

Campaigning as the Press: *Citizens United* and the Problem of Press Exemptions in Law

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I. Introduction

Was the documentary film “Hillary: The Movie” a piece of advocacy journalism or long-form political campaign advertisement? If it is the former, First Amendment jurisprudence largely prohibits the government from placing restrictions on its content or availability. If it is the latter, the United States Congress has long argued that important government interests allow for prior restraints and a myriad of content requirements, such as disclosure and disclaimer rules. In court challenges spanning more than 30 years, the Supreme Court of the United States has upheld the constitutionality of campaign-finance regulations that aimed to control the influence of

money in political campaigns.¹ However, as this symposium issue makes clear, the constitutional framework of campaign-finance regulations was upended in 2010, when the Supreme Court in *Citizens United v. FEC* overturned two key precedents and invalidated corporate expenditure limits for electioneering communications on the grounds that they violated the free speech rights of corporate speakers.² The Court left in tact disclosure and disclaimer requirements for corporate speech leading up to elections. The effects of *Citizens United* will remain a critical line of academic, legal and political debate for the foreseeable future.

One troubling aspect of the *Citizens United* decision is the Court’s failure to properly assess the nature of the docu-

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1. See *Buckley v. Valeo*, 424 U.S. 1 (1976).
2. *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

mentary film in relation to the government interests in regulation and the application of the law’s so-called “media exemption” to the case.³ Most campaign finance laws explicitly exclude news organizations and “media” entities from the ambit of regulation, at least when they are performing traditional “press” functions. Appropriate application of the media exemption has been described by one scholar as the “most pressing problem facing campaign finance regulation.”⁴ Some scholars have proposed banning media organizations from making endorsements in political races,⁵ while others have advocated for the elimination of the exemption on equal-protection grounds or through corruption and independence arguments (i.e., media companies can’t be trusted to operate in the public good).⁶ On the opposite side of a continuum, the Reporters Committee for Freedom of the Press advocated in *Citizens United* for the application of a broad media exemption in campaign finance law, arguing that a broadly defined exemption based on an individual or organization’s intent to gather and disseminate news is constitutionally mandated.⁷

In *Citizens United*, the Supreme Court gave the media exemption short

shrift in its analysis. Indeed, some legal analysts and *amici* briefs suggested that the Supreme Court apply the media exemption to *Citizens United* and decide the case on narrower grounds.⁸ In rejecting the application of the media exemption to *Citizens United*, the Court suggested that the exemption created an unconstitutional distinction between media and non-media corporate speakers. The Court reasoned that “[t]here is no precedent supporting laws that attempt to distinguish between corporations which are deemed to be exempt as media corporations and those which are not.”⁹ The Court recognized that “[w]ith the advent of the Internet and the decline of print and broadcast media, moreover, the line between the media and others who wish to comment on political and social issues becomes far more blurred.”¹⁰

Still, the media exemption remains an important component of regulations in a post-*Citizens United* environment. For example, in the summer of 2010, several months after the Court issued its *Citizens United* decision, the Federal Elections Commission determined that *Citizens United* – the organization – was a “media entity” exempt from disclosure and disclaimer requirements still intact in cam-

3. 2 U.S.C. § 434(f)(3)(B)(i); 11 C.F.R. § 100.29(c)(2).
 4. Joshua Shapiro, *Corporate Media Power, Corruption and the Media Exemption*, 55 EMORY L.J. 161, 163 (2006).
 5. *Id.* at 189.
 6. Richard Hasen, *Campaign Finance Laws and the Rupert Murdoch Problem*, 77 TEX. L. REV. 1627 (1999).
 7. Brief Amicus Curiae of The Reporters Committee for Freedom of the Press in Support of Appellant, *Citizens United v. FEC*, 130 S. Ct. 876 (2010) (No. 08-205).
 8. *Id.*
 9. *Citizens United*, 130 S.Ct. at 905.
 10. *Id.* at 905-906.

paign finance laws.¹¹ In 2004, the FEC had ruled that Citizens United was not a media entity,¹² and the Supreme Court in *Citizens United* appeared to agree.¹³ But in 2010, the FEC reversed itself, saying that in the prior six years, Citizens United regularly produced documentary films that fell within the FEC's new broader interpretation of the press exemption, and therefore had apparently transformed into a press entity for purposes of the statute.¹⁴ The FEC's reversal underscores the troublesome application of the media exemption.

The Internet and other forms of new media have also complicated the regulation of political campaigning.¹⁵ Social and digital media have become powerful and common tools for all forms of political communication, making it more difficult to neatly categorize political expression as commentary, advocacy or campaigning. Media companies no longer act as powerful gatekeepers of mediated communications. At the prompting of the courts, bloggers themselves have come under the purview of the FEC and other regulatory agencies, suggesting that legal application of press definitions will continue to be a developing area of law.¹⁶

Given the unpredictable application of the media exemption and the inherent definitional difficulties, how can the media exemption be properly applied in the future? Can the "media exemption" be narrowed or expanded in particular ways that do not violate free press principles but that support the government interests in regulating money in politics? In assessing the definitional problems inherent in the application of the media exemption, this research set out to assess whether journalist's privilege law might provide a framework for resolving media-exemption problems in campaign-finance law. Privilege law has undergone a transformation in recent years with regard to who qualifies for protection, in part because of a rash of legal cases involving bloggers. Similar non-traditional journalists have long sought to use the privilege in cases dating back to the 1970s, and the federal common law test that is generally used provides one point of analysis. Broader "functional" tests found in some statutes and in proposals for federal laws offer additional guidance. The research concludes that these privilege tests provide some guidance in evaluating what should qualify for the press exemption,

11. FEC Advisory Opinion, AO 2010-08.

12. FEC Advisory Opinion, AO 2004-30.

13. *Citizens United*, 130 S.Ct. at 890 (The Court rejected Citizens United's description of the film as a "documentary film that examines certain historical events," saying "there is no reasonable interpretation of Hillary other than as an appeal to vote against Senator Clinton. Under the standard stated in *McConnell* and further elaborated in *WRTL*, the film qualifies as the functional equivalent of express advocacy.")

14. FEC Advisory Opinion, AO 2010-08.

15. See, e.g., Neil Pandey-Jorin, *Is Everyone a Journalist?: How the FEC's Application of the Media Exemption to Bloggers Weakens FEC Regulation*, 60 ADMIN. L. REV. 409 (2008); Benjamin Norris, *Fired Up! In the Blogosphere: Internet Communications Regulation Under Federal Campaign Finance Law*, 84 WASH. U. L. REV. 993 (2006).

16. *Shays v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004).

especially now that the media exemption will only determine whether disclosure and disclaimer rules apply to speakers.

II. Press Exemptions in Campaign Finance Law

The so-called “media exception” has been a component of campaign-finance laws since 1974, when Congress amended the Federal Election Campaign Act of 1971 (FECA) to place limits on contributions and expenditures related to federal elections, including a prohibition on corporate spending for these purposes.¹⁷ In *Buckley v. Valeo*, the Court applied strict scrutiny standards to the FECA, finding a “sufficiently important” government interest in the “prevention of corruption and the appearance of corruption”¹⁸ that supported limits on direct contributions of political candidates. The Court invalidated restrictions on independent expenditures, however, finding that the “absence of prearrangement and coordination” does not support a *quid pro quo* corruption rationale.¹⁹ The *Buckley* framework recognized that free speech was curtailed by campaign finance laws, but ruled that uncorrupted elections were sufficiently important government interests that outweighed First Amendment

concerns. This framework operated in Supreme Court jurisprudence for the next 30 years.

In 2002, Congress sought to plug loopholes in the law that allowed for large amounts of spending in election-related television advertising. Congress passed the Bipartisan Campaign Reform Act (BCRA), otherwise known as McCain-Feingold after its two Senate sponsors, which aimed to eliminate “soft money” from donors to political parties.²⁰ The BCRA also restricted unions and corporations from using general treasury funds for “issue ads” the law characterized as “electioneering communications.”²¹

Both the FECA and the BCRA contained clauses exempting press activities from being defined as expenditures under the law. The 1974 law exempts “any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication” from the definition of expenditure, “unless such facilities are owned or controlled by any political party, political committee, or candidate.”²² The BCRA contains near identical language exempting “communication appearing in any news story, commentary or editorial” from its definition of electioneering communication. In in-

17. 2 U.S.C. Section 434(f)(3)(B)(i) and 11 CFR 100.29(c)(2).

18. *Buckley*, 424 U.S. at 25.

19. *Citizens United*, 130 S.Ct. at 902 (citing *Buckley v. Valeo*, 424 U.S. 1, 47 (1976)).

20. 2 U.S.C. § 434 (f)(3)(A)(i)(I)-(II)(aa)(bb). The law defined electioneering communication as any broadcast, cable, or satellite communication which “(I) refers to a clearly identified candidate for Federal office; (II) is made within (aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or (bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate”.

21. *Id.*

22. 2 U.S.C. § 431 (9)(B)(i).

cluding the media exemptions in the FECA, the legislative history makes clear that Congress aimed to protect the institutional press from legal entanglement. The House Report said the exemption was adopted to “assure the unfettered right of newspapers, TV networks, and other media to cover and comment on political campaigns.”²³

Prior to *Citizens United*, the FEC applied a two-pronged analytical framework to determine the applicability of the press exemption.²⁴ First, the FEC determined if the entity or individual was a “qualifying press entity.” The entity must be a broadcast or cable television station, newspaper, magazine or other periodical publication that must ordinarily derive revenue from advertisements or subscriptions, and appear at regular intervals. The entity must be spending resources to carry a news story, commentary or editorial. Second, the FEC determined whether the entity is performing a “proper press function.” It must not be owned or controlled by a political party, political committee or political candidate and must be acting like a member of the media in conducting the activity at issue.

The media exemption has been examined several times by the Supreme Court, and in several cases the Court upheld the constitutionality of the provision

and articulated some appropriate limits. The Supreme Court upheld the inclusion of the media exemption in both *McConnell v. FEC*²⁵ and *Austin v. Michigan Chamber of Commerce*,²⁶ two precedents that were at least partially overturned in the *Citizens United* decision.

In *Austin*, the Court upheld a state law prohibiting corporate independent expenditures for directly advocating the election or defeat of a political candidate. The “anti-distortion” interest, which the Court defined as the “corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas,” was enough to support the government’s ability to regulate corporate political speech.²⁷

The *Austin* court treated the media exemption as an important component of the regulatory framework, saying that it did not violate the Equal Protection Clause by making distinctions between corporations:

A valid distinction thus exists between corporations that are part of the media industry and other corporations that are not involved in the regular business of imparting news to the public. Although the press’ unique societal role may not entitle the press to greater protection under the

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

24. See generally Clifford A. Jones, *The Stephen Colbert Problem: The Media Exemption for Corporate Political Advocacy and the ‘Hail to the Cheese Stephen Colbert Nacho Cheese Doritos 2008 Presidential Campaign Coverage,’* 19 U. FLA. J.L. & PUB. POL’Y 295 (2008); Christopher P. Zubowicz, *The New Press Corps: Applying the Federal Election Campaign Act’s Press Exemption to Online Political Speech*, 9 VA. J.L. & TECH. 6 (2004).

25. *McConnell v. Federal Election Comm’n*, 540 U.S. 93 (2003).

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

27. *Id.* at 660.

Constitution, it does provide a compelling reason for the State to exempt media corporations from the scope of political expenditure limitations.²⁸

In *McConnell*, the court also ruled that important interests justify making legal distinctions between media and nonmedia companies, saying that the exemption only applies to media companies' press function activities and not to other business purposes. "Numerous federal statutes have drawn this distinction to ensure that the law does not hinder or prevent the institutional press from reporting on, and publishing editorials about, newsworthy events," the Court wrote approvingly.²⁹

While these cases are no longer good precedent following *Citizens United*, several additional cases have elaborated on the necessity of a media exemption and its possible applications.

The United States Supreme Court construed the press exemption somewhat narrowly in a 1986 case. In *FEC v. Massachusetts Citizens for Life*,³⁰ the Court held that a special edition newsletter of a nonprofit pro-life corporation did not qualify as a proper press function, despite the organization's regular publication of a newsletter. The regular newsletter had a circulation of 6,000, while the special edition had a 100,000 print run that strongly urged voters to vote for specific candidates in upcoming elections. The court listed several criteria, or "consider-

ations of form," that distinguished the special edition from other editions of the newsletter:

It was not published through the facilities of the regular newsletter, but by a staff which prepared no previous or subsequent newsletters. It was not distributed to the newsletter's regular audience, but to a group 20 times the size of that audience, most of whom were members of the public who had never received the newsletter. No characteristic of the Edition associated it in any way with the normal MCFL publication. The MCFL masthead did not appear on the flier and, despite an apparent belated attempt to make it appear otherwise, the Edition contained no volume and issue number identifying it as one in a continuing series of issues.³¹

In other lower court cases, traditional media companies have been denied use of the media exemption for activities that were not traditional press functions. For example, in 1981, a district court judge in *Reader's Digest Association, Inc. v. FEC*³² denied injunctive relief to Reader's Digest after the FEC launched a preliminary investigation into the magazine's distribution of a video reenactment of Senator Edward Kennedy's 1969 traffic accident. The video, created by an expert in accident reconstruction, had been commissioned by the magazine as part of its investigation in the incident and was distributed as part of a press release by the magazine promoting its story.³³ The judge said the news story was clearly exempt from FEC regulations, but said the ques-

28. *Id.* at 652.

29. *McConnell* 540 U.S. at 208.

30. Federal Election Comm'n v. Massachusetts Citizens for Life, 479 U.S. 238 (1986).

31. *Id.* at 250.

32. Reader's Digest Ass'n v. Federal Election Comm'n, 509 F. Supp. 1210 (S.D.N.Y. 1981).

33. *Id.* at 1212.

tion of whether the distribution of the video to other television stations was outside of its proper press functions was one that the FEC could at least investigate. “It seems appropriate within the framework of the statutory exemption for the FEC to investigate the limited question whether in disseminating the tape, RDA was acting in the context of the distribution of a news story through its facilities or whether it was acting in a manner unrelated to its publishing function,” the judge wrote.³⁴

The same year, in another case involving Senator Edward Kennedy’s bid for the Democratic presidential nomination, another district court ruled that a publisher of a bi-weekly conservative newsletter was protected from an FEC investigation into its finances.³⁵ The Kennedy campaign had filed a complaint with the FEC after Phillips Publishing sent a mailing to regular and potential subscribers that included writings opposed to Kennedy’s campaign. In *FEC v. Phillips Publishing*, a district court enjoined the FEC from further investigation. The judge recognized the “FEC’s need to conduct an inquiry in order to determine whether conduct falls within the statute’s press exemption, while at the same time strictly limiting the inquiry in order to minimize harm to First Amendment values.”³⁶ The judge first noted that

Phillips Publishing was not under the control of any political party or candidate, based on several affidavits filed by the publishers, and second ruled the solicitation letter was a routine function of the publishers. “Because the purpose of the solicitation letter was to publicize The Pink Sheet and obtain new subscribers, both of which are normal, legitimate press functions, the press exemption applies,” the judge wrote.³⁷

The case law discussed above suggests a relatively clear doctrinal approach to media company speech. Speech associated with the traditional press functions is exempt from regulation. The “entity” and “function” tests established by the FEC provided a framework for analysis when definitional problems arose. The development of the Internet, however, raised wholly new problems for campaign finance laws.³⁸ Are bloggers, for example, exempt from campaign finance laws? The FEC originally excluded Internet communications from the ambit of the FECA and the BCRA. This medium-specific exception was struck down by the courts in *Shays v. FEC*, in which a district judge ruled that the blanket exemption for all Internet communication was inconsistent with the aims of the statute.³⁹ As a result, the FEC promulgated new Internet rules that retained wide freedom from regulation for blog-

34. *Id.* at 1215.

35. Federal Election Comm’n v. Phillips Publishing, 517 F. Supp. 1308 (D.C.D.C. 1981)

36. *Id.* at 1312-1313.

37. *Id.* at 1313.

38. See, e.g., *supra* note 15.

39. Shays v. Federal Election Comm’n, 337 F. Supp. 2d 28, 65 (D.C.D.C. 2004), *aff’d*. 414 F.3d 76 (D.C. Cir. 2005).

gers and other Internet activists as long as their work is “uncompensated.”⁴⁰ Paid political advertising on the Internet now falls under FEC regulations. One example of the FEC broadly interpreting the media exemption for bloggers involved the political website Fired Up! Missouri, a blog started by a former Democratic senator and executive director of the state political party that attacked Republicans. In a 2005 FEC advisory opinion, the blog was determined to qualify for the press exemption because it was a press entity with a regularly updated website and readership; it was not controlled by a political party, committee or candidate; and its commentary was a “legitimate press function.”⁴¹ In several subsequent opinions, the FEC ruled that political advocacy blogs fell under the media exemption, including one case involving the left-leaning DailyKos.com.⁴²

Congress also got involved in the post *Shays* debate, and several bills were introduced to unequivocally exclude bloggers from FEC regulations. One of the bills, called the Online Freedom of Speech Act, would have allowed for almost unlimited spending on the Internet, without reporting requirements. “Today, the Internet is free from FEC regulation. Clearly it should remain that way,” said Rep. Jeb Hensarling, R-Texas, one of the bill’s sponsors.⁴³ Rep. Martin Meehan, one of the leading sponsors of the 2002 BCRA, called the bill a “major unrav-

eling” of the BCRA. “It reopens the floodgates of corrupting money.”⁴⁴ Congress did not pass a bill, and interest appeared to subside after the FEC’s broad regulations.

Still, determining that all bloggers are deserving of the media exemption subverts some of the basic goals of campaign-finance regulations. The Internet is becoming an increasingly powerful tool of political campaigning. As such, the same government interests in regulating “big money” in television advertising may apply to the Internet medium. The Internet also allows for additional corrosive influences, including anonymity, a lack of transparency, and the absence of media gatekeepers. Scholars and policy makers have yet to find the right balance, erring on the side of little to no regulation until the government interests in making more distinctions among Internet speakers becomes more obvious.

III. The Press Exemption Question in *Citizens United v. FEC*

The problem of the politically motivated blogger is underscored by the blending of traditional political campaign organizations with independent political commentary in the marketplace of ideas. More outlets are available for political campaigning, and more entities are spending millions of dollars to amplify

40. See Norris, *supra* note 15, at 1019-1020.

41. *Id.* at 1008.

42. See Pandey-Jorin, *supra* note 15 at 418-419.

43. Rick Klein, *Internet Campaign Exemption Defeated*, BOSTON GLOBE, Nov. 3, 2005, at A1.

44. *Id.*

their messages. The central holding of *Citizens United v. FEC* is that it is constitutionally impermissible to deny corporations the right to spend money to influence political elections.

The Supreme Court decision in *Citizens United v. FEC* stemmed from an attempt by a non-profit organization, Citizens United, to broadcast *Hillary: The Movie*, a 90-minute documentary film, on video-on-demand services and promote the film on broadcast and cable television.⁴⁵ Citizens United wanted to make the film available within 30 days of Democratic Party's 2008 primary elections for president, in which Hillary Clinton was a candidate. Fearing that the film and the advertisements would ensnarl Citizens United in potential actions by the FEC under the BCRA, Citizens United sought declaratory and injunctive relief. Specifically, Citizens United argued that the BCRA's ban on corporate-funded independent expenditures was unconstitutional as applied to *Hillary: The Movie* and that the BCRA's disclaimer and disclosure requirements were unconstitutional as applied to the film and advertisements for the film.⁴⁶

The district court denied Citizens United's motion and held that the BCRA's prohibition on corporate-funded independent expenditures was constitutional as applied to the film.⁴⁷ The court

noted that the film was "susceptible of no other interpretation than to inform the electorate that Senator Clinton is unfit for office, that the United States would be dangerous place in a President Hillary Clinton world, and that viewers should vote against her."⁴⁸

In its review, the Supreme Court rejected several potential avenues to decide the case on at least four narrower grounds. First, the Court declined to rule that video-on-demand services did not fit the statutory definition of "electioneering communication" because it was not likely to reach 50,000 or more people, and thus not "publicly distributed" as defined by the statute. Additionally, the Court declined to rule that video-on-demand services have a lower risk of distorting the political process than do television ads, and therefore rendering the BCRA unconstitutional as applied because it fails to meet heightened levels of scrutiny.⁴⁹ Third, the Court was asked to carve out an exception to the BCRA for nonprofit corporations funded primarily by individuals and formed for the purpose of promoting political ideas.⁵⁰ The Court found no principled way to make this distinction consistent with its interpretation of the First Amendment.⁵¹

The fourth option for a narrower decision considered by the Court, and most on-point for the purposes of this article,

45. *Citizens United*, 130 S.Ct. at 887.

46. *Id.* at 888.

47. *Id.*

48. *Id.*

49. *Id.* at 890-891.

50. *Id.* at 891.

51. *Id.* at 891-892.

was to rule that the documentary did not meet the definition of “electioneering communication” as narrowed by *WRTL*, in which the court ruled that the BCRA was unconstitutional when applied to speech that was not “express advocacy or its functional equivalent.”⁵² Notably, the Court characterized the film as a “feature-length negative advertisement that urges viewers to vote against Senator Clinton for President”⁵³ and said “the thesis of the film is that she is unfit for the Presidency.”⁵⁴ The Court rejected Citizens United’s description of the film as a “documentary film that examines certain historical events.” The Court said, “there is no reasonable interpretation of *Hillary* other than as an appeal to vote against Senator Clinton. Under the standard stated in *McConnell* and further elaborated in *WRTL*, the film qualifies as the functional equivalent of express advocacy.”⁵⁵

In rejecting these narrower approaches, the Court discussed the legal morass that campaign-finance laws created for speakers:

The First Amendment does not permit laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day. Prolix laws chill speech for the same reason that vague laws chill speech: People

“of common intelligence must necessarily guess at [the law’s] meaning and differ as to its application.”⁵⁶

The Court said any of the narrower options was inconsistent with a First Amendment that protects political speech that is “central to the meaning and purpose of the First Amendment.”⁵⁷ Instead, in striking down several elements of the BCRA as applied, the Court reviewed its many First Amendment precedents that rejected content-based regulations and heralded robust protections for political speech.

The Court did have another option. It could have ruled that Citizens United was a media entity for purposes of the statute. In a 2004 advisory opinion, the FEC determined that Citizens United did not qualify for the press exemption.⁵⁸ The organization sought an FEC opinion on the distribution of films about John Kerry and John Edwards, as possible Democratic presidential candidates, and advertisements about a book on Kerry. In its opinion, the FEC said neither the film nor the ads would fall under the media exemption. Advertising the book, which was written by Citizens United’s president David Bossie but published by another company, would not be a “news story, commentary or editorial,” nor would it be considered part of a “normal, legitimate [media] function,” the FEC

52. *Id.* at 889.

53. *Id.* at 890 (citation omitted).

54. *Id.*

55. *Id.*

56. *Id.* at 889.

57. *Id.* at 892.

58. Documentary and Ads Do Not Qualify for Electioneering Communications Media Exception, FEC AO 2004-30 (2004), available at <http://www.fec.gov/pdf/record/2004/oct04.pdf#page=9>.

stated.⁵⁹ The film would not qualify for the exemption because Citizens United “does not regularly produce documentaries or pay to broadcast them on television.”⁶⁰ One factor cited by the FEC supporting its decision was Citizens United’s act of paying to have its film broadcast on television. That act was contrary to traditional media entities receiving payment for the broadcast of its content, the commission said.⁶¹

In 2010, after the *Citizens United* decision by the Supreme Court, Citizens United again sought an advisory opinion as to its status as a press entity. Two organizations opposed the designation of Citizens United as a press entity. “If the Commission determines that a classic advocacy organization like Citizens United acquires the protections of the press exemption merely by producing a handful of films in furtherance of its advocacy mission, the unbounded nature of that determination will open the door for any and all advocacy groups to obtain an exemption from the campaign finance laws,” wrote Democracy 21 and the Campaign Legal Center, two organizations that support campaign-finance regulations.⁶²

Six years after ruling Citizens United was not a press entity, the FEC ruled 4-1 that Citizen United’s films were a press

function that qualified the organization for the press exemption. The practical effect was that the group would not have to disclose its income and spending related to the film projects. The FEC noted that between 2004 and 2010, “the volume and frequency of Citizens United’s film have increased substantially. As a result, the Commission is presented with a significant change in the facts that has passed since” its 2004 advisory opinion.⁶³ In 2009, Citizens United spent about \$3.4 million, or twenty-five percent of its annual budget, on the production and distribution of films.⁶⁴ Because Citizens United produces documentaries on a regular basis, the Commission concluded it was a press entity. Second, the Commission determined that Citizens United was not owned or controlled by a political party, political committee, or political candidate. Third, the Commission determined that the production and distribution of films was a legitimate press function.

The advisory opinion noted that the FEC had over time expanded its definition of the press beyond the enumerated media in the statute (i.e., newspapers and TV networks), to include books, cable television, the Internet, satellite broadcasts and rallies.⁶⁵ “While Citizens United’s films may be designed to further

59. *Id.*

60. *Id.*

61. *Id.*

62. Comment on Agenda Document No. 10-34 by Democracy 21 and the Campaign Legal Center (06/09/2010), available at <http://saos.nictusa.com/saos/searchao> (enter “2010-08” into the “Go to AO number” search bar; hyperlink of referenced citation will appear on left side of webpage).

63. FEC AO 2010-08, 5, available at <http://saos.nictusa.com/saos/searchao> (enter “2010-08” into the “Go to AO number” search bar).

64. *Id.* at 2.

65. *Id.* at 4.

its principal purposes as a non-profit advocacy organization, an entity otherwise eligible for the press exemption does not lose its eligibility merely because of a lack of objectivity in a news story, commentary, or editorial,” the FEC wrote.⁶⁶

As such, the FEC’s opinion took *Citizens United* even further – determining, in apparent contradiction to the Supreme Court, that the film was a documentary in line with traditional press activities. In fact, the Court called it “a feature-length negative advertisement.”⁶⁷ The effect of the 2010 FEC advisory opinion seems to be that almost any organization that communicates publicly using formats associated with traditional media speech without direct coordination or control of a political party or candidate would qualify as a media entity. This seems to undercut the public policy rationales of campaign finance laws.

The declaration by the FEC of *Citizens United* as a press entity is yet another perplexing problem in campaign-finance law. The Supreme Court determined *Citizens United*’s film to be a film-length “negative advertisement” that qualitatively was similar to the 30-second TV spots that the law was aimed to regulate. Thus, while the Court struck down the spending limits for *Citizens United*, it left intact the disclosure and disclaimer limits. In doing so, the Court said, “The First Amendment protects political speech; and disclosure permits citizens

and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.”⁶⁸ Somewhat ironically, the FEC took away this transparency requirement in ruling *Citizens United* as a press entity.

Perhaps now that the primary constitutional question has been resolved, for the time being, that spending limits for corporations violate the First Amendment, it is time to envision a *narrower* interpretation of the press exemption. How might one go about reconfiguring the FEC standards for determining press exemption applicability? One can look to the common law treatment of the definitional problems in journalist’s privilege law as one model.

IV. Using Journalistic Standards to Define Press Exemptions

Since colonial times, journalists have sought to protect confidential sources from compelled disclosure.⁶⁹ Over time, journalists successfully turned a professional ethic into law, convincing state legislatures and judges to create statutory and common law privileges, akin to privileges that exist in law for other relationships, such as husband-wife, doctor-patients, and attorney-clients. Forty-nine

66. *Id.* at 6.

67. *Citizens United*, 130 S. Ct. at 890.

68. *Id.* at 916.

69. See generally JASON M. SHEPARD, *PRIVILEGING THE PRESS: CONFIDENTIAL SOURCES, JOURNALISM ETHICS AND THE FIRST AMENDMENT* (forthcoming 2011).

states recognize a journalist's privilege in some form. At the federal level, Congress has made repeated attempts at passing a shield statute, without success. A qualified federal common law privilege exists in most federal circuits, despite and because of the 1972 Supreme Court ruling in *Branzburg v. Hayes*⁷⁰ that ruled there was no First Amendment privilege against grand jury subpoenas but that has been interpreted to support a qualified privilege in other situations.⁷¹

In modern privilege law, a key area of policy dispute and litigation is who qualifies for protection.⁷² Under state statutes, the question becomes one of statutory construction and legislative intent. Some statutes use narrow "status" tests and applicability of the law is generally clear. Other state statutes, as well as the federal common law, use broader "functional" tests that provide protections to individuals whose work is similar to traditional journalists.

The development of the federal common law shows how judges have wrestled with applying the privilege to non-traditional journalists whose purposes, processes and products are similar to traditional journalists, while excluding from protection individuals whose work

was purely personal, for entertainment purposes, and for political advocacy. Elsewhere, I have articulated more thorough the standards of "purpose," "process," and "product" that I call the "comprehensive functional analysis" that is supported by the federal case law in this area of law.⁷³ It is clear from the case law that judges have been sympathetic to individuals who serve the public-information and checking value functions of traditional journalism.

Two federal appellate cases providing privilege protection to non-traditional journalists lay the groundwork for the comprehensive functional analysis. In the 1977 case *Silkwood v. Kerr-McGee*,⁷⁴ the Tenth Circuit Court of Appeals overruled a lower court's order requiring Arthur "Buzz" Hirsch to provide information about his confidential sources for a documentary about the life of Karen Silkwood, who among other things had attempted to expose wrongdoing and unionize workers at the Kerr-McGee Corporation. While Hirsch, a film student at UCLA, wasn't employed by a traditional news organization, the court noted his previous work as a freelance journalist and said his activities as a documentary filmmaker were similar to those of estab-

70. *Branzburg v. Hayes*, 408 U.S. 665 (1972).

71. Some early federal appellate decisions by circuit, for example, are *Bruno & Stillman, Inc. v. Globe Newspaper Corp.*, 633 F.2d 583 (1st Cir. 1980); *United States v. Burke*, 700 F.2d 70 (2d Cir. 1983); *United States v. Cuthbertson*, 630 F.2d 139 (3d Cir. 1980); *LaRouche v. NBC*, 780 F.2d 1134 (4th Cir. 1986); *Miller v. Transamerican Press*, 621 F.2d 721 (5th Cir. 1980); *Cervantes v. Time, Inc.*, 646 F.2d 986 (8th Cir. 1972); *Farr v. Pitchess*, 522 F.2d 464 (9th Cir. 1975); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977); *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981).

72. See generally Jason M. Shepard, *Bloggers After the Shield: Defining Journalism in Privilege Law*, 1 J. MEDIA L. & ETHICS 186 (2010), available at <http://www.marquettejournals.org/images/Vol1Nos3-4Final.pdf>.

73. *Id.*

74. *Silkwood v. Kerr-McGee*, 563 F.2d 433 (10th Cir. 1977).

lished television and print journalists. “His mission in this case was to carry out investigative reporting;” he spent “considerable time and effort in obtaining facts and information;” and he had planned “to make use of this in preparation of the film,” the court wrote.⁷⁵

Using similar logic, the Ninth Circuit Court of Appeals granted the privilege to Ronald Watkins, an investigative book author. The 1993 case *Shoen v. Shoen*⁷⁶ involved a defamation action among the family members owning the U-Haul moving company. While Watkins was denied protection under Arizona’s state statute that used a traditional “status” test to determine who qualified for protection, the Ninth Circuit granted Watkins relief under federal common law, rejecting the contention that book authors are part of the institutional press that the privilege aims to protect.

The journalist’s privilege is designed to protect investigative reporting, regardless of the medium used to report the news to the public. Investigative book authors, like more conventional reporters, have historically played a vital role in bringing to light “newsworthy” facts on topical and controversial matters of great public importance. . . . Indeed, it would be unthinkable to have a rule that an investigative journalist, such as Bob Woodward, would be protected by the privilege in his capacity as a newspaper reporter writing about Watergate, but not as the author of a book on the same topic. In sum, we see no principled basis for denying the protection of the journalist’s privilege to investigative book authors while granting it to more

traditional print and broadcast journalists. What makes journalism journalism is not its format but its content.⁷⁷

The *Silkwood* and *Shoen* cases show that judges extended the privilege to a documentary filmmaker and an investigative book author – two individuals whose purposes, processes and products were similar to traditional journalists. Two additional federal appellate court decisions offer examples where the privilege has not been extended to individuals and provide contrasting examples for the “comprehensive functional analysis.” In *Von Bulow v. Von Bulow*,⁷⁸ the Second Circuit Court of Appeals rejected a privilege claim from Andrea Reynolds, an “intimate friend” of Claus von Bulow, who was prosecuted for attempting to murder his wife Martha. As part of litigation against Claus von Bulow filed by Martha’s children, plaintiffs sought notes and a book manuscript written by Reynolds. In rejecting Reynolds’ claim that she was a journalist for purposes of the subpoena, the Second Circuit ruled that Reynolds’ primary motivation was the vindication of Claus von Bulow and not a journalistic endeavor of gathering and disseminating news to the public. A second case emphasizing the role of journalistic purposes and processes is that of *Titan Sports, Inc. v. Turner Broad. Sys. (In re Madden)*,⁷⁹ a case involving defamation claims between two professional wrestling companies. Mark Madden was

75. *Id.* at 436-437.

76. *Shoen v. Shoen*, 5 F.3d 1289 (9th Cir. 1993).

77. *Id.* at 1293.

78. *Von Bulow v. Von Bulow*, 811 F.2d 136 (2d Cir. 1987).

79. *Titan Sports, Inc. v. Turner Broad. Sys. (In re Madden)*, 151 F.3d 125 (3d Cir. 1998).

an employee of World Championship Wrestling (WCW) when he recorded commentaries that fans could listen to by calling a 900-number. Executives of the competing World Wrestling Federation sued over allegedly defamatory content, and during discovery Madden claimed a journalist's privilege from having to reveal his sources. The Third Circuit Court of Appeals overturned a district judge's ruling that the privilege applied to Madden. Madden was not acting as an independent journalist seeking the truth. The appellate court wrote:

[A]s an author of entertaining fiction, he lacked the intent at the beginning of the research process to disseminate information to the public. He, like other creators of fictional works, intends at the beginning of the process to create a piece of art or entertainment. Fiction or entertainment writers are permitted to view facts selectively, change the emphasis or chronology of events or even fill factual gaps with fictitious events – license a journalist does not have. Because Madden is not a journalist, it follows that he cannot conceal his information with the shadow of the journalist's privilege.⁸⁰

The four appellate court decisions provide the basis for a comprehensive functional analysis that grants privilege protection to individuals whose purposes, processes and product are similar to those of the traditional press. They must intend at the beginning of a newsgathering process to disseminate their information to the public, regularly use processes of information gathering with independent editorial judgment, and disseminate the news information to a public audience using a journalistic medium.

Cases of non-traditional journalists seeking the privilege under the federal common law have provided a framework of analysis that looks at some of the same characteristics as the FEC press exemption analysis. Thus, they may be able to provide guidance as the FEC again reconsiders the application of the press exemption in campaign finance regulations. In many ways, the "status" and "function" tests that are contrasted in the privilege context are each included in the two prongs of the FEC's media exemption application. If a press entity not under political party control is engaged in traditional press activities, the media exemption has generally applied. However, a number of forces, including the development of the Internet, the loss of traditional journalism organizations as gatekeepers, and the rise of issue and political advocacy groups, have made the FEC's two-prong standards difficult to apply.

Using a framework similar to privilege law is appealing for several reasons. Privilege law recognizes that the public policy interests in the privilege do not extend to all speakers, and thus distinctions are necessary based on the manner and content of speech as well as the nature of the speaker. By examining an individual's purposes, processes and product, the courts have tried to institutionalize an analysis of journalism ethical standards in determining whether an individual qualifies for the privilege.

Certainly, there are some key differences between privilege and campaign-fi-

80. *Id.* at 130.

nance law that suggest limitations to comparisons. Most significantly, campaign-finance laws erect prior restraints around certain kinds of political expression, which rightly subject such laws to the strictest of scrutiny under First Amendment doctrine. Privilege law, on the other hand, is largely the basis of statutory and common law that extends special rights to certain speakers and kinds of speech. Thus, the First Amendment concerns are different. Still, using the comprehensive functional analysis in the media exemption context may help clarify the contours of the press entity and traditional press activities prongs of the FEC's media exemption application.

V. Conclusion

In purporting to simplify one controversial area of First Amendment law, the Court in *Citizens United* failed to resolve a fundamental problem with campaign finance regulations. While criticizing the

media exemption as evidence of unconstitutional discrimination among types of speakers, the Supreme Court left it intact for disclaimer and disclosure requirements. Perhaps that is appropriate, given the lesser burdens on speech that come with disclosure and disclaimer requirements as opposed to expenditure bans, and the important government interests that remain in disclosure and disclaimer requirements.

Still, the media exemption will continue to be a point of litigation. Because the First Amendment concerns with campaign-finance statutes and FEC regulations are lessened by the elimination of expenditure bans, a recalibration of the media exemption application may be necessary to advance government interests of transparency. Narrowing the press exemption application using standards of journalism, similar to the developing law of journalist's privilege, is one possibility.