THE QUEST TO SAVE JOURNALISM: A LEGAL ANALYSIS OF NEW MODELS FOR NEWSPAPERS FROM NONPROFIT TAX-EXEMPT ORGANIZATIONS TO L3CS

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1. INTRODUCTION

The proliferation of online news sources masks a deepening crisis in American journalism. Newspapers, which continue to be the linchpin of original news reporting, are facing unprecedented economic pressures—largely due to the rise of new media—that have forced nearly all major newspapers to lay off large numbers of journalists, reduce the scope of coverage, and sometimes cease operating entirely. The current economic crisis has only exacerbated existing forces already undermining the viability of the newspaper industry. The traditional support from commercial advertising and paper subscription base now seems antiquated, and the question looming before American journalism is what the next operating model will be. As such, a broad spectrum of publicly minded individuals and institutions has tried to find solutions for the ailing industry. One proposal that has gained traction has been to allow commercial newspapers to qualify for tax exemption. What has been lacking thus far is a comprehensive legal analysis of what a tax-exempt nonprofit newspaper can and should look like. This Article seeks to fill that gap by explicating the viability, problems, and benefits of particular legal structures these nonprofit newspapers might employ.

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3 See, e.g., sources cited supra note 2.

Newspapers are crucial to the functioning of a democratic society. Historically, democracy has relied heavily upon the exchange of information relayed through the widespread distribution of information through newspapers. French political philosopher Alexis de Tocqueville noted in the 1800s that newspapers were the principal modes of communication and association for the American public, and political theorist Gabriel Tarde believed that newspapers were what wove people together in democratic dialogue.

More recently, Benedict Anderson, professor at Cornell University, has noted that newspapers are part of what helps form the “imagined communities” of nationhood, bringing together people in common conversation. Newspapers are a source of conversation, but the journalism they contain is also a way in which democracy is engaged and acted out. Journalism scholar James Carey has gone so far as to say that democracy is communication (afforded by journalism). In addition, another journalism scholar, Michael Schudson, has stated that journalism performs seven essential functions for democracy: informing the public, investigating those in power, analyzing events or complicated narratives, providing social empathy, creating a public forum, serving as a place for mobilization, and publicizing representative democracy. Newspapers are crucially important to American democracy because they are the primary source for news in the United States, and without newspapers, many communities will find themselves without people who are regularly employed to question those in power and to help preserve the community conversation that is so crucial to the type of civic life imagined by de Tocqueville and Tarde.

This Article attempts to demystify the discourse about nonprofit news as well as draw attention to the crisis in journalism for those not in journalism circles. As such, Part II begins by describing the state of the newspaper industry. After considering the history of government intervention in news media, Part III breaks down the current legal landscape that forces commercial newspapers to operate as

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5 See Jürgen Habermas, The Public Sphere: An Encyclopedia Article, 3 NEW GER. CRITIQUE 49, 49 (1964).
10 MICHAEL SCHUDSON, SIX OR SEVEN THINGS NEWS CAN DO FOR DEMOCRACY, IN WHY DEMOCRACIES NEED AN UNLOVABLE PRESS 11, 13–25 (2008).
11 DOWNIE & KAISER, supra note 1, at 64; see also Ben Fritz, ‘Old Media’ Still Main Source, Study Finds, L.A. TIMES, Jan. 11, 2010, at B3 (“As the number of sources for news proliferates on digital platforms, most original reporting still comes from newspapers, television and radio.”).
12 Bowers, supra note 4; Guensburg, supra note 4.
for-profit entities. First, it presents an overview of tax-exempt nonprofit organizations. Second, it considers the current law of tax exemption as it applies to news organizations generally. Third, it argues that extending tax exemption to commercial newspaper publishers is theoretically justified. Finally, Part IV identifies and evaluates potential new models for the commercial newspaper industry, including both tax-exempt nonprofit models and a promising hybrid form of entity, the “low-profit limited liability company” (L3C). In considering these models, we seek to anticipate potential problems that a newspaper organization may face when adopting the form—from insufficient financial support to content restrictions—and offer structural and planning solutions to these problems. While we ultimately have reservations about the efficacy of these new models to save newspapers, we remain hopeful and encourage legislators and struggling newspaper organizations to carefully consider these options as they respond to the current crisis in the newspaper industry.

II. THE ECONOMIC LANDSCAPE: FAILING MODELS OF NEWSPAPER CORPORATIONS

A. Newspapers in Decline

Newspapers are the primary source of original news gathering in the United States, making them crucially important to the survival of American democracy and civil discourse. A 2010 Pew Study conducted of the Baltimore news ecosystem found that “old media” did most of the original news reporting, with most of it coming from newspapers. John Carroll, former Los Angeles Times editor and overseer of over a dozen Pulitzer Prizes, has estimated that 80% of news comes from newspapers, and he maintains that no one has given him a figure that suggests otherwise. Paul Starr, founder of the American Prospect and professor at Princeton University, argues that newspapers are “civic alarm systems” that keep...
an eye on the state.\textsuperscript{16} According to Starr, newspapers are the heart of public affairs coverage and are responsible for rigorous fact-checking and scrutiny.\textsuperscript{17}

Even in an age of new media, newspapers remain relevant because of their role in serving as a primary source of news.\textsuperscript{18} For example, John Kelly, the founder of Morningside Analytics (an organization devoted to online social network analysis), observed that even the most politically polarized blogs still rely on mainstream news articles when commenting on current events, and he concluded that newspaper articles are the common thread of the blogosphere.\textsuperscript{19} Leonard Downie, Jr. and Michael Schudson, professors of journalism and communication, make a similar case for institutionalized news gathering by print news organizations, noting:

We would be reminded that there is a need not just for news but for newsrooms. Something is gained when reporting, analysis, and investigation are pursued collaboratively by stable organizations that can facilitate regular reporting by experienced journalists, support them with money, logistics, and legal services, and present their work to a large public. Institutional authority or weight often guarantees that the work of newsrooms won’t easily be ignored.\textsuperscript{20}

\textsuperscript{16} Starr, supra note 13, at 28 (citing a Pew study from 2006, which noted that a typical metro paper ran seventy stories a day, counting local, national and business—but not sports and style, as compared to the ten to twelve stories a day reported on television, which focused mostly on fire and crime).

\textsuperscript{17} Id.

\textsuperscript{18} But see Jeff Jarvis, No Newspapers at Any Price, HUFFINGTON POST (May 2, 2009, 4:10 PM), http://www.huffingtonpost.com/jeff-jarvis/no-newspapers-at-any-pric_b_195189.html (noting observations that the newspaper print business model is unsustainable and predictions of its eventual extinction); Newspapers and Thinking the Unthinkable, CLAY SHIRKY, (Mar. 19, 2009, 9:22 PM), http://www.shirky.com/weblog/2009/03/newspapers-and-thinking-the-unthinkable (detailing the failure of various business models aimed at preserving the print newspaper, concluding that “[t]here is no general model for newspapers to replace the one the internet just broke,” and arguing that what will ultimately save the news is a new model of journalism, not a new model of newspaper); Jay Rosen, Top 10 Ideas of ’04: Open Source Journalism, or “My Readers Know More than I Do,” PRESSTHINK (Dec. 28, 2004, 12:58 AM), http://journalism.nyu.edu/pubzone/weblogs/pressthink/2004/12/28/tpm04_opsc_p.html (arguing that open source journalism is replacing the traditional newspaper model).


In light of the proliferation of online journalism, via blogs and social media, it is tempting to assume that newspapers could simply disappear. At first glance, most Americans do not get their online news from newspapers, but instead most commonly from MSNBC, CNN, Yahoo, AOL—and then, in fifth place, from the New York Times. But the reality is that much of this news can be traced to news that is more deeply and thoroughly reported by newspapers. Furthermore, most online blogs provide little original news reporting. The Huffington Post, for example, in one week only had 18% original content. Newspapers do the dirty work other media institutions do not. They play a significant role in shaping the discourse of American democracy by providing the solid, institutional fabric of accurate and disciplined reporting that is essential to expose abuses of power and social problems.

However, newspapers are facing a terrific challenge that some have called a “perfect storm.” This perfect storm arises not only from a decline in the country’s fortune overall, but also from a turn to the Internet for news and information and a reduction in newspapers’ traditional source of revenue—local advertising. Newspapers have traditionally relied upon local advertising to support most of their news ventures, while reader subscriptions have subsidized very little of newspapers actual journalism. As such, newspapers depend upon advertising receipts to recover expenses—and hopefully to realize a profit—after running presses, delivering papers, and paying wages and other operating costs associated with reporting. Local advertising, in particular, has been especially important to

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25 Even in the time of Walter Lippmann, reader loyalty was not what brought in money to news organizations. See WALTER LIPPmann, PUBLIC OPINION 328 (1922) (“The loyalty of the buying public to a newspaper is not stipulated in any bond. In almost every other enterprise the person who expects to be served enters into an agreement that controls his passing whims. At least he pays for what he obtains. In the publishing of periodicals the nearest approach to an agreement for a definite time is the paid subscription, and that is not, I believe, a great factor in the economy of a metropolitan daily.”).
many big-city newspapers. For example, in some years, the *Los Angeles Times* has derived all of its profits from classified advertising.

But newspapers have lost local advertising for a variety of reasons. First, advertising revenue from classified ads for jobs, car sales, housing, and other products and services has largely moved online; Web sites like Craigslist and Monster.com have significantly reduced one of the main sources of income for newspapers. Second, newspapers lost some of their most reliable advertisers when big department stores that used to buy large newspaper ads either merged or went out of business. Similarly, car companies have been increasingly pinched for pennies, causing them to cut back on large newspaper ads, particularly following the most recent recession. Third, advertising companies are finding that they no longer need newspapers to market to their consumers and that they can directly market to them through online tactics. Thus, newspapers have seen a significant reduction in three of the major sources of ad revenue.

Meanwhile, newspaper circulation has continued to decline, potentially compounding the revenue difficulties newspapers are facing. Newspaper circulation began to decrease in the 1990s, with less than 1% reduction each year in the industry overall: consumers shifted away from newspapers to cable TV and

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26 *Pickard et al.*, *supra* note 24, at 7, 10.
30 Greg Bensinger, *Newspapers Find Some Relief in GM, Mercedes-Benz Ads*, BLOOMBERG (Oct. 16, 2009, 16:13 EDT), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=arzt0uUkGpw (“Auto ads comprised 5.5 percent of national ad spending last year, down from 11 percent in 2005, according to NAA data. That was the most recent year that car and truck sales rose in the U.S.”).
32 The salvo for the news industry was supposed to be online advertising on their news web sites, but that appears to have been a false hope. As the 2009 State of the News Media report notes

It is now all but settled that advertising revenue—the model that financed journalism for the last century—will be inadequate to do so in this one. Growing by a third annually just two years ago, online ad revenue to news websites now appears to be flattening; in newspapers it is declining.

other news sources; suburban development disconnected people from the metropolitan dailies; and most significantly, the birth of online news meant that news no longer had to be delivered to doorsteps at cost, but could often be obtained for free online. Since then, circulation declines have accelerated dramatically. In 2008, newspaper circulation dropped 4%, and from 2001 to 2008, the circulation for daily newspapers plummeted by about 13.5%. City newspapers, especially, have struggled to maintain their circulation numbers. The *San Francisco Chronicle*, for example, lost 25% of its readers in a single year, and the *Houston Chronicle* lost 14% of its print readers. More than one hundred newspapers closed in 2009, and while these were mostly small papers, they also included a number of big city newspapers. Lower circulation numbers may further exacerbate problems with the existing advertising-based revenue model. As circulation continues to decline, there will be fewer readers, and fewer readers will mean that fewer people will view print ads. Consequently, newspapers may be forced to lower the prices they charge customers who still advertise in their newspapers.

Due to these economic challenges, newspapers around the country are shutting down. Fitch Ratings predicted that early this decade there would be at least one major city without a major newspaper. There were several large-scale newspaper casualties in 2009: in February, Denver’s *Rocky Mountain News*

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33 See Richard Pérez-Peña, *Newspaper Circulation Falls by More than 10%*, N.Y. TIMES, Oct. 27, 2009, at B3. Newspapers made what could have been dubbed a colossal mistake by giving away their content for free online when the Internet was new—and there are still few exceptions to this model, although the *Wall Street Journal* is one of them. Nikki Usher, *The Business Model for News Is and Always Has Been Broken and Rupert Murdoch Can’t Fix It*, ONLINE JOURNALISM REV. (Dec. 22, 2009), http://www.ojr.org/ojr/people/nikkiusher/200912/1808/.

34 *State of the News Media*, supra note 32 (follow “Newspapers” hyperlink; then follow “Audience” hyperlink).


36 Cowan & Westphal, supra note 27, at 5.


closed, while in March, the *Tucson Citizen* closed and the *Seattle Post-Intelligencer* closed its print edition. Meanwhile, other newspaper companies are going bankrupt. Newspaper job losses have mounted from more than 2,256 in 2007, to 15,984 in 2008, to 14,861 in 2009, underscoring the mounting difficulties newspapers are facing as they attempt to cut costs by trimming labor.

With fewer reporters on hand, there is a danger that the number and quality of stories will decline. Newspapers no longer have the staff power to devote to large projects. And there are fewer eyes on public officials than ever before; the number of newspaper reporters covering state capitals full-time fell from 524 in 2003 to 355 in 2009. Washington political reporting is similarly threatened, particularly as more mid-level papers pack up and go back to their metro areas. The *San Diego Union-Tribune* no longer has a Washington, D.C. bureau, even though its bureau, in conjunction with metro staff, was responsible for clamping down on Representative Randy “Duke” Cunningham’s corruption—a feat that earned them a Pulitzer.


Downie & Schudson, *supra* note 20. Even when newspapers do have enough reporters to execute large projects, many are instead using that labor to produce stories for the web or more focused consumer-friendly journalism. *Id.*

Id.


Journalism” notes, “[a] large share of newspaper reporting of government, economic activity, and quality of life simply disappeared.”

In sum, the fundamental problem facing newspapers is this: newspapers provide their content online for free, but they cannot afford to continue reporting because the traditional advertising-based business plan is failing in the new media era.49 As noted earlier, newspapers’ Web audiences are strong, but news organizations have not found a way to monetize these audiences because most papers’ content remains free while online ad spending is flattening.50 Becoming online-only is a step two newspapers have taken—the Wisconsin Capital Times and the Christian Science Monitor. But most newspapers continue to make the bulk of their revenue from print circulation. At this point, the Los Angeles Times has claimed it can fund its payroll with online advertising, but it would only meet payroll, not reporting expenses.51 At the New York Times, despite having seventeen million unique visitors a month, print still remains the primary source of revenue.52 Without revenue coming in, declining print circulation means that newspapers are being forced to make cuts—chipping into the valuable reporting that makes them worthwhile for consumers to read.53 With newspapers in danger, democracy is in danger as well, due to the lack of “civic alarm systems” that provide a check on


49 While some news organizations, such as the Los Angeles Times, have said that they can support the payroll of their news department through online advertising, this does not mean that funding payroll can also support funding reporting. Jeff Jarvis, History in the Making in LA as Online Ads Hit Target, GUARDIAN (Jan. 12, 2009), http://www.guardian.co.uk/media/2009/jan/12/la-times-online-advertising. The New York Times Baghdad bureau, for instance, costs $3 million a year to staff. Seth Mnookin, The New York Times’s Lonely War, VANITY FAIR, Dec. 2008, at 296, 296.

50 State of the News Media, supra note 32.

51 Jarvis, supra note 49.


power. Because of the essential role newspapers serve in a democracy, it is crucial to find ways to keep newspaper journalism alive.

B. Government Intervention in the News Industry

Increasingly, the government is paying attention to the fate of the news industry. In late September 2009, the Joint Economic Committee of the U.S. Congress (JEC) convened a hearing on the future of the newspaper industry under the premise that “[o]ver the past year, dozens of daily newspapers have shut down their presses creating a ripple effect through communities, having consequences for local economies, and removing a critical check on government accountability and corruption.”54 Testimony was taken from the publisher of citizen journalism Web site The Washington Independent, Tom Rosenstiel, Director of the Pew Center for Excellence in Journalism, Paul Starr, a Princeton sociologist and co-founder of the American Prospect, and the president of the Newspaper Association of America.55

In this conversation, the importance of the newspaper industry was impressed upon the JEC. Rosenstiel said:

A good deal of what is carried on radio, television, cable [and] wire services begins in the newspaper newsrooms. These media then disseminate it to a broader audience. In every community in America I have studied in 26 years of being a press critic, the newspaper in town has more boots on the ground, more reporters and editors than anyone news organization in the community, usually more than all the other media combined. 56

In addition, the Federal Trade Commission has also taken an interest in the future of news—convening hearings in December 2009 and in March and June of 2010.57 These hearings brought together publishers from major newspapers such as media mogul Rupert Murdoch, academics, journalists, and new media specialists.58

These presentations to Congress reveal that when we imagine the news ecosystem in the twenty-first century, the newspaper is still the largest originating,

56 Id. at 7 (statement of Tom Rosenstiel, Director, Pew Project for Excellence in Journalism).
58 Id.
gathering source. And as the situation for newspapers grows increasingly grim, many advocates of newspapers are looking to the government as a means to help rescue the news industry.

In fact, there is historical precedent for government involvement in the news industry, as the news media has always received some form of subsidy from the government to help insure its continued survival. Since the early history of America, newspapers have enjoyed favorable postage rates in order to increase the spread of news to more distant outposts where mail delivery may otherwise be difficult, and until the establishment of the government printing office in 1860, contracts to print legislation and records of state and federal bodies were a major source of income for news organizations. Today, these traditional subsidies continue in modified forms as low-circulating news magazines receive reduced postal rates, and governments publish notices in newspapers of legal events like court-ordered name changes and major auctions for relinquished property. In fact, in a four-week study of the Wall Street Journal, the government was the top purchaser by column inches of ad space.


60 PAUL STARR, THE CREATION OF THE MEDIA 3, 93–94 (2005). Low circulating news magazines still enjoy postage subsidies, but this is increasingly in jeopardy as the postal service itself falls on hard times. When Congress was set to raise these rates in 2007, small circulation news magazines were in an uproar based on the argument that these postage subsidies were crucial to democracy. John Nichols, Going Postal: Arguing for Media Diversity, Debate & Democracy, THE NATION (Oct. 30, 2007), http://www.thenation.com/blog/going-postal-arguing-media-diversity-debate-democracy; Megan Tady, Post Office to Favor Big Mags, Spike Rates for Small Pubs, NEW STANDARD (Apr. 25, 2007), http://newstandardnews.net/content/index.cfm/it/ems/4741. Another rate hike followed in May 2009. State of the News Media, supra note 32.

61 STARR, supra note 60, at 93–94.

62 COWAN & WESTPHAL, supra note 27, at 1. From 1792 to 1970, postal rates were subsidized about 75%, as compared to the current 11%. Id.

63 See N. J. Admin. Office of the Courts, How to Ask the Court to Change the Name of Your Minor Child under the Age of 18, at 4, http://www.judiciary.state.nj.us/prose/10552_namechg_minor.pdf (last updated Dec. 2009) (stating that the New Jersey Courts require the hearing and the final judgment for name changes to be published in a newspaper); see also MASS. GEN. LAWS. ch. 135, § 8 (2009) (“If such property remains unclaimed in the possession of such police department or member thereof for one month and the owner thereof or his place of abode or business is unknown . . . notice of the time and place of sale, with a description of the property to be sold, first being given by publishing the same once in each of three successive weeks in a newspaper published in such city.”).

64 COWAN & WESTPHAL, supra note 27, at 10. However, increasingly these same government actions that appear in newspapers are allowed by judges and government agencies to appear online only. Id.
Other forms of subsidies have come for the broadcast industry thanks to the Federal Communications Commission (FCC), particularly through the creation of public media. Congressional appropriations account for about 12% of Corporate Public Broadcasting’s (CPB) annual budget, while 5.8% of National Public Radio’s annual budget comes from federal, state, and local government. Fights over the funding accorded to national public broadcasting have been quite bitter over the years, even though the subsidies represent a miniscule portion of the national budget. Because the CPB’s appropriations expire every two years, its


CPB does not produce any of its own programming; instead, programming is left to PBS, NPR, and its affiliates. Despite its small government subsidy, NPR relies primarily on funding from corporate underwriting, membership fees from eight hundred sixty public radio stations, donations from foundations and individuals, and from a $200 million endowment given by Joan Kroc, the widow of McDonald’s owner Ray Kroc. Ditslear, supra; John Ydstie & Kevin Klose, Philanthropist Joan Kroc Leaves NPR $200 Million Gift, NAT’L PUB. RADIO (Nov. 6, 2003), http://www.npr.org/templates/story/story.php?storyId=1494600; Public Radio Finances, supra. But see COWAN & WESTPHAL, supra note 27, at 2 (estimating that about 40% of the money for public broadcasting—$1.14 billion of $2.85 billion—comes from a combination of state and federal funding).

66 Fights in Congress have broken out over the appropriations of funding to public broadcasting on the charge that politicians find the programming objectionable (often too liberal), though media advocacy groups dispute this charge. Steve Rendall & Peter Hart, Time to Unplug the CPB, FAIR (Sept./Oct. 2005), http://www.fair.org/index.php?page=2671. One of the biggest fights was in the mid-1990s, when Speaker of the House Newt Gingrich announced that he wanted to “zero out” funding to the CPB, intending to fight to privatize it. Gingrich Wants to ‘Zero Out’ Federal Funding to CPB, CURRENT, Dec. 12, 1994, available at http://www.current.org/mo423.html. Senator Larry Pressler, who chaired the Senate Commerce Committee which gives funding to the CPB, had this to say about it in 1994:

Well, I haven’t contributed the last few years because I’ve gotten increasingly upset. And I voted against the entire Corporation for Public Broadcasting funding last year because I have become upset at the political twist that I believe public TV constantly puts on things. For example, I was watching this nice baseball series and, God, every night I’d have to listen to Mario Cuomo tell about his boyhood. It just seems, though, that all their favorite people are from the American left. And true, they do throw in a few folks from the middle or right here and there, but I’ve seen it again and again—the twists on the news, the subtle twists, are from the liberal left.

Id.
appropriations are continually a source of contention, subject to partisan attacks.\textsuperscript{67} Despite recent funding threats,\textsuperscript{68} funding for the CPB has remained fairly flat from fiscal year 2007 to the projected 2010 budget, at a figure of about $400 million.\textsuperscript{69}

Both of the Free Press report and the Downie and Schudson report suggest innovative ways for transforming the government subsidy of the press. One view put forth by Free Press is that Americans should receive a $200 tax credit to spend

\begin{itemize}
\item \textit{Glen J. McLoughlin, Cong. Research Serv., RS22168, The Corporation for Public Broadcasting: Federal Funding Facts and Status} 1–2 (2005);
\item Patricia Aufderheide, \textit{Public Television, Museum of Broadcast Comm.}, http://www.museum.tv/eotvsection.php?entrycode=publictelevi (last visited Dec. 25, 2010) (“[CPB] has . . . acted as the lightning rod for Congressional discontent, since it is the funnel for federal tax dollars.”).
\item Memorandum from William P. Tayman, Jr. to CPB Board of Directors 1 (July 26, 2007), available at http://www.cpb.org/aboutcpb/leadership/board/resolution/070806_fy08operatingbudget.pdf (“FY 2008 is the third consecutive year of a flat appropriation amount of $400 million.”); CPB, FY 2010 OPERATING BUDGET 1 (2009), available at http://www.cpb.org/aboutcpb/leadership/board/resolutions/090915_fy10OperatingBudget.pdf (showing a federal appropriation for CPB of $400 million dollars in 2009 and $420 million dollars in 2010). While NPR is largely insulated from cuts because of its internal funding structure, smaller stations are not, as they depend on government subsidies to make up their budgets along with listener contributions. Paul Farhi, \textit{Public Broadcasting Targeted House; Panel Seeks to End CPB’s Funding within 2 years}, WASH. POST, June 10, 2005, at A01; David Chircop, \textit{Public TV and Radio at Risk for Cuts?; Broadcasters believe Congress will not sustain proposed cuts in their funding}, HERALD (Feb. 13, 2008), http://www.heraldnet.com/article/20080213/NEWS01/615755595.
\item Shortfalls in government handouts, though, are death knells to local stations, which have to pay fees to NPR or PBS simply to air shows produced by these organizations and often lack the resources to put out their own programming. But there is variety among the stations in their capacity to survive and produce news. “[M]any stations have only a single full-time journalist on staff, [while] some big-city stations and state networks employ 30 journalists or more.” Karen Everhart, \textit{Talks Sharpen Focus on Local News}, CURRENT.ORG (Nov. 9, 2009), http://www.current.org/news/news0921local_news.shtml. It is these bigger networks, such as Minnesota Public Radio, for instance, that can raise more money, as opposed to the one-journalist small town newspaper. Id.
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on daily newspapers. Other Free Press suggestions are: a government subsidy of newsprint; an emergency subsidy to newspapers as they transition to other models; a tax credit for newspapers for half of journalists’ salaries; and a direct injection of money into newspapers, in line with France and Sweden’s example, by giving free subscriptions or offering aid to ailing newspapers. Downie and Schudson proposed other options, such as creating a national fund for local news out of Federal Communications Commission (FCC) license fees and having the CPB step up local newsgathering efforts. One of their most significant suggestions, however, is another approach: making it easier for newspapers to qualify as tax-exempt nonprofits.

III. THE LEGAL LANDSCAPE: NEWSPAPERS’ LIMITED ACCESS TO TAX EXEMPTION

A. Understanding Tax-Exempt Nonprofit Organizations

1. For-Profit Entities v. Nonprofit Entities

At the outset, it is important to understand that not all nonprofit organizations are tax-exempt organizations. A nonprofit organization is an entity formed under state law, and it may or may not qualify for tax exemption on the state or federal level. Moreover, although all tax-exempt organizations are nonprofits, not all tax-exempt organizations are 501(c)(3) charitable organizations eligible for deductible contributions from the public. Rather, the world of tax-exempt organizations consists of at least twenty-nine categories of tax-exempt organizations with various associated benefits and regulatory requirements: some can accept deductible donations and foundation money, while others cannot, and some are prohibited from substantial lobbying, while others can engage in unlimited lobbying. Most

71 Id. (follow “Postal and Print Subsidies” hyperlink; then follow “Direct Government Stimulus” hyperlink; then follow “International Subsidy Models” hyperlink).
72 Downie & Schudson, supra note 20, at 47–50.
73 Id. at 45–46.
75 Id. Moreover, not all 501(c)(3) charitable organizations are eligible to receive deductible donations. See I.R.C. § 170(c)(2)(B) (2006) (excluding 501(c)(3) organizations formed for the purpose of public safety testing).
76 See I.R.C. § 501(c)(3). Note that Bruce Hopkins has further broken down these categories to identify seventy-two distinct categories of tax-exempt organizations. HOPKINS, supra note 74, at 1117.
77 See I.R.C. § 170(c)(2)(B) (listing the types of charitable organizations that can accept deductible contributions).
78 Compare id. § 501(c)(3) (prohibiting certain lobbying activities), with id. § 501(c)(4) (lacking limitations on legislative lobbying).
advocates have proposed that newspaper organizations be granted 501(c)(3) eligibility, but it is important to recognize that the full potential for tax-exempt newspapers probably lies in combination structures that take advantage of various features of different tax-exempt categories.

Before considering these potential tax-exempt models for newspapers, it is helpful to first understand the financial differences between for-profit and nonprofit organizations. The main potential for tax-exempt models of newspaper organizations is a change in funding. It is common among academics to speak of today’s newspapers as reliant on “advertising funding” and to contrast this model with a “donor-funded” tax-exempt model.\(^79\) While the notion of advertising funded newspapers is not entirely incorrect—although advertising sales are the main revenue-producing components of today’s newspapers—the comparison of advertising revenues to donor contributions is misleading at best. To understand why this comparison fails, it is useful to consider the financial structures and operating activities of for-profit and nonprofit corporations generally.

The capital structure of a for-profit corporation consists of equity financing (cash contributions by shareholders) and often debt financing (cash contributions by creditors).\(^80\) A for-profit newspaper corporation puts this money to work for the purpose of generating profits. It might invest some of these funds in various types of long-term assets like an office building or printing press, and it will spend some on current operating expenses like wages and paper. To the extent that gross revenues exceed current expenses, the newspaper makes a profit that it can choose to distribute to shareholders or creditors or retain for future use.\(^81\) In the meantime, if the newspaper corporation needs additional cash for a project, it can raise funds either by selling more stock (equity financing) or by borrowing more money (debt financing).\(^82\) Various considerations help a corporation decide whether to seek equity funding or debt funding, but regardless of the funding source, one fact is the same: the person who contributed the funds will eventually want the money back plus a return on the investment. A corporation that consistently loses money is, in most cases, undesirable to investors and risky to lenders, and its sources for funding will dry up. When it is no longer able to meet its current expenses, the corporation will be lucky to survive.

A nonprofit corporation has a different financial structure. A nonprofit is prohibited from having profit-seeking shareholders, so it will not raise equity funding.\(^83\) It may fund related operations with debt financing, but like any company, it must determine how much debt its revenues can support in order to

\(^79\) See Bowers, supra note 4 (“The future of journalism is a non-profit one . . . . [R]eadership donations, rather than advertising, will be the driving source of income for news organizations.”); Guensburg, supra note 4; supra text accompanying notes 2, 4.
\(^81\) See id.
\(^82\) See id.
\(^83\) See Henry Hansmann, The Ownership of Enterprise 17–18 (1996); Hopkins, supra note 74, at 5.
avoid overleveraging. Instead, many (but not all) nonprofit organizations receive their initial and ongoing funding from direct grants from the federal government, pass-through grants from states, grants from private foundations, and direct or indirect contributions from members of the public or from a small number of donors. Once funded, the nonprofit organization can, like its for-profit counterparts, invest the funds in assets or in income producing operations.

To the extent that a tax-exempt nonprofit organization’s operations further a tax-exempt purpose, income from such operations will be received tax-free. To the extent that operations are unrelated to the exempt purpose, any income generated by those activities will be taxable as if the organization was a taxable for-profit corporation. In either case, any cash inflows that exceed current expenses must be used in furtherance of the charitable purpose. If, instead, the

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87 Id. § 512(a). Unrelated business taxable income (UBTI) is defined as “gross income derived by any organization from any unrelated trade or business . . . regularly carried on by it,” less certain allowable deductions. Id. § 512(a)(1). Subject to a few narrow exceptions, an unrelated trade or business is:

[A]ny trade or business the conduct of which is not substantially related (aside from the need of such organization for income or funds or the use it makes of the profits derived) to the exercise or performance by such organization of its charitable, educational, or other purpose or function constituting the basis for its exemption under section 501.

Id. § 513(a). Tax-exempt organizations will be taxed in the same way as non-exempt organizations with respect to income earned from activities that are unrelated to the organization’s exempt purposes. Id. § 511(a)(1) (imposing a tax on UBTI in the same way as taxable income earned by a taxable corporation is taxed under section 11, which imposes the corporate tax on taxable corporations). Note, however, that there are important exceptions to the UBTI rules, including exceptions for certain passive income. See id. § 512(b) (excluding certain income from dividends, royalties, rents, and gains from sale of property).

88 See BRUCE R. HOPKINS, STARTING AND MANAGING A NONPROFIT ORGANIZATION 25 (5th ed. 2009). Note that to the extent the profits are not reinvested in operations, they may be distributed for charitable purposes. Wexler, supra note 80, at 566.
organization’s expenditures exceed its cash inflows, as is often the case, the organization looks to its donors for additional support to cover cash shortfalls. As has been pointed out by commentators, a tax-exempt commercial newspaper would not need donor funding equal to its yearly expenses, but it would need enough support to cover its current cash shortfalls.\(^89\)

In other words, nonprofit newspapers would likely continue to be advertising-funded in the sense that they would continue to look to advertising as a source of cash receipts; however, where for-profit newspapers must turn to investors to help cover their operating losses, a nonprofit newspaper must rely on donors. As explained below, the extent to which a nonprofit newspaper would have access to donor funding would be affected by whether the newspaper meets certain requirements set forth in the tax code. Moreover, unless a nonprofit newspaper qualifies for tax exemption, it will continue to be taxed as it is under current law—as a taxable business entity. Most newspapers are taxed as corporations, which are subject to two levels of tax. First, income earned by a corporation is taxed at the entity level. Second, corporate income is taxed to shareholders either as dividend income (when earnings are distributed), or as capital gain income (when a shareholder sells appreciated stock). In contrast, a tax-exempt organization pays no tax at all on income related to its exempt purpose: such income is not taxed at the entity level, and since nonprofit organizations have no shareholders, such income also escapes shareholder-level tax. Practically speaking though, today’s newspapers pay little to no income tax; because newspapers’ gross revenues are almost always offset by deductible expenditures, newspapers generate very little taxable income. For this reason, tax exemption alone would have little impact on most newspapers. The potential benefit lies rather in donor-support as an alternative source of funding.

With this background in mind, we turn now to the current law that governs tax-exempt organizations.

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\(^90\) Id. The Cardin bill, discussed infra Part IV.A.1, which would make the “Qualified Newspaper Organization” an educational organization within the meaning of 501(c)(3), implicitly acknowledges that nonprofit newspapers would continue to seek advertising sales by specifically exempting such income from the unrelated business tax. See S. 673, 111th Cong. (2009).

\(^91\) Note, however, that tax-exempt organizations are taxable on certain UBTI. I.R.C. § 511. UBTI is income earned from an active business that is not “substantially related” to the furtherance of a tax exempt purpose and is taxable under the UBTI rules. Id. § 513. Under current law, regularly selling advertisements to be printed in a publication would in most cases be taxed as UBTI. Id. § 513(c); Treas. Reg. § 1.513-1(b) (as amended in 1983).

\(^92\) See Marion R. Fremont-Smith, Can Nonprofits Save Journalism?, 65 EXEMPT ORG. TAX REV. 463, 466 (2009).
2. Tax-Exempt Organizations: An Overview

Federal tax law exempts a nonprofit organization from taxation if it is of a type described in IRC section 501(c), which lists twenty-nine broad categories of tax-exempt organizations, the most well known being the so-called charitable organizations listed in 501(c)(3). As a preliminary matter, for an organization to qualify as a 501(c)(3) charitable organization, it must be organized and operated “exclusively” for one or more of the enumerated exempt purposes, which include religious, charitable, scientific, and educational purposes. Thus, to qualify as a 501(c)(3) charitable organization, two tests must be met: the organizational test and the operational test.

The organizational test is a formal test based on the nonprofit’s articles of organization. To pass the organizational test, the articles of organization must limit the nonprofit’s purpose to one or more exempt purposes, and cannot permit the organization to engage in more than an insubstantial amount of activities that are not in furtherance of these exempt purposes. Thus, a nonprofit must pass the organizational test at formation.

In contrast, the operational test looks at how the organization functions in operation with respect to its exempt purpose. Its simplest iteration, the operational test asks whether the nonprofit’s activities (including revenue-producing businesses) accomplish or further the organization’s exempt purpose. However, a considerable amount of law has developed to complicate application of the operational test. To fully understand the operational test, at minimum, one must

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93 I.R.C. § 501(a). Organizations described in 501(d) may also qualify for tax-exempt status. Id.
94 Id. § 501(c).
95 Id. Note that despite the plain meaning of the word “exclusively,” for the purposes of the organizational test and the operational test, the word generally means “primarily.” Treas. Reg. § 1.501(c)(3)-1(c)(1) (as amended in 2008).
96 Treas. Reg. § 1.501(c)(3)-1(c)(1). Note that § 501(c)(3) requires that the organization be both organized and operated for a tax exempt purpose. I.R.C. § 501(c)(3). The “organized and operated” requirements have given rise to two tests: the organizational test and the operational test. Treas. Reg. § 1.501(c)(3)-1(a)(1). The organizational test is met when the organization’s articles of organization limit the purposes of the organization to one or more exempt purposes; and do not expressly empower the organization to engage in activities which in themselves are not in furtherance of one or more exempt purposes. Id. § 1.501(c)(3)-1(b)(1)(i). The operational test is met when the organization engages primarily in activities that accomplish one or more exempt purposes, has no part of its net earnings inure to the benefit of private shareholders or individuals, and is not an action organization. Id. § 1.501(c)(3)-1(c).
97 Id. § 1.501(c)(3)-1(a)(1).
98 Id. § 1.501(c)(3)-1(b)(1).
99 Id. § 1.501(c)(3)-1(b)(1)(i).
100 See id. § 1.501(c)(3)-1(c)(1).
101 Id.
understand the private inurement doctrine, the concept of action organizations, and the commerciality doctrine.

First, the operational test will not be met if the organization violates the private inurement doctrine. Under the tax regulations, the operational test requires that an organization’s net earnings must not “inure in whole or in part to the benefit of private shareholders or individuals.” This language has been expanded in the courts and now forms the basis for what is known as the “private inurement doctrine.” In brief, the private inurement doctrine prohibits a charitable organization from engaging in transactions that benefit certain “insiders” in their private capacity under circumstance when the insider is able to influence the organization using its position of control. For this purpose, “insider” means any person having a personal and private interest in the activities of the organization, including trustees, officers, directors, founders, members, or shareholders of the nonprofit.

Second, an organization will not pass the operational test if it is characterized as an “action organization.” An organization will be characterized as an action organization if more than an insubstantial part of its activities involve attempts to influence legislation. In addition, an organization will be characterized as an action organization if it participates in or intervenes in a political campaign in support or opposition of a candidate for public office. Though an insubstantial amount of activities intended to influence legislation or a political campaign will not cause the organization to be characterized as an action organization, a publication or distribution of written or printed endorsements will cause an organization to become an action organization.

Third, especially with respect to publications, the determination of whether the operational test is met often turns on the commerciality doctrine.

\[\text{References:}\]

102 See id. § 1.501(c)(3)-1(c)(2).
103 Id. § 1.501(c)(3)-1(c).
104 See, e.g., Airlie Found., Inc. v. United States, No. 93-5254, 1995 WL 310025, at *3–4 (D.C. Cir. Apr. 24, 1995); Church of Scientology of Cal. v. Comm’r, 83 T.C. 381, 491 (1984). Note that the private inurement doctrine has applicability to most other tax exempt organizations in addition to the charitable organizations described here.
106 See Treas. Reg. § 1.501(a)-1(c) (as amended in 1982) (defining private shareholder); see also Hopkins, supra note 74, at 564.
108 Id. § 1.501(c)(3)-1(c)(3)(ii).
109 Id. § 1.501(c)(3)-1(c)(3)(iii).
110 Id. § 1.501(c)(3)-1(c)(3)(ii)–(iii).
Specifically, if a nonprofit operates a revenue-generating business in furtherance of its exempt purpose, the activity may nevertheless be considered substantially unrelated if the business operations are similar to those used by commercial enterprises operated for profit. The commerciality doctrine will be explained in greater detail in connection with an overview of tax-exempt publishers.

If an organization fails to be organized and operated exclusively for one or more enumerated exempt purposes—religious, charitable, scientific, public safety testing, literary, educational, fostering amateur sports competitions, or preventing cruelty to children or animals—then the organization will not qualify as a charitable organization within the scope of 501(c)(3), and its status as a charitable organization will be denied or revoked. The failure to qualify under 501(c)(3) may have consequences with respect to the types of support the organization is able to attract, since, with few exceptions, only 501(c)(3) organizations can receive deductible contributions from the public.

But failure to meet the organizational and operational tests does not necessarily mean that an organization cannot qualify as another type of tax-exempt organization. For instance, an organization that fails to qualify as a charitable organization because it is characterized as an action organization may nevertheless qualify as a 501(c)(4) tax-exempt social welfare organization. Though social welfare organizations are not permitted to receive deductible contributions, they are often used in combination with charitable organizations to isolate activities that may cause the charitable organization to otherwise fail as an action organization.

A final layer of complication in the law of tax-exempt organizations is the distinction between public charities and private foundations. Private foundations are typically funded by a very small number of sources and usually engage primarily in grant-making activity. Because private foundations are subject to strict rules related to self-dealing and distribution requirements, charitable organizations often seek to avoid classification as a private foundation. Yet, every charitable organization is presumed to be a private foundation unless it can show that it is a public charity. The term “public charity” includes certain

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112 See infra note 126 and accompanying text.
115 A § 501(c)(4) social welfare organization is a nonprofit civic organization that is organized and operated exclusively for the promotion of social welfare. I.R.C. § 501(c)(4). An organization is operated exclusively for the promotion of social welfare if it is “primarily engaged in promoting in some way the common good and general welfare of the people of the community.” Treas. Reg. § 1.501(c)(4)-1(a)(2)(i) (as amended in 1990). The definition includes organizations operated for the purpose of “bringing about civic betterments and social improvements.” Id.
116 HOPKINS, supra note 74, at 352.
117 Id. at 373–85; see also I.R.C. §§ 4940–48 (imposing excise taxes on private foundations that engage in self-dealing, fail to satisfy certain income distribution requirements, own excess business holdings, make jeopardizing investments, or fail to exercise expenditure responsibility).
charitable organizations listed under 170(b)(1)(A), such as churches, educational institutions, and governmental units, and it also includes certain publicly supported organizations, or supporting organizations. Insofar as the potential options for tax-exempt newspapers cannot be fully understood without at least some engagement with the related law of private foundations, the specific issues presented by private foundation law will be addressed as they arise.

B. Current Law and Newspaper Corporations as Tax-Exempt Organizations

1. Tax Exemption and the Commercial Newspaper Publisher

Since as early as 1940 it has been at least theoretically possible to operate a tax-exempt nonprofit newspaper. In American Society of Cinematographers v. Commissioner, the court held that the monthly publication of a magazine by a charitable organization was an exempt activity, explaining: “We do not think that the petitioner is to be denied exemption from tax because of the publication of a magazine, the American Cinematographer. The publication of the magazine was necessary for the advancement of the art of cinematography. It was not published

118 I.R.C. § 509(a). Note that the definition of public charity is derived from the exceptions to the definition of private foundation. All charities are presumed to be private foundations unless a § 509(a) exception applies. I.R.C. § 508(b). Under § 509(a)(1), certain § 170(b)(1)(A) organizations are always public charities, such as churches, certain nonprofit universities, certain nonprofit hospitals, and governmental units. Id. §§ 509(a)(1), 170(b)(1)(A). Under § 509(a)(2), certain publically supported organizations qualify as public charities. Id. § 509(a)(2). Section 509(a)(2) sets forth two different support tests to determine whether an organization is publicly supported. Id. An organization will satisfy the first test if it normally receives more than one-third of its support each taxable year from any combination of gifts, grants, contributions, or membership fees, and certain gross receipts from admissions, sales of merchandise, performance of services, or furnishing of facilities in an activity that is not an unrelated trade or business to the extent that such receipts do not exceed the greater of $5,000 or 1% of total support for the year. Id. § 509(a)(2)(A). The first test does not include contributions from certain disqualified persons in the calculation. Id. An organization will satisfy the second test if it normally receives not more than one-third of its support in each taxable year from the sum of gross investment income and the excess of UBTI over the amount of tax imposed on the UBTI. Id. § 509(a)(2)(B). Finally, under § 509(a)(3), certain supporting organizations qualify as public charities. Id. § 509(a)(3). A “supporting organization” is an organization that is organized and operated exclusively for the benefit of, to perform the functions of, or to carry out the purposes of a § 509(a)(1) or § 509(a)(2) public charity. Id. Section 509(a)(3)(B) lists three types of supporting organizations. Id. § 509(a)(3)(B). A Type I supporting organization is operated, supervised, or controlled by one or more public charities. Id. § 509(a)(3)(B)(i). A Type II supporting organization is supervised or controlled in connection with one or more public charities. Id. § 509(a)(3)(B)(ii). A Type III supporting organization is operated “in connection with” one or more public charities. Id. § 509(a)(3)(B)(iii). Supporting organizations may not be controlled directly or indirectly by certain disqualified persons. Id. § 509(a)(3)(C).

for profit.\textsuperscript{120} In that case, the magazine publication was considered one of several exempt activities conducted by the charitable organization.\textsuperscript{121} This favorable treatment of publications by charitable organizations continued in the 1950s, when courts upheld the tax exemption of both an educational organization formed to publish a manual about library cataloging systems, and also a religious organization that sold religious publications to students for a small profit.\textsuperscript{122}

These early cases focused narrowly on the purpose of the publishing activities; if the primary purpose of the publishing operation was to further an exempt purpose, the organization’s tax exemption was upheld.\textsuperscript{123} Nevertheless, the government’s arguments in these early cases, which often focused on the similarities between the publishing activities and for-profit businesses, foreshadowed a decade of aggressive application of the commerciality doctrine to nonprofit publishers in the 1960s.\textsuperscript{124} To be sure, the commerciality doctrine is almost as old as U.S. tax law itself.\textsuperscript{125} But the 1960s marked a high point for the doctrine when case after case denied tax exemption to nonprofit publishers on the theory that because the publishing activities closely resembled those of commercial publishers, the organizations failed the operational test.\textsuperscript{126}

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{120} See id.
  \item \textsuperscript{121} See id.
  \item \textsuperscript{122} Saint Germain Found. v. Comm’r, 26 T.C. 648, 657–58 (1956); Forest Press, Inc. v. Comm’r, 22 T.C. 265, 269 (1954).
  \item \textsuperscript{123} See, e.g., Saint Germain Found., 26 T.C. at 658 (“Such [publishing] activities bear an intimate relationship to the proper functioning of the petitioner, and we do not believe that income received from these activities prevents the petitioner from being an organization organized and operated ‘exclusively’ for religious purposes . . . .”).
  \item \textsuperscript{124} See id. at 657–58 (“Respondent points out that petitioner received income from the sale of religious publications to students and members of the religious following and, in addition, received income in the form of fees in connection with certain annual conclaves, and respondent urges that these income producing activities show that the petitioner was not ‘operated exclusively’ for religious purposes.”); Forest Press, 22 T.C. at 268 (“The respondent takes the view that the petitioner was engaged in a commercial publishing enterprise with an unrestricted certificate of incorporation and consequently neither organized nor operated exclusively for scientific, literary, or educational purposes . . . .”).
  \item \textsuperscript{125} HOPKINS, supra note 74, at 113 (stating that the commerciality doctrine was first mentioned at the federal level in 1924). The first permanent U.S. income tax was levied in 1913. JOEL SLEMRD & JON BAKIJA, TAXING OURSELVES 18–20 (4th ed. 2008).
  \item \textsuperscript{126} Parker v. Comm’r, 365 F.2d 792, 798 (8th Cir. 1966); Am. Inst. for Econ. Research v. United States, 302 F.2d 934, 938 (Ct. Cl. 1962); Scripture Press Found. v. United States, 285 F.2d 800, 805–06 (Ct. Cl. 1961); Found. for Divine Meditation, Inc. v. Comm’r, 24 T.C.M. (CCH) 411, 1965 Tax Ct. Memo LEXIS 248, at *34, *37 (Apr. 5, 1965); Rev. Rul. 66-104, 1966-1 C.B. 135; Rev. Rul. 60-351, 1960-2 C.B. 169. But see Elisian Guild, Inc. v. United States, 412 F.2d 121, 125 (1st Cir. 1969) (upholding tax exemption of a publisher that ran a deficit operation because profits were not the goal); Sci. & Research Found., Inc. v. United States, 181 F. Supp. 526, 527 (S.D. Ill. 1960) (upholding tax exemption of an organization that contracted with a for-profit corporation to distribute pamphlets and books in furtherance of its scientific purpose and received royalties from that corporation); A.A. Allen Revivals, Inc. v. Comm’r, 22 T.C.M. (CCH) 1435, 1963 Tax.
\end{itemize}
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As the commerciality doctrine gained momentum in the publishing context, the legal analysis turned toward whether the publishing activities had a business purpose, and the courts ceased to ask whether that business was related or unrelated\textsuperscript{127}—so stated the court in *American Institute for Economic Research v. United States*:

Our approach, then, is to first assume arguendo an educational purpose without giving definitive meaning to that concept, and next ascertain whether or not the taxpayer has an additional commercial purpose. Should the answer to the latter inquiry be affirmative, we must decide whether the commercial purpose is primary or incidental to the exempt purpose.\textsuperscript{128}

With such statements, the courts acknowledged that the technical legal issue was whether the nonexempt commercial activities were substantial, but practically speaking, the line between substantial and insubstantial was imprecise, and the commerciality doctrine often determined the outcome.\textsuperscript{129}

In *Fides Publishers Ass’n v. United States*, the court introduced a distinction between stand-alone commercial publishers and organizations that operated a commercial publisher as one of many activities.\textsuperscript{130} The inquiry with respect to the latter, said the court, was “whether certain commercial activities, admittedly necessary for the perpetuation of any large organization, are carried on in furtherance of those [tax-exempt] purposes.”\textsuperscript{131} If the commercial activities were substantial and unrelated to an exempt purpose, then such organizations would fail the operational test.\textsuperscript{132} The former group of stand-alone publishers, however, “cannot be governed by the same standards.”\textsuperscript{133} Rather, when the organization’s sole activity is a commercial business, then it must be assumed that the commercial purpose itself is substantial.\textsuperscript{134} The court concluded, “It could not be otherwise. If

\textsuperscript{127} *Am. Inst. for Econ. Research*, 302 F.2d at 938.

\textsuperscript{128} *Id.* at 938.

\textsuperscript{129} *See, e.g., id.* (“We think the sales activities of plaintiff reflect ‘a non-educational purpose’ and are not only ‘substantial in nature’ but preponderate.”); *Scripture Press Found.*, 285 F.2d at 805–06; *Hopkins*, supra note 74, at 113–19.

\textsuperscript{130} *Fides Publishers Ass’n v. United States*, 263 F. Supp. 924, 933 (N.D. Ind. 1967).

\textsuperscript{131} *Id.*

\textsuperscript{132} *Id.* at 934.

\textsuperscript{133} *Id.*

\textsuperscript{134} *Id.*
it were, every publishing house would be entitled to an exemption on the ground that it furthers the education of the public.\textsuperscript{135}

In Revenue Ruling 67-4, published the same year as \textit{Fides}, the IRS stated its position clearly: an organization engaged in a tax-exempt purpose may qualify for tax exemption if (1) the content of the publication furthers the exempt purposes, (2) the preparation of material follows methods generally accepted as furthering the exempt purpose, (3) the distribution of the materials is necessary or valuable in achieving the organization’s exempt purposes, and (4) the manner in which the distribution is accomplished is \textit{distinguishable from ordinary commercial publishing practices}.\textsuperscript{136}

The rule thus having been established, the remaining cases and IRS rulings functioned only to refine the standard for “commercial publishing practices.” In \textit{Elisian Guild, Inc. v. United States},\textsuperscript{137} the appeals court overruled a lower court decision that focused on an organization’s accumulated profits, instead concluding that the current “deficit operation reflects not poor business planning nor ill fortune but rather the fact that profits were not the goal of the operation.”\textsuperscript{138} In contrast, Revenue Ruling 77-4 denied tax exemption to a newspaper when the “organization’s only activities are preparing and publishing a newspaper, soliciting advertising, and selling subscriptions to that newspaper in a manner indistinguishable from ordinary commercial publishing practices.”\textsuperscript{139} In \textit{Church of Scientology of California v. Commissioner}, the court again denied tax exemption to a religious organization that printed and sold books, noting that the “the goal of making money permeated virtually all of petitioner's activities—its services, its pricing policies, its dissemination practices, and its management decisions.”\textsuperscript{140}

Finally, in a 1982 General Counsel Memorandum, the IRS summarized the practices considered to reflect commercial publishing activities.\textsuperscript{141} The following factors were listed:

\begin{itemize}
  \item \textit{Id.} at 935.
  \item Rev. Rul. 67-4, 1967-1 C.B. 121.
  \item 412 F.2d 121 (1st Cir. 1969)
  \item \textit{Id.} at 125. Similarly, \textit{Pulpit Resources v. Commissioner} upheld tax exemption for a religious publisher where the market for the product was so limited that it would not attract a truly commercial enterprise, and “[w]hile petitioner projected a profit from its sales for 1977, the amount was small and it was dedicated to be used for religious purposes.” 70 T.C. 594, 611 (1978).
  \item Rev. Rul. 77-4, 1977-1 C.B. 141.
  \item Church of Scientology of Cal. v. Comm’r, 83 T.C. 381, 443 (1984). Although \textit{Church of Scientology of California} is primarily a case about improper private inurement, the court also discussed the commercial nature of the petitioner’s activities. \textit{See id.}
\end{itemize}
(1) conducting as its sole activity publishing activities using standard commercial techniques which generate ongoing profits; (2) pricing its materials ‘competitively’ with other commercial publications or to return a profit; (3) conducting an enterprise in a manner in which all participants expect to receive a monetary return; (4) publishing its materials almost exclusively for sale, with only a de minimis amount of material donated to charity; (5) existing or accumulating large profits; and accumulating profits from sales activities which are greatly in excess of the amounts expended for educational programs.\(^\text{142}\)

Despite the hurdle presented by the commerciality doctrine, it would be misleading to say that stand-alone newspaper organizations cannot qualify for tax exemption under current law. Marion Fremont-Smith, nonprofit scholar, observed that there are a “number of IRS rulings [that] provide a strong precedent for a determination by the agency that a nonprofit newspaper could meet the exemption standards set forth in Revenue Ruling 67-4 and the 1982 General Counsel Memorandum.”\(^\text{143}\) Specifically, Fremont-Smith points to a 1966 revenue ruling that granted tax exemption to a noncommercial radio broadcasting organization that “broadcast[ed] music, literary productions, news reports, lectures, and discussions on subjects of interest to the community.”\(^\text{144}\) The IRS reasoned that the “organization’s sources of income are contributions from individuals, corporations, exempt organizations, and local governmental agencies and the receipts from the sale of a monthly program guide. All of its disbursements are for the operating expenses of the radio station. The station sells no broadcasting time for commercial use.”\(^\text{145}\)

In sum, the current law governing tax-exempt publishers prevents most traditional newspaper organizations from achieving tax exemption. First, traditional newspapers are virtually always organized as for-profit business entities that cannot qualify for tax exemption. Second, even a nonprofit newspaper may fail to qualify as a tax-exempt organization by publishing prohibited content. For example, a nonprofit newspaper that publishes political endorsements would violate section 501(c)(3), though it may nevertheless achieve tax exemption under a less restrictive provision. Third, even if a traditional newspaper’s content does comply with section 501(c) requirements, most newspapers still would not qualify as tax-exempt organizations because their publishing and distribution practices are commercial. Yet, despite these barriers, many news media organizations other than stand-alone newspapers have achieved tax exemption under current law. The next section surveys tax exempt news organizations that exist today.

\(^{143}\) Fremont-Smith, supra note 92, at 471.
2. Existing Models for Tax-Exempt News Organizations

Working within the limitations of the commerciality doctrine, some news organizations have already attained 501(c)(3) tax-exempt status under current law. Yet, the number of nonprofit news organizations is small.146 Vince Stehle, the Program Officer for the Nonprofit Sector Support Program at the Surdna Foundation, said the following about the relative void of nonprofit newspapers:

Every type of media can be carried out as a commercial or noncommercial entity. National Public Radio and the Public Broadcasting Service, nonprofit magazines like Consumer Reports and The American Prospect, and book publishers like Oxford University Press are all examples of enterprises that operate under nonprofit ownership. The daily newspaper stands alone as a form that is carried out almost entirely in the commercial realm. A few highly respected exceptions—the St. Petersburg Times and The Guardian of London—prove that newspapers could easily operate as nonprofit organizations.147

In fact, a survey of existing nonprofit news publications reveals three basic models of nonprofit news organizations: (1) the for-profit publisher wholly owned by a tax-exempt nonprofit parent; (2) the tax-exempt nonprofit with a publishing operation; and (3) the stand-alone tax-exempt news media organization. Before considering new models for tax-exempt nonprofit news organizations, one must first understand how each of these models of nonprofit news media organizations operates under current law.

Interestingly, Stehle’s domestic example of a nonprofit U.S. newspaper, the St. Petersburg Times, is an example of the first basic model of existing nonprofit news organizations: the for-profit publisher wholly owned by a tax-exempt nonprofit parent. The St. Petersburg Times is published by the Times Publishing Company, a wholly-owned for-profit subsidiary of the tax-exempt parent, the Poynter Institute.148 Since Times Publishing Company is a for-profit publisher, it

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146 Vince Stehle, It’s Time for Newspapers to Become Nonprofit Organizations, CHRON. PHILANTHROPY, Mar. 12, 2009, at 32.
147 Id.
148 Douglas McCollum, Somewhere East of Eden: Why the St. Pete Times Model Can’t Save Newspapers, COLUM. JOURNALISM REV., Mar.–Apr. 2008, at 50, 50 (“We are a private, for-profit company.’ This was virtually the first thing Paul Tash, the lanky, fifty-three-year-old Indiana native who heads the St. Petersburg Times, said to me last summer when we met in his office to talk about the Poynter model. It was a point he would make even more emphatically a few weeks later in a letter to The New Yorker, after the writer Steve Coll referred to the Times as a ‘nonprofit foundation’ in a story. Clearly, Tash is irked by the lingering misconception in journalism circles that his paper is some kind of altruistic venture. Much of this confusion, though, can be chalked up to the paper’s curious
does not qualify for tax-exempt status even though it is owned by a nonprofit
organization. This first existing model of so-called nonprofit newspapers—the
Poynter-model—has both advantages and disadvantages. On the one hand, because
Times Publishing Company has the ability to operate as a for-profit company, it is
free from content and operating restrictions when it publishes the St. Petersburg
Times and other newspaper publications. On the other hand, since Times
Publishing Company is not itself a 501(c)(3) organization, it cannot receive
charitable donations, and it is fully taxable at the entity-level. Moreover, the
Poynter Institute must take precautions to avoid having Times Publishing Company’s
activities attributed to it, which could endanger its tax exemption.

The second basic model of existing nonprofit news organizations includes
newspapers published by a tax-exempt nonprofit with a publishing operation.
Unlike in the Poynter-model, under this second existing model for nonprofit news
organizations—the tax-exempt publisher model—a tax-exempt organization
publishes the news publication directly as one of several operations. Organizations
that publish newspapers or magazines usually qualify for tax exemption under the
rubric of “educational” or “religious” tax-exempt organizations. For instance, a
newspaper may be published through the publishing arm of a tax-exempt
organization like a church or a university. Significantly, newspapers that are
published by a tax-exempt publisher are not independent entities. Rather, these
newspapers are publishing businesses conducted by the tax-exempt organizations
directly, and the tax-exempt parent may incur tax on unrelated business income

ownership history.”); see also Andrew Barnes, Who Owns the St. Petersburg Times? Why it
Matters to Readers, ST. PETERSBURG TIMES, Dec. 26, 1999, at 1D; Richard Pérez-Peña,

149 Treas. Reg. § 1.501(c)(3)-1(e) (as amended in 2008) (stating organizations
organized and operated for the primary purpose of carrying on an unrelated trade or
business are not exempt).

an organization otherwise qualifying for a Code § 501(c)(3) exemption which owned a
controlling interest in the stock of a commercial newspaper corporation that carried on
certain legislative and political activities. Under those conditions, it was our view that these
non-charitable activities of the newspaper corporation could not be imputed to its parent for
the purpose of adversely affecting the exempt status of the latter, in the absence of evidence
showing that the inter-corporate relationship was a mere sham or guise, or otherwise
demonstrating that the newspaper corporation was acting as an agent of its controlling
parent in conducting the activities in question.”).


152 FRANCES R. HILL & DOUGLAS M. MANCINO, TAXATION OF EXEMPT

153 See, e.g., Rev. Rul. 68-306, 1968-1 C.B. 257 (granting tax exemption to a
newspaper devoted to church and religious matters); Rev. Rul. 67-4, 1967-1 CB 121
(granting tax exemption to a medical journal because the journal was educational).
attributable to the publishing activities to the extent that the publishing activity is unrelated to the organization’s exempt purpose.\(^{154}\)

A well-known nonprofit magazine that is published directly by a tax-exempt organization is *Mother Jones*, which is published by the Foundation for National Progress.\(^{155}\) The Foundation for National Progress is a 501(c)(3) organization organized for “charitable, scientific, and educational purposes,” and it self-describes as a news organization that “specializes in investigative, political, and social justice reporting.”\(^{156}\)

The main concern for tax-exempt nonprofits with publishing operations is to ensure that these publishing activities further the nonprofit’s tax-exempt purposes so that the publishing activities do not threaten its tax-exempt status.\(^{157}\) As per the commerciality doctrine, if the commercial publishing activities are substantial and unrelated to an exempt purpose, then the organization will fail the operational test and lose its tax exemption.\(^{158}\) An example of the nonprofit publisher model, the *Central City Extra*, is a monthly print publication published by the tax-exempt San Francisco Study Center.\(^{159}\) The publication arm of the San Francisco Study Center is intended to “educate or inform on a variety of public health issues and to promote [the San Francisco] arts scene, fiscal management of local non-profit programs, & web development.”\(^{160}\)

\(^{154}\) United States v. Am. Coll. of Physicians, 475 U.S. 834, 849–50 (1986) (“By coordinating the content of the advertisements with the editorial content of the issue, or by publishing only advertisements reflecting new developments in the pharmaceutical market, for example, perhaps the College could satisfy the stringent standards erected by Congress and the Treasury. In this case, however, we have concluded that the Court of Appeals erroneously focused exclusively upon the information that is invariably conveyed by commercial advertising, and consequently failed to give effect to the governing statute and regulations.”); Rev. Rul. 75-200, 1975-1 C.B. 163; Rev. Rul. 74-38, 1974-1 C.B. 144; see also I.R.S. Tech. Adv. Mem. 99-14-035 (Apr. 12, 1999) (“Generally, an exempt organization’s advertising in its periodical is regarded as an unrelated business, even if the publication of the editorial content of the periodical furthers exempt purposes. The Supreme Court in *American College of Physicians* held open the possibility that advertising may, under some circumstances, educate the readers, and thus be a related business. In the case of a student-run newspaper, however, the advertising function, like the other newspaper functions, may provide vocational training (recognized as an educational purpose) to the participating students.”).


\(^{156}\) Found. for Nat’l Progress, IRS FORM 990, OMB NO. 1545-0047, RETURN OF ORGANIZATION EXEMPT FROM INCOME TAX (May 13, 2009).


\(^{160}\) S.F. Study Ctr. Inc., IRS FORM 990, OMB NO. 1545-0047, RETURN OF ORGANIZATION EXEMPT FROM INCOME TAX (July 16, 2008).
A more widely circulated example of a newspaper published by a tax-exempt nonprofit is the well-known and respected *Christian Science Monitor* (the *Monitor*). The *Monitor* is a national news publication published by the First Church of Christ, Scientist, which is a 501(c)(3) tax-exempt religious organization. Until March 27, 2009, the *Monitor* was a daily print newspaper. At that time, the *Monitor* changed to a daily Web-based publication combined with a weekly print edition. The organization explained that it changed its distribution methods “to deliver the Monitor’s journalism more quickly, to improve the Monitor’s timeliness and relevance, and to increase revenue and reduce costs.”

The third model for existing nonprofit news media organizations is the stand-alone tax-exempt news organization model. An example of this model is the *Voice of San Diego*, which is an online publication with 501(c)(3) tax-exempt status. The tax-exempt purpose of the *Voice of San Diego* is to “educate and inform the residents of San Diego County about civic and regional issues and to provide an interactive forum for the discussion of issues affecting the people and communities of San Diego.” Similarly, ProPublica in New York City is a 501(c)(3) tax-exempt Web-based news publication. Though ProPublica’s mission is to produce investigative journalism in the public interest and to focus “exclusively on truly important stories . . . with moral force,” its official categorization is as an educational organization. Likewise, *MinnPost*, which publishes the online-news publication MinnPost.com, is a 501(c)(3) organization in Minnesota.

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162 *About the Christian Science Monitor*, supra note 161.


165 Id.


167 *Voice of San Diego*, IRS FORM 990, OMB NO. 1545-0047, RETURN OF ORGANIZATION EXEMPT FROM INCOME TAX (May 15, 2008).


170 E-mail from Mike Webb, Dir. of Commc’ns, ProPublica, to author (Sept. 25, 2009 11:21 AM) (on file with author).

tax exempt purpose is “publishing high quality journalism that will support democracy and strengthen community in the Twin Cities.”

In addition to Web-based news publications, some radio news companies and magazines also operate as stand-alone tax-exempt nonprofits. Among the best-known nonprofit radio news organizations is National Public Radio, Inc. (NPR), which follows the stand-alone tax-exempt news media organization model. NPR’s educational tax-exempt purpose is “to create a more informed public—one challenged and invigorated by a deeper understanding and appreciation of events, ideas, and cultures. To accomplish this mission, [NPR] produce[s], acquire[s], and distribute[s] programming that meets the highest standards of public service in journalism and cultural expression . . . .” Similarly, a well-known magazine that operates as a stand-alone tax-exempt private foundation is Harper’s Magazine (Harper’s), which is a tax-exempt literary organization.

Thus, under current law, there are three major types of nonprofit news models. The first—the Poynter model—is not really a tax-exempt nonprofit newspaper at all. The second—the tax-exempt organization with a publishing operation—is a nonprofit operating model, but any tax exemption is derivative of the tax-exempt publisher’s larger purpose, and its very existence threatens the tax exemption of the organization. The third—the stand-alone tax-exempt news organization—tends to qualify for 501(c)(3) status as an “educational” organization. This last is the purest form of nonprofit news organizations under existing law since these organizations are created specifically to produce news, albeit for a tax-exempt purpose. The stand-alone tax-exempt news organization model is rarely used by print newspaper organizations, however, and it is most common among Web-based publications and public radio news organizations.

3. Partnerships between For-Profit Newspapers and Tax-Exempt News Organizations

Despite their inability to operate as tax-exempt nonprofits themselves, some commercial newspaper organizations are beginning to look to the nonprofit sector for an answer to their revenue problems. As explained, tax-exempt nonprofit news organizations can and do form under current law, but such nonprofits are not permitted to operate using ordinary commercial news methods. Instead, they form

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172 MinnPost, IRS FORM 990, OMB NO. 1545-0047, RETURN OF ORGANIZATION EXEMPT FROM INCOME TAX (Aug. 14, 2008).
for an educational purpose, such as to produce investigative journalism, and then seek methods of distribution that are unlike traditional commercial newspaper organizations. Some for-profit newspapers have begun to use news content produced by, or with the assistance of, existing tax-exempt news organizations.

Specifically, some for-profit newspapers have begun to purchase content from new tax-exempt news organizations. Through these relationships, for-profit newspapers can acquire news content for a lower cost than would be required if the corporation were to produce it itself. Likewise, the tax-exempt organization benefits through modest sale revenues and the opportunity to more widely distribute its news content in furtherance of its exempt purpose.

For example, the Chicago News Cooperative is a tax-exempt nonprofit organization formed to produce “public-interest journalism focused on Chicago, its politics and policy, culture and the arts, and the diverse communities of the metropolitan area.”176 The organization publishes its content on a public Web site. In addition, the Chicago News Cooperative sells content to be published in the New York Times (the Times) on Fridays and Sundays.177 According to the organization’s Web site, it is “the first outside news organization to produce entire pages for the Times.”178 Yet, the Chicago News Cooperative will not be the last nonprofit to produce content for the Times. Since then, the Times struck a deal with The Bay Area News Project, a nonprofit local-news organization, to produce content for its San Francisco edition.179 So far, such practice is unusual and limited to local content, but as newspaper corporations become increasingly unable to produce quality news content, such practices may become more common.

Moreover, the Times is not the only newspaper to experiment with strategies involving nonprofits. The Washington Post (the Post) has begun to run content in its newspapers provided by ProPublica.180 Unlike the deal struck between the Times and the Chicago News Cooperative, however, the deal between the Post and ProPublica is free-of-charge.181 Andrew Alexander of the Post explained:

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178 About the Chicago News Cooperative, supra note 176.
181 Id.
The partnerships are good for The Post because they offer quality reporting free of charge at a time when resources are being stretched and the paper is losing money. They’re good for ProPublica, giving exposure to its work and fulfilling its goal of producing investigative journalism. And they’re especially good for Post readers, who crave solid watchdog reporting. Readership surveys consistently show that readers want more so-called “accountability journalism.”

Alexander went on to explain the relationship this way, “The collaboration is about 50-50 between Post and ProPublica reporters. The two sides work as a team, but in the end the story goes through The Post’s editing process and is scrutinized by the newspaper’s in-house libel counsel. When it is published, it also appears on ProPublica’s Web site.”

Under the terms of their relationship, the Post and ProPublica both contribute services and resources to create news content for paid and unpaid distribution. In so doing, the Post furthers a profit-motive by running “free” content in its sold newspapers, while ProPublica furthers a charitable purpose by distributing the stories to the public via its free Web site. But what would happen if a for-profit newspaper and a nonprofit media organization were to join together to produce actual newspapers? Most likely, this type of relationship would be characterized as a joint-venture.

Nonprofit organizations are permitted to enter joint ventures with for-profit corporations. Such relationships are often formed with for-profit entities as a source of capital, professional skills, and technical expertise. In general an exempt organization that enters such a joint venture will not lose its exempt status as long as the arrangement ensures that the partnership will serve tax-exempt purposes, and as long as the structure of the partnership minimizes conflicts between participation in the joint venture and the charitable purpose.

Both nonprofit and for-profit media organizations may be hesitant to form such joint ventures. As Michael Sanders, professor of law at Georgetown University, explained:

For-profit organizations cite the overly restrictive laws that make the ventures inherently risky and undesirable from an investment perspective.
(i.e., requiring control by the nonprofit and subordinating the maximization of profits to charitable goals), while exempt organizations are concerned with ambiguities in the law that could lead to loss of their exempt status or, at a minimum, unrelated business taxable income.  

Relationships like the *Times-Chicago* News Cooperative and *Post*-ProPublica arrangements, or even more formal non-profit/for-profit joint ventures, may allow newspapers to find some refuge in the nonprofit sector under current law. The louder rally cry, however, is for commercial newspaper organizations to be made eligible for tax exemption in their own right. The next section asks whether the push for tax-exempt newspapers is theoretically justified.

**C. Theoretical Support for Tax-Exempt Commercial Newspaper Publishers**

Certain nonprofit organizations have been granted tax-exempt status since the beginning of the American income tax. The early Congress did not explain why certain charitable organizations were to be granted tax exemption, but tax scholars have observed that Congress seemed to act out of deference toward the historic place of charitable organizations in America. The motive driving the tax exemption may have been to encourage activities that Congress viewed as inherently meritorious and promoting the general welfare, or Congress may have viewed tax exemption for charitable organizations as a way to consistently correlate tax policy to political theory.

Until the 1970s, many observers justified tax exemption for certain qualifying nonprofit organizations based on a “public benefit” or “traditional subsidy” theory, which justified tax exemption for charitable organizations on the basis of the public benefits such organizations provide to society. More recent theories to justify tax exemption for certain charitable organizations have focused on the

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188 See Hopkins, supra note 74, at 10.


190 Belknap, supra note 189, at 2039.


192 Fishman & Schwarz, supra note 189, at 68. The theory held that the government subsidizes these organizations because they relieve the burden on the government to otherwise provide “goods or services that society or government is unable or unwilling to provide.” *Id.*
nature of nonprofit entities themselves, as opposed to the services and goods they provide. In 1976, Boris Bittker, professor at Yale Law School, and George Rahdert, Yale Law graduate, promoted the “income measurement” theory that justified tax exemption for nonprofits on the basis that identifying a charity’s income would be a complex task since many charities can be regarded as mere conduits through which donations and endowments flow to recipients. Later, Henry Hansmann, professor at Yale Law School, developed the “capital subsidy” theory, which justifies tax exemption on the basis that nonprofit organizations must forego capital funding and may therefore be disadvantaged in the absence of some government subsidy.

Interpretation of tax exemption as a subsidy is consistent with the views of public economists, and it relies on an underlying assumption that a consistently applied tax system would tax income earned by these organizations, as the departure from the normal application of the income tax costs the government money in foregone taxes. The cost of departing from the baseline income tax in the case of tax-exempt organizations might be viewed as a government expenditure—a tax subsidy.

A more recent justification for tax exemption that relies heavily on the idea of tax exemption as a subsidy is the “risk compensation” theory of Nina Crimm, professor at St. John’s School of Law. Crimm’s risk compensation theory combines theories of market failure and government failure to explain the need for tax-exempt organizations. The theory begins with the premise that a for-profit corporation would not be expected to provide public goods. A public good is one that can be consumed by more than one person in society, a classic example of

193 Boris I. Bittker & George K. Rahdert, The Exemption of Nonprofit Organizations from Federal Income Taxation, 85 YALE L.J. 299, 307–16 (1976) (arguing that without tax-exemption, the government would face a difficult task in identifying the gross income of nonprofits, which do not operate as businesses, but instead often receive most of their income in the form of donations and endowments); Henry Hansmann, The Rationale for Exempting Nonprofit Organizations from Corporate Income Taxation, 91 Yale L.J. 54, 72–75 (1981) (arguing that tax-exemption for nonprofits can be justified as compensation for the restrictions to capital financing faced by nonprofit organizations).
194 Bittker & Rahdert, supra note 193, at 307–16.
195 Hansmann, supra note 193, at 72–75.
196 See, e.g., JONATHAN GRUBER, PUBLIC FINANCE AND PUBLIC POLICY 542 (2010) (comparing the economic effect of direct spending to tax benefits).
198 Id.
200 See id. at 439.
201 See id. at 451.
which is light, as from a lighthouse or street lamp. Since many people can enjoy a public good after its production, consumers have incentive to free ride off others’ investments. Since free riders use the good without paying for it, production of a public good may be risky and unprofitable, despite its value to society. For-profit organizations are unlikely to assume this risk, leading to a failure to produce valuable public goods.

The resulting undersupply of public goods might be answered by the nonprofit sector, which is free from the pressure to earn profits for shareholders. However, Crimm explains,

Despite the lack of expected gains, the literature reveals that nonprofit organizations make project investment decisions in the same manner as do for-profit entities. The same economic forces motivate for-profit and nonprofit organizations. Management must make investment decisions in light of expected risks and uncertainties. Then, as with for-profit firms, charitable organizations likely are risk averse. It should follow that as providers of goods and services, nonprofits must be compensated, albeit for furnishing public goods and services. Without some form of compensation, even nonprofit organizations would not be enticed to supply public goods and services.

Thus, the theory concludes, “to entice a charitable organization to offer public goods and services, there must be an ‘insurer’ to provide some level of expected return. That ‘insurer,’ historically and currently, is the government, and it has employed the tax exemption as the ‘insurance’ . . . .”

As applied to newspaper organizations, the risk compensation theory favors tax exemption. The purpose of a newspaper organization is to supply the news, which can be properly viewed as a public good. News content—and its physical manifestation in newspapers—can be enjoyed by multiple consumers without

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204 Despite their failure to pay, free riders do value the goods that they use. In the case of news consumption, the economic value the free rider ascribes to the activity can be measured by his opportunity cost: time spent reading a news story is time spent not doing something else that had value (e.g., work valued by wages), so the free rider can be understood as willing to “pay” the value of foregoing the other activity. See JAMES T. HAMILTON, ALL THE NEWS THAT’S FIT TO SELL 10 (2006).
205 See Crimm, supra note 199, at 451.
206 See id. at 452–53.
207 See id. at 453.
208 See id. at 454.
209 See HAMILTON, supra note 204, at 9–10.
After a newspaper is purchased, its reader might pass the paper around to others to read without paying, or he might retell the stories to non-paying listeners. And now that many “print” stories are available for free on the Internet, even more people have access to news stories without payment. As quality news stories produced by respected news producers like the New York Times, the Washington Post, and the Wall Street Journal become increasingly easy to access, the instances of free riding will increase.

The nonprofit sector may be better equipped to produce newspapers; however, the risk compensation theory suggests that even nonprofit organizations would be reluctant to embark upon newspaper production given its risks. For this reason, a tax exemption for newspaper organizations would be justified.

IV. ENVISIONING THE FUTURE: NEW MODELS FOR THE NEWSPAPER INDUSTRY

Shifting newspaper production to the nonprofit sector may be one way to address the current problems in the newspaper industry. Moreover, extending tax exemption to nonprofit organizations formed for the purpose of publishing and selling newspapers is justified on the theory that even nonprofits require some compensation for the risk of producing public goods. Indeed, the theoretical case for the tax-exempt newspaper organization is strong. But the practical question remains: can tax exemption save newspapers? This section identifies and evaluates potential new models for news organizations, from tax-exempt newspapers to newspaper L3Cs. All of these models should be both considered and questioned. Newspaper organizations must be open to change but remain realistic in their expectations for these new models.

A. Evaluating Potential Tax-Exempt Nonprofit Models for Newspapers

Many commentators have suggested that money-losing newspaper corporations would have a better chance of survival if they operate as tax-exempt nonprofits. Because a tax-exempt newspaper would have no shareholders, it

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210 Id. at 9. Some commentators have argued that a physical product like a newspaper or a magazine should be considered a “mixed-public good” since, in general, only a single consumer could consume a newspaper or magazine at a time, in contrast to traditional public goods, like light. See, e.g., T.V.S. Ramamohan Rao & Umamaheswaran Kalpagam, Mixed Public Goods, Consumption Externality, and Economic Growth, 37 J. Econ. 385 (1977). James Hamilton implicitly rejects this view, explaining, “If I consume an apple, it is not available for consumption by another. If I do not pay for the apple at a store, I cannot consume it. The apple is clearly a private good. . . . If I read [a] story about apples, my consumption does not prevent others from reading the same story. I may be able to read the story, view it on television, or hear about it from a friend without paying any money or directly contributing its cost of creation. In this sense, news goods are public goods.” HAMILTON, supra note 204, at 9.

211 See HAMILTON, supra note 204, at 9.

212 See supra Part III.C.
would not be obligated to seek a profit. Those who contribute to a tax-exempt newspaper would do so without strings attached; donors never recover their contributions or earn a return. Yet, if the newspaper operations are a consistent money-loser, the pressure will mount for the organization to raise additional donations each year to cover current cash shortfalls.

While it is easy enough to conclude that a single newspaper should be able to raise enough donations to cover its cash shortfalls, it is important to realize that a finite number of people are willing to contribute to newspapers in a meaningful capacity. A few large media-supporting foundations exist, but the funding need of newspapers is likely to far exceed these funds. The *Washington Post* reported $24.9 million in operating losses in 2008; the *New York Times* reported $61.6 million in operating losses in the first quarter of 2009 alone. By means of comparison, in 2007 the top fifty U.S. foundations awarding grants for media and communications awarded five hundred seventy grants totaling only $150,113,834. This figure was down from $227,153,121 in 2006. Even applying the unlikely assumption that literally all of those grants would go to newspapers, the available foundation money would fall pathetically short of what would be needed to support these newspapers; endowing every newspaper would take $114 billion, the total coffers of the ten largest U.S. foundations combined.

It seems reasonable to predict, then, that the burden of supporting tax-exempt newspapers would fall on the public, but it is far from clear whether the public would accept that challenge. If newspaper corporations are unable to sell subscriptions, how will they convince the public to support them in donations? Until this crucial question is answered, the tax-exempt model may be destined to fail. Nevertheless, let us consider the options.

1. *Newspapers as Charitable Organizations*

Proposals have already been sent to Congress that would make the “Qualified Newspaper Organization” an educational organization within the meaning of

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218 See supra Part II.A.
These proposals generally retain all of the existing qualities of the “educational” category of charitable organizations, but they statutorily overrule the commerciality doctrine as applied to newspaper organizations. This approach would make it easier for traditional newspapers to qualify as nonprofit organizations; however, the approach is narrow—applying only to certain qualified newspaper organizations while eventually excluding new forms of newspaper organizations—and may limit tax exemption to a traditional form of newspaper organization that may evolve in a new media environment.

Moreover, there are some significant reasons why newspapers may hesitate to convert to 501(c)(3) organizations. First, most large and mid-sized newspapers are published by large, publicly traded corporations that own many publications. Examples include Gannett Company Inc., which owns eighty-four daily newspapers, including USA Today, and more than seven hundred non-daily publications; the New York Times Company, which publishes eighteen daily newspapers, including the New York Times and the Boston Globe, and over fifty Web sites, including NYTimes.com, Boston.com, and About.com; and the Hearst Corporation, which owns fifteen daily newspapers, including the Houston Chronicle and the San Francisco Chronicle, as well as a variety of other media organizations. According to media business analyst Rick Edmonds of the Poynter Institute, one of the major reasons newspapers are reluctant to convert to nonprofit status is that it would require a tremendous amount of money for these publicly traded corporations to buy out their shareholders in order to convert to the nonprofit form.

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220 See id. § 1.
221 The proposed definition of “qualified newspaper corporation” is:

   (1) the trade or business of such corporation or organization consists of publishing on a regular basis a newspaper for general circulation,
   (2) the newspaper published by such corporation or organization contains local, national, and international news stories of interest to the general public and the distribution of such newspaper is necessary or valuable in achieving an educational purpose, and
   (3) the preparation of the material contained in such newspaper follows methods generally accepted as educational in character.

225 Telephone Interview with Rick Edmonds, Media Bus. Analyst, Poynter Inst. (Feb. 10, 2010). The Sulzberger family, which is the majority shareholder of the N.Y. Times, has
To be sure, Senator Benjamin Cardin, Democrat from Maryland, hinted that conversion to nonprofit status would be difficult for publicly owned newspapers when he introduced a tax-exempt newspapers bill in 2009. Cardin observed, “[T]his may not be an optimal choice for some major newspapers or corporate media chains interested in profit.” He went on to state, however, that conversion to nonprofit “should be an option for many local newspapers fast disappearing in our states, cities, and towns.” Yet, Edmonds notes that family-owned newspapers, such as the Seattle Times, the Bakersfield Californian, and the New York Daily News, comprise only a small minority of newspaper companies. These newspapers would be in the best position to take advantage of tax exemption, but doing so would require families to relinquish their ownership of the newspapers, a sacrifice that may be financially and emotionally difficult to make.

A second potential problem, already discussed, is that many newspapers may have trouble generating sufficient cash flows if they operate as nonprofits. As mentioned above, the nonprofit form restricts the financing options available to tax-exempt organizations due to ownership restrictions; since tax-exempt organizations cannot allow private ownership, they do not have access to capital financing and instead must rely on debt, donations, and gross receipts from operations. Newspapers’ primary source of gross receipts from operations—advertising—has proven inadequate to sustain many newspaper organizations, many of which consistently run operating deficits. Since capital financing would no longer be an option to tax-exempt newspapers, and since no organization wants to rely increasingly on debt financing, if newspaper organizations are to be saved by 501(c)(3) status, it will have to be through donations. Unfortunately, as already explained, it would take a lot of donations to save newspapers.

In addition to the practical financing concerns, the probable reliance of newspapers on donor funding has prompted critiques that nonprofit newspapers’ content may be compromised if newspapers are unaccountable to market forces. To support his complaints about nonprofit journalism, critic Jack Shafer recently quoted a 1997 Rockefeller Foundation Annual Report, stating, “Foundations lack the three chastising disciplines of American life: the market test, which punishes or rewards financial performance; the ballot box, through which the numbskulls can be voted out of office; and the ministrations of an irreverent press biting at your 


226 Id.
227 Id.
heads every day.” Shafer argues that a major risk of the nonprofit newspaper model is that donors may have increasing power over what could be said in newspapers, and they may even have the capacity to revoke funding if their content does not get covered. Shafer argues that, while the commercial press may also reflect their owners’ views, “this tendency is always tempered by the need to attract readers and viewers.”

On the other hand, nonprofit organizations, according to Shafer, “almost always measure their success in terms of influence, not audience, because their customers are the donors who’ve donated cash to influence politics, promote justice, or otherwise build a better world.” As such, there is a risk that donors may become the new gatekeepers for newspapers with their own individual agendas, posing a significant challenge to news organizations hoping to keep their coverage independent.

Others worry that a commitment to independent reporting may risk driving away some large donors. As former Washington Editor for McClatchy Newspapers and USC Annenberg Executive in Residence David Westphal points out, “Journalism needs long-term, reliable, sustainable funding and foundations and wealthy donors often have something else in mind.”

Importantly, these critics’ concerns about excessive donor influence might overstate the issue since, unlike private foundations that are indeed beholden to a few large donors, tax-exempt newspapers would presumably seek a large part of its funding from many small public donors in order to maintain public charity status. Donor influence should be minimized since the donations would be drawn from multiple sources so that no single donor could have enough power to dictate coverage.

230 Id.
231 Id.
232 Id.
233 Id.
235 See Treas. Reg. § 1.170A-9(f) (as amended in 2008) (explaining the public funding proofs that must be met to maintain public charity status and to avoid classification as a private foundation). Classification as a private foundation subjects an organization to several onerous operating restrictions, including distribution requirements, limitations on permitted business holdings, expenditure responsibility requirements, and the obligation to avoid investments that may jeopardize the organization’s charitable purpose. I.R.C. §§ 4940–48 (2006).
236 For example, NPR’s donor influence is limited because the endowment is structured so that it only provides limited cash flow each year. Ombudsman, NPR Makes Budget Cuts, NAT’L PUB. RADIO (Dec. 15, 2008, 6:22 PM), http://www.npr.org/ombudsman/2008/12/npr_makes_budget_cuts.html. This forces NPR to rely on a combination of fees from member stations plus corporate and individual donations. Public
corporations from all pressure from larger donors, donor influence should be a lesser concern in the context of a public charity than comparisons to private foundations might suggest.

Third, newspaper organizations may have concerns about how news content may be affected if news organizations are subject to the operating restrictions placed on charitable organizations’ daily activities. Newspaper corporations, like other tax-exempt organizations, would need to take care to operate within the restrictions of 501(c)(3), lest they lose their tax-exempt status or fall subject to intermediate sanctions. Among these restrictions are limitations on legislative and political lobbying activities. When he introduced his tax-exempt newspaper bill, Senator Cardin stated “[nonprofit] newspapers would not be allowed to make political endorsements, but would be allowed to freely report on all issues, including political races.” Robert Picard, journalism scholar, has argued that the restriction would be significant, with the expansive prohibition extending to endorsements for “local, state, or national office or possibly even taking positions on governmental proposals.” Picard goes on to say the prohibition against endorsements “would somewhat limit the scope of content and could lead to IRS investigations if complaints were made to the IRS that a paper was taking sides, was too conservative or liberal, or evidenced some other kind of agenda that was deemed political activity.”

Picard’s concerns assume that the historic prohibition against charitable organizations engaging in campaign activities will remain valid and applicable in the future. Some scholars have observed that the ongoing validity of campaign restrictions placed on 501(c)(3) organizations may have been cast in question by a recent Supreme Court ruling. In Citizens United v. Federal Election Commission, the Court struck down a federal electioneering law that prohibited both nonprofit and for-profit corporations from advocacy speech related to pending elections within thirty days of a primary election or sixty days of general election for federal office. In deciding the case on First Amendment grounds, the Court broadly stated, “No sufficient governmental interest justifies limits on the political


See supra Part III.A.2. Intermediate sanctions are tax penalties that apply when a charitable organization engages in impermissible activities that should not result in the revocation of an organization’s tax-exempt status.


Id.


130 S. Ct. 876 (2010).

Id. at 887, 917.
speech of nonprofit or for-profit corporations.”

At least one commentator has used the Court’s strong language to predict “a potential removal (or relaxation) of lobbying and electioneering restrictions imposed on [501(c)(3)] corporations.”

This extension of Citizens United to political and lobbying restraints on 501(c)(3) organizations probably overstates the significance of the opinion. While it is possible that some charitable organizations may rely on Citizens United to challenge lobbying or political restrictions, it is far from clear that such an attack would be successful. First, despite the tax-exempt plaintiff, tax related restrictions were not at issue in Citizens United; Citizens United is a 501(c)(4) social welfare organization that, unlike a charitable organization, was permitted to engage in unlimited legislative lobbying and considerable political lobbying activities. Second, the issue was the constitutionality of a federal electioneering law that made certain political speech punishable by civil and criminal penalties.

In contrast to laws punishing speech, it has long been the position of the courts that tax benefits contingent on speech restrictions do not violate the First Amendment. The leading case on the issue is still Regan v. Taxation with Representation of Washington, which expressly held that lobbying restrictions placed on 501(c)(3) organizations do not violate the First Amendment. In so holding, the court reasoned that tax exemption is akin to a subsidy, and that

244 Id. at 913.
245 Korman, supra note 241, at 7.
246 Section 501(c)(4) organizations are permitted to engage in unlimited lobbying activities as long as lobbying does not become the organization’s primary activity. See I.R.C. § 501(c)(4) (2006).
247 Citizens United, 130 S. Ct. at 896.
248 Hopkins, supra note 74, at 669.
249 Regan v. Taxation with Representation of Wash., 461 U.S. 540, 544 (1983). Miriam Galston has questioned the extent to which Taxation with Representation supports upholding tax law restrictions on campaign activity. Miriam Galston, Campaign Speech and Contextual Analysis, 6 FIRST AMENDMENT L. REV. 100, 123 (2007). She points out that Taxation With Representation relied upon the existence of an “alternative channel” through which § 501(c)(3) organizations could engage in unlimited lobbying. Id. at 114–15, 117; see Taxation with Representation, 461 U.S. at 553 (Blackmun, J., concurring) (“Any significant restriction on this channel of communication, however, would negate the saving effect of § 501(c)(4).”). Specifically, the § 501(c)(3) organization in that case was able to control an affiliated § 501(c)(4) social welfare organization’s lobbying message, and the § 501(c)(4) organization was able to engage in unlimited lobbying. Galston, supra, at 114–15. In contrast, no analogous alternative channel exists in the area of political campaign activities, since § 501(c)(4) organizations are themselves subject to some campaign limits and § 501(c)(3) organizations may not affiliate with a § 527 political organization. See Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii) (as amended in 1990) (limiting the degree to which § 501(c)(4) organizations may engage in campaign activities because political campaign activities do not constitute promotion of social welfare); Galston, supra, at 117–18 (explaining why § 527 political organizations do not provide an adequate alternative channel).
Congress can freely choose whether to subsidize lobbying.\textsuperscript{250} Nothing in \textit{Citizens United} suggests that the Court has changed its position on this issue.

Even if 501(c)(3) lobbying restrictions have been weakened by \textit{Citizens United}, newspaper organizations considering whether to convert to nonprofit status should not yet rely upon a significant shift in the law surrounding lobbying restrictions. Consequently, it is important to understand the 501(c)(3) lobbying restrictions under current law. First, charitable organizations are not prohibited from all lobbying activities, but they are prohibited from \textit{substantial} legislative lobbying activities and from all political campaign lobbying.\textsuperscript{251} A charitable organization that engages in substantial legislative lobbying or any political campaign activities will be reclassified as an action organization and will no longer qualify for 501(c)(3) tax exemption.\textsuperscript{252} Legislative lobbying is an effort to influence legislation through contacting or urging the public to contact legislators for the purpose of supporting or opposing legislation, or through advocating the adoption or rejection of legislation.\textsuperscript{253} Political lobbying, the other hand, is participation or intervention “(including the publishing or distributing of statements)” in any political campaign on behalf of or in opposition to a candidate for public office.\textsuperscript{254}

Accordingly, if a charitable newspaper organization were to endorse candidates, it would lose its 501(c)(3) status. Similarly, if the newspaper engaged to a substantial extent in endorsing proposed legislation, it would lose its exemption. Yet while some newspapers will undoubtedly be unwilling to let go of endorsements, the larger concern is whether such restrictions would reach beyond endorsements to chill other politically controversial content. For example, would opinion columns be threatened? And what would be the limits on editorials? Further, what constraints might apply to local coverage? After Hurricane Katrina, the New Orleans \textit{Times-Picayune} went on a crusade against the federal government, publishing numerous articles about the government’s failure to build adequate levees\textsuperscript{255}—their coverage even prompted lawsuits against the government.\textsuperscript{256} At the time, even the \textit{Times-Picayune} journalists admitted that their newspaper had become an advocate for the community rather than a typical

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\textsuperscript{250} \textit{Taxation with Representation}, 461 U.S. at 544.
\textsuperscript{252} Treas. Reg. § 1.501(c)(3)-1(c)(3)(i)–(ii).
\textsuperscript{253} Id.
\textsuperscript{254} I.R.C. § 501(c)(3).
\textsuperscript{255} Will Bunch, \textit{Why the Levee Broke}, \textsc{AlterNet} (Sept. 1, 2005), http://www.alternet.org/story/24871/.
\textsuperscript{256} See generally Editorial, \textit{Sound Bites and Spin Jobs}, \textit{Times-Picayune} (New Orleans), June 19, 2007, at 6 (arguing that the levee failures were neither “inevitable [n]or excusable”); Nikki Usher, \textit{Recovery from Disaster: How Journalists at the New Orleans Times-Picayune Understand the Role of a Post-Katrina Newspaper}, \textsc{3 Journalism Prac.} 216, 222 (2009) (finding that journalists used the newspaper to advocate for the city).
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objective newspaper.\textsuperscript{257} If the *Times-Picayune* had been a nonprofit newspaper, would such activity have jeopardized its tax exemption?

Though the above concerns are often couched in terms of lobbying restrictions, this concern is misplaced. As explained above, lobbying restrictions are a much narrower concept that involves direct appeals to legislators or to the public in favor or opposition of legislation or candidates.\textsuperscript{258} In all but the most extreme cases, it seems unlikely that the above activities would violate lobbying restrictions. Rather, the concern should be whether, in a world where newspapers are educational charities, the above activities would be considered “advocacy” or “propaganda.” Advocacy and propaganda are not educational within the meaning of 501(c)(3), and an educational organization that engaged in more than an insubstantial amount of advocacy or propaganda will lose its exemption.\textsuperscript{259}

Under current law, courts apply a methodology test to determine whether an activity is advocacy or propaganda, as opposed to educational.\textsuperscript{260} Under the methodology test, the IRS looks at the method used by an organization to develop and present its views.\textsuperscript{261} The method used will not be considered educational if the it fails to provide a factual foundation for the advocated viewpoint or position, or fails “to provide a development from relevant facts that would materially aid a listener or reader in a learning process.”\textsuperscript{262} The following factors indicate that the organization is engaging in advocacy: (1) “presentation of viewpoints unsupported by facts is a significant portion of the organization’s communications”; (2) purported facts are distorted; (3) presentation “makes substantial use of inflammatory and disparaging terms and expresses conclusions based more on strong emotions than on objective evaluations”; or (4) approach used in presenting ideas is not aimed at developing an understanding among the readership “because it does not consider the audience’s background and training on the subject matter.”\textsuperscript{263} According to the court that developed the methodology test, the test “leads to the minimum of official inquiry into, and hence potential censorship of, the content of expression, because it focuses on the method of presentation rather than the ideas presented. The methodology test is thus the least intrusive standard available to evaluate an organization’s qualification for tax exemption.”\textsuperscript{264}

\textsuperscript{257} Usher, *supra* note 256, at 222 (noting that nearly all *Times Picayune* journalists interviewed felt they were advocates for the residents of New Orleans).

\textsuperscript{258} See *supra* notes 251–254 and accompanying text.


\textsuperscript{260} *Nat’l Alliance*, 710 F.2d at 875; HOPKINS, *supra* note 88, at 263.


\textsuperscript{262} Id.

\textsuperscript{263} Id.

\textsuperscript{264} *Nat’l Alliance*, 710 F.2d at 875–76. Newspapers are likely to object to the methodology test, which has been criticized on First Amendment grounds. See Brian A. Hill, Note, *First Amendment Vagueness and the Methodology Test for Determining Exempt Status*: Nationalist Movement v. Commissioner, 48 Tax Law. 569, 579–80 (1994) (arguing
It seems unlikely that the average newspaper organization would be at risk of failing the methodology test, given that journalistic standards encourage newspapers to present all sides of a story, to detail their sources and distinguish for the public when they are anonymous sources, and even to print opinion columns, editorials, and letters to the editor representing a variety of perspectives. However, the issue highlights an additional concern: can a newspaper that qualifies for tax exemption as an educational organization print non-news content?

Newspapers in the post-penny press era have never been merely public service organs designed to keep track of politicians and people in power; they have provided much more. Newspapers are the source of entertainment, sports, cooking recipes, personal technology recommendations, personal finance assistance, wedding announcements, advice columns, crosswords, comics, and many other forms of journalism that may or may not be considered “educational.” Newspapers provide much more than simply information; they represent a cultural collection of entertainment and a portrait of national and community life that extends beyond the boundary of news a person needs to know. An important question to which there is no clear answer under current law, then, is whether publishing content like crosswords and entertainment columns, which ultimately distinguish newspapers from online headline aggregators, will be an exempt activity.

Existing Web-based stand-alone nonprofit news organizations do not provide “how-to” style articles that are commonly known as “service journalism,” nor do they produce the consumer friendly entertainment or advice-type articles. These omissions make sense, given the IRS’s apparent position that popular topics like sports, fashion, food, drink, popular music and movies are indices of prohibited ordinary commercial publishing practices. In fact, “service journalism” and other soft-content was in part a creation to attract the advertisers who provide the revenue needed to fund important investigative projects.

Yet, these types of content are as much of what makes a newspaper as is the hard news, and it is a reason why many people argue for their continued existence in an online world. There is reason to suggest that the existing nonprofit news magazines, which are forced to operate within the educational-purpose mandate, do not have broad appeal as compared to traditional newspapers: both Harper’s

that the methodology test is unconstitutionally vague and permits impermissible viewpoint restrictions).


267 See supra Part III.B.1.

and *Mother Jones* are dedicated to national politics, but Harper’s has a weekly circulation of only 200,000, a number that is steadily dropping, and *Mother Jones* has a weekly circulation of only 214,999. Since Harper’s and *Mother Jones* are intended for a national audience, the best comparisons are to newspapers that are similarly published with a national audience in mind: *USA Today*’s daily circulation is 1,900,116; the *Wall Street Journal*’s daily circulation is 2,024,269; and the *New York Times*’s daily circulation is 927,851.

2. Journalism as a Charitable Activity

One way to avoid the special requirement that newspaper journalism be “educational” may be to permit newspaper organizations to qualify as charitable organizations formed for the advancement of journalism. When tax lawyers and academics speak of “charitable organizations,” they are normally referring to section 501(c)(3) organizations generally. However, “charitable” purposes are just one of the eight exempt purposes enumerated in section 501(c)(3). This subcategory of charitable organizations, which contains some overlap with other enumerated exempt purposes, includes organizations formed for the following purposes, among others: relief of the impoverished or distressed; advancement of religion, education, or science; lessening burdens of government; promoting of health; promoting social welfare; and promoting the arts. Given the importance of journalism to democracy, it is not a stretch to consider the advancement of journalism to be a worthy charitable purpose.

It may be argued that the advancement of journalism is already recognized under current law, as evidenced by tax-exempt media organizations that have formed for the express purposes of promoting investigative journalism; however, under current law a traditional newspaper corporation would fail to qualify as furthering the advancement of journalism because the commerciality doctrine.

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272 *Pressure on the Presses*, WALL ST. J., http://online.wsj.com/public/resources/documents/NEWSPAPERS0903.html (last visited Dec. 26, 2010). *Harper’s* and *Mother Jones*’s circulation is more in-line with large local newspapers like the *Sacramento Bee* (217,545), the *Kansas City Star* (216,226), the *Orange County Register* (212,293), and the *Indianapolis Star* (201,823). *Id.*


would cause it to fail the operational test.\footnote{275} To allow news organizations to qualify as charitable organizations for the advancement of journalism, then, Congress would need to statutorily overrule the commerciality doctrine.

In theory, recognizing the promotion of journalism as a charitable purpose would offer newspapers more flexibility in content than would an amendment to the “educational” category; however, this approach would likely leave the IRS to define what “journalism” is. In a new media environment when many are hoping for innovative, expansive definitions of journalism that encourage experimentation among citizen journalists, this may be a regretful result.\footnote{276}

In sum, many have advocated for amendments to the current law to enable commercial newspaper publishers to qualify for 501(c)(3) tax exemption. Yet, barriers exist that may give newspapers reason to pause, such as the financial risk of insufficient donors, the logistical problem of converting large publicly owned newspapers into nonprofit organizations, and lingering concerns that content will be chilled if newspapers must act within the limitations of 501(c)(3).

3. Newspapers as Other Tax-Exempt Organizations

A potential response to the limitations imposed by 501(c)(3) is for newspapers to seek tax exemption outside that section. One way to achieve such a goal would be to amend current law to add a wholly new category of exempt organizations by adding a new section to 501(c): the 501(c)(30) newspaper organization. An advantage to this approach is that it would provide a way to avoid implicit restrictions imported by the “educational purpose” requirement and acknowledge that all types of content—from serious political reporting to Charlie Brown—are equally essential to newspapers. To allow this new form of tax-exempt organization to receive deductible donations, the tax code would need a corresponding amendment to section 170, which would allow individual and corporate donors to deduct part of their contributions to charities.\footnote{277} To preserve the newspaper tax-exempt organization’s access to public donations and private foundation money, however, the newspaper would still need to avoid becoming an advocacy organization or an action organization through distributing propaganda, engaging in substantial legislative endorsement, or by political campaigning. This continued restriction derives from the rules governing charitable donations and private foundation grants: such support is not available to organizations that carry on propaganda, engage in substantial legislative lobbying, or engage in political campaign lobbying.\footnote{278}

\footnote{275}{See supra Part III.B.1.} \footnote{276}{Nikki Usher, Professional Journalists, Hands Off!: Citizen Journalism as Civic Responsibility, in WILL THE LAST REPORTER PLEASE TURN OUT THE LIGHTS: THE COLLAPSE OF JOURNALISM AND WHAT CAN BE DONE TO FIX IT (Bob McChesney & Victor Pickard eds., forthcoming 2011).} \footnote{277}{I.R.C. § 170(a).} \footnote{278}{I.R.C. §§ 4945(d)(1), 170(c)(2)(D).}
Similarly, current law includes a type of organization that could allow newspapers to receive tax exemption with very few lobbying or advocacy restrictions, as long as the newspaper is willing to sacrifice the ability to attract deductible contributions or private foundation money: the 501(c)(4) social welfare organization. As explained above, social welfare organizations are permitted to become action organizations through unlimited legislative lobbying. And unlike charitable organizations, a social welfare organization can engage in some political campaign activity, including political endorsements, as long as the campaign activity is not the primary activity of the organization, which must have a purpose to promote social welfare. “Social welfare” implies a purpose that is for the common good and general welfare, but it does not include carrying on a business with the general public in a manner similar to a for-profit organization. As such, section 501(c)(4) would need to be amended before a commercial newspaper publisher could qualify as a social welfare organization.

While both of these options would offer tax-exempt newspapers the flexibility to minimize lobbying and advocacy restraints, they ultimately represent poor solutions to newspaper’s financial woes, since to do so would limit the newspaper’s access to donor and foundation support. A tax break alone would be only small relief, if any. As Senator Cardin noted, tax exemption would cause minimal revenue loss to the federal government as most newspaper profits have been falling for years, suggesting that the tax exemption itself would not be a significant subsidy to newspapers. In other words, since today’s money-losing newspapers pay very little taxes, a tax break without access to new sources of funding would do little to help newspapers.


Despite the limited potential of 501(c)(4) social welfare organizations to help newspapers on a stand-alone basis, social welfare organizations may be useful in a combination structure that makes the 501(c)(4) an affiliated action organization to handle riskier lobbying-related reporting. Increasingly, charitable organizations are affiliating with 501(c)(4) social welfare organizations as a way to protect the charitable organization from impermissible lobbying activity.

A typical structure is for the charitable organization to create a 501(c)(4) subsidiary that can act as an action organization. The primary risk of this structure is that the activities of the 501(c)(4) organization may be imputed to the parent organization. Typically, the activities of a 501(c)(4) subsidiary will not be attributed to its exempt parent as long as the exempt parent does not exert

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279 See supra note 115 and accompanying text.
282 S. 673, 111th Cong. § 1 (2009).
283 HOPKINS, supra note 88, at 987–89.
284 See HILL & MANCINO, supra note 152, ¶ 6.08[3], at 6-80.
285 Id.
operational control over the subsidiary. An exempt parent can avoid operational control over the subsidiary by ensuring that the subsidiary has a separate business purpose (including that of protecting the parent’s exempt status), and by avoiding total overlap in officers or directors. In addition, an exempt parent and a 501(c)(4) subsidiary can safely share both employees and office space without risk of attribution as long as doing so is not merely a mechanism for the exempt parent to control the daily operations of the subsidiary.

As such, it would be possible for an exempt newspaper organization that is itself subject to strict lobbying restrictions to form a 501(c)(4) subsidiary to engage in types of reporting that constitute lobbying activity. The tax-exempt newspaper and its 501(c)(4) subsidiary could safely share reporters, office space, supplies, and printers. The exempt parent could take the form of a 501(c)(3) educational organization, for instance, or it could comprise a new form of tax-exempt newspaper free of any “educational purpose” requirement. The exempt parent can continue to receive public support and grants from private foundations, while the 501(c)(4) subsidiary protects the newspaper’s status by isolating any lobbying-related activities.

However, a recent IRS ruling suggests that in the context of newspapers, this strategy may pose difficulties. In Technical Advice Memorandum 2009-08-050, the IRS considered whether a political endorsement made by a 501(c)(4) organization could be attributed to an affiliated charitable organization when the charitable organization published the endorsement on its Web site. Except for the 501(c)(4) organization’s logo and address below the charitable organization’s banner, the Web page that ran the endorsement was “virtually indistinguishable” from the other pages on the charitable organization’s Web site. As a result of the presentation, the charitable organization was considered to have impermissibly

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286 Id. ¶ 27.03[2], at 27-11.
288 HILL & MANCINO, supra note 152, ¶ 27.03, at 27-19; HOPKINS, supra note 88, at 1013.
290 New Standards, supra note 289.
distributed the candidate endorsement.\textsuperscript{291} This ruling suggests that, were a tax-exempt newspaper to adopt this strategy, it would need to be exceedingly careful not to publish content created by the 501(c)(4) organization in a way that resembles its own published content. Moreover, any type of distribution of the 501(c)(4)’s lobbying content by the tax-exempt newspaper would cause the lobbying activity to be imputed to the tax-exempt newspaper.

If a tax-exempt newspaper uses this strategy, it should consider causing the 501(c)(4) subsidiary to distribute endorsements separately from the main newspaper using a newspaper that is visibly distinct from the main volume. The 501(c)(4) organization’s content might be printed on a different color paper, or it might have a noticeably different banner. In addition, the Web display of the 501(c)(4) organization’s content should be easily distinguishable from the exempt newspaper’s main Web page. Moreover, the exempt newspaper should avoid posting links to specific endorsements made by the 501(c)(4), although a general link to the 501(c)(4) organization’s separate homepage may be acceptable.\textsuperscript{292} Provided that adequate precautions are taken to avoid attribution of an affiliated 501(c)(4) organization’s lobbying activity to the exempt newspaper organization, this combined structure may offer exempt newspapers a reasonable solution to lobbying restrictions.

5. Combined Structure: Affiliation with 509(a)(3) Supporting Organizations

Combined structures may also be used to facilitate funding of a tax-exempt newspaper organization. Normally, a tax-exempt organization that receives more than one-third of its support from gross investment income and unrelated business income (net of taxes) will be treated as a private foundation.\textsuperscript{293} This may pose problems for a tax-exempt newspaper organization hoping to use an endowment fund, since investment income earned from the fund may cause the tax-exempt newspaper organization to exceed the one-third threshold. Supporting organization structures can help address this problem by transforming some of the investment income into contributions.\textsuperscript{294} Specifically, if a tax-exempt newspaper organization qualifies as a charitable organization, it can affiliate with a section 509(a)(3) supporting organization that can act as an endowment fund and fundraising entity for the benefit of the tax-exempt newspaper.\textsuperscript{295} For the reasons explained below, such supporting organization would be free to earn unlimited investment income and pay that income to its supported tax-exempt newspaper organization, which would receive the payments as charitable contributions. In this way, investment income from an endowment fund that may otherwise threaten the public charity

\begin{thebibliography}{99}
\bibitem{291} Id.
\bibitem{292} HOPKINS, supra note 88, at 666–67.
\bibitem{293} I.R.C. § 509(a)(2)(B) (2006); see also supra note 118.
\bibitem{294} HILL & MANCINO, supra note 152, ¶ 8.06[4][d].
\end{thebibliography}
status of the tax-exempt newspaper organization if earned directly could nevertheless be used to support the newspaper.

A supporting organization is a charity that carries out its exempt purpose by supporting another exempt organization, usually another public charity. The key feature of a supporting organization is that it bears a strong relationship with the organization it supports so that the supported organization may oversee the operations of the supporting organization. Specifically, a supporting organization must have one of the following relationships with the supported organization: (1) it is operated, supervised, or controlled by the supported organization (Type I); (2) it is supervised or controlled in connection with the supported organization (Type II); or (3) it is operated in connection with the supported organization (Type III).

When properly organized and operated, a supporting organization qualifies as a public charity by virtue of its status as a supporting organization. Unlike many 501(c)(3) organizations that must raise substantial support from public contributions in order to maintain their public charity status, a supporting organization automatically avoids private foundation classification. As a result, not only do supporting organizations avoid unfavorable private foundation rules that restrict donors’ ability to deduct contributions and impose strict operating requirements on the foundation, but they also avoid public support requirements. A supporting organization can therefore receive the bulk of its support from an endowment funded by a single donor without risking private foundation status. Such an endowment, along with any other fund-raising activities conducted by the organization, can then be used for the exclusive benefit of the supported charity.

An example of a nonprofit media organization that uses a Type I supporting organization to help support its operations is National Public Radio (NPR). NPR is a 501(c)(3) organization that qualifies as a public charity under section 509(a)(2). To maintain its public charity status under 509(a)(2), NPR is required to raise a substantial part of its support from government units or from direct or indirect contributions from the public. In general, this support requirement means that to maintain its status as a public charity (as opposed to a private foundation) NPR must raise at least one-third of its support from the government or public contributions, or else it must satisfy a facts-and-circumstances test to prove its public charity status. On the other hand, NPR’s 509(a)(3) Type I

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297 Id.
299 Id. § 509(a)(3).
300 See supra text accompanying notes 116–118.
303 See I.R.C. § 509(a)(2).
supporting organization, the NPR Foundation, is not required to meet the strict support requirements.\footnote{See NPR Found., IRS Form 990, OMB No. 1545-0047, Return of Organization Exempt from Income Tax (Aug. 13, 2009).}

The NPR Foundation was formed in 1993 for the purpose of supporting NPR; it received its largest donation of $200 million from the wife of Roy Kroc, the founder of McDonalds.\footnote{Ydstie & Klose, supra note 65.} In fiscal year 2008, the NPR Foundation received $6,675,541 in direct public contributions, as compared to $11,856,372 earned from investment income, interest on savings, or gain from asset sales; its total revenue for the year was $18,594,613.\footnote{NPR Found., IRS Form 990, OMB No. 1545-0047, Return of Organization Exempt from Income Tax (Aug. 13, 2009).} That year, the NPR Foundation made a $15,559,924 contribution to NPR.\footnote{Id.}

NPR, however, must actively maintain its 509(a)(2)(A) status by meeting the public support requirements. For the purposes of calculating NPR’s public support amount, NPR must disregard the contribution received from the NPR Foundation; the remaining portion of NPR’s public support must independently meet the public support requirements.\footnote{I.R.C. § 509(a)(2)(A) (requiring contributions from 1% of donors to be disregarded for the purpose of the public support test); Qualifying as a Publicly Supported 501(c)(3) Organization, TAX COUNSEL LTD., http://www.taxcounsel-ltd.com/501c3-organization.php (last visited Dec. 24, 2010).} NPR had no trouble meeting this requirement in 2008, as 91% of its total revenue was attributable to sources that qualified as public support.\footnote{Nat’l Pub. Radio, Inc., IRS Form 990, OMB No. 1545-0047, Return of Organization Exempt from Income Tax (Aug. 6, 2009) (Schedule A). Gifts, grants, and membership fees qualify as public support, as do gross receipts from sales of merchandise to the extent that such receipts exceed 1% of NPR’s total support. See I.R.C. § 509(a)(2)(A). \footnote{Public Radio Finances, NAT’L PUB. RADIO, http://www.npr.org/about/aboutnpr/publicradiofinances.html (last visited Dec. 24, 2010); see also I.R.C. § 509(a)(2)(A).} Public support for NPR includes membership fees from member stations, corporate sponsorships, certain revenue from merchandise sales, and government grants.\footnote{See David Swensen & Michael Schmidt, Op-Ed., News You Can Endow, N.Y. TIMES, Jan. 28, 2009, at A31; Seward, supra note 217.}

Nevertheless, despite the benefits of the supporting organization structure, the question remains as to whether sufficient support is available to support newspapers, and a supporting organization structure alone cannot solve a problem of insufficient funding. Some commentators have tried to predict what size endowment would be needed to support a tax-exempt newspaper.\footnote{See David Swensen & Michael Schmidt, Op-Ed., News You Can Endow, N.Y. TIMES, Jan. 28, 2009, at A31; Seward, supra note 217.} For example, op-ed contributors to the New York Times stated: “The news-gathering operations at The New York Times cost a little more than $200 million a year. Assuming some additional outlay for overhead, it would require an endowment of approximately $5 billion (assuming a 5 percent annual payout rate). Newspapers
with smaller newsrooms would require smaller endowments. Another observer expanded on this assessment, remarking that $114 billion in endowments would be needed to support America’s newspapers. These predictions are misleading for at least two reasons. First, tax-exempt commercial newspapers would not need enough support to meet their yearly expenses; rather, they would need enough support to cover their cash shortfalls. Second, a tax-exempt newspaper that adopts a support structure would not receive 100% of its support from the endowment—to do so would risk becoming a private foundation. Rather, the tax-exempt newspaper would need to raise at least one-third of its support from other public sources. To be sure, the endowment funding could be a significant percentage of a tax-exempt newspaper’s support, but it almost certainly would not be the sole source of support.

That said, tax-exempt newspapers that are able to secure endowments should consider integrating a supporting organization into their overall structure for the sole purpose of fund-raising, managing an endowment, and contributing those funds to the tax-exempt newspaper. Not only would such a structure free the newspaper from at least some of the operating burdens of fund-raising activities, but it would also ensure that reliance on an endowment would not pose a risk to the tax-exempt organization’s public charity status.

B. Potential Hybrid Model for Newspapers: The L3C

In addition to new nonprofit models for news organizations, many commentators are paying close attention to a relatively new form of business entity called the “low-profit limited liability company” (L3C). The L3C made its first statutory appearance in Vermont in 2008, and it has since been adopted or introduced in fourteen other states. The goal of L3C statutes is to make it easier for for-profit organizations to attract private foundations as investors, thereby expanding the pool of potential investors beyond traditional for-profit investors.

In addition to making grants, private foundations are permitted to invest funds in income-producing assets; but if the private foundation invests in “such a manner as to jeopardize the carrying out of any of its exempt purposes,” then it will be subject to a 10% excise tax on the amounts invested. In other words, private foundations are penalized for making risky investments that are likely to result in

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312 Swensen & Schmidt, supra note 311.
313 Seward, supra note 217.
314 See supra text accompanying notes 88–89.
317 I.R.C. § 4944(a)(1) (2006). A second-tier excise tax is also imposed on any manager that makes a jeopardizing investment equal to 10% of the amount invested for the year. Id. § 4944(a)(2).
losses. Due to the risk of tax penalties, many private foundations prefer to seek private rulings from the IRS preapproving investments. These rulings can take months to acquire. Alternatively, some private foundations hire lawyers to provide costly written opinions that prospective investments would not jeopardize their exempt purposes. As a result, investments in for-profit companies can be costly to private foundations and may be avoided. Moreover, a risky for-profit company will almost certainly be unable to attract private foundations as investors because such an investment would be a jeopardizing investment.

Jeopardizing investments are permitted, however, if the investment is a Program Related Investment (PRI). A PRI is an investment made by a private foundation in a for-profit company that is intended to support charitable activities and is not intended to produce significant investment returns. In other words, if investment in a for-profit company furthers a charitable purpose, then the fact that the investment itself is risky will be disregarded and the private foundation will not be penalized. An investment in a for-profit company will advance charitable purposes if the for-profit company’s activities are charitable in nature despite its for-profit status.

L3C statutes are intended to allow certain for-profit companies to easily qualify for PRIs. An L3C must form under a state statute that legally restricts the company’s activities so that the company is formed for charitable purposes, the company does not have as a significant purpose the production of income or appreciation of property, and the company has no purpose to accomplish political or legislative purposes. A non-L3C company that meets these criteria would be eligible for a PRI, but private foundations may nevertheless be hesitant to make the investment because of the risk, time, and cost involved. The L3C statutes are intended to minimize the risk and administrative burdens that bias private foundations away from these investments by legally binding L3Cs to these permitted activities.

Thus, the L3C is often conceived as a hybrid entity that combines the charitable attributes of a nonprofit organization with the potential to have both nonprofit and for-profit owners. In addition to noble social goals, the purpose of this form of entity, according to its proponents, is to specifically comply “with IRS regulations regarding [PRIs, which] are IRS sanctioned investments made by foundations, often into for-profit business ventures, to support charitable activities,

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318 Cassady V. Brewer & Michael J. Rhim, Using the ‘L3C’ for Program-Related Investments, 21 TAX’N EXEMPTS 11, 12 (2009).
319 I.R.C. § 4944(c).
which may involve the potential return of capital within an established period of time.\footnote{323 The Concept of the L3C, supra note 316.}

Within the journalism community, many academics are hopeful that federal law will be passed to allow newspapers to form L3Cs, allowing them to attract PRIs from private foundations.\footnote{324 Sally Duros, How to Save Newspapers, HUFFINGTON POST (Feb. 9, 2009, 10:54 AM), http://www.huffingtonpost.com/sally-duros/how-to-save-newspapers_b_164849.html.} Such PRIs may come in the form of equity contributions, but they are more likely to come as loans. Because L3Cs are taxed as flow-through entities like traditional LLCs, equity investments—but not debt investments—risk exposure to taxable income from entity-level activities that are unrelated to the private foundation’s exempt purpose.\footnote{325 Brewer & Rhim, supra note 318, at 14.}

In addition to the ability to attract PRIs, an interesting advantage of L3Cs is the potential to separate investment tiers to cater to both for-profit and nonprofit investors: capital bearing the most risk could be funded by private foundations, since they would not seek a high return on their PRIs; safer investments could be funded by for-profit investors who hope to see a return on capital.\footnote{326 Id. But see Daniel S. Kleinberger, A Myth Deconstructed: The ‘Emperor’s New Clothes’ on the Low Profit Limited Liability Company 37–39 (William Mitchell Coll. of Law Legal Studies Research Paper Series, Working Paper No. 2010-03, 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1554045&download=yes (explaining that “[u]sing foundation funds to offer market-rate returns to ‘tranch[ed]’ investors is at best a complicated device, not appropriate for ‘branding’ and simplistic appeals to social conscience”).} Newspaper L3Cs, many of which might publish several editions plus a Web component, may be able to funnel PRI funds toward its money-losing operations and encourage for-profit investment in the more profitable operations.

Because the L3C is a new legal creation, it is too early to gauge whether L3Cs will be able to attract PRIs as efficiently as its proponents hope. One skeptic eschewed the notion that private foundations that would not make a PRI in an LLC (due to perceived cost and procedural barriers) would make a PRI in an L3C:

There is no evidence to support this notion. To the contrary, numerous foundation officers and program staff, as well as exempt organization practitioners, have confirmed that the treasuries of the nation’s private foundations were not bulging with money just waiting to be invested in L3C-type vehicles prior to the current economic downturn if only someone had invented the L3C. The events of the last two years have not changed this situation.\footnote{327 Chernoff, supra note 322, at 5.}
Daniel Kleinberger, professor at William Mitchell College of Law, similarly expressed deep skepticism that L3Cs will more easily attract PRIs than other companies, going as far as to call the L3C “nonsensical and useless.”

Despite such criticisms, the L3C is a form of entity that newspaper organizations should watch carefully, as it represents a compromise between the nonprofit and for-profit forms that may have the potential to facilitate other useful structures. For example, where a nonprofit media organization may hesitate to enter a joint venture with a for-profit newspaper, it may be considerably more open to forming a similar joint venture with a newspaper L3C. And where a for-profit newspaper’s shareholders may be expensive to redeem for the purpose of converting it to nonprofit form, they may be more open to exchanging their shares for membership interests in an L3C if those new interests are less risky and more profitable than their current shares. Though the newspaper L3C would import the same lobbying restrictions as charitable organizations—the violation of which would disqualify the investment as a PRI—combination structures could again be used to minimize risks, as through a joint venture with a 501(c)(4) or through an affiliated for-profit company.

Given the flexibility and unique hybrid nature of the L3C, it may ultimately prove to be the most promising structure discussed. While on the one hand, newspaper L3Cs probably should not expect many large PRIs, most tax-exempt newspapers would probably be similarly unlikely to see many large private foundation grants. But while the tax-exempt newspaper would be left to seek out rare public contributions to fill the funding gap, the newspaper L3C may be able solicit capital from for-profit investors. Meanwhile, the newspaper L3C could continue to seek new ways to make the newspaper business profitable.

V. CONCLUSION: THE FUTURE OF TAX-EXEMPT NONPROFIT NEWSPAPERS

This Article has outlined the significance of the crisis in journalism and the importance of finding a new operating model to sustain newspapers, which continue to be essential to a well-functioning democracy. The nonprofit tax-exempt model examined here can take many forms, each of which offer specific benefits and challenges to the traditional, commercial news organization. The importance of this Article is that it articulates what has been, until this point, ambiguity with respect to how these models might actually be implemented.

While academics and lawmakers continue to call for tax-exempt commercial newspapers, it is essential that newspaper organizations understand the full legal ramifications of adopting a tax-exempt structure. First, tax exemption in isolation is unlikely to provide much value to struggling newspapers because most do not pay tax anyway due to their continuing operating losses. Second, the extent to

328 Kleinberger, supra note 326, at 37, 39. (“When a foundation contemplates making a program related investment, the matter requires careful, individualized, professional assessment, not reliance on a branded template.”).

329 See Brewer & Rhim, supra note 318, at 18.
which donor support will be available to fill the revenue gap turns on the extent to which newspapers will be willing to give up some of the traditions to which their editorial pages have grown accustomed, such as the right to endorse political candidates and recommend legislation.

Many of the concerns about nonprofit tax-exempt newspaper models can be addressed by experimenting with tax-exempt structures or new forms of entities. Newspapers that worry about lobbying-related restrictions should consider affiliating with a 501(c)(4) social welfare organization that is free to function as an action organization. Newspapers that have concerns about fundraising or excessive reliance on endowment funding should consider affiliating with a supporting organization that can handle a significant amount of the fundraising operations. And newspapers that decide that tax exemption is not the best option for them should consider the L3C option because it may offer access to private foundation money that would not otherwise be available.

In considering their options, newspaper organizations must remain wary of the danger of relying heavily on too few funding sources. For-profit newspapers that rely on too few sources risk a financing drought if their sources stop investing. Nonprofit newspapers that have too few donors risk subjecting themselves to onerous private foundation rules. Both risk compromised news coverage as they shy away from controversy that could upset their supporters.

Finally, newspapers need to understand that none of the proposed models for news have yet provided a solution to the fundamental problem they face: accessing funding. Despite the theoretical promise of the tax-exempt and L3C funding models, all will fail in reality unless newspapers can access enough funding to continue operating. Even a nonprofit tax-exempt newspaper can only operate in the red for so long.

For newspapers to survive in the digital age, there needs to be two fundamental changes in the American news landscape. First, commercial failure suggests that newspapers cannot continue to exist in their current for-profit model. Second, as news-consumers and members of a democracy, people who care about the future of news need to understand that democracy comes at a price—and that price is the cost of news.