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Constitutional Dimension of Tax Restrictions

Essentially all decisions are selfish decisions. Essentially everything anybody does, they do out of some strong sense of self-interest. The illusion that we do things out of a common good is essentially either a naive illusion, or a less than honest effort at hiding what the true motive is, and that in fact much of public policy that has been based on the assumption that one can try to achieve altruism and concern for someone other than yourself and long term concerns for the common good is simply wrong, because public choice analysis will try to disentangle and debunk the notions of the common good.

And in some sense if you were a public choice theoretician, and you wanted to create a public choice world, you could not do a better job than the Internal Revenue Service does on our speech. Because if you think about where speech comes from, where public discourse comes from, in the great public square that is the United States, it's going to come from one of three places. It is going to come from individuals, many of whom are motivated by their own self-interests, some of whom are motivated by altruistic settings but many of whom are self-interested. It is going to come from corporations, all of which are and should be motivated by self-interests—after all, that is what they are; they are economic entities that are designed to achieve an economic end, and they will be dominantly thought about in terms of self-interest--or it is going to come from labor unions, which are simply an

effort by a particular economic class to organize and advance its self-interests. And the vast bulk of public speech in the United States is therefore self-consciously self-interested, selfish speech designed to advance the, usually short-term economic, interests of the speaker.

The one segment of the American community from which one could expect to receive a steady flow of speech that would be in some sense removed from the traditional conceptions of short-term self-interest would be the charitable community, the community that has assembled assets, however done—whether through subsidy, whether through (c)(4)—but that has assembled assets in an effort to achieve ends that are directed at common good ends, or directed at serving individuals who are too weak in the traditional give-and-take of politics and the hurly-burly of the market to be able to achieve their ends by themselves. This is the segment of the community from which one would hope that the great common good speeches and speech would come from—the flow of speech about urging us to be better than we are, urging us to be able to achieve, to be able to be nobler than we are when we advance only our self-interests—and the tax law in many ways strangles that speech. It cuts it off. It weakens the ability of that segment of the community to weigh in with the kind of speech that would help to counterbalance the speech that public choice theoreticians hypothesize as the only kind of speech. And so in some strange way we built ourselves a public choice world, not because it necessarily exists, but because we taxed ourselves into it.

The second point I tried to make a couple of years ago, and I think it's still worth talking about today. I'm going to switch over and try to get practical and

talk about subsidies with you in a minute. But the point I tried to make a couple of years ago is that the 501(c)(3) corporation, a 501(c)(3) entity, the usual game, the usual story, is the subsidy story, is that it is I think a mistake to assume that 501(c)(3)'s are one hundred percent subsidized. If you take the tax rates at their most favorable status for subsidy, it's only thirty cents on the dollar that is subsidized spending. When I make a contribution to a (c)(3) and I take a deduction, if I'm in the top bracket, the subsidy that goes to me is a thirty-cent subsidy on the one dollar contribution. So that if you were to disaggregate the subsidy and non-subsidy dollars in your bank accounts, seventy percent of those, from an economic standpoint, are non-subsidy dollars. They are dollars for which the contributor has paid one cent on the cent, I mean absolutely no government subsidy to it at all, and it's only thirty cents on the dollar that can be thought to be subsidized in any kind of meaningful sense. That's a highly relevant fact, if it's true. That's a highly relevant fact, because as we'll see a little bit later, even the subsidy theory doesn't give the government the power to put restrictions on how you spend your non-subsidized funds. The fact that you happen to receive a government subsidy doesn't mean that the government can then put a hook, as the price of that subsidy, as to how you spend private funds or funds that are not derived from the government. Now that paper, as so many of my other papers, is gathering dust in an office somewhere, for non-use, but if you're interested in it, I'm sure Harvey can exhume some copies of it, and it spells out public choice and the partial subsidy arguments that I think are of some relevance to today's law.

But today, though, I'm going to shift over, I want to get a little bit more ambitious than I was a couple of years ago, and I want to try to talk to you today about the constitutional matrix into which these issues are put. But I don't want to approach it in the very traditional way of just going through a batch of cases and saying Regan held this and Rust held this and Rosenberger held this, and therefore we might be able to this. That is the way I'd approach it if I were working out a lawsuit or trying to work out a straight legal problem. But a gathering like this, it seems to me, is a unique opportunity to try to get a little bit more ambitious than to simply work through existing legal doctrine and talk about how analogies might be made. I want to suggest to you that we are confronting in thinking about this issue what is the central First Amendment issue of the current age and the First Amendment issue that will dominate our thinking about free speech into the next century, and that's the general relationship between speech and property. The analytical relationship between those two ideas and how we can think about them as legal practitioners, and judges, and policymakers. The basic philosophical question that I put to you is this: What is the relationship between property and speech? Does the fact that someone owns property that they wish to put to speech uses mean that we simply merge the two ideas into a very powerful autonomy idea that says that the government has nothing to do with the process because speech and property merge into a single idea? Or is it possible to disaggregate speech from property and say that the two are, at least in some situations, not completely co-terminous in the way we analyze it? I mean the traditional approach is that you know the person that pays the piper calls the tune. That there is a one-to-one link

between property and speech. That property is the left hand, and speech is the right hand of a particular approach. Indeed, that they are really synonymous.

I'll give you two examples, and then we'll go on. The two examples would be a case like Tornillo v. Miami Herald Publishing Company a couple of years ago, when somebody wanted access to a newspaper, to try to answer a charge against them that was published in the newspaper. It's a bedrock, famous First Amendment case back from 1974. And the court analyzed it essentially to say, look, the newspaper is private property. It gets to say what it wants in its pages, and if someone wants to get in there and use the property to say something else, that's a violation of the First Amendment. But they could just as easily have said it was a violation of property rights, because what they were really talking about was a merger of the private property interest of the owner of the newspaper and the speech interest in using the property any way they wanted. Now that has been the traditional view of the Supreme Court over the years. The traditional view of the Supreme Court over the years is that the person whose property it is, gets to say how that property is to be used for First Amendment purposes, and no one can question that.

And that has, if that idea is an idea that continues to have essentially unchallenged sway in the Supreme Court, that idea has two implications, one of which is critical for you, but that idea has two implications. The first implication is that there's no way to control powerful aggregations of private wealth when they operate in the marketplace of ideas. In a sense, you can't have campaign finance reform, because if the person whose property gets to call the speech tune and the

two are thought of essentially as coterminous ideas as they are thought of in Buckley v. Valeo the great campaign finance case that dominates the area, then any attempt to regulate the use of the property is perceived as an attempt to regulate the speech, triggering the very powerful autonomy norms of the First Amendment; and the government is essentially driven out of the process, leaving the very powerful property owners free to use the speech any way they want.

Now that has implications, of course, in a number of areas. It has implications in campaign finance. It has implications in media concentration. It has implications in any setting in which a very large aggregation of private wealth is thought to be distorting the ideal flow of a marketplace of ideas, in other words, whether it's too loud, whether it's controlling what other people can say. However you want to think about it, if you're a reformer, unless you can break the link between property and speech, there's no way to correct, and maybe you shouldn't, and maybe it's bad public policy—I don't mean to suggest that it's good public policy—but I'm just thinking about it now from a constitutional standpoint. Unless you can break the link between property and speech in that arena, it is impossible to be able to consider any kind of reform efforts. That's why the campaign reform movement has been chasing its tail ever since Buckley v. Valeo, because unless you can break that link, attempts to impose regulation on a process generally just push the money to somewhere else in the process.

The second implication, and it's an important implication for you, is that if it's government property, as opposed to private property, that's being used to subsidize this speech process or in some sense to subsidize some organization, the

government gets to say how that property is to be used. What I'm suggesting to you is that they are two sides of the same coin. If you say that property equals speech, or if you say the link between the two is philosophically so strong that a regulation of one is a regulation of the other and that the property owner is privileged to use that property any way that person wants in the context of a speech setting, it then follows that you can't control private property, but you can't control public property either.

The public property then is whatever the public, the owner of the property, wants it to be, and the classic example of that in our jurisprudence is Regan v. Taxation With Representation, which is the bedrock case that everybody cites to when we start talking about this. And the analytic underpinning of that case is quite simple. The analytic underpinning of that case is that if the government gives you money—through tax subsidy, through somebody just dropping dollars on you—if the government gives you money, the government has the power ultimately to tell you what to do with that money, in the First Amendment context, in the free speech context. It can tell you whether it wants it to be vibrant speech money, silent speech money, speech money for veterans, speech money for something else. It's the government as the speaker, using the government's property, speaking through you as the person who received the money.

And of course in our era—and Kathleen Sullivan has written on this about as well as anybody—in our era the worst example of that is a case like Rust v. Sullivan, where the government supports, the government subsidizes, a health program for expectant mothers, and because it's the government's money that's

subsidizing the health program for expectant mothers, the government gets to tell the doctors in the health program what they can say to the patients, and the government gets to say to the doctors in that program: “Don’t say anything about abortion.” And when the doctor says, “But I have to, because I can’t carry out my responsibilities as a responsible doctor unless I provide all the options and all the information that my patient might need,” the government’s response is—and the Supreme Court accepts it—“You’re not the speaker.” The government is the speaker. It’s the government’s money. And since it’s the government’s money, the government gets to say what the message is. So that unless it’s possible to break that tie, to break that link between speech and property, we’re into this, I think, almost unbreakable box of uncontrolled private and very, very uncontrollable public control of the speech process.

I just want to quickly go through a couple of cases with you so you will see how the Supreme Court is dealing with it, and then to mention what I believe to be some extraordinary recent movement in the Court that points to the fact that they’re getting a little nervous with a one-to-one relationship between speech and property, and that we may be living through an intellectual sea change that may make it possible for us to think about these cases and these issues a little differently. The starting point if you’re thinking about a line in these, the bad cases—well, they’re not bad cases, the traditional cases—because there’s a lot to be said for linking speech and property in terms of creating a powerful autonomy norm. The traditional cases, there are five of them that I will just quickly run through, I think create one line going in one direction. Regan is the first one, and you all know the

facts of Regan, that the government can decide to allow one subsidized organization to do things without giving the same right to other subsidized organizations, because it's the government's money and the government can pick and choose how the subsidized organizations are going to speak.

That then translated into a series of four cases during the Rehnquist era that solidified that even more strongly. First is the Cumire case, which is the student press case. There the question is the extent to which school authorities are permitted to censor a student newspaper, and the Supreme Court, after some anguish and some wrestling with the issue, essentially came down with the proposition that who owns the newspaper. They said, Wait a minute, it's the school's newspaper. The school is essentially the publisher of the newspaper. Since the school authorities, the school board, owns the newspaper, of course the school board can censor what goes into the paper. The school board is the speaker." And that's simply another example of linking property and speech in a mix to say that if it's government property, government gets to decide how the property is going to be used in a speech situation.

I should say, just beside the point: Ironically, that case has created a dreadful situation in American education, because now if you're a sensitive student, and you really want to fulfill what you understand to be the obligations of a free press—let's say you're a gifted high school student, a junior in high school somewhere. You really want to have a newspaper that can actually function as a newspaper, where the principal doesn't tell you what to write in it, but where you want to do it. What you have to do under those circumstances is create an

underground paper. You have to go off and not use the facilities of the school, not allow the English teacher to help you learn how to do it, not allow the journalism advisor to give you some good advice about the difference between irresponsible and responsible journalism. In other words, you are literally driven away from the very educational authorities that would help you learn what it means to be a responsible journalist and what the role of a responsible free press is. You've got to do it off on your own, because if you do it with the school authorities, the school authorities own the newspaper and they get to tell you what goes in it. So there's this really bizarre situation where the best of our kids are driven into doing the underground papers rather than the formal school newspapers, essentially because of Cumire.

The next case is Rust v. Sullivan, which is a 1991 case, and which plays out the same model. It says, "Who owns. . . whose property is it? Who owns the speech?" In Rust v. Sullivan, the answer was that the government owns the speech. It's the government's dollars. They're spending the money funding the program. They get to say what the doctors in the program are entitled to say. The doctor is simply a mouthpiece for the government. The government is the one that's speaking, because it's their property.

The next case along, would be the case like Kokenda, which I mentioned in my paper. Kokenda is a case where the government bars speech on a sidewalk, but it's a publicly opened, government-owned sidewalk abutting a post office. And somebody wanted to set up tables on that sidewalk, to engage in petition gathering and leafleting and other types of classic First Amendment activity, some of which

involved criticizing the post office. The post office said, “It’s our sidewalk; you can’t engage in First Amendment activities here, even though it’s a publicly open sidewalk, even though everybody walks back and forth.” I mean it’s not a sidewalk inside the post office. It’s a sidewalk abutting the post office that happens to be owned by the United States. Again, the Supreme Court said, “Whose property is it?” It’s the government’s property. It gets to decide what kind of First Amendment activity can go on on the property.

And then finally Finley, a case that Kathleen and I and Floyd Abrams filed an amicus brief in, in which the grants of the National Endowment for the Arts were at stake. Restrictions on the degree to which public money that would go to subsidize art in the United States, the extent to which the government could put substantive restrictions about not having, not subsidizing indecent art or not subsidizing art that fails to respect the values of the community. Again, the Supreme Court did two things in Finley. Fortunately they construed the statute to pull its teeth completely. So, they turned the statute into just a precatory statute that didn’t have any real political force. But they then went on to uphold the idea that since it was the government’s money and since the government was doing the funding, the government had a very substantial amount of power over how that money was to be spent, even to the point of engaging in the type of substantive regulation of art that took place in that case.

Now if you follow those cases, if those are the cases that are going to be the model for tomorrow, then it seems to me that the 501(c)(3) community is in a hopeless quest, if it thinks that it can break out of the existing restrictions on its

speech. And I think this is so despite the fact that advanced thinking and maybe even better economic thinking will argue that you are not really subsidized, that a tax deduction is not the same thing as a subsidy. The idea that a tax deduction is a subsidy is so deeply ingrained into our thinking and so clearly articulated in the Regan opinion—and I see no movement in the general intellectual formula of the Court, to think that they are rethinking that—that they are going to treat you as subsidized creatures. They are going to treat you as people who are walking around with the government’s money in your pocket, and they’re going to tell you that for First Amendment purposes, since it’s our money, we get to tell you how you can use it. And if we tell you that we don’t want it used this way and we want it used that way, that’s an important question of policy, but it is not a question for the First Amendment, because you have government subsidy money, which is why, in some sense, I think it’s so important to try to limit the subsidy to the 30 cents on the dollar that is the most that they can argue that you are subsidized entities.

I now want to take just a few moments and suggest to you that all hope is not lost, because I think that the traditional link between speech and property is being weakened. It’s not being weakened so much in the area of public. . . well it is even in the area of public as well. Let me suggest to you two potential lines of cases that run counter to the notion that I’ve just suggested to you, that speech and property are somehow the same thing. The first would be efforts to deal with powerful, private concentrations of wealth that people think are adversely affecting the marketplace in ideas. I mean the first is the tremendous pressure that is building, and I hope building successfully, to rethink Buckley v. Valeo. That the

nation, that we cannot, we are paralyzed to enact serious campaign finance reform and have to essentially watch while our democracy turns into a vast auction where political power is simply sold to the richest people in the country. I don't think that we are condemned forever to live under that rule, and my hope is that Buckley v. Valeo will be reconsidered and reconsidered in a way that breaks the tie between property and speech in certain settings, although obviously it is very difficult and it is not an easy issue to do.

But there are at least three cases which suggest to me that the Court is willing to do that. One of them is an old one and two of them are quite recent. The old one is the famous Red Lion Broadcasting Co. v. FCC case that upheld the famous doctrine back in the sixties, in which the Court said, "Look, I know it's private property. I know that the networks own the property but that's very important property, charged with a very important public service component, and we think that we can tell them that as a condition of having a broadcast license, they have to fairly cover most of the issues. They have to provide balanced coverage on important issues." Red Lion is intensely controversial. Some people think it's been overruled implicitly; I don't. I think it's still a good law. I think it still has a clear majority support in the Supreme Court, but it's a classic example in saying that private property doesn't trump free speech in every context.

And the reason I feel quite confident about saying that is that two recent decisions of the Supreme Court I think reinforce Red Lion very strongly. The first is Turner One, Turner Broadcasting, which upheld the Cable Act requirements that cable broadcasters carry the over-the-air signal of all of the over-the-air free

broadcasters. That's a clear interference with the property interest of the cable
broadcasters. They own the cable system. They should, under traditional rules,
have plenary power to say what that cable system carries. And yet, what Congress
said was, "Look, we're nervous that unless we have this restriction you won't carry
the over-the-air broadcasters, and the reason you won't carry the over-the-air
broadcasters is that you want them to go out of business so that you then can have
a monopoly over this setting. And since you have what the Court called
"gatekeeper power," you have gatekeeper power to determine what goes on your
network and therefore you control what many other people can speak and say.
Under certain circumstances, that gatekeeper power can be regulated in the service
of a broad and vigorous and effective free market in ideas._

And the last case is Denver Area Educational Consortium, which is again
another cable case in which the Court essentially recognized that portions of the
cable spectrum, even though they are the technical private property of the owners,
can be set aside for public use in which the owners are demoted from speakers to
conduits. They own the property but they don't get to say what goes out over their
property. They become conduits for other people's speech in an effort again to
ensure the broadest possible spectrum of speech.

Now these issues, these questions of whether or not you want to turn
powerful speakers into conduits, are among the most difficult policy questions. I
don't suggest that it's a good idea to do it, but I do suggest that the current court is
relaxing the almost reflexive notion that there is a one-to-one correlation between
property and speech, and that the two are always going to be intertwined. And

those of you who are interested in the area, what I recommend is that you read Justice Thomas's pretty extraordinary separate opinion in the Denver Area case, because that's the case in which in which he sets out what he thinks the change is. He's against it. He thinks we ought to go back to the old days, when speech and property were very closely connected. But his separate opinion sets out the issue and really clarifies it in quite an extraordinary way, and I recommend it to you.

The last case I'll mention to you is the case that I think is closest to your situation, because the three that I've just mentioned are situations where the linkage between speech and property is weakening in the private area, where it's private property and the power of private property to control the speech that's interlocked with that property. The three cases that I suggested to you—Red Lion, Turner, and Denver Area—are all private property cases. But Rosenberger is a public property case. Rosenberger v. Rectors of the University of Virginia is a public property case. Rosenberger is a case where the government subsidized student newspapers at the University of Virginia. But it decided that it only wanted to subsidize secular student newspapers. It didn't want to subsidize religious student newspapers, and so it made a judgment that in order to get the money, you had to promise that you were a secular newspaper instead of a religious newspaper, and it refused to fund a number of, one or two, of the religious newspapers that the student groups put out.

When that case came to the Supreme Court, the Supreme Court made a critically important distinction in the subsidy area. And the critically important distinction is this: that when the government wants to be the speaker, in other

words when the government wants to use its property to speak, then the government is entitled to a very close correlation between speech and property. Since it's the government's property, the government gets to say what it wants. Rust v. Sullivan would be an example of that. I think it's a perverted example, but it would be the example that you might think of. There the Supreme Court said the government wants to be a speaker; therefore, the government gets to say what gets said. They said in a case like Rosenberger, it's clear that the government is not functioning as a speaker. What the government is functioning as is the dispenser of subsidies to other people to act as speaker, and what they are trying to do is subsidize behavior generally and not to act as a particular speaker with their own speech.

Well, I suggest to you that there is a real possibility for growth in the Rosenberger opinion, in the area of 501(c)(3)'s, because it's quite clear that even if we concede across the board that what a tax deduction is is a subsidy, it's also quite clear that it is a broad subsidy given to a very substantial number of entities without attempting to control what those entities do, except that they function in accordance with the general notions of charity. But that there, unlike Rust, there isn't a preset government program that that subsidy is designed to achieve. It is designed to empower a broad base of private people to act in ways that they might otherwise not be able to do. That's Rosenberger, and if that's Rosenberger, then it says that that kind of subsidy is subject to genuine First Amendment constraints. And if that is a subsidy subject to genuine First Amendment constraints, that then takes us back to the question of whether or not entities receiving that subsidy can

be walled off from the public square and told that they cannot speak in that square simply because they have received a subsidy.

Now, there's one big distinction between Rosenberger and the argument that I've just made to you, and it may be a fatal distinction. In Rosenberger it's clear that they were making content-based decisions. Rosenberger said, "You know we're favoring seculars against religion. Here all of you have been treated equally and none of you are allowed to speak in certain settings." The question is, nevertheless, if the government grants a broad subsidy to a very large group in the community, can it grant that subsidy in return for that group in the community waiving their First Amendment rights? Now if speech and property are exactly the same under Regan, it's not even a hard question. But to the extent that speech and property get uncoupled, we're allowed now for the first time to start thinking seriously about that—maybe to develop an unconstitutional conditions argument, maybe to develop a general First Amendment argument—but really at least on the verge for the first time of an intellectual climate in the Supreme Court that makes those questions possible. And so it's on that note that I'll end.