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Citizens United and the Press: Two Distinct Implications

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On its face, *Citizens United v. Federal Election Commission*[1] is not about the press. In fact, the majority never explicitly mentions any freedom of the press concerns. Justice Scalia, in a short concurrence, alludes to the Press Clause only in passing, while Justice Stevens, in dissent, devotes only a short amount of space to First Amendment Press Clause issues.

Yet *Citizens United* may in fact have important implications for the press. This short essay touches on two of them—one legal, and one financial. Both involve the Court's new understanding of the Free Press and Free Speech clauses of the First Amendment.

On the legal side, it discusses how the Court expands the legal definition of "the press" in two ways: by attacking federally sanctioned special treatment for the "institutional press";[2] and by appearing to expand the Speech Clause of the First Amendment while deemphasizing any heightened protection afforded by the Press Clause.

On the business side, the essay applies the Court's expansion of freedom of speech for corporate entities to prior restrictions on nonprofit 501(c)(3) advocacy. While a full discussion of relevant tax policy remains beyond the scope of the essay, it does at least raise the issue of whether such restrictions must now be reconsidered in light of new political-speech privileges afforded to corporations, and whether such a shift may remove a major reservation of media companies (and particularly newspapers) in pursuing a 501(c)(3) model.

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[1] Citizens United v. Federal Election Comm'n, No. 08-205, slip op. (U.S. Jan. 21, 2010).

[2] Both the majority and dissenting opinions in *Citizens United* use the term "institutional press" to describe those companies that currently receive favorable treatment as members of the press. *See id. passim.* Television, print, internet magazines, and blogs, all as currently understood by the average reader, would likely be included in this "institutional press" category.

Both of these issues—the legal expansion of what constitutes the press and a reevaluation of the not-for-profit newspaper—require significantly more space for discussion than is available in this essay. Moreover, they remain relatively discrete and separate issues. As such, this essay seeks to only briefly discuss these two, less-apparent takeaways from *Citizens United*, and leaves the more difficult analysis for future consideration.

INTRODUCTION

As mentioned, this essay proceeds in two distinct parts. First, it discusses background jurisprudential understandings of what "the press" in fact entails, and then argues that *Citizens United* upends this discussion by expanding potential understandings of "the press," in part by granting press freedoms—notably the right to electioneer in the days before federal elections—to nonconventional and noninstitutional press entities, and in part by neutering the explicit First Amendment protection of press freedoms. This in effect narrows the scope of whatever vague protections the press has, and grants additional rights to corporate entities already afforded state benefits of incorporation. Put plainly, it expands the number of institutions that can now be considered to be part of the press.

Second, it extends an interesting line in *Citizens United* to an at-first-glance unrelated subject: media corporations as not-for-profit entities. A major impediment to newspapers' embrace of the foundation model is the tax code's prohibition on such foundations' attempts to influence legislation;[3] and editorial control and political advocacy remain an important function of an independent press. Yet although the conferring of federal tax benefits—notably the ability to fundraise tax-deductible donations—may legally carry federally attached strings, *Citizens United* may indirectly imply that restrictions on speech may be too high a price for the government to exact. Specifically, while affording corporate entities unfettered free speech electioneering rights, the Court fails to define a new bar on speech restrictions, leaving open for dabte the degree to which the government can restrict electioneering. This then opens a possible—though not necessarily winnable—challenge to the tax code's speech restrictions and to the Court's 1983 decision in *Regan v. Taxation with Representation of Washington*,[4] and encourages further encroachment on all organizational political-speech restrictions.[5]

I. WHAT IS "THE PRESS"?

The Press Clause of the First Amendment remains perhaps one of the most ill-defined and least-understood rights prescribed as inalienable by the founders. Compounding the baseline question of what in fact is the press, and who is covered by the clause's protections, is the issue of what the Free Press Clause really accomplishes, and what protections it provides beyond those of the Free Speech clause. Yet in *Citizens United*, a case that deals mostly with free speech concerns, the majority has perhaps unintentionally ruled on the Free Press Clause as well. On one hand, by disallowing corporate electioneering prohibitions, the Court may have massively expanded the coverage of the Press Clause—or in other words, expanded those considered to be "the press." On the other hand, by affording all corporations the same rights as those granted the media, the decision at the same

[3] *See* 26 U.S.C. § 501(c)(3) (2006).
[4] 461 U.S. 540 (1983).
[5] Unfortunately, a normative critique—and my own personal opinions on the matter—will have to wait for a future (and lengthier) discussion.

time seems to further enfeeble the Press Clause, and may even call into question its necessity—especially if it is read to pertain only to an "institutional press" (though this may no longer even be common wisdom[6]).

In an age in which electronic news distribution and the prevalence of nontraditional sources of journalism have further eroded our understanding of what "the press" really is, *Citizens United* now comes along and further muddies the waters, perhaps opening up "the press" to a whole different set of companies and advocacy groups who were not previously understood to have press-related First Amendment rights. While contradictions such as General Electric's (and now Comcast's) ownership of NBC always raised concerns of true press independence,[7] the Court's new reading of the First Amendment may have, at least as a legal matter, rendered that issue moot.

A. The Indefinable Press

The current debate over "what is the press today" generally begins with mainstream media organizations,[8] and moves in the hazier direction of blogs, internet postings, newsletters, and even Twitter posts or RSS feeds. Fortunately, such mediums of news dissemination need not require press protections; the First Amendment Freedom of Speech Clause unquestionably protects the authors' and publishers' right to publish that which they choose (outside of copyright, defamation, and "clear and present danger"[9] restrictions).

In fact, the lack of understanding of what the press entails may stem from the incredibly stalwart Free Speech Clause: With so few restrictions on what can and cannot be said, there may not have been a need for courts to define either their understanding of the press, or what exactly the framers intended by including the Press Clause in the First Amendment. And scholars remain in disagreement over originalist intent: Some see the Press Clause's inclusion as evidence that the framers intended the press to serve as a democratic check on government, while others merely

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[6] Many now argue that the Free Press Clause no longer pertains only to the institutional press, but rather to everyone. *See, e.g.*, Erwin Chemerinsky, *Tucker Lecture, Law and Media Symposium*, 66 WASH. & LEE L. REV. 1449, 1452, 1465 (2009) ("If special protections were given to the institutional press, how would lines ever be drawn in light of the democratization of access to the media? . . . So I think the laws that do provide special protections to the institutional press need to be reconsidered and be expanded to include the Internet and the media and once you do that for the web, I do not know how there can ever be special protections for the formal institutional press.") .

[7] There is of course a distinction that needs to be drawn between independence from corporate influence and independence from the government. Though this essay doesn't address the former, problems with corporate conglomeration abound. *See, e.g.* Maurice E. Stucke & Allen P. Grunes, *Toward a Better Competition Policy for the Media: The Challenge of Developing Antitrust Policies that Support the Media Sector's Unique Role in our Democracy*, 42 CONN. L. REV. 101, 103 (2009) (noting two problems with media consolidation: "First, media giants may raise prices to consumers and advertisers above competitive levels. . . . [And second,] concern is media-specific: namely, society's political and cultural health 'is fostered by numerous, independent media,' and excessive media concentration may threaten the public's access to important information or viewpoints"). There also exists the potential issue of institutional media entities skimping on critical coverage of their parent corporations.

[8] For the purposes of this essay, mainstream media is defined as the large television, print, or multiplatform newsgathering and news-disseminating organizations such as News Corp., CNN (and thus Time Warner), The New York Times Co., The Washington Post Co., etc.

[9] *See* Schenck v. United States, 249 U.S. 47 (1919). Justice Holmes established the "clear and present danger" test—one of the few jurisprudentially established restrictions on speech—in his oft-quoted passage: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." *Id.* at 52.

accord it as a natural extension of the freedom of speech.[10] And some, such as Anthony Lewis, argue that the framers included the "press" language alongside "speech" "merely to cover both oral and written expression."[11]

The Supreme Court's important cases touching on the limits of what the press can publish—*Schenck v. United States*,[12] *New York Times v. Sullivan*[13] and *New York Times v. United States*[14]—are all really free speech cases first, and less about First Amendment freedom of the press protections. When the courts *are* forced to tackle issues directly relevant to the Press Clause, independent of the freedom of speech protections, the cases tend to involve either prior restraint[15] or issues related to newsgathering, notably the reporter's work-product privilege or the protection of confidential sources.[16]

In all these cases, however, the Court has generally been unwilling to provide clarity on the extent of the Press Clause's coverage. The closest it came was in *Branzberg v. Hayes*, though even then it famously restrained itself from making any real categorical distinction (aside from extending (in dicta) press protections beyond "newspapers and periodicals"):

> Sooner or later, it would be necessary to define those categories of newsmen[,] . . . a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods. Freedom of the press is a "fundamental personal right" which "is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion."[17]

Such open-ended categorization (or lack thereof) was unknowingly prescient in light of the dramatic recent changes to news dissemination. It also comports well with an emerging understanding of blogs or other internet postings as an increasingly valuable component of the greater media landscape.[18] As some of these nontraditional publications gain traction and credibility, their First

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[10] For a discussion of this scholarly debate, see generally Leonard W. Levy, *On the Origins of the Free Press Clause*, 32 UCLA L. REV. 177 (1984).

[11] ANTHONY LEWIS, FREEDOM FOR THE THOUGHT THAT WE HATE: A BIOGRAPHY OF THE FIRST AMENDMENT 98 (2007). Interestingly, Lewis touched on these greater issues thirty years earlier, writing about dangers to the institutional press if they were in fact afforded special protection under the First Amendment. "The safety of the American press," he noted, "does not lie in exclusivity." Anthony Lewis, *A Preferred Position for Journalism?*, 7 HOFSTRA L. REV 595, 627 (1979).

[12] 249 U.S. 47 (1919) (creating the "clear and present danger" requirement, and also implying other yelling-fire-in-a-crowded-theater type speech restrictions).

[13] 376 U.S. 254 (1964) (upholding First Amendment protections for all statements save those made with "actual malice")

[14] 403 U.S. 713 (1971) (refusing to hold newspapers responsible for publication of Pentagon Papers, and establishing a very high bar to what cannot be published—perhaps limited only to issues vital to national security).

[15] *See* Near v. Minnesota, 283 U.S. 697 (1931) (striking down a Minnesota law that proscribed the publication of material deemed to be a nuisance or other public concern).

[16] *See* Branzberg v. Hayes, 408 U.S. 665 (1972) (ruling against the existence of a reporter's privilege and refusing to categorically protect a reporter from testifying before a grand jury on observations made in the course of a reporting investigation).

[17] *Id.* at 704 (citing Lovell v. City of Griffin, 303 U.S. 444, 450, 452) (other citations omitted).

[18] *See* Leonard Downie, Jr., & Michael Schudson, *The Reconstruction of American Journalism*, Columbia Journalism Rev., Oct. 19, 2009, *available at* http://www.cjr.org/reconstruction/the_reconstruction_of_american.php?page=all ("In fact, the

Amendment protections would seemingly expand beyond simple free speech guarantees to include additional press protections—though this of course then begs the questions of what additional rights the Press Clause in fact guarantees.[19]

Until *Citizens United*, it seemed as if these additional Press Clause rights were manifested *ad hoc*, in a sort of case-by-case heightened standard of protection for media and print enterprises and their employees. Examples include media shield laws,[20] reporter access to crime scenes, press conferences, and other semi-private events, and, until *Citizens United*, the privilege to editorialize and advocate for positions and political candidates in the run-ups to federal elections.[21] Yet in reality, these "rights" are more positive privileges than negative protections, and thus amount to very little.

B. *Citizens United* and an Expansion of the Press?

Despite an acceleration of institutional media consolidation in the past decades,[22] the internet age has to some extent assuaged the concerns of consolidation skeptics. Blogs, online magazines, and now Twitter seem to run counter to the fears that all information dissemination will end up in the hands of a few large corporations. Leaving aside the budgetary restrictions of new media—particularly on its ability to engage in in-depth investigative journalism—the digital age has most certainly allowed for a proliferation of independent media outlets (with full electioneering privileges) that fell into the exceptions of campaign finance law, most recently the Bipartisan Campaign Reform Act of 2002.[23] Today, more than ever, there is no shortage of bipartisan, multi-dimensional independent editorializing in the days and weeks before federal elections. Put another way, press protections, while technically statutory in nature, reflect perhaps the very same support for the press that prompted the framers to insert such protection into the First Amendment.

The Press Clause of the First Amendment would seem to grant *some* form of heightened protection for the media industry. But, as noted, there really are few federal rights extended to the press (institutional or otherwise), despite an explicit First Amendment industry protection. The pre-election editorial privilege afforded to media companies may in fact have been one of the few legal differences between media corporations and all others. However, *Citizens United* has now removed this distinction.

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blogosphere and older media have become increasingly symbiotic. They feed off each other's information and commentary, and they fact-check each other. They share audiences, and they mimic each other through evolving digital journalistic innovation.")

[19] New media institutions would likely be able to take advantage of statutory benefits afforded to media companies—again, to the extent that such protections in fact exist.

[20] At present, thirty-six states and the District of Columbia have some form of reporters' shield law on their books. *See* Alex Kingsbury, *Congress Moves Forward on Media Shield Law*, U.S. NEWS WORLD RPT., Dec. 29, 2009, http://www.usnews.com/news/articles/2009/12/29/congress-moves-forward-on-media-shield-law.html.

[21] The Bipartisan Campaign Reform Act of 2002 added an exception to the restriction of corporate electioneering expenditures to not include "any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are controlled by any political party, political committee, or candidate." 2 U.S.C. § 431(9)(B)(i) (2006).

[22] For a quite readable chart of the few major corporations and their media holdings, see Ownership Chart, Freepress, http://www.freepress.net/ownership/chart/main (last visited Mar. 9, 2010).

[23] Pub.L. 107-155, 116 Stat. 81 (Mar. 27, 2002) (allowing an exception to the prohibitions on electioneering for news stories and editorials).

Whereas the proliferation of blogs and other new media can be seen as emerging to one side of the old, institutional media, *Citizens United* seems to extend the definition in the other direction. But in granting "electioneering" privileges to all corporations on par with those currently held by the mainstream institutional press,[24] any heightened First Amendment press protection disappears. Looking at it from the other direction, by eliminating any implied First Amendment distinction between the press and normal corporations—or by affording all corporate entities the unrestricted right to political speech—the Court is granting press protections to *all* corporations. In other words, the Court is expanding the definition of "the press."

Justice Kennedy nearly explicitly says this: "There is no precedent supporting laws that attempt to distinguish between corporations which are deemed media corporations and those which are not."[25] In essence, either no corporations can be deemed media companies, or else they all must be considered as such. Kennedy acknowledges that "the line between the media and others who wish to comment on political and social issues becomes far more blurred,"[26] and that the Court has "'consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers'"[27] (this despite the fact the First Amendment *does* in fact single out the press for special treatment). Yet he concludes with this viewpoint: All corporations are in fact media corporations, all are protected by the First Amendment, and "[t]here is simply no support for the view that the First Amendment . . . would permit the suppression of political speech by media corporations."[28]

Such a reading of the First Amendment requires some slight of hand, which Justice Stevens, in dissent, is more than happy to point out.[29] The majority's reasoning seems to ignore one glaring problem: that the First Amendment in fact provides explicit protection for "*the press*." The majority's reading, and Justice Scalia's concurrence,[30] seems to ignore the Press Clause entirely, opting instead for a reading in which the "or of the press" language is either redundant or else invisible. Such readings, however, may not be unusual in such closely divided constitutional decisions, especially with the current Court's composition.[31]

If *Citizens United* then knocks down the legal distinction between media and non-media corporations, it similarly removes all benefits specially conferred on the press in the first place. What few privileges the institutional press once had are now seemingly also up for challenge: Why should a Washington Post reporter be allowed access to a White House press conference, and not

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[24] *See Citizens United*, No. 08-205, slip op. at *37.
[25] *Id.* at *36.
[26] *Id.*
[27] *Id.* (quoting Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 691 (1990) (Scalia, J., dissenting)).
[28] *Id.* at *37
[29] *Id.* at *40 n.57 (Stevens, J., dissenting) ("First . . . the drafters of the First Amendment did draw distinctions—explicit distinctions—between types of 'speakers,' or speech outlets or forms. Second, the Court's strongest historical evidence all relates to the Framers' views on the press, yet while the Court tries to sweep this evidence into the Free Speech Clause, the Free Press Clause provides a more natural textual home." (internal citation removed)).
[30] Scalia, in criticizing Stevens's dissent, notes, "It is passing strange to interpret the phrase 'the freedom of speech, or of the press' to mean, not everyone's right to speak or publish, but rather everyone's right to speak or the institutional press's right to publish." *Id.* at *6 n.6 (Scalia, J. concurring).
[31] Interestingly, Stevens made a similar case in another recent Bill of Rights case, *D.C. v Heller*, 128 S. Ct. 2783 (2008), in which he argued that the majority similarly—and conveniently—ignored the "militia" language of the Second Amendment to find an individual right to bear arms.

an official from ALCOA? Why should a member of the AP get to embed with a military unit, but not a representative of KBR?

This end result then nicely returns to an initial question[32]: What is the institutional press? Under a reading of *Citizens United*, the answer must be that everyone—every corporation, nonprofit, advocacy group, association, or lonely pamphleteer—is in fact a member. Potter Stewart would not be happy.[33]

For the First Amendment partisan, *Citizens United* is undoubtedly a victory. From the decision emerge thousands of newly empowered political voices who, per their First Amendment freedom of *speech*, are now able to more freely participate in the electoral process. Yet for defenders of the institutional press, generally also First Amendment advocates, the results are bittersweet. Though the electoral and democratic implications of the much-criticized decision remain unknown, the Court has, at the legal level, dramatically expanded the size and breadth of "the press," thus diluting established media voices. While the average citizen will no doubt still draw a distinction between the New York Times and the New York Stock Exchange, the average federal judge may now find that task more difficult.

II. *CITIZENS UNITED* AND CORPORATE ELECTIONEERING: GOOD NEWS FOR NONPROFIT NEWSPAPERS?

While *Citizens United* may usher in a new era of corporate spending in federal elections, and while it devalues whatever legal privileges the "institutional press" may have held, the decision actually holds a glimmer of hope for financially foundering media companies: a potential removal (or relaxation) of lobbying and electioneering restrictions imposed on nonprofit corporations. As this part demonstrates, *Citizens United*, in granting corporations additional free-speech rights, may have provided significant ammunition to push back on 501(c)(3) restrictions against political advocacy.[34] While by no means certain, and by no means a panacea for the newspaper industry, the removal (or reduction) of such restrictions would significantly aid financially vulnerable media companies considering the nonprofit option.

A. Background: The Not-for-Profit Newspaper

In an early 2009 New York Times op-ed, David Swensen and Michael Schmidt put forward the case for the not-for-profit newspaper. "As long as newspapers remain for-profit enterprises," they write, "they will find no refuge from their financial problems."[35] The collapse of the hardcopy

[32] Though it unfortunately provides an unsatisfying answer.

[33] Justice Stewart famously argued that the First Amendment does in fact protect the institutional press, and that the institutional press is "the only organized private business that is given explicit constitutional protection." Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 630, 633 (1974).

[34] *See* 26 U.S. 501(c)(3) (2006) (Corporations that accept tax-deductible charitable donations must not attempt to "influence legislation . . . or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office."). Naturally, the ability fundraise tax-deductible donations provides organizations with a major fundraising boon.

[35] David Swensen & Michael Schmidt, Op-ed, *News You Can Endow*, N.Y.TIMES, Jan. 27, 2009, at A31.

Seattle Post-Intelligencer,[36] the near-closure of the Boston Globe,[37] and the bankruptcy of the Tribune Company,[38] among other examples, serve as monthly reminders of the national financial state of traditional media stalwarts. Large metropolitan dailies appear the worst hit. While such a thinning of the herd may actually serve the interests of the larger national papers, able now to slip into voids left open by insolvent mid-market institutions—interestingly, share prices of the Times Company and Gannet (publisher of USA Today) have surged since the Tribune Company bankruptcy filing—accepted wisdom still forecasts trouble for most print news, regardless of size.

A number of potential solutions have been offered, though none ideal: direct government subsidies remain unpopular in times of fiscal uncertainty, universities may be unwilling to assume the burden of managing complex news organizations, and the NPR syndication model may not work for smaller local operations. The endowed nonprofit may thus provide a possible solution, though the restrictions on political advocacy still remain. Some commentators downplay this holdup. Swensen and Schmidt write that "[t]he loss of endorsements seems minor in the context of the opinion-heavy Web."[39] But to others, direct political advocacy remains a newspaper's *raison d'etre*, not to mention a freedom of speech issue worth fighting for.[40] Additional protections for such advocacy would thus go a long way towards assuaging such traditionalists' concerns. *Citizens United* might help in this effort.

B. Transitioning to Nonprofit

While the conversion of for-profit media companies to not-for-profit enterprises involves a host of factors, including the dissolution of the corporation, sale of assets, bankruptcy concerns, conflicts between state and federal law, and securing of funding,[41] one of the major impediments in considering a move towards 501(c)(3) nonprofit status is the tax code's restriction on political advocacy. As Marion R. Fremont-Smith explains, "the first drawback to [nonprofit] publishing is the need to forgo what has been a traditional, and extremely important, role for newspapers, namely supporting candidates in elections."[42] Other issues, such as lobbying limitations, fundraising, and the need to meet the requirements of "a charitable, educational organization" are, according to Fremont-Smith, of lesser concern.[43] But the sticking point remains political advocacy, which has prompted Fremont-Smith and a number of other commentators and congressmen to call for changes in the tax code.[44]

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[36] *See* Andrew Clark, *Seattle mourns the last day of its venerable Post Intelligencer*, GUARDIAN, Mar. 17, 2009, *available at* http://www.guardian.co.uk/media/2009/mar/17/seattle-post-intelligencer-last-day. The Post-Intelligencer exists now in online form only.

[37] *See* Richard Pérez-Peña, *Times Co. Said to Consider Closing Boston Globe*, N.Y.TIMES, Apr. 4, 2009, at B5. The near-shutdown was averted after a last-minute $20 million deal between the Boston Newspaper Guild and the paper's owners.

[38] *See* Shira Ovide, *Tribune Co. Files for Chapter 11 Protection*, WALL ST. J., Dec. 9, 2009, at B1.

[39] *See* Swensen & Schmidt, *supra* note 35.

[40] *See, e.g.*, Dan Kennedy, *Lifting the tax on free speech*, GUARDIAN, Feb. 3, 2009, *available at* http://www.guardian.co.uk/commentisfree/cifamerica/2009/feb/03/newspapers-non-profit-endowments.

[41] For a discussion of the problems and potential requirements for newspapers seeking nonprofit status, see Marion R. Fremont-Smith, *Can Nonprofits Save Journalism: Legal Constraints and Opportunities*, Joan Shorenstein Center on the Press, Politics and Public Policy, Harvard University, Oct. 2009, *available at* http://www.hks.harvard.edu/presspol/publications/papers/can_nonprofits_save_journalism_fremont-smith.pdf.

[42] *Id.* at 36.

[43] *Id.* at 36–37.

[44] *See, e.g.* Kennedy, *supra* note 40. Senator Ben Cardin (D-MD) introduced a somewhat related bill in early 2009 that, while seeking to aid newspapers in the transition to nonprofit status, still did not do away with the 501(c)(3) restrictions. *See* Newspaper Revitalization Act , S. 637, 111th Cong. (2009). However, the bill went nowhere.

Current restrictions on nonprofit electioneering stem from the Court's 1983 holding in *Regan v. Taxation with Representation of Washington*,[45] which unanimously affirmed that "tax exemptions and tax deductibility are a form of [federal] subsidy," and held that "Congress is not required by the First Amendment to subsidize lobbying."[46] The Court also noted that the IRS had established a viable workaround for those nonprofits that did want to engage in electioneering: the 501(c)(4). Under the tax code, a nonprofit could create such a parallel organization to engage in lobbying and electioneering, so long as tax-deductible and charitable donations to the original 501(c)(3) organization were kept separate from the 501(c)(4).[47] Newspapers and media organizations, unfortunately, would likely be unable (or unwilling) to separate their editorials from their product, thus rendering the sister-501(c)(4) option relatively moot.

C. Does *Citizens United* Change the Calculus?

Enter however *Citizens United*, and its creation of a corporate free-speech right to engage in electioneering. At the time of writing, only one commentator, Professor Lloyd H. Mayer, has thus far drawn the link between the *Citizens United* holding and its potential effect on the nonprofit tax code. Though Mayer doesn't see the decision as an immediate threat to *Regan*, he does hint at potential uncertainty: "[T]he strong affirmation by the Supreme Court that corporate speech enjoys First Amendment protection as much as individual speech means that the IRS will have to continue to be very careful when enforcing these limits to ensure it does not tread on the free speech rights guaranteed by that amendment."[48]

A close analysis of *Citizens United*, however, may actually begin to call into question the Court's reservations in *Regan*. At issue in *Regan* was a question of whether a 501(c)(3) nonprofit's free speech rights trumped government restrictions on lobbying, a constitutionally protected First Amendment activity. As discussed, because the *Regan* Court rightly viewed the nonprofit's ability to raise tax-deductible donations as a federally conferred benefit, Congress had the power to restrict the nonprofit's activities, as the federal government was in no way required to subsidize free speech. Yet in *Citizens United*, the court seems to make legal these very subsidies—in a different yet similar context.

In the majority opinion, Justice Kennedy acknowledges that the state does in fact subsidize corporate shareholders by providing the corporation with specific state-conferred benefits. Drawing from *Austin v. Michigan Chamber of Commerce*, Kennedy notes that "'[s]tate law grants corporations special advantages—such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets.'"[49] Though incorporation is a matter of state rather than federal law, it is unquestionable that shareholders and the corporate entity are given benefits—subsidized, if one will—by the state. And Justice Kennedy continues: Such state support, he explains, "does not suffice, however, to allow laws prohibiting speech. 'It is rudimentary that the

[45] 461 U.S. 540 (1983).
[46] *Id.* at 544, 546.
[47] For a discussion, see *id.* at 552–54 (Blackmun, J., dissenting).
[48] Lloyd H. Mayer, Citizens United (Part II), Nonprofit Law Blog, Jan. 22, 2010, http://lawprofessors.typepad.com/nonprofit/2010/01/citizens-united-part-ii.html.
[49] *Citizens United*, No. 08-205, slip op. at *34–35 (quoting Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 658–59 (1990)).

State cannot exact as the price of those special advantages the forfeiture of First Amendment rights.'"[50]

How then does the same logic not apply to 501(c)(3)s? Leaving aside issues of federalism, the Court cannot likely declare on one hand that an artificial corporate entity created to further the business interests of its shareholders cannot be denied the freedom of political speech, but on the other say that a not-for-profit corporation, although granted different state benefits, may not have the same right to free-speech political advocacy. To my knowledge, there is as yet no law or precedent distinguishing between the First Amendment rights of corporate and nonprofit executives, or of corporate shareholders and charity donors.

And even leaving aside the issue of state incorporation privileges, the higher and undefined bar on free speech electioneering (assuming that it still exists at all) may preclude, or at least leave open for challenge, *any* political-speech restriction attached to a federal benefit. Analogies can easily be drawn to other recipients of government aid: Can a Section 8 voucher recipient's speech or electioneering rights be conditioned by the receipt of federal housing assistance? Can restrictions on a student's political participation or a college newspaper's political editorials legally accompany Pell Grants or federal research funding? Probably not.

In *Citizens United*, the Court has seemingly opened the floodgates to *all* challenges of institutional free-speech restrictions, without providing any indication of where it will set its limits. And in acknowledging that a state-privileged corporation—or for that matter any organization—maintains an unrestricted First Amendment free-speech right, the *Citizens United* Court now begs a similar challenge with regard to 501(c)(3)s. This then can only be good news for cash-strapped newspapers seeking alternative revenue structures.

CONCLUSION

Though in many regards unrelated, the two press-related implications of *Citizens United* discussed herein deserve requisite attention. This essay does neither their deserved justice, but rather highlights the two issues for future analysis.

On the legal front, though *Citizens United* appears to greatly expand the number and type of institutions considered to be "the press," the actual impact on the established institutional press may be *de minimis*, unless of course corporations begin purchasing and self-servingly misusing media institutions. On the financial nonprofit-newspaper front, while *Citizens United* may begin the process of affording 501(c)(3)s the ability to advocate and endorse legislation and political candidates, greater structural and financial impediments remain, and for the time being no major paper or media outlet will likely be able to make the jump to 501(c)(3).[51]

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[50] *Id.* at 35 (quoting *Austin*, 494 U.S. at 660).

[51] The nonprofit newspaper does exist. The most prominent example is the Guardian, in the United Kingdom. The biggest impediment to an initiation of the model in the United States, however, may be the need to raise initial capital to buy out private shareholders or creditors and then transition to the foundation model. For interesting commentary on this issue, see Who Would Fund America's Largest Nonprofit Newspapers, VALLEYWAG, http://gawker.com/5167825/who-would-fund-americas-largest-nonprofit-newspaper (last visited Mar. 9, 2010) (discussing the issues as they would hypothetically pertain to the San Francisco Chronicle).

Moreover, both issues are really of secondary concern, as most criticism of the opinion has focused on the democratic-legitimacy effects of corporate money flooding election-week airways.

Yet given the lack of high court jurisprudence defining "the press," and given the need for media institutions to find creative means for survival, *Citizens United* provides some related insight into both concerns. These two issues, though of secondary importance to the case's election-related implications, should thus not be ignored.