PROTECTING SPEECH FROM THE HEART: HOW *CITIZENS UNITED* STRIKES DOWN POLITICAL SPEECH RESTRICTIONS ON CHURCHES AND CHARITIES

PAUL WEITZEL*

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* J.D. U.C.L.A. 2009; paulweitzel@gmail.com. I thank my wife, Wendy Weitzel, for her constant support. I also thank David M. Carr, Michael W. Mosman, Joseph Mueller, Don Hansen, Adam Winkler, Zhimin Lin, John Dalton, Ajit Thind, Bryce Carr, Debbie Palmer, Simone Sema, Chris Truxler, Chris Jones, Richard Mo, Stuart Harris, Joe Wood, Eric Boorstin, Sam Brooks, and all my colleagues at Davis Polk & Wardwell. All errors are my own.

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I. INTRODUCTION

This article will argue that *Citizens United v. Federal Election Commission*[1] prohibits restricting the political speech of 501(c)(3) charitable organizations, in effect abrogating *Regan v. Taxation with Representation of Washington.*[2]

"The First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office."[3] The First Amendment grants individuals the right to endorse or denounce a candidate for office. After *Citizens United*, when individuals organize together as a for-profit corporation, they retain this right. But when individuals organize for a cause that is heartfelt, rather than economic, this right is eliminated. Ironically, this gag only restricts political speech, "speech that is central to the meaning and purpose of the First Amendment."[4]

In *Citizens United,* the United States Supreme Court recognized corporate speech rights. *Citizens United*'s plain language and reasoning also support allowing charitable organizations to engage in political speech. The traditional argument—that the free speech rights of these groups are not infringed because they can speak through affiliate organizations—was expressly rejected by *Citizens United.*[5] Likewise, the argument that these groups have sold their speech for subsidies is misplaced after *Citizens United*—corporations are subsidized by limited liability, as are 501(c)(4) organizations,

1. 130 S. Ct. 876 (2010).

2. 461 U.S. 540 (1983).

3. *Citizens United*, 130 S. Ct. at 898 (quoting Eu v. San Francisco Cnty. Democratic Cent. Comm., 489 U.S. 214, 223 (1989) (internal quotations omitted)).

4. *Id.* at 892 (citing Morse v. Frederick, 551 U.S. 393, 403 (2007)).

5. The counter position is masterfully explained by Roger Colinvaux and Miriam Galston. *See* Roger Colinvaux, Citizens United *and the Political Speech of Charities* 5–9 (Dec. 17, 2010) (unpublished manuscript), *available at* http://ssrn.com/abstract=1726407; Miriam Galston, *When Statutory Regimes Collide: Will* Wisconsin Right to Life *and* Citizens United *Invalidate Federal Tax Regulation of Campaign Activity?* 24 (George Washington Univ. Legal Studies Research Paper No. 499, Mar. 2010), *available at* http://ssrn.com/abstract=1572511. These authors argue that because the restriction arises from the tax code it is not a burden on speech, so it will be subject to a lower standard of review than strict scrutiny. This argument is based on the premise that the tax code merely removes a subsidy to political speech, rather than creating a penalty for speech. I address the implications of these arguments in Part III.B. *infra*.

which are also tax-exempt, but neither is barred from political participation.[6]

This article will argue that *Citizens United* implicitly recognized the right of 501(c)(3) organizations to endorse political candidates and engage in substantial lobbying. Part I will introduce 501(c)(3) organizations and the two major cases on point: *Regan v. Taxation with Representation of Washington*, which held that limits to the political speech of 501(c)(3) organizations were constitutional,[7] and *Citizens United v. Federal Elections Commission*, which held that some limits to the political speech applied to corporations were unconstitutional.[8] Part II will apply the Court's holding in *Citizens United* to 501(c)(3) organizations. Part III will discuss the possible consequences of removing the restriction.

II. INTRODUCTION TO 501(C)(3) ORGANIZATIONS AND PRIOR CHALLENGES

A. *Introduction to 501(c)(3) Organizations*

A 501(c)(3) organization is a non-profit, tax-exempt and tax-deductible organization.[9] Not all non-profit organizations are tax-exempt,[10] and not all tax-exempt organizations are eligible to receive tax-deductible donations.[11] Tax-exemption means the organization is not required to pay federal income taxes.[12] Tax-deductibility allows those who contribute to the organization to deduct those contributions from their income tax. 501(c)(3) organizations are both tax-exempt and tax-deductible and are prohibited from engaging in certain types of political speech.[13]

6. 26 U.S.C. § 501(c) (Supp. IV 2006).

7. 461 U.S. at 546.

8. 130 S. Ct. at 882.

9. 26 U.S.C. § 501(c).

10. "The word *non-profit* should not be confused with the term *not-for-profit* (although it often is). The former describes a type of organization; the latter describes a type of activity." Bruce R. Hopkins, THE LAW OF TAX-EXEMPT ORGANIZATIONS 4 n.4 (10th ed. 2011). *Compare* 26 U.S.C. § 501(c), *with* 26 U.S.C. § 183(a) (Supp. IV 2006).

11. *See* Hopkins, *supra* note 10, at 48–49.

12. 26 U.S.C. § 501(a), (c). Non-profit organizations are still subject to some form of tax. *See* Hopkins, *supra* note 10, at 6. For the scope of the tax exemption to 501(c)(3) organizations, *see* Parts II, III, and VI of Title 26, Subtitle A, Chapter 1, Subchapter F. *See also* 26 U.S.C. § 501(b).

13. 26 U.S.C. § 501(c).

A 501(c)(3) organization is a creation of the federal tax code.[14] It encompasses non-profit[15] groups "organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes," as well as certain amateur sports organizations, and societies working to reduce child and animal abuse.[16]

The tax code imposes two broad speech restrictions on 501(c)(3) organizations. First, they may not have a "substantial part" of their activities dedicated to influencing legislation.[17] Second, they may not participate or intervene in political campaigns for or against a candidate for public office.[18] Along with these restrictions, 501(c)(3) organizations have two significant benefits: they are tax-exempt and contributions made to them are tax-deductible.[19]

B. Regan v. Taxation with Representation of Washington

In *Regan*, the Supreme Court held that speech restrictions on 501(c)(3) organizations were constitutional.[20] Taxation with Representation of Washington (TWR) was a non-profit corporation organized to influence tax policy.[21] TWR was formed by merging a 501(c)(3) organization with a 501(c)(4) organization.[22] 501(c)(3) organizations are tax-exempt and tax-deductible, but cannot engage in substantial lobbying.[23] 501(c)(4) organizations are also tax-exempt, but are not tax-deductible and are not prohibited from engaging in substantial

14. *Id.* State law defines exemptions and deductibility from state taxes (e.g., income, property and sales). For a discussion of state tax exemptions and their limitations, *see, e.g.,* Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me., 520 U.S. 564, 587 (1997) (labeling the use of tax exemptions in certain contexts as impermissible). This article will focus on the federal tax code because it is the source of the federal speech restriction.

15. The organization is non-profit if "no part of [its] net earnings . . . inure[] to the benefit of any private shareholder or individual." 26 U.S.C. § 501(c)(3).

16. *Id.*

17. *Id. But see id.* § 501(h) (specifying conditions under which tax-exempt status will be denied).

18. 26 U.S.C. § 501(c)(3). The contours of these restrictions have filled volumes. *See generally* Hopkins, *supra* note 10.

19. 26 U.S.C. § 170(a)(1), (c) (Supp. IV 2006); 26 U.S.C. § 501(c)(3).

20. Regan v. Taxation with Representation of Wash., 461 U.S. 540, 546 (1983).

21. *Id.* at 540.

22. *Id.*

23. 26 U.S.C. § 501(c)(3).

lobbying.[24] A 501(c)(4) organization is the corporate form usually used by lobbying organizations such as political action committees.[25]

Following the merger, the IRS denied 501(c)(3) status to TWR because it planned to engage in substantial lobbying.[26] The organization sued for a declaratory judgment, arguing that it qualified for 501(c)(3) status and that the restriction against substantial lobbying violated the First Amendment.[27] TWR also argued that denying deductibility to groups that engage in certain forms of speech "is in effect to penalize them for [such] speech."[28]

The unanimous Supreme Court made three key holdings. The first holding, which the concurrence referred to as the Court's "necessary assumption,"[29] was that TWR could reorganize into a 501(c)(4) organization, which is not tax-deductible but can still engage in substantial lobbying.[30] Because TWR had the option to reorganize as a 501(c)(4), the Court found that the organization as a whole was not entirely restricted from substantial lobbying. As a less drastic alternative to complete reorganization, the court said, "TWR can obtain tax-deductible contributions for its non-lobbying activity by returning to the dual structure it used in the past, with a § 501(c)(3) organization for non-lobbying activities and a § 501(c)(4) organization for lobbying."[31] In other words, a "501(c)(3) organization's right to speak is not infringed, because it is free to make known its views on legislation through its § 501(c)(4) affiliate without losing tax benefits for its non-lobbying

24. 26 U.S.C. § 501(c)(4). 501(c)(4) organizations face a practical limit to their lobbying: they must be "operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes." *Id.* Excessive lobbying may disqualify an organization from claiming it is operated exclusively for these purposes.

25. *Id. See also* Fed. Election Comm'n v. Beaumont, 539 U.S. 123, 160 (2003) (stating section 501(c)(4) "covers some of the Nation's most politically powerful organizations, including the AARP, the National Rifle Association, and the Sierra Club").

26. *Regan*, 461 U.S. at 542.

27. *Id.*

28. *Id.* at 545 (quoting Speiser v. Randall, 357 U.S. 513, 518 (1958)).

29. *Id.* at 552 (Blackmun, J., concurring).

30. *Id.* at 544.

31. The Court previously stated, "Congress chose not to subsidize lobbying[, which is allowed only for a 501(c)(4) organization,] as extensively as it chose to subsidize other activities that non-profit organizations undertake to promote the public welfare." *Id.*

activities."[32] In effect, the option of creating a 501(c)(4) entity served as a safety valve to keep the speech restriction constitutional.

The Court's second key holding was that tax-exemption and tax-deductibility are both economically equivalent to cash subsidies; "A tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income. Deductible contributions are similar to cash grants of the amount of a portion of the individual's contributions."[33] The two tax benefits are distinguishable only by degree.[34]

The third holding addressed whether the tax was a penalty or whether it was merely withholding a subsidy. The Court found that taxation is not a penalty; exemption from taxation is a subsidy.[35] Because the government is not required to subsidize the exercise of a right, the government could withhold the subsidy when it was being used for political speech.[36] Tax exemptions and deductions are "a matter of grace [that] Congress can, of course, disallow . . . as it chooses."[37]

With these three holdings, the Court held that by placing speech restrictions on 501(c)(3) organizations, the government was merely declining to further subsidize charitable organizations to the extent they engaged in substantial lobbying. The "necessary assumption" was that lobbying activities could be channeled through a 501(c)(4) entity.

C. Citizens United v. Federal Election Commission

Citizens United effectively abrogates *Regan*. Citizens United was a non-profit corporation.[38] Using donations from individuals

32. *Id.* at 553 (Blackmun, J., concurring).

33. *Id.* at 544. However, this assumes the donor will itemize deductions. Donations by low-income individuals may not be subsidized at all, which skews the benefit of deductibility toward organizations funded by wealthier donors.

34. *Id.* ("The system Congress has enacted provides this kind of subsidy to non-profit civic welfare organizations generally, and *an additional subsidy* to those charitable organizations that do not engage in substantial lobbying."(emphasis added)). *See also id.* ("Both tax exemptions and tax deductibility are a form of subsidy that is administered through the tax system.").

35. *Id.* at 549.

36. *Id.*

37. *Id.* at 549 (quoting Comm'r v. Sullivan, 356 U.S. 27, 28 (1958)) (internal quotations omitted) (alteration and omission in original).

38. Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 886–87 (2010).

and corporations, it sought to distribute a film through cable television titled "Hillary: The Movie," a 90-minute documentary critical of a presidential candidate, during the primary elections.[39] Concerned that the release would violate election law, Citizens United sought a declaratory judgment against the Federal Elections Commission.[40] The district court found that the release would violate 2 U.S.C. § 441b, which prohibits corporations and labor unions from making "any broadcast, cable, or satellite communication" that "refers to a clearly identified candidate for Federal office" and is made within thirty days of a primary or sixty days of a general election.[41]

The case was appealed directly to the Supreme Court following a subsequent hearing by a three-judge panel.[42] The 5-4 majority reversed the district court, holding that section 441b violated the First Amendment's guarantee to free speech.[43] The Court found that "First Amendment protection extends to corporations,"[44] and "political speech does not lose First Amendment protection 'simply because its source is a corporation.'"[45] The majority applied strict scrutiny[46] to hold section 441b unconstitutional.[47]

One key argument rejected by the majority was that corporate speech was not actually limited because the corporation was still free to speak through a political action committee, or "PAC."[48] A PAC is a distinct organization that is specifically exempted from section 441b's corporate speech ban.[49] The Court held that being able to speak through a PAC does not cure the unconstitutionality of section 441b's speech restriction on

39. *Id.* at 887.

40. *Id.* at 886, 888.

41. *Id.* at 887 (citing 2 U.S.C. § 434(f)(3)(A) (Supp. IV 2006)). Violating this statute was a felony with a maximum penalty of five years in prison. 2 U.S.C. § 437g(d)(1)(A) (Supp. IV 2006).

42. *See* 28 U.S.C. § 1253 (Supp. IV 2006) (permitting direct appeal to the United States Supreme Court from "an order granting or denying . . . an interlocutory or permanent injunction in any civil action, suit or proceeding required by an Act of Congress to be heard and determined by a district court of three judges").

43. *Citizens United*, 130 S. Ct. at 917.

44. *Id.* at 899.

45. *Id.* at 900 (quoting First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 784 (1978)).

46. *Id.* at 898.

47. *Id.* at 917.

48. *Id.* at 897.

49. 2 U.S.C. § 441b(b)(2) (Supp. IV 2006).

corporations.[50] The Court noted that "PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulations."[51] The Court then described the administrative requirements of a PAC, including staffing, recordkeeping, file retention, and monthly reporting to the FEC.[52] In addition, the Court noted that a corporation may not be able to set up a PAC in time to speak about a current campaign.[53] The Court held that "[s]ection 441b's prohibition on corporate independent expenditures is thus a ban on speech . . . . Were the Court to uphold these restrictions, the Government could repress speech by silencing certain voices at any of the various points in the speech process."[54] The Court struck down section 441b for impermissibly restricting speech.[55]

III. *Citizens United* Prohibits the Current Speech Restrictions on 501(c)(3) Organizations

A. Citizens United *Applies to 501(c)(3) Organizations*

In *Citizens United*, the Court dealt with corporations. Most 501(c)(3) organizations are organized as corporations, so applying *Citizens United*'s holding to non-profit and tax-deductible organizations is a natural fit. In fact, the plaintiff in *Citizens United* was a non-profit corporation.

The *Citizens Untied* opinion suggests the Court was aware that its holding would impact the non-profit sector. As an example of the perverse effects of the law banning corporate speech, the Court pointed out that the Sierra Club could not run an advertisement against a logging candidate, the NRA could not publish a book advocating the defeat of a candidate who endorsed a handgun ban, and the ACLU could not create a website supporting a candidate for defending free speech.[56] The Court emphasized that "[t]hese prohibitions are classic

50. *Citizens United*, 130 S. Ct. at 897–98.
51. *Id.* at 897.
52. *Id.*
53. *Id.* at 898.
54. *Id.*
55. *Id.* at 913.
56. *Id.* at 897.

examples of censorship."[57] Each of these organizations is affiliated with a 501(c)(3) organization.[58]

The holding in *Citizens United* makes no distinction between tax-deductible organizations and other entities using the corporate form. The Court affirmed that:

> The people determine through their votes the destiny of the nation. It is therefore important—vitally important—that all channels of communication be open to them during every election, that no point of view be restrained or barred, and that the people have access to the views of every group in the community.[59]

The Court did not qualify this statement—no group was to be restrained.

Speaking more directly, the Court held "[i]n the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue."[60] Congress's ban on speech by 501(c)(3) organizations is Congress's attempt to dictate who may address a public issue. In light of *Citizens United*, that restriction is unconstitutional.

B. Citizens United *Rejected the Reasoning in* Regan

Citizens United abrogates *Regan* by rejecting its reasoning in two ways. First, *Citizens United* rejects *Regan*'s alternate channel assumption—that an entity's right to speak can be exercised by speaking through an affiliate.[61] Second, *Citizens United* rejects the idea that a person can be forced to choose between some special advantages and the exercise of its fundamental rights, which

57. *Id.*

58. The Sierra Club is affiliated with the Sierra Club Foundation. *2004 Annual Report*, SIERRA CLUB, 37, http://www.sierraclub.org/foundation/downloads/2004annualreport.pdf (last visited Nov. 16, 2011). The NRA is affiliated with the NRA Foundation. *About the NRA Foundation*, NRA FOUND., http://www.nrafoundation.org/about/ (last visited Nov. 16, 2011). The ACLU is affiliated with the ACLU Foundation. *Donating to the American Civil Liberties Union and ACLU Foundation: What is the Difference?*, AM. CIVIL LIBERTIES UNION, http://www.aclu.org/donating-american-civil-liberties-union-and-aclu-foundation-what-difference (last visited Nov. 16, 2011).

59. *Citizens United*, 130 S. Ct. at 901 (quoting U.S. v. Auto. Workers, 352 U.S. 567, 593 (1957) (Douglas, J., dissenting)).

60. *Id.* at 902 (quoting First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 784–85 (1978)).

61. *Id.* at 897.

weakens *Regan*'s distinction between a penalty and a withdrawn subsidy.[62]

The reasoning in *Citizens United* is incompatible with the approach taken by *Regan*. If *Regan* survives *Citizens United*, their combined reasoning would allow the government to eliminate speech by any individual or group, thus allowing it to do indirectly what it cannot do directly.

1. *Citizens United* Rejected *Regan*'s Necessary Assumption as Unconstitutional

In *Regan,* the Court's opinion was premised on the "necessary assumption" that a 501(c)(3) could still speak by creating a 501(c)(4) affiliate.[63] It reasoned that as long as the organization was still able to speak through an affiliate, the ban was not a restriction on speech, but a permissible way to segregate funds. This alternate channel argument was rejected in *Citizens United*.[64]

Perhaps thinking of *Regan*, the Court in *Citizens United* directly addressed the argument that the restriction on speech was not a ban because corporations could still speak by creating affiliated PACs, and that the restriction merely prevented the corporation from commingling its political speech monies funded by donations expressly for that purpose with its general treasury.[65]

The Court rejected this reasoning:

> A PAC is a separate association from the corporation. So the PAC exemption from § 441b's expenditure ban, § 441b(b)(2), does not allow corporations to speak. Even if a PAC could somehow allow a corporation to speak—and it does not—the option to form PACs does not alleviate the First Amendment problems with § 441b.[66]

The Court thus rejected the alternate channel approach that it relied on in *Regan*. A 501(c)(4) organization is a separate association from the 501(c)(3). Its existence does not allow the 501(c)(3) to speak and does not alleviate the First Amendment

62. *Id.* at 905.

63. Regan v. Taxation with Representation of Wash., 461 U.S. 540, 544, 552 (1983); *see supra* Part II.C.

64. *Citizens United*, 130 S. Ct. at 897.

65. *Id.*

66. *Id.* The Court went on to explain that "[p]rohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others . . . . Speech restrictions based on the identity of the speaker are all too often simply a means to control content." *Id.* at 898–99.

problems with the ban. The necessary assumption in *Regan*—that speech through a reorganized affiliate is sufficient—was struck down.

2. Persons Cannot Be Forced to Choose Between a Special Advantage and a Fundamental Right

Regan's "necessary assumption" is not the only part of *Regan*'s reasoning stricken by *Citizens United*. *Regan* held that the ban on speech was acceptable because the funds in the 501(c)(3) organization were subsidized by tax-deductibility.[67] In *Regan,* the Court distinguished penalties from subsidies.[68] Congress was allowed to condition subsidies, but not penalties, on the waiving of the organization's fundamental rights.[69]

Citizens United rejected this holding by dropping the strained distinction between subsidy and penalty and finding plainly that a corporation cannot be forced to choose between a subsidy and a fundamental right:

> "[S]tate law grants corporations special advantages—such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets." This does not suffice, however, to allow laws prohibiting speech. "It is rudimentary that the State cannot exact as the price of those special advantages the forfeiture of First Amendment rights."[70]

Yet that is exactly what is currently required of 501(c)(3) organizations. They have been granted a special advantage, tax-deductibility, for which the state seeks to exact a "forfeiture of its First Amendment rights."[71] The Court's holding could not be more clear.

3. Applying *Regan*'s Reasoning After *Citizens United* Would Allow Congress to Prevent Any Speech

If *Regan* survives *Citizens United,* then Congress could silence corporations by creating two forms of for-profit corporations: those that are able to speak, and those that are not. Congress could raise corporate taxes to the point of shareholder protest,

67. *Regan*, 461 U.S. at 544.
68. *Id.*
69. *Id.*
70. *Citizens United*, 130 S. Ct. at 905 (quoting Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 658–59, 680 (1990)) (internal citations omitted).
71. *Id.*

say 95%, but offer a subsidized rate to those that waive their First Amendment rights. In this way, corporations could be silenced through a de facto ban on corporate speech. Congress could justify its actions by saying it simply did not want to subsidize corporate political speech. The penalty/subsidy argument accepted by *Regan* would allow Congress to do indirectly what it could not do directly.

In *Citizens United*, the Court analyzed the constitutionality of the speech ban by considering whether the law would be constitutional if applied to individuals. "If § 441b applied to individuals, no one would believe that it is merely a time, place, or manner restriction on speech. Its purpose and effect are to silence entities whose voices the Government deems to be suspect."[72] Further, it stated that "[t]he Court has thus rejected the argument that political speech of corporations *or other associations* should be treated differently under the First Amendment simply because such associations are not 'natural persons.'"[73]

A similar comparison demonstrates the absurdity of *Regan* surviving *Citizens United*. Under the *Regan* logic, the government could vary tax rates depending on a person's individual political activity. There could be a tax for those who exercise their right to speak and a different tax for those who do not. Congress could justify this as merely choosing not to subsidize political speech by individuals. But, in effect, a citizen would be required to pay additional taxes to exercise a fundamental right. This would be a shadowy reincarnation of the poll taxes stricken in the 1960s.[74]

C. Citizens United *Also Rejected* Regan*'s Policy Concerns*

Under the policy rationales stated in *Citizens United*, it makes sense to allow 501(c)(3) organizations to speak. First, these organizations have in-the-trenches experience on many important policies. Second, they do not carry the same risks as speech by for-profit corporations. And, third, removing the

72. *Id.* at 898.

73. *Id.* at 900 (emphasis added) (internal citations omitted).

74. *See* Harper v. Va. Bd. of Elections, 383 U.S. 663, 670 (1966) (holding that poll taxes are unconstitutional, because "where fundamental rights and liberties are asserted . . . classifications which might invade or restrain them must be closely scrutinized and carefully confined").

speech restrictions would eliminate the additional cost and chill already put on these organizations.

1. Expertise and Experience of 501(c)(3)s

By banning speech by charities, we lose the voices of some of the most passionate and knowledgeable groups in our society.[75] We exclude from welfare debates those running the soup kitchens. We exclude from environmental debates those most dedicated to conservation. We exclude from foreign policy debates those who work to heal our soldiers at war and who pray for peace. The price is too steep. "The Government has 'muffle[d] the voices that best represent the most significant segments of the economy.'"[76] Just as banning corporate speech muffles some of the most knowledgeable voices about our economy, banning charities from speaking muffles the voices of those who care passionately about helping others and those who care passionately about political issues. "The remedy of 'destroying the liberty' of some factions is 'worse than the disease.' Factions should be checked by permitting them all to speak and by entrusting the people to judge what is true and what is false."[77]

2. Granting Speech Rights to 501(c)(3)s Creates Fewer Risks Than Granting Speech Rights to Corporations

In *Citizens United*, the Court addressed the risks of allowing corporations to speak. These risks are no greater with charities, and often do not exist at all. Because charities are funded by donations, there is a far lower risk of forcing unwilling shareholders to sponsor speech they disagree with; far lower risk of aggregating massive amounts of wealth that is disproportionate to the contributor's belief in the message; and far lower risk of a loss of faith in democracy. There is little reason to expect that foreign money would be channeled through 501(c)(3) organizations any more than it is funneled

75. *Citizens United*, 130 S. Ct. at 912 ("On certain topics corporations may possess valuable expertise, leaving them the best equipped to point out errors or fallacies in speech of all sorts, including the speech of candidates and elected officials.").

76. *Id.* at 907 (alteration in original) (quoting McConnell v. Fed. Election Comm'n, 540 U.S. 93, 257–58 (2003) (Scalia, J., dissenting in part)).

77. *Id.* (quoting THE FEDERALIST NO. 10, at 130 (James Madison) (Benjamin Fletcher Wright ed., 1961)).

through 501(c)(4) organizations.[78] And while corporations were only banned from speaking for 60 days before an election, the ban on 501(c)(3) organizations is year-round.[79]

3. Granting Speech Rights to 501(c)(3)s Alleviates the Current Chill

Allowing political speech by 501(c)(3) organizations would also prevent some of the circumvention and difficulties with the gray areas the Court was concerned about in *Citizens United*. 501(c)(3) organizations are allowed to discuss political issues, but cannot endorse any candidate. However, "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application."[80] Because it is so difficult to delineate between the two, 501(c)(3) organizations are likely to be chilled from discussing issues for fear they may lose their tax-deductible status.

This difficulty is compounded in the YouTube generation of politics where retaining a lawyer to prescreen an internet advocacy video beforehand could cost more than producing the video itself. As production becomes less expensive and more agile, the relative cost of compliance increases and disproportionately affects organizations subject to speech restrictions.

IV. Possible Consequences of Striking the Speech Restrictions Approved in *Regan*

If linking tax-deductibility to limited speech is now unconstitutional, there are two ways the statute could be corrected. The Court could either strike down the speech restrictions on 501(c)(3) organizations, or the Court could strike down both the speech restrictions and the tax-

78. There is no reason to believe that foreign contributors would have a greater incentive to donate to a 501(c)(3) than a domestic contributor would. On the contrary, a foreign contributor would likely have less need of tax-deductibility in the United States.

79. *Compare* 2 U.S.C. § 434(f)(3)(A)(i)(II)(aa) (Supp. IV 2006) (defining prohibited electioneering communications as any broadcast communication that is made within 60 days of a general election and refers to a clearly identified candidate for federal office), *with* 26 U.S.C. § 501(c)(3) (Supp. IV 2006) (exempting corporations, charities, and foundations from taxes provided that they never attempt to intervene in any political campaign or attempt to influence legislation).

80. *Citizens United*, 130 S. Ct. at 909 (citing Buckley v. Valeo, 424 U.S. 1, 42 (1976)).

deductibility of 501(c)(3) organizations, making them similar to 501(c)(4) organizations. Because charities are subsidized in order to promote charitable work,[81] rather than as hush money, the better-reasoned approach is to strike down only the speech restrictions.

A. *Tax-Deductibility Should Remain In Place*

Governments have a long tradition of using tax breaks to encourage charitable activity.[82] Federal tax subsidies to charities predate most of the tax code.[83] Tax subsidies by states began before the American Revolution.[84]

In contrast, the restrictions prohibiting endorsement of candidates by 501(c)(3) organizations only emerged in 1954, when then-Senator Lyndon B. Johnson added an amendment to the Revenue Act of 1954 in order to limit the power of his opponent in the coming primary election, who was backed by a charitable organization.[85] The ban was proposed on the floor of the Senate, without the benefit of committee review.[86] If the purpose of the speech restriction was to favor one candidate over the other, the time-tested practice of tax-deductibility ought not be thrown out with it.[87]

Tax-deductibility for charities also serves several policy goals.[88] Subsidizing charity encourages generosity, which helps counter the free-rider problem inherent to the public goods charities

81. *See* G.S.G., Annotation, *Exemption of charitable organization from taxation or special assessment*, 34 A.L.R. 634 (1925) (explaining the legal rationales upon which the exemption is based).

82. *See generally* Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 675–80 (1970) (describing the ways that colonial governments and the early U.S. Congress exempted churches from property tax).

83. Tariff Act of 1894, ch. 349, § 32, 28 Stat. 556 (1894).

84. *See Walz*, 397 U.S. at 677–78, 682 (1970) (noting that tax subsidies of churches were widespread in colonial days and in the early United States); Joseph V. Sliskovich, *Charitable Contributions or Gifts: A Contemporaneous Look Back to the Future*, 57 UMKC L. REV. 437, 446 n.37 (1989) (explaining that American charity and gift law originated in pre-American Revolution English law).

85. Hopkins, *supra* note 10, at 608.

86. Hopkins, *supra* note 10, at 608 n.6 (citing 100 Cong. Rec. 9604 (1954)).

87. See Colinvaux, *supra* note 5, at 5–9, for an extensive history of Senator Johnson's amendment.

88. *But see* Stanley Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 HARV. L. REV. 705, 707–11 (1970) (arguing that a tax deduction is generally inferior to a direct subsidy as a means of achieving policy goals, because tax deductions are less equitable and more difficult to develop administer).

provide.[89] Subsidizing charity may also change an organization's focus in a way that increases the amount of charitable work provided. For example, Jill Horwitz found that not-for-profit hospitals were more likely to offer unprofitable services than for-profit hospitals.[90] Eliminating tax breaks for charities because we are afraid of what they might say would set back all of these policies, subjecting them to the market failures the tax breaks were designed to mitigate.

B. *Flooding the 501(c)(3) Form*

One concern with allowing 501(c)(3) organizations to speak while retaining their tax-deductibility is that many other groups may begin to organize themselves under section 501(c)(3) just for tax-deductibility. This is a danger, but it will be mitigated by the other restrictions on 501(c)(3) organizations. 501(c)(3)s must be:

> [O]rganized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals[.][91]

Because this substantially limits the range of organizations that could fit within this description, the use of the 501(c)(3) form will remain somewhat limited.[92]

In addition, Congress could pass new legislation to create a framework that increases tax advantages for charitable *activities*, rather than for charitable *organizations*. The law already makes

89. David M. Schizer, *Subsidizing Charitable Contributions: Incentives, Information and the Private Pursuit of Public Goals* 2 (Columbia Law & Econ., Working Paper No. 327, 2008), *available at* http://ssrn.com/abstract=1097644.

90. Jill R. Horwitz, *Why We Need the Independent Sector: The Behavior, Law, and Ethics of Not-For-Profit Hospitals*, 50 UCLA L. REV. 1345, 1367–68 (2003).

91. 26 U.S.C. § 501(c)(3) (Supp. IV 2006).

92. There is also a limitation that "no part of the net earnings" of the 501(c)(3) organization "inures to the benefit of any private shareholder or individual[.]" 26 U.S.C. § 501(c)(3). This will probably not pose any real barrier though, because for-profit organizations can create separate 501(c)(3) entities, donate to them for tax deductions, then speak through them.

analogous distinctions,[93] though admittedly the issue becomes more difficult when dealing with religious charities.[94]

C. *501(c)(3) Organizations and Religion*

Because religious groups are often organized as 501(c)(3) organizations, a number of commentators have considered whether tax-deductibility violates the Establishment Clause.[95] Other commentators have asked whether these speech restrictions violate the Free Exercise Clause.[96] Because so much has already been said on these topics, I will only briefly discuss the most relevant case, *Walz v. Tax Commission.*[97] For further depth, I recommend the articles cited above.

In *Walz,* the plaintiff argued that exempting religious organizations from paying property tax violated the Establishment Clause.[98] The Supreme Court recognized the difficulty of reconciling the Establishment Clause with the Free Exercise Clause, "both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other."[99] Because of this difficulty, the court found that the "First Amendment . . . does not say that in every and all respects there shall be a separation of Church and State."[100] The Court then listed various subsidies that flow from the government to churches, including tax-exemptions such as those for federal income tax and property tax[101] and indirect subsidies such as paying bus fares for students attending

93. *Compare* 26 U.S.C.§ 501(c) (describing tax-advantaged organizations), *with* 26 U.S.C.§ 183(a) (2006) (describing tax-advantaged activities).

94. *See* Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 674 (1970) (stating that "[t]o give emphasis to so variable an aspect of the work of religious bodies would introduce an element of governmental evaluation and standards as to the worth of particular social welfare programs, thus producing a kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize").

95. *E.g.*, Jennifer M. Smith, *Morse Code, Da Vinci Code, Tax Code and . . . Churches: An Historical and Constitutional Analysis of Why Section 501(c)(3) Does Not Apply to Churches*, 23 J.L. & POL. 41, 81 (2007) (arguing that treating churches differently than other tax-exempt organizations probably does not violate the Establishment Clause).

96. *E.g.*, Stephanie A. Bruch, *Politicking from the Pulpit: An Analysis of the IRS's Current Section 501(c)(3) Enforcement Efforts and How It Is Costing America*, 53 ST. LOUIS U. L.J. 1253, 1265 (2009); Smith, *supra* note 84, at 81.

97. 397 U.S. at 664.

98. *Id.* at 667.

99. *Id.* at 668–69.

100. *Id.* at 669 (internal citations and quotations omitted).

101. *Id.* at 676.

parochial as well as public schools and providing textbooks for parochial schools.[102]

The Court held that the property tax-exemptions were a "reasonable and balanced" attempt to guard against religious intolerance.[103] The Court also found that the purpose of the exemption was "neither the advancement nor the inhibition of religion," finding it relevant that the exemption had not "singled out one particular church or religious group or even churches as such; rather, it has granted exemption to all houses of religious worship within a broad class of property owned by non-profit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups."[104]

The reasoning in *Walz* suggests that lifting the speech restriction against 501(c)(3) organizations while retaining tax-deductibility would not violate the Establishment Clause. *Walz* explained that:

> Adherents of particular faiths and individual churches frequently take strong positions on public issues including, as this case reveals in the several briefs amici, vigorous advocacy of legal or constitutional positions. Of course, churches as much as secular bodies and private citizens have that right. No perfect or absolute separation is really possible; the very existence of the Religion Clauses is an involvement of sorts—one that seeks to mark boundaries to avoid excessive entanglement.[105]

The Court found no distinction between speech by individuals or religious groups before concluding that the property tax-exemption was constitutional. According to the *Regan* Court, tax-exemptions and tax-deductions are both "form[s] of subsidy that [are] administered through the tax system.[106] So even according to *Regan*, lifting the speech restriction against 501(c)(3) organizations while retaining tax-deductibility would change only the degree of the subsidy, which is within Congress's power.[107] There is also no reason to suspect that the

102. *Id.* at 670–72.
103. *Id.* at 673.
104. *Id.* at 672–73.
105. *Id.* at 670.
106. Regan v. Taxation with Representation of Wash., 461 U.S. 540, 544 (1983).
107. *Id.* at 549.

other concerns found in *Walz*, such as singling out religion from other non-profits, would be present.

Because the change is merely a change of degree within the province of Congress, and no additional concerns mentioned in *Walz* are present, lifting the speech restrictions against 501(c)(3) organizations is unlikely to violate the Establishment Clause.

V. CONCLUSION

After *Citizens United*, for-profit corporations can speak because "the worth of speech 'does not depend upon the identity of its source.'"[108] Overturning *Regan* would merely recognize that speech from the heart is as valuable as speech from the wallet.

Because the restrictions on political speech by non-profit organizations were premised on assumptions the Court rejected in *Citizens United*, *Regan* is effectively abrogated and 501(c)(3) organizations now have the right to fully engage in political speech.

108. Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 904 (2010) (quoting First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 777 (1978)).