The Constitutionality of Campaign Restrictions on Non-Profit Organizations after Citizens United

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Ellen Aprill, *Regulating the Political Speech of Noncharitable Exempt Organizations After* Citizens United, Loyola-LA Legal Studies Paper No. 2010-57 (2010), *available at* SSRN.

Tax Law and Election Law are now unlikely bedfellows. Political campaigning is often conducted through tax-exempt entities, and the tax code has become an important mechanism for regulating political campaign entities. Ellen Aprill, in her recent article entitled *Regulating the Political Speech of Noncharitable Exempt Organizations After Citizens United,* explores the constitutionality of regulating tax-exempt organizations post the Supreme Court's recent decision in *Citizens United*, which overturned existing rules prohibiting corporations from making contributions to political campaigns. Aprill points out that *dicta* in *Citizens United* could provide justification for overturning some of the provisions regulating tax-exempt entities and their involvement in political campaigns. In this piece, Aprill concludes that those provisions are constitutional, and suggests some further regulation that would strengthen some existing weakness in the current regulatory scheme.

Aprill starts with a discussion of the current regulatory framework that applies to tax-exempt organizations. In short, the Code provides certain limitations on the campaign and lobbying activities of tax-exempt organizations. Courts and scholars have generally justified these regulations based on the notion that an entity was not entitled to tax-exempt status and that Congress therefore had the power to define the contours of the tax-exemption. Thus, 501(c)(3) organizations (mainly charities and educational institutions) can be prohibited from intervening in a political campaign, 501(c)(4) social welfare organizations must have social welfare as their tax-exempt purpose, and 527 political organizations can be required to disclose contributions and expenditures. While some scholars have questioned these regulations, I, and others, and in my view the Supreme Court, have upheld these types of regulations. Language in *Citizens United* indicating that the Congress cannot condition corporate status on a prohibition on campaign contributions by corporations calls into question the constitutionality of the restrictions on tax-exempt organizations. If Congress cannot condition corporate status on a corporation's agreement not to make political contributions, then can Congress place restrictions on the political activities of tax-exempt organizations as a condition of their qualifying for exempt status.

The regulation of First Amendment activities of tax-exempt organizations presents a classic conflict between two existing constitutional doctrines – the "greater power doctrine" and the "unconstitutional conditions" doctrine. Under the greater power doctrine, it is constitutional for the Government to condition the grant of government benefit on the recipient's willingness to comply with restrictions that otherwise might be unconstitutional. The "unconstitutional condition" doctrine provides that the Government cannot condition the receipt of a benefit on the requirement that an organization give up a constitutional right.

Aprill thoroughly details pre-*Citizens United* case law and examines the application of the unconstitutional conditions and greater power doctrines in the tax-exempt context. The cornerstone cases, *Regan v. Taxation with Representation,* 461 U.S. 540 (1983) and *Cammarano v. Commissioner*, 358 U.S. 498 (1959) provide support for the notion that the Congress can regulate tax-exempt entities.

In *Cammarano*, the court upheld a provision that denied an ordinary and necessary business expense deduction for amounts spent to defeat an initiative on liquor sales. The Court rejected taxpayer's argument holding that the denial of the deduction was merely the denial of a subsidy and therefore not unconstitutional. In *Taxation with Representation*, the Court examined the limitation in 501(c)(3) that prohibited 501(c)(3) organizations from engaging in a substantial amount of lobbying. The Court held that an organization was not entitled to 501(c)(3) status and that Congress could condition tax-exempt status on the requirement that organizations not engage in a substantial amount of lobbying. The concurrence in the case also found it important that 501(c)(3) organizations could form separate social welfare organizations that could engage in lobbying.

The question is whether language in *Citizens United* discussing the conditioning of corporate status on the corporate campaign contribution ban was a signal that the Court viewed *Taxation with Representation* and its progeny in disfavor. In *Citizens United* the Court states, quoting Justice Scalia's dissent in *Austin*, "It is rudimentary that the State cannot exact as the price of those special advantages [granted corporations such as limited liability and perpetual life] the forfeiture of First Amendment Rights." 494 U.S. 653, 680 (2010). Aprill notes, however, that the source of this quote is *Speiser v. Randall*, 357 U.S. 513 (1958) and that *Speiser* was distinguished in *Taxation with Representation*, and that *Speiser* simply represents the unconstitutional conditions doctrine and the premise that Congress cannot use its power to penalize someone for exercising a constitutional right. In other words, the quote in *Citizens United* should not be read as changing pre-*Citizens United* jurisprudence in this area. Aprill then traces the case law as well as whether the Government is actually providing a benefit to these tax-exempt organizations. Aprill ultimately concludes that the disclosure requirements under 527 and implicitly the restrictions in (c)(3) are likely constitutional. Ultimately she concludes that 501(c)(3) organizations have an alternative channel for political intervention, and that the burdens on 527 organizations are less burdensome than the disclosure requirements upheld in *Citizens United.*

Aprill also reminds us, however, that the disclosure provisions in section 527 may be constitutional even without reference to *Taxpayers with Representation* and the subsidy-based theory. She notes "in light of the statement in *Citizens United* that an important government interest supports disclosure provisions under exacting scrutiny even for speech that is not the functional equivalent of express advocacy it may be that an elaborate justification on the basis of TWR subsidy theory for the registration and disclosure requirements that sponsors of the amendments to section 527 thought necessary is no longer required." This reminder that straight up disclosure requirements, ones that do not rely on a subsidy theory, may be constitutional, is likely as important as her analysis of the greater powers and unconstitutional conditions doctrine. She provides an excellent path for examining both disclosure and other restrictions placed on tax-exempt organizations.

Finally, in the last part of her article, Aprill provides some suggestions for further regulation of tax-exempt organizations engaged in political advocacy or lobbying. Her suggestions are almost all "good government" suggestions and ones that will cut down on efforts to use tax-exempt organizations as a means of circumventing tax and campaign regulations. Her suggestions include:

1) Requiring (c)(4)s and possibly (c)(5)s and (c)(6)s to apply for exempt status and receive favorable determination in order to be treated as exempt. At the moment, the organizations have to file annual information returns but these annual returns come long after organizations have started their activities.

2) Creating a new category of tax-exempt organizations for organizations primarily interested in lobbying. At the moment, there is no such designation and most organizations that wish to engage in lobbying organize as (c)(4) social welfare organizations.

3) Increasing disclosure of contributors to tax-exempt organizations. Public disclosure is only required

for 527 organizations. She suggests adding a simpler disclosure regime by requiring non-527 organizations to disclose the returns they file that includes information on large donors to the organization.

4) Taxing a non-profit's expenditures on political advocacy in all instances. Under current law it is taxed if the organization also has investment income, but it is not taxed if the organization has not generated such income.

Aprill achieves much in her recent article. She grapples with some of the downstream impacts of *Citizens United* and sets out a path for how courts may interpret existing restrictions on tax-exempt organizations. She also sets out for broader discussion ways in which we can improve the current regulatory regime for tax-exempt organizations engaged in political campaigns. It is a wonderful read for anyone trying to figure out how tax-exempt organizations that engage in political advocacy are regulated and provides a nice starting point for further scholarship and debate on this issue.

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