Keeping Tax-Subsidized Corporate Money Out of Politics
By Theodore Seto

The Supreme Court’s decision in Citizens United v. Federal Election Commission\(^1\) has raised concerns that corporations may come to dominate public discourse and policy on matters of special interest to them. One particular threat to the integrity of the tax system is the possibility that corporate interests will dominate decision-making regarding tax subsidies. It is possible, of course, that they already do. But if not, by removing effective limits on corporate participation in politics, Citizens United has made this scenario more likely.

The problem is urgent. A recent study on the effective yield on corporate lobbying expenses on a single tax provision — the repatriation amnesty of 2004 — estimated that 93 corporations spent a total of $282.7 million to lobby for the provision, receiving in return a total of $62.5 billion in tax savings when the provision passed — a yield of $220 of tax savings for every lobbying dollar spent.\(^2\) And that was just lobbying. Members of Congress now face the prospect of targeted corporate campaign interventions against them if they do not support requested corporate tax benefits. Their jobs are now on the line. It is reasonable to expect that the effective yield on corporate campaign expenditures will be even higher.

Unlike, for example, climate change, Social Security privatization, or healthcare reform, corporate tax subsidies tend to be politically invisible. Tax-savvy readers, for example, may understand my unfootnoted reference to “the repatriation amnesty.” Nontax readers probably do not, despite the fact the tax savings involved were roughly $90 billion in a single year.\(^3\)

Numerous legislative and constitutional responses to Citizens United have been suggested. All face the prospect of filibuster in the Senate. Many also raise constitutional questions. The purpose of this article is to suggest an alternative: to amend the political participation provisions of the code, at least regarding C corporations. Section 162(e) already disallows the deduction of lobbying and campaign expenditures. It would be relatively simple to condition the receipt of other special tax benefits on refraining from such activities as well.

Such an amendment might provide that any C corporation that incurs nondeductible lobbying or political expenses, within the meaning of section 162(e), in excess of some de minimis dollar amount (for example, $1 million per year) would be disqualified from claiming the benefit of other enumerated tax benefits for the tax year in which it so engages and for some period (say three years) afterward. For this purpose, expenditures made by any member of the corporation’s affiliated group, determined without regard to section 1504(b), would be attributed to all other members of that group. Expenditures in the conduct of a media trade or business would be exempt.\(^4\) Tax subsidies subject to the proposed condition might include, for example, deferral of controlled foreign corporation income, the research and development credit, the deduction for U.S. production activities, intangible drilling cost expensing, percentage depletion, and depreciation using any method other than that specified in section 168(g). An examination of the government’s tax expenditure budget\(^5\) would undoubtedly suggest other candidates.

This approach would at least arguably avoid the constitutional problems raised by direct regulation of campaign financing. In Regan v. Taxation With Representation,\(^6\) the Supreme Court held that conditioning tax exemption under section 501(c)(3) on refraining from lobbying activities did not constitute imposition of an unconstitutional condition on speech. Chief Justice William Rehnquist stated: “A tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income.” In response to the taxpayer’s argument that “the government may not deny a benefit to a person because he exercises a constitutional right,” he reasoned that “Congress has merely refused to pay for the lobbying out of public moneys. This Court has never held that Congress must grant a benefit such as TWR claims here to a person who wishes to exercise a constitutional right.” The same should be true of tax subsidies, even more so when the fear is that the system through which such subsidies are awarded is largely invisible to the electorate.

The tax code includes many tax subsidies with very large price tags. Particularly in the context of a large

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\(^{1}\)130 S. Ct. 876 (Jan. 21, 2010).


\(^{3}\)See Floyd Norris, “Tax Break for Profits Went Awry,” The New York Times, June 5, 2009 (“$300 billion in overseas profit was repatriated by American companies in 2005, when they had to pay a tax rate of just 5.25 percent, rather than the normal corporate tax rate of 35 percent”).

\(^{4}\)See, e.g., U.S.C. section 431(9)(B)(i) (“The term ‘expenditure’ does not include any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate.”) The legislation might provide that if such an exemption is constitutionally problematic, it is the intent of Congress that the exemption, not the disqualification from tax subsidies, be stricken.


corporate group, tracing the use of these subsidies to the activities they are intended to induce or subsidize is not practical. The failure, for example, of the purposes restrictions on offshore profit repatriations, included in section 965(b)(4)(B) to limit the temporary tax amnesty authorized by the American Jobs Creation Act of 2004 to repatriations that would enhance job creation, is well documented.\footnote{See, e.g., Dhammika Dharmapala et al., “Watch What I Do, Not What I Say: The Unintended Consequences of the Homeland Investment Act,” NBER Working Paper 15023 (June 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1337206.} Even in simpler contexts, tracing is a practical impossibility. The tracing requirements of temporary reg. section 1.163-8, for example, have never been widely observed or enforced. (Although the regs were published in 1987, I am not aware of any tax return preparation software that takes them into account today.) Indeed, much of our income tax system is premised on the assumption that tracing is impossible.

A corporate group receiving $1 billion per year in tax subsidies (as many undoubtedly do) can easily and untraceably divert a portion of those subsidies to lobbying or political activities that lead to the enactment of more subsidies. Even a small portion of $1 billion will likely dominate the political discourse on tax and other issues of special interest to the corporate group. Preventing the use of government moneys to obtain more government moneys is a legitimate state interest.

As a practical matter, moreover, it is not possible to distinguish between corporate efforts to obtain tax subsidies and corporate efforts to obtain other types of favorable legislative treatment. Corporations commonly lobby for favorable nontax rules or direct government grants and accept instead subsidies administered through the tax system. The intended result of an advertisement urging viewers to contact a congressman and tell him to support oil drilling in his district may well be a new energy tax credit.

Limiting the proposed disqualification to C corporations is justified on the grounds that only C corporations are typically large enough to overcome the collective action problems involved in obtaining nonsalient targeted tax subsidies. Smaller businesses can elect S status or organize in a form taxable under the subchapter K rules instead, thereby avoiding any disqualification.

The normal business activities of media corporations, which unavoidably involve expressing views on policy issues, do not present the same danger to the integrity of the tax system as conventional lobbying or political campaigning by nonmedia businesses. Fox News may express views about global warming, but it probably does not do so because it stands to profit directly if its views are adopted. It is also unlikely to take a public editorial position about the proper useful life (for tax purposes) of its cameras.

One particularly important advantage of the approach described above is that it would likely be self-enforcing. In practice, primary enforcement responsibility would likely fall on inside tax counsel; secondary responsibility, on the outside accountants who certify the corporation’s reserve for taxes for public reporting purposes. Neither the IRS nor any other governmental agency would likely have to be involved in any ongoing capacity. Unlike religious leaders, corporate CEOs are generally not motivated by moral or policy imperatives — they answer instead to the quarterly report. If lobbying or campaign intervention is not profitable, they are unlikely to push the envelope in ways that require governmental monitoring.

Finally, I note two further procedural implications of dealing with corporate lobbying and campaign financing issues through the tax code. First, the provisions outlined in this article could be enacted through reconciliation. Second, any challenge to these provisions would be subject to the Anti-Injunction Act,\footnote{Section 7421(a).} which requires that challenges to tax rules be adjudicated through a suit for refund or suit challenging a deficiency assessment.

It is not my purpose to urge enactment of any such approach. There may be good reasons not to respond to Citizens United legislatively at all. My purpose instead is to note that such an approach would solve many of the practical and legal problems raised by alternatives already under consideration. A largely self-enforcing rule calculated to ensure that the many hundreds of billions of dollars of largely nonsalient tax subsidies awarded to C corporations are not, even in part, diverted to change the political landscape within which these subsidies are awarded might well address some of the more obvious threats to the integrity of our tax system raised by Citizens United.