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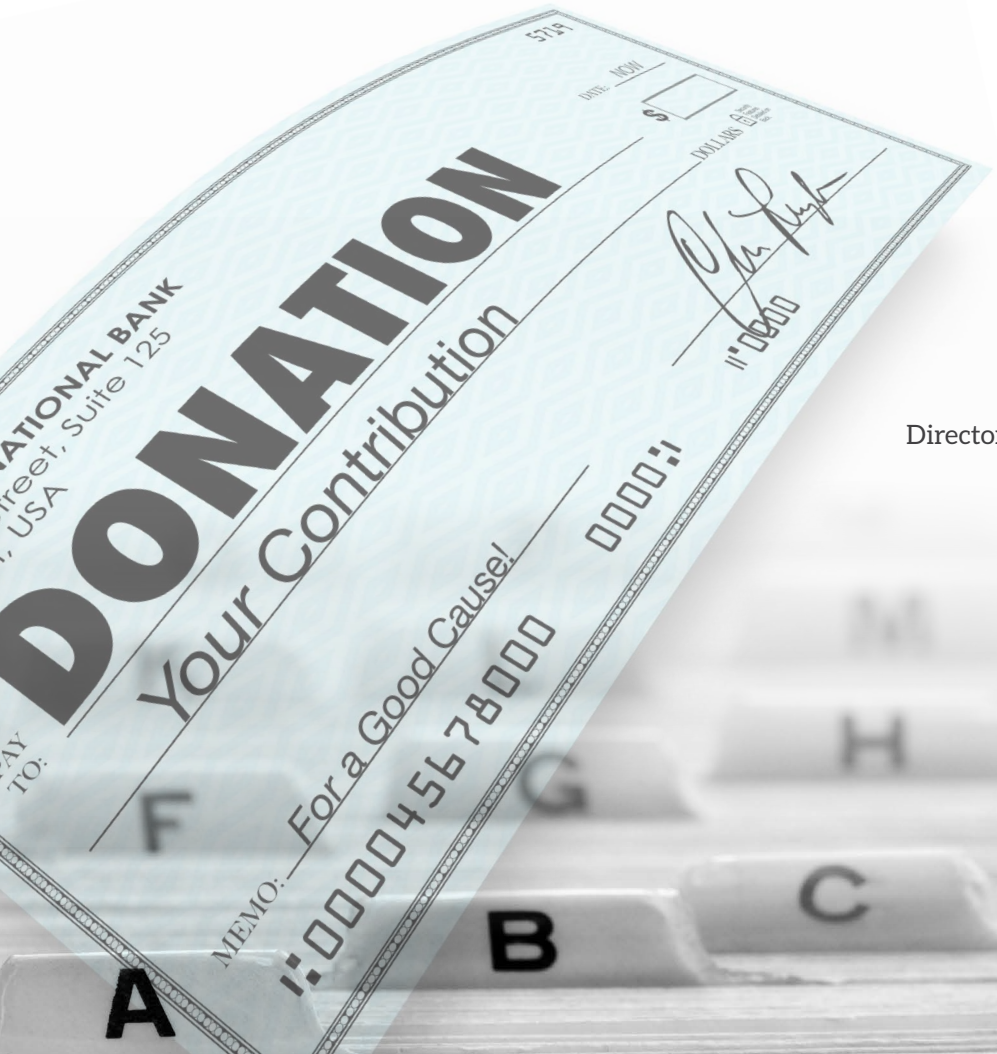
An Informed Citizenry:

Broadening the "Media Exemption" to Include Nonprofit Communications



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Executive Summary

Both nonprofit organizations and the traditional media have played a central role in American life by informing citizens about matters of public concern, including the workings of government. In fact, the press and nonprofit associations have a historically complementary relationship in our republic—both provide information about important public issues, and serve as a means for citizens to join together to advocate for political and social change. But legislatures and the courts have treated these groups very differently, and that disparity is growing. When nonprofits discuss matters of public concern, they are increasingly required to disclose the names, addresses, and other private information about their donors, ostensibly to ensure corporations and other organizations are not anonymously influencing public policy. The media, on the other hand, enjoys broad exemptions from these sorts of disclosure requirements and other campaign finance laws, despite the fact that some of the asserted government interests in mandating donor disclosure apply with even greater force to media activities than to those of the nonprofit world. This difference in treatment is unprincipled and unworkable. It also raises important and unresolved areas of First Amendment law that must eventually come to a head at the U.S. Supreme Court. Litigants should seek ways to broaden protections that currently apply to media organizations but not to nonprofits, and legislators should work to ensure that both the media and nonprofit sectors can work freely to inform the public about the salient issues of our time.

Introduction

In 2014, a small nonprofit called Delaware Strong Families (DSF) wanted to disseminate a voter guide on issues of interest to the organization. Such voter guides—basically pamphlets that suggest how voters should mark their ballots—are a common way for organizations to inform the public about political issues. DSF's guide included its analysis on a range of social issues, including government funding for Planned Parenthood and the regulation of internet gambling.[1]

DSF is a charity organized under Section 501(c)(3) of the federal tax code. There are nearly 1 million 501(c)(3) charities in the United States.[2] These organizations include

schools, churches, hospitals, art centers, public radio stations, research foundations, and other groups dedicated to a variety of issues—from environmental improvements to the provision of legal services for indigent litigants.[3]

As a 501(c)(3) nonprofit, DSF is prohibited by law from engaging in any activities that either directly or indirectly endorse or oppose any candidate for elected office.[4] If DSF violates the law, it could lose its tax-exempt status. DSF's voter guide did not call for the election or defeat of any candidate, nor did it endorse any candidate. In fact, the guide listed all candidates from both major political parties and evaluated them all on equal terms. DSF did not and has not had its tax-exempt status revoked by the IRS. In other words, it was and is operating legally as a nonprofit organization.

Private donors support DSF's activities through voluntary contributions. Many charitable donors prefer to keep their donations and identities private. Their reasons range from religious obligations to fears that donations to groups engaged in controversial debates might subject them to threats and violence from those who disagree. An enormous amount of evidence shows that donors to some nonprofit organizations are subject to retaliation and harassment, as are the donors' families and businesses.[5]

Delaware law, however, required DSF to "report the names, addresses, and contribution amounts of not only those donors who earmarked their donations for the creation of the voter guide, but also any and all donors who contributed more than $100 to the nonprofit during the election period," because according to Delaware regulators, DSF's voter guide qualified as an "electioneering communication."[6] That meant DSF had to choose whether to publish its voter guide or subject its donors to government reporting requirements.

At the same time, the *Delaware News Journal*, the state's largest newspaper and one of the highest-circulating newspapers in the United States, regularly comments on political issues and expressly endorses political candidates. In the 2016 election, it endorsed John Carney for governor, Lisa Blunt Rochester for Congress, Matt Meyer for New Castle County executive, and Mike Purzycki for Wilmington mayor.[7] All those candidates are Democrats.

The *Delaware News Journal* is owned by Gannett Inc., a for-profit corporation that is one of the largest newspaper publishing companies in the United States. Among other interests, it owns *USA Today* and nearly 110 local media organizations in 34 states. Gannett provides content in print, digital, and mobile products and reaches more than 110 million readers nationwide.[8] Consequently, the *News Journal* and its parent company exercise tremendous influence on public policy issues and political races locally and throughout the United States.

Yet the law that required DSF to register with the government and to comply with myriad campaign finance regulations, including the handover of private donor information to the government, does *not* apply to the *News Journal* or its parent company. That is because Delaware law specifically exempts from its definition of "electioneering communication" any "news article, editorial, opinion, or commentary, provided that such communication is not distributed via any communications media owned or controlled by any candidate, political committee or the person purchasing such communication."[9]

In other words, a small nonprofit that does not and cannot engage in electoral politics is prevented from even discussing policy issues without having to report donor names and other identifying information to the government, while at the same time, a large and powerful for-profit media empire is free to not only discuss political issues, but to expressly advocate for the election or defeat of political candidates without *any* campaign finance restrictions whatsoever.

Why does this disparity exist in a country that protects free speech? And should it?

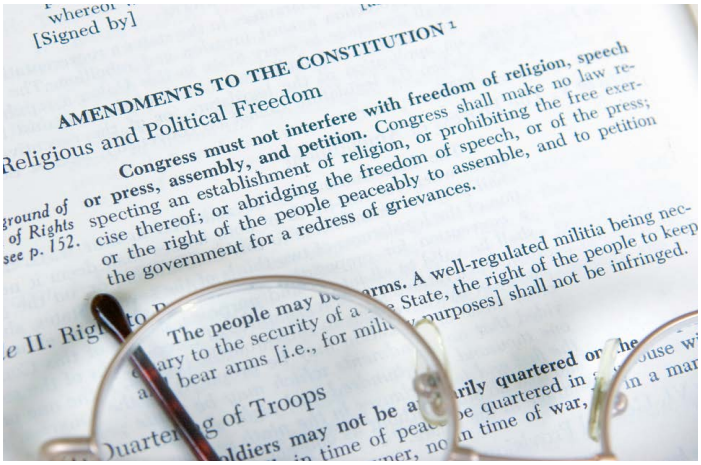
This paper looks briefly at the history of campaign finance restrictions, particularly donor disclosure mandates, and the statutory press exemptions in these laws. It also examines how courts have treated these exemptions and mandates, and one particularly fascinating component of the U.S. Supreme Court case, *Citizens United v. Federal Elections Commission*,[10] that identifies the media exemption in federal campaign finance law as confirmation of unconstitutional speaker discrimination but leaves in place certain federal donor disclosure mandates.

Is it wise for the government to treat the press differently in this area, or to discriminate between speakers, particularly in an age when it is increasingly difficult to even define the word "media"? This paper answers no. While media exemptions in campaign finance laws are worthwhile to the extent they seek to broadly protect all of those who assemble and share information, it is not a proper role for the government to discriminate between speakers, let alone to increase the risk of intimidation or retaliation in the marketplace of ideas. Ultimately, the objective of policymakers everywhere should

be protecting the free flow of information from government interference and courts should apply heightened scrutiny to donor disclosure mandates, especially those that include a media exemption.

Background

A free press is essential to a free society. As James Madison said, "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both."[11] Individuals and organizations must be free to collect and disseminate information without government restrictions. This includes information about political issues and candidates. Free discussion on policy matters enables the people to hold elected officials accountable and helps inform them about what our government is up to. Throughout history, governments have tried to restrict this flow of information, often in the guise of protecting the public or ensuring "fairness," but in reality, as a way to preserve and expand government power and silence dissenting views. Recognizing this danger, the founders of our country sought to limit the ability of lawmakers to control the free flow of information. They enshrined this right in the First Amendment, which declares "Congress shall make no law . . . abridging the freedom of speech, or of the press."



Yet since at least 1907 and increasingly over the last few decades, Congress and state governments have tried to regulate the discussion of political issues through campaign finance laws that take several forms, including prohibiting certain types of political expenditures and requiring the reporting of specific information about speakers.

These laws, however, often exempt media companies. Recognizing the risk to free speech if such mandates were imposed on news organizations, legislators have often made sure to include exceptions in campaign finance regulations so that these rules do not apply to newspapers and broadcasters. The result is a paradox: a small nonprofit organization is subject to often onerous regulations whenever it speaks about policymakers or supports candidates and issues in the run-up to an election—while giant companies like Comcast, CNN, or Fox can make movies, publish reports, and write editorials supporting or opposing those very same issues and candidates without facing any such restrictions whatsoever.

These exemptions represent a laudable effort to avoid intruding on First Amendment values. Yet the enormous changes in the way information is collected and consumed in recent years—both in terms of media consolidation and technological advances—show why the differential treatment of news companies and nonprofit organizations makes little sense.

The traditional news media have consolidated in absolute numbers and content. In 1984, for example, one researcher counted 50 major news media corporations. Fifteen years later that number was down to 10.[12] In 2013, Comcast acquired General Electric's stake in NBCUniversal, which owns NBC News, Universal Studios, Hulu, Telemundo, DreamWorks, and the Weather Company, among many others.[13] Disney owns Disney Media, Walt Disney Studios, ABC, Lucasfilm, ESPN, the History Channel, Lifetime, and Marvel Entertainment, among many others. And of course, Rupert Murdoch's News Corporation owns Fox News, Dow Jones (including the *Wall Street Journal*), along with Sky News, Twentieth Century Fox, the *New York Post*, and HarperCollins, and others.[14]

Additionally, it is no surprise that the manner in which news is consumed and the sources of that information have changed tremendously. The decline of print is a primary example. In 2003, ad revenue for major print publications in the United States was approximately $50 billion dollars. Ten years later is was less than $20 billion. Over that same time, online ad revenue increased from $1.2 billion to over $3.3 billion.[15]

And, of course, the sources of information are almost unrecognizable today as compared to a decade ago. Facebook was founded in 2004; Twitter in 2006. Anyone with a computer can produce content that is available to the broader public instantaneously. The ability of most Americans to share information without an intermediary, institutional or otherwise, is beyond all precedent. Today's media is now much more than the Sunday paper.

Simultaneously with these changes, policymakers at all levels have been imposing greater restraints on how money may be spent to communicate on political matters as well as who may spend it, and what information must be reported to the government prior to making those communications. These rules limit direct expenditures to political candidates, seek to prohibit independent expenditures *about* political causes and candidates, and also require the reporting of information to the government before an organization or entity can discuss certain policy issues.

One troubling trend throughout the country in recent years has been the development of donor disclosure mandates. These now require issue-advocacy organizations and nonprofit entities to give the government information about their

supporters, including names and addresses, if those organizations discuss specific policymakers or support policy measures, such as ballot initiatives. These reporting requirements have disturbing implications for the nonprofit sector because they ultimately discourage free speech and chill charitable contributions.

The risk is not a speculative one. In the 1950s, Southern state governments aggressively used donor-disclosure demands against anti-segregation groups like the NAACP. In a series of cases that climaxed with a 1958 decision by the U.S. Supreme Court, the NAACP challenged these demands on First Amendment grounds, warning that their supporters faced ostracism and even violence in retaliation if the identity of their supporters was publicly disclosed. As the Supreme Court recognized when it struck down those rules, "compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association" as outright censorship.[16]

The nonprofits at issue here range from soup kitchens to civic organizations, and they cross the ideological spectrum from the ACLU to the NRA. Donor disclosure mandates are increasingly forcing these groups to hand over private information about their supporters to the government (thus risking even broader public disclosure) if those organizations participate in certain types of issue advocacy—while imposing no similar requirements on CBS, Fox News, or the *New York Times*.

But as far as free speech is concerned, the bottom line is simple: what's good for media companies should be good for nonprofit organizations. Nonprofits perform many of the same functions as news companies, and restricting their ability to participate in democratic debate threatens the same First Amendment values as laws that would burden the traditional media. Lawmakers and judges should refuse to treat the two differently. All speakers should be free of restraints on their ability to communicate information and express opinions.

I. Campaign Finance Laws and Statutory Press Exemptions

A. Federal Campaign Finance Laws and the Media Exemption

Campaign finance restrictions come in several varieties, including limits on contributions to candidates, or on independent expenditures that advocate for the election or defeat of candidates, and disclosure requirements that require that donors and supporters be publicly identified. Some of these restrictions apply to corporations, both for-profit and nonprofit.

Congress barred corporations from contributing directly to political candidates and campaigns in 1907.[17] The 1947 Taft-Hartley Act also prohibited corporations from making independent expenditures—that is, expenditures that are not coordinated with a candidate or campaign—that seek to influence the outcome of an election.[18] In 1974, Congress amended the Federal Elections Campaign Act (FECA) to limit direct contributions to candidates, as well as independent expenditures that either supported or opposed candidates.[19] Then, in 2002, Congress passed the Bipartisan Campaign Reform Act (BCRA), also known as the McCain-Feingold Act, which sought to bar corporations from spending money on "issue ads" that include "electioneering communications."[20]

BCRA also required that any electioneering communication display the name and address of the person or group that funded the advertisement.[21] It further required that any person who spends more than $10,000 on electioneering communications within a calendar year file a statement with the Federal Elections Commission (FEC) that identifies the person making the expenditure, the amount of the expenditure, the election to which the communication was directed, and the names of certain contributors.[22] The reasoning behind these disclosure requirements was to ensure that the general public would know who paid for a candidate's advertisements.

Both FECA and BCRA contained specific exemptions that relieved the traditional press from having to comply with contribution and expenditure limits. FECA declares that "any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication" does not qualify as an expenditure unless that institution is controlled by a political party or a candidate.[23] BCRA contains a similar press exemption.[24] These laws also exempt the media from disclosure and disclaimer requirements.[25]

As a result of these exemptions, media corporations are essentially free from federal campaign finance rules, even before court decisions that later found parts of these laws unconstitutional under the First Amendment. Media corporations can therefore directly advocate for the election or defeat of any candidate at any time, even if they coordinate with the candidate. But nonmedia corporations, whether for-profit or nonprofit, are prohibited

from engaging in the same activities, and are required to disclose extensive information to the government if they engage in certain communications. As one commentator noted, the press exemptions mean that "CNN may air an editorial that endorses a candidate for federal office . . . [but if] a non-press corporation did the same, it would likely be an impermissible corporate contribution to the candidate."[26]

B. State Donor Disclosure Mandates

States also impose their own campaign finance measures in addition to federal mandates. These include the reporting of political contributions and expenditures as well as disclosure requirements. In recent years, several states have passed measures requiring private, nonprofit organizations to reveal the identities, addresses, and other information regarding their donors, and some state attorneys general have aggressively used existing law to demand that nonprofit groups hand over this information. These mandates have important ramifications for the millions of nonprofit organizations across the country, including those organized as social or civic organizations under 501(c)(3) of the federal tax code.

These organizations include schools, churches, hospitals, art centers, public radio stations, research foundations, and other groups dedicated to everything from improving the environment to providing legal services to the poor.[27] Nonprofit 501(c)(3) organizations operate in nearly every industry in the United States and abroad, including education, healthcare, culture, sports, animal care, foreign affairs, the humanities, and many others.[28] Many of these nonprofits also engage on policy matters, either through lobbying or by supporting ballot initiatives or referenda.[29] Forcing them to disclose the identities of their supporters to the government is a serious burden on their right to free speech.

State campaign finance requirements can ensnare the activities of nonprofit organizations in one of two ways: by expanding the definition of (1) "political committee" to include groups that would otherwise be free of these mandates, or (2) broadening the definition of "electioneering communication" to cover the sort of communications that nonprofit groups may engage in.

Take, for example, Missouri. That state's comprehensive campaign finance scheme defines a "continuing committee" as:

> a committee of continuing existence . . . whose primary or incidental purpose is to receive contributions or make expenditures to influence or attempt to influence the action of voters whether or not a particular candidate or candidates or a particular ballot measure or measures to be supported or opposed has been determined at the time the committee is required to file any statement or report pursuant to the provisions of this chapter.[30]

The Missouri statute then goes on to require the disclosure of information regarding donors to "continuing committees." This information includes the "total amount of all monetary contributions received which can be identified in the committee's records by name and address of each contributor." It also includes information about the donor's employer, if available.[31]

Thus the Missouri law requires that 501(c)(3) organizations—particularly those with a 501(h) election—that support a ballot measure, would likely have to disclose the identities of their donors, even if that organization's political activities are only incidental to its primary purpose. A nonprofit dedicated to historical preservation, for example, that supported a ballot proposition to declare a region of St. Louis historically significant, would be forced to turn over the names of its supporters even if that organization had no other political interests. Indeed, this law could even apply to the activities of traditional think tanks and policy organizations that do nothing more than produce policy reports and white papers, if those reports could be construed as influencing "the action of voters." This law could easily ensnare small grassroots organizations, like a group of neighbors who get together to advocate for or against a ballot question. Such groups' purposes may be political, but treating them as if they were sophisticated political action committees—with attendant registration and disclosure requirements—deters activities that are constitutionally protected and ought to be encouraged.

This too is not a hypothetical concern. Grassroots citizen activism has not infrequently been targeted under campaign finance restrictions. In 2008, a Colorado philosophy student published a 34-page paper on the Internet that concluded with a sentence urging voters to reject a ballot initiative. As a result, she was deemed to have violated the state's campaign finance rules by not registering as a political committee. State officials acknowledged that if that one sentence had been left out of her paper, she would have been free to express herself without those burdens.[32] In 2000, a resident of Muleshoe, Texas, painted a sign on the side of an old shipping container encouraging people to vote for Al Gore, and set it on the porch of his furniture business by State Highway 214. The FEC investigated him and issued an order that he was in violation of federal law for failing to include on the sign a disclaimer saying who had paid for it.[33] In 2006, the Republican

National Committee asked the FEC to prosecute two Los Angeles radio talk show hosts who encouraged people to vote against a Republican congressional candidate, arguing that the radio station was engaging in illegal "in-kind contributions" by broadcasting the show.[34] Traditional think tanks have also often been targeted under campaign finance laws. Denver's Independent Institute was forced to undergo a lengthy investigation in 2005 because it published a report on the potential costs of two ballot initiatives.[35] Even public interest litigation groups have been ordered by state officials to turn over the names of their supporters.[36]

Along with expansive definitions of "political committee," state legislatures have also tried to broaden the definition of "electioneering communication" so that 501(c)(3) nonprofits and other small groups are required to disclose the identities of their donors simply because the nonprofit speaks out on a political issue.

For example, the Delaware legislature revised its Election Disclosure Act in 2012 to require any entity that makes an independent expenditure or electioneering communication exceeding $500 to file a report with the State Election Commissioner.[37] That requirement applies to anyone other than a candidate who spends more than $500 on "third-party advertisement[s]" during an election period.[38] A "third-party advertisement" includes an "electioneering communication" that "refers to a clearly identified candidate" and is "publicly distributed within 30 days before a primary election . . . or 60 days before a general election to an audience that includes members of the electorate for the office sought by such candidate."[39] In other words, 501(c)(3) nonprofits that publish voter guides—a very common, longstanding practice—would be required to file a report listing the names and addresses of their supporters. That was why DSF was forced to hand over its information to state officials.

Yet most state-based donor disclosure requirements, like federal campaign finance rules, specifically exempt traditional media organizations. The Missouri law, for example, requires reporting of expenditures by continuing committees[40] but declares that "expenditure" does not include a "news story, commentary or editorial which is broadcast or published by any broadcasting station, newspaper,

magazine or other periodical without charge to the candidate or to any person supporting or opposing a candidate or ballot measure."[41] Similarly, the Delaware law requires an entity engaged in "electioneering communications" to file a third-party advertising report with the name and address of each person who contributes in excess of $100 during the election period, which can be as long as four years,[42] but also declares that "electioneering communication" does not include a "news article, editorial, opinion, or commentary, provided that such communication is not distributed via any communications media owned or controlled by any candidate, political committee or the person purchasing such communication."[43]

Thus the disparate treatment between nonprofit organizations and traditional media corporations is clear. Activities that should obviously be protected from government interference—such as issue advocacy—are swept into the ambit of these regulations, while press activities, which may go further than issue advocacy by directly supporting or opposing candidates, are immune from them. This makes no sense.

C. Why the Traditional Media Should Care

The traditional media have not generally opposed donor disclosure mandates, probably because they are exempt from them and don't see them as a threat to their activities. In fact, some media outlets appear to support them.[44] But they shouldn't—not just because such rules infringe on critical First Amendment values, but because several state campaign finance laws do not expressly exclude the media from their ambit.[45] And because such exemptions are considered special privileges, those that do exist might be withdrawn anytime political leaders decide to do so.

Nevada offers an interesting example of a law that includes no express exemption for the media. In 2013, Nevada amended its campaign finance laws to expand the definition of a "committee for political action,"[46] so that it now includes:

> Any business or social organization, corporation, partnership, association, trust, unincorporated organization or labor union . . . which does not have as its primary purpose affecting the outcome of any primary election, general election, special election or any question on the ballot, but for the purpose of affecting the outcome of any election or question on the ballot receives contributions in excess of $5,000 in a calendar year or makes independent expenditures in excess of $5,000 in a calendar year.[47]

Under this language, any group that receives or spends more than $5,000 on an election or ballot question is deemed a political committee *regardless* of the nature or purpose of the organization. A traditional media corporation, such as a print newspaper, presumably does not have as its primary purpose affecting the outcome of an election. Yet

that corporation would easily spend more than $5,000 "for the purpose of affecting the outcome of an election or question on the ballot" if the paper ran an editorial supporting or opposing a candidate or ballot question. And since all "committees for political action" must file contribution and expense reports, that would appear to include ordinary news organizations.[48]

Courts would likely regard any effort to enforce such a rule against a traditional news outlet with skepticism. But courts have also refused to uphold laws that distinguish between speakers based on the speaker's identity. Thus, either the restrictions that *do* apply to traditional media are unconstitutional, or the legal discrimination from which media currently benefit is unconstitutional. If exemptions—or the First Amendment—are good enough for the press, they should be good enough for nonprofit organizations.

II. The Press Exemption & Donor Privacy in Court

The U.S. Supreme Court has decided many cases involving federal campaign finance laws, often striking down major pieces of them. In *Citizens United*, the court recently considered a law that provided an explicit exemption for the media—a provision the court notably criticized.[49] Yet while the justices have not yet decided a case about donor disclosure requirements involving traditional 501(c)(3) nonprofits,[50] they have expressed skepticism about discriminating between speakers based on their identity—and have done so specifically in the context of media exemptions from campaign finance laws.[51] Clearly, any such discrimination should be subject to the firmest of all legal tests: strict scrutiny.

A. Campaign Finance Backdrop

In its seminal 1976 decision *Buckley v. Valeo*,[52] the Supreme Court distinguished between *direct candidate contributions* and *independent expenditures*. The justices declared that government has an interest in preventing political corruption or the appearance of corruption; consequently, they upheld a $1,000 individual *contribution* limit to federal candidates.[53] However, they struck down independent *expenditure* limitations, holding that they were "wholly at odds with the guarantees of the First Amendment."[54] The court

explained the difference: while *contributions* run a fairly obvious risk of corruption—donors might give candidates money in exchange for special favors—there is far less likelihood that a candidate might be corrupted through *expenditures* of their own money. Thus the "anticorruption rationale" justified contribution limits but not expenditure limits.

The *Buckley* case did not address the constitutionality of limiting a *corporation's* independent expenditures. That was the issue addressed in *Citizens United*, a case that has proven controversial, even though its primary holding was unremarkable. The court simply extended Buckley's rationale, and held that limits on a corporation's independent *expenditures* violate the First Amendment just like limits on spending by an individual.[55] As in *Buckley*, the *Citizens United* court found there was no way for independent *expenditures* to lead to corruption in the absence of some coordination between a candidate and the source of the communication.

The bottom line is the Supreme Court has invalidated most restrictions on independent expenditures because such restrictions run a serious risk of silencing people who want to express their opinions—and spend money to do so. The state may intervene only if the person or entity making those communications has some arrangement with a candidate that might give rise to concerns about corruption.

It is also worth emphasizing the crucial role of the "anticorruption rationale" in this area of the law. The *Buckley* court made clear that restrictions on campaign finance were justified only by the government's legitimate interest in preventing corruption—as opposed to other goals, such as making speakers somehow "equal," or ensuring some form of "fair access" to public debate. Not until one hotly contested 2000 case did the court suggest that government could restrict campaigning for other reasons—yet even in that case, justices allowed the state to restrict speech only in order to prevent "subversion of the political process."[56]

But another theory—called the "antidistortion rationale"—has become increasingly popular among some legal thinkers in recent years. Under that theory, it is proper for the government to regulate campaign finance, not only to prevent corruption, but also to prevent the "distortion" of the political process that results from wealthy candidates spending money on advertising that less wealthy candidates cannot afford. Along the same lines, the court held in a 2010 case called *John Doe No. 1 v. Reed* that government can require the disclosure of the identities of supporters of a political campaign in order to "preserv[e] the integrity of the electoral process," "foster[] government transparency," and ensure that the electorate is fully informed.[57]

The Supreme Court has since rejected the "antidistortion rationale."[58] But even if it had not, such purposes cannot justify forcing 501(c)(3)s, which do not engage in political campaigning, to disclose information about their donors—since such a mandate would do nothing to foster transparency or ensure the integrity of elections. And the only way in which they might "distort" the political process is by informing and persuading the public—which is what they are supposed to do in a free society.

In other words, none of the three "sufficiently important" interests that the Supreme Court has found to justify restrictions on campaign finance apply to nonprofits. Those interests—deterring actual corruption (or its appearance), collecting information necessary "to detect violations of . . . contribution limitations," or helping voters evaluate political candidates[59]—do not justify forcing 501(c)(3)s to report their private donor information to the government. These organizations are *legally prohibited* from engaging in electoral politics, either directly or indirectly. And although 501(c)(4) organizations are permitted to engage in political speech—they can advocate for the election or defeat of political candidates—they can do so only if that is not the organization's primary purpose. Also, because 501(c)(4)s focus on civic engagement and issue advocacy, and there is no coordination between them and political campaigns, subjecting them to donor disclosure requirements does not fit the three legally accepted bases for mandatory disclosure.

What's more, if the antidistortion rationale rejected in *Citizens United* or the transparency theory of the *John Doe* case *are* enough to justify imposing restrictions on nonprofit groups, then those theories cannot justify *exempting* the traditional media, which certainly have a major effect on the electoral process. Yet statutory press exemptions ensure that *no* traditional media corporations are subject to disclosure mandates—even though they are allowed to coordinate with candidates for stories and editorials, and even though they have enormous resources at their disposal to "distort" the political process.

B. The Media Exemption in Court

Since at least 1978, shortly after the enactment of FECA, the Supreme Court suggested that it disfavored any distinction between media corporations and other types of corporations. As the Court put it in *First National Bank v. Bellotti*, the press plays a "special and constitutionally recognized role" in our democracy, but it "does not have a

monopoly on either the First Amendment or the ability to enlighten."[60] To accept the idea that the press is entitled to greater constitutional protection than nonpress corporations, the court declared, "would not be responsive to the informational purpose of the First Amendment."[61]

Unfortunately, the court seemed to reverse course 12 years later, in *Austin v. Michigan Chamber of Commerce*, when it upheld a state law that prohibited corporate expenditures but exempted media companies: "Although the press' unique societal role may not entitle the press to greater protection under the Constitution," the court declared, "it does provide a compelling reason for the State to exempt media corporations from the scope of political expenditure limitations."[62] Then, in 2010, the court reversed course again in *Citizens United*. That decision directly overruled *Austin*. Yet it also created a paradox that remains in the law today: while the court criticized laws that treat media companies differently from other organizations, it upheld disclosure requirements for nonmedia corporations.[63]

The case involved a nonprofit organization called Citizens United that wanted to broadcast a 90-minute documentary called *Hillary: The Movie*—critical of Democratic presidential candidate Hillary Clinton—within 30 days of the Democratic Party's primary in 2008. Concerned that publication of the video would subject it to repercussions under BCRA, Citizens United sued the FEC, and asked the court to issue an order declaring that BCRA's independent expenditure limitations and disclosure requirements were unconstitutional as applied to *Hillary: The Movie*.[64]

The Supreme Court did strike down BCRA's expenditure prohibitions. But it kept the disclosure requirements in place. It also went to some length in criticizing BCRA's media exemption, declaring there is "no precedent supporting laws that attempt to distinguish between corporations which are deemed to be exempt as media corporations and those which are not."[65] Such exemptions were:

> all but an admission of the invalidity of the antidistortion rationale. And the exemption results in a further, separate reason for finding this law invalid: Again, by its own terms, the law exempts some corporations but covers others, even though both have the need or the motive to communicate their views. The exemption applies to media corporations owned or controlled by corporations that have diverse and substantial investments and participate in endeavors other than news. So even assuming the most doubtful proposition that a news organization has a right to speak when others do not, the exemption would allow a conglomerate that owns both a media business and an unrelated business to influence or control the media in order to advance its overall business interest. At the same time, some other corporation, with an identical business interest but no media

> outlet in its ownership structure, would be forbidden to speak or inform the public about the same issue. This differential treatment cannot be squared with the First Amendment.[66]

Despite this criticism, the court upheld BCRA's disclosure requirements. This leaves donor disclosure requirements in an odd constitutional place. If states cannot treat media corporations differently from other corporations, including nonprofit corporations, how can they continue to exempt the media from invasive donor disclosure requirements? The answer is simple: they cannot. And that means the same First Amendment concerns raised when such laws are imposed on the traditional media are also raised when the government imposes these laws on nonprofits.

III. The Problem with the Press Exemption and How to Overcome It

There are two problems with press exemptions: the first is a problem in principle, the second a problem in practice.

First, there is no principled reason to give special treatment to some corporations—particularly large, politically influential, for-profit conglomerates—that other corporations, especially small nonprofits, do not receive. This is especially true considering the purpose of the press exemption, which is to protect the collection and dissemination of information—a role that has been vitally served by many organizations, not just the institutional press, since the beginning of our republic.

Second, with the rise of web-based media, the line between traditional and nontraditional media is increasingly difficult to define. Distinguishing between a *New York Times* interactive webpage and Facebook, or the *Wall Street Journal* and *SCOTUSBlog*, appears increasingly arbitrary. In fact, the Supreme Court itself has acknowledged that "regulations that discriminate among media . . . often present serious First Amendment concerns."[67] Courts should be leery of laws that differentiate between traditional media and new media, or between some speakers and others—and legislatures should either cease imposing regulations on speech by nonprofits, or expand statutory "press exemptions" to include all organizations that disseminate information. Either way, government cannot justify imposing burdensome limits on some categories of speech and not on others.

A. The Principled Case for Broadening the Media Exemption

The press's role in a free society is to collect and disseminate information. That value does not depend on the identity or corporate structure of the source of information.

As Alexis de Tocqueville recognized in the 1830s, it is free people, informed by a free press, that form the basis of our civil society, especially when those people form civic organizations. In marveling at the importance of associations to free people in America, Tocqueville observed that the "press" was a means to an end: "It often happens that, in democratic countries, a large number of men who want or need to form an association cannot do so because they fail to see or find each other," he wrote. "Then a newspaper appears to publish the opinion or idea which had occurred simultaneously but separately to each of them . . . The newspaper has brought them together and continues to be necessary to keep them together."[68] The "press" in Tocqueville's day was not dominated by hoary corporations like the *New York Times* (founded two decades after Tocqueville wrote), rather, it was often the purview of small, tightly knit associations such as abolitionist groups or churches. Today, those associations continue, and they take the form of nonprofit groups that operate in nearly every sector of society.[69]

Some have argued that the institutional press should receive special constitutional protection not afforded to other corporations or associations because the institutional press is somehow unique—a distinct group of experts who disseminate information. Justice Potter Stewart, for instance, described the separate "expert" press as "a fourth institution outside the Government as an additional check on the three official branches."[70] According to such arguments, Congress should treat the press as a unique "Fourth Estate" entitled to special privileges.

These arguments are dangerously elitist: they envision the press as a special class whose expertise is outside the range of ordinary citizens, and disregard the honorable American tradition of amateur citizen journalists and political activists. Tom Paine, Ben Franklin, William Lloyd Garrison, Nellie Bly, Ida B. Wells—none of these great pamphleteers and reporters had any specialized training in journalism or held themselves out as experts entitled to special legal status. Moreover, the notion that the institutional press deserves unique legal treatment creates an inherent problem: if the legislature can carve out distinct benefits for a special "press," then the legislature must also be empowered to determine who "the press" is—and that would undermine the protections of the First Amendment, which was designed to ensure that the government does not have power to decide who is and is not "the press." Whether information originates with a reporter or a blogger, a scholar or an amateur, it deserves legal protection.

That is why the Supreme Court has repeatedly observed there is no justification for treating some organizations that disseminate information differently than others. "The liberty of the press," said the court in 1938, "is not confined to newspapers and periodicals.

It necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest."[71]

The court's skepticism of special treatment for the media should also apply to cases involving campaign finance limitations, independent expenditures, and disclosure mandates. And in rejecting the antidistortion rationale in *Citizens United*, the Supreme Court seemed to recognize the danger of such special treatment.[72] As one commentator notes, the *Citizens United* court recognized that "placing regulatory burdens on certain corporate speakers but not on the press . . . would distort the public dialogue in favor of the media's views, which do not always mirror the views of the public at large."[73]

Unfortunately, although the court had an opportunity in 2012 to find donor disclosure mandates unconstitutional as applied to 501(c)(3) nonprofit organizations, it failed to take up the issue. That was the case in which DSF challenged the constitutionality of Delaware's Election Disclosure Act, which required DSF to disclose to the government the name and address of each person who contributed $100 during the election period, even if that money was not contributed to support a candidate or issue.[74] That Act exempted "news article[s], editorial, opinion[s], or commentary" in the traditional media,[75] but DSF didn't qualify. And although the voter guide DSF prepared to disseminate ahead of the 2014 election cycle did not expressly advocate for or against any candidate for public office, it still fell within the law's definition of "an electioneering communication."

That meant DSF had to "report the names, addresses, and contribution amounts of not only those donors who earmarked their donations for the creation of the voter guide, but also any and all donors who contributed more than $100 to the nonprofit during the election period."[76] DSF challenged this requirement in a federal lawsuit, arguing that the law violated its First Amendment rights, and the district court agreed, holding that "the Act required disclosure of 'virtually every communication made during the critical time period, no matter how indirect and unrelated it is to the electoral process,' including a presumptively neutral voter guide published by a presumptively neutral, tax-exempt, nonprofit entity."[77]

But the Third Circuit reversed that decision, and declared that the law was sufficiently tailored to serve the government's interest in an "informed electorate"—one of the rationales adopted by the *John Doe* decision.[78] The U.S. Supreme Court declined to review the case, thus allowing the Third Circuit's decision to stand.[79]

Justice Thomas, however, objected to the court's decision not to hear the matter, and issued an opinion of his own in which he noted that the *John Doe* rationale cannot justify requiring "the disclosure of otherwise anonymous donor rolls" of a nonprofit group like DSF.[80] He was right. The Supreme Court has long recognized "the vital relationship between freedom to associate and privacy in one's associations,"[81] and for good reason: compelled disclosure can stifle public debate, leading to self-censorship and retaliation. In striking down the attempt by Alabama politicians to force the NAACP to release its donor lists in the 1950s, the court compared the "compelled disclosure of membership in an organization engaged in advocacy of particular beliefs" to a "requirement that adherents of particular religious faiths or political parties wear identifying arm-bands."[82] In the years that followed, the court has repeatedly ruled that the freedom of association is protected by the First Amendment, and this right can be overridden only in exceptional circumstances to serve especially important governmental interests. The *John Doe* rationale—that government can require public disclosure of this confidential information in order to serve a purported "informational interest"—simply cannot warrant mandating the disclosure of information regarding supporters of private, nonprofit organizations that do not, and cannot, engage in electoral politics.

This is particularly true in states like Delaware that exempt traditional media from disclosure requirements. If Delaware has a sufficient "informational interest" in compelling the disclosure of names and addresses of anyone who donates $100 to an issue advocacy group that does not endorse or oppose candidates, it cannot simultaneously claim that it has no interest in requiring disclosure of financial information of a newspaper that openly advocates for the election or defeat of candidates.

Of course, imposing something like campaign finance reporting on newspapers would be outrageous—a plain violation of the First Amendment.[83] But as the Supreme Court has observed, that is "all but an admission of the invalidity" of

these requirements under the First Amendment. It shows that states like Delaware, which exempt traditional media from disclosure mandates, cannot have a sufficient interest in the disclosure of that information from nonpolitical entities generally. It must be neither or both—and the answer should be "neither." The Supreme Court should take a case involving this form of unconstitutional speaker discrimination, and strike it down.

In fact, the court did something like that in its 2015 decision, *Reed v. Town of Gilbert*.[84] That case invalidated a town ordinance that imposed stricter limits on signs that advertised religious services than it did on signs that displayed other messages, including political messages.[85] "Speech restrictions based on the identity of the speaker," the court declared, "are all too often simply a means to control content."[86] Any law that favors some speakers over others is thus subject to the most demanding form of legal scrutiny.[87]

The same must be true of donor disclosure laws. When they exempt the media, they discriminate based on the speaker's identity, and unjustifiably favor established media corporations over other types of speakers, including bloggers, nontraditional media, and nonprofit organizations that play a crucial role in our democracy. Such laws are also content based: they prohibit the discussion of political issues by any entity that has not satisfied onerous disclosure requirements—except when done by the traditional media. That is unconstitutional under *Reed*. As the decision notes, "a law limiting the content of newspapers, but only newspapers, could not evade strict scrutiny. [88] The same is true of a law that basically allows only newspapers to speak.

The *Reed* court subjected a law to strict scrutiny because it limited communications from one type of speaker—churches—but not from other speakers, even if they were conveying similar messages. When bringing challenges to disclosure mandates, litigants should emphasize the language in *Reed* and other cases that reject speaker-based discrimination. If disclosure laws are already constitutionally suspect under the less strenuous "exacting scrutiny," then they are plainly unlawful under strict scrutiny.

B. The Practical Case for Broadening the Media Exemption

There is yet another problem with statutory exemptions for the media: the definition of "media" is rapidly changing as new technologies replace and supplement the ways information is collected and disseminated. The "media" today is no longer just Comcast, Disney, and News Corp. They include the blogger with an internet post, and the nonprofit and its newsletter. In prior centuries, "the press" meant printshop activists and pamphleteers associated with groups like the American Antislavery Society and the Sons of Liberty. Today it refers not only to CNN, but to the papers and investigations published by ProPublica,[89] the Center for Public Inquiry, the Institute for Justice, the Cato Institute,

Public Citizen, the Goldwater Institute, and others. In other words, the media is more than a reporter with a fedora and a press pass.

When Congress enacted the press exemption in FECA, it appeared to acknowledge the multitude of "media" organizations that exemption would apply to. The House of Representatives report on that bill indicated that the campaign finance provisions were not intended "to limit or burden in any way the first amendment freedoms of the press *and of association*. Thus, [the press exemption] assures the unfettered right of the newspapers, TV networks, and *other* media, to cover and comment on political campaigns."[90] It seems plain that Congress did not mean to confine the press exemption to newspapers and TV networks, but rather to apply more broadly to "other media" as well as to the right "of association." That instinct was correct. In today's world, there is no practical way to differentiate between the value of a TV broadcast, a book, academic research, a policy report, or a blog post.

As courts have recognized, it is not only constitutionally problematic, but practically unmanageable to differentiate among media speakers. The Supreme Court wrote in *Citizens United*:

> While some means of communication may be less effective than others at influencing the public in different contexts, any effort by the Judiciary to decide which means of communications are to be preferred for the particular type of message and speaker would raise questions as to the courts' own lawful authority . . . And in all events, those differentiations might soon prove to be irrelevant or outdated by technologies that are in rapid flux.[91]

The FEC has already proven wildly inconsistent in defining what is and is not "media" for purposes of the press exemption. For example, it has opined that a periodical that "includes commentary that endorses a candidate for federal office and solicits contributions for that candidate's campaign" qualifies for the press exemption, while a free, one-time publication that "seeks to recruit supporters for a political organization [but is] not affiliated with [any] candidate or party" does not.[92] In 2014, Congressman Paul Ryan wrote a book about his experience in political life and asked the FEC whether it qualified for the press exemption. The FEC could not arrive at an answer.[93]

Indeed, the FEC's treatment of Citizens United is a perfect example of the unworkability of the current media exemption. The *Citizens United* case made its way to the Supreme Court because in 2004 the FEC had originally said that Citizens United was *not* a media entity.[94] As one author noted just six years later, "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."[95]

Supporters of disclosure mandates argue that the "informational interest" referred to in the *John Doe* case justifies forcing some groups but not others to publicly disclose information about their supporters because that informs the public of who is funding particular types of political speech. Exempting the media, they claim, does not contradict this interest because traditional media do not have "donors" in the sense that nonprofit organizations might. But nonprofit groups that engage in journalism do have donors. In fact, many traditional media outlets are nonprofits. The *Texas Tribune*, for example, is one of the largest media organizations in Austin, covering Texas's capital city, and "inform[ing] Texans . . . about public policy, politics, government and statewide issues."[96] The *Tribune* is also organized as a 501(c)(3). As such, it is supported by private donations, private members, and grants. Prior to 2014, the *Tribune* had a policy of accepting anonymous donations. One can only imagine the outrage if donor disclosure laws mandated that this newspaper report to the government the names and addresses of supporters who wished to maintain their privacy. But there is no basis for exempting the *Tribune* that would not also require exempting other nonprofit organizations that discuss "policy, politics, government and statewide issues."

These examples and others show that statutory press exemptions are arbitrary and ultimately unworkable, given the enormous number of ways in which information is publicly disseminated. Such exemptions should be as broad as possible to protect *all* individuals and entities that collect and disseminate information against the intrusive burdens of campaign finance mandates. In the context of nonprofit activity, *all* organizations that communicate to the public but are neither controlled by candidate campaigns or political parties nor coordinate with them should qualify as a "media organization."

Conclusion

The institutional press has no monopoly on the First Amendment—or on the collection and dissemination of information that the amendment protects.[97] Millions of organizations, including nonprofits, serve just as vital a role in informing the public about the salient political issues of our time. None of these organizations should be forced to disclose to the government confidential information about their supporters. Those disclosure mandates that exempt the press are likely unconstitutional because they discriminate based on the identity of the speaker. Such exemptions should be revised to include nonprofits that communicate to the public about public policy issues, and litigants should seek to challenge disclosure mandates that include press exceptions.

The First Amendment was not written to protect an industry. It was written to protect the free flow of information in our republic. This is as important today as it was when the printing press was the primary way that activists, investigators, scholars, and political candidates spoke to the public. The law should afford all speakers—including nonprofit organizations and their supporters—the greatest possible protection.

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