RESURRECTING THE PRESS CLAUSE

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In recent decades, the Press Clause has been no more than an invisible force in constitutional law, influencing interpretation of the speech clause but having no independent effect of its own. In the early years of First Amendment jurisprudence the Supreme Court often relied explicitly on the Press Clause as the source of press rights. But for the past thirty or forty years, the Court has refused to give the Press Clause any significance independent of the speech clause. When faced with claims based on freedom of the press, the Court usually interpreted the speech clause broadly enough to protect the claimed right, and when that was not possible – when rights were claimed that could not be made available to all speakers – the court denied them.

This strategy in most instances caused no serious harm to the interests of a free press. Rights shared with the public at large were just as useful as press-specific rights, and they deflected the resentments that the latter might have generated. Well-financed media litigants pursing their own interests won free speech rights for others who might have lacked the interest or resources to win them on their own. In the few instances in which the Court rejected press claims, the media were often able to secure passage of legislation that gave them at least as much protection as the failed constitutional claim would have provided.

Now, however, the Court has embarked on a course that makes it more difficult to avoid the question of special constitutional protection for the press. In a series of cases culminating this term in *McConnell v. the Federal Election Commission*, the Court has held that Congress can restrict the political speech of corporations.[1] The decision upheld key provisions of the McCain-Feingold campaign finance bill, known officially as the Bipartisan Campaign Reform Act (BCRA). Corporations are now forbidden to pay directly[2] for "electioneering communications" and may not promote their political views indirectly through contributions to political parties. The prohibitions extend even to nonprofit corporations such as the American Civil Liberties Union and the National Rifle Association.[3]

The prohibitions against expenditures and contributions apply to media companies too, but because news, commentary, and editorials are exempted, the restrictions give media corporations a political advantage over nonmedia corporations. "Media companies can run procandidate editorials as easily as nonmedia corporations can pay for advertisements."[4] Before *McConnell*, this disparity was not dramatic because the legislation upheld by earlier decisions only prohibited direct corporate contributions to candidates, leaving corporations free to promote their political views by buying ads and

[1] The restrictions apply also to labor unions, and some of them also limit wealthy individuals. For simplicity's sake I use "speech of corporations" or "corporate speech" to refer to all the entities to which the restrictions apply.
[2] They are still permitted to form Political Action Committees for these purposes, but they may not use funds from the corporate or union treasury.
[3] The Court held that the legislation must be construed to exempt certain voluntary organizations that exist purely to engage in political advocacy. As defined by Massachusetts Committee for Life, 479 U.S. 238 (1986), this subset is limited to nonprofits that were formed for the purpose of political advocacy, do not engage in business activities, were not formed by businesses or unions and do not accept contributions from them, and have no shareholders. 124 S.Ct. at 699.
[4] 740, Thomas, J. dissenting.

giving money to political parties and like-minded committees. But the BCRA closes those avenues of political expression for virtually all corporations (including media corporations), while leaving the media free to proselytize without restriction through their editorials and even news columns. Justice Kennedy alleged that *McConnell* "is the codification of an assumption that the mainstream media alone can protect freedom of speech."

McConnell invites two kinds of Press Clause claims. One kind are the challenges that will arise, from entities that are undeniably press, if Congress or the state legislatures attempt to impose new regulations on the political speech of media. Legislators might do this to reduce the media-nonmedia disparity that *McConnell* ratifies, or they might do it simply because they are emboldened by the message that they have considerable power to limit speech in the interest of curtailing the advantages of wealth in politics.

The second kind of Press Clause claims will come from entities that do not qualify for the press exemptions in the legislation but contend that they are "press" within the meaning of the Press Clause and therefore cannot be subjected to the regulations. Not surprisingly, nonmedia corporations are said to be exploring ways of availing themselves of the press exceptions – by starting or purchasing newspapers or broadcast stations, for example. If Congress or the courts attempt to prevent such circumventions by distinguishing somehow between "real" news media and those that exist primarily to promote the political views of the parent corporation, some of those denied exemption

will surely advance claims that they are being denied freedom of the press. Indeed, the *McConnell* litigation itself included such a claim.

Unless the Court is prepared to hold that freedom of the press does not include the right to try to influence elections, it will be difficult to deny some of those claims. Because many newspapers, magazines, and broadcast outlets today are owned by conglomerates that also have nonmedia holdings, there is no easy distinction between "true" media and media that are mouthpieces for nonmedia corporations. It may be even harder to reject the free press claims of nonprofit corporations, some of which already have well-established media outlets that seem to be indistinguishable from competing outlets that are indisputably "the press."[5]

In the past the Court avoided difficulties like these by construing the speech clause broadly enough to obviate the need to single out the press. The dissenters in *McConnell* urged that result this time too. All four of them warned that the majority's refusal to construe the speech clause broadly enough to protect corporate speech would have far reaching implications for the role of the press. The majority refused to do so because it was convinced that unlimited corporate spending threatened the integrity of American politics. I agree with that premise and with the Court's decision, and I therefore do not fault the Court for refusing to give corporations a First Amendment right to pay for "electioneering communications" and fund the political parties. But the legislation upheld by the decision sets up such a wide disparity between the political

[5] E.g., the Nation magazine, the St. Petersburg Times newspaper, and the Texas Observer, are all widely recognized as independent voices of political journalism and are all owned by nonprofit foundations.

power of media and nonmedia corporations that it seems certain to force the Court to eventually decide two weighty First Amendment questions: Can the political speech of media be regulated? If not, is it the Press Clause that precludes it?

I. The Press Clause in the early years

"Early" is a relative term here, since the Supreme Court did not begin to make First Amendment law until well into the twentieth century. In the first twenty or thirty years of that development, the Court seemed to take the Press Clause seriously. Many of the great press victories were based explicitly on the Press Clause. The Court said it was the constitutional guarantee of freedom of the press that protected newspapers from prior restraints on publication,[6] prevented discriminatory taxation of newspapers,[7] allowed pamphleteers to distribute their writings without a permit,[8] and protected editors' freedom to editorialize about elections.[9]

In retrospect, these early cases seem both natural and naïve. The claimants asserting First Amendment rights were clearly press by any definition, so why shouldn't their claims be addressed under the Press Clause? It would have seemed unnatural then if the Court had chosen to treat them as speech clause claims. At the same time, it appears that the potential problem of deciding who qualifies as press never occurred to the Court. [elaborate].

[6] Near v. Minnesota.
[7] Grosjean v. American Press Co.
[8] Lovell v. Griffin, 303 U.S. 444 (1938).
[9] Mills v. Alabama.

Gradually that reliance on the Press Clause gave way to less specific attributions, such as "freedom of speech and press" or "freedom of expression". In some instances this may have occurred because press claims and those of nonpress speakers were being decided in the same case. In *Bridges v. California*, for example, the Court struck down contempt citations against the Los Angeles Times and the labor leader Harry Bridges in the same opinion; *New York Times v. Sullivan* reversed libel judgments against not only the Times, but also four individual defendants. Eventually, however, the Court came to eschew reliance on the Press Clause even when the claim involved only the press.[10]

This abandonment of the Press Clause as a specific source of constitutional authority had no immediate consequences, because the Court gave the press whatever rights it recognized under the speech clause and the press asked no more. But in the 1970s the press began asserting claims that could only be accepted if the First Amendment gave the press rights that it did not give all speakers. These included claims that journalists had First Amendment rights to interview prisoners[11] and resist subpoenas[12] and search warrants.[13] Whether the Press Clause created rights different from those based on the speech clause for the first time became an issue that had to be decided.

[10]Craig, Pennekamp, Hill
[11] Pell, Saxbe, Houchins.
[12] Branzburg v. Hayes,
[13] Zurcher v. Stanford Daily

Justice Stewart argued that it did. He first advanced the argument in 1972 in a dissenting opinion in *Branzburg v. Hayes*. The issue in that case was whether the First Amendment gave journalists a right to refuse to disclose confidential sources – or, as the majority put it, "require[d] a privileged position for them." Although Stewart discussed at length the constitutionally protected role of the press, he did not explicitly ascribe independent significance to the Press Clause. Indeed, he seemed at pains to ground his argument in more diffuse notions of the First Amendment:

> As I see it, a reporter's right to protect his source is bottomed on the constitutional guarantee of a full flow of information to the public. A newsman's personal First Amendment rights or the associational rights of the newsman and the source are subsumed under that broad societal interest protected by the First Amendment. Obviously, we are not here concerned with the parochial personal concerns of particular newsmen or informants.[14]

Nonetheless, it was clear he believed that the First Amendment gave the press rights different from those of other speakers: his proposed solution to the confidential source problem was to create a qualified testimonial privilege available to persons he described as "reporters" or "newsmen."[15]

Two years later, Stewart explicitly embraced the Press Clause as a source of special protection for the press. In an off-the-bench speech that attracted great deal of

[14] Branzburg at 726 n. 2.
[15] Banzburg at 743.

attention, he argued that "the Free Press Clause extends to "the publishing business" an institutional protection different from that of other Bill of Rights guarantees, including the speech clause. He argued that the Founders distinguished between freedom of speech and freedom of the press and intended "the constitutional guarantee of a free press . . . to create a fourth institution outside government as an additional check on the three official branches."

The Court seemed to take that view, at least in dicta, in a decision issued a few months before Stewart spoke. The case was *Miami Herald Publishing Co. v. Tornillo*; the issue was whether a state could constitutionally require a newspaper to give a right of reply to a political candidate it had attacked. The Court's answer was no; the costs to the newspaper of providing the space and composing time to print the reply would penalize it for having attacked the candidate, which would tend to deter editors from publishing material that might trigger the right-of-reply. Such a content-based penalty would be contrary to general First Amendment principles – a rationale that required no extra protection for the press. But the Court added another paragraph:

> Even if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forgo publication or news or opinion by the inclusion of a reply, the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors. A newspaper is more than a passive receptacle for conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to

> limitations on the size and content of the paper, and treatment of public issues and public officials -- whether fair or unfair – constitute the exercise of editorial control and judgment. It has yet to be demonstrated how government regulation of this crucial process can be exercised consistent with the First Amendment guarantees of a free press as they have evolved to this time.

This explicit resort to the guarantees of a free press, and more importantly, the suggestion that the First Amendment protected editorial control and judgment from governmental intrusion into the function of editors, seemed to confirm Stewart's view. The proposition that the Press Clause protects editorial judgment has become a central tenet for some who claim a distinct role for the Press Clause.

II. Abandoning the Press Clause

But 1974, the year of *Tornillo* and Stewart's speech, turned out to be the apogee of the independent life of the Press Clause. The Court did not develop an independent Press Clause jurisprudence. Indeed, it went out of its way to avoid doing so. The Court responded to constitutional claims by the press in one of two ways. Whenever possible, the Court interpreted the speech clause broadly enough to sustain the press claim, thereby obviating the need to rely on the Press Clause. When that was not possible, the Court rejected the claim.

The determination to base protections on the speech clause whenever possible had many salutary effects. In defamation cases, by basing the constitutional protections on the speech clause rather than the Press Clause, the Court made them available to speakers generally, not just the press. Although the history that the Court relied on in *New York Times v. Sullivan* was primarily the historical use of libel law to suppress the press, the Court's decision was not limited to the Times, but applied equally to four individuals sued separately for having prepared (bought?) the ad over which the Times was sued. In a subsequent libel decisions the Court occasionally employed rhetoric suggesting that nonpress speakers might be less fully protected,[16] but in fact it has never failed to give them the same treatment as media defendants. The result is that the constitutional law of defamation gives media no advantage over other participants in public discussion. The same is true of constitutional limitations on other torts, such as privacy and intentional infliction of emotional distress.

Sometimes, however, the Court's determination to rest protections on the speech clause rather than the Press Clause forced it to adopt unconvincing fictions. When faced with press claims for a constitutional right of access to judicial proceedings, the court responded by recognizing a *public* right of access instead. The public was not seeking access to courtrooms, of course, and could not be widely accommodated if it did. The Court recognized this, and even advised that it would be permissible to exclude members of the public in order to make room for the press, but insisted nonetheless that the right it was recognizing was that of the public rather than the press.

[16] (D&B, Gertz, Hepps),

In that context, the impulse to avoid preferential treatment for the press produced only a harmless and transparent fiction. In others, however, it can produce analytical confusion. The Court's cases on differential taxation of media illustrate this. Initially these cases clearly relied on the Press Clause. The first of them, *Grosjean*, was easy. The Louisiana legislature had imposed a two per cent tax on newspapers'gross receipts from advertising, but exempted all papers with less than 20,000 circulation. Its purpose was generally understoodto be to punish the 13 largest newspapers in the state, all but one of which opposed Senator Huey Long, without burdening the smaller newspapers, most of which supported him. Indeed, Long's own literature called it "a tax on lying, 2 cents per lie." The Court reviewed at length the of use of taxation throughout history to suppress the press or segments thereof, and concluded that the tax in question had "the plain purpose of penalizing the publishers and curtailing the circulation of a selected group of newspapers."[17] It was unconstitutional "because it abridges the freedom of the press."

The subsequent cases, the Court elaborated and extended the theory that the history of the Press Clause required special scrutiny of differential taxation of media. [More on Minneapolis Star, Arkansas Writers,]

For reasons that are not clear, the Court eventually backed away from the straightforward notion that the Press Clause precluded discriminatory taxation of the press. In *Leathers*, the Court reinterpreted the press taxation cases in terms of discrimination against *speakers.* Referring to *Grosjean, Minnealpolis Star, and*

[17] Grosjean at 251.

*Arkansas Writer*s, the Court said "These cases demonstrate that differential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints."[18]

"Differential taxation of speakers" is a difficult concept to understand. All taxpayers are speakers; to say they can't be differentially taxed is to say taxes must apply uniformly to everyone. But the Court has repeatedly rejected that proposition and did so again in *Leathers*, opining that "Inherent in the power to tax is the power to discriminate in taxation." So the phrase must refer to taxation of speakers *qua speakers* . But that is a problematical concept too. Unless one posits an omnipresent tax collector – one who can collect the tax whenever someone speaks, a "tax on speech" could not be administered. A tax on speech about specified subjects, or speech expressing specified views, would be subject to the same administrative difficulty, and would be subject to the further objection that the government may not penalize speech on the basis of its content or viewpoint.

As a practical matter, the only way the legislature can differentially tax speakers is by categorizing them according to tangible indicia that enable the tax collector to determine who owes the tax and who does not. The only obvious tangible means of classification is the medium by which the speech is communicated. The shift in Leathers to the speech clause makes sense only if the Court means to extend the constitutional limitations on differential taxation to nonpress media – i.e., to hold that in addition to the anti-discrimination principles that apply to the press because of the Press Clause, the speech clause limits discrimination among other media.

[18] Leathers at 447

One might suppose the Court thought this necessary because the complaining taxpayers in *Leathers* -- cable television operators – were not press. If they were not, the previous taxation cases would not provide a basis for holding that the cable operators could not be discriminated against. But that explanation fails, for two reasons. First, the Court did not hold that the press cases were inapplicable to cable; on the contrary, it said cable television "is, in much of its operation, part of the 'press.'" It treated the press tax cases as relevant precedents, although it expanded the analysis to also include similar First Amendment claims by nonpress organizations. Second, it did not hold the discrimination against cable unconstitutional. It upheld the tax discrimination, not only as to intermedia discrimination between cable and print media, but also as to intramedia discrimination between cable and satellite services. Although it might have been necessary to create a new speech-clause-based principle to invalidate the tax discrimination against cable, it obviously was not necessary to do so to *uphold* it. If the Court believed the previous cases did not create a principle broad enough to cover cable, that by itself would have been a sufficient basis for the decision.

We are left, then, with no explanation for *Leathers* except that the Court wished to back away from the clear reliance on the Press Clause in the earlier cases and explain those results in speech clause terms. But those are not readily explainable as speech clause cases. Here is an instance where the Court's zeal to avoid reliance on the Press Clause led it into an untenable, if not incoherent, rationale.

Another case in which the analysis could have been more straightforward had the Court been willing to use the Press Clause is *Bartnicki v. Vopper*. The question was whether a radio station could be held liable for broadcasting a private cellular phone conversation that it knew had been recorded in violation of state and federal wiretap laws. The relevant statutes forbade not only the illegal recording but also intentional disclosure thereof, and contained no exception for disclosures by news media. The defendants were clearly liable unless the First Amendment protected them. They argued that the press has a right to publish even stolen information if it concerns a matter of public importance, but the Court refused to consider any special right for the press. Instead, it adopted a rationale that required it to perform contortions, both analytical and factual.

Although it conceded that the wiretap statutes were content-neutral, the Court subjected them to the strict scrutiny normally reserved for content-based regulations. It held that the statutes could not be applied to the defendants absent a "need of the highest order" – the test that was developed in *Daily Mail*, *Landmark Communications*, and *Florida Star* for statutes that punished speech because of its content. It then held that neither the government's interest in discouraging third parties' use of illegally taped conversations nor its interest in protecting the privacy of telephone conversations was sufficient to justify application of the wiretap statutes to disclosures about matters of public concern by defendants who had nothing to do with the illegal interception. That formulation of the controlling principle then forced the Court into a factual contortion: characterization of private telephone conversations as "debate about matters of public concern." Unpersuasive as this reasoning may be, it enabled the Court to protect the

media defendants in that case (and perhaps more important, the New York Times in another similar case pending at the time *Bartnicki* was decided), without creating a specific rule for the press.

These objections to *Leathers* and *Bartnicki* are largely aesthetic, however. Up to this point, the Court's determination to avoid the Press Clause has done little real harm to the interests of a free press. The press's objections to newsroom searches were valid and compelling, but the Court's refusal to treat them as a First Amendment problem proved to be inconsequential. Congress and many state legislatures promptly passed statutes severely restricting newsroom searches, and the problem has pretty much disappeared.

The Court's failure to adopt a First Amendment privilege to prevent compelled disclosure of reporters' confidential sources has had consequences, but not as dire as might have been expected. One reason is that here too legislatures stepped into the breach: more than half of the states now have shield statutes, some of them creating broader protection than the First Amendment privilege the Court was asked to create in *Branzburg*. It is said that Congress was ready to enact a federal shield statute if media had been able to agree on the scope of protection they wanted. A second reason is that most federal courts, and a considerable number of state courts, have recognized some sort of First Amendment privilege despite *Branzburg*. Those courts limit *Branzbur*g to its setting – reporters refusing to testify before grand juries – and adopt a privilege like the one rejected in *Branzburg* for other types of proceedings, such as criminal and civil trials.

The Court's refusal to use the Press Clause to protect confidentiality of news sources was followed by a great deal of litigation, but how much of that would have been avoided had the Court decided otherwise is far from clear. The issues being litigated generally have to do with who may claim the privilege and how much information the privilege covers – issues that would not have disappeared had the Court recognized a First Amendment privilege. And just as the media have lobbied legislatures for ever broader protection, so might they have pressed the Court for expansion of whatever privilege the Court might have created in *Branzburg*.

The one area in which the Court's rejection of Press Clause claims has had important lasting consequences is lack of access to prisons (and perhaps, by logical extension, to other public facilities to which press access is limited). The press's unsuccessful attempts to create a constitutional right of access seem to have resulted in some softening of prison rules restricting press access, but there has been no significant legislative response to the problem. It is impossible to know, of course, how much this has curtailed news coverage of prisons. It seems clear that the coverage since the mid-1970s has not kept pace with the burgeoning prison population over that period, but this might reflect public (or press) indifference to prison conditions rather than inability to gain access. If the Court had recognized a constitutional right of access to state prisons, as it was asked to do in *Houchins*, and federal prisons as it was asked to do in *Saxb*e, that would not necessarily have guaranteed access to those being held in military custody in the aftermath of 9/11, Afghanistan, and Iraq, but it at least might have provided a basis for the press to litigate that issue. In the absence of either a constitutional or statutory

right of access, the press has no clear legal ground to challenge the administration's no-access policies.

So far the Court has been able to avoid reliance on the Press Clause. It has been able to avoid giving the press explicitly preferential treatment under the speech clause, although the press has been de facto the chief beneficiary of the courtroom access cases, the *Bartnicki* case, and the defamation cases.

III. The Campaign Finance cases

Members of the Court recognized early on that regulating the funding of political campaigns could raise prickly questions about the political speech of the press. Reluctance to raise such questions clearly played a role in the Court's decision in First *National Bank of Boston v. Bellotti*. The Court held that a state statute forbidding expenditures by business corporations to influence the outcome of referenda violated the First Amendment. Although the court acknowledged that the press has a "special and constitutionally recognized role" in informing the public,[19] limiting the right to influence referenda to corporate members of the institutional press "would not be responsive to the informational purpose of the First Amendment."[20]

In a long concurring opinion, Chief Justice Burger said failure to protect the speech expenditures of the bank would also threaten the First Amendment rights of "the

[19] Belloti at 781
[20] Belloti at fn. 18

large media conglomerates . . . because of the difficulty, and perhaps impossibility, of distinguishing, either as a matter of fact or constitutional law, media corporations from corporations such as [the bank]." He went on to argue that the Press Clause could not provide a basis for such a distinction because in his view, the history of the First Amendment showed that the Press Clause was not intended to confer any special rights on the press.

The chief justice's vote was crucial to the Court's five-member majority. Justice White, joined in dissent by Justices Brennan and Marshall, thought the statute could be upheld without limiting press speech by distinguishing between, on the one hand, the press and "corporations formed for the express purpose of advancing certain ideological causes," and on the other, "corporations operated for the purpose of making profits."[21] Justice Rehnquist, also dissenting, suggested a distinction that seemed to be based on corporate law rather than the First Amendment. He said media corporations could be distinguished from others, such as the bank, on the ground that when the state charters a corporation for the purpose of publishing a newspaper, "it necessarily assumes that the corporation is entitled to the liberty of the press essential to the conduct of its business." While that liberty would include the right to endorse a candidate in its editorial columns, the newspaper would have no greater right than any other corporation to contribute money to a campaign.[22] (825).

[21] 805
[22] 825

In *Austinv. Michigan chamber of Commerce*, the problem of distinguishing between the press and other corporations arose in a different way. The nonprofit corporation challenging a state statute forbidding corporate contributions to candidates claimed, among other things, that the statute's exemption of news stories, commentary, and editorials denied it equal protection. The Court held that "Although the press' unique societal role may not entitle the press to greater protection under the Constitution [citing Bellotti}, it does provide a compelling reason for the state to exempt media corporations from the scope of political expenditure limitations."[23]

[More on the Federal Election Campaign Act pre-BCRA, and on First Amendment jurisprudence thereon pre-*McConnell*: *Buckley, Mass. Citizens for Life, Beaumont, National Right to Work, Shrink Missouri Govt*]

[Explanation of the BCRA and analysis of *McConnell*]

The only significant use of the Press Clause in the *McConnell* litigation was by a group of libertarian litigants that included Congressman Ron Paul, other libertarian party candidates, and several nonprofit organizations and political committees. The Paul Plaintiffs, as the Court described them, did not claim to qualify for the news media exemptions in the BCRA, which they interpreted as being available only to the "institutional" press, but argued that they are press, within the meaning of the Press Clause, because they "publish through press releases, unpaid appearances on radio and television news, talk, and other shows, through political advertisements in newspapers

[23] Austin at 668

and on radio and television, and through their own outlets – faxes, email, web sites, direct mail, newsletters, bumper stickers, video and audio tapes, telephone calls, door-to-door campaigning, speeches, debates, and even a syndicated radio show."

They claimed the restrictions interfered with their ability to function as "independent and effective 'presses'" reporting and commenting on public policy issues, campaigns, and candidates. They argued that the Press Clause creates an absolute freedom from licensing, prior restraints, editorial control, forced disclosures, and discriminatory economic burdens. These prohibitions are more sweeping than those of the speech clause, they argued, and therefore invalidated many of the BCRA's restrictions without regard to whether those served compelling government interests. The Court rejected the argument in a footnote saying simply that "this contention lacks merit."[24] Their argument against the section of the statute that increased limits on hard money contributions was rejected on the ground that they lacked standing.

IV. Political Speech after *McConnell*

If and when the hegemony of media political speech that *McConnell* ratifies is challenged, one can envision at least three alternative scenarios. The key determinant in all is whether the Court will hold that media political speech receives more constitutional protection than that of other corporate speakers.

[24] 698n. 89.

Scenario 1: If the Court decides that the political speech of media is entitled to no more protection than that of nonmedia corporations, media power to influence elections will exist at the sufferance of Congress. This is the scenario envisioned by Justice Thomas in his *McConnell* dissent. He said "Although today's opinion does not expressly strip the press of First Amendment protection, there is no principle of law or logic that would prevent the application of the Court's reasoning in that setting."[25] In his view, Congress can have no less power to regulate media political speech than speech of nonmedia corporations "because of the difficulty, and perhaps impossibility, of distinguishing, either as a matter of fact or constitutional law, media corporations from [nonmedia] corporations."[26]

A statutory ban on editorial endorsements would not be the end of freedom as we know it. Telling people how they should vote is not a core function of a free press. Most magazines do not endorse candidates or ballot propositions. Some newspapers do not, and some editors who do have doubts about the propriety of the practice. Until fairly recently, the ability of radio and television stations to endorse candidates was curtailed by a requirement that they give the opponent an opportunity to respond. That rule is no longer enforced, but most broadcast outlets still do not endorse candidates. Restricting the right of media corporations to editorialize about elections might be viewed by them as an assault on a freedom they have enjoyed since long before the First Amendment as adopted, but the dent it would put in the total corpus of media speech about politics would be a small one.

[25] 742.
[26] 740, quoting Burger, C.J., concurring, in Bellotti.

The problem, of course, is that a prohibition against editorial endorsements *only* would be impractical. It could easily be evaded by clothing the endorsement as something else – a commentary, an opinion column, an op-ed piece, or a news analysis. If the regulatory target is not only endorsements but also attacks, the problem is even greater. A negative news story may be more effective than an editorial as a tool of opposition. For these reasons, a legislature bent on restricting the political influence of media would be unlikely to settle for a ban on editorials. To make that ban effective, the legislation would have to extend to other forms of media political speech, such as commentary, analysis, and news coverage. That would go to the core of freedom of the press, and it would be inconsistent with the longstanding understanding that the press plays a crucial role in informing the public about matters political.

This scenario is probably unlikely because of the political power of the media. We have seen previously that the media have had considerable success in getting legislatures to create entirely new protections for them, in the form of shield statutes and prohibitions against newsroom searches. They might be expected to have at least as much success persuading legislatures not to take away longstanding press perquisites such as the right to freely cover and comment about elections.

Political success is rarely complete, however. Even if the threat of pervasive regulation of media political speech is remote, the risk of scattered legislative incursions is real. Legislators have often attempted to regulate particular aspects of media political

speech. State legislatures have attempted to prohibit the publication of falsehoods about candidates, give candidates who are attacked in the media a right of reply, prohibit unsigned editorials endorsing or opposing candidates, restrict election-day endorsements, and prohibit exit polling. Congress has required broadcasters who provide time to one candidate to give an equal opportunity to the opponent and required them to offer reply time to the opponents of candidates they endorse or oppose. Most of these restrictions have been held unconstitutional, or have been repealed in the face of constitutional objections, but they show that media power does not always forestall legislation restricting their political speech.

Unwillingness to give media speech some constitutional preference would very likely result at least in occasional and peripheral restrictions on the role of the press in politics. Depending on public sentiment toward the press, the willingness of the press to defend itself in legislative battles, and the intensity of legislative zeal to curtail the press's role, the restrictions could be far more serious.

Scenario 2: The Court might hold that media political speech enjoys more constitutional protection than the political speech of corporations. This seems to be the scenario envisioned by Justice Kennedy and Chief Justice Rehnquist in their *McConnell* dissents. Neither explicitly endorsed a favored constitutional position for the press, but both clearly believed that the result of *McConnell* would be a preferred position for media corporations in the political dialogue of the nation. (De facto only?) (quotes)

The Court might attribute the favored treatment of the media to the Press Clause, or perhaps to some favored-speaker theory developed under the umbrella of the speech clause. The Court's history of avoiding reliance on the Press Clause would suggest the latter course is likely, but in this instance it is hard to see that anything is gained by it. In previous cases, the strategy of squeezing press claims into a speech clause analysis had two advantages. One, it made the right available to nonpress speakers too. Second, it obviated the need to define the press. In this context the strategy would have neither of those advantages. It would be necessary to define the class of favored speakers by some means even if "the press" is not the defining concept, and the right would be available only to those speakers.

Another way of giving preference to media speech without invoking the Press Clause would be to hold that the risk of corruption that justified the BCRA's restriction of corporate political speech does not exist, or is not as great, in the case of media speech. That argument has already been anticipated, and answered, by Justice Thomas: "Candidates can be just as grateful to media companies as they can be to corporations and unions. In terms of the 'corrosive and distorting effects' of wealth . . . there is no distinction between a media corporation and a nonmedia corporation."[27] The majority was not dissuaded in *McConnell*, however, and it is entirely possible that a future Court might decide that a particular restriction on a specific type of media political speech presents a sufficiently different balance of interests to be distinguishable from *McConnell* on familiar speech clause grounds.

[27] 740. See also Rehnquist, dissenting, 780.

Preferential treatment of media political speech, however it is accomplished doctrinally, would prevent *McConnell* from being the disaster for freedom of the press that Justice Thomas predicted, but it would not be an unmixed blessing, even for the media. A world in which those who enjoy favored status are surrounded by outsiders constantly trying to gain admission might threaten, or diminish the value of, perquisites that the media presently enjoy. Corporations that seek to be media for purposes of gaining protection for their political speech are likely to also want to share other advantages that the press enjoys, such as seats in the press gallery, favorable tax treatment, and exemption from financial disclosure requirements.

More importantly, a wide disparity in political speech rights might create internal pressures for the media themselves. General Electric, a major defense contractor, is forbidden, as a result of the BCRA and *McConnell*, from spending corporate money to urge the election of members of Congress who appreciate the need for a well-equipped military. But General Electric also owns NBC and NBC's 14 network-owned televisions stations and three cable networks,[28] and those entities are free, legally at least, to use their news programs to influence congressional elections any way they choose. Disney, which owns ABC and its 10 television stations, and Viacom, which owns CBS and its 16 stations, also have many nonmedia interests on behalf of which they seek to influence Congress. The same is true of AOL-Time Warner and other conglomerates that have both media and nonmedia interests.

[28] See Who Owns What, cjr.org.

So far there is little evidence that the conglomerates use their media subsidiaries to advance the political interests of the parent corporation. The managers of the media subsidiaries seem to guard their journalistic independence fairly zealously. Nonetheless, one cannot welcome any development that increases the temptation for parent corporations to influence the journalistic decisions of their media outlets, or for managers of the subsidiaries to serve the political interests of the parents without being told to do so. Creation of a large political advantage for corporations that own media is such a development.

Scenario 3: In my view, the best post-*McConnell* course would be one that includes elements of both of the preceding scenarios. If faced with a substantial restriction on the political speech of the media, the Court should begin with the course suggested by Scenario 2. However frustrated or disenchanted we may become from time to time with the press's performance of its role in political discussion, that role is too important to be left to the mercy of legislatures. Imagining a world in which political discussion is left to the Internet and television commercials should be a sufficient reminder of the crucial role that the press plays in questioning, verifying, organizing, synthesizing, and condensing the information we rely on in making political decisions. Restrictions that seriously interfere with that role ought to be constitutionally forbidden.

That should be accomplished by resurrecting the straight-forward Press Clause analysis that the Court articulated in *Mills v. Alabama*: a major purpose of the First Amendment was to protect discussion of matters relating to politics; the Constitution

specifically selected the press to play an important role in that discussion; suppression of the right of the press to clamor for or against change is "an obvious and flagrant abridgement of the constitutionally guaranteed freedom of the press."[29]

Attempting to accomplish this without using the Press Clause is not promising. Doing it under the speech clause by some sort of ad hoc balancing is too risky. By their nature, controversies over restrictions on political speech will always be fraught with political consequences; decisions that turn on assessment of benefits and burdens in particular cases will always arouse suspicions of political motives. Attempting to accomplish it under the speech clause by treating the press some sort of favored speaker complicates speech clause analysis without avoiding the definitional difficulties that arise from reliance on the Press Clause.

In dealing with those definitional questions, the Court should preserve some of the legislative autonomy that Scenario 1 envisions. As I have argued elsewhere,[30] the Press Clause should not be read as an anti-discrimination clause. Its purpose is not to confer individual rights on everyone who can claim the label "press." To paraphrase Justice Stewart, its purpose is to protect the full flow of information to the public, and the individual rights of particular press claimants are subsumed under that broad societal interest.[31] This means that the press's role in political speech can be protected under the Press Clause without giving the same rights to everyone who might qualify as press.

[29] 219.
[30] *Freedom of the Press*, 80 Tex. L. Rev. 429 (2002).
[31] 408 U.S. 726 n. 2.

This is a difficult interpretation to accept because it differs so dramatically from speech clause jurisprudence, where nondiscrimination among speakers is an article of faith. The marketplace model of free speech is so deeply entrenched that it is unpopular, if not unthinkable, to suggest that free speech interests could be served without giving everyone the same right to speak.[32] But sensible interpretation of the Press Clause begins with an understanding that it is different from other Bill of Rights provisions. As Justice Stewart pointed out, most of those protect specific rights of individuals, while the Press Clause protects an institution. That means that a law violates the Press Clause only when it compromises the institutional role of the press, not when it merely denies a right to an individual member of the press. A litigant advancing a Press Clause claim should not be able to succeed by showing that he or she has been denied a right given to another member of the press; success should require a showing that the challenged restriction threatens the ability of the press to perform its role.

That, of course, is a hard distinction to maintain. Only the law's effects on particular components of the press can compromise its ability to carry out its institutional role, and only the press entities or individuals who are affected can bring litigation to protect the institutional role of the press. Requiring them to assert and show not merely an interference with their own ability to function as press, but also a threat to the press as an institution, gives them an unfamiliar burden. But an interpretation of the Press Clause that prevents legislative discrimination among members of the press is unworkable. The

[32] Such heresies do occasionally get articulated. "What is important is not that everything be said, but that everything worth saying be heard." In a few instances, the Court seems to have actually embraced a First Amendment theory based on the need to receive information rather than the right of the speaker to speak. See Va. Pharmacy.

press receives a great deal of favorable treatment by law, and is therefore defined legislatively for many different purposes, ranging from access to the White House to tax exemption to protection from searches and subpoenas. An interpretation of the Press Clause that created uniform press rights as a matter of constitutional law would inevitably interfere, possibly fatally, with the existing universe of nonconstitutional press preferences.

To put that concern into the context of politics in the post-*McConnell* world, there are many different ways of regulating media political speech – by deciding which members of the press get to ask questions in political debates, who gets access to candidates and incumbents, when election results may be projected, whether a "newspaper" is really a campaign flyer. Constitutional law is not a sufficiently flexible mechanism to deal with all such questions. That is why Congress and the state legislatures must retain a great deal of leeway in deciding how, and by whom, the institutional role of the press is to be fulfilled. Ultimately, however, the freedom of the press to influence politics must be constitutionally protected.

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