this media exemption raised significant constitutional problems. It was unfair, they argued, to allow government regulation of some corporate speakers—nonmedia corporations—but not of media corporations.<sup>6</sup> At the same time, however, because the news media's political speech falls at the core of our First Amendment protections, if a law regulated all corporations, including media corporations, it would violate the First Amendment.<sup>7</sup>

Therefore, under the Court's reasoning, the government may not regulate only *some* corporations, and it also may not regulate *all* of them. As Justice Stevens explained, “[t]he only way out of this invented bind: no regulations whatsoever.”<sup>8</sup>

The media exemption dilemma in campaign finance law is nothing new, but *Citizens United* appears to have solidified it. In his recent book, *Plutocrats United*, Professor Richard Hasen declares the media exemption issue to be “the third rail of the campaign finance debate.”<sup>9</sup> Campaign finance reform advocates, he argues, have found themselves in a no-win situation: “Say that there should be an exception, and you run the risk of inconsistency or outright hypocrisy; say there should not be an exception and you are considered too extreme.”<sup>10</sup> Seeing no way out, Hasen notes, they often choose to “simply ignore [] or quickly gloss over” the problem.<sup>11</sup>

Yet the question of how to treat the press in campaign finance law can no longer be ignored. For the discussion to move forward, it is necessary to determine whether Congress, without running afoul of the First Amendment,

it violates the First Amendment rights of the press. The only way out of this invented bind: no regulations whatsoever.”).

4 2 U.S.C. § 441b (2006) (section subsequently transferred to 52 U.S.C.A. § 30118 (West 2015)).

5 See 2 U.S.C. § 431(9)(B)(i) (2006) (section subsequently transferred to 52 U.S.C.A. § 30101(9)(B)(i) (West 2015)) (exempting by definition “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”).

6 *Citizens United*, 558 U.S. at 352 (majority opinion).

7 *Id.* at 353.

8 *Id.* at 474 n.75 (Stevens, J., concurring in part and dissenting in part).

9 RICHARD L. HASEN, *PLUTOCRATS UNITED: CAMPAIGN MONEY, THE SUPREME COURT, AND THE DISTORTION OF AMERICAN ELECTIONS* 127 (2016).

10 *Id.* at 126.

11 *Id.*

can ever regulate the political speech of nonmedia speakers. Left unchallenged, the faulty logic of the *Citizens United* majority will always favor corporations' speech interests in campaign expenditures over the public's interests in reducing the influence of big money in politics, promoting self-government or increasing political equality.

Thus it is critical to determine whether, in a post-*Citizens United* world, there is a way out of the campaign finance media exemption box.

The answer is, quite simply, yes. Exempting the press from campaign finance regulations is not the impenetrable quandary the *Citizens United* majority made it appear. In fact, the solution is quite obvious as soon as the fundamental flaw of the majority's logic is understood. That flaw is the Court's failure to recognize that the press is different from other types of speakers. The press is different textually. It is different historically. And it is different functionally. Once the special constitutional role of the press is acknowledged, the media exemption problem loses its force.

Objections to media exemptions focus on two issues—justification and definition. The justification criticisms question whether there are acceptable reasons why we should grant protections to certain types of speakers (those that are members of the press) and not to others.<sup>12</sup> The definition arguments, meanwhile, claim that there is no acceptable way to identify which speakers should be allowed to claim a media exemption and which should not.<sup>13</sup>

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12 See, e.g., *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 777 (1978) ("The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual."); *id.* at 782 n.18 (noting that granting institutional press greater protection would conflict with the "informational purpose of the First Amendment," and surmising that the people may be as interested in hearing the views of the appellants as those of a media corporation); *Branzburg v. Hayes*, 408 U.S. 665, 705 (1972) ("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."); *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938) ("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."); Lyriisa Barnett Lidsky, *Not a Free Press Court?*, 2012 BYU L. REV. 1819, 1833 ("[The *Citizens United* majority implied that] media corporations are elitist, wield political power and influence disproportionate to their public support, and are no more deserving of 'special' protection than any other corporation.").

13 See, e.g., *Branzburg*, 408 U.S. at 704-05 ("Sooner or later, it would be necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure . . ."); *In re Grand Jury Subpoena*, Judith Miller, 438 F.3d 1141, 1156-58 (D.C. Cir. 2006) (Sentelle, J., concurring) (highlighting the definitional problems with privileging the press and surveying the various and incompatible ways that state legislatures define who is protected under their shield statutes); Michael W. McConnell, *Reconsidering Citizens United as a Press Clause Case*, 123 YALE L.J. 412, 438 (2013) ("There is no coherent way to distinguish the institutional press from others who disseminate information and opinion to the public through communications media."); David B. Sentelle, *Freedom*

In *Citizens United*, the majority made both types of arguments. First, the majority claimed that there was no justification for differing treatment of media speakers vis-à-vis nonmedia speakers. If Congress's purpose in regulating corporate political spending was to prevent wealthy corporations from distorting the political debate, the Court reasoned, then many media corporations, which have also accumulated immense wealth from the corporate form, should also be included.<sup>14</sup> Placing regulatory burdens on certain corporate speakers but not on the press, the majority also argued, would distort the public dialogue in favor of the media's views, which do not always mirror the views of the public at large.<sup>15</sup>

A similar justification argument is foreseeable under a political equality rationale. That is, if the purpose of a regulation is to promote equal voices, failure to exempt the press would allow the media to have a louder voice than nonmedia speakers. And yet simply regulating media corporations in addition to other corporations was also not an answer, according to the Court, because suppressing the political speech of the press would be contrary to the original understanding of the First Amendment.<sup>16</sup>

But as Justice Stevens pointed out in his *Citizens United* dissent, these arguments overlook the significant textual and historic evidence establishing that the press can and should be treated differently. The most vital piece of the constitutional puzzle, he explained, was not the First Amendment's Free Speech Clause but the one that follows—the Press Clause.<sup>17</sup> By specifically protecting the freedom of the press, Justice Stevens stated, the Framers demonstrated “why one type of corporation, those that are part of the press, might be able to claim special First Amendment status.”<sup>18</sup> Indeed, as Justice Potter Stewart famously pointed out, through the Press Clause the Framers made the media “the only organized private business that is given explicit constitutional protection.”<sup>19</sup>

Beyond the clear textual protection for the press, the history of the Press Clause also demonstrates its uniqueness. The framing generation placed a substantial premium on press liberties, even over speech rights.<sup>20</sup> James

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*of the Press: A Liberty for All or a Privilege for a Few?*, 2013–2014 CATO SUP. CT. REV. 15, 19 (“Perhaps it is this problem of definition raised by Chief Justice Burger that best illustrates the difficulty with the proposition that the freedom of the press protects a class of persons rather than all persons.”).

<sup>14</sup> *Citizens United v. FEC*, 558 U.S. 310, 351–52 (2010) (majority opinion).

<sup>15</sup> *Id.* at 352–53.

<sup>16</sup> *Id.* at 353.

<sup>17</sup> U.S. CONST. amend. I, cl. 2.

<sup>18</sup> *Citizens United*, 558 U.S. at 431 n.57 (Stevens, J., concurring in part and dissenting in part).

<sup>19</sup> Potter Stewart, “*Or of the Press*,” 26 HASTINGS L.J. 631, 633 (1975).

<sup>20</sup> See David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 508 (1983) (“The textual antecedents of the first amendment reflect a greater concern with press than with

Madison declared press freedom to be of the “choicest privileges of the people” and proposed language to make press freedom “inviolable.”<sup>21</sup> It was hailed as “one of the greatest bulwarks of liberty”<sup>22</sup> and “essential to the security of freedom in a state.”<sup>23</sup>

Numerous Supreme Court decisions, moreover, have demonstrated the special constitutional status of the press by detailing the unique functions that the press fulfills in our democracy. These functions include informing the public of newsworthy matters<sup>24</sup> and restraining the government and the powerful.<sup>25</sup> Not only does the Constitution recognize and safeguard the press’s role in furthering these structural goals, but the Court also has recognized the ability of legislatures to provide additional press protections.<sup>26</sup> Again, in the words of Justice Stevens, when legislators enact media exemptions they are simply recognizing “the unique role played by the institutional press in sustaining public debate.”<sup>27</sup>

The *Citizens United* majority also raised a definitional objection. It asserted that, even accepting “the most doubtful proposition” that media corporations could be exempted from campaign finance laws, it is unclear which corporations should be considered “media” corporations.<sup>28</sup> Thanks to modern technology, the majority stated, “the line between the media and others who wish to comment on political and social issues becomes far more blurred.”<sup>29</sup>

The definitional argument against a media exemption, however, is not as unworkable as the Court described it. When it comes to recognizing constitutional protections, the fact that courts will be called on to determine some potentially blurry boundaries is not a death sentence. Courts, of course,

speech.”); see also Sonja R. West, *The “Press,” Then & Now*, 77 OHIO ST. L.J. (forthcoming 2016) (detailing the historical evidence that the framing generation highly valued press freedoms).

21 JEFFERY A. SMITH, *PRINTERS AND PRESS FREEDOM: THE IDEOLOGY OF EARLY AMERICAN JOURNALISM* 166 (1988).

22 Virginia Declaration of Rights § 12 (1776), reprinted in 1 BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 234, 235 (1971).

23 Massachusetts Declaration of Rights art. XVI (1780), reprinted in SCHWARTZ, *supra* note 22, at 339, 342.

24 See, e.g., *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936) (declaring “an untrammelled press [to be] a vital source of public information”).

25 See, e.g., *Leathers v. Medlock*, 499 U.S. 439, 447 (1991) (stating that “[t]he press plays a unique role as a check on government abuse”). See generally Sonja R. West, *The Stealth Press Clause*, 48 GA. L. REV. 729, 753-55 (2014).

26 See, e.g., *Branzburg v. Hayes*, 408 U.S. 665, 706 (1972) (“At the federal level, Congress has freedom to determine whether a statutory newsman’s privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned and, equally important, to refashion those rules as experience from time to time may dictate.”).

27 *Citizens United v. FEC*, 558 U.S. 310, 417 (2010) (Stevens, J., concurring in part and dissenting in part).

28 *Id.* at 352-53 (majority opinion).

29 *Id.* at 352.

deal with ambiguous terminology and gray areas in constitutional law on a regular basis without being forced to declare the entire undertaking undoable.

The issue of free speech alone, for example, has forced the Court to draw surely imperfect lines between all kinds of protected and unprotected speech—including commercial speech, obscenity, fighting words, incitement, and threats. And the Court has maneuvered through issues of content-based and content-neutral regulations, questions of speech versus conduct, as well as problems of overbreadth and vagueness. There is simply no reason to assume that when it comes to defining the press, the task of constitutional interpretation is unusually difficult.<sup>30</sup>

The media exemption problem is only a problem if the Court continues to ignore the significant constitutional evidence of press uniqueness. Non-press speakers simply are not—and never have been treated as—the same as the press. And, as Justice Stevens stressed in *Citizens United*: “Once one accepts that much, the intellectual edifice of the majority opinion crumbles.”<sup>31</sup>

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<sup>30</sup> For a discussion of how to distinguish press speakers from non-press speakers, see Sonja R. West, *Press Exceptionalism*, 127 HARV. L. REV. 2434 (2014).

<sup>31</sup> *Citizens United*, 558 U.S. at 431 n.57 (Stevens, J., concurring in part and dissenting in part).