

## THE INDEPENDENT SIGNIFICANCE OF THE PRESS CLAUSE UNDER EXISTING LAW

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### I. INTRODUCTION: THE SPEECH AND PRESS CLAUSES

In 1973, Jerome Barron asked the most important First Amendment question regarding the press: “freedom of the press for whom?”<sup>1</sup> Four years earlier, in 1969, relying very heavily on a newspaper precedent, *Associated Press v. United States*,<sup>2</sup> the Supreme Court gave an answer to Barron’s question. In *Red Lion Broadcasting Co. v. FCC*,<sup>3</sup> probably its most famous broadcasting case, the Court asserted that “[i]t is the right of the viewers and listeners . . . which is paramount.”<sup>4</sup> This claim—that the audience’s interests are paramount—could not have been made when in a public school a child refused to salute the flag on the basis of conscience.<sup>5</sup> In *West Virginia Board of Education v. Barnette*,<sup>6</sup> the speaker’s interests, or more precisely the would-be non-speaker’s interests or, even better put, the individual’s liberty, was paramount.<sup>7</sup> The difference between *Barnette* and *Red Lion*, as well as the Court’s

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1. JEROME A. BARRON, FREEDOM OF THE PRESS FOR WHOM?: THE RIGHT OF ACCESS TO MASS MEDIA (1973). As the celebration of this conference recognizes, Barron effectively asked that question before the Court’s decision in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). See Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1641-43 (1967).

2. 326 U.S. 1 (1945).

3. 395 U.S. 367 (1969). At three crucial places in its reasoning, the Court invoked *Associated Press*. *Id.* at 387, 390, 392.

4. *Id.* at 390.

5. Specifically, on the basis of religion, but the Court held that point not to be significant and, thus, did not rely on the religion clauses. *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 629, 634-35 (1943).

6. 319 U.S. 624 (1943).

7. See *id.* at 633-34, 641-42.

reasoning in *Associated Press*, illustrates how the rationale for constitutional protection of the press differs from that of the protection of individuals. These different rationales lead, in turn, to somewhat different protection for the press and for individuals, with the press sometimes receiving special protections, but also with it sometimes being subject to regulations as structured enterprises that could not be applied to individuals. These different rationales even explain why regulation of the press sometimes actually serves the values embodied in the First Amendment—as Justice Black argued in *Associated Press*.<sup>8</sup> This Article aims to support each of these assertions.

A ubiquitous understanding of the constitutional guarantee of press freedom is that it aims to protect a Fourth Estate or, more expansively, to protect media entities because of their instrumental contribution to democracy and a free society. Nevertheless, despite the powerful presentation of this view by Justice Potter Stewart<sup>9</sup> (and also Justice William Brennan),<sup>10</sup> the Court has never explicitly recognized that the Press Clause involves any significant content different from that provided to all individuals by the prohibition on abridging freedom of speech.<sup>11</sup> The result is a common view that, at best, the Press Clause means that individuals have the right to disseminate their views as well as to voice them. According to this reading of Court decisions, the Press Clause is not meaningfully separate from the Speech Clause.

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It would be strange indeed, however, if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom.

*Associated Press v. United States*, 326 U.S. 1, 20 (1945).

9. Potter Stewart, “*Or of the Press*”, 26 HASTINGS L.J. 631, 634 (1975).

10. William J. Brennan, Jr., Address at the Dedication of the S. I. Newhouse Center for Law and Justice, Rutgers University (Oct. 17, 1979), in 32 RUTGERS L. REV. 173, 174-75 (1979).

11. David Anderson points out that from the 1930s through the 1960s, the Court often invoked and appeared to rely on the Press Clause. David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 448 (2002). However, all those cases were ones that one suspects individual speakers would receive the same protection except, maybe, for special animosity to prior restraints as applied to the press. *Near v. Minnesota*, 283 U.S. 697, 716-19 (1931). Interestingly, *Near*, a press case, is the first case where the Court invalidated a state law on the basis of the First Amendment. *Id.* at 717-23.

In fact, the Court is sometimes portrayed as repudiating a separate role for the Press Clause. Most often cited for this proposition is *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*<sup>12</sup> The lower court, possibly relying on the pedigree of Justice Stewart's dubious proposition that the Court had never applied the *New York Times Co. v. Sullivan*<sup>13</sup> actual malice standard to non-media defendants,<sup>14</sup> held that these non-media speakers receive less protection. On this basis, it found *Dun & Bradstreet* liable. In contrast, by adding Justice White's concurrence to the opinion of the four dissenters, a majority in *Dun & Bradstreet* explicitly rejected giving the non-media defendants less First Amendment protection for their defamatory speech than is given to media defendants.<sup>15</sup> In addition to these five, the three member plurality opinion, while affirming the lower court result, explicitly withheld approval of the lower court's premise. Instead, Justice Powell found that the protection provided to the defendants in *Gertz v. Robert Welch, Inc.*<sup>16</sup> did not apply because here the negligently false defamatory speech (assertedly) did not involve an "issue of public concern."<sup>17</sup> No member of the Court recognized a difference in protection of individuals and the media, and a majority explicitly rejected the proposition in this context. Sometimes these opinions are taken to mean that the two clauses have no operationally different content.

That reading of the Court's decision does not follow. A principle of no greater protection for the press against defamation suits does not logically rule out the converse—that individuals receive greater rights in these contexts. More plausible though, *Dun & Bradstreet* could merely mean that any difference in protection provided by the two clauses does

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12. 472 U.S. 749, 758-59 (1985).

13. 376 U.S. 254, 279-80, 283 (1964).

14. Stewart, *supra* note 9, at 635. Stewart's interpretation of *New York Times Co.* is curious. Although the *Times* did choose to accept the civil rights leaders' advertisement and, therefore, the ad could be seen as speech of a media defendant, it was also speech of the non-media defendants who signed and placed the ad. Their speech was not the speech of the media, although they did use the media. The Court applied the same actual malice standard to these individual defendants, apparently belying Stewart's subsequent interpretation. Thus, the only way to understand Stewart's position is not that the media have special rights but that whoever uses the media for their speech has these greater rights.

15. Justice White said he agreed with "Brennan that the First Amendment gives no more protection to the press in defamation suits than it does to others exercising their freedom of speech"—not, thereby, ruling out the converse, that the press receives less protection. *Dun & Bradstreet, Inc.*, 472 U.S. at 773 (White, J., concurring). Justice Brennan, however, also said that "in the context of defamation law, the rights of the institutional media are no greater and no less than those enjoyed by other[s]." *Id.* at 784 (Brennan, J., dissenting) (emphasis added).

16. 418 U.S. 323, 330-32 (1974).

17. *Dun & Bradstreet, Inc.*, 472 U.S. at 757.

not come into play in this context. In other contexts, however, their rights vary, with individuals some times and the press at other times having greater rights.<sup>18</sup> In fact, defamatory speech is a peculiar locus to test the thesis of independent meaning of the Press Clause. If individual liberty is the core of the speech freedom, individuals presumptively should have at least the rights to speak held by any mere instrumentally-valued “entity”—such as the press. If the press is, as Justice Stewart suggested, the only constitutionally-protected business, its speech rights should only be greater, if at all, than those of other businesses. Even if, as Justice Stewart argues, the normative rationale for the two constitutional provisions is different, it is still possible—as I mostly argue—that both the press and individuals have basically the same right not to be censored. Censorship interferes both with individuals’ liberty and with the press’s performance of its instrumental role. The press might even have less, not more, speech rights if there are circumstances where the instrumental justification for its protection is not at stake—for example, if the regulation does not involve censorship. In contrast, the context where there may be special rights for the press as compared to individuals (as well as compared to other businesses) is where its institutional integrity is at stake.

I and others have defended distinguishing the Speech and Press Clauses, usually understanding the Press Clause along the general lines of Justice Stewart’s Fourth Estate approach.<sup>19</sup> Others reject this view, arguing that confusion and danger lie in giving the press any special

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18. Later, I consider the possibility that individuals have greater rights to be free from mandatory speech requirements and greater rights to be unrestricted by copyright than the press. See *infra* notes 38-62 and accompanying text.

19. In addition to the articles by Justices Stewart and Brennan, many in the communications field assume that the press is different and legal articles giving reasons for the conclusion are not uncommon. See, e.g., Floyd Abrams, *The Press Is Different: Reflections on Justice Stewart and the Autonomous Press*, 7 HOFSTRA L. REV. 563, 563-64 (1979); David A. Anderson, *Freedom of the Press in Wartime*, 77 U. COLO. L. REV. 49, 66-69 (2006). I have presented my views various places. See C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 225-71 (1989) [hereinafter BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH]; C. Edwin Baker, *Turner Broadcasting: Content-Based Regulation of Persons or Presses*, 1994 SUP. CT. REV. 57, 62 [hereinafter Baker, *Turner Broadcasting*]. I have also argued that Vincent Blasi’s argument for the checking function as being a central First Amendment value relies on historical evidence and rationales related to the Press Clause, not the First Amendment generally. Compare Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 523 (arguing that free expression has value because of the function it performs in checking the abuse of official power and examining how this “checking value” differs from other values that have dominated First Amendment analysis) with C. Edwin Baker, *Press Rights and Government Power to Structure the Press*, 34 U. MIAMI L. REV. 819, 830-31 (1980) [hereinafter Baker, *Press Rights and Government Power*].

rights.<sup>20</sup> The present Article is not intended to reenter this theoretical debate. Instead, this Article will challenge the common view that existing doctrine rejects the special rights or independent interpretation view. More specifically, the primary effort will be to: (i) consider the extent an independent interpretation of the Press Clause has been implicitly, though perhaps unwittingly, accepted by the courts. The argument will be that an independent interpretation either is implicit in decisions the Court has reached or provides a more appealing interpretation of good results that otherwise seem doctrinally anomalous. I will also consider: (ii) whether the independent interpretation would lead to the “better” and most likely resolution of issues that are currently doctrinally unresolved, that is, whether independent interpretation would be required. Finally, I will consider: (iii) whether it would provide correctives where good reasons exist for objecting to current doctrine. All the examples discussed below will fit into one of these three categories.

There are two doctrinal contexts in which this exploration takes place. Part II considers how constitutional treatment of the press differs from that of individuals and obviously, the differences could involve either greater, lesser, or merely different protection. Part III involves how treatment of the press differs from that given to non-media commercial enterprises. Here, the expected differences, if any, will always be in the direction of greater protection of the press. Part IV will conclude with brief remarks on how definitional problems related to special treatment of the press are more apparent than real.

## II. DIFFERENT CONSTITUTIONAL RIGHTS OF INDIVIDUALS AND THE PRESS

Any differences between the Speech Clause and the Press Clause should depend on an understanding of the primary rationale behind each. This theoretical understanding could then provide a basis for predicting what differences should be found in an examination of doctrine if that doctrine corresponds to the proposed theory. Here, my hypothesis is that individual speech rights are based on respect for the individual's autonomy or liberty as an actor. In contrast, the press's rights are related to its instrumental role as a fundamental institution of a free and

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20. Anthony Lewis, *A Preferred Position for Journalism?*, 7 HOFSTRA L. REV. 595, 609 (1979); William W. Van Alstyne, *The Hazards to the Press of Claiming a “Preferred Position”*, 28 HASTINGS L.J. 761, 768-69 (1977); David Lange, *The Speech and Press Clauses*, 23 UCLA L. REV. 77, 77 (1975).

democratic society. Most obviously this encompasses its Fourth Estate role, but more generally its role in developing and presenting information, opinion, and vision that is instrumentally valuable to its audience—the people in a free society.

This understanding of the basis of the rights predicts corresponding doctrinal positions. As to speech, an individual should be free to say, and, at least whenever her basic values are at stake, not to say whatever she chooses. In contrast, the press should be able to communicate whatever it, as an independent entity, believes serves its audience's need for facts, opinions, or vision. Thus, though for different reasons, the rationale for each clause requires freedom from censorship—that is, freedom from prohibitions or penalties for, in the case of the individual, expressive choices, and in the case of the press, its choices to communicate ideas or information. (This formulation does not exclude regulation of unprotected categories of speech, but the unprotected categories, whatever they are, should presumptively be the same for the individual and the press.) On the other hand, there may be differences. Most obviously, the individual should receive protection for her liberty and the press for its institutional integrity. Some regulations place one at issue but not the other.

The most obvious example of only individual liberty being at issue is where the individual claims the liberty right not to bear false witness to her values. This constitutionally required respect for individual autonomy provides no obvious reason that the press should have such a right not to speak—at least, unless a mandate to speak can be shown in the particular context to be inconsistent with its integrity as an institution. So, though as to affirmative speech, the two should have (virtually) the same right to speak, the individual may have greater rights not to speak. In contrast, special rights of the press should be expected, if at all, in the context of laws or government practices that would interfere with its integrity as an institution. Just as the autonomy value has little applicability to an instrumentally-valued institution, institutional integrity has little application to the individual. Thus, any special rights related to institutional integrity of the press can be expected to have no parallel in claims that individuals can raise on their own. These, then, are the theoretical expectations. The rest of Part II examines the relative case law—and, I claim, largely confirms the review of the separate role of the two clauses.

A. *Protecting Institutional Integrity: Special Press Rights*

1. Reporter's Privilege

The most discussed possibility, and one emphasized by Justice Stewart, is that journalists should have some privilege to refuse to identify confidential sources in judicial proceedings.<sup>21</sup> The argument is that since, without wrong-doing by the press, the press develops this information about sources solely within the constitutionally-protected activity of providing news, and since compelled breaches of this confidentiality will significantly interfere with the press's news-providing role, that compelled breaches undermine its integrity as an institution. Moreover, the government has no legitimate authority to appropriate for itself the products of the press's constitutionally-protected freedom (i.e., its institutional integrity).<sup>22</sup> Rather, the institutional integrity of the press can be seen to require that it be able to control its work product prior to publication.<sup>23</sup> The emphasis here is specifically on institutional integrity. Justice Stewart's complaint was that without this protection of journalists' capacity to promise confidentiality, the authorities could "undermine the historic independence of the press by attempting to annex the journalistic profession as an investigative arm of government" to the long run detriment even of the administration of justice.<sup>24</sup> The empirical claim is that the absence of this privilege will lead to the press being less able to provide quality news. The relevance of this instrumental point follows precisely from the basic claim that the Press Clause protects the institutional integrity of the press in order to benefit the public.

Nevertheless, in *Branzburg v. Hayes*, speaking for the five member majority, Justice White stated that "[t]he sole issue before us is the

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21. See, e.g., *Branzburg v. Hayes*, 408 U.S. 665, 725-52 (1972) (Stewart, J., dissenting).

22. See *Zurcher v. Stanford Daily*, 436 U.S. 547, 570-77 (1978) (Stewart, J., dissenting).

23. The 5-3 decision in *Zurcher* largely duplicated its split in the earlier *Branzburg* case. Justice White wrote for the five member majority including Justice Powell. Justice Powell, though, noted that in issuing a warrant a judge should interpret reasonableness in light of the value of the integrity of the press, *id.* at 570, a value which Justices Stewart and Marshall argued in dissent should prevent its issuance. *Id.* at 570-71. Even Justice White, though only arguing that judges should enforce the requirement of reasonableness for issuing warrants with special exactitude when the broader category of "First Amendment interests," not specifically press interests, were at stake, observed "that the struggle from which the Fourth Amendment emerged 'is largely a history of conflict between the Crown and the press.'" He then gave as a consideration against adopting a general rule restricting warrants for certain searches of the press the fact, as he saw it, that recent history "hardly suggests abuse." *Id.* at 564-66 (citation omitted).

24. *Branzburg*, 408 U.S. at 725 (1972) (Stewart, J., dissenting).

obligation of reporters to respond to grand jury subpoenas as other citizens do . . . .”<sup>25</sup> In response to the request to interpret the First Amendment as granting such a privilege, he said, “[t]his we decline to do.”<sup>26</sup> Since this area of controversy is well known, I will only make a few brief comments. First, even taking Justice White’s opinion for all it is worth, it is singularly narrow. It did not assert the broader proposition that the Press Clause does not provide for special rights. As Justice Powell was quick to emphasize, Justice White allowed that “news gathering is not without its First Amendment protections.”<sup>27</sup> The majority’s primary arguments were directed not at the commonly suggested view that freedom of the press does not provide for special rights.<sup>28</sup> Rather, the opinion offered reasons to conclude that denial of a journalist privilege does not undermine freedom of the press and, according to Justice White, this fact is the lesson that history teaches.<sup>29</sup> With a history providing different empirical evidence—or a different reading of the history that we do have—Justice White did not rule out a different result. More specifically, the opinion limited itself to the narrow issue of whether the First Amendment provided this privilege, and in saying no, Justice White’s opinion said nothing about whether the Press Clause has independent significance in relation to other issues.

Second, if one Justice had moved from Justice White’s majority to the dissenting view, the reigning doctrine would be that the Press Clause does provide different protection for the press than for individuals. Third, despite Justice White speaking for five Justices, many lower courts and commentators think that the case showed a different five Justices (a majority) supporting special constitutional claims of the press.<sup>30</sup> That is, many lower courts read Justice Powell’s concurrence to require consideration of the needs of the press in a case-by-case determination of whether disclosure of a source is properly compelled, leading many lower federal courts—sometimes as a matter of federal common law but sometimes as a matter of the First Amendment—to

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25. *Id.* at 682 (majority opinion).

26. *Id.* at 690.

27. *Id.* at 707.

28. The majority did note that recognition of a journalist privilege would create the difficulty of determining “those categories of newsmen who qualified” as well as other practical problems, but this hardly seemed determinative. *Id.* at 704. The contexts in which this problem of identifying a person as a journalist arises—specifically, after the journalist’s investigation—may make this problem relatively easy to handle as compared to other contexts, such as a person wanting access to a facility on grounds that she may, as a freelancer, subsequently publish a story and thus should be considered part of the press.

29. *Id.* at 698-99.

30. See, e.g., *Commonwealth v. Bowden*, 838 A.2d 740, 752 (Pa. 2003).



provide protection and to formulate a test very close to the one that Justice Stewart had proposed.<sup>31</sup> If these courts are right, this subsequent history can be read to show that *Branzburg* did in effect recognize an independent press right.

In sum, nothing in Justice White's opinion requires rejecting a view that the Press Clause has independent implications different from the Speech Clause and some elements suggest that it does. If Justice Powell's opinion is read as many lower courts have read it, the majority in this case does base special press rights on the Press Clause. Finally, anyone who believes that a constitutional journalist privilege should exist is committed to reading the Press Clause as having independent force. Of course, she could also believe in the independent force of the Press Clause even if she favored total rejection of any constitutionally-based reporter's privilege.

## 2. Required Speech: Mandatory Disclosure of Government Payment for Speech

This Section deviates from the Article's general approach by raising an important issue not yet litigated. Here I only claim that an independent interpretation of the Press Clause leads to the right result. Sometimes payment is made to get the payee to speak as the payor directs without the payee disclosing that she is not the originator, not the "author," of the speech. This practice, paying another person or entity to present a communication as if it were their own, is what Ellen Goodman has described (and condemned) as "stealth marketing."<sup>32</sup> Functionally, "stealth" refers to the failure to identify speech as having been paid for, for example, not identifying the communication as an advertisement.

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31. MARK A. FRANKLIN ET AL., *MASS MEDIA LAW* 575 (7th ed. 2005) (citing Anthony L. Fargo, *The Journalist's Privilege for Nonconfidential Information in States Without Shield Laws*, 7 COMM. L. & POL'Y 241, 252-53 n.74 (2002)), reports that by 2002 "all but one of the federal circuit courts of appeal appeared to recognize some form of qualified constitutional privilege." The case book also noted opinions going the other way, *id.*, and, according to Bruce Sanford, the judicial attitude may be quickly changing "with a velocity that would make your head spin faster than Linda Blair in the Exorcist." *Id.* at 580. Of course, putting aside whether there is a First Amendment basis, many states rely on their own constitution, legislation, or state common law to find a privilege. For purposes of this essay, the main relevance of this fact may be that in the years after *Branzburg* a popular consensus (or sufficient lobbying power on the part of the press) seems to support a view that the press should be treated differently from individuals in this context, presumably because of the peculiar social role of the press.

32. Ellen P. Goodman, *Stealth Marketing and Editorial Integrity*, 85 TEX. L. REV. 83 (2006). See also Tamara R. Piety, "Merchants of Discontent": *An Exploration of the Psychology of Advertising, Addiction, and the Implications for Commercial Speech*, 25 SEATTLE U. L. REV. 377, 444 (2001).

Many media entities are legally required to disclose the fact of payment (or, equivalently, identify the communication as an advertisement)—though cynically it might be asked how often these requirements have been enforced and how easy they are to circumvent. Since the 1912 “Postal Act,” newspapers and periodicals that receive second class mail privileges have been required to make this “mandated speech.”<sup>33</sup> Congress has also imposed the same requirement on broadcasters and, in some cases, cable providers.<sup>34</sup> There seems to be little question of the constitutionality of these requirements.<sup>35</sup> Much less clear is whether disclosure can be required in cases where an individual, not a media entity or person working for a media entity, is paid to speak. The issue seldom arises, presumably because policy makers usually see no need for such a requirement in the case of individuals. Can, however, the government require political or charitable canvassers to identify themselves as either “paid” or “volunteer”? The Court has explicitly refused to decide the issue.<sup>36</sup> Assuming, as seems likely, that mandated disclosure can be expected to reduce the effectiveness of the payee’s communication, the requirement would raise a difficult constitutional question.<sup>37</sup> If the disclosure requirement were impermissible here, the

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33. 39 U.S.C. § 3685 (2000); Postal Service Appropriations Act of 1912, Pub. L. No. 62-336, 37 Stat. 539, 553-54 (1912).

34. See C. Edwin Baker, *The Media That Citizens Need*, 147 U. PA. L. REV. 317, 371 n.155 (1999).

35. For a good analysis, see Goodman, *supra* note 32, at 130-37. Although decided before any meaningful development of First Amendment doctrine, *Lewis Publ’g Co. v. Morgan*, 229 U.S. 288 (1913), upheld the 1912 Postal Act against a First Amendment challenge. 229 U.S. 288, 313 (1913).

36. The Court has held that requiring paid, but not volunteer, circulators of ballot measure petitions to identify themselves by name and to communicate the amount they are paid to circulate the petitions is unconstitutional. *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 204 (1999). The Court repeatedly stated, however, that neither it nor the Court of Appeals expressed a view on whether the state could require that these canvassers identify their “paid or volunteer status, and if paid, by whom . . .” *Id.* at 200; see also *id.* at 197.

37. Anonymity has been protected for varying instrumental reasons but primarily to aide vulnerable speakers. See Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 HASTINGS L.J. 983, 1024-26 (2005). A speaker’s right to use paid stand-ins is well established. See, e.g., *Meyer v. Grant*, 486 U.S. 414, 422-24 (1988); *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 803 (1988); *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 633-34 (1980). Thus, a speaker can maintain anonymity and has a right to pay someone to stand in her place. The combination of these two rights could be seen to favor a right of non-identification. Moreover, a regulation is of doubtful constitutional validity if designed to reduce a speaker’s effectiveness and only applies—only could constitutionally apply given the individual’s right to anonymous speech—when the payee avails herself of her constitutional right to use the stand-in. The requirement then would be punishing the exercise of a constitutional right. Still, to merely force the party to disclose that she is a stand-in may not interfere with why anonymity is protected. Existing precedent is not very informative maybe because the primary non-media contexts where mandated identification in support of increasing audience’s ability to assess

question then would be why the difference in the media and non-media contexts. I will not further speculate on how the Court would or should treat this open question. Rather, I turn to the issue of whether the First Amendment should ever be interpreted to *mandate* disclosure.

Unidentified payment for speech is especially troubling when the government is the ultimate speaker. Having met any state action requirement, the question can then be raised: Does the Constitution prohibit stealth advocacy by the government? This view has been forcefully advanced. The argument is, essentially, that “political accountability [is] a bedrock principle of our Constitution” that grounds a constitutionally-based transparency principle for government communications.<sup>38</sup> The government violates that principle when it speaks without identifying itself as the speaker. With this reasoning, Gia Lee finds a constitutional basis for mandating disclosure in the Constitution’s structural democratic commitments to public accountability.<sup>39</sup> In the end, though, she concludes that this constitutionally-based transparency of government communications principle should play a role in constitutional litigation (for example, to bar the government from claiming that speech is its own if it had not disclosed that fact<sup>40</sup>) but, for practical reasons, violation of this constitutional principle should not itself create a cause of action.

Even watered down so as not to create a cause of action for those harmed by violations, recognizing this principle would be a radical step. A plausible analogy would be First Amendment claims for a right of access to government-held information or to government facilities. The democratic benefits from access are clear—but lack of information never stops a person from speaking, including accusing the government of

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messages have mostly occurred either in commercial contexts (where commercial speech is protected only or primarily to serve listeners’ interests) or in the campaign context, which, surprisingly to some, is probably the most regulated, and one of the most properly regulated, speech context. *See generally* C. Edwin Baker, *Campaign Expenditures and Free Speech*, 33 HARV. C.R.-C.L. L. REV. 1 (1998).

38. Lee, *supra* note 37, at 1016.

39. *Id.* at 1016-17.

40. Lee effectively criticized *Johanns*, and her views were roughly expressed by the dissent. “[I]f government relies on the government-speech doctrine . . . it must make itself politically accountable by indicating that the content actually is a government message. . . .” *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 571 (2005) (Souter, J., dissenting). Still, *Johanns* may represent merely a sub-rosa rejection of *United States v. United Foods, Inc.*, 533 U.S. 405, 417 (2001), which has been subject to savage critique for inconsistency with the bulk of Supreme Court law on commercial speech, see Robert Post, *Compelled Subsidization of Speech: Johannis v Livestock Marketing Association*, 2005 SUP. CT. REV. 195, and a return to upholding this type of assessment as the Court did earlier in *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 477 (1997).

“hiding” information that should be public, speculating about why it does so, and demanding that it come clean. Thus, how the denial of access violates speech freedom is unclear. Given the recognition that secrecy is sometimes desirable (whether to protect personal privacy or national security or many other legitimate interests), the better constitutional doctrine might be to treat the need for information not as giving rise to a constitutional right, but rather as providing a powerful argument for government (legislative or executive) action to make information available.<sup>41</sup> The claim should be that legislatures should enact strong freedom of information acts, as they often have.

Similarly, in the context of government speech, a host of *arguably* acceptable reasons explain why, and identify contexts in which, government might choose not to disclose that it is the ultimate source of a communication. Consider the use of undercover agents, promotion of views where the government only wants people to focus on the content, cases where, as is common in public relations-type promotions, an effort is made to identify the message with a personality popular among a targeted audience, and secretly authorized “leaks” of information. The propriety of these practices raise thorny policy issues, but it seems doubtful that constitutional analysis provides the right tools with which to resolve them. Thus, like in the relation between privacy and freedom of information acts, maybe the better approach is for the public to demand and for the legislature to enact general transparency rules, but to leave their extent up to legislative or other policy-making refinement.

Curiously, in Lee’s argument for a constitutional basis for her “transparency of communications” principle, the main relevance of the First Amendment is as a potential obstacle.<sup>42</sup> Mandated transparency seems initially to conflict with the First Amendment right of anonymity. In response, Lee persuasively argues that requiring government self-identification does not conflict with any of the specific and limited reasons, all of which were only instrumental, for the First Amendment to

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41. This conclusion is not unassailable. Though in concurrence, Justice Brennan, who viewed the individual’s right to speak as virtually “inviolable,” adopted a dual level First Amendment approach that treats some instrumentally grounded claims, such as a right of access to information, as having First Amendment status and as justifying various “balancing” or pragmatic structural doctrines that sometimes provide a constitutional basis for access. *See, e.g.*, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 585-86 (1980) (Brennan, J., concurring). With this reasoning, Brennan went way beyond the majority’s more limited argument for why the judicial process is uniquely a place where people have a First Amendment right to be present to gather information.

42. Lee, *supra* note 37, at 1023-24.

protect anonymity.<sup>43</sup> (She could have added the additional point that normally<sup>44</sup> the First Amendment does not protect government speech.)

Nevertheless, the First Amendment might bear more affirmatively on the issue Lee raised once media and individual speech are distinguished. The constitutional principle would then not be “transparency,” no matter how desirable that would be in general, but “required respect for institutional integrity,” which would be mandated as a core principle of the Press Clause. In the case of communications by individuals, it is difficult to see how the government violates that person’s First Amendment rights by employing her to present the government’s message even if the payment requires that she not identify herself as a government spokesperson. Are the First Amendment rights of a sports star violated when she is paid to say: “just say no!”? Sometimes terms of government employment that restrict her later speech may violate the First Amendment—but often not.<sup>45</sup> The government permissibly restricts speech of an employee on the job if (and probably only if) the restriction advances her proper performance of her job and not disclosing in her communication that the government is

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43. *Id.* at 1020-21.

44. Whether the government, having created a particular government-owned institution, must recognize certain First Amendment rights of that institution is somewhat unsettled. For example, must the government respect First Amendment rights of public libraries? In *United States v. American Library Ass’n*, 539 U.S. 194 (2003), Justice Rehnquist’s plurality opinion carefully avoided deciding this question, *id.* at 211-12, though Justice Stevens in dissent clearly found that it must. *Id.* at 226-27. Must the federal government respect First Amendment rights of local governmentally-created cable access channels? In *Denver Area Educational Telecommunications Consortium v. FCC*, 518 U.S. 727 (1996), the Court, in fractured opinions, found that the grant to cable operators of power to restrict certain offensive sexual programming on locally created public access channels violated the First Amendment, thereby implicitly finding that these public channels receive First Amendment protection. In concluding that a state-owned broadcast station did not violate candidate Forbes’s First Amendment rights to participate in a campaign debate, the Court’s reasoning assumed that, at least as then constituted, the state-owned broadcast stations had the same free speech rights that commercial stations had. *Arkansas Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 669 (1998).

The general argument for these conclusions is that when the government sets up an institution or funds a person to play a particular role, regulation of its or her speech contrary to the social role of the institution violates the First Amendment. See *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 536-37 (2001). In a recent case involving the *Stars and Stripes*, a newspaper that has over 280,000 readers and has considerable editorial independence, but is owned and published by the Department of Defense, the court, after accepting clear lower court precedent holding that a reporter’s privilege is established by the First Amendment, held that the paper’s journalists were entitled to the reporter’s First Amendment privilege, finding no reason to deny the privilege simply because the government owned and published the paper. *Tripp v. Dep’t of Def.*, 284 F. Supp. 2d 50, 57 (D.D.C. 2003).

45. See, e.g., *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980).

the communication's ultimate source can sometimes relate to that performance.

The media context is different. Assume, as argued here, that the press receives constitutional protection to be a voice independent of the government (or, at least, independent of the other three "estates") in order to perform the crucial democratic tasks of providing an independent source of vision and information, including performance of a watchdog role. Then the press's claim to special constitutional protection encompasses most importantly a demand that the government not purposefully undermine its institutional integrity in its performance of these roles. Payment to the press to present the government's message as the press's own message (as opposed to payment for carriage as an advertisement) undermines this independence and breaches the press's institutional integrity. The notion of a free press presumes that *its* speech represents *its* choices, not the government's choices. Though the individual media entity presumably enters voluntarily into the agreement with the government not to identify the government as a payee, *because* the protection of the integrity of the press is for the benefit of the public, the government's payment violates the public's rights relating to a free press.<sup>46</sup>

Even the media entity itself would object if the payment is to a media reporter or other employee who does not notify the media entity (i.e., its editor, publisher, or owner) that she has been paid by the government to have her story contain government-chosen content. In contrast, violation of institutional integrity does not occur if the communication is presented as that of the government, as it would if the content is explicitly identified as an advertisement. Likewise, the integrity of the press is not compromised, although its quality may be tested, when the government, through press releases or "leaks" or good public relations management or even lies, leads the press on the basis of the press's own reporting or journalistic routines to print stories that the government wants reported. As Justice Stewart puts it, "[t]he Constitution . . . establishes the contest" in which "[t]he press is free to do battle"—and that contest includes an "autonomous press" as a

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46. In response to the practical question about "standing" to assert the violation, other non-compromised media entities can complain that the practice damages them since it both undermines the reputation of the press on which they rely and creates competitive pressure on them to accept such payments. The 1912 postal legislation, which prohibited publication of paid speech without identifying it as advertising, was strongly supported by members of the press that did not engage in the practice. LINDA LAWSON, *TRUTH IN PUBLISHING: FEDERAL REGULATION OF THE PRESS'S BUSINESS PRACTICES, 1880-1920* 111 (1993).

constitutionally-protected participant.<sup>47</sup> Essentially, this argument about a violation of institutional integrity takes the same form as did the argument for a reporter's privilege (to not expose the identity of confidential sources), but is logically even stronger though less familiar. The public knows that the press may err, but if there is a "free press" that constitutes a watchdog on government, the public has a right to know that the decisions as to what the press prints under its own name are those of the watchdog and not the watched government.

The objections to this use of the media lie most centrally in its destructive impact on democratic discourse.<sup>48</sup> The general legal prohibition of "stealth" in periodicals and in broadcasting embodies the popular perception that the practice is objectionable.<sup>49</sup> The law, however, has singled out governmental practices for special prohibitions. Typical appropriations legislation forbids government agencies from using government funds for "propaganda,"<sup>50</sup>—a term of art given that many people reasonably view most of the government's huge budgets for public relations, advocacy, and "informative" communications as being spent essentially on propaganda. As interpreted to mean "*covert* propaganda," which involves "the concealment of [or failure to disclose] the agency's role in sponsoring the materials," these statutory requirements make the "stealth" interference with media integrity illegal.<sup>51</sup> The dual goal is to restrict the government and to protect the integrity of the press.<sup>52</sup>

Admittedly, the constitutional issue has not been decided and may not need to be decided given the (often ignored<sup>53</sup>) statutory prohibitions on governmental behavior. Still, the existing state of affairs represents a well-considered and quite explicit normative judgment about the nature of the press that a democracy should protect. Of course, the First

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47. Stewart, *supra* note 9, at 636.

48. Goodman, *supra* note 38, at 112-17.

49. *Id.* at 84.

50. Typical language is: "No part of any appropriation [contained in this or any other Act] shall be used for publicity or propaganda purposes within the United States not heretofore authorized by the Congress." See U.S. Gov't Accountability Office, B-305368, Dep't of Educ.—Contract to Obtain Services of Armstrong Williams 6 (Sept. 30, 2005) [hereinafter GAO, B-305368].

51. *Id.* at 14-15 (citing U.S. Gov't Accountability Office, B-303495, Office of National Drug Control Policy—Video News Release (Jan 4, 2005)). Interpreting propaganda to mean covert propaganda, defined as communications "circulated as the ostensible position of parties outside the agency," has been consistent. See *id.* at 7 (quoting U.S. Gov't Accountability Office, B-229257, Appropriations/Financial Management (June 10, 1988)).

52. See *id.* at 6.

53. *Id.* at 14-15.

Amendment directly restricts only government, not private corruption of a free press. The destructive impact on the integrity of the media has led to legislative prohibitions on private forms of contracting.<sup>54</sup> The additional legislated limits on government agencies again represent a considered judgment about legitimate forms of public discourse. If presented with the issue, a court may, and I believe should, recognize the independent structural significance of the Press Clause, and find that government payments to the press to present the government's position as the press's own violates the public's right to a free press.

### *B. Protecting Individual Liberty*

#### *1. Right Not to Speak: Speaking as Others Direct*

Possibly the doctrinal area in which an individual liberty theory of the First Amendment is most obviously in play is the right not to be coerced into making professions that one does not believe. In *Barnette*, the majority emphasized the foundation of the First Amendment in the liberty not to be coerced into pledging allegiance to the flag.<sup>55</sup> In contrast, in dissent, Justice Frankfurter in effect adopted a marketplace of ideas theory, which is concerned that everything worth saying can be said. Frankfurter emphasized that he would join the majority if any speech or any view was suppressed.<sup>56</sup> He observed, however, that both the children involved and their parents were entirely free to express their views, including their view about the horrendous nature of the compelled salute, both before and after the flag salute ceremony.<sup>57</sup> Of

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54. See, e.g., Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, div F, tit. VI § 624, 118 Stat. 3, 356 (2004) (discussing the publicity and propaganda prohibition that prohibits the government from entering into certain contracts with private parties).

55. *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 635-36 (1943). Though *Barnette* is used here to illustrate the claim, its holding has been repeated in subsequent cases. See, e.g., *Wooley v. Maynard*, 430 U.S. 705, 713, 717 (1977). Closely related is the matter of freedom not to associate. Because it has complexities and, I believe, unresolved inconsistencies that are without any obvious parallels in the press context, I put it aside.

56. See *Barnette*, 319 U.S. at 664 (Frankfurter, J., dissenting).

57.

It is not even remotely suggested that the requirement for saluting the flag involves the slightest restriction against the fullest opportunity on the part both of the children and of their parents to disavow as publicly as they choose to do so the meaning that others attach to the gesture of salute. All channels of affirmative free expression are open to both children and parents. Had we before us any act of the state putting the slightest curbs upon such free expression, I should not lag behind any member of this Court in striking down such an invasion of the right to freedom of thought and freedom of speech protected by the Constitution.



course, like the instrumentalist marketplace theory of speech, the instrumentalist Fourth Estate view of the Press Clause places value primarily on things being said and speech not being censored. Both, among other things, treat the value in the guaranteed freedom as lying in its instrumental contribution to a search for truth or, more generally, in providing for the listener's or audience's need for exposure to diverse content. If this view of the Press Clause is adopted, the liberty not to speak protected for individuals in *Barnette* would have little applicability to the press.<sup>58</sup> That turns out to be roughly the existing state of the law, a result inexplicable if the two clauses have a unified theoretical basis and scope.

Compelled speech in many media contexts is quite routine. Broadcasters have both general and specific affirmative speech obligations. They either now have, or previously had, speech duties involving fairness, public service, reasonable access for political candidates, children-oriented educational content, and more.<sup>59</sup> The primary current doctrinal question is whether these obligations can be cabined to the broadcast area on the basis of the view that broadcasting is a special case where First Amendment rights are less robust. *Miami Herald Publishing Co. v. Tornillo*<sup>60</sup> is regularly cited as representing the purportedly dominant print paradigm and as implying that compelled media speech would interfere with editorial autonomy.<sup>61</sup> But when it came to upholding "must carry" cable requirements in *Turner Broadcasting System, Inc. v. FCC*, the Court emphatically did not place cable in a category with broadcasting or any other purportedly less protected category. Rather, rejecting the cable systems claim of interference with editorial autonomy, the Court emphasized that *Miami Herald* was a case about the impermissibility of punishing editorial

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*Id.* at 664.

58. Of course, there might be other justifications specially related to the Press Clause for objecting to compelled media speech, an issue I put aside for now.

59. As is well known, the FCC found that the Fairness Doctrine was unconstitutional but the Court of Appeals affirmed purely on statutory grounds. *Syracuse Peace Council v. FCC*, 867 F.2d 654, 656 (D.C. Cir. 1989). Particularly interesting, though speaking about the public interest not the constitutional issues, was Judge Wald's opinion, concurring in part and dissenting in part. She agreed with the result concerning the deterrent or penalty aspects of the balance prong—an analysis which has since become the dominant interpretation of what was wrong with the right of reply in *Miami Herald*, but saw no "reasoned decisionmaking" supporting the elimination of the requirement to air issues of great public importance. *Id.* at 669-73.

60. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974).

61. See, e.g., *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727, 813 (1996); Marvin Ammori, *Another Worthy Tradition: How the Free Speech Curriculum Ignores Electronic Media and Distorts Free Speech Doctrine*, 70 MO. L. REV. 59 (2005).

content choices.<sup>62</sup> In other words, in the interpretation relied on in *Turner Broadcasting, Miami Herald* protected only against censorship, a result required by the press's Fourth Estate role; it did not recognize any institutional autonomy or liberty analogous to that with which *Barnette* was concerned.

## 2. Right Not to Speak: Anonymity

Since the 1912 Postal Act referred to earlier, Congress has required newspapers and other periodicals having second class or periodical publication privileges to furnish the government and, at least once a year, to include in the publication the name of the editor, managing editor, publishers and owners as well as certain other information about circulation.<sup>63</sup> That is, the statute purposely eliminates anonymity for much of the commercial press—in part out of a hope that the public will benefit from knowledge of the ownership, enabling them to resist manipulation.<sup>64</sup> On the other hand, drawing on a history going back to the publicists for the American Revolution, the Court interprets the First Amendment to protect anonymity of individuals in many contexts—especially in their distribution of pamphlets.<sup>65</sup> There is certainly no simple distinction that individuals have anonymity rights and the press does not. Often individuals also do not. For example, the Court has upheld disclosure requirements for contributors in political campaigns<sup>66</sup>—although it also required that an exception be made when the requirement would predictably deter contributions to an unpopular political group, thereby undermining their speech.<sup>67</sup>

The cases might be reconciled on the ground that there is no fundamental right of anonymity the way there may be for individual

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62. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 653-56 (1994).

63. 39 U.S.C. § 3685 (2000); Postal Service Appropriations Act of 1912, Pub. L. No. 62-336, 37 Stat. 539, 553-54 (1912). The Court in *Lewis Publishing Co. v. Morgan* also upheld this requirement and it too is still on the books. 229 U.S. 288, 316 (1913).

64. *Lewis Publ'g Co.*, 229 U.S. at 316.

65. See *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-43 (1995); *Talley v. California*, 362 U.S. 60, 64-65 (1960).

66. *Buckley v. Valeo*, 424 U.S. 1, 143 (1976). But cf. *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 200 (1999) (invalidating requirement that initiative petition circulators wear badge containing their name).

67. *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 95, 98 (1982). Cf. Geoffrey R. Stone & William P. Marshall, *Brown v. Socialist Workers, Inequality as a Command of the First Amendment*, 1983 SUP. CT. REV. 583, 592 (describing the Court as mandating content discrimination). This result, however, follows easily from the perspective that the First Amendment primarily protects dissent. See generally STEVEN H. SHIFFRIN, *DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA* (1999).

speech—it is always a matter of pragmatic assessment. In many contexts, required disclosure can seriously deter speech. This deterrence of speech could then be seen as gratuitous, maybe even desired by the government, if the government could not give a convincing reason to require it.<sup>68</sup> Thus, invalidation would depend on the likelihood of deterrence and the credibility of and necessity for the government's rationale for requiring identification.

The area, however, remains in tension. Disclosure of identity sheds light that can reduce manipulation of audiences, a possibly good purpose, but often this same light can deter speech. As for now, the right of anonymity has been recognized only in the context of individual speakers, not the press, thereby representing the difference that this Article is seeking. Nevertheless, the hypothesis here is that greater rights of the individual relate to claims of formal autonomy or liberty. Though the instrumentalist argument for anonymity is not inconsistent with such claims, it does not seem like the right type of difference to demonstrate the thesis offered here. I suspect that there is no fundamental distinction between the press and individual speech rights here. The Court gave as one of its reasons for invalidating the ban on anonymous handbills in *Talley v. California*, not only the importance of anonymity to individual pamphleteers in the revolutionary era, but also noting that the “obnoxious press licensing law of England . . . was due in part to the knowledge that exposure . . . would lessen the circulation of literature critical of the government.”<sup>69</sup>

### 3. Restricting the Right to Speak: Copyright

Like defamation law, copyright restricts speech absent permission from the protected party. Unlike defamation law, however, Fourth Estate press theory and individual liberty speech theory lead to different demands for limiting the copyright owners' claims of control.<sup>70</sup> Fourth Estate theory requires that the media be able to report all facts and ideas—which copyright's idea/expression distinction largely grants. Expansive right for non-owners to use copyrighted material in transformative uses likely contributes more than it “costs” in terms of

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68. This would explain why the Court struck down mandated disclosure of membership lists in legislative investigations when the information was not germane to legitimate legislative purposes but upheld the disclosure requirement when it arguably seemed more relevant.

69. *Talley*, 362 U.S. at 64. In contrast, the dissent cited the press case, *Lewis Publishing*, as precedent for upholding the law. *Id.* at 70 (Clark J., dissenting).

70. See C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891, 951 (2002) [hereinafter Baker, *First Amendment Limits*].

any reduced incentive to create originally. Giving *some* rights to copyright holders, however, arguably benefits the public by encouraging (commercial) creation. A media enterprise's duplication of the full content of an item offered by a copyright holding competitor clearly amounts to a copyright violation.<sup>71</sup> This restriction on publication, however, should hardly be troubling from a Fourth Estate perspective—publication occurs, the public gets access. That is, properly constrained, copyright can support the press in its central role. As a practical matter, the institutional press is able to perform its Fourth Estate role only due to its ability to sell its product (or sell its audience to advertisers). The incentive provided by ownership to produce saleable products turns copyright into a purported “engine of free expression,”<sup>72</sup> making it a plausible (though, of course, often controversial and not always persuasive) media policy aimed at expanding the quality (and, less importantly, maybe the quantity) of communications made available to the public.<sup>73</sup>

Individuals' *speech* freedom has no implications for freedom to profit from speech through market transactions. Market transactions involve exercises of power—each party to a transaction exercises power over the other by getting the other to do something she would not wish to do except for the fact of it leading to payment by the other.<sup>74</sup> In contrast, outside of market exchanges, gains to a speaker typically result either due to her speech affirming or assisting in her own goals irrespective of an audience or due to her speech convincing an audience to share her perspective—creating a form of solidarity between speaker and listener. That is, free speech provides liberty and solidarity rights, not market rights. Thus, any bar copyright imposes on commercial uses of “other people's expression” is not problematic from the perspective of individual speech freedom. It is otherwise, however, with limits on non-commercial uses of copyrighted speech. Here, speech freedom demands a largely unrestricted opportunity to use other people's words—a

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71. Publication of unpublished work, however, would seem to serve the press's *Fourth Estate* role. A better ground for decision in *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985), may have been an unfair competition (a “scoop”) theory, which is arguably consistent with a Fourth Estate or utilitarian perspective, than the theory offered by the Court, being unpublished, which in general might serve privacy interests but not public knowledge. *See, e.g., Int'l News Serv. v. Associated Press*, 248 U.S. 215, 234 (1918).

72. *Harper & Row*, 471 U.S. at 558.

73. This is the democratic justification for copyright consistently emphasized by Neil Netanel. *See* NEIL W. NETANEL, *COPYRIGHT'S PARADOX: PROPERTY IN EXPRESSION/FREEDOM OF EXPRESSION* (2007).

74. *See* C. Edwin Baker, *Property and its Relation to Constitutionally Protected Liberty*, 134 U. PA. L. REV. 741, 769-71 (1986).

freedom implicit in early copyright legislation that only applied to commercial copying. The freedom to engage in non-commercial copying is still typically provided, as illustrated by individuals' fair use right to engage in recording of broadcasts for purposes of time-shifting.<sup>75</sup> Expressive freedom for an individual must include her right to copy word for word and distribute a complete political analysis or to copy and give or to quote to her lover a complete poem if she finds those words better express her sensibilities than anything she herself has composed.

As a matter of current copyright law, it seems clear that individuals have rights to non-commercial uses of copyrighted content not available to media entities.<sup>76</sup> Other statutory limits on copyright, especially the inability to copyright facts and ideas, clearly provide well-established opportunities needed by media entities in order to properly perform their constitutional role.<sup>77</sup> If the rights in both cases are constitutionally mandated, then this would be a case where different rationales for speech and for press freedom lead to different speech rights—with individual liberty providing more complete freedom than the limited usage rights required by media entities which are, themselves, often central beneficiaries of properly crafted copyright ownership rules.

This constitutional conclusion, however, is uncertain. The Court has said that “[t]o the extent [copyright’s restrictions on a person making other people’s speeches] raise First Amendment concerns, copyright’s built-in free speech safeguards are generally adequate to address them”; it concludes that no more First Amendment scrutiny is required as long as “Congress has not altered the traditional contours of copyright protection. . . .”<sup>78</sup> A lot rides doctrinally, of course, on what “traditional contours” are taken to be. Here, however, my lament is somewhat different. Without identifying which of copyright’s built in safeguards are required by the First Amendment and which are merely a matter of legislative grace, it cannot be concluded with certainty whether or not the rights of individuals to use copyrighted materials in their (non-commercial) expression and the usage rights also available to profit-oriented media firms represent First Amendment minimums or policy judgments. Still, existing differences between rights for commercial media and the greater rights for individual non-commercial uses can be taken to represent popular judgments about the scope of different values

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75. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 432-34 (1984).

76. *Id.* at 442.

77. *See Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 344-45 (1991).

78. *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003).

underlying commitments to both individual liberty and a Fourth Estate or, more broadly, a dynamic culture.

#### 4. Doctrinal Basics: Content Discrimination

The presumptive impermissibility of content discrimination today constitutes a bedrock of First Amendment doctrine—or, maybe, of doctrinal confusion. This Section makes the following claim. The individual liberty concern of the Speech Clause and the democratic discourse concern that justifies special protection for the press suggest different objections to content discrimination. Given a presumption that when found it is bad, the different objections lead to different methods of identifying content discrimination. While this would not be problematic if the Court was clear about when to use one or the other conception of content discrimination, its failure to explain these different bases of objection has contributed to confusion in this area. Still, case law results (largely) correspond to what a dual Speech/Press Clause perspective suggests.

The modern doctrine condemning content discrimination is normally taken to have been initiated by the 1972 decision of *Police Department of Chicago v. Mosley*, where Chicago had prohibited picketing within 150 feet of a school while the school was in session except for “‘peaceful [labor] picketing of any school involved in a labor dispute . . . .’”<sup>79</sup> In invalidating this ordinance, the Court made three arguments (as well as relying on two constitutional provisions—the First Amendment and the Equal Protection Clause, although later cases have made clear that the First Amendment itself encompasses all that is important in the equal protection argument and I will not attempt to separate the elements). First is a neutrality argument. The Court explained, “the ordinance itself describes impermissible picketing . . . in terms of subject matter. The regulation ‘thus slip[s] from the neutrality of time, place, and circumstance into a concern about content.’ This is never permitted.”<sup>80</sup> Second is an objection to *restriction* of speech on the basis of content, which leaves open the possible permissibility of *promotion* on the basis of content. The Court said, “the First

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79. *Police Dep’t of Chicago v. Mosley*, 408 U.S. 92, 93 (1972). The application of the exemption only to labor picketing, as indicated by my brackets, was undisputed. *Id.* at 94 n.2.

80. *Id.* at 99 (citation omitted). Neutrality is also suggested by the Court’s statement that the government “may not select which issues are worth discussing or debating in public facilities. There is an ‘equality of status in the field of ideas,’ and government must afford all points of view an equal opportunity to be heard.” *Id.* at 96 (citation omitted). *Cf.* *City of Madison Joint Sch. Dist. v. Wisconsin Pub. Emply. Relat. Comm’n*, 429 U.S. 167 (1976) (allowing such selection).

Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”<sup>81</sup> It further explained, the “government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views.”<sup>82</sup> Third is a defense of people’s speech freedom on the grounds that permitting labor speech shows that a bar on a person’s speech is not really required by the state’s purpose in its use of this property. The theory is that gratuitous restrictions on speech are unconstitutional.<sup>83</sup> Thus, the Court says:

Although preventing school disruption is a city’s legitimate concern, Chicago itself has determined that peaceful labor picketing during school hours is not an undue interference with school. Therefore, . . . Chicago may not maintain that other picketing disrupts the school unless that picketing is clearly more disruptive than the picketing Chicago already permits. If peaceful labor picketing is permitted, there is no justification for prohibiting all nonlabor picketing, both peaceful and nonpeaceful. “Peaceful” nonlabor picketing, however the term “peaceful” is defined, is obviously no more disruptive than “peaceful” labor picketing. But Chicago’s ordinance permits the latter and prohibits the former.<sup>84</sup>

Thus, the Court offered three different rationales for objecting to content discrimination involving, respectively, principles of neutrality, non-suppression, and speech freedom. Some observations can be made about each.

“Neutrality” has some intuitive appeal but, at least as normally understood, is entirely inconsistent with accepted practice. Periodically, the First Amendment is asserted to require government neutrality in the marketplace of ideas.<sup>85</sup> Such a view, however, would invalidate the accepted and hugely active role of government in engaging in speech,

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81. *Id.* at 95. Along the same lines, the Court argued that “[a]ny restriction on expressive activity because of its content would completely undercut the ‘profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.’” *Id.* at 96 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)) (emphasis added).

82. *Id.* at 96.

83. *Id.* at 100.

84. *Id.* (citations omitted). This is the argument that the Court, in one of the deletions above, treats as an equal protection problem and later notes that such disruption can be handled by a more “narrowly tailored” or “narrowly drawn” statute. *Id.* at 101, 102. Interestingly, though citing equal protection cases for the narrowly tailored standard, all the other cases cited to illustrate why the law failed this constitutional standard were First Amendment cases. *See id.* at 101 n.8; *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969); *United States v. O’Brien*, 391 U.S. 367 (1968); *Niemotko v. Maryland*, 340 U.S. 268 (1951); *Saia v. New York*, 334 U.S. 558, 562 (1948).

85. Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 566-67 (1980).

usually to promote the government's views.<sup>86</sup> Topics and views that the government expresses directly or promotes using others' speech have more than an equal status in the field of ideas and more than an equal opportunity to be heard. If "neutrality" refers to a constitutionally-required governmental stance toward the marketplace of ideas, the notion cannot be taken seriously as an aspect of constitutional doctrine. (There is also no available conception of a proper baseline of non-governmentally structured discourse from which to identify deviations from neutrality.)

A constitutional objection to government restrictions on, as opposed to objections to the promotion of, particular content or particular subject matters is more persuasive. Of course, any notion that suppression (treated as unacceptable) differs from promotion (treated as acceptable) also requires a baseline. This baseline, however, can be found through an examination of the purpose or interpretative meaning of the law—and the vitality of this "purpose" inquiry is well established.<sup>87</sup> Objection to suppression makes sense from a marketplace of ideas or a Fourth Estate perspective. Although there may be no standards for a neutral or properly working marketplace, and consequently no objection to any content that is added even when added and promoted by the government, preventing content from entering contradicts the fundamental notion of a free marketplace of ideas. Restrictions of particular content is, at least in many contexts, "censorship in its most odious form," according to Justice Black as quoted by the majority in *Mosley*.<sup>88</sup> In addition, suppression, at least as applied to individual speakers, is also objectionable as unjustified interferences with their liberty. Essentially, the claim here is that the key value of liberalism should be toleration, not neutrality—and suppression, restriction of speech out of objection to its content, is the opposite of toleration. Thus, restrictions as a means to suppress certain content, whether of particular subject matters or viewpoints, should be equally unconstitutional under either an individual liberty speech theory or a Fourth Estate press theory.

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86. See *id.* at 568; MARK G. YUDOF, *WHEN GOVERNMENT SPEAKS: POLITICS, LAW AND GOVERNMENT EXPRESSION IN AMERICA* (1983); EDWARD S. HERMAN & NOAM CHOMSKY, *MANUFACTURING CONSENT: THE POLITICAL ECONOMY OF THE MASS MEDIA 2* (1988).

87. See C. EDWIN BAKER, *MEDIA CONCENTRATION AND DEMOCRACY: WHY OWNERSHIP MATTERS* 138-41 (2007). Possibly the dominant reasons to ignore this feature of doctrine reflects, for conservatives, a tendency to adopt economic models and, for liberals, a tendency to be effects or outcome oriented.

88. *Mosley*, 408 U.S. at 98 (quoting *Cox v. Louisiana*, 379 U.S. 536, 581 (1965) (Black, J., concurring)).



The problem with this objection is that it does not fit the facts of *Mosley*. It is very difficult to believe that Chicago wished to suppress discussion of all issues except those involving labor disputes. The exemption of picketing about labor disputes is much better explained by the lobbying power of teachers' unions—they wanted to promote or enable their speech—than by any animosity to all other categories of speech. Surely, Chicago had no animosity to expression promoting the re-election of the mayor, even though the law restricted that expression. Thus, objections to suppression can hardly explain what is significant in the constantly cited case of *Mosley*.

The speech freedom principle provides the most interesting objection to content discrimination. As a matter of individual liberty, there should be a presumption that a person can engage in her chosen expressive activity whenever she chooses—certainly, should generally be able to do so at least in places that she otherwise has a right to be. The Court has held that the streets and parks are such places.<sup>89</sup> Still, despite a person's general right to be at some place, regulation is sometimes justified if her activities, *as activities*, would interfere with other uses to which the government wishes to dedicate the property, other uses that the government considers especially valuable. Given the potential legitimacy of such governmental choices to make use of public property to pursue public goals, the fear is that these reasons will constantly be available to override speech freedom.<sup>90</sup> A practical response is to develop evidentiary doctrines that identify when limits on liberty are best explained by lack of respect for expressive liberty rather than by real needs for the use of the property at issue. Permissible, then, would be regulations reasonably necessary given these government-dedicated uses.<sup>91</sup> Impermissible would be a regulation not necessary to serve the government interest—for example, a limit on leafleting, where the real evil is not leafleting but littering. There the government could (even if predictably less efficiently) simply prohibit littering—the real evil—rather than prohibit leafleting, that is, the speech.<sup>92</sup>

A parallel conclusion—that the government does not really believe its regulation is essential for serving the government needs in respect to the property—presumptively follows if the denial of freedom depends

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89. See, e.g., *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515-16 (1939). In modern language, these are traditional public forums.

90. *Mosley*, 408 U.S. at 98-99.

91. This approach interprets scrutiny tests as an aide to interpretation rather than a matter of instrumental rationality.

92. *Schneider v. New Jersey*, 308 U.S. 147, 162 (1939).

on the content of the expression. The evidentiary question, as the Court in *Mosley* noted, is whether the disallowed speech really interferes with the government's normal use of the property more than does the allowed speech.<sup>93</sup> The rationale of asking this question is not to identify a proper functioning of the marketplace of ideas or to prevent censorship. The specific point is to protect the individual liberty that the regulation would restrict. Thus, the central feature of the only coherent argument that fits the facts of *Mosley* is that content discrimination is often bad because it evidences an unnecessary restriction on individual expressive freedom. The objection exists even without a suppressive aim. No censorious purpose or danger need be shown.

Though the above is the only objection that fits the facts in *Mosley*, two points should be made about the second and third objections to content discrimination, the two that were found to be coherent. First, the speech freedom argument is most obviously relevant to individuals—that is, it is a Speech Clause claim. This is illustrated by its “official” origin in *Mosley* and the common interpretation of the prohibition on content discrimination as an offshoot of time, place, and manner doctrine.<sup>94</sup> Because the requirement relates to limits on people's use of government property, it has no obvious application to issues of media policy or regulation even if these policies are content-based. In contrast, the narrower concern with suppression is relevant in both contexts—that of press regulation and individual freedom. Media policies that suppress, as opposed to promote, speech on the basis of content, that is, policies that engage in censorship, should be invalidated.

This doctrinal distinction is fortunate. History provides a long line of socially desirable governmental attempts to promote quality media content.<sup>95</sup> Promotion of national news, local news, the arts, and educational content for children is constitutionally unobjectionable despite their content basis. In contrast, true attempts to suppress particular content, subjects, or viewpoints are objectionable as censorship. Purposeful suppression interferes both with the press's role in a democratic society and with individual autonomy. But by making

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93. *Mosley*, 408 U.S. at 100.

94. Even if identified with *Mosley*, the objection to content discrimination has a longer history. It is implicit in the long recognized reasons to reject standardless permit systems—namely, that they allow “censorship in its baldest form.” *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938). Again, though not clearly articulated as an objection to content discrimination, the point was generally well recognized before *Mosley*. See THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 303-04, 371-73 (1970) (public spaces must be made available to all on an equal basis; permit systems must be limited by standards sufficient to prevent uncontrollable authority).

95. See Baker, *Turner Broadcasting*, *supra* note 19, at 111.

the “evidence of lack of necessity” argument in *Mosley*, the Court implicitly adopted the liberty theory with respect to individual speakers and implicitly recognized special implications of the Speech Clause.<sup>96</sup>

Second, the two objections naturally suggest different criteria for identifying (presumptively objectionable) content discrimination. The concern with unnecessary restraints on individual expressive liberty is possibly best embodied in the test for content discrimination offered by Justice Brennan: “[A]ny restriction on speech, the application of which turns on the content of the speech, is a content-based restriction regardless of the motivation that lies behind it.”<sup>97</sup> That is, any time a law applier must examine the content of the speech in order to determine the applicability of a regulation, content discrimination exists. On the other hand, the concern with suppression would suggest an alternative test: “The principal inquiry in determining content-neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.”<sup>98</sup>

These two points add up to a third. The narrower test, “because of disagreement with the message,” should always provide a basis to invalidate a law except where the government is in some sense the speaker. In particular, suppression—or regulation because of disagreement with the message—is equally objectionable under the Press Clause and Speech Clause analyses. Passing *this* test, however, should not end the inquiry when individual speech freedom is at stake. Then, the other test, “turns on the content of the speech,” should also apply. Unfortunately, I cannot show that this is how the tests have been invoked. My sense is that the Court exhibits doctrinal confusion in its

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96. *Mosley*, 408 U.S. at 97-98.

97. *Boos v. Barry*, 485 U.S. 312, 335-36 (1988) (Brennan, J., concurring). Similarly, in finding that a ban on editorializing by noncommercial broadcast stations was a content regulation, Justice Brennan explained that to determine “whether a particular statement by station management constitutes an ‘editorial’, . . . enforcement authorities must necessarily examine the content of the message.” *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 383 (1984).

98. This test has had a checkered life. It was originally formulated in *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989), where the test was designed only to determine whether a facially content-neutral law should be found to be actually content-based. In that context, namely where the challenged law is not content-based on its face, the test makes perfect sense. The test has been used in about ten cases since, almost always in upholding a law after finding it not to be content-based. Interestingly, the Court in *Turner* quoted the *Ward* test but transformed it by adding in brackets around the words “agreement or” before the word “disagreement”—which makes the test seem to require neutrality, not merely suppression. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994). Given that change, the dissent makes a persuasive argument that the must-carry law there was content-based. If, however, the proper test in the media context is, as I have argued, the suppression version of the test, the majority reached the right conclusion. See Baker, *Turner Broadcasting*, *supra* note 19, at 127-28.

oscillation between the two.<sup>99</sup> Nevertheless, Court results seem largely in line with what would be called for by an honest application of these tests in the manner recommended here. For example, the government's legitimate aim with its must-carry rules, upheld in *Turner Broadcasting*,<sup>100</sup> was not to suppress content, but to promote the availability of local content, especially local news and cultural or current affairs programming. Likewise, although violations of copyright obviously turn on examining the content of the infringing speech to see if it duplicates copyrighted expression, the legitimate goal of copyright as a media policy regulation is to promote, not suppress, production of quality speech. Often, maybe usually, this legitimate purpose should suffice to defeat challenges by commercial copiers. In contrast, the Speech Clause analysis mandates legal permission for most non-commercial copying. Here, the content regulation—the regulation requires examination and comparisons of content—unnecessarily interferes with individual liberty.<sup>101</sup>

### C. Summary

Even if the Speech and the Press Clauses have different rationales and protect different types of agents, their rationales overlap in objecting to any government censorship. Hence, in respect to most core First Amendment issues, the same result follows whether the case involves an individual or the press. Bread and butter First Amendment cases, those involving run of the mill censorship, can be explained on either basis. Censorship equally infringes individual liberty and interferes with the constitutional role of the press—as well as violating any other First Amendment theory that has any judicial traction. Such cases do not test whether the Press Clause has an independent status.

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99. In addition to this oscillation, members of the Court vary greatly in their attitude about the notion of content discrimination. Justice Kennedy, for example, argues that content discrimination should be per se unconstitutional, with no need to additionally flunk the traditional equal protection strict scrutiny test, while Justice Stevens frequently criticizes routine invocation of the doctrine. *See, e.g., Simon & Schuster, Inc. v. New York Crime Victims Bd.*, 502 U.S. 105, 124 (1991) (Kennedy, J., concurring); *Young v. Am. Mini Theatres*, 427 U.S. 50, 65-66 (1976). Moreover, all members of the Court agree that the doctrine applies differently in different contexts—e.g., depending on the type of forum at issue. In fact, all members agree that even the most extreme version of content discrimination, namely viewpoint discrimination, is sometimes justifiable without any scrutiny, for example, if the context is “not a forum at all” such as the day-to-day programming of a public broadcaster. *Arkansas Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 678 (1998).

100. 512 U.S. 622 (1994).

101. For a further discussion of First Amendment implications on copyright laws, see Baker, *First Amendment Limits*, *supra* note 70, at 922-40.

Part II has shown that, where the hypothesis of a separate meaning of the two clauses would have relevance, actual case law either corresponds to the separate meaning hypothesis or is open, but in the later circumstance is most appealingly advanced by the separate meaning theory. Individual liberty is infringed if the government compels individuals to speak someone else's, for example, the government's chosen words, so the Court has protected these individuals. In contrast, requiring the media to carry information and sometimes even ideologically charged speech that the media entity would reject often interferes with neither a marketplace of ideas nor the capacity of the media to serve the public and its Fourth Estate role—in fact, it may promote these ends. These laws have always been upheld. Anonymity has also been instrumentally much more important to the communicative freedom of individuals than of media businesses, and that is where it has (sometimes) been protected. Individual liberty suggests a right to say anything one chooses even if one chooses to use expressions originally spoken or written by another person. In contrast, the instrumental justification of a free press is usually satisfied if the media is able to duplicate the facts or ideas that another person or entity has previously created.<sup>102</sup> Though not perfectly, copyright law largely corresponds to this distinction, explicitly leaving open whether the First Amendment compels these differing protections of the expression of, respectively, the individual and the press. Finally, clarity would be brought to the plastic and inconsistently formulated doctrinal objection to content discrimination if it were understood that one formulation primarily relates to protecting individual liberty and should be in play only when this liberty is the issue, while a more limited conception of content suppression should apply more broadly to protect audience as well as speaker interests, including audience interests related to the constitutional role of the media.

The key addition that a separate interpretation of the Press Clause offers the press involves its institutional integrity. A proposed interpretation of case law in relation to the validity of the thesis of protection of institutional integrity must face a potential indeterminacy. A failure to recognize a particular claim can be interpreted either as a conclusion that the First Amendment does not give special protection to the press's integrity or that its integrity is not threatened by rejecting the

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102. Complications occur for the news media where the actual words (or pictures) constitute the news or for the creative media where the project requires the integration of former expression—issues potentially handled by fair use doctrines including the notion of news use and transformative uses.

claim.<sup>103</sup> Certainly, nowhere has the institutional integrity argument been clearly rejected,<sup>104</sup> with the law being apparently unsettled in the two contexts considered. Justice Powell's concurrence in *Branzburg* allowed many, probably most, lower courts faced with the issue to conclude that the First Amendment does justify at least some special attention to the press's claims not to be required to reveal confidential sources.<sup>105</sup> The view that this represents the proper understanding of the First Amendment has also clearly prevailed among journalists and arguably within popular opinion. The right to have the government not subvert the integrity of the press by the government paying the media to present the government's views as its own has not been presented to the courts. Legislative decisions to prohibit private parties from making such payments and media entities from accepting them, prohibitions on government that have been interpreted to bar primarily these "covert" payments, and popular outrage at such practices when exposed illustrate the popular view that this type of payment undermines a fundamental value of institutional integrity.

In sum, the independent interpretation of the two clauses is clearly evident in constitutional holdings respecting autonomy rights of individuals not granted to media entities and arguably in existing (and desirable) doctrine relating to special rights of media to protection of their institutional integrity.

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103. Although Chief Justice Burger's later concurrence in *First National Bank v. Bellotti*, 435 U.S. 765, 797-802 (1978), was obviously hostile to any reading of *Branzburg* as recognizing a separate meaning for the Press Clause, Justice White's original opinion for the Court can be read as merely doubting that a reporter's privilege was needed to maintain institutional integrity and the press's ability to perform its role, leaving open what he would say in other cases. Thus, it is less clear what Justice White would say about payment to the press to present the government's views as the press's own or government power to license the press, compared to government's clear power to license other speaking occupations. *Cf. Lowe v. SEC*, 472 U.S. 181, 214-15 (1985) (White, J., concurring).

104. *Cf. Zurcher v. Stanford Daily*, 436 U.S. 547, 565 (1978) (rejecting newspapers special rights in relation to being subject to search warrants). *Zurcher* may well fall into the category of not being essential for institutional integrity. Certainly, the thrust of Justice White's opinion for the Court was to show that the press needed no such protection.

105. See, e.g., *United States v. Smith*, 135 F.3d 963, 971 (5th Cir. 1998); *Titan Sports, Inc. v. Turner Broad. Sys., Inc.*, 151 F.3d 125, 128 (3d Cir. 1998); *Shoen v. Shoen*, 5 F.3d 1289, 1292-93 (9th Cir. 1993); *United States v. Long*, 978 F.2d 850, 852-53 (4th Cir. 1992); *United States v. LaRouche Campaign*, 841 F.2d 1176, 1182 (1st Cir. 1988). *But see McKevitt v. Pallasch*, 339 F.3d 530, 532-33 (7th Cir. 2003).

### III. DISTINCTION BETWEEN CONSTITUTIONAL STATUS OF THE PRESS AND OTHER BUSINESSES

Business entities are constituted by legal recognition of the significance of acts taken by individuals. Thus, ultimately, the moving parts are individuals. If there were no independent interpretation of the Press Clause, two possibilities would exist. The individuals, by being the actual authors of their business's speech, would be fully protected by the First Amendment, just like in respect to their other speech. Or, given that businesses are necessarily structured by law and subject to extensive and constitutionally unquestionable regulation, speech attributable to the business enterprise—itsself a legal creation<sup>106</sup>—would be generally subject to regulation. On *either* view, without recognition of an independent interpretation of the Press Clause, the press would have no rights different from that of any other commercial or market-oriented endeavors. A business's speech (or its expenditures on speech) would be equally protected as ultimately that of an individual or equally subject to regulation as that of a business no matter what the business is.

Though either protecting or not protecting the speech of all business represents a coherent possibility, from the perspective of individual liberty, a corporation's potentially "immense aggregations of wealth . . . have little or no correlation to the public's support for the corporation's political ideas"—that is, its speech—while contributions of actual flesh and blood individuals to segregated funds do "accurately reflect[] contributors' support . . . ."<sup>107</sup> More generally, "the communications of profitmaking corporations . . . do not represent a manifestation of individual freedom or choice."<sup>108</sup> This conclusion presumably follows for both media and non-media business enterprises. In fact, in relation to typical examples of a corporation's speech, it may be more likely that more stockholders of General Motors will expect, maybe even desire, its speech, for example, about the merits of its cars, than the stockholders of a media conglomerate will desire its speech, for example, its Presidential endorsement. If there are instead greater speech

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106. Tax law, corporate and partnership law, and a host of regulatory law distinguish people acting as business entities or entrepreneurs from people on their own.

107. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 660 (1990).

108. *Bellotti*, 435 U.S. at 805 (White, J., dissenting). Interestingly, Justice White then immediately distinguished some corporations organized for the express purpose of advancing ideological ideas and the press as cases where the corporation "may be viewed as merely a means of achieving effective self-expression." *Id.* This argument clearly applies to the ideological corporation, but the fact that the press is created, according to Justice White, to "disseminat[e] information and ideas" does not show why it should be viewed as a means of "self-expression." *Id.*

rights for the newspaper than the car company, it would seem that the right must lie not in protection of individual liberty (the Speech Clause), but in some independent status of the press (embodied in the Press Clause).

Thus, only if an independent status is given to the press by the Press Clause would the speech and other rights of the media be different from, in particular, greater than, those of other businesses—except maybe due to legislative grace.<sup>109</sup> Correspondingly, a test of the thesis that the Court has implicitly recognized an independent interpretation of the Press Clause is to see if it recognizes—or, maybe to consider if it almost certainly would recognize—different First Amendment rights of media and non-media enterprises.

This examination (conducted below) shows that there is no equivalence between the media and other business entities' legal rights. Most of the divergences are precisely those expected if the First Amendment protects the press as a provider of communicative content for an open democratic culture and all of the divergences are consistent with this thesis. Still, methodologically, there is a difficulty. Legislative decisions create most of these differences in rights. In all these cases, sound democratic policy reasons, independent of any constitutional mandate, may provide the basis for the differences. Whether the laws embodying the differences reflect merely policy or whether they also reflect legislators' implicit (and correct) judgments about their constitutional obligation to not violate press freedom cannot be determined analytically—and probably most legislators would not be conscious of the distinction. Still, sometimes this opaqueness is not present and, in other situations, reasonable conclusions can be made about constitutional mandates. Thus, in looking at various different treatments of the press and other businesses, Part III offers one or the other of three types of arguments depending on the example. In some cases, court decisions implicitly recognize the independent significance of the Press Clause by reaching constitutional holdings that, on grounds of consistency, cannot be understood other than as embodying an

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109. Businesses are routinely subject to industry-specific regulation and sometimes industry-specific privileges. That this is true for the press might initially suggest equal protection challenges—but when made, these challenges should, and have, lost. For example, in *FCC v. National Citizens Committee for Broadcasting*, newspapers were distinguished from non-media corporations in being disabled from receiving broadcast licenses in their area of operation. Their equal protection challenge was noted, but rejected without discussion. 436 U.S. 775, 801-02 (1978). More generally, equal protection objections to industry specific regulation would suggest the potential unconstitutionality of the FCC as well as the Newspaper Preservation Act and much other legislation.



independent interpretation of the Press Clause. In other cases, reading the Constitution as embodying an independent meaning of the Press Clause provides a more satisfying basis for an intuitively right result that the Court reached in a confused way. Finally, often examples merely point to differences in legal rights that have been legislatively adopted but would only be constitutionally required if the Press Clause has independent significance. In many of these later cases, however, I suggest that most people would not want to accept and, in fact, the Court predictably would not accept a legislative failure to give the press the rights provided by existing law. Obviously, the first of these arguments provides the strongest evidence for the thesis of this Article that existing law embodies an independent interpretation of the Press Clause. The last two provide a strong incentive to adopt this view and a reasonable basis to predict that the Court would adopt it in the face of legislative failure. Although the categorization is crude, I try to organize the examples around different contexts or types of issues.

#### A. *Media Speech Rights*

##### 1. Informational Privacy

Since Warren and Brandeis's classic article, *The Right to Privacy*, published in 1890,<sup>110</sup> the twentieth century has seen a huge growth in this area of law (a matter itself calling for sociological explanation), with protection of informational privacy being a fertile basis of statutory and judicial decision-making. Law school case books are written and conferences regularly held on how far this right should extend and what the best ways to protect it are. Many people simply do not want various facts about themselves exposed at all—or, if at all, only when they themselves make the exposure and maintain power to control subsequent uses of the information. The question here is whether the extent the law is constitutionally permitted to protect this interest varies depending on whether the protection is against press exposure or against other commercial, but still communicative,<sup>111</sup> uses. In every case decided so

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110. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

111. Sometimes, rather than prevent the flow of information the law adopts the strategy of denying businesses the right to make use of the information in their decision-making. For example, some laws prohibit businesses from basing hiring, selling, or other commercial decisions on the race, gender, sexual orientation, religion or other categorical aspects of individuals even though it allows them to possess this information. This restriction does not directly relate to the flow of the

far by the Supreme Court, it has struck down attempts to protect individual privacy from truthful media exposure,<sup>112</sup> while (as far as I know) never finding unconstitutional legislative attempts to protect this privacy against intrusion by other businesses (or by the government). Thus, despite the huge and popular development of this “right,” it remains possible to argue that the Supreme Court would not and should not uphold any restriction on media exposure. Pragmatically, this distinction may reflect that non-media businesses and government are the source of the more common intrusions that matter to most people. In any event, the law at present clearly embodies greater protection here of the speech rights of the media than of other businesses.

Doctrine in this area is still developing. Some, but decidedly not all, states presumably make it a tort to expose certain private information about a person.<sup>113</sup> Nevertheless, the category of private information protected by general tort law that applies to the media is usually very, maybe even vanishingly, narrow. For example, it usually covers only information that is both “not of legitimate concern to the public” and also is of a type whose disclosure “would be highly offensive to a reasonable person.”<sup>114</sup> Cases where states have in fact recognized the tort, especially as applied to the media, have been rare and the tort has been subject to severe judicial and scholarly criticism.<sup>115</sup>

So far, the Supreme Court has only examined restrictions on communication of private information in media cases where statutes specifically restricted communication of discrete categories of information—for example, the name of rape victims, juvenile defendants, or information about confidential proceedings before a Judicial Inquiry and Review Commission investigating alleged improper behavior by a judge.<sup>116</sup> In every decision, the Court has upheld the

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information, though gathering information about these qualities can sometimes be evidence of intent to make improper use of it.

112. Paul Gewirtz, *Privacy and Speech*, 2001 SUP. CT. REV. 139, 176.

113. Among the states, Oregon and New York have rejected the tort. *See* *Anderson v. Fisher Broad. Cos.*, 712 P.2d 803, 814 (Or. 1986) (a carefully reasoned opinion by Hans Linde that paid great attention to free speech considerations); *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442, 447 (N.Y. 1902).

114. RESTATEMENT (SECOND) OF TORTS § 652D (1976); *see also* *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1229 (7th Cir. 1993).

115. *See, e.g., Anderson*, 712 P.2d at 808; Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 296-99 (1983); *see also* C. Edwin Baker, *Autonomy and Informational Privacy, or Gossip: The Central Meaning of the First Amendment*, 21 SOC. PHIL. & POL'Y 215 (2004).

116. *See, e.g., Florida Star v. B.J.F.*, 491 U.S. 524, 530 (1989); *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 98-100 (1979); *Landmark Commc'ns v. Virginia*, 435 U.S. 829, 837-38 (1978).

media's constitutional objections and protected their speech.<sup>117</sup> In every case, however, the Court cautiously wrote its opinion very narrowly—explicitly leaving open the possibility of upholding prohibitions on media exposure of private information in an appropriate case.<sup>118</sup> Still, the First Amendment clearly protects most, if not all, communication of “private” information by the media.

The situation changes when the legal regulation of the practices of other commercial entities is examined. They are subject to considerable regulation in their disclosure of personal information about individuals.<sup>119</sup> Probably the area of greatest societal concern has been information kept in databases, medical records, and credit reports. As a central example, consider credit reporting agencies—that is, private businesses engaged in providing personal consumer credit or related information to third parties.<sup>120</sup> Their communications are regulated in ways that clearly could not be imposed on newspapers or other mass media. For example, credit reporting agencies can only supply reports to certain persons—that is, the law limits the people to whom they can speak!<sup>121</sup> They cannot include certain information, for example, about a bankruptcy that occurred over ten years before the report or about many other adverse events that occurred over seven years earlier.<sup>122</sup> In many cases—for example, if the report will be used in connection with an employment decision or in some cases when the information relates to medical records, the credit reporting agency can provide the information only with the consent of the person about whom it is speaking.<sup>123</sup>

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117. See, e.g., *Smith*, 443 U.S. at 106.

118. See, e.g., *id.*

119. Joel R. Reidenberg, *Privacy in the Information Economy: A Fortress or Frontier for Individual Rights?*, 44 FED. COMM. L.J. 195 (1992).

120. 15 U.S.C. § 1681a(f) (2000) (defining consumer reporting agencies). Other commercial enterprises are similarly prohibited from disclosing information that the press or media could not be stopped from disclosing, at least, could not be in respect to their constitutional roles of communicating information to the public. For example, the Family Education Rights and Privacy Act of 1974, 20 U.S.C.A. § 1232g (b) (1) (2002), prohibits schools that receive federal money from releasing various information about a student—her confidential letters of recommendation, financial information, and educational records. If able to obtain the information, as it often has, a newspaper would undoubtedly be protected in including it within a news story. The same is true for the Video Privacy Protection Act of 1988, 18 U.S.C. § 2710 (2000), which regulates information that a videotape service provider can disclose about its customers, in particular the subject matter of the videos its customers rent—though surely, if the press had this information, it could publish it, for instance if were about a judicial nominee (the Act was passed in part in reaction to the exposure of such information during the nomination of Judge Robert Bork for a Supreme Court seat).

121. 15 U.S.C. § 1681b(a) (2000).

122. *Id.* § 1681c(a)(1).

123. *Id.* § 1681b(b)(2)(A)(ii), § 1681b(g).

Moreover, often the credit reporting agency's communications must include information that the consumer demands be included—for example, the fact that she disputes some of the information or that she is fearful that an identity theft is occurring.<sup>124</sup> If applied to newspapers, all of these requirements—that it only communicate with certain people, that it not communicate various factual information about the past, that it communicate information demanded by the person described in the story, that it not communicate information about the person without her consent—would clearly be unconstitutional. Both credit agencies and the press are in the speech business, but the First Amendment apparently protects the speech of only one, the newspaper.

## 2. Right of Publicity

As copyright and privacy law illustrate, all areas of legally granting property rights in information or expression—in the material subject to communication—have been subject to severe and powerful legal critique. This proposition is true, too, for the so-called right of publicity, the right of a person to control the use of her image or persona.<sup>125</sup> That general critique is not the present concern—rather the concern is the specific content of this modern, state-created, right of publicity.<sup>126</sup> The New York legislature created the most famous version soon after its highest court in 1902 rejected a claim of a common law right of privacy against an advertiser who had used a picture of the plaintiff, a very attractive young girl, in its advertising for Franklin Mills Flour.<sup>127</sup> The legislature created liability (and injunctive relief) for unauthorized “uses for advertising purposes, or the purposes of trade, [of] the name, portrait or picture of any living person . . . .”<sup>128</sup> But, the courts tell us, purposes of trade do not include uses by the media in their constitutionally-protected communicative roles.<sup>129</sup>

Various versions of this statutory protection of the right of publicity are common. California law, for example, provides liability for “[a]ny person who [without prior consent] knowingly uses another’s name, voice, signature, photograph, or likeness, in any manner, on or in

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124. *Id.* § 1681c-1.

125. See, e.g., Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 125 (1993).

126. It is sometimes said that this right was first recognized in *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953). See FRANKLIN ET AL., *supra* note 31, 403-08 (discussing the tort ensuing from the right of publicity).

127. *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442, 447 (N.Y. 1902).

128. N.Y. CIV. RIGHT L. §§ 50, 51 (McKinney 1992).

129. See *Finger v. Omni Publ'n Int'l, Ltd.*, 77 N.Y.2d 138, 143 (1990).

products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases . . . .”<sup>130</sup> The modern trend toward recognizing such rights is widespread.<sup>131</sup> Thus, the Restatement (Second) of Torts § 652C provides: “One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other . . . .”<sup>132</sup>

These limits on the “beneficial” or commercial uses of people’s name or image, if the rights are as broad as the initial statement suggests (i.e., “use . . . in products”) would destroy the press as we know it and especially undermine its Fourth Estate role. Unsurprisingly, exceptions to the various statutes and “comment d” to the Restatement make clear that the right does not cover legitimate media uses.<sup>133</sup> Undoubtedly, publications often include stories, pictures, and details about celebrities to attract audiences or, more generally, for profit making reasons. Still, “comment d” of the Restatement insists:

The fact that the defendant is engaged in the business of publication, for example of a newspaper, out of which he makes or seeks to make a profit, is not enough to make the incidental publication a commercial use of the name or likeness. Thus a newspaper . . . does not become liable under the rule stated in this Section to every person whose name or likeness it publishes.<sup>134</sup>

Here, as the Restatement and many state statutes make clear, even though the press and other businesses both use people’s persona and

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130. CAL. CIV. CODE § 3344(a) (West 1999).

131. See Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STAN. L. REV. 1161, 1167-75 (2006).

132. RESTATEMENT (SECOND) OF TORTS § 652C (1976).

133. As used here, “legitimate” refers objectively to the type of use, not a subjective evaluation of the propriety of the editorial judgment. Given the constitutional role of the media, knowing falsehoods—e.g., falsehoods that are not mere negligent errors are not aspects of the press or of speech that is protected by the First Amendment. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964). Thus, knowing (or probably reckless) falsity would deny the media content the status of being a protected press product and turn its use of a person’s image into a mere commercial use. See, e.g., *Cher v. Forum Int’l, Ltd.*, 692 F.2d 634, 639 (9th Cir. 1982). On the other hand, some uses within advertising may not equate to a regulated advertising use. One court found that the press’s advertising for itself did not involve a commercial use of a person’s image when the advertisement merely printed a copy of the advertised publication to illustrate the publication’s content despite the copy containing a picture of a celebrity. See *Booth v. Curtis Publ’g Co.*, 223 N.Y.S.2d 737, 743-46 (N.Y. App. Div. 1962), *aff’d without opinion*, 11 N.Y.2d 907 (1962).

134. RESTATEMENT (SECOND) OF TORTS § 652C, cmt. d (1976). The words “incidental” and “every” person suggest that sometimes a newspaper story could be the basis of liability but that has not been the case at least as to true accounts that would generally be protected by the First Amendment.

image to make money, when it is used for press purposes, the law does not grant the person used any “right to object.”<sup>135</sup>

As described here, the difference between the treatment of the press and other businesses is a matter merely of statutory or common law grace. Surely, however, the notion that the law could require the press to gain consent before describing or picturing the day’s newsmakers or society’s corrupt officials is a constitutional non-starter. The currently accepted capacity of the state to give people rights against many commercial forms of exploitation of their image would be unconstitutional if the state attempted to restrict the press’s freedom to report on people’s role in the world or to print images of people participating in public life. Given the presumptively legitimate public interest in the full scope of people’s lives as a matter of awareness of the norms and foibles of the people in their society, the prominence or lack thereof of the person or the nature of the story is not likely to change this conclusion. Except for the lack of need due to the statutory exemption of the press, the constitutional basis for protecting the press’s use of people’s names or images could easily be developed using constitutional analyses from defamation and privacy cases as doctrinal resources. Thus, the right of publicity illustrates a distinction that currently exists statutorily between media enterprises and other business enterprises, but that constitutionally could not plausibly be eliminated by treating the press the way other commercial users are now treated. Although legislation and common law restrict some businesses’ profitable use of people’s personae or images in their product or to promote their product, it would be unconstitutional to do so to press’s use within its product—no pictures of the candidates or the home run sluggers in the paper! Of course, there are line-drawing issues that may or may not have constitutional dimensions.<sup>136</sup> Still, here, a constitutional difference surely exists between speech by the press and by other businesses.

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135. *Id.*

136. *See* *Montana v. San Jose Mercury News, Inc.*, 40 Cal. Rptr. 2d 639, 643 (Cal. Ct. App. 1995); *Namath v. Sports Illustrated*, 371 N.Y.S.2d 10, 11-12 (N.Y. App. Div. 1975); *Booth*, 223 N.Y.S.2d at 743-46. If the Press Clause is interpreted, as I have argued it should be, from the perspective of complex democracy to include cultural media that are important for people’s self-definition and groups’ internal debates about identity and values, most cases where a persona or image of a person is the product itself, as opposed to merely being used in an advertisement or promotion, the Press Clause ought to prevent the right of publicity from being used to restrict this commercial use. *Cf.* *Madow*, *supra* note 125, at 239 (reaching this conclusion largely on policy grounds).

### 3. Campaign Expenditures

A narrow five member majority initially granted First Amendment protection to corporate political expenditures in the context of referenda, reasoning that “[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.”<sup>137</sup> Then in two subsequent cases, adopting reasoning closely paralleling a dissent in the earlier case, the Court reversed course.<sup>138</sup> It emphasized the centrality of individual self-expression and the importance for First Amendment purposes of the actual speakers’ allegiance to the viewpoint expressed.<sup>139</sup> On this basis, the Court in *Austin v. Michigan Chamber of Commerce* and *McConnell v. Federal Election Commission* upheld strict limits on corporate use of money to support electoral candidates,<sup>140</sup> relegating the notion of “[t]he inherent worth of the speech . . . for informing the public” to the wishes of very irate dissents.<sup>141</sup>

Each restriction on corporate political speech either exempted the press or, in *Bellotti*, its applicability to the press was not before the Court.<sup>142</sup> In upholding the restrictions in *Austin*, the Court rejected the non-media corporations’ argument that exempting the media violated equal protection.<sup>143</sup> The much more troubling question—and an issue brought up in each case by those objecting to limits on corporate campaign speech—is whether the press must be exempted, that is, whether the First Amendment requires that the press be allowed to use its resources to write stories and publish commentary about candidates.<sup>144</sup> (Portions of the Bipartisan Campaign Reform Act of 2002—“BCRA”—upheld by the Court barred non-media business corporations from using general treasury funds for broadcast ads that even “refer to” candidates in the period shortly before elections, which

137. *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978).

138. *See McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 233 (2003); *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 667-68 (1990).

139. *McConnell*, 540 U.S. at 205; *Austin*, 494 U.S. at 666.

140. Obviously, the cases are formally distinguishable on grounds that the first involved a referendum and, thus, there was no candidate subject to corruption, but the rationale of the first case easily encompasses the later cases and rationale of the later cases is essentially the rationale of the dissent in the first.

141. *Austin*, 494 U.S. at 700 (Kennedy, J., dissenting); *McConnell*, 540 U.S. at 257 (Scalia, J., dissenting); *id.* at 328 (Kennedy, J., dissenting as to this issue).

142. *Bellotti*, 435 U.S. at 781-82 n.17.

143. *Austin*, 494 U.S. at 667-68.

144. *Id.* at 667 (“We have consistently recognized the unique role that the press plays in ‘informing and educating the public, offering criticism, and providing a forum for discussion and debate.’”) (quoting *Bellotti*, 435 U.S. at 781); *see also McConnell*, 540 U.S. at 208.

raises the question of whether the press too could be barred from referring to candidates for political office during the period leading up to an election.)<sup>145</sup> Surely, the answer must be that the First Amendment requires that the press be permitted to refer to political candidates. But without an independent meaning for the Press Clause, it is unclear how to make an argument for mandatory exemption. In contrast, given independent constitutional protection for the press, the argument is easy. Unlike other businesses, evaluation of candidates by the press is part of its constitutional role. Since surely no one would think BCRA can be permissibly applied to the news media in their media roles,<sup>146</sup> if one also assumes (as I do)<sup>147</sup> that existing doctrine is correct, that is, that the Court was correct to uphold restrictions on general corporate political participation, it is hard to avoid the conclusion that First Amendment must provide the press special protection different from and greater than that of other enterprises.

The opposite view—that media cannot be distinguished from other businesses for First Amendment purposes—was, of course, a possibility advanced by the dissenting Justices. That conclusion would surely lead to striking down the restrictions on corporate expenditures. Thus, Justice Scalia, beginning with the assertion that the Court has “consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers,” concludes that one can only “hope . . . that Michigan will continue to provide this generous and voluntary exemption,” a hope that he suggests should give the institutional press “little reason for comfort.”<sup>148</sup> Justice Kennedy combines the conclusion, offered in reliance on a quote from Justice Brennan in *Dun & Bradstreet* that the institutional media has (at least in the context of that case) no special constitutional rights, with the point that “[i]t is beyond peradventure that the media could not be prohibited from speaking about candidate qualifications,” to conclude that the bar on corporate campaign expenditures must be invalid.<sup>149</sup> In *McConnell*, Justice Thomas argues: “The chilling endpoint of the Court’s reasoning

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145. 2 U.S.C. § 434 (Supp. 2001-2004).

146. Like other corporations, presumably they can be restricted in the campaign contributions or campaign expenditures that are unrelated to their media business.

147. BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH, *supra* note 19, at 196-97; C. Edwin Baker, *Paternalism, Politics, and Citizen Freedom: The Commercial Speech Quandary in Nike*, 54 CASE W. RES. L. REV. 1161, 1170 (2004) [hereinafter Baker, *Paternalism, Politics, and Citizen Freedom*]; C. Edwin Baker, *Realizing Self-Realization: Corporate Political Expenditures and Redish’s the Value of Free Speech*, 130 U. PA. L. REV. 646, 652 (1982).

148. *Austin*, 494 U.S. at 691-92.

149. *Id.* at 712 (Kennedy, J., dissenting).



is not difficult to foresee: outright regulation of the press. . . . [N]one of the reasoning employed by the Court exempts the press . . . . The press now operates at the whim of Congress.”<sup>150</sup>

Analytically correct conclusions are clear. One can strike down laws restricting corporate political expenditures without taking a position in regards to an independent interpretation of the Press Clause. But to uphold these laws, as the Court has done in both *Austin* and *McConnell*, requires the Court to at least implicitly accept an independent interpretation of the Press Clause. As Justice Kennedy put it, “it is beyond peradventure” that the Court would leave the press vulnerable to these regulations. The press must be exempt from these laws not simply as a matter of legislative grace but of constitutional right. And there seems no basis for that exemption absent an interpretation of the Press Clause that gives the media special rights.

### *B. The Press Compared to Other Speaking Professions*

#### 1. Duty of Care: Press Versus Accountants, Lawyers, or Other Speaking Professions

Many businesses are liable for pecuniary losses caused by their supplying negligently “false information for the guidance of others in their business transactions.”<sup>151</sup> The Ohio Supreme Court has held this duty applies to accountants in relation to their clients.<sup>152</sup> Then, in *Gutter v. Dow Jones, Inc.*, it distinguished accountants in explaining that this duty does not apply to newspapers in relation to its readers.<sup>153</sup> In addition to describing how its holding represented the “general view” among jurisdictions about reasons for not holding the media liable for harms resulting from people’s reliance on its negligently false statements, the Court also emphasized that First Amendment principles likely preclude liability.<sup>154</sup>

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150. *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 283, 286 (2003) (Scalia, J., dissenting).

151. RESTATEMENT (SECOND) OF TORTS § 552(1) (1977).

152. The court described its earlier holding involving accountants. *Haddon View Inv. Co. v. Coopers & Lybrand*, 436 N.E.2d 212, 215 (Ohio 1980) (citing *Rusch Factors, Inc. v. Levin*, 284 F. Supp. 85, 93 (D.R.I. 1968)).

153. *Gutter v. Dow Jones, Inc.*, 490 N.E.2d 898, 900 (Ohio 1986).

154. *See id.* at 901. The court also noted factual differences between the communications of newspapers and accountants—the number of clients or customers who might rely on the communication and the reasonableness of the reliance—that arguably support, on policy grounds, the distinction. Whether the product of any business other than the press is “communications to the world” is unclear but, if so, an attempt to impose liability on that business might test the issue of

This merely represents one of many areas where professionals of various sorts are subject to liability for negligent speech while the press generally receives greater protection. "Speaking professions" commonly are subject to malpractice liability for negligently failing to base advice on facts or wisdom they are expected to possess; they can even be liable for failure to speak when required by professional standards.<sup>155</sup> That is true, for example, in the context of regulation of the medical profession<sup>156</sup> and lawyers.<sup>157</sup> Speech restrictions designed to maintain quality of performance of these speaking professions are and should be upheld. This standard applied for liability is, however, a far cry from standards typically applied to the press. There, criteria for liability are typically "reckless disregard of the truth" or "knowingly false," which apply to the press in tort law as illustrated most clearly by defamation law, or versions of the clear and present danger test, which applies in many other situations.<sup>158</sup>

For example, the First Amendment allows regulation of lawyers if the regulation is designed to assure their proper performance—though the notion of proper performance may have constitutional overtones itself given the constitutional establishment of their role in maintaining due process.<sup>159</sup> Thus, Chief Justice Rehnquist, speaking for a majority in *Gentile v. State Bar of Nevada*, held that a defense attorney, during the pendency of a case in which she is involved, can be punished for having a press conference in which she (truthfully) offers her view about the innocence of her client and the existence of police corruption even though this speech would clearly be protected if made either by a private

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whether the First Amendment protection that the court discussed applied to all business because of the context. More likely, the protection applied especially to newspapers (or media), the entities of First Amendment concern that the court emphasized throughout its opinion and were emphasized in the cases it cited and in its quote from *American Jurisprudence 2d*. See *id.* at 900.

155. Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771, 834-50 (1999).

156. See *id.* at 834; see generally Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939.

157. See Halberstam, *supra* note 155, at 834.

158. Compare *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988) (noting the standard for liability that applies to the press in tort law and quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964)) and *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1022-23 (5th Cir. 1987) (applying the incitement test from *Brandenburg v. Ohio*, 395 U.S. 444 (1969), to deny media liability) with *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1038-39 (1991) (discussing the standard that applies to lawyers).

159. The central difference between the opinions of the majority and dissent in *Gentile* can be read as a disagreement about the appropriate conception of the lawyer's role, and on that a very good case can be made that the dissent had the better of the argument.

individual or the press.<sup>160</sup> That is, Rehnquist rejected a “clear and present danger” of “actual prejudice or an imminent threat” standard and rejected other analogies to protection of speech by the press as appropriate standards to be met “before any discipline may be imposed on a lawyer who initiates a press conference such as [the one conducted in *Gentile*].”<sup>161</sup> More generally, the clear and present danger standard that the Court has applied to communications by individuals<sup>162</sup> and the press<sup>163</sup> for speech about pending legal proceedings is precisely the speech that the Court in *Nebraska Press Association v. Stuart* suggested restricting in the case of participating lawyers.<sup>164</sup> Lawyers, it seems, because of their occupation or “business” have less speech rights than the First Amendment provides the press (or private individuals).

## 2. Licensing Securities Advisors

In *Lowe v. SEC*, the Court avoided the question of whether the government can require a newspaper that provides the public with financial information to be licensed under rules that allow the government to deny or revoke the license for past unethical or illegal behavior.<sup>165</sup> Surely, however, such a regime would constitute a system of prior restraints.<sup>166</sup> The law at issue, however, provided such licensure requirements for securities advisors.<sup>167</sup> Although Lowe was now seemingly publishing a newsletter, the SEC characterized his practice as coming under the law and took action to prevent him from continuing to distribute his newsletter. The Court majority rejected this result by

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160. *Gentile*, 501 U.S. at 1071.

161. *Id.* at 1069.

162. *See, e.g.*, *Bridges v. California*, 314 U.S. 252, 260-62 (1941).

163. *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 570 (1976). By counting Justices, *Nebraska Press* can be read to leave open the possibility of even greater protection than offered by the clear and present danger test, namely for Justice Brennan’s view that an injunction should never be issued to stop publication by the press of information about criminal proceedings. Likewise, in referring to *Bridges* context, Justice Brennan asserted in *New York Times Co. v. Sullivan* that the speech not only does not lose its protection because the utterances contain misinformation and half-truths but also that “repression [of the speech] can be justified, *if at all*, only by a clear and present danger of the obstruction of justice,” which “*Bridges’* threat to cripple the economy of the entire West Coast” apparently did not create. 376 U.S. 254, 272-73 (1964) (emphasis added); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 624 (1978).

164. *Nebraska Press Ass’n*, 427 U.S. at 552-54 (citing with approval such steps as recommended in *Sheppard v. Maxwell*, 384 U.S. 333, 362-63 (1966)).

165. *Lowe v. SEC*, 472 U.S. 181, 189-90, 211 (1985).

166. *Cf. Near v. Minnesota*, 283 U.S. 697 (1931) (prior objectionable behavior was found not to be basis for enjoining future publication).

167. *See Lowe*, 472 U.S. at 203-09 (discussing the licensure requirements and exceptions under 15 U.S.C. § 80b-2).

finding that Lowe came within the *statutory* exception for the publishers of a “bona fide newspaper, news magazine or business or financial publication of general and regular circulation.”<sup>168</sup>

No one questioned that these licensure requirements could be imposed on the business of investment advising, but would the Constitution permit them to be imposed on the press? In many ways, the question resembles the issue of the accepted authority of the government to impose license requirements on speaking professions—say doctors or psychiatrists or lawyers—as a precondition for practicing their trade despite the recognized right of newspapers to have its journalists or columnists write medical reports or columns, personal self-help advice columns, or legal columns that provide information that many people rely on in lieu of going to a professional. In these examples, the law requires neither the newspaper nor its “reporters” or columnists to have a professional license, at least as long as neither the paper nor its reporter falsely claims to be a doctor or lawyer. Still, both the person for whom the law requires a license and the publication and its writers are in the business of providing information, opinion, and advice and the content of the information or advice may be identical in each case. What, then, is the relevant difference? Only the latter is the “press.” This fact apparently bars imposing the license requirement.

In *Lowe*, Justice White, joined by two other Justices, found that the statute did cover Lowe.<sup>169</sup> This interpretation raised the question of government power noted above. Without questioning the power of the government to require a revocable license for security advisors, Justice White then concluded that the statute violated the First Amendment when applied to Lowe. He was not entirely clear about the basis of his conclusion—for example, he did not decide whether Lowe’s speech was “fully protected” or was “commercial.” And he did not specifically rest on the Press Clause as opposed to the protection the First Amendment provides for speaking and publishing.<sup>170</sup> However, his method of distinguishing this case from regulatable speech of professionals looked precisely at the factors that distinguish the professionals’ business from the press—factors such as a “personal nexus between professional and client.”<sup>171</sup> In other words, it seems that the premise required for the proper result—a result that one suspects the rest of the Court would reach except for their different statutory interpretation and would surely

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168. See *id.* at 210; 15 U.S.C. § 80b-2(a)(11)(D) (2000).

169. See *Lowe*, 472 U.S. at 211 (White, J., concurring).

170. See *id.* at 234-35.

171. See *id.* at 232.

reach if the law were applied to the reporters for the business section of the *New York Times*—is that the press is a special constitutionally-protected business.

### 3. Speaking Professions and the Perversion of Defamation Law

As noted in the introduction and contrary to some interpretations, *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*<sup>172</sup> does not require rejection of an independent status of the Press Clause. The Court only refused to give the press greater protection than given an individual.<sup>173</sup> The Court's reasoning, however, is problematic. Though right not to distinguish the press from individuals,<sup>174</sup> by failing to distinguish the press from credit reporting agencies, the Court cast doubt on the logic of vast areas of law that treat the press differently than other businesses. Thus, here I offer three observations. First, the Court could have reached its final result much more easily than it did. Second, the method it chose greatly and unwisely deformed defamation law. Finally, if read as rejecting an independent role of the Press Clause, this decision would come at the cost of destroying the whole regime of regulation of credit reporting agencies in particular and regulation of medical records and other databases in general.

In *Dun & Bradstreet*, the majority of the Court stated that the media did not have greater protection in defamation suits than individuals do.<sup>175</sup> Any other holding would, I believe, be absurd. Given that defamation law normally (though the exceptions are considerable) treats repeaters of defamatory content as if they were original speakers,<sup>176</sup> giving lesser protection to individuals leads to the absurdist image of a person at the breakfast table reading a passage from a newspaper to her partner and then being held liable for her reading while the First Amendment protects the newspaper that originally published the story. But to say that the press receives no greater protection than an individual does not mean that it cannot receive greater protection than other businesses. Such a view would have allowed the Court to reach the outcome it reached. Instead, by failing to recognize this role for the Press Clause, the plurality found it could only reach its (correct, in my view) result of upholding liability for the credit agency by deforming defamation law in

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172. 472 U.S. 749 (1985).

173. See *supra* notes 12-17 and accompanying text.

174. *Dun & Bradstreet*, 472 U.S. at 753.

175. *Id.* at 773 (White, J., concurring); *id.* at 784 (Brennan, J., dissenting).

176. See, e.g., RESTATEMENT (SECOND) OF TORTS § 578 (1977).

two unfortunate ways.<sup>177</sup> The plurality, first, increased the general availability of punitive damages in defamation law—which also increased the practical significance of the difficult task of drawing lines between matters of public concern and purely private information; second, it gave the notion of “matters of public concern” an intolerably narrow interpretation.<sup>178</sup>

As to the first point, in *Gertz v. Robert Welch*, the Court announced that a “private defamation plaintiff who establishes liability under a less demanding standard than that stated by *New York Times* may recover only such damages as are sufficient to compensate him for actual injury.”<sup>179</sup> This complete rejection of punitive damages absent a showing of *New York Times* actual malice was also noted in opinions of other Justices.<sup>180</sup> The important limitation the Court changed eleven years later in *Dun & Bradstreet*. In respect to speech that is not on “matters of public concern,” that is, “speech on matters of purely private concern,” the plurality in *Dun & Bradstreet* held “that the state interest adequately supports awards of presumed and punitive damages—even absent a showing of ‘actual malice.’”<sup>181</sup> This holding troublingly expands the potential for punitive damages in defamation cases<sup>182</sup> unless the category of matters “not of public concern” is a null set.

The second move, criticized vigorously by Brennan’s dissent as a radical and ill-advised departure, is the plurality’s characterization of the speech at issue. Brennan’s complaint is that speech reporting the bankruptcy of a local employer is “potentially of great concern to residents of the community” and comes well within the category of a matter of public concern as that term had previously been used.<sup>183</sup>

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177. *Dun & Bradstreet*, 472 U.S. at 757-63.

178. *Id.* On the dangers of bowing to majoritarian norms implicit in this line-drawing, see *Anderson v. Fisher Broad. Cos.*, 712 P.2d 803, 809 (Or. 1986).

179. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). The Court asserted essentially this proposition repeatedly. For example, it said: “We also find no justification for allowing awards of punitive damages against publishers and broadcasters held liable under state-defined standards of liability for defamation.” *Id.* “It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury.” *Id.* at 349.

180. See *id.* at 354 (Blackmun, J., concurring); *id.* at 368-69 n.3 (Brennan, J., dissenting)

181. *Dun & Bradstreet*, 472 U.S. at 759, 761.

182. Five of the Justices in *Dun & Bradstreet* observe that this amounts to a rejection of *Gertz* and an expansion of when liability can occur. See *id.* at 772 (White, J., concurring); *id.* at 785 n.11 (Brennan, J., dissenting).

183. *Id.* at 789. Interestingly, Justice Brennan argues that the bankruptcy report is a matter of public concern and, even if it were not, is “well within the range of valuable expression for which the First Amendment demands protection.” *Id.* at 790 (Brennan, J., dissenting). Justice Brennan, implicitly accepting the relevance of *Gertz*’s rule structure in this context, quotes a law review

Justice Powell's explanation for a contrary conclusion is difficult to construct and appears to be entirely driven by his effort to achieve the right result—subjecting the credit reporting agency's speech to legal regulation.<sup>184</sup> Justice Powell cites a holding that concluded that, for purposes of the speech rights of government employees, the determination of whether their speech was a matter of public concern depended on its "content, form, and context."<sup>185</sup> Although Brennan suggested that Justice Powell "appear[s] to focus on primarily on subject matter" (that is, "content"), Justice Powell actually never says anything about subject matter but only about form and context.<sup>186</sup> Justice Powell does point to the relevance of contextual factors that characterize the credit report as speech offered by a business (the report was done for profit and had other qualities that the Court has identified with commercial speech) and other factors that also typify credit reporting but that distinguish it from media speech (the report had a limited, discrete audience who are contractually prohibited from further circulating the information).<sup>187</sup> On this basis, the result would have been easy if Justice Powell had merely asserted that First Amendment protection accorded individuals and the press did not encompass the speech of (at least some) non-media businesses. This step, the basis for which he had laid, would implicitly recognize the independent significance of the Press Clause. Failure to take it and instead to announce purportedly general principles led directly to the deformation of defamation law identified here.

The Court's refusal to rest liability on the difference between the press and credit reporting agencies initially caused fear in the press about potential liability under the *Dun & Bradstreet* standard. Nevertheless, reasons for worry apparently have not materialized. Courts, properly disinclined to second guess editors about what is of public concern, have in effect treated the press differently from other

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article that shows that the Fair Credit Reporting Act would, as does *Gertz*, allow liability here for negligence but that the Act is best interpreted to rule out, as would *Gertz*, punitive damages. That is, despite the wide disparity between the speech regulations imposed by the Fair Credit Reporting Act and those that would be constitutional if applied to the press, Brennan appears not to object to the Fair Credit Reporting Act, thereby implicitly being committed, as the earlier discussion of privacy showed, to a separate interpretation of the Press Clause. *Id.* at 796 n.19 (Brennan, J., dissenting) (quoting Virginia G. Maurer, *Common Law Defamation and the Fair Credit Reporting Act*, 72 GEO. L.J. 95, 126 (1983)); see also Brennan, *supra* note 10 at 175-77.

184. *Dun & Bradstreet*, 472 U.S. at 761-63.

185. *Id.* at 761. Brennan complained that the Court had explicitly limited this test, taken from *Connick v. Myers*, 461 U.S. 138 (1983), to the public employee "context." *Id.* at 789-90 n.14 (Brennan, J., dissenting).

186. Compare *id.* at 786 (Brennan, J., dissenting) with *id.* at 761-62.

187. *Id.* at 762-63.

businesses by deferring to the press's judgments about what matters are of public concern.<sup>188</sup> Brennan had already observed that the speech in *Dun & Bradstreet* "would clearly receive the comprehensive protections of *Gertz* were the speech publicly disseminated."<sup>189</sup> In effect, lower courts, and maybe Justice Powell, have *sub rosa* embodied an independent reading of the Press Clause in their interpretation of "context" as a criterion of "public importance."<sup>190</sup> The fact that the press originates the speech seems in practice to represent a "context" that shows that it is of public importance and should receive protection.

Interestingly, existing regulations of the speaking professions and of credit reporting in behalf of protecting privacy illustrate that the route not taken in *Dun & Bradstreet* is firmly embedded in existing law. Nevertheless, *Dun & Bradstreet* leaves defamation as an area where I cannot claim that the Court has implicitly recognized the independent significance of the Press Clause. However, it represents an area where the failure to recognize this principle has led to doctrinal shambles and where the pressure for the correct principle, an independent status for the press, has led to its *sub rosa* acceptance that fortunately allows for appropriate protection of the press. Certainly, recognizing the Press Clause as distinguishing the press from other businesses is by far the easiest way to reach a result that the Court reached—upholding state defined standards of liability for inappropriate, here false, credit reporting. (This interpretation would also allow the dissent to use the significant—even though reduced—protection granted commercial speech to frame its objection to the majority's conclusion.)

### C. Other Reduced Speech Rights of Non-Media Businesses

#### 1. Compelled Identification of Non-Media Originated Speech

Part II observed that statutes often require the media to identify the source of communication content that it was paid to carry. Of course, as the Court of Appeals observed in *SEC v. Wall Street Publishing Institute, Inc.*, "forcing a magazine to label its contents as published in return for consideration received from the subject of its articles carries an inherently pejorative connotation."<sup>191</sup> Still, the court there upheld the general requirement to disclose the fact of consideration and the amount

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188. FRANKLIN ET AL., *supra* note 31, at 312.

189. *Dun & Bradstreet*, 472 U.S. at 795 n.18 (Brennan, J., dissenting).

190. *See, e.g., id.* at 762 n.8; *id.* at 786 n.12, 795 n.18.

191. *SEC v. Wall Street Publ'g Inst. Inc.*, 851 F.2d 365, 376 (D.C. Cir. 1988).



paid for publishing a story promoting a particular financial security.<sup>192</sup> This compelled identification could either deter the media from carrying the “paid for” speech or deter the entity that paid from being willing to do so. In either event, the requirement “burdens” the speech. *Miami Herald* teaches that the government cannot punish or penalize the media for its choice to carry particular (protected) content, for example by requiring it to include additional unwanted content in response to its initial speech choices.<sup>193</sup> That “penalty” is precisely what is accomplished by requiring the media to identify material as paid content. The two holdings are in apparent conflict.

The special constitutional status of the press eliminates the conflict. If the media receives special protection only for speech it originates (and that is constitutionally valued precisely because the speech originated in an independent press), and if this protection is not given to other commercial entities for their speech, the mandatory disclosure should not be troublesome. The mandated disclosure will burden or deter speech, but only speech whose ultimate basis lies in another, non-media business.<sup>194</sup> Thus, for the Court to uphold the provision of the Securities Act that makes it unlawful to describe a security for consideration unlawful without disclosing the fact and the amount of consideration<sup>195</sup> makes sense only if the rights recognized in *Miami Herald* apply only to the press (and maybe private individuals), but not to businesses in general.<sup>196</sup> In fact, as discussed in Part II, requiring this disclosure enhances rather than violates the institutional integrity of the media.

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192. The court held that mere receipt of free text would not amount to consideration, but the facts alleged could show the necessary quid pro quo. *Id.*

193. See *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256-58 (1974); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 653-56 (1994).

194. Presumably, the other business that paid to have its message carried could itself be a media entity—certainly the media actively advertise their products. The type of speech for which a Fourth Estate interpretation of the Press Clause requires protection is, however, the speech that originates in the Fourth Estate entity identified with the speech. In having another media entity promote its media content by carrying its message, the media entity is in the same position of any other business—and presumably can be required to self-identify. See *infra* note 206.

More interesting is if the outside payment comes not from a business but an individual claiming a speech right to pay for politically salient speech and also asserting free speech rights of anonymity. Here, requiring the media to identify the source, thereby discouraging the individual's anonymous speech, must be understood as holding that individuals, although free to maintain anonymity on their own (e.g., in their leafleting), can be prohibited from activities that undermine the integrity of the media as legislatively understood, a holding for which *Associated Press v. United States*, 326 U.S. 1, 20 (1936), provides ample support.

195. 15 U.S.C. § 77q(b) (2000).

196. Another way to describe this conclusion is to find the “paid for content” constitutes commercial speech, a rather obvious conclusion in most cases. The court, however, rejected this characterization of the paid-for promotional speech in *Wall Street Publishing* but instead argued:

## 2. Commercial Speech

The last discussion may be merely an illustration of a more general distinction between the speech of media enterprises and other businesses. As is well known, in an earlier period the Court,<sup>197</sup> and even so-called First Amendment absolutists on and off the Court,<sup>198</sup> found commercial speech entirely outside First Amendment protection.<sup>199</sup> Since the early 1970s, however, the Court has accorded commercial speech some, but reduced, protection—with the extent of subsequent protection actually, though not “officially,” waxing and waning.<sup>200</sup> Thus, even now, commercial speech is subject to many regulations that are clearly unconstitutional if applied to the press.<sup>201</sup> Prior restraints are allowed. The government can require that advertisers include communicative content—i.e., disclosures—which is a requirement that would constitute an unconstitutional penalty on the advertising speech under any interpretation of *Miami Herald*. Misleading commercial speech is subject to prohibition—but think of applying that restriction to either the speech of politicians or stories in newspapers! Falsity in

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“Speech relating to the purchase and sale of securities, in our view, forms a distinct category of communications in which the government’s power to regulate is *at least* as broad as with respect to the general rubric of commercial speech.” *Wall Street Publ’g Inst. Inc.*, 851 F.2d at 373 (emphasis added, though the court proceeded to suggest these communications were even more subject to regulation than commercial speech). Since the speech itself did not propose the “purchase or sell of securities” or directly relate to such sales, the court might understand “relating to” as meaning “likely to” or maybe “intended to” influence sales or purchases of securities. Such an interpretation would seem to cover most newspaper financial advice columns and maybe even news stories about public companies. If this means that these newspaper columns and stories are subject to routine regulation, the result would be in huge tension with the First Amendment. The better reading of the opinion is probably to understand the court as limiting its point to regulating the “communication of the regulated parties.” *Id.* at 372. This reading is even more appropriate given that the court, in its interpretation of “consideration,” was careful to describe it narrowly enough to avoid interference with the normal practices of the media and cited approvingly *Miami Herald*’s protection of the editorial integrity of the press. *Id.* at 374. If this reading is correct, the court essentially adopts the view, argued for in the text, that businesses when engaged in the sale of securities have different and lesser protections for its corresponding speech activities than does the media when engaged in its Fourth Estate function.

197. *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942).

198. See Baker, *Paternalism, Politics, and Citizen Freedom*, *supra* note 147, at 1162 (noting that Justice Black, Meiklejohn, Emerson and others, including eminent free speech theorists such as John Stuart Mill, would exclude commercial speech from the scope of free speech principles).

199. See *id.*; see also *Valentine*, 316 U.S. at 54.

200. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 772 (1976) (“In concluding that commercial speech enjoys First Amendment protection, we have not held that it is wholly undifferentiable from other forms.”); Baker, *Paternalism, Politics, and Citizen Freedom*, *supra* note 147, at 1162-63.

201. The Court provided a list of permissible restrictions, noted in the text, which at this point are not, I believe, controversial. *Virginia State Board of Pharmacy*, 425 U.S. at 771-72 n.24.

commercial speech does not get even the limited protection of *Gertz*'s requirement of fault. These restrictions all apply even before coming to the *Central Hudson* test, which further allows regulation of content if the government can show it provides a properly narrow means to advance an important state purpose.<sup>202</sup> There the Court suggested that New York could bar advertising that undermined energy conservation—although it invalidated the restriction before it for being overbroad and not narrowly tailored to these energy conservation goals.<sup>203</sup>

Normally, the issue of commercial speech has not been considered from the perspective of the issue considered here—whether the Press Clause provides independent protection to the media business. Rather, the point has simply been that commercial speech is a protected—but not fully protected—category of speech. Here, however, the questions are first, whether the communications of the commercial, profit-oriented mass media are commercial speech—they are usually designed to make money for the publisher. Second, if not commercial speech, how does the Court distinguish commercial speech and media?

As early as *New York Times Co. v. Sullivan*, the Court distinguished the speech of newspapers sold for profit (as well as the advertisement placed by activists) from commercial speech, holding that neither the advertising format nor the general commercial rationale for newspaper publication justified treating the press as a commercial speaker.<sup>204</sup> More recently, as a necessary step in upholding a statute that appeared to bar broadcast of all lottery information, the Court strained to interpret it not to cover the press's own publication of the information but only advertising involving lotteries.<sup>205</sup> The Court quite clearly does not consider the content of commercial media to constitute commercial speech despite the profit motive that lies behind it and even when the media *content* is identical to regulatable commercial speech. As the list of ways in which commercial speech can be regulated makes clear, treating the media's product as commercial speech would drastically contradict existing doctrine protecting media speech.

Thus, the second question becomes the interesting one: how are the two different? On the factual level, the most obvious difference is that

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202. *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 563-64, 576 (1980).

203. *Id.* at 570-71.

204. In distinguishing *Valentine v. Chrestensen*, 316 U.S. 52 (1942), the Court said: "That the Times was paid for publishing the [editorial] advertisement is as immaterial in this connection as is the fact that newspapers and books are sold." *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964).

205. *United States v. Edge Broad. Co.*, 509 U.S. 418, 429-30 (1993).

the speech of the press is its product, while the speech of other businesses instrumentally aims to aid its sale of its non-speech products or its other endeavors to achieve profits.<sup>206</sup> In fact, this is the answer that in a moment I will assert is also constitutionally salient—but note that it has constitutional relevance *only* if the press is constitutionally a specially protected business such that its product, even if it has the same expressive content as something put out by another business, receives protection. But first consider whether there are any good alternatives. One possible alternative, the profit orientation of speakers, has already been shown not to work.<sup>207</sup> Both media and other businesses are typically profit oriented. Rather, possibly the most common attempt to offer an alternative is to focus on content. The expectation is that commercial speech is identified by its content and it receives reduced protection because of something about this content. Certainly, content has been a central feature of other areas of reduced or denied First Amendment protection. It is the primary factor that identifies obscenity; and false content, combined with fault, is central to defamation. Various Court statements in commercial speech cases focus on content.<sup>208</sup>

Nevertheless, content has never been a determinative factor.<sup>209</sup> In the foundational case, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, using examples such as ads for

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206. Of course, the media also advertises and otherwise promotes its media, that is, speech, products. It is unlikely that the press's constitutionally protected Fourth Estate role would suggest a right to an exemption from a *general* regulation of advertising or solicitation any more than from a general regulation of its labor practices or wages. In contrast, a regulation specifically of the media's self-promotion would be hard to interpret other than as an attempt to burden the press in its protected role of communicating with the public. Roughly, this reasoning was sometimes invoked to explain *Bigelow v. Virginia*, 421 U.S. 809 (1975), decided the year before *Virginia State Board of Pharmacy*, made clear that commercial speech was protected. The argument was that *Bigelow* showed the impermissibility of specifically barring information, even when communicated by advertising, about a constitutionally protected activity—abortions. Similar is a possible interpretation of *Booth v. Curtis Publishing Co.*, 223 N.Y.S.2d 737, 745 (N.Y. App. Div. 1962), *aff'd without opinion*, 11 N.Y.2d 907 (1962) (denying application of New York's privacy—read, “right of publicity”—statute to a magazine's use of a picture of a person previously published in its magazine for an advertisement for the magazine). The argument is that applying the law here would prevent only publications, not other businesses, from using pictures of its product in its advertisements—and thus this application would be a media-specific limit on advertising. In any event, the issue is not crucial for the argument here, and I put it aside.

207. See *New York Times v. Sullivan*, 376 U.S. at 266; *Pittsburg Press Co. v. Pittsburg Comm'n on Human Relations*, 413 U.S. 376, 385 (1973).

208. Still, probably descriptively the most accurate of the Court's discussions involving commercial speech, which occurred in one of the few cases where identification was difficult, makes content only one factor. See *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 65 (1983).

209. See generally Baker, *Paternalism, Politics, and Citizen Freedom*, *supra* note 147 (discussing the distinction between content and speaker identity as factors in the analysis of commercial speech cases).

artificial furs as an alternative to those that contribute to the extinction of fur-bearing mammals or for domestically produced products that are said to preserve American jobs, the Court noted that sometimes commercial speech will refer to public issues about which speech by the individuals or the media would undoubtedly be fully protected.<sup>210</sup> Content, in other words, is not what turned the ads into commercial speech. Rather, it was something about the identity of the speaker. Actually, in *all* cases of regulation of commercial speech, the law applied only to businesses promoting their commercial interests. The laws were never general bans on a category of speech defined by content—the laws did not restrict the *same* content published by others.<sup>211</sup> The occasionally offered argument that the regulations manifest a paternalistic governmental view, namely, that people should not be exposed to particular information or assertions,<sup>212</sup> has never been quite right. 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. They are free to say smoking is great, turn up the air conditioner, or that drug prices are less at these stores than at those.<sup>213</sup> That is, if there is paternalism, the paternalism is about the parties who should participate in the discourse, not about what is said or what people should read or hear. Flesh and blood individuals, their non-commercial associations, and the media always have full discourse rights.

Possibly, the point about content not being the basis of regulation is best illustrated by a series of lower court cases. The same expressive content about the science, efficacy or other features of some product, process, or activity might be either published as a book sold for a profit or distributed without, or at a reduced, cost by a commercial enterprise with the aim to promote the profitable sale of the firm's products or business. The same content, the very same book, might even play both roles in separate contexts. When faced with this dichotomy, lower courts have been quite uniform in their results.<sup>214</sup> The communicative content is fully protected speech when sold as a media product and is commercial speech subject to regulation for being misleading when provided within

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210. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 764 (1976).

211. An exception is the language of the statute in *Edge Broadcasting* noted earlier, but the Court interpreted it to apply only to advertising, thereby justifying the claim in the text above.

212. *See, e.g., Virginia State Bd. of Pharmacy*, 425 U.S. at 769-70.

213. Justice Rehnquist emphasized this point in his dissent in *Virginia State Board*. *See id.* at 782 (Rehnquist, J., dissenting).

214. *See infra* note 215.

a promotional campaign for a firm or its products.<sup>215</sup> Thus, the distinction between commercial speech and media publications is neither the aim of profits nor the content. There seems little explanation for the constitutionally salient distinction other than the identity of the parties. That is, the business of the press, whose media content is its product, is constitutionally special and receives a degree of First Amendment protection that other businesses, whose speech content is not their product but is used instrumentally to advance profits, do not receive.

### 3. Discriminatory Taxation

Government authority to tax media businesses is unabashedly limited in ways that its authority to tax other businesses clearly is not. In general, governments can discriminate incredibly between businesses in imposing tax liability—imposing unique taxes that in addition to raising revenue clearly (and, one suspects, purposively) suppress demand for the products of the targeted businesses. Basically, at least since 1935, the Federal Constitution imposes almost no meaningful limits on discretion in the use of the federal taxing power to further virtually any policy goal.<sup>216</sup> State power too is largely constitutionally unconstrained—though state taxes cannot discriminate against out-of-state businesses in violation of the Commerce Clause. Only in extraordinary circumstances, for example, an application of a state tax that dramatically violates a state's declared legal policy about its taxes, has the Court found a state tax practice irrational enough to violate equal protection.<sup>217</sup>

In contrast, since the ill-fated stamp taxes of the eighteenth century, the taxing power has been seen as a threat to a free press.<sup>218</sup> Although it

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215. The issue usually comes up in the context of the Lanham Act, 15 U.S.C. § 1125(a) or state unfair competition statutes. *See, e.g.,* *Gordon & Breach Sci. Publishers v. Am. Inst. of Physics*, 859 F. Supp. 1521, 1544 (S.D.N.Y. 1994) (stating that articles were fully protected when initially published but were commercial speech subject to regulation under Lanham Act, 15 U.S.C. § 1125 (2000), when distributed as promotional materials to encourage purchase of defendant's products). *Compare* *Oxycal Lab., Inc. v. Jeffers*, 909 F. Supp. 719, 726 (S.D. Cal. 1995) (finding book protected when, despite its relevance to commercial transactions, the book was not used as promotional material), *with* *Semco, Inc. v. Amcast, Inc.*, 52 F.3d 108, 113-14 (6th Cir. 1995) (holding that article constituted commercial speech when publication may reflect the willingness of the company that employed the author to take out advertising in the publication and where article was used as promotional material in trade shows and communications to customers).

216. *See* JESSE H. CHOPER, RICHARD H. FALLON, JR., YALE KAMISAR & STEVEN H. SHIFFRIN, *CONSTITUTIONAL LAW* 111 (9th ed. 2001) ("since [*United States v.*] *Constantine*, [296 U.S. 287 (1935),] no federal tax has been held invalid because of a regulatory motive outside federal power").

217. *See* *Allegheny Pittsburgh Coal Co. v. County Comm'n*, 488 U.S. 336, 346 (1989).

218. Often opposition to these "taxes on knowledge" is given a rose-tinted account. Initial American opposition to the Stamp Act had more to do with colonial objections to taxation without representation than any concern with the press freedom. In England, a plausible historical account

is unquestioned that the media is subject to general taxes, special tax treatment is another story. I will not here try to summarize or reconcile this disputed area of doctrine,<sup>219</sup> but it is clear that significant First Amendment limits exist to the taxation of the press. For example, the government cannot justify a tax placed specifically on the press by the claim that it is merely seeking to raise revenue—the alternative view that the tax purposefully burdens press freedom seems obvious given the government’s inability to reply to press’s query: if only interested in revenue, why not apply the tax more generally, not just to us?<sup>220</sup> After a series of cases invalidating media taxes as discriminatory, many observers concluded that the First Amendment imposed “a nondiscrimination principle for like-situated members of the press.”<sup>221</sup> Though it is now established that the government can differentially grant exemptions to different segments of the media, including different segments within a single general category,<sup>222</sup> any tax policy that seems oriented toward specially burdening the media or burdening particular out-of-favor media entities is clearly unconstitutional.<sup>223</sup>

Thus, the constitutional power to tax is more restricted for media businesses than others. Though these tax cases might be seen as free speech or general First Amendment cases, not free press cases, this logic does not entirely work. As this Section has emphasized, from merely a speech perspective, it is difficult to distinguish between businesses. A special tax on an oil company limits its capacity to speak just as a tax on the press limits its speech capacity. Maybe a special tax on the press can

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given by James Curran and Jean Seaton is that the stamp taxes, initially intended to control the press serving the rabble, had backfired. JAMES CURRAN & JEAN SEATON, *POWER WITHOUT RESPONSIBILITY, THE PRESS AND BROADCASTING IN BRITAIN* 12, 26 (5th ed. 1997). Radical, working-class papers flourished by illegally not paying the tax that established middle and upper class competitors paid. *Id.* at 12. Their non-payment counterbalanced the advertising “subsidy” received by the established press, and on this comparatively equal playing field, these radical papers flourished. *Id.* As some members of Parliament realized, by eliminating the tax, the established papers could competitively undersell the radical papers, taking enough audience away to bankrupt them. Elimination of the tax was, thus, at least in part a means not to free knowledge but to suppress radical working-class papers. *Id.* at 26.

219. See C. EDWIN BAKER, *ADVERTISING AND A DEMOCRATIC PRESS* 130-32 (1994).

220. *Minneapolis Star & Tribune Co. v. Minnesota Comm’r of Revenue*, 460 U.S. 575, 586 (1983).

221. *Leathers v. Medlock*, 499 U.S. 439, 454 (1991) (Marshall, J., dissenting). Although I never viewed this as a correct description of the principles in this area, in discussion I heard it from many media scholars before *Medlock*, most of whom expected the challenge in that case to prevail.

222. *Id.* at 453.

223. *Id.* at 444-47.

be understood as having a bad purpose.<sup>224</sup> The bad purpose, however, would be to burden specifically the press, or some part of it, as compared to other businesses. To object to that purpose requires a notion of the special constitutional status of the press.

#### 4. An Excursus: Structural Regulation

In other writings, I have argued that the Court interprets the First Amendment to allow great structural regulation of the media in virtually any manner, despite sometimes harming or disadvantaging particular media entities, as long as the structural regulation can reasonably be thought to represent a plausible legislative judgment about how to improve the democratic quality or societal value of the media. In fact, I have gone beyond that argument and claimed that the Supreme Court has never invalidated a true structural regulation of the media<sup>225</sup>—although this assertion cannot be applied to lower federal courts. Apparent exceptions always involve situations where the law is better characterized as involving a content-based suppression or penalty on particular types of communicative content.<sup>226</sup> Here, however, I want to offer an observation pointing in the opposite direction.

In the post-*Lochner* era, almost any structural regulation of business—regulation of who has power to make various decisions, what conditions must be met for the power to exist, the relations between different parts of the business (think of labor and corporate law), who owns the business, under what conditions, and with what powers—either

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224. Though the difference between intent or motive on the one hand and purpose on the other is important, with the latter usually being constitutionally dispositive, *Leathers* questions whether this characterization is crucial, stating that “illicit legislative intent” is not required. *Id.* at 445.

225. Baker, *Turner Broadcasting*, *supra* note 19, at 93-94; BAKER, *supra* note 87, at 124-62; *Los Angeles v. Preferred Communications, Inc.* is a possible exception, though the Court did not invalidate the law but merely reinstated a cause of action, thus leaving my claim in the text formally true. *Los Angeles v. Preferred Commc'ns, Inc.*, 476 U.S. 488, 494-96 (1986). Still, *Preferred Communications* is an exceptional case. A typical policy issue in structural regulation is whether the government should intervene to prevent concentration and disperse ownership. In *Preferred Communications*, the challenged law intervened to assure monopoly ownership. *Id.* at 492. Though in fact policy arguments can be made favoring that choice, especially if the cable company is operated more like a common carrier, the Court indicated that for the government to create a monopoly control of a particular form of communication would be unconstitutional unless the government could make an adequate showing that competition would undermine the media that people receive or otherwise create some significant problem. *Id.* at 494.

226. For example, *Miami Herald* gave both structural and content penalty arguments to justify invalidating the right-of-reply statute, which would indicate the Court's willingness to strike down the statute for its improper structural features, but subsequently in *Turner Broadcasting* the Court implicitly rejected the structural objection in favor of the content penalty analysis. Compare *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 254-58 (1974), with *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 640-42 (1994).



in general or in relation to specific business types, is uncontroversially constitutional. In contrast, such structural regulation of a flesh and blood body that determines who has authority is virtually an incoherent notion, unthinkable in the post-slavery world.<sup>227</sup> This might be a slight overstatement—some acceptable regulations of individuals may be characterized as structural,<sup>228</sup> but for the most part legal regulation of people is probably better described as behavioral. So structural is a category of legal regulation that seems best understood as related to artificial, not natural entities. And, as to these artificial entities, government has generally unassailable freedom to make the rules as it likes and for purposes it chooses—until it comes to the media.

Even if I am right that the government can structurally regulate the media in any case where it can make a good faith claim that it does so for legitimate reasons, these structural regulations are inevitably challenged in the courts and are widely thought to raise real First Amendment issues. The point here is that the expanse of acceptable reasons available to justify regulation of most businesses is, as the tax cases surely indicate, narrower in the context of the media. Proper challenges, I believe, are ones that can show that the challenged regulation is best understood as aimed at interfering with or burdening the press's broad Fourth Estate role. Given what I consider the best theory of democracy, the media has multiple, somewhat conflicting Fourth Estate roles, and very different regulations can represent plausible judgments about legitimate regulation with which courts should not interfere. Still, the widely recognized greater vulnerability to constitutional challenge of structural regulations of the media, like the greater protection of the media from discriminatory tax burdens, can only be explained by a constitutionally special status of these businesses. The Press Clause provides the only obvious basis for this status. The proper analysis in evaluating these regulations involves two steps. First, it involves accepting that the Press Clause establishes that these regulations must meet particular constitutional standards, a conclusion implicit in these regulations being so commonly challenged. Second, it involves giving a proper interpretation of the Press Clause, which I argue the Court has concluded is one that defers generally to the government, a

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227. Maybe not totally! A state tried to give husbands power to veto legal abortions by their wives, but the Court predictably invalidated the legislation. *Planned Parenthood v. Danforth*, 428 U.S. 52, 71 (1976).

228. Structural regulation might, for example, be a way to characterize legal regulation of the status of marriage, parenthood, parental authority, and guardianship—but the whole way of thinking about these differs greatly from the way of thinking about structural regulation of economic entities.

conclusion which I also argue follows from a proper theory of democracy.

*D. Summary*

The introduction to Part III argued that any differences in the constitutional status of media speech and other corporate speech can only be explained by the Press Clause. The investigation then found that legal differences abound. Most often they exist in non-constitutional legal policies that establish special privileges or exemptions for the media or particular portions of it. Few commentators argue that the Constitution requires most of these press privileges—ones that I have not discussed in Part III. Consider, for example, providing the press with special press facilities, press passes, and other access to government facilities, or waived charges for receipt of information under the Freedom of Information Act (“FOIA”). Few believe, however, that the press can constitutionally be denied other privileges or exemptions. That is true, I believe, in the case of being permitted to spend money on speech that identifies candidates for office or supports their candidacy during the period before elections, of using the name or persona of people to advance their profit interests when that usage involves inclusion in media content, or of a lesser duty of care owed to those who use or are affected by its product.

Because of legislative overreaching, some differences between the press and other businesses are already a matter of constitutional doctrine. Protection of personal privacy from disclosures by various businesses, such as credit agencies, exists and the Court held it cannot be applied to media speech. Law also subjects businesses to many other regulations aimed at preserving degrees of privacy that would be unconstitutional if applied to regulating media content. Courts give media speech greater constitutional protection than other businesses’ profit-oriented speech (commercial speech) even when the two have the exact same content. In a different context, Justice White argued, and one suspects other Justices would agree if forced to face the issue, that the government can require that security advisors have a license that the government can deny or revoke for misbehavior, but that the First Amendment prevents imposing this requirement on journalists or the press. Compulsion to identify the fact that speech within the media was formulated and paid for by an outside party burdens or penalizes this outsider’s speech, a burden of the sort that *Miami Herald* held is unconstitutional in relation to the media’s own speech. Courts protect the media from discriminatory taxation,

protection that it denies other businesses.<sup>229</sup> One area in which the Court failed to explicitly recognize this difference between types of businesses, namely defamation, resulted in an unfortunate perversion of doctrine. Even there, though, the propriety of recognizing this constitutional difference between the press and other businesses reasserted itself in practice through the way the standard, “matter of public concern,” is applied. Overall, vast areas of law would be disrupted by any failure to recognize the special constitutional status of the media—presumably based on the Press Clause.

#### IV. PROBLEMS WITH SEPARATE CONSTITUTIONAL STATUS OF THE PRESS MORE APPARENT THAN REAL

Commentators have alleged various problems with reading the Press Clause to provide independent protection of the press. Some objections really only apply to particular asserted special rights. Often, the right response is that a sound interpretation of the Press Clause would not recognize that particular asserted right. In the context of objecting to any special rights for the press as compared to individual speakers in the defamation area, Steve Shiffrin provocatively argues that “[t]he idea that the [F]irst [A]mendment protections should be consciously divvied out in more generous doses to those with knowledge, wealth, and capacity to cause damage is indefensible.”<sup>230</sup> Shiffrin is right. Note, however, that the only differences identified in Part II between the *speech* rights of individuals and the press were where the press had the lesser right. This reflects that both have the same right in relation to freedom from censorship but that the individual has additional rights related to personal liberty or autonomy. In the specific area that concerned Shiffrin, defamation, both the theory of separate speech and press rights and the Court’s actual holdings properly suggest identical constitutional rights<sup>231</sup>—a result consistent with Shiffrin’s argument. Moreover, in contrast to many constitutionally gratuitous privileges of the press, such as receiving press facilities, the particular constitutional rights that it arguably has that individuals do not have, especially a reporter’s privilege to keep sources confidential, is more a benefit to the reporters and their capacity to perform their constitutional

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229. See *supra* Part III.C.3.

230. Steven Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 UCLA L. REV. 915, 934 (1978).

231. This aspect of *Dun & Bradstreet* is unimpeachable but did contradict Justice Stewart’s own development of the Fourth Estate theory. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 773 (1985).

role of serving the people than to the media's wealthy owners.<sup>232</sup> A reporter's privilege, and probably other rights related to institutional integrity of the media, have a complex relation to the circumstances of the politically or economically weak and vulnerable. On the whole, however, to the extent these rights or privileges better enable the media to perform its watchdog role, they are often likely to especially benefit those less powerful and will often contribute to information that benefits the democratic process.

Other commentators fear that a Fourth Estate constitutional status for the press will lead to demands for accountability or regulation as a public fiduciary that are inconsistent with the press's, and especially the journalist's, historical and proper nature "as a freebooter outside the system."<sup>233</sup> Possibly! Still, there seem to me three persuasive responses to this fear. First, any proper interpretation of a special status should invalidate any attempt to impose formal (behavioral) accountability.<sup>234</sup> Reading the Press Clause as a structural provision should give the press protection precisely against such attempts. Of course, a proper interpretation of the special constitutional status of the press cannot be assured. Nevertheless, the possibility of an objectionable interpretation should not be used as an excuse to avoid an interpretation that otherwise makes sense and serves democracy<sup>235</sup>—any contrary view would likely wipe out all constitutional law. Second, though under a proper interpretation of the Press Clause accountability cannot be legally enforced, society would benefit from frequent popular and public demands that the press properly live up to its constitutional role. Democracy is served both by a free media and by media criticism.

Third, I admit the attraction of Anthony Lewis's romantic vision of freebooter outside the system.<sup>236</sup> I would go further. Not only does the communications order, as I have argued in three books, need legally-based structural reform to prevent profit-maximizing concerns of both

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232. If Press Clause protection of the press's institutional integrity prevents the government from paying the press to present the government's message as the press's own, the rule protects journalism at the cost of reducing owners' flexibility in making profits.

233. Lewis, *supra* note 20, at 605; *see also* Van Alstyne, *supra* note 20, at 768-70.

234. *Cf.* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 256 (1974) ("A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated.").

235. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559-60 (1976) (quoting Sheppard v. Maxwell, 384 U.S. 333, 350 (1966) ("A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice . . .").

236. Lewis, *supra* note 20, at 605.

media corporations and their advertisers from undermining these “freebooters,” which would also undermine the quality of journalism in the press and creativity in the cultural media. The communications order also depends on Lewis’s strong-willed media professionals remaining committed to their journalistic ideals. Often legislative structural interventions and journalists’ commitments are alike in one respect. Both often oppose the profit orientation of (many) owners. A key aim of both is to assure journalists more opportunities to perform their professional roles as they understand these roles. On the whole, this country has received great benefit from having such strong-willed, committed journalists and editors. The legal question is how the legal order can best nourish this spirit among journalists and editors. My guess is that culturally and legally recognizing the special *constitutional* importance of their role is more likely to contribute than an approach that views journalists and editors merely like any other workers employed by any other profit-oriented business.<sup>237</sup>

Commentators also raise questions concerning constitutional history. Chief Justice Burger, for example, raised this issue in his concurrence in *Bellotti*, arguing that there was no historical grounding for a special reading of the Press Clause.<sup>238</sup> Putting aside, I think, persuasive objections to how history should influence constitutional interpretation, Burger seems to be simply wrong about history. Much better supported is the view that “[h]istorically, there is little doubt that the Press Clause was viewed as having independent significance.”<sup>239</sup>

Most critiques of independent content for the Press Clause emphasize a final problem: the difficulty of defining “the press.”<sup>240</sup> Here, I do not propose any canonical solution but, instead suggest some partial responses. First, however, I wish to express some dismay at the claim. At the 2007 annual meeting of the American Association of Law Schools, on different two section panels, two distinguished scholars, one from Columbia and one from Chicago, despite finding important normative and practical reasons for giving the press special protection, rejected reading the Press Clause as providing this because of the difficulty of definition.<sup>241</sup> The same point is ubiquitous in scholarly

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237. See generally Anderson, *supra* note 11 (providing some illustrations of this spirit among media professionals and the opposite among financial consultants).

238. *First Nat’l Bank v. Bellotti*, 436 U.S. 765, 796-802 (1978) (Burger, C.J., concurring).

239. FRANKLIN ET AL., *supra* note 31, at 56; see also Anderson, *supra* note 11, at 533-37.

240. This difficulty, continually expressed by both commentators and Justices, probably began for the Court with *Branzburg v. Hayes*, 408 U.S. 665, 703 (1972).

241. See AALS Annual Meeting, <http://www.aals.org/am2007/program.html> (last visited July 31, 2007).

writing. But line-drawing problems are ever present in constitutional law. Does speech include nude dancing?<sup>242</sup> The real difficulty of defining or identifying speech does not justify ignoring the Speech Clause. When history and normative theory both suggest the propriety of an independent interpretation of the Press Clause, courts should face up to the difficult task of line-drawing, recognizing that here, as everywhere else, the edges will require controversial judgments. Both grey areas and occasional lapses in judgment are inevitable. Still, the protection that the courts do provide will generally serve the purposes of a society that accepts judicial review. The difficulties here are little different from interpretative difficulties in constitutional interpretation more generally.

*A. Difficulties of Definition*<sup>243</sup>

The necessity of defining the press is no stranger to the law. David Anderson notes, in a very partial listing, that “the press gets preferential access to legislative chambers, executive news conferences, trials, war zones, disaster scenes, prisons, and executions. State and local statutes protect the press from otherwise legal police searches.”<sup>244</sup> Anderson continues, noting state “shield laws” that create “reporters’ privileges,” exemptions “from some securities regulations and campaign-expenditure limitations,” “special postal rates,” fee waivers for information sought by FOIA requests, and, in California, the right to receive from the police the “addresses of arrestees and crime victims” when sought for “journalistic purposes.”<sup>245</sup> In each case, the law either formally or in practice had to define the press—or, at least, had to offer some way to determine who are the beneficiaries of the governmentally-created right. Most observers, however, do not find these ubiquitous definitions much help for constitutional purposes. The rights Anderson identified are all at least arguably gratuitous. Given that it is well established that some media entities, even some within the same rough category, can be given privileges that the government denies to other media entities, the law can grant these privileges either to a narrower or broader category than the

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242. *Erie v. Pap’s A.M.*, 529 U.S. 277, 289-90 (2000).

243. Though I mostly follow conventional practice and use the term “definition,” that usage should not be taken to mean a precise linguistic formulation. Rather, it seems more likely that the notion of the press will involve an overlapping set of features no one of which is essential, but taken together can allow relatively clear application with some border line cases. These features or “family resemblances” might be better described as representing a conception than a definition.

244. Anderson, *supra* note 11, at 432.

245. *Id.* at 432, 445.

“press” in its constitutional sense.<sup>246</sup> It is this constitutional definition or conception of the press that must be specified. As to constitutionally claimed rights, since an entity gets the right if, but only if, it is the press, excluding an entity properly defined as the press would seem to violate its rights—thus, precise definition seems to be required.<sup>247</sup>

A first mechanical step toward definition is purely descriptive. The claim is that the media’s product is speech—or more generally, communicative, whether verbal, visual, musical or some combination—while other businesses’s products are non-communicative for which they then use (commercial) speech to aid in selling. (I will say more below about whether the First Amendment term “press” should be treated as referring to the mass media generally or only to some sub-category such as the “news media” or media engaged in the “journalistic function.” David Anderson gives strong reasons to favor the narrower conception.)<sup>248</sup> This speech-product formulation does not quite work. As noted in Part III, speech is also the product of a number of businesses that few would consider the “press” or even “mass media”—consider

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246. See, e.g., *Leathers v. Medlock*, 499 U.S. 439, 453 (1991) (holding that a state can grant tax exemption to one entity but not another even though they are in the same media category, video delivery services); *Committee for an Indep. P-I v. Hearst*, 704 F.2d 467, 481 (9th Cir. 1983) (holding that law can grant newspapers an exemption from antitrust act even though only some newspapers qualify and their exemption can harm other papers that are not exempted); *Sherrill v. Knight*, 569 F.2d 124, 129 (D.C. Cir. 1977) (not challenging aspect of policy that makes only Washington-based journalists eligible for Justice White House press pass); *Los Angeles Free Press, Inc. v. City of L.A.*, 88 Cal. Rptr. 605, 609 (Cal. Ct. App. 1971) (upholding policy of only granting daily papers providing certain daily police and fire stories receive press passes).

247. Anderson suggests, however, maybe not. Anderson, *supra* note 11, at 68-69, 91-98. Given the instrumental basis of the Press Clause as serving the public, it might be adequate to hold that the relevant right does not necessarily go to particular rights-bearing parties or to all members of the press as long as the right exists for elements of the press in a manner beneficial to the public. As a matter of constitutional law, courts would determine where the type of right in question exists, but would defer to the government’s determination that a particular claimant should not receive it, at least should defer *as long as* the government’s definition is neither arbitrary nor exercised for invalid reasons and extends to sufficient elements of the press that the press’s constitutional role is served. This approach arguably embodies Justice Stewart’s insight that press freedom is an institutional right. Essentially this approach is now used in practice in respect to many of the gratuitous press rights mentioned above.

The unusual nature of this approach reflects, and can be justified, on the ground that while most rights are for the benefit of individuals and hence it violates their right if they are improperly denied the right, press rights exist to benefit the amorphous public and as long as the rights are given adequate scope to provide this benefit, individual claimants have no grounds to object if excluded. Anderson applies this argument in the context of arguing that “the press,” but not any particular person claiming to be a part of the press, must be given access to war zones. *Id.*

248. Anderson, *supra* note 11, at 436-47; see also Anderson, *supra* note 20, at 52 (“When I use the term media, I mean to cast a wider net, to include not only the press but also media entities that do not have plausible claims to Press Clause protection.”).

accountants, financial advisors, lawyers, doctors, or psychiatrists.<sup>249</sup> In the defamation case discussed earlier, no Justice or judge in the lower courts thought *Dun & Bradstreet* was the press although its primary product was speech. The obvious distinction may be that the media or the press makes the same product *non-selectively available* to a broad public.<sup>250</sup> Denying Press Clause protection for individualized professional or commercial communications—lawyers’ work or credit reports, for example—creates no problem for individuals’ typical non-market oriented speech<sup>251</sup> since this speech is fully protected under the liberty or autonomy theory of the Speech Clause.

Justice Stewart, in his defense of an independent interpretation of the Press Clause argued that “[t]he publishing business is . . . the only organized private business that is given explicit constitutional protection.”<sup>252</sup> Following Justice Stewart’s lead, the criterion suggested above allows a distinction between the press and other businesses.

One red-herring should be mentioned. Sometimes those who assert a practical impossibility of identifying the press argue that conglomerate ownership and technological online convergence eliminate any historical capacity to identify the press. After purchasing a newspaper or network or setting up a web site, is General Electric the “press,” and thus a beneficiary of the rights of the press? The question is more imposing when expressed this generally than when asked in relation to a particular right of the press—that is, when asked in places where it matters. When so narrowed, General Electric’s web site or its expenditures on campaign “advertising” or other speech unassociated with its media “properties” is likely to constitute commercial speech. In contrast, its newspapers or broadcast network (including the newspapers’ or network’s web site) may be protected from various regulations in relation to their specific media activities. The law can and constantly does deal with corporate

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249. See *infra* Part III.B.

250. This criterion hides a complexity that might be decided either way. Should a business that limits the people to whom it will disclose its reports still be considered the “press”? If the press is protected because of its Fourth Estate role or because of its being the most important institution of a democratic public sphere where speech is presumptively addressed to all, no one should be denied access to its communications. Then the idea of a press that refused to make its product available to some willing to pay the cover price would contradict its democratic role and the non-exclusive requirement would be appropriate. On the other hand, the significance of limited public spheres of subaltern publics, a feature of complex democracy, *infra* note 270 and accompanying text, might justify greater sympathy for at least some claims of being the press despite audience selectivity.

251. *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 413 (1979) (protecting teacher from dismissal for her private conversations with the school principal about allegedly racially discriminatory policies).

252. Stewart, *supra* note 9, at 633.



parts. Few rights related to the institutional integrity of the press would sensibly apply to General Electric as a whole—in fact, in structurally supporting press freedom, the law could prohibit General Electric from owning these media entities—while press rights can apply to the activities or practices of the specific media “properties” that General Electric owns.

Commentators also often note that the First Amendment should protect the lonely pamphleteer just as much as *The New York Times* or CBS even though the pamphleteer “sells” no product. Two not inconsistent routes to understanding protection for this pamphleteer are available: recognize her liberty rights as an individual speaker or treat her as the press by analogy to the characterizations of the so-called institutional press. As for the first route, the pamphleteer’s speech—her pamphlet—is surely protected simply on the basis of the Speech Clause.<sup>253</sup> As noted in Part II, any occasional difference between the press and individual in relation to their “speech” rights favors the individual. Under existing law, the pamphleteer has speech rights apparently not available to the commercial media, for example, a right of anonymity that does not apply to the ownership of the commercial press.<sup>254</sup> Moreover, if the issue were raised, I suspect that these pamphleteers, in reliance on *Barnette*, would have rights not to be conduits for other speakers’ messages.<sup>255</sup>

Doctrinally, this resolution is admittedly not very tidy. During the middle decades of the twentieth century, when the Supreme Court sometimes seemed to explicitly rest many decisions on the Press Clause,<sup>256</sup> the Court put pamphleteers into the press category.<sup>257</sup> Of course, this does not matter unless the press receives some special constitutional rights in comparison to individuals (Part III argues that they clearly receive special rights as compared to other businesses and

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253. *Talley v. California*, 362 U.S. 60, 64 (1960) (describing law as interfering with “freedom of expression”).

254. *Compare id.* at 64-65 (invalidating city ordinance which prohibited distribution of pamphlets unless it identified the names and addresses of persons who prepared, distributed, or sponsored it), *and McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334 (1995) (invalidating statute that prohibited distribution of campaign literature unless it contained identifying information), *with* 39 U.S.C.A. § 3685 (2000) (requiring each owner of a publication having periodical publication mail privileges to provide the government and publish in the publication once a year information properly identifying the editor, managing editor, publishers, and owners as well as various other information specified by the statute or the Postal Service), *and* Post Office Appropriations Act of 1912, Pub. L. No. 62-336, 37 Stat. 539, 553-54 (1912) (same except required twice a year).

255. *See West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

256. *See Anderson, supra* note 11, at 448.

257. *See Lovell v. City of Griffin*, 303 U.S. 444, 450-51 (1938).

also are discretionarily given rights as compared to individuals by legislation or policy). If it does, are pamphleteers also the beneficiary? The relevant area lies in the possibility that the press receives “defensive rights” that protect its institutional integrity.<sup>258</sup> The continuing controversy about the privilege to protect confidential sources presents the obvious test case. If the privilege exists, the most obvious argument is that when individuals, even on a non-commercial basis, seek out information not merely because of their own curiosity, but precisely in order to then communicate their “edited” or selected finding to a broad public, they are performing a central function of Justice Stewart’s constitutional business and should receive the same protection. In the context of blogging, at least one court has reached this conclusion, giving the web site editors contesting a subpoena the same right as a journalist who works for the commercial mass media.<sup>259</sup> On the argument here and as the court decided, the right should not go automatically to all bloggers, but should depend on the purposes of the individual blogger when she gathered the information.<sup>260</sup>

The possibility of these alternative doctrinal approaches to the lonely pamphleteer (today, the blogger) suggests two points. First, though the commercial press should be evaluated solely under the rationale of the Press Clause and, thereby be distinguished both from the individual who has obvious liberty interests in her speech and from other businesses, arguably the lonely pamphleteer or part-time “volunteer”

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258. The term “defensive rights” is taken from BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH, *supra* note 19, at 225; Baker, *Press Rights and Government Power to Structure the Press*, *supra* note 19, at 839. Following Justice Stewart’s analysis, I suggested that the Press Clause should be understood to establish special right that are inherent in, that “defend,” the institutional integrity of press entities but not “offensive rights,” that is, rights, as an initial matter, to engage in behavior not permitted for other people—such as to violate the speed limit or break and enter an office in order to get a story or to have unique, constitutionally protected access to governmental files. Stewart consistently favored what I characterized as “defensive rights” but not “offensive rights.” *Id.* at 837-48.

259. *O’Grady v. Superior Court*, 44 Cal. Rptr. 3d 72, 97 (Cal. Ct. App. 2006). After finding that the petitioners should receive the benefit of California’s statutory reporter privilege, the Court also found that the petitioners should receive the constitutional privilege arising from the California and federal constitutional guarantees of a free press. In so holding, the court said of the petitioners: “It is established without contradiction that they gather, select, and prepare, for purposes of publication to a mass audience, information about current events of interest and concern to that audience . . . [i]f their activities and social function differ at all from those of traditional print and broadcast journalists, the distinctions are minute, subtle, and constitutionally immaterial.” *Id.* at 106.

260. The Court in *Grady* distinguished “the open and deliberate publication on a news-oriented Web site of news gathered for that purpose by the site’s operators—with the deposit of information, opinion, or fabrication by a casual visitor to an open forum such as a newsgroup, chatroom, bulletin board system, or discussion group” and indicated that it was recognizing a privilege only for the former. *Id.* at 99.

journalist should not only have full Speech Clause protection but also, in appropriate cases, Press Clause protection. For example, it is possible that she can have both rights of anonymity or exemption from carriage obligations and, in an appropriate case, a “reporter’s privilege.” As to any specific issue, she should be able to claim the characterization that provides the greater protection.

Second, earlier discussion suggested that the line-drawing problem for identifying the press may not present courts an insurmountable problem. Largely by using functional reasoning relating to the distinctions between the press and both individuals and other businesses, courts may be able to make practical decisions on a case-by-case basis. This approach, despite leaving grey areas, is not uncommon in constitutional law and in principle should not be any more troublesome here. The problem may, however, be reduced given the contexts in which identification is necessary. If the only evidence that a person is an embodiment of the press is her unadorned assertion, the difficulty of an accurate and principled evaluation of the claim is obvious. But the individual will not need to assert the status of the press for speech rights where the only (minimal) differences favor the individual. Offensive rights would apply in cases before outward evidence of being a journalist appear but, I have argued, the Press Clause does not justify this category of journalistic rights. Thus, the only context in which the issue must be resolved relates to “defensive rights.” There, the question of identification occurs, however, only after the person has done her investigations, sought out the confidential source, and thus occurs in a factual context where evaluating her claim about the nature of her activities will be more concrete and subject to more objective resolution.

### *B. Journalism or Entertainment and Culture*

The First Amendment protects movies, art, music, and fiction.<sup>261</sup> It would seem obvious that these can all be important forms of individual self-expression and, as such, receive full protection under the Speech Clause. Successful versions of these forms, however, are often the products of large-scale commercial development and exploitation. If businesses other than the press are subject to many restrictions and

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261. The Court has opined that the First Amendment “unquestionably shield[s] painting of Jackson Pollock, the music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carol.” *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 569 (1995); *see also Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952) (holding that the First Amendment guarantees of the freedom of speech and of the press apply to motion pictures).

regulations of their speech that do not apply either to individuals or to the press, the obvious question is how to think of these forms of expression—often entertainment—when they are products of commercial entities.

Historically, some theorists, most famously Alexander Meiklejohn, but also others including Robert Bork, would deny these cultural forms of expression First Amendment protection.<sup>262</sup> After serious attack for drawing an unsustainable line of protecting only speech about public matters,<sup>263</sup> Meiklejohn reversed course and saw that these media nourished reflective thought on which democracy depends.<sup>264</sup> Though he did not engage in any discussion of possible distinctions between speech and the press, given his unwillingness to recognize any protection for commercial speech of business enterprises, he was necessarily committed to some type of distinction between the products of some cultural or media businesses from those of other businesses—and a role for the Press Clause logically follows.<sup>265</sup>

Nevertheless, many First Amendment commentators, probably most journalists and likely many professionals in the entertainment business, see the “press” as the portion of the media oriented toward current affairs and public policy—basically journalism<sup>266</sup> and related expression historically identified with newspapers.<sup>267</sup> Likewise, if either history or Justice Stewart’s image of the Fourth Estate is the impetuous for understanding the special nature of the press, probably these cultural expressions would not be included. What defines the press is the provision of “news.”

Still, the issue of scope merits more sustained consideration. Elsewhere I have argued that a democracy needs protection for production and distribution of information and vision independent of the governmental dictates and control.<sup>268</sup> Entertainment and cultural media

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262. ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 46 (1948); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20 (1971).

263. Zechariah Chafee, Jr., 62 HARV. L. REV. 891, 899 (1949) (book review).

264. Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 256-57 (including other forms of expression, such as philosophy, literature, and art, in his definition of “political speech”).

265. *Id.* at 258-59.

266. Anderson, *supra* note 11, at 445-47.

267. Interestingly, in the nineteenth century, newspapers regularly combined “news” with publication of often serialized fiction and poetry. Today, one need only think of *The New Yorker* to recognize that publications often combine these varying types of content.

268. C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 890, 898, 919 (2002).

play central roles in stimulating, exploring, critiquing, and ratifying ways that people think of themselves, their society, and the issues that confront them. Moreover, these media do so with a sensibility for human flaws and weaknesses, with a capacity for inspiring change, and with recognition of human variability that effectively debate and teach much that is relevant for public as well as private self-government.

If the First Amendment protects the press for its service to democracy, a proper conception of the press would depend on what mass communications a democracy requires. The answer to this question depends, in turn, on the appropriate conception of democracy. Elsewhere I outlined arguments for four models or ideal type conceptions of democracy—elite, liberal pluralist, republican, and complex.<sup>269</sup> There I argued that “complex democracy” was both normatively most appealing and descriptively most in line with existing Court doctrine. Complex democracy argues that a free society requires not only both republican or inclusive discourses aimed at forming conceptions of the public good and liberal discourses aimed at obtaining fair bargains between different groups, but also internal discourses within subgroups of society aimed at these subgroups’ self-understanding and identity formation. Without this last category of discourse and, presumably, the media that serves it, the likelihood of marginalization and ultimately the oppression of subaltern groups<sup>270</sup> is huge. It seems that cultural media are crucial both for the broader society to understand itself, a crucial step in the republican search for a common good, and possibly even more so (and more endangered) for subgroups to be able to debate and form or understand their otherwise marginalized identity. If this conception of democracy is accepted, it provides an ample democratic reason to interpret the Press Clause expansively as protecting these broader forms of cultural media.

## V. CONCLUSION: WHY IT MATTERS

The constitutional order has long done without any explicit recognition of an independent interpretation of the Press Clause.<sup>271</sup> So it

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269. C. EDWIN BAKER, *MEDIA, MARKETS, AND DEMOCRACY* 129-53 (2002). The model I label complex democracy, which combines elements of liberal pluralist and republican democracy plus adding emphasis on internal self-definitional discourses of subgroups, duplicates closely Habermas’s discourse theory of democracy. JURGEN HABERMAS, *BETWEEN FACT AND NORM* 118-31 (1996).

270. Nancy Fraser, *Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy*, in HABERMAS AND THE PUBLIC SPHERE 109-142 (Craig Calhoun ed., 1992).

271. *But see supra* note 11 (discussing but doubting the significance of reliance on the press clause between the 1930s and the 1960s).

is natural to ask, does this issue really matter (much)? A plausible answer is: “no.” First, not only has the legal order, the country, and the press gotten along until now without recognition of an independent (judicial) interpretation of the Press Clause, but radical commentators who claim to be more critical of the history of the country, of the legal order, and even of the operating press seldom attribute the problem to this corner of constitutional law. Even the legal areas I have discussed in this Article have done relatively well without explicit acceptance of this interpretation. Second, freedom from censorship—(purposeful) government penalties on the communicator’s chosen content—is surely the most important guarantee provided by the First Amendment’s constitutional protection of expression. As long as this stands, other concerns can mostly take care of themselves. In particular, the press is usually well positioned to convince the government of the utility of various privileges that will help it perform its constitutional role.

Still, this answer is unwelcome. The Court and the law should get it right! History and normative theory both support the independent interpretation. Although a relatively intellectualized point, as long as existing legal doctrine (and other results that are clearly appropriate if the issue arises constitutionally) requires the assumption of an independent status to the Press Clause, the absence of this interpretation denies the important virtues of clarity, coherence, and consistency to the law. More pragmatically, without this recognition, the tensions embedded in existing law can be a source of legal instability that could lead to wrong results and a failure to provide appropriate guidance as to new issues. Thus, these final remarks explore five pragmatic considerations that indicate the importance of formally recognizing the independent status of the Press Clause that the Article shows is already implicit in existing law.

First, only such recognition will prevent the obvious democratic importance of press freedom from giving general corporate interests a powerful but unjustified rhetorical edge in arguing that regulation of their speech is constitutionally indistinguishable from regulating the press and, hence, impermissible. This phenomenon has recently been most evident in the campaign finance debate. The refrain is either: “if the government can restrict our expenditures, the press should tremble because its speech freedom will also be at the mercy of the legislature;” or, “since the government cannot do this to the press, it similarly cannot do it to other corporations.” Whatever the merits of various regulations of businesses’ speech, the judgment about that policy issue should not be influenced by the fact that some of these regulations could not and

should not be applied to the press. Only recognition of the independent status of the Press Clause prevents this distortion of proper policy debate—and, when relevant, only this recognition will lead to proper court holdings.

Second, though acting within legislative halls and with popular support, the press often is able to protect rights essential to its integrity, government administrations come and go; popular opinion is fickle. Many see popular support for the press recently to have been at a low ebb and see the Bush administration to be particularly indifferent to the integrity of the press. Only recognition of the independent status of the Press Clause provides legal security for this important democratic institution. Moreover, for those properly doubtful of the power of court decisions where the spirit of the people is not behind it, in the case of finding an independent meaning for the Press Clause the courts would be ratifying largely popular understandings of the constitutional status of the press. In doing so, the courts would be reinforcing and most likely contributing to the stability of this important value.

Third, recognition of the constitutional basis of protecting the institutional integrity of the press provides a foundation for properly addressing new or previously unrecognized threats to that integrity.<sup>272</sup> For example, my defense of the press's independence in Part II-A considered two issues, one well worn (reporter's privilege) and the other virtually unknown within the existing legal literature. The novel claim was that the integrity of the institution could be undermined equally by, to use Justice Stewart's words, the government "annex[ing] the journalistic profession as an investigative arm of government" or by the government using payments to "annex" the watchdog by making it a secret mouthpiece of the government.<sup>273</sup> Recognizing the independent status of the press provides a basis to understand, evaluate, and arguably invalidate both institutional threats as well as others not now evident and that may have not yet even arisen.

Fourth, only through recognition of the independent status of the press will courts not be placed in the position of distorting proper constitutional doctrine in trying to reach the right results as, at least so I argued, occurred in the case of defamation law in response to the issues posed by *Dun & Bradstreet*.<sup>274</sup>

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272. See *supra* Part II.A.

273. *Branzburg v. Hayes*, 408 U.S. 665, 725 (1972) (Stewart, J., dissenting).

274. See *supra* notes 9-19 and accompanying text.

Finally, as a parallel to the first point above, failure to recognize the press's unique constitutional special status creates the danger that proper regulation of the press will be thwarted not on the merits but because of analogizing the press to individuals. Jerome Barron's advocacy of access rights, with which this Article began, raises complex issues concerning the proper understanding of the Press Clause. This analysis would be improperly truncated (in a manner inconsistent with existing Supreme Court precedent!) if the instrumental and institutional constitutional status of the press were not recognized. Without this recognition, provisions that compel media carriage of outsiders' speech (especially for communications contrary to the ideological views of the relevant decision-makers within a media entity) would seem to interfere with press autonomy the same way the compelled speech interfered with the liberty of the schoolchild in *Barnette*.<sup>275</sup>

Rejection of an independent meaning of the Press Clause blinds analysis. It leads both to the view that there is no First Amendment-based distinction between the press and individual speakers, a view that Part II shows is rejected by existing constitutional law (as well as statutory law) and to the view that there are no First Amendment based distinctions between the press and other businesses, a view that Part III shows existing constitutional law (as well as statutory law) rejects. The only conclusion can be that, though unacknowledged, existing law embodies an independent role for the Press Clause—essentially, some version of Justice Stewart's Fourth Estate theory.<sup>276</sup>

Both the press and a democratic country obviously can get by without an independently interpreted Press Clause in its Constitution. This absence leaves no vital human right subject to simple governmental abridgment, nor prevents the possibility of having a robust and free press. Largely because of its lobbying capacity, the press is likely to secure most of the privileges and exemptions that serve a society, as well as some that do not, from either the legislature, executive, or the administrative agencies. Nevertheless, this Article has claimed that failure to acknowledge an independent status of the Press Clause of the United States Constitution is not only a theoretical mistake, contrary to the historical meaning of the Press Clause and contrary to the best normative interpretation of the Constitution and, as this conclusion has argued, a potentially significant pragmatic mistake. It is also inconsistent with existing law.

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275. See *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

276. See Stewart, *supra* note 9, at 634.