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Favoring the Press

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Favoring the Press

Sonja R. West*

In the 2010 case Citizens United v. Federal Election Commission, the US Supreme Court caught the nation's attention by declaring that corporations have a First Amendment right to spend unlimited amounts of money independently in political campaigns. The Court rested its five-to-four decision in large part on a concept of speaker-based discrimination. In the Court's words, "the Government may commit a constitutional wrong when by law it identifies certain preferred speakers."

To drive home its point that speaker-based distinctions are inherently problematic, the Court focused on one type of speaker distinction—the treatment of news media corporations. The Court began by asserting that allowing regulation of corporate speakers but not of non-corporate speakers would permit the government to limit the speech of media corporations—a thought that the majority called “dangerous, and unacceptable.” The campaign finance law in question, however, included an exemption for the news media, thus protecting the rights of the press. But the Court found the media exemption to be problematic because it treated some corporations differently than others. This favoritism of media corporations, in the Court's view, would also amount to unconstitutional speaker discrimination. To the Citizens United majority, therefore, the news media corporation example settled the question on corporate speech rights. Under this example, a campaign finance law restricting corporate spending that exempted the news media would be unconstitutional speaker-based discrimination, but a law lacking such an exemption would open the door to regulation of the news media.

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But was the Citizens United Court correct about the media corporation dilemma? Is the government no more able to regulate the expressive activities of Exxon Mobil Corporation than those of the New York Times Company? Must all speakers be treated uniformly whether or not they are members of the press? And does the First Amendment's Press Clause (and not just the Speech Clause) play a role in this analysis?

In this Article, I challenge the claim that the First Amendment prohibits the government from treating the press differently than other speakers. Rather than banning such distinctions, the Press Clause traditionally has supported differential treatment of the press. History, court precedent, and legislative practice, moreover, demonstrate how favoritism of press speakers has been condoned and often encouraged.

This debate over the meaning of the Press Clause could have significant ramifications for the future of our free press. A jurisprudential drift of press rights away from protecting core press functions and toward constraining the government's ability to recognize the unique role press speakers play in our democracy could significantly threaten the vital structural safeguards of the Fourth Estate.

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INTRODUCTION

Merely suggest that the press receive different legal protections than other speakers, and one will quickly be met with cries of unfairness. Americans value equality and naturally recoil at the thought of some speakers receiving special treatment.

This common resistance to treating the press differently than other types of speakers made a notable appearance in the 2010 case *Citizens United v. Federal Election Commission*.¹ In reaching its conclusion that corporations and unions could independently spend unlimited amounts of money in political campaigns, the US Supreme Court heavily emphasized how some media organizations have taken the corporate form. The Court explained 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.”² To do so, the Court declared, would constitute speaker discrimination.³ The Court then concluded that the government may not treat corporate speakers differently than other types of speakers; just as it cannot treat press speakers differently than non-press speakers.

The justices who joined together in *Citizens United* are part of a growing chorus of judges and scholars who argue that the First Amendment functions primarily as a nondiscrimination provision.⁴ The First Amendment free expression clauses state that “Congress shall make no law . . . abridging the freedom of speech, or of the press.”⁵ And while the *Citizens United* majority relied on the Speech Clause,⁶ others have suggested that the Press Clause is the “more natural textual home” for this discussion. Under the nondiscrimination view, the Press Clause does not function as an active protector of the press, allowing (and perhaps demanding) government efforts that enable the news media to do their job. Rather, proponents of this view see the Press Clause as an obstacle to government regulations that grant special privileges to select speakers

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

2. *Id.* at 352; *see also id.* (“We have consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers.”) (quoting *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 691 (1990) (Scalia, J., dissenting) (quotation marks omitted)).

3. *See id.*

4. Other prominent advocates of this view include Professor Michael McConnell and Professor Eugene Volokh. *See* Michael W. McConnell, *Reconsidering Citizens United as a Press Clause Case*, 123 YALE L.J. 412, 418 (2013) (arguing that the Press Clause protects the activity of “publishing information and opinions to the general public[.]” not a subset of speakers); 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, 538–39 (2012) (concluding that the Press Clause guarantees “equal treatment to [all] speakers without regard to whether they are members of the press-as-industry”); *see also* Ashutosh Bhagwat, *Producing Speech*, 56 WM. & MARY L. REV. 1029, 1053 (2015) (suggesting that “the dominant understanding of the Press Clause has been that it protects a particular technology (the printing press) rather than a particular group of speakers (the institutional press)”).

5. U.S. CONST. amend I.

6. RANDALL P. BEZANSON, *TOO MUCH FREE SPEECH?* 40 (2012) (noting that the issue of the Press Clause was neither briefed nor argued in *Citizens United*).

including the news media. The right it secures, they argue, is simply the right of all speakers to be treated equally in their ability to publish speech.

The nondiscrimination view of the Press Clause is deeply flawed for the simple reason that the press is different and has always been recognized as such. Unlike other speakers, the press dedicates significant time, resources, and expertise to the journalistic missions of checking the government and informing the citizenry on matters of public concern. While individual speakers might, at times, act in “press-like” ways, only the press is consistently devoted to these endeavors, which at their core strengthen our democracy by countering tendencies toward self-serving aristocracy and by aiding the public’s ability to responsibly participate in our system of self-government.⁷

Recasting the Press Clause as a nondiscrimination provision is not only a dubious concept, but a dangerous one as well. Barring the government from recognizing the differences between press and non-press speakers threatens to undermine the vital role of the Fourth Estate.⁸ It also contradicts decades of Supreme Court precedent in which the Court has repeatedly celebrated the essential functions the press fulfills in our democracy. These functions include the press’s ability to serve as a check on the government and to inform the public on newsworthy matters.⁹

For these reasons, the legislative practice of determining that the press should be favored in some contexts, so as to further a public good, dates back to the birth of the nation. Since then, federal and state legislatures, courts, and other government actors have adopted a wide range of regulations that provide the press with rights, privileges, and protections that are not granted to other speakers. These measures include testimonial privileges; enhanced protections from searches and seizures; procedural safeguards in certain types of litigation; special access to government-controlled places, information, or meetings; reduced fees; preferential postal rates; and exemptions from antitrust regulations as well as certain taxes.¹⁰

At first glance, such laws might seem to provide some speakers with unfair advantages over other types of speakers. Specialized press freedoms, however, are not designed to balance individual rights of one speaker in relation to another. Rather, this differential approach is designed to safeguard the balance of power

7. See Sonja R. West, *Press Exceptionalism*, 127 HARV. L. REV. 2434, 2443–45 (2014) (discussing the government-checking function of the press and distinguishing “occasional public commentators”).

8. See Potter Stewart, “*Or of the Press*,” 26 HASTINGS L.J. 631, 633 (1975) (noting that the Court’s approach to cases involving the press “uniformly reflected its understanding that the Free Press guarantee is, in essence, a *structural* provision of the Constitution”).

9. See Sonja R. West, *The Stealth Press Clause*, 48 GA. L. REV. 729, 749–55 (2014) (describing the two main “unique constitutional functions” of the press as (1) news-gathering and dissemination, and (2) checking the government).

10. See, e.g., *Jefferson Publ’g Corp. v. Forst*, 234 S.E.2d 297, 300–01 (Va. 1977) (strictly construing a statutory sales tax exemption for publications other than newsstand sales).

between the people and their government. Press speakers are unique in the structural work they do to foster the flow of information regarding matters of public importance and to aid the public in monitoring the government and the powerful through shared knowledge. Providing unique legal protections for these speakers defends and enables this work. It is, therefore, entirely in keeping with the text, history, and spirit of the First Amendment's Press Clause for the government to, at times, treat press speakers differently.

In the following discussion, I consider the question of speaker-based classification of the press. It proceeds in four parts: in Part I, I introduce the current debate over the constitutionality of speaker discrimination under the First Amendment, including the Supreme Court's reliance on identity-based discrimination in *Citizens United*. I also detail the rise of the concept of the Press Clause as a nondiscrimination provision and the recently popular argument that press freedom should be read as embracing nothing more than an "all speakers equal" liberty.

In Part II, I highlight the incompatibility of this theory with our nation's tradition of press freedom. In particular, I explore the varied ways in which courts and legislatures have acknowledged the press's unique role throughout our nation's history. In Part II.A, I review the historical evidence illustrating that a favored view of the press can be traced to the founding generation. In Part II.B, I survey America's long and expansive tradition of preferential press treatment, including Supreme Court rulings that explicitly invite legislative actions favoring the press.

After establishing our country's strong relationship with press-favoring laws, I offer a critique in Part III of the idea that the Press Clause functions as a mere nondiscrimination provision. I dissect the logic behind the nondiscrimination view and conclude that it does not align with our existing jurisprudence of press freedom. Rather than lump the press together with other speakers, the Supreme Court has historically done just the opposite. In case after case, the Court has acknowledged and approved of government actions favoring the press. It has done so, moreover, in recognition of the press's unique structural role in our democracy.

I conclude in Part IV by examining the potential ramifications of continuing along the path of demanding speaker equality in relation to the press. By focusing on the connection between the press's identity and function, I offer an alternative vision of how best to protect and strengthen the press in a way that honors its critical, but specialized, constitutional pedigree.

The idea of press exceptionalism is not new. In fact, it is deeply embedded in our constitutional history and structure. Unlike other types of speakers, the press has its own text-based constitutional protection, a unique history of judicial and legislative recognition, and a distinctive policy-driven role that is central to meaningful self-governance. For all of these reasons, rather than fear preferential treatment of the press, Americans should embrace it.

I.

THE FIRST AMENDMENT AND SPEAKER CLASSIFICATIONS

A. Citizens United and Speaker Discrimination

In *Citizens United*,¹¹ the Supreme Court caught the nation's attention by declaring that corporations and unions have a First Amendment right to independently spend unlimited amounts of money in political campaigns. The Court rested its five-to-four decision on a concept of speaker-based discrimination. It violated the First Amendment's Free Speech Clause, the Court pronounced, for the government to limit corporate spending in political campaigns.

Building on its earlier holdings that campaign contributions are a form of political speech, the Court held that legislatures may not limit the political speech of some speakers because of who (or what) they are. The Court likened speaker classifications to the First Amendment's well-established suspicion of subject or viewpoint discrimination.¹² It also made clear that speaker discrimination in and of itself is constitutionally problematic. "Quite apart from the purpose or effect of regulating content," the Court stated, "the Government may commit a constitutional wrong when by law it identifies certain preferred speakers."¹³

The Court's claim that free speech doctrine generally prohibits speaker-based classifications is striking—in large part because it is almost certainly incorrect.¹⁴ Contrary to the Court's assertion, neither history nor Court precedent support the principle that speaker-based distinctions offend the First Amendment. In fact, in prior cases the Court has upheld differential treatment of speakers based on their identities as students,¹⁵ prisoners,¹⁶ members of the

11. 558 U.S. 310 (2010).

12. *Id.* at 340 ("Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints. Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others.") (citations omitted).

13. *Id.*

14. Whether the Court should recognize a constitutional prohibition on speaker classifications is a different question than whether established doctrine has included such a ban. *See, e.g.,* Michael Kagan, *Speaker Discrimination: The Next Frontier of Free Speech*, 42 FLA. ST. U. L. REV. 765, 781 (2015) (arguing that the Court should declare a First Amendment ban on speaker-based discrimination, but admitting that prior to *Citizens United* "the Court had not previously said this clearly"); McConnell, *supra* note 4, at 447 (calling the Court's theory on speaker discrimination "newly minted" and "overbroad").

15. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969) (holding that schools cannot regulate the speech of students "without evidence that is necessary to avoid material and substantial interference with schoolwork or discipline").

16. *See Turner v. Safley*, 482 U.S. 78, 89 (1987) ("[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.").

military,¹⁷ noncitizens,¹⁸ members of Congress,¹⁹ commercial advertisers,²⁰ attorneys,²¹ dissident unions,²² unpopular political candidates,²³ terrorists,²⁴ and federal employees.²⁵

While the Court has occasionally observed that differential treatment of speakers might indicate questionable governmental motivations, it has done so only to root out discrimination based on the content of speech—not discrimination based on the identity of the speaker alone.²⁶ The central focus of

17. See *Parker v. Levy*, 417 U.S. 733, 758 (1974) (“[T]he different character of the military community and of the military mission requires a different application of [First Amendment] protections.”).

18. See *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972) (holding that it does not violate the First Amendment to deny visas to noncitizens who advocate or publish communist doctrine).

19. See *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951) (broadly interpreting the “privilege of legislators to be free from arrest or civil process for what they do or say”).

20. See *L.A. Police Dep’t v. United Reporting Publ’g Corp.*, 528 U.S. 32, 35 (1999) (upholding a California statute that prohibited commercial speakers from accessing arrest records, but did allow access to speakers who wanted the information “for a scholarly, journalistic, political, or governmental purpose”) (citation omitted); *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council*, 425 U.S. 748, 760 (1976) (upholding a Virginia statute limiting licensed pharmacists’ ability to advertise drug prices).

21. See *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 635 (1995) (“Particularly because the standards and conduct of state-licensed lawyers have traditionally been subject to extensive regulation by the States, it is all the more appropriate that we limit our scrutiny of state regulations to a level commensurate with the ‘subordinate position’ of commercial speech in the scale of First Amendment values.”) (quoting *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 477 (1989)).

22. See *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 49 (1983) (holding that a school district did not violate the Constitution by denying access to some unions and not others).

23. *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 683 (1998) (finding that a state-owned broadcaster’s decision to exclude a political candidate from a debate was constitutional as long as the candidate’s “objective lack of support, not his platform, was the criterion”).

24. See *Holder v. Humanitarian Law Project*, 561 U.S. 1, 8 (2010) (finding no First Amendment problem with a federal statute that banned providing support for the lawful speech activities of groups designated as foreign terrorist organizations).

25. See *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) (“We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”).

26. See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 658 (1994) (“Our holding in *Buckley* does not support appellants’ broad assertion that all speaker-partial laws are presumed invalid. Rather, it stands for the proposition that speaker-based laws demand strict scrutiny when they reflect the Government’s preference for the substance of what the favored speakers have to say (or aversion to what the disfavored speakers have to say).”; *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 548 (1983) (rejecting a First Amendment challenge to differential tax treatment of veterans groups and other charitable organizations, but noting that the case would be different had there been any “indication that the statute was intended to suppress any ideas or any demonstration that it has had that effect”); see also *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2230–31 (2015) (“Characterizing a distinction as speaker based is only the beginning—not the end—of the inquiry.”); Leslie Kendrick, *Content Discrimination Revisited*, 98 VA. L. REV. 231, 267 (2012) (“[S]peaker- and medium-based discrimination appears not to be suspect in itself. Only when a particular classification has a high correlation with subject-matter and viewpoint discrimination does the Court conclude that it should be treated with suspicion.”).

free speech protections has consistently remained on safeguarding speakers from government discrimination based on the content of their speech.²⁷

In the wake of *Citizens United*, a few commentators questioned the Court's doctrinal shift toward prohibiting speaker classifications,²⁸ while others expressed concern about possible future consequences of such a ruling.²⁹ One lower court even concluded that the *Citizens United* dissenters' view that some speaker classifications are constitutional was controlling.³⁰ Even the Supreme Court itself seemed unsure how far its ban on speaker-based classifications should go. In *Citizens United*, for example, it explicitly reserved the question of whether bans on campaign spending by foreign nationals and governments would be unconstitutional, and later upheld such a speaker-based prohibition without explanation.³¹

Nonetheless, the Court's decision in *Citizens United* clearly hinged on the premise that speaker-based distinctions are constitutionally problematic.³² For purposes of this Article, however, let us set aside the larger question of whether a First Amendment issue arises whenever the government treats some speakers differently than others and instead focus on the type of speaker distinction the Court relied on to support its holding—the treatment of news media corporations.

27. See, e.g., Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 443 (1996) (calling content-based protection the “keystone of First Amendment law”); see also ROBERT C. POST, *DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE* 9 (2012) (“the cornerstone of the Supreme Court’s First Amendment jurisprudence”) (citation omitted); Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1275, 1304–05 (2006) (“the centerpiece of modern First Amendment doctrine”); Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256, 1270 (2005) (“the unalterable core of the First Amendment”).

28. See McConnell, *supra* note 4, at 448 (“In its Speech Clause decisions, the Court has been vigilant to prohibit discrimination on the basis of viewpoint and sometimes subject matter, but has never before placed speaker-based discrimination in the same suspect category.”) (citation omitted).

29. See, e.g., Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581, 584 (2011) (“For example, it is unclear how, if the Court took its own broad pronouncements in *Citizens United* seriously, it could possibly sustain spending limits against foreign nationals and governments, who might seek to flood U.S. election campaigns with money.”).

30. *Bluman v. FEC*, 800 F. Supp. 2d 281, 289 (D.C. Cir. 2011) (concluding that “the Supreme Court has never squarely addressed the issue presented in this case, the only four [dissenting] justices who spoke to the question in *Citizens United* indicated that the government obviously has the power to bar foreign nationals from making campaign contributions and expenditures”).

31. See *Citizens United v. FEC*, 558 U.S. 310, 362 (2010) (“We need not reach the question whether the Government has a compelling interest in preventing foreign individuals or associations from influencing our Nation’s political process.”). In *Bluman v. FEC*, however, the Court unanimously affirmed a lower court decision holding that the federal law barring foreign individuals from spending or contributing money in US election campaigns did not violate the First Amendment. 565 U.S. 1104 (2012).

32. See *Citizens United*, 558 U.S. at 394 (Stevens, J., dissenting) (noting that government reliance on speaker identity is “[t]he basic premise underlying the Court’s ruling”); Kagan, *supra* note 14, at 781 (observing that speaker discrimination was “a central issue” in the Court’s holding in *Citizens United*).

The campaign finance law in *Citizens United* included an exemption for the news media.³³ Yet the Court declined to rest its decision on this statutory provision.³⁴ Instead, the Court held that the media exemption was unconstitutional.³⁵ Having swept aside the media exemption, the Court then considered the law as though it applied to all corporations, including media corporations. The majority declared the thought that the government could limit the speech of media organizations to be “dangerous, and unacceptable,”³⁶ and Justice Antonin Scalia said it “boggles the mind.”³⁷

Thus, to the *Citizens United* majority, the news media corporation example settled the question on corporate speech rights. Under this example, a campaign finance law restricting corporate spending that exempted the news media would be unconstitutional speaker-based discrimination, but a law lacking such an exemption would open the door to regulation of the news media.³⁸ In dissent, Justice John Paul Stevens summed up the majority’s logic this way:

[T]he legislature is thus damned if it does and damned if it doesn’t. 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.

33. It is arguable, moreover, that the exemption covered the documentary film at the center of the case. See FEC, Advisory Opinion 2010-08, at 5 (June 11, 2010) (in which the FEC, six months after the Court’s decision in *Citizens United*, revisited its earlier advisory opinion and concluded that “Citizens United’s costs of producing and distributing its films, in addition to related marketing activities, are covered by the press exemption”).

34. See *Citizens United*, 558 U.S. at 351–52 (“Media corporations are now exempt from § 441b’s ban on corporate expenditures. Yet media corporations accumulate wealth with the help of the corporate form, the largest media corporations have ‘immense aggregations of wealth,’ and the views expressed by media corporations often ‘have little or no correlation to the public’s support’ for those views. Thus, under the Government’s reasoning, wealthy media corporations could have their voices diminished to put them on par with other media entities. There is no precedent for permitting this under the First Amendment.”) (citations omitted).

35. See *id.* at 352–53 (“[E]ven assuming the most doubtful proposition that a news organization has a right to speak when others do not, the exemption would allow a conglomerate that owns both a media business and an unrelated business to influence or control the media in order to advance its overall business interest. At the same time, some other corporation, with an identical business interest but no media outlet in its ownership structure, would be forbidden to speak or inform the public about the same issue. This differential treatment cannot be squared with the First Amendment.”).

36. *Id.* at 351; see also *id.* at 353 (“There is simply no support for the view that the First Amendment, as originally understood, would permit the suppression of political speech by media corporations. . . . Yet television networks and major newspapers owned by media corporations have become the most important means of mass communication in modern times. The First Amendment was certainly not understood to condone the suppression of political speech in society’s most salient media. . . . At the founding, speech was open, comprehensive, and vital to society’s definition of itself; there were no limits on the sources of speech and knowledge.”) (internal citation omitted).

37. *Id.* at 390 (Scalia, J., concurring); see also Sonja R. West, *The Media Exemption Puzzle of Campaign Finance Laws*, 164 U. PA. L. REV. ONLINE 253 (2016) (discussing the Court’s reliance on both speaker discrimination and press freedom to invalidate a media exemption to a campaign finance law.).

38. See *Citizens United*, 558 U.S. at 314 (“Differential treatment of . . . corporations . . . cannot be squared with the First Amendment”).

If the legislature does not give media corporations an exemption, it violates the First Amendment rights of the press. The only way out of this invented bind: no regulations whatsoever.³⁹

But, was the *Citizens United* Court correct about the media corporation dilemma on which its decision relied? Is the government no more able to regulate expressive activities of Exxon Mobil Corporation than it is of the *New York Times* Company? Must lawmakers treat all speakers identically, whether or not they are members of the press?

In its analysis, the *Citizens United* majority focused on the Speech Clause. Writing for the four dissenters, however, Justice Stevens suggested that the media corporation problem could be resolved by simply reading a bit further along in the First Amendment to the Press Clause. The Press Clause, Justice Stevens argued, provides news organizations with special protection from government regulation, and its text and history demonstrate that not all identity-based speech regulations violate the Constitution.⁴⁰ Indeed, he noted, the Framers themselves drew “distinctions—explicit distinctions—between types of ‘speakers,’ or speech outlets or forms” by singling out the press for special protection.⁴¹

In other words, whether or not the Speech Clause allows for identity-based distinctions, the Press Clause is a clear endorsement of speaker categorization when it comes to the press. The Press Clause tells us that the government historically has, can, and sometimes must treat the press differently than other types of speakers.

B. *The Press Clause is Not a Nondiscrimination Provision*

In a 2013 article, Professor Michael McConnell also turned to the Press Clause to analyze *Citizens United*.⁴² He suggested that the Court was mistaken in stating that the Speech Clause forbids all speaker-based distinctions, yet he also⁴³ contended that the Press Clause does prohibit such classifications.⁴⁴ To McConnell, the Speech Clause’s role is to prevent content-based discrimination, which still leaves room for identity-based groupings.⁴⁵ On the other hand, he

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

40. *See id.* at 431 n.57 (Stevens, J., concurring in part and dissenting in part) (“The text and history . . . [of the Press Clause] suggest[] why one type of corporation, those that are part of the press, might be able to claim special First Amendment status . . .”).

41. *Id.*

42. *See* McConnell, *supra* note 4.

43. *See id.* at 448 (“In its Speech Clause decisions, the Court has been vigilant to prohibit discrimination on the basis of viewpoint and sometimes subject matter, but has never before placed speaker-based discrimination in the same suspect category.”) (citation omitted).

44. *Id.* at 418.

45. *Id.* at 449 (“The Speech Clause comprises a variety of doctrines such as public forum, expressive conduct, time-place-and-manner restrictions, public employee speech, and neutrality in access to subsidies, which have not traditionally been thought to preclude all speaker-based distinctions.”).

suggested that the Press Clause's job is to protect every speaker's right "to disseminate information and opinion to the public through media of mass communication."⁴⁶ This task, he argued, does not leave room for speaker-based distinctions, at least when it comes to the use of newspapers and their functional equivalents.⁴⁷

McConnell's argument is one of several recent versions of an increasingly popular view of the Press Clause as a nondiscrimination provision.⁴⁸ This movement rejects the long-embraced view of the Press Clause as a repository of rights and protections for "the press"—traditionally known as speakers who fulfill unique constitutional functions such as informing the public and checking the government.⁴⁹ Instead, proponents of the antidiscrimination interpretation see the freedom of the press as a mechanical extension of individual speech rights—a safeguard of everyone's right to publish and disseminate their speech.⁵⁰

Advocates of the nondiscrimination interpretation are so confident in their view that they often dismiss any alternative approach as indefensible.⁵¹ Their arguments rest on multiple shared ideas. First, they see only two possible purposes of the Press Clause—it must be either an "all-speakers-equal,"⁵²

46. *Id.*

47. *See id.* ("The heart of the Press Clause is its prohibition on licensing; another way to express the prohibition on licensing is that the government may not pick and choose who can publish.").

48. *See* Randall P. Bezanson, *Whither Freedom of the Press?*, 97 IOWA L. REV. 1259, 1259–60 (2012) (arguing that the Court in *Citizens United* and Professor Volokh have "reduced freedom of the press to nothing. . . . There is no press freedom because there is no press, constitutionally speaking"); Paul Horwitz, *Institutional Actors in New York Times Co. v. Sullivan*, 48 GA. L. REV. 809, 838 (2014) ("In Professor McConnell's view of the Press Clause, however, the point is not that the institutional press receives any special protection. To the contrary, his point is that it receives *no* special protection."); *see also* Ashutosh Bhagwat, *Posner, Blackstone, and Prior Restraints on Speech*, BYU L. REV. 1151, 1157 (2015) ("[T]he most careful modern scholarship tends to confirm the view that the Press Clause was intended and has been understood to protect a particular technology: the printing press (as opposed to a favored group of speakers, the institutional press)."); Edward Lee, *Freedom of the Press 2.0*, 42 GA. L. REV. 309, 345 (2008) ("At its core, the freedom of the press was designed to protect speech technology."); Christina Mulligan, *Technological Intermediaries and Freedom of the Press*, 66 SMU L. REV. 157, 158 (2013) (discussing favorably the "press-as-technology" viewpoint); David B. Sentelle, *Freedom of the Press: A Liberty for All or a Privilege for a Few?*, 2014 CATO SUP. CT. REV. 15, 29 (2014) ("[I]t seems most likely that the public would have understood 'the press' to be referring to all writings, by all citizens, not just those by an elite group that did not even exist in 1791").

49. *But see* David A. Anderson, Response, *The Press and Democratic Dialogue*, 127 HARV. L. REV. F. 331, 334 (2014) ("The case for enforcing the press clause is not dependent on any belief that the press is unique. . . . It is enough that the press is one of the entities that usefully serve these functions, and is the one the Framers saw fit to recognize. Protecting them all would be impossible, and protecting none would be intolerable.").

50. *See Citizens United v. FEC*, 558 U.S. 310, 390 n.6 (2010) (Scalia, J. concurring) ("It is passing strange to interpret the phrase 'the freedom of speech, or of the press' to mean, not everyone's right to speak or publish, but rather everyone's right to speak or the institutional press's right to publish.").

51. *See* Volokh, *supra* note 4, at 465 (arguing that any other conclusion would require reliance on "sources other than text, original meaning, tradition, and precedent for support").

52. *See id.* at 505 ("The freedom of speech, or of the press, the theory goes, provides the same protection for the rights to speak, write, and print.") (quotation marks omitted).

nondiscrimination clause or a source of special rights reserved only for the “institutional press.”⁵³ They also contend that even if the Press Clause involves a more select group of constitutional rights-holders, the task of determining who is or is not the press is impossible.⁵⁴ For textual and historical support, they have rallied around Professor Eugene Volokh’s analysis in a 2012 article claiming that, as a matter of originalist interpretation, the Press Clause “protects everyone’s use of the printing press (and its modern equivalents) as a technology.”⁵⁵ And, finally, proponents of the nondiscrimination interpretation stress that Supreme Court precedent is on their side, echoing the words of the *Citizens United* majority that the Court has “consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers.”⁵⁶

In other articles, I have challenged these points, including: the historical and textual argument that the Press Clause only protects the technology of the printing press;⁵⁷ the claim that the only potential constitutional rights holders under the Press Clause are the “institutional” press;⁵⁸ the allegation that defining the “press” is inherently unworkable;⁵⁹ and the Supreme Court’s purported track record of treating the press like other speakers.⁶⁰ In this Article, however, I focus specifically on the suggestion that the Press Clause functions as a nondiscrimination provision that prohibits speaker-based classifications by the government.

53. See *Citizens United*, 558 U.S. at 352 (“We have consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers.”); McConnell, *supra* note 4, at 418 (“[T]he 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.”) (internal citations omitted); Volokh, *supra* note 4, at 463 (“Under [*Citizen United*]’s approach, the First Amendment rights of the institutional press and of other speakers rise and fall together.”).

54. See McConnell, *supra* note 4, at 418 (arguing that defining the press “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”).

55. Volokh, *supra* note 4, at 462 (emphasis omitted); see also Bezanson, *supra* note 48, at 1260 (suggesting that Volokh’s press-as-technology view “can no longer be said to be an emerging revolution, but an accomplished one”); McConnell, *supra* note 4, at 441 (arguing that the Press Clause only protects “the right of any person to use the technology of the press to disseminate opinions”).

56. *Citizens United*, 558 U.S. at 352 (quoting *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 691 (1990) (Scalia, J. dissenting)); see also *id.* (“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.”).

57. See generally Sonja R. West, *The “Press,” Then & Now*, 77 OHIO ST. L.J. 49 (2016) (expanding the scope of relevant historical evidence and evaluating the founding generation’s view of the Press Clause).

58. See generally West, *supra* note 7 (arguing in favor of a narrow, functional definition of the term “press”).

59. See *id.* (suggesting a “holistic approach” to defining the press).

60. See generally West, *supra* note 9 (contending that the Court has recognized the press as different from other speakers).

A threshold inquiry to this discussion is the sometimes vexing question of who or what is the “press.” To many observers, the freedom of the press merely protects an activity—the individual right to publish and disseminate speech. One problem with this interpretation is that the Speech Clause already protects rights to receive and disseminate speech.⁶¹ Another popular definition is that the “press” is a technology. Thus, press freedom originally secured speakers’ right to use the printing press and today secures speakers’ right to use mass communication technology. Yet publishing speech via mass communication technology is already covered by the Court’s interpretation of the freedom of speech.⁶² Both of these interpretations of the “press” are thus problematic because they relegate the Press Clause to a constitutional redundancy.⁶³

Perhaps more importantly, however, both of these views fail to adequately reflect the historical evidence of the original purpose of press freedom, which was to provide structural protection of the Republic through an informed citizenry and a closely scrutinized government.⁶⁴ The Press Clause is thus best viewed as a safeguard for these unique press functions as opposed to simply a generic right of all individuals to disseminate their messages. To protect those unique functions, moreover, we must identify the speakers who are most effectively acting as government watchdogs and public informants.⁶⁵ I have previously proposed developing a functional definition to determine which speakers fulfill these roles.⁶⁶ And, while I do not claim to have perfected a test, I suggest that such a determination is possible and consistent with how the Court has handled other situations in which it needed to identify a subset of constitutional rights holders.⁶⁷

61. See, e.g., *Reno v. ACLU*, 521 U.S. 844, 874 (1997) (referring to the constitutional right of adults “to receive [speech] and to address to one another”); *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976) (explaining that freedom of speech is “afforded . . . to the communication, to its source and to its recipients both”); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) (stating that the freedom of speech includes “the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences”).

62. See, e.g., *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 826 (2000) (holding that regulations limiting cable operators’ ability to transmit their programs was a violation of the freedom of speech, not the freedom of the press); *Reno*, 521 U.S. at 849 (holding that regulations on speakers’ rights to publish sexually oriented material on the Internet violated the freedom of speech, not the freedom of the press).

63. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) (“It cannot be presumed that any clause in the constitution is intended to be without effect . . .”).

64. See generally West, *supra* note 57, at 62–71.

65. See generally West, *supra* note 7; see also West, *supra* note 9, at 750 (reviewing Supreme Court precedent and identifying the two primary constitutional functions of the press: (1) gathering and disseminating news to the public and (2) providing a check on the government and the powerful).

66. West, *supra* note 7, at 2455–62 (suggesting guidelines for identifying press speakers for purposes of the Press Clause).

67. See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012) (applying a functional inquiry into who was a “minister” for purposes of the Free Exercise Clause); Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. REV. 1025, 1058–60 (2011) (discussing the role of the Speech Clause as a “fallback protections” for the Press Clause).

This discussion, moreover, does not take on the more formidable challenge of defining the press for purposes of recognizing unique constitutional rights. Instead, it considers state and federal lawmakers' longstanding practice of crafting specific laws and regulations (such as reporters' shield laws or access rights) that apply to the speakers they have identified as the most appropriate recipients of such benefits. In particular, I argue in this Article that the Press Clause should be interpreted as supporting the government's ability to recognize such speakers and to create necessary legal safeguards to protect their work rather than bringing such laws into constitutional doubt.

The point on which my argument converges with Professor McConnell's is that the issue the Court considered in *Citizens United* should have been analyzed under the Press Clause rather than the Speech Clause. As McConnell has pointed out, there is little support for the Court's suggestion that speaker-based classifications categorically infringe upon the Speech Clause. He also cautioned that adopting the Court's theory about identity-based distinctions under the Speech Clause could lead to "wider, and perhaps unforeseeable, implications." He argued correctly that analyzing the *Citizens United* case under the Press Clause avoids these problems.

Our views diverge, however, as to why the Press Clause is useful to the Court's analysis. Professor McConnell claims that the Press Clause, unlike the Speech Clause, does prohibit speaker-based discrimination for two reasons. First, he argues that the Press Clause stands for the principle that "the government may not pick and choose who can publish."⁶⁸ Second, he suggests that a Press Clause ban on identity-based regulations would neutralize the troublingly "far-reaching consequences" of the Court's Speech Clause rule.⁶⁹

I believe that both of these arguments are incorrect. First is the suggestion that the Press Clause—and not the Speech Clause—prohibits speaker classifications because it simply protects a speaker's right to publish. As mentioned above, limiting the role of the Press Clause to protecting only the right to publish allows it to be entirely absorbed by the Speech Clause's protection of a speaker's right to reach their audience. Doing so further denies the Press Clause the opportunity to fulfill its independent structural tasks of ensuring that the public is informed and the government is monitored. Declaring that it is the Press Clause (and not the Speech Clause) that forbids speaker classifications, moreover, ignores the historical evidence that the framing generation envisioned identity-based distinctions under the Press Clause, which is far stronger than any such evidence regarding the Speech Clause. The Press Clause has never functioned as a ban on speaker distinctions; rather, it traditionally has worked in support of differential treatment for the press.

68. McConnell, *supra* note 4, at 449.

69. *Id.* at 417.

To McConnell's second point, the potential ramifications of treating the Press Clause as a nondiscrimination provision are deeply problematic. In Part II, I discuss the numerous and wide-ranging laws and regulations that lawmakers have enacted to single out the press for special treatment. Adopting a nondiscrimination view of the Press Clause places them all in doubt. A jurisprudential drift of the freedom of press away from protecting core constitutional press functions and toward constraining the government's ability to recognize the unique role of the press threatens the basic structure of the Fourth Estate.

Nevertheless, I agree that whether the media exemption to the campaign finance law at issue in *Citizens United* constituted unconstitutional speaker-based classification should have been analyzed under the Press Clause. It is, as Justice Stevens observed, "a more natural textual home"⁷⁰ for this discussion than the Speech Clause. And because the preferential treatment of media corporations played such a key role in the majority's logic, it is especially important to explore fully whether a media exemption to the campaign finance regulations actually offended the First Amendment.⁷¹

In the following discussion, I examine the relationship between press freedoms and speaker classifications. This review of history, precedent, and longstanding legislative practice shows that our constitutional tradition not only condones different and preferential treatment of the press but actively endorses it.

II.

THE AMERICAN TRADITION OF PRESS FAVORITISM

A. *The History of Press Favoritism*

The Court in *Citizens United* claimed that it was relying on "ancient First Amendment principles,"⁷² "history," and the Speech Clause "as originally understood" to support the conclusion that "differential treatment [of media corporations] cannot be squared with the First Amendment."⁷³ In fact, however, the majority's historical analysis is extremely thin. Particularly notable is the lack of any evidence in the majority opinion supporting the claim that the

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

71. The Supreme Court, however, has long focused the lion's share of its attention on the Speech Clause, while generally overlooking the Press Clause. See West, *supra* note 7, at 2439 (describing the Speech Clause as the Court's "favorite child" and the Press Clause as "the neglected one"). Thus, most of its decisions affecting the press are framed as questions about freedom of speech. The analysis in this Article, therefore, will consider both speech and press rights, but its ultimate conclusion is that the Press Clause works in support of differing protections for the press.

72. 558 U.S. at 319 (internal quotation marks omitted).

73. *Id.* at 352–53.

Framers disapproved of the government's use of speaker classifications in matters involving the press.⁷⁴

Writing in dissent, Justice Stevens pointed to the majority's failure to offer original meaning evidence, and noted that "[t]o the extent that the Framers' views are discernible and relevant to the disposition of this case, they would appear to cut strongly against the majority's position."⁷⁵ Justice Stevens is correct. Historical evidence shows that the framing generation openly endorsed uniquely favorable treatment of the press, an endorsement based on a structural concept of the capacity of the press to equalize the influence wielded by the public and by other powerful actors.

When discussing the founding generation's treatment of the media, the *Citizens United* Court focused only on a hypothetical scenario in which Congress had *not* exempted the news media from its campaign finance regulation. Such regulation of the press, the justices suggested, would violate the Constitution.⁷⁶ On this point, I certainly agree. There would be serious First Amendment concerns if the law had not included a media exemption, or if the media exemption were too narrowly drawn.⁷⁷

But, in *Citizens United*, the law did include a media exemption. And the exemption is where the issue of potential speaker discrimination comes in. The Court contended that giving preferential treatment to media corporations is unconstitutional,⁷⁸ calling it "the most doubtful proposition that a news organization has a right to speak when others do not."⁷⁹ The Court, however, did not offer any historical evidence implying that the framing generation frowned

74. See *id.* at 426 (Stevens, J., concurring in part and dissenting in part) (arguing that "there is not a scintilla of evidence" to support the majority's original understanding of the First Amendment). But see *id.* at 353–54 ("The Framers may have been unaware of certain types of speakers or forms of communication, but that does not mean that those speakers and media are entitled to less First Amendment protection than those types of speakers and media that provided the means of communicating political ideas when the Bill of Rights was adopted."); *id.* at 390 (Scalia, J., concurring) ("Historical evidence relating to the textually similar clause 'the freedom of the press' also provides no support for the proposition that the First Amendment excludes conduct of artificial legal entities from the scope of its protection.") (alteration omitted).

75. *Id.* at 426.

76. *Id.* at 353 ("The First Amendment was certainly not understood [by the Framers] to condone the suppression of political speech in society's most salient media.").

77. See *Mills v. Alabama*, 384 U.S. 214, 219 (1966) (holding that it violated the First Amendment for a state to punish a newspaper for publishing an editorial on election day urging citizens to vote a particular way, and observing that "[s]uppression of the right of the press to praise or criticize governmental agents and to clamor and contend for or against change . . . muzzles one of the very agencies the Framers of our Constitution thoroughly and deliberately selected to improve our society and keep it free"); see also Brief Amicus Curiae of The Reporters Comm. for Freedom of the Press in Support of Appellant, *Citizens United v. FEC*, 558 U.S. 310 (2010) (No. 08-205) (arguing that a broadly defined media exemption is constitutionally required).

78. See *Citizens United*, 558 U.S. at 352 ("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.").

79. *Id.*

on preferential treatment for press speakers. If the First Amendment generally—or the Press Clause specifically—is truly based on antidiscrimination principles, there should be some indication of early opposition to acts of press favoritism. Yet there is no such evidence. In fact, historical evidence suggests that members of the founding generation were quite comfortable granting the press special benefits.

1. *The Original and Special Status of Press Freedom*

Historical evidence from the founding era shows that the Framers considered press freedom to be of vital importance.⁸⁰ James Madison declared the liberty of the press to be “one of the great bulwarks of liberty”⁸¹ and “essential to the security of freedom in a state.”⁸² It was, he said, among the “choicest privileges of the people”⁸³ and should be considered “inviolable.”⁸⁴ John Adams likewise proclaimed that “[a] free press maintains the majesty of the people.”⁸⁵ Indeed, press historians have concluded that press freedom was “a matter of widespread concern”⁸⁶ to the framing generation and “was everywhere a grand topic for declamation.”⁸⁷

Not only did early Americans value press freedom, but historical evidence suggests that they treasured it even beyond the freedom of speech.⁸⁸ Professor David Anderson explained how press freedom originally took precedence over speech rights in his influential article, *The Origins of the Press Clause*. In that article, Anderson traced the evolution of the clause through pre-Revolutionary and founding-era documents. This evidence, he concluded, shows that “the press clause was primary and the speech clause secondary” in importance and that speech rights evolved only later “as an offshoot of freedom of the press” and freedom of religion.⁸⁹ Indeed, most early state declarations of rights mentioned

80. See West, *supra* note 57, at 62 (“Despite the lack of consensus about the specific meaning of the Press Clause, one thing is certain: Press freedom was of paramount importance at the time of the framing.”).

81. JOSEPH GALES, THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES 451 (1834).

82. MASS. DECLARATION OF RIGHTS art. XVI (1780), *reprinted in* 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 339, 342 (1971).

83. JEFFERY A. SMITH, PRINTERS AND PRESS FREEDOM 166 (1988) (quoting Letter from James Madison to Edmund Randolph (May 31, 1789), *reprinted in* 5 THE WRITINGS OF JAMES MADISON 380 (Gaillard Hunt ed., 1904)).

84. Letter from James Madison to Edmund Randolph (May 31, 1789), *reprinted in* 5 THE WRITINGS OF JAMES MADISON, *supra* note 83, at 377.

85. WENDELL BIRD, PRESS AND SPEECH UNDER ASSAULT 153 (2016) (quoting JOHN ADAMS, A DISSERTATION ON THE CANON AND FEUDAL LAW (1765)).

86. David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 487 (1983).

87. LEONARD W. LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY 214–15 (1960).

88. See Anderson, *supra* note 86, at 508 (“The textual antecedents of the first amendment reflect a greater concern with press than with speech.”).

89. *Id.* at 487.

only the freedom of the press and did not make any reference to speech rights.⁹⁰ This evidence contradicts the nondiscrimination view of the Press Clause as merely an extension of individual speech rights.

Historical evidence, therefore, establishes that members of the founding generation placed the liberty of the press in a special and uniquely significant category. We also learn from the historical evidence that the framing generation valued press freedom in large part because of the important structural role the press plays in our democracy. The Founders viewed a free press as vital to the country's survival by checking government tyranny and corruption and by monitoring laws and public policies through an informed citizenry.⁹¹

There is also early evidence that the Framers embraced press freedom to serve another important public interest—balancing the influence of the “aristocrats who would control Congress” and “ordinary people.”⁹² One way that we know that the Framers viewed the freedom of the press as a tool for combatting the ability of the wealthy to gain control of the public debate and, in turn, political power is through their views of printers. Members of the ratifying generation placed great expectations of duty onto the publishers, and were also comfortable providing them with favorable treatment.⁹³

In many ways, early Americans viewed printers as public servants who worked to amplify voices that might not otherwise be heard. While the government did not support content-based regulations of the press, the public expected its printers to amplify a variety of voices.⁹⁴ In a 1782 newspaper editorial, for example, the author explained that “[a] printer is in this country a sort of public officer, and in that character has a special protection.”⁹⁵ Often the debate focused on printers’ obligation to publish opposing political viewpoints. Benjamin Franklin promoted this idea in 1731 in his article “Apology for Printers,” in which he wrote, “Printers are educated in the Belief, that when Men differ in Opinion, both Sides ought equally to have the Advantage of being heard by the Publick.”⁹⁶

90. See West, *supra* note 57, at 63–64 (discussing the importance of press freedom to the Founders).

91. *Id.* at 67–71 (explaining the Founders’ emphasis on the “structural function” of the press).

92. See AKHIL REED AMAR, BILL OF RIGHTS: CREATION AND RECONSTRUCTION 10, 21 (1998) (observing that the First Amendment’s “historical and structural core was to safeguard the rights of popular majorities (like the Republicans of the late 1790s) against a possibly unrepresentative and self-interested Congress”); *id.* at 10–11 (describing the Anti-Federalists’ concerns of creating an aristocratic government.).

93. I am grateful to Bill Vander Lugt for his insights into this concept.

94. See generally West, *supra* note 57, at 86–88 (discussing views of early printers as public servants.).

95. Sidney, Editorial, FREEMAN’S J., Apr. 10, 1782, available at America’s Historical Newspapers, 1690–1876 (NewsBank, Inc. 2017).

96. Benjamin Franklin, *Apology for Printers*, PA. GAZETTE, June 10, 1731, reprinted in 1 THE PAPERS OF BENJAMIN FRANKLIN 194–99 (Leonard W. Labaree ed., 1959).

While the press was praised when it was seen as presenting multiple points of view, it was likewise heavily criticized when it was deemed to have come under the control of powerful political parties or wealthy individuals. For example, Thomas Jefferson's reputation was severely damaged after it was disclosed in 1792 that he had hired a newspaper editor as a "government translator."⁹⁷ The alliance between a government actor and a member of the press triggered the ratifying generation's fear of coercion by the economically powerful—coercion that the press was meant to guard against.⁹⁸ As historian Jeffrey Pasley explained:

The standard scenario in which Americans imagined liberty being destroyed called for an ambitious leader or 'junto' of leaders to recruit a loyal corps of helpers, men whose loyalties were to their leader rather than the community as a whole These subverters of liberty could come in many forms: a warlord's private army, a classical dictator's Praetorian Guard, or the parliamentary pensioners and hireling newspaper editors of Britain.⁹⁹

Early Americans saw the press as playing a crucial structural role in our democratic debate that functioned as a counter-balance to the voices of the wealthy and powerful. The press has always occupied a special place in the heart of our constitutional democracy. The founding generation, in fact, viewed the importance of press freedom as different from, and at times even more important than, basic speech rights. Historically, we have treated the press as special because of the structural roles it fills.

2. *The Early Practice of Press Favoritism*

The early reverence for the unique structural role of the press was more than just talk. The founding generation also practiced press favoritism. The primary example of this early embrace of special press rights can be found in the development of the United States Post Office. According to Professor Anju C. Desai, government actors openly encouraged and fought for privileged benefits for the press during the formation and growth of the Post Office.¹⁰⁰ This history, he noted, "raises serious questions about First Amendment theories that call for an arm's length relationship between government and the press."¹⁰¹ Thus, as

97. See JEFFREY L. PASLEY, "THE TYRANNY OF PRINTERS": NEWSPAPER POLITICS IN THE EARLY AMERICAN REPUBLIC 75 (2001).

98. See *id.*

99. *Id.*

100. Professor Desai has argued that the history of the Post Office is an important source of information about the Press Clause that has been "virtually ignored by First Amendment scholars even those whose work explores the historical origins of the Free Speech and Free Press Clauses." Anuj C. Desai, *The Transformation of Statutes into Constitutional Law: How Early Post Office Policy Shaped Modern First Amendment Doctrine*, 58 HASTINGS L.J. 671, 689 (2007).

101. *Id.* at 688.

Desai rightly observed, “any First Amendment theory based on originalism . . . must contend with this intertwined relationship.”¹⁰²

The Framers believed that the free flow of information was critical to the unity of the country’s citizenry and that “a conduit for political information was a necessary condition for maintenance of a democracy over such a geographically dispersed area.”¹⁰³ To accomplish this, they turned to newspapers for information and to the Post Office for distribution. James Madison explained in a 1791 essay in the *National Gazette* that “[w]hatever facilitates a general intercourse of sentiments, as good roads, domestic commerce, a free press, and particularly a circulation of newspapers through the entire body of the people, . . . is favorable to liberty, where [the geographical reach of the nation otherwise] may be too extensive.”¹⁰⁴

The decision to use the national Post Office to spread news was no historical accident, according to Desai, but the result of “a substantial amount of conscious government policy.”¹⁰⁵ The Framers were unusually unified in their support of the plan.¹⁰⁶ Even political opponents who were typically at odds over matters of government policy agreed that the best way to improve public knowledge was by circulating newspapers via the Post Office.¹⁰⁷ To these early government officials, not all types of communication were equal. Rather, they saw newspapers as occupying a special place.¹⁰⁸ Government officials expressed their unique favoritism of the press by granting substantial subsidies for the shipment of newspapers.¹⁰⁹

The unique status of newspapers played a central role in the congressional debates leading to the passage of the Post Office Act of 1792. It is especially noteworthy that this debate was not about *whether* to give preferential treatment to newspapers, but about *how much* preferential treatment to give them.¹¹⁰ The congressmen ultimately agreed to allow all newspapers access to the postal

102. *Id.*

103. *Id.* at 686; *see also* THE SELECTED WRITINGS OF BENJAMIN RUSH 29 (Dagobert D. Runes ed., 1947) (“For the purpose of diffusing knowledge, as well as extending the living principle of government to every part of the United States; every state—city—county—village—and township in the union, should be tied together by means of the post-office.—This is the true non-electric wire of government.”).

104. James Madison, *Public Opinion*, NAT’L GAZETTE, Dec. 19, 1791, *reprinted in* 14 THE PAPERS OF JAMES MADISON 170 (Robert A. Rutland et al. eds., 1983).

105. Desai, *supra* note 100, at 672.

106. *See id.* at 692–93.

107. *Id.* at 693.

108. *See id.* at 680 (discussing the relationship between newspapers and the postal service in the eighteenth century).

109. *See* George Washington, President, Fourth Annual Address to the United States Senate and House of Representatives (Nov. 6, 1792) (“It is represented that some provisions in the law which establishes the post office operate, in experiment, against the transmission of news papers to distant parts of the country. Should this, upon due inquiry, be found to be the fact, a full conviction of the importance of facilitating the circulation of political intelligence and information will, I doubt not, lead to the application of a remedy.”).

110. *See* Desai, *supra* note 100, at 692–93.

system at “rates that were both far below those of ordinary letters and below the actual cost of delivery.”¹¹¹ The result was a system under which newspaper publishers mailed their papers to subscribers at a rate that was heavily subsidized by other non-press speakers, such as merchants and personal letter writers, who paid a higher price to send their missives.¹¹²

The Post Office Act’s subsidized postal rate for newspapers demonstrates the early acceptance of government favoritism of the press over other speakers. Congressional embrace of speaker-based classifications favoring the press, however, did not mean that early congressmen were comfortable with laws that involved content-based discrimination. These same congressmen, for example, rejected a proposal to reduce the burden on the postal system by allowing only some newspapers to use the mail service. They rejected the proposal out of fear “that such a policy would be used discriminatorily and would effectively amount to a federal subsidy for the government’s supporters in the press.”¹¹³

Not only did the early Congress treat newspaper publishers more favorably than other types of speakers, it also gave preferential treatment to certain subgroups of the press—notably smaller, rural newspapers—in an effort to support the functional role of these papers in servicing certain communities. With this goal, Congress passed regulations that were specifically designed to help less profitable, rural newspapers compete with their wealthier urban counterparts.¹¹⁴ Historical evidence reveals that smaller, rural newspapers “were the special darlings of Congress, whose policies were deliberately designed to foster them and make them competitive with city newspapers” and “to protect them against the encroachments of the urban press.”¹¹⁵ In other words, contrary to the assertions of the *Citizens United* majority, early government policy makers embraced the idea that some speakers, even press speakers, “could have their voices diminished to put them on par with other media entities.”¹¹⁶

These overt actions by Congress favoring the press over other speakers were not simply historical anomalies or examples of an overlooked yet still unconstitutional act. They were, rather, a closely examined and acknowledged legislative power. In the 1913 case *Lewis Publishing Co. v. Morgan*, for example, the Supreme Court explicitly considered Congress’s power to treat the press differently than other speakers through the development of the postal service.¹¹⁷ The Court found that there was “no doubt that from the beginning[,] Congress,

111. *Id.* at 693.

112. *Id.* at 694.

113. *Id.* at 691.

114. *Id.* at 693–94.

115. WAYNE E. FULLER, *THE AMERICAN MAIL: ENLARGER OF THE COMMON LIFE* 113 (Daniel J. Boorstin ed., 1972).

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

117. *Lewis Publ’g Co. v. Morgan*, 229 U.S. 288, 301 (1913).

in exerting the power to establish post-offices and post-roads, has acted upon the assumption that it was not bound by any hard and fast rule of uniformity”¹¹⁸

Focusing specifically on Congress’s ability to provide newspapers with lower postal rates, the *Lewis Publishing* Court reviewed the history of the Post Office Act and found that Congress was always free to favor the press.¹¹⁹ This power, moreover, “rested upon broad principles of public policy” under which Congress could decide “how far it was wise for the general welfare to give advantages to one class not enjoyed by another.”¹²⁰ The Court reached this holding while openly acknowledging that this meant Congress had the power to discriminate against non-press speakers. Indeed, it stated that Congress had the power to favor the press even though such a law “apparently seriously discriminates against the public and in favor of newspapers, periodicals, etc., and their publishers.”¹²¹ This serious discrimination was allowable, the Court further held, despite the fact that this favoritism bestowed upon newspaper publishers great economic and other advantages that “undoubtedly operated a very great discrimination in their favor.”¹²²

The actions of early federal lawmakers in creating postal subsidies for newspaper publishers, as well as the Supreme Court’s acceptance of that power, confirms what the early history of the nation suggests—namely that lawmakers could and did engage openly in speaker-based classifications in favor of the press.

B. The Precedent and Practice of Press Favoritism

The historical evidence suggests that early Americans were not opposed to speaker-based classifications favoring the press. In fact, they supported special rules as means to further the valuable structural functions the press fulfills. This tradition of press favoritism has continued and grown.

Indeed, more than a hundred years of court precedent as well as state and federal legislation refute an interpretation of the Press Clause as a constitutional prohibition on speaker-based discrimination. Rather than invalidating any government action that treats press speakers differently from other speakers, the courts have consistently allowed—and often encouraged—just such distinctions.

118. *Id.*

119. *Id.* at 302 (“[I]t was always conceived not only that Congress might so exert its power as to favor the circulation of newspapers, by giving special mail advantages . . .”).

120. *Id.* at 303.

121. *Id.* at 313; *see also* *United States ex rel. Milwaukee Soc. Democratic Publ’g Co. v. Burleson*, 255 U.S. 407, 410 (1921) (noting the preferential postal rates are “a frank extension of special favors to publishers because of the special contribution to the public welfare which Congress believes is derived from the newspaper and other periodical press”).

122. *Lewis Publ’g Co.*, 229 U.S. at 303–04; *see also* *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 157 (1946) (holding that the US Postal Service could not withdraw a publication’s mail permit based on its own views of whether the publication served the public good or not).

State and federal lawmakers, meanwhile, have both implicitly and explicitly approved of speaker categorization by enacting special protections for the press.

1. The Supreme Court Has Endorsed Laws Favoring the Press

The clearest evidence that special rights and protections for the press are not constitutionally prohibited can be found in the words of the Supreme Court itself. On many occasions, the Court has explicitly endorsed legislative protection for the press.

Perhaps most notable is the landmark 1972 case of *Branzburg v. Hayes*.¹²³ *Branzburg* is most widely known for the holding that journalists do not have a constitutionally mandated testimonial privilege. Justice Byron White authored the opinion of the Court and refused to recognize a First Amendment protection for reporters who were subpoenaed to testify in front of a grand jury about their confidential sources.¹²⁴ Yet, while holding that the Constitution did not require a reporter's privilege in that instance, Justice White made clear that it also did not prohibit such a privilege if legislatively granted.

In fact, Justice White affirmatively encouraged legislators to decide for themselves whether to provide this form of extra protections for the press. He contended that legislators are better situated than courts to evaluate the need for special rights. At the federal level, he explained, "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." He likewise suggested that the same is true for state legislatures, which are "free, within First Amendment limits, to fashion their own standards in light of the conditions and problems with respect to the relations between law enforcement officials and press in their own areas."¹²⁵

An argument that the First Amendment prohibits differential treatment of press speakers is completely contradictory to this holding in *Branzburg*. If there were such a constitutional ban, it would, of course, supersede any law enacted by federal or state legislatures. A constitutional rule prohibiting preferential press

123. 408 U.S. 665 (1972).

124. Lower courts and scholars have debated the holding in the *Branzburg* case due to an ambiguous concurrence by Justice Lewis Powell, one of the five justices who signed on to the Opinion of the Court, advocating a case-by-case balancing approach to a constitutional reporters' privilege. See Sonja R. West, *Concurring in Part & Concurring in the Confusion*, 104 MICH. L. REV. 1951, 1951–54 (2006) (discussing the confusion surrounding the *Branzburg* opinion). The result is that today almost all the federal circuits and many state courts recognize at least some form of a First Amendment privilege. See *The Reporter's Privilege Compendium: An Introduction*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, <http://www.rcfp.org/browse-media-law-resources/guides/reporters-privilege/introduction> [https://perma.cc/V4N8-RX6X] (noting constitutional and common law protections for the press at the state and federal appellate level).

125. *Branzburg*, 408 U.S. at 706.

treatment, moreover, would also be supreme over a state constitutional provision providing such advantages. Yet, the Court in *Branzburg* declared just the opposite, stating that it “goes without saying, of course, that we are powerless to bar state courts from responding in their own way and construing their own constitutions so as to recognize a newsman’s privilege, either qualified or absolute.”¹²⁶

Branzburg is not the only example of the Supreme Court explicitly approving legislative protections for the press. For example, the plurality in *Houchins v. KQED, Inc.*¹²⁷ denied a constitutional right for journalists to have access to county jails beyond the access granted all other persons. The Court, however, recognized a legislative power to provide for such additional access. Chief Justice Warren Burger captured this endorsement, calling the journalists’ argument for a constitutional access right flawed, “because it invites the Court to involve itself in what is clearly a legislative task which the Constitution has left to the political processes.”¹²⁸ He later reiterated that the power to grant special media access to jails or prisons lies with the legislatures, stating that “until the political branches decree otherwise, *as they are free to do*, the media have no special right of access to the Alameda County Jail different from or greater than that accorded the public generally.”¹²⁹ And in *Zurcher v. Stanford Daily*, a case involving both First and Fourth Amendment rights, the Court found no constitutional problem with government searches of newsrooms.¹³⁰ But it went on to note that the Constitution did “not prevent or advise against legislative or executive efforts to establish nonconstitutional protections.”¹³¹

Lower court judges have echoed the Supreme Court’s approval of legislative protections directed at the press. In *In re Grand Jury Subpoena, Judith Miller*,¹³² a reporter and a publisher appealed contempt orders directed at them after they refused to reveal the names of their sources in response to grand jury subpoenas. The D.C. Circuit found that the First Amendment did not protect them from testifying. In a concurring opinion, however, Judge David Sentelle noted that key questions regarding a privilege, such as its scope and to whom it would apply, “smack[s] of legislation more than adjudication[.]”¹³³ He advised members of the media advocating for such a right to “address those concerns to the Article I legislative branch for presentment to the Article II executive [rather] than to the Article III courts.”¹³⁴

126. *Id.*

127. 438 U.S. 1 (1978).

128. *Id.* at 12.

129. *Id.* at 16 (emphasis added).

130. 436 U.S. 547, 567–68 (1978).

131. *Id.* at 567.

132. 438 F.3d 1141 (D.C. Cir. 2006).

133. *Id.* at 1158.

134. *Id.*; see also *id.* (“[S]uch a decision requires the resolution of so many difficult policy questions, many of them beyond the normal compass of a single case or controversy such as those with which the courts regularly deal . . .”).

A variety of other federal courts have also reached the conclusion that legislatures are better situated to create protections for the press. The Fourth Circuit stated that Congress “can more effectively and comprehensively weigh the policy arguments for and against adopting a privilege and define its scope.”¹³⁵ Other federal courts have stressed that giving the press special status serves important public policies. These include protecting “the vital communication role played by the press in a free society”¹³⁶ and “a paramount public interest in the maintenance of a vigorous, aggressive and independent press capable of participating in robust, unfettered debate over controversial matters, an interest which has always been a principal concern of the First Amendment.”¹³⁷ A long line of federal cases supports the proposition that the press may plead their case for special treatment to the legislatures.¹³⁸

2. Numerous Laws Grant the Press Special Rights and Protections

Another indication that laws privileging the press are constitutional is the sheer number of them that have been enacted—none of which has been found to involve unconstitutional speaker discrimination. The quantity, breadth, and longevity of laws benefiting the press¹³⁹ are difficult to square with the view that such differing treatment violates the First Amendment.

The majority of states, for example, have enacted shield laws that provide varying degrees of protection for the press.¹⁴⁰ Although many of these laws have

135. *United States v. Sterling*, 724 F.3d 482, 505 (4th Cir. 2013).

136. *Riley v. City of Chester*, 612 F.2d 708, 715 (3d Cir. 1979); *see also id.* at 714–15 (reviewing the legislative history of Federal Rule of Evidence 501 to demonstrate that the rule was “designed to encompass . . . a reporter’s privilege not to disclose a source” and discussing the Pennsylvania shield statute: “Although . . . [the court is] not bound to follow the Pennsylvania law, neither should . . . [it] ignore Pennsylvania’s public policy giving newspaper reporters protection from divulging their sources.”).

137. *Von Bulow v. Von Bulow*, 811 F.2d 136, 144 (2d Cir. 1987) (quoting *Baker v. F & F Inv.*, 470 F.2d 778, 782 (2d Cir. 1972)); *see also Gonzales v. NBC*, 194 F.3d 29, 36 n.6 (2d Cir. 1999) (noting in a footnote the ability of Congress to modify journalist’s privilege).

138. *See, e.g., PG Publ’g Co. v. Aichele* 705 F.3d 91, 107 (3d Cir. 2013) (noting that the press seeking a right of access “must rely, as so often in our system we must, on the tug and pull of the political forces in American society”) (internal quotation marks and citation omitted); *In re Grand Jury Proceedings*, 810 F.2d 580, 588 (6th Cir. 1987) (finding that a Michigan shield law which treated newspaper reporters differently than broadcast media reporters was not an equal protection violation); *Coughlin v. Westinghouse Broad. & Cable, Inc.*, 780 F.2d 340, 350 (3d Cir. 1986) (Becker, J., concurring) (noting the need to defer to legislature’s judgment on reporter’s shield laws).

139. *See* David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 430–32 (2002) (observing that governmentally granted, but not necessarily constitutionally required, legal preferences for the press are “numerous” and “are among the principal features that distinguish the press from other information businesses”).

140. *See generally* Joel G. Weinberg, *Supporting the First Amendment: A National Reporter’s Shield Law*, 31 SETON HALL LEGIS. J. 149 (2006) (discussing the various applications of the reporter’s privilege across jurisdictions and proposing a national reporter’s shield law); *The Reporter’s Privilege*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, <http://www.rcfp.org/reporters-privilege> [<https://perma.cc/MQ7J-MBXM>] (compiling information on the reporter’s privilege available in every state and federal circuit).

been enacted since *Branzburg*, state legislative protection for the press has been going on for over a century. Maryland enacted the first state shield law in 1896, in response to the jailing of two reporters who refused to reveal their confidential sources to a Senate committee.¹⁴¹ Ten other states followed suit in the 1930s.¹⁴² Since the 1970s, most states have passed shield statutes, bringing the total number of states with statutory protection for the press to thirty-nine, along with the District of Columbia.¹⁴³

A variety of other state laws give the press special legal protections. Examples of such protections include: an opportunity for the media to provide evidence of mitigation for actions of defamation or libel,¹⁴⁴ an opportunity for the media to publish a correction prior to an action for libel or slander,¹⁴⁵

141. Act of Apr. 2, 1896, ch. 249, 1896 Md. Laws 437 (codified at MD. CODE ANN., CTS. & JUD. PROC. § 9-112 (Lexis 2017)); see also Dean C. Smith, *The Real Story Behind the Nation's First Shield Law: Maryland, 1894–1897*, 19 COMM. L. & POL'Y 3 (2014) (addressing several misconceptions about the adoption of Maryland's first shield law).

142. See Mary-Rose Papandrea, *Citizen Journalism and the Reporter's Privilege*, 91 MINN. L. REV. 515, 516 n.4 (2007) (listing the states that "followed suit" in the 1930s).

143. See Introduction—*Legislative Protection of News Sources—The Constitutional Privilege and Its Limits*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, <http://www.rcfp.org/first-amendment-handbook/introduction-legislative-protection-news-sources-constitutional-privilege-a> [https://perma.cc/55JH-JKBJ]. Although no federal shield statute exists, federal legislation also has been proposed multiple times. See generally RonNell Andersen Jones, *Avalanche or Undue Alarm? An Empirical Study of Subpoenas Received by the News Media*, 93 MINN. L. REV. 585, 594–615 (2008) (discussing various federal shield law proposals).

144. See, e.g., IOWA CODE § 659.2 (2017) (limiting damages if a media defendant shows that defamatory statement was "published or broadcast through misinformation or mistake"); VA. CODE ANN. § 8.01-48 (West 2016) (media defendant in action for libel or defamation may introduce mitigation evidence including source of the information, prior publications of similar purport, and apology or retraction (if any), whether punitive damages are sought or not).

145. See, e.g., MONT. CODE ANN. § 27-1-818 (2015) (written notice and the opportunity to correct the defamatory statements must be afforded media defendants prior to a claim of punitive damages); TENN. CODE ANN. § 29-24-103 (West 2017) (plaintiff may not recover punitive damages if media defendant publishes an apology or retraction within 10 days of receiving notice); OR. REV. STAT. ANN. § 31.210 (West 2017) (limiting damages against media defendants unless a correction is first demanded but not published).

restrictions on search warrants¹⁴⁶ and seizures,¹⁴⁷ an additional notice requirement,¹⁴⁸ special requirements for subpoenas of media witnesses,¹⁴⁹ and assurances that publication of a source shall not be considered a waiver of any protections provided by the state's shield statute.¹⁵⁰ Still more state laws give the press additional privileges that other speakers do not enjoy, such as special access to inmates,¹⁵¹ to arrest records,¹⁵² and to reduced fees.¹⁵³

Another noteworthy example of legislators enacting laws to protect the press arose after the 1978 case of *Zurcher v. Stanford Daily* in which the Supreme Court held that there was no First Amendment defense to government

146. See, e.g., LA. STAT. ANN. § 15:42 (Lexis 2017) (no search warrant directing seizure of property related to a person engaged in the news media absent an affidavit that such person has committed a criminal offense); IND. CODE ANN. § 35-33-5-14 (West 2016) (requiring reasonable notice and opportunity to be heard in court prior to issuance of search warrant relating to journalist or news media, absent government notice that notification would pose a "clear and substantial" threat to a criminal investigation); CAL. PENAL CODE § 1524(g) (West 2017) ("No warrant shall issue for" news source); CONN. GEN. STAT. §§ 54-33i, 54-33j (2017); 725 ILL. COMP. STAT. 5/108-3(b) (2017) (setting restrictions on search warrants for things which are used for the "gathering or dissemination of news"); NEB. REV. STAT. § 29-813(2) (2017) (restricting issuance of search warrants for news sources); N.J. STAT. ANN. § 2A:84A-21.9 (West 2017) (stating that any person or entity engaged in disseminating news "shall be free from searches and seizures"); OR. REV. STAT. ANN. § 44.520(2) ("[n]o papers, effects or work premises of a person connected with, employed by or engaged in any medium of communication to the public shall be subject to a search"); TEX. CODE CRIM. PROC. ANN. art. 18.01(e) (West 2017) (forbidding search warrants for "property or items . . . in an office of a newspaper, news magazine, television station, or radio station"); WASH. REV. CODE ANN. § 10.79.015(3) (West 2017) (requiring a subpoena *duces tecum* to obtain evidence from a source related to a homicide or felony); WISC. STAT. ANN. § 968.13(1)(d) (West 2017).

147. See, e.g., N.J. STAT. ANN. § 2A:84A-21.9 (West 2017) ("Any person, corporation, partnership, proprietorship or other entity engaged on, engaged in, connected with, or otherwise employed in gathering, procuring, transmitting, compiling, editing, publishing, or disseminating news for the public, or on whose behalf news is so gathered, procured, transmitted, compiled, edited, published or disseminated shall be free from searches and seizures, by State, county and local law enforcement officers with respect to any documentary materials obtained in the course of pursuing the aforesaid activities whether or not such material has been or will be disseminated or published.").

148. See, e.g., CAL. CIV. PROC. CODE § 1986.1 (West 2013) ("[A] party issuing a subpoena in any civil or criminal proceeding to a third party that seeks the records of a journalist shall, except in circumstances that pose a clear and substantial threat to the integrity of the criminal investigation or present an imminent risk of death or serious bodily harm, provide notice of the subpoena to the journalist and the publisher . . . at least five days prior to issuing the subpoena."); FLA. STAT. ANN. § 770.01 (West 2017) (requiring that the plaintiff serve media defendants with written notice specifying alleged defamatory statements at least five days prior to instituting the suit); TENN. CODE ANN. § 29-24-103 (requiring written notice five days prior to the institute of a civil action).

149. See, e.g., ARIZ. REV. STAT. ANN. § 12-2214 (2017) (subpoena for witness or production of evidence directed to a person engaged in the news publication or broadcasting must be accompanied by an affidavit).

150. See, e.g., D.C. CODE ANN. § 16-4704 (West 2017).

151. See, e.g., MINN. STAT. § 241.251 (2016) (permitting inmates of state correctional facilities to speak with representatives of the news media and noting that exercising such right shall not constitute a regular facility visit).

152. See, e.g., CAL. GOV'T CODE § 6254(f)(3) (West 2017).

153. 5 U.S.C.A. §§ 552(a)(4)(A)(ii)(I)–(II) (West 2016) (stating the administrative fees for Freedom of Information Act requests by a "representative of the news media" will be lower than those requested "for commercial use").

searches of newsrooms.¹⁵⁴ In direct response, Congress passed the Privacy Protection Act of 1980, which limited the government's ability to search or seize the work product of "a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication."¹⁵⁵

Through their press-favoring laws, legislators have shown an interest in protecting not only the press's acts of newsgathering and reporting, but also its economic stability as a means to ensure its independence. Almost 200 years after the early Congress enacted favorable postal rates for the press, for example, Congress again passed a major piece of legislation with the explicit purpose of preserving the nation's newspapers.

The legislation was enacted in response to a 1969 Supreme Court decision affirming judgments of antitrust violations against two daily newspapers. That case, *Citizen Publishing Co. v. United States*, arose out of a time of declining circulations for newspapers in which many urban markets were no longer able to sustain multiple competitive daily newspapers. The two newspapers in the case, like many others across the country, had entered into a joint operating agreement in which they shared business operations but not editorial and news departments.¹⁵⁶ But the Court held that the agreement violated the anticompetitive provisions of the Sherman and Clayton Acts.

In response, Congress swiftly passed the Newspaper Preservation Act of 1970 ("NPA"), with retroactive application. The NPA exempted joint operating agreements between competing newspapers from the otherwise generally applicable antitrust laws. The express purpose of the legislation was to help one type of speaker—the "newspaper press." Congress stated that it was acting in the public's interest of "maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States."¹⁵⁷ While the ultimate success of the NPA as a policy initiative has been criticized, two lower courts upheld its constitutionality in separate legal challenges.¹⁵⁸

In addition to official legislation, the Court has supported other, more informal ways the government has advantaged the press over other speakers. We see this plainly in the area of access. Preferential access to government information, meetings, and places ties directly to speech.¹⁵⁹ And while the Court

154. 436 U.S. 547, 567–68 (1978).

155. 42 U.S.C. § 2000aa (2012).

156. 394 U.S. 131, 133 (1969).

157. Newspaper Preservation Act, Pub. L. No. 91-353, § 2, 84 Stat. 466 (1970) (codified at 18 U.S.C. § 1801 (2012)).

158. See *City & Cty. of Honolulu v. Haw. Newspaper Agency, Inc.*, 559 F. Supp. 1021, 1032 (D. Haw. 1983) (holding that the NPA was a selective repeal of antitrust laws for the newspaper industry and stating that such preferential treatment did not violate the Press Clause); *Bay Guardian Co. v. Chronicle Publ'g Co.*, 344 F. Supp. 1155, 1158 (N.D. Cal. 1972) (rejecting the argument that the NPA violated the First Amendment, because it was "merely a selective repeal of the antitrust laws").

159. But see *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576–77 (1980) ("The explicit, guaranteed rights to speak and to publish concerning what takes place at a trial would lose much

has held that the press does not have a heightened constitutional right of access, it also has never expressed concern with government actors choosing to grant preferential access to the press.

At every level of federal, state, and local government, public officials routinely provide the press with special rights of access to government-controlled information and places.¹⁶⁰ They do this by issuing special press access to government buildings, non-public spaces, press conferences, press secretaries, press pools, press galleries, press planes, executions, crime and disaster scenes, and military operations.¹⁶¹ As long as the process for distributing the necessary credentials is reasonable and not viewpoint-based, the courts have uniformly upheld this type of preferential treatment.¹⁶²

Even the Supreme Court has a credentialing policy that confers upon certain members of the press “privileges that journalists find helpful, including access to seats in the Courtroom during Court sessions; use of the pressroom facilities and office resources; assigned personal work space; and access to the Court building after normal business hours.”¹⁶³ The Court’s Public Information Office also provides “credentialed reporters with information and guidance, beyond what is provided to the public, that facilitates their work.”¹⁶⁴ According to its policy guidelines, the Court’s Public Information Office typically awards press passes to “full-time professional journalists employed by media organizations that have records of substantial and original news coverage of the Court.”¹⁶⁵ But, the guidelines note, the decision to award a press pass will not include consideration of any content-based factors.¹⁶⁶

To risk stating the obvious, the Court’s press credentialing policy is an excellent example of a government regulation that significantly favors the press over other types of speakers. Seating for a Supreme Court oral argument is a

meaning if access to observe the trial could, as it was here, be foreclosed arbitrarily.”); *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972) (recognizing that “without some protection for seeking out the news, freedom of the press could be eviscerated”).

160. See *Anderson*, *supra* note 139, at 486 (“Congress, the White House, legislatures, government agencies, courts, the military services, and the police give representatives of the press preferential access.”).

161. See *Sherrill v. Knight*, 569 F.2d 124, 130 (D.C. Cir. 1977) (recognizing the right of a “bona fide Washington correspondent” to a White House press pass).

162. See, e.g., *L.A. Free Press, Inc. v. City of L.A.*, 88 Cal. Rptr. 605, 609 (Cal. Ct. App. 1970) (upholding the city of Los Angeles’s denial of a press pass to the petitioner publisher because “[t]here is no constitutional requirement that Respondent show uniform treatment to all publications or news media in issuing Press Passes, the only requirement being that there be a reasonable basis for the classification imposed”).

163. SUPREME COURT OF THE UNITED STATES, REQUIREMENTS AND PROCEDURES FOR ISSUING SUPREME COURT PRESS CREDENTIALS (2015), http://www.supremecourt.gov/publicinfo/press/Media_Credential_Requirements_And_Procedures_February_2015_v2.pdf [<https://perma.cc/P5FB-KEQ2>].

164. *Id.*

165. *Id.*

166. *Id.* (“The PIO makes no assessment of the content or quality of a journalist’s coverage in the credentialing process.”).

notoriously competitive enterprise.¹⁶⁷ It is also a zero-sum game; each journalist who is allowed in means another non-press speaker will not get a seat. The Court's credentialing policy thus leads directly to many non-press speakers being shut out of the proceedings (which, also notoriously, are not broadcast outside the courtroom).¹⁶⁸ Transcripts and audio recordings of oral arguments and opinion announcements are released hours, days, or even months later,¹⁶⁹ leaving a crucial interim period in which only certain favored speakers have the necessary information to speak about the oral arguments.¹⁷⁰ Thus, in the words of its opinion in *Citizens United*, the Court itself regularly "identifies certain preferred speakers" for favored treatment and, in the process, restricts the ability of others to speak by "taking the right to speak from some and giving it to others."¹⁷¹

The Court also has praised this practice of preferential press access to limited-space proceedings in other contexts. In *Richmond Newspapers v. Virginia*, the Court held that the press and the public have a constitutional right of access to criminal trials. While not treating the press differently for its constitutional analysis, the opinion acknowledged the limited capacity of many courtrooms and stated that there may be a need for "preferential seating for media representatives."¹⁷² Thus, once again, the Court suggested that government actors, like judges, can choose to favor the press over other speakers.

The many and varied statutes and policies in which the government treats (or has treated) the press differently than other speakers are telling. They represent a long tradition in which government actors have, often with the express approval of the Court, exercised their abilities to protect and privilege the press.

167. See, e.g., Dahlia Lithwick & Mark Joseph Stern, *Not All Must Rise*, SLATE (Apr. 27, 2015), http://www.slate.com/articles/news_and_politics/jurisprudence/2015/04/standing_in_line_for_supreme_court_gay_marriage_arguments_draw_crowd_days.html [https://perma.cc/N3YQ-PMRN] (discussing the difficulty and expense of witnessing important Supreme Court arguments).

168. See Sonja R. West, *The Monster in the Courtroom*, 2012 BYU L. REV. 1953 (2012).

169. Transcripts of oral arguments are released daily, audio weekly. Audio of bench statements are released the beginning of the following term. *Transcripts and Recordings of Oral Arguments*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/oral_arguments/availabilityoforalargumenttranscripts.aspx [https://perma.cc/W8YG-L7QJ].

170. See Adam Liptak, *Justice Thomas Talks; People Listen: Reporter's Notebook*, N.Y. TIMES (Mar. 3, 2016), <https://www.nytimes.com/2016/03/04/insider/justice-thomas-talks-people-listen-reporters-notebook.html> (Journalist describes his struggle to cover the story of Justice Clarence Thomas breaking his decade-long silence on the bench since the reporter was not in the courtroom at the time, and stating "but what could I write? I had not heard the questions, and a preliminary transcript would not be available until, as it turned out, 12:15 p.m.").

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

172. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 582 n.18 (1980).

III.

THE NONDISCRIMINATION VIEW AND OUR TRADITION OF PRESS FAVORITISM

The view that the First Amendment prohibits the government from engaging in speaker-based classifications of the press is a sharp departure from our past and current practice. Rather than forbid such distinctions, the Court repeatedly has allowed and encouraged a wide range of special laws for the press. In doing so, the Court has necessarily allowed non-press speakers to be disfavored relative to press speakers; in other words, it has condoned speaker discrimination.

Yet legislatures' differential treatment of media and non-media speakers appears to be entirely at odds with the Court's argument in *Citizens United* that it is constitutionally suspect for the news media to be given special rights or protections. For the nondiscrimination view to be correct, there must be a way to reconcile the theory with the long tradition of press favoritism or else all of these press-favoring statutes and Court precedents are wrong.

It is somewhat difficult to parse out exactly how proponents of the nondiscrimination view reconcile the Court's longstanding embrace of press-favoring laws with their theory, because they rarely discuss it. Indeed, only Professors McConnell and Volokh have addressed the issue at all, and even they only did so in passing. In this Section, however, I strive to understand the nondiscrimination theory's relationship with our robust tradition of press favoritism.

The primary argument regarding how the nondiscrimination theory comports with our history of press-favoring laws appears to be that there is a difference between laws that provide benefits only to certain speakers on the one hand and laws that place limits only on certain speakers on the other. In Professor Volokh's words: "It is '[s]peech *restrictions* based on the identity of the speaker that are presumptively condemned by *Citizens United*, not *benefits* for certain classes of speakers."¹⁷³ Professor McConnell likewise suggested that "[w]hen *expanding* [First Amendment] protection, legislatures are entitled to draw lines that might not be permissible in the case of *abridgements*."¹⁷⁴ Thus, both scholars seem to suggest that the laws discussed in Part II are constitutional, because they do not restrict or abridge the speech of non-press speakers. They would contend that these laws instead provide benefits or expand the rights of press speakers. The former, the argument goes, is unconstitutional while the latter is not.

173. Eugene Volokh, *Unradical: "Freedom of the Press" as the Freedom of All to Use Mass Communications Technology*, 97 IOWA L. REV. 1275, 1279 (2012) (second emphasis added) (citation omitted). Professor Volokh was responding in this piece to Professor Randall Bezanson's assertion that the *Citizens United* ruling called into question a host of legislatively granted press regulations because "[s]uch legislative discrimination (against non-media or non-news corporations) would constitute discrimination on the basis of the identity or class of speakers and thus be flatly unconstitutional under *Citizens United* . . ." Bezanson, *supra* note 48, at 1263–64.

174. McConnell, *supra* note 4, at 441 (emphasis added).

Another distinction they appear to propose, although admittedly less clearly, is that it is different for a law to restrict a speaker's end-stage speech—the final expression or publication of a message—than it is for a law merely to boost another speaker's ability to gather and report information. McConnell, for example, stated that only laws that involve “publication of opinion” and not those that “focus on the newsgathering function” raise speaker-based discrimination issues.¹⁷⁵ Similarly, Volokh contended that the *Citizens United* Court was focused on “the constitutionality of restrictions on *otherwise protected speech*,” but it was not concerned with “legislation offering generally available *subsidies or other benefits*.”¹⁷⁶ This suggests that there is a type of means-ends distinction for speaker classifications: it is acceptable for the government to subsidize only some speakers' means or ability to engage in expression, but it is unacceptable to restrict only some speakers' end-stage or final message.

Neither of these distinctions, however, fares well under closer examination. They do not support the Court's decision in *Citizens United* and conflict with Supreme Court precedent.

An initial problem with accepting these distinctions is that under this view, the campaign spending law in *Citizens United*—at least in terms of how it treats media corporations versus other corporations—would likely have been constitutional.¹⁷⁷ The law's media exemption is best characterized as an allowable *benefit* to a select group. The federal law applied broadly to all corporations, including for-profit and non-profit, as well as to unions. The media exemption, however, covered only a relatively small number of press speakers.¹⁷⁸ Usually an exemption from an otherwise generally applicable regulation is viewed as a benefit to that group, not as a burden to the others.¹⁷⁹ But, contrary to what the nondiscrimination theory would suggest, the Court declared the media exemption to be unconstitutional speaker discrimination and not a constitutionally acceptable press benefit.

The second means-ends argument also does not explain the outcome in *Citizens United*, because the campaign finance law regulation did not restrict end-stage expression. *Citizens United*, the corporation, was always free to

175. *Id.*

176. Volokh, *supra* note 173, at 1279 (emphasis added).

177. The analysis of treating corporate speakers differently than individual or non-corporate speakers, of course, might differ and is not the focus of this article.

178. See 52 U.S.C. § 30101(9)(B)(i) (2012) (defined as “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”).

179. The Court has only expressed concern with laws granting exemptions to some speakers when the number of speakers not exempted was small. See, e.g., *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 591 (1983) (holding that a tax on ink and paper that exempted the first \$100,000 was unconstitutional, “because it targets a small group of newspapers”). That was not the case in *Citizens United*.

engaged in unlimited speech about any message whatsoever.¹⁸⁰ No speaker was ever gagged and no message ever “banned.”¹⁸¹ The issue in the case, as Justice Stevens explained in his dissent, was “how, not if” the corporation could *pay* to transmit its speech.¹⁸² There was no restriction on “publication of opinion.” Citizens United’s expressive message as such was never restricted. Thus the regulation in *Citizens United*, which addressed which funds may be used during what time period to pay for speech, is better characterized as one that affects the means of speaking, and not the end-stage speech itself.

A. *The Benefits-Burdens Distinction*

The arguments on how to reconcile the nondiscrimination view with our press favoring history are also inconsistent with Supreme Court precedent. Let us return to the first claim that there is a constitutional line between giving benefits to some speakers, which is allowable, and placing burdens on other speakers, which is not.

With this argument, the proponents of the nondiscrimination interpretation are essentially arguing that the Supreme Court recognizes a constitutional baseline of expressive rights below which the government may not restrict speakers’ speech based solely on their identities.¹⁸³ But the legislatures, they suggest, are nonetheless free to expand the expressive privileges and protections of certain groups of speakers (like the press) beyond this baseline. This argument is reminiscent of the so-called “ratchet theory” proposed by Justice William Brennan in which he contended that under Section 5 of the Fourteenth Amendment, Congress has the power to expand rights protected under the Amendment but could not dilute them.¹⁸⁴

The difficulty, however, is that what seems like a benefit to some speakers can look an awful lot like a burden to other speakers and vice versa.¹⁸⁵ The Court, in fact, has noted as much in its cases involving selective taxation of the press. Take the decision in *Minneapolis Star & Tribune Co. v. Minnesota*

180. See *Citizens United v. FEC*, 558 U.S. 310, 393 (2010) (Stevens, J., concurring in part and dissenting in part) (noting that Citizens United could have used other funds to broadcast its message “wherever and whenever it wanted to”).

181. See *id.* (“Neither Citizens United’s nor any other corporation’s speech has been ‘banned.’”).

182. *Id.*

183. See Bezanson, *supra* note 48, at 1263 (suggesting Volokh’s argument amounts to “a one-way rule, permitting legislative exemptions for the media or news organizations under the First Amendment, yet denying that the First Amendment allows them to be treated differently as a class of corporations fully protected by the First Amendment”).

184. *Katzenbach v. Morgan*, 384 U.S. 641, 651 n.10 (1966). The Court later rejected this theory in the Section 5 context. *City of Boerne v. Flores*, 521 U.S. 507, 528–29 (1997).

185. See Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1, 14 (2001) (discussing the difficulties of deciding when speech is or is not being restricted by relying “upon the now-discredited faith in some form of preexisting baseline”); see also C. Edwin Baker, *The Independent Significance of the Press Clause Under Existing Law*, 35 HOFSTRA L. REV. 955, 978 (2007) (“[A]ny notion that suppression (treated as unacceptable) differs from promotion (treated as acceptable) also requires a baseline.”).

*Commissioner of Revenue*¹⁸⁶ as an example. In that case, the Court considered a state tax scheme that exempted from a paper and ink tax the first \$100,000 of the commodities consumed.¹⁸⁷ The result of this tax framework was that small newspapers and publications received a tax subsidy, leaving only a handful of larger publications to pay the lion's share of the tax.¹⁸⁸ Writing for the Court, Justice Sandra Day O'Connor explained that even though the tax subsidy was technically a benefit given to some, it could easily "resemble more a penalty for a few of the largest newspapers than an attempt to favor struggling smaller enterprises."¹⁸⁹

If the ratchet theory of the Press Clause were correct, moreover, the Court would find no constitutional problem with laws that merely favored certain groups of speakers by exempting them from tax laws and would only be troubled by laws that levied an additional tax upon select groups of speakers. Yet the Court has not decided its cases that way. Instead, it has found some tax exemptions or subsidies affecting the press to be constitutional¹⁹⁰ and declared others to be unconstitutional.¹⁹¹ Thus, in these tax cases, the mere fact that the press as a group was treated differently did not alone raise a constitutional problem. In fact, the Court noted specifically in *Leathers v. Medlock* that a "differential burden on speakers is insufficient by itself to raise First Amendment concerns."¹⁹²

And, finally, since the Court is concerned about the government's ability to distort the public debate by promoting the messages of press speakers over those of others,¹⁹³ the ratchet theory is not a viable solution to the alleged problem. If marketplace distortion is the concern, it makes little difference whether the government chooses to turn up the volume on one speaker or to turn down the volume on another. The effect on the public debate is the same.

186. 460 U.S. 575 (1983).

187. *Id.* at 577–78.

188. *Id.* at 578–79.

189. *Id.* at 592.

190. See, e.g., *Leathers v. Medlock*, 499 U.S. 439 (1991) (finding a state law that exempted newspapers, magazines, and satellite broadcasting services from the general sales tax, but not cable services, was constitutional).

191. See, e.g., *Minneapolis Star & Tribune Co.*, 460 U.S. at 575 (holding tax exemption from paper and ink tax for the first \$100,000 consumed was unconstitutional).

192. *Leathers*, 499 U.S. at 452–53; see also *Mabee v. White Plains Publ'g Co.*, 327 U.S. 178, 184 (1946) (holding that exemptions from Fair Labor Standards Act requirements for small newspapers but not for larger ones were "not a 'deliberate and calculated device' to penalize a certain group of newspapers") (citation omitted); *Okla. Press Publ'g Co. v. Walling*, 327 U.S. 186, 193 (1946) (rejecting a claim that exemption of employees of small newspapers was an invalid classification).

193. See *Citizens United v. FEC*, 558 U.S. 310, 352–53 (2010) (suggesting that upholding the media exemption would allow a corporation that owns a media outlet "to advance its overall business interest," but a corporation without a media outlet "would be forbidden to speak or inform the public about the same issue" and stating that this would violate the First Amendment).

B. The Means-Ends Distinction

The means-ends rationale for distinguishing the vast number of press-favoring laws also does not hold up under close analysis. This is the contention that only regulations affecting end-stage speech raise constitutional concerns and not those that merely subsidize a speaker's ability to speak.

The Court has never asserted that the government cannot use speaker classifications that affect end-stage speech but may use them to confer subsidies and benefits on the means of speaking. In *Zacchini v. Scripps-Howard Broadcasting Co.*,¹⁹⁴ for example, the Court explicitly declared that the government can favor the press even as to end-stage speech. It stated, albeit in dicta, that a state legislature could allow members of the press to broadcast a performer's entire act while, at the same time, prohibiting other (non-press) speakers from doing the same.¹⁹⁵ In other words, the Court saw no problem with the government holding non-press speakers liable for rights of publicity violations if they broadcast the performance, even if it did not hold press speakers liable for airing the exact same end-stage content. In fact, a host of regulations involving intellectual property rights allow press speakers to express end-stage messages that are restricted for other speakers.¹⁹⁶ Under the nondiscrimination approach, however, these types of restriction would be unconstitutional.

Similarly, the Court has upheld restrictions on the end-stage speech of commercial speakers that would not be constitutional if they were applied to the press. That is, under current law, there is no First Amendment violation when the government regulates a commercial speaker's message even though it could not regulate a press speaker's ability to express the exact same message.¹⁹⁷ Thus the determination of whether a particular message can be regulated as commercial speech or not, in the words of Professor C. Edwin Baker, does not turn on the content of the message at all, but "[r]ather, it [is] something about the identity of the speaker"¹⁹⁸ that determines whether the law applies.

194. 433 U.S. 562 (1977).

195. *Id.* at 578–79 (holding that while the press had no constitutional privilege to broadcast the entire performance without the actor's permission, the state "may as a matter of its own law privilege the press in the circumstances of this case").

196. *See, e.g.*, Lanham Act, 15 U.S.C. § 1125 (2012) (excluding "[a]ll forms of news reporting and news commentary" from trademark dilution regulations); ARIZ. REV. STAT. § 44-1448.01(C)(3) (2017) (excluding news reporting and news commentary from liability for a trademark dilution claim); ARK. CODE ANN. § 4-71-213(c)(3) (West 2017) (same); 765 ILL. COMP. STAT. 1036/65(b)(3) (2017) (same).

197. Baker, *supra* note 185, at 1006–08; *see also id.* at 1007 ("Those not involved in market transactions promoted by the restricted speech—that is, individuals, or consumer and other public interest groups, or newspapers—have always been left free to communicate."); *id.* at 1008 n.215 (giving examples of cases in which the exact same content was protected when published by the press but regulated later when published by commercial speakers).

198. *Id.* at 1007.

Another problem with this means-ends distinction is that it implies that only end-stage speech raises First Amendment interests. Because if acts of newsgathering and speech production (the “means” of speech) do not trigger the alleged constitutional ban on speaker discrimination, then logic would suggest that it is because these acts have no free expression significance. The implications for drawing such a constitutional line would be serious and contradict Supreme Court precedent.¹⁹⁹ There could be no recognized First Amendment interest in information gathering such as access to judicial proceedings or government controlled documents or the ability to record law enforcement officers. Likewise, there would be no First Amendment defense to government taxations schemes that favor or disfavor the tools or equipment used to produce speech such as paper and ink, film, amplification equipment or their modern equivalents. It would also raise doubts about the constitutionality of many of the existing protections for the press that do not involve end-stage speech such as safeguards against government subpoenas and seizures.²⁰⁰

Contrary to the suggestions of the nondiscrimination view proponents, the Court has never focused on whether the regulation is a burden or a benefit or on whether it involves the ends or means of speech. In the next Part, I examine the factors that the Court has focused on when considering press-favoring laws—those relating to the unique functions of the press. The connection between press function and press identity is key to understanding the constitutionality of press favoritism.

IV.

THE CONSTITUTIONALITY OF PRESS FAVORITISM

Adopting the nondiscrimination view of the Press Clause is a dangerous road to travel. If the Constitution prohibits laws that treat the press differently than other speakers, then the numerous press-protective laws outlined in Part II cannot stand, because they favor the press’s right or ability to speak. There is no viable way to limit the nondiscrimination view such that it would not apply to any law or regulation that gives the press speakers an advantage over other speakers in their capacities to speak. It also directly conflicts with our long-held tradition of protecting press freedom by preferencing those who are doing the traditional and essential Fourth Estate work of checking the government and the powerful, while broadly informing the public on newsworthy matters.

199. See cases cited at *supra* note 159.

200. It would also bring into question the argument that the Press Clause merely protects the technology of publishing, since the printing press is clearly a means or tool of speech. See Volokh, *supra* note 4, at 463 (“[P]eople during the Framing era likely understood the [Press Clause] as fitting the press-as-technology model”); see also Bhagwat, *supra* note 4, at 1035 (“Press Clause protects technology—in 1791 the printing press, today of course many other things as well—used to produce communications intended for later mass dissemination.”).

This is not to suggest that the goal of seeking equal treatment by avoiding speaker discrimination is not important. But the problem is that the value of protecting the structural role of the press and the value of avoiding speaker discrimination are simply not always compatible. In some situations, a nondiscrimination view of the Press Clause, however appealing in theory, comes at the cost of weakening government scrutiny and impairing the flow of information to the public. In these situations, the nondiscrimination theory would force the government to choose between protecting all speakers equally or not protecting any of them, and all too often it will decide on balance to protect no one.²⁰¹

Thus, we must decide whether there are some instances in which we choose to protect the structural, information-producing value of press freedom over the nondiscrimination principle of speaker equality.²⁰² In the Speech Clause context, it might make sense to favor speaker equality over our desire to maximize public information.²⁰³ One of the many recognized values of free speech is the individual right to engage in expression for personal autonomy and self-fulfillment. If some speakers are given benefits in that endeavor that others are not, our basic tenets of individual equality are challenged. But in the Press Clause context, as we have seen, constitutional history, text, and precedent all tell us that it is the protection of the structural press functions, rather than speaker autonomy, that is paramount. Thus, in a face-off between speaker equality with the press and maximization of public information flow, the Press Clause made the decision for us—and it chose the latter.

How do we know what these structural press values are and how strongly they should be protected? We know because the Supreme Court has told us. While the Court has been reluctant to embrace distinct constitutional rights and protections for the press, it has, nonetheless, frequently recognized and celebrated the unique role the press play in our constitutional democracy.

201. See West, *supra* note 67, at 1056 (“Ironically, the more vigorously that judges, scholars, and press advocates fight for broadly held press rights, the less likely it is that these protections will materialize.”).

202. See Frederick Schauer & Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 TEX. L. REV. 1803, 1807 n.15 (1999) (“To the extent that many constitutional rights are best understood as tools for realizing various common or collective or public goods, rather than in more individualistic terms, the content of rights depends on how the relevant public good ought best be understood.”); see also Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 730 (1998) (discussing the concept of “structural conception of rights”).

203. See West, *supra* note 67, at 1056 (explaining how constitutional overprotection makes sense in the free speech context but not necessarily in the free press context.) Whether there is reason for the Court to embrace an antidiscrimination stance (even, perhaps, at the expense of maximizing communicative expression) in situations not involving the press is outside the scope of this article. See John Fee, *Speech Discrimination*, 85 B.U. L. REV. 1103, 1114 (2005) (“If speech maximization were the First Amendment’s primary value, we would do better in some settings to allow government to discriminate among messages, rather than encouraging it to prohibit all speech simply to avoid some objectionable speech.”).

Ultimately, the Court has concluded that the press has an “historic, dual responsibility in our society.”²⁰⁴ In another piece, I reviewed the Court’s discussions of the role of the press and identified two constitutional functions that the Court has emphasized of the press qua press.²⁰⁵ The first is the press’s role as surrogate for and conduit of news to the public.²⁰⁶ The second is its work to check the government and the powerful.²⁰⁷

This Part explains why recognizing these core structural press functions is crucial to fulfilling the constitutional promise of the Press Clause and how these organizing concepts should inform consideration of press-favoring laws. These twin press functions both help us to identify the speakers who are fulfilling the structural roles of the press and to guide our analysis as to which press-favoring laws and regulations comport with First Amendment doctrine.²⁰⁸ Keeping the focus on the press’s constitutionally recognized functions gives us assurances that while press-favoring laws may not be equal, they promote the public welfare.

A. *Press Identity and Press Function*

The Court in *Citizens United* did not declare that the First Amendment prohibits all speaker classifications. It acknowledged that in a number of prior cases it upheld laws that treated some groups of speakers differently from others, such as students,²⁰⁹ prisoners,²¹⁰ soldiers,²¹¹ and government employees.²¹² The

204. *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 382 (1984); *see also id.* (stating that these responsibilities are “reporting information and . . . bringing critical judgment to bear on public affairs”).

205. *See West, supra* note 9, at 750.

206. *See id.* at 750–53.

207. *See id.*

208. These functions also may call for unique constitutional rights and protections for press speakers. This Article, however, is focused on the ability of the government to classify press speakers for special treatment. For a discussion on possible constitutional protection for the press, *see generally West, supra* note 7.

209. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986) (“Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse.”); *see also id.* at 685 (observing that allowing this speech “would undermine the school’s basic educational mission”).

210. *Jones v. N.C. Prisoners’ Labor Union, Inc.*, 433 U.S. 119, 129 (1977) (“It is clearly not irrational to conclude that individuals may believe what they want, but that concerted group activity, or solicitation therefor, would pose additional and unwarranted problems and frictions in the operation of the State’s penal institutions. The ban on inmate solicitation and group meetings, therefore, was rationally related to the reasonable, indeed to the central, objectives of prison administration.”).

211. *Parker v. Levy*, 417 U.S. 733, 758 (1974) (“While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections.”).

212. *Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers*, 413 U.S. 548, 564–65 (1973) (“It seems fundamental in the first place that employees in the Executive Branch of the Government, or those working for any of its agencies, should administer the law in accordance with the will of Congress, rather than in accordance with their own or the will of a political party. They are expected to enforce the law

Court distinguished those cases, however, by claiming that they involved situations in which the Court was protecting a recognizable “interest in allowing governmental entities to perform their functions.”²¹³

Thus governmental function separates prohibited speaker classifications from those that are allowed. It is debatable, of course, whether this analytical touchstone focused on promoting governmental function explains the result in *Citizens United*. The Court arguably could have concluded that in order for the elected branches of government to perform their representative function of reflecting the will of the people, there need to be limitations on the ability of powerful corporations to exert excessive influence on elections.²¹⁴

Yet the Court in *Citizens United* was clearly on to something when it suggested that speaker identity and function are inescapably intertwined and that the function served by the class of speakers is of central importance when explaining whether speaker-based categorizations are appropriate. As the Court noted, it has recognized the ability of the government to identify and classify some groups of speakers based on the functions they serve. But rather than support the Court’s holding that media corporations cannot be treated differently, these other speaker-classification cases suggest the exact opposite.

It is specifically because members of the press serve important constitutionally recognized functions that the government may treat them differently than other speakers. The distinctive characteristic of press speakers is their shared engagement in particular constitutionally valued functions, which the Supreme Court has identified as checking the government and the powerful, and informing the populace on matters of public concern.²¹⁵ As discussed earlier, courts have upheld and even encouraged the enactment of press-favoring laws precisely because they assist the press in performing these valued tasks.

Granted, speaker classifications of students, members of the military, and government employees differ from those involving the press in a significant way.²¹⁶ In those cases, the Court has concluded that in order to function effectively, government institutions need to regulate or perhaps even silence

and execute the programs of the Government without bias or favoritism for or against any political party or group or the members thereof.”).

213. *Citizens United v. FEC*, 558 U.S. 310, 341 (2010).

214. *See generally* Schauer & Pildes, *supra* note 202 (suggesting that campaign finance laws can satisfy the First Amendment if they were passed with the goal of furthering certain structural justifications such as reducing the influence of wealth).

215. *See* West, *supra* note 9, at 749–55 (discussing the unique constitutional functions of the press).

216. Classifications involving press speakers also differ from those involving students, members of the military, and federal employees, because they have a constitutional basis. Another example of a constitutionally recognized protection for a particular group of speakers is the Speech or Debate Clause. U.S. CONST. art. I, § 6, cl. 1 (providing in part that “for any Speech or Debate in either House, . . . [Senators and Representatives] shall not be questioned in any other Place”). The Court has interpreted this privilege broadly based, again, on a concept of allowing legislators to fulfill their intended functions. *See* *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951) (“Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good.”).

speakers. The argument is that public schools, the military, and various government offices simply cannot do their work without some ability to control the speech of students, soldiers, or employees. Their function requires obedience, efficiency, and discipline.²¹⁷

With the press, however, the effective check of government often requires expanding press freedoms and protections. But whether increasing or decreasing expressive rights, the differential treatment is still tied to function. When the government enacts press-favoring laws, it does so precisely because the press strengthens our democracy by checking the government²¹⁸ and promoting a robust democratic civic discourse. These laws recognize that the public must be armed with newsworthy information in order for the process of effective self-government to function in the manner envisioned by the Framers.²¹⁹

Recognizing the unique constitutional functions of the press is key both to understanding and protecting the vital structural role the press serves. Laws and regulations that favor the press are at least presumptively valid, for the simple reason that they further the goal of a properly functioning government, which requires a vibrant and independent press. Press-favoring laws do exactly what the *Citizens United* Court recognized speaker-classifications should do—enable the government to function effectively. Singling out the press for special treatment does not raise constitutional issues as long as there is a sufficient connection between the right or protection and the unique functions of the press.

Indeed, the vital work of press speakers has always been interwoven with the regulations that favor them.²²⁰ The laws and regulations discussed above

217. See *Parker v. Levy*, 417 U.S. 733, 758 (1974) (“The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.”).

218. See Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 527 (1977) (noting the importance of free speech and press in checking governmental power).

219. Dean Robert C. Post describes this effect as “democratic competence.” POST, *supra* note 27, at 33–34; see also Anderson, *supra* note 139, at 527 (“My own view is that the starting point ought to be something close to Robert Post’s conception of public discourse: that the system of freedom of expression ought to favor speech that facilitates the making of democratic accommodations within a culturally heterogeneous state. He views public discourse as a central value in First Amendment thinking generally, but it can also be seen as central to freedom of the press specifically.”); Akilah N. Folami, *Using the Press Clause to Amplify Civic Discourse Beyond Mere Opinion Sharing*, 85 TEMP. L. REV. 269, 314 (2013) (arguing that the Press Clause could provide the constitutional framework to promote democratic competence); Stephen I. Vladeck, *Democratic Competence, Constitutional Disorder, and the Freedom of the Press*, 87 WASH. L. REV. 529, 535–36 (2012) (discussing the potential ways Post’s theory of “democratic competence” might expand or narrow press freedoms).

220. Focusing on the unique function of the press also explains the validity of laws that place additional requirements on press speakers but not on non-press speakers. In certain circumstances, the Court has upheld regulations that mandated the media include certain content. For example, in order to receive second-class postal rates, newspapers and periodicals are required to make certain disclosures including the identity of the editors and publishers. See 39 U.S.C. § 3685 (2012); Postal Service Appropriations Act of 1912, Pub. L. No. 62-336, 37 Stat. 539, 553–54 (1912) (requiring newspapers and periodicals receiving second-class postal rates to make certain disclosures); see also *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 653–56 (1994) (upholding “must carry” law requiring cable companies

illustrate that relationship in action. The fact that press speakers serve as the eyes and ears of the community,²²¹ for example, justifies allowing reporters special access to government places, meetings, or information, at least in contexts where disruption, overcrowding, and chaos require a winnowing of potential information receivers. The commitment of the press to act as watchdogs of government and other centers of societal power²²² supports the need for special protections from government searches and subpoenas. And the unique history of oppression directed at the press by hostile government actors explains the special scrutiny of tax schemes that target or burden the news media.²²³

B. *The Limits of Press Favoritism*

Upholding press-favoring laws, however, does not mean there are no limitations on the government's ability to single out the press for support. Because the justification for such laws is grounded in constitutionally recognized press functions, only laws and regulations that advance these functions should be upheld. Of particular importance, courts can and should police government regulations that favor the press for content-based discrimination.²²⁴ Laws that

to include broadcast channels); *Red Lion Broad. Co., Inc. v. FCC*, 395 U.S. 367, 389 (1969) (upholding requirement that a broadcast licensee “share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves”).

221. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572–73 (1980) (plurality opinion) (“Instead of acquiring information about trials by firsthand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media. In a sense, this validates the media claim of functioning as surrogates for the public.”); see also *id.* at 586 n.2 (Brennan, J., concurring in the judgment) (“the institutional press is the likely, and fitting, chief beneficiary of a right of access because it serves as the ‘agent’ of interested citizens, and funnels information about trials to a large number of individuals”); *id.* at 600 & n.3 (Stewart, J., concurring in the judgment) (“[E]very courtroom has a finite physical capacity, and there may be occasions when not all who wish to attend a trial may do so. . . . In such situations, representatives of the press must be assured access.”).

222. See *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989) (recognizing that the press allows the public to learn “what their government is up to”) (quotation marks omitted); see also *Mills v. Alabama*, 384 U.S. 214, 219 (1966) (“[T]he 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.”); West, *supra* note 9, at 753 (“In addition to conveying newsworthy information to the public, it has long been accepted as a basic assumption of our political system that [t]he press plays a unique role as a check on government abuse and will often serve as an important restraint on government.”) (internal footnotes and quotations omitted).

223. See *Grosjean v. Am. Press Co.*, 297 U.S. 233, 245–49 (1936) (discussing this history).

224. See *Citizens United v. FEC*, 588 U.S. 310, 340 (2010) (“Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints.”); but see Genevieve Lakier, *Reed v. Town of Gilbert, Arizona and the Rise of the Anti-Classificatory First Amendment*, SUP. CT. REV. (forthcoming 2017) (challenging the application of strict scrutiny to all facially content-based speech regulations); Eliza Collins, *Trump Adds ‘Washington Post’ to Banned List*, USA TODAY (June 13, 2016, 5:58 PM), <https://www.usatoday.com/story/news/politics/onpolitics/2016/06/13/trump-washington-post-banned-list/85842316> [<https://perma.cc/H6DX-7272>] (discussing then-Republican nominee Donald Trump’s decision to revoke the press credentials of the *Washington Post* because of its coverage of his campaign).

avored certain press speakers by burdening other press speakers, moreover, would also raise heightened concerns because specialized press protections, absent some special justification, logically should extend to the press as a whole.²²⁵

Because press speaker identity is tied to press function, specialized protection of the press should only apply when a relevant press function is in the picture. In this regard, a speaker might be identified as the press in some situations but not in others. The speaker's status would depend on whether she was engaged in the constitutional press functions at the relevant time. For example, a reporter might have a special privilege not to testify about witnessing a possible crime while engaged in undercover reporting at a local school. But that same person might not have a privilege if he witnessed a possible crime after work while simply attending his child's recital at that same school.²²⁶ This sort of sensitivity to identity-shifting is not new. It is found in the Court's work in other contexts that involve a function-centered analysis of specialized speaker identity. Rules governing the speech rights of government employees or members of the military, for example, will no longer apply once the speaker leaves the job or is discharged from service. At this point, these speakers are no longer engaged in the key function (working for the federal government or serving in the military) that justifies the classification.²²⁷ A particularly good analogy to press speakers is the identity of student speakers, whose status might shift multiple times throughout the day depending on whether they are at school,²²⁸ at home, in class, in the hallways, or participating in a school-

225. Although the Court has held that the government may intervene if private press speakers are acting to suppress other private press speakers. *See* *Associated Press v. United States*, 326 U.S. 1, 20 (1945) (finding that the Sherman Act could constitutionally be applied to news organizations engaging in anticompetitive acts and stating that “[t]he First Amendment affords not the slightest support for the contention that a combination to restrain trade in news and views has any constitutional immunity”).

226. *See, e.g.,* *Too Much Media, LLC v. Hale*, 993 A.2d 845, 858–61 (N.J. App. Div. 2010) (finding that a woman who worked as a freelance journalist could not claim protection under the reporter's shield law for statements she made merely as a participant in an Internet chat room).

227. Legislators also lose their speaker-based protections granted by the Speech or Debate Clause when they are not engaged in congressional business or once they are no longer in office. *See* *United States v. Brewster*, 408 U.S. 501, 515–16 (1972) (“In every case thus far before this Court, the Speech or Debate Clause has been limited to an act which was clearly a part of the legislative process—the due functioning of the process.”).

228. *See* *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969) (upholding nondisruptive Free Speech rights by students in schools).

sponsored²²⁹ or school-sanctioned activity.²³⁰ As the student moves throughout her day, so do the differing rules and regulations that govern her speech.²³¹

Focusing on speaker function is also vital, because it is only through function that we can determine which speakers are members of the press. Press speakers are, by definition, those speakers who are fulfilling press functions. These speakers tend to possess distinct qualities. Press speakers have a proven record of reaching a broad audience through regular publication or broadcast. They devote time, resources, and specialized skills to gathering and reporting the news. They bring knowledge and expertise to the subject matter and place information in context. The link between function and identity to support press-favoring laws, moreover, builds upon itself. Press-favoring laws give certain advantages that will further the public good to those speakers who have demonstrated that they will use these privileges for the public good.

Yet, for many, the concept of the government bestowing special advantages only upon certain speakers is troubling. Doing so smacks of elitism and raises concerns about government partiality toward certain non-government speakers. Critics of press exceptionalism who claim that favoring the press violates principles of equality, however, are simply looking for that equality in the wrong place. The relevant question about equality is not whether all speakers enjoy the same rights and protections at all times,²³² but whether all speakers have the same opportunity to be identified as a press speaker and, if so, receive the same rights and protections enjoyed by other members of the press. Advancements in mass communication technology and broadening access to the internet increasingly ensure expansive opportunities to be identified as the press.²³³ And judicial scrutiny of press regulations for content neutrality and the uniform treatment of press speakers serves to confirm that gaining that status will prove to be practically meaningful.²³⁴

229. See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272–73 (1988) (distinguishing *Tinker*, finding no First Amendment violation for censoring articles in a school-sponsored student paper, and holding that such speech restrictions must be merely reasonable).

230. See *Morse v. Frederick*, 551 U.S. 393, 403 (2007) (finding no First Amendment violation where a school censored the student’s speech at a school-sponsored class trip, where the speech reasonably could be seen to promote illegal drug use).

231. See, e.g., *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 932 (3d Cir. 2011) (refusing to apply more restrictive free speech analysis to student speech that occurred off-campus and during non-school hours).

232. Again, this might be the correct inquiry if dealing with non-press speech rights. See generally Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 479 (2011) (explaining that equality of individual speech rights “reflect the autonomy of . . . speakers”).

233. See West, *supra* note 7, at 2452 (“Advances in mass communication technology, meanwhile, have opened the gates to press membership wider than ever before.”).

234. See, e.g., *Minneapolis Star & Tribune Co. v. Minnesota Comm’r of Revenue*, 460 U.S. 575, 592 (1983) (observing that allowing the government “to tailor [a] tax so that it singles out a few members of the press” would be constitutionally suspect). Courts also police for pretextual press-specific laws that claim to be intended to favor the press but do not have that effect. See *id.* at 592 (rejecting the state’s argument that its goal was to implement an “equitable” tax system).

In short, just as the Court explained in *Citizens United*, speaker classifications are justified when they relate closely to an effectively functioning government. For precisely this reason, laws singling out the press for special protections that further constitutional press functions are to be lauded, rather than eschewed.

When it comes to matters involving press freedoms, the focus should be on maximizing information flow of newsworthy matters and effective government scrutiny. In some situations, those goals do not require speaker classifications, and in those cases all speakers can and should enjoy the same expressive freedom.²³⁵ In other cases, however, these interests diverge, and it is at this point that the government should be able to take steps to promote the values of press freedom.

CONCLUSION

In *Citizens United*, the Court relied on the media exemption to the challenged campaign finance law as the primary support for its argument that the law was unconstitutional speaker discrimination. This analysis is misguided. It is misguided both because it draws on a highly questionable reading of precedent, and more importantly because it raises future dangers of hobbling the freedom of the Fourth Estate. If followed to its logical end, viewing the Press Clause as a mere nondiscrimination provision threatens the vital structural role of the press.

As a nation, we have a long history of embracing the special constitutional role of the press. And one of the primary ways Americans have expressed this is by passing or encouraging laws that protect and support the press beyond the rights recognized for other speakers. These unique protections are not granted lightly. They have always been determinedly content-neutral and focused on ways to help the press accomplish its constitutionally assigned task of serving the public through shared information and government scrutiny.

A review of history, judicial precedent, and legislative practice underscores the error that lay at the root of *Citizens United*. The media exemption to the campaign finance law did not demonstrate the unconstitutionality of speaker classifications of the press. Conversely, it is clear that if there is one group of speakers we can with confidence treat differently from others, it is the press.

235. See, e.g., *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (holding that all speakers, not just press speakers, are protected by the actual malice standard in defamation cases brought by public officials engaged in official conduct).