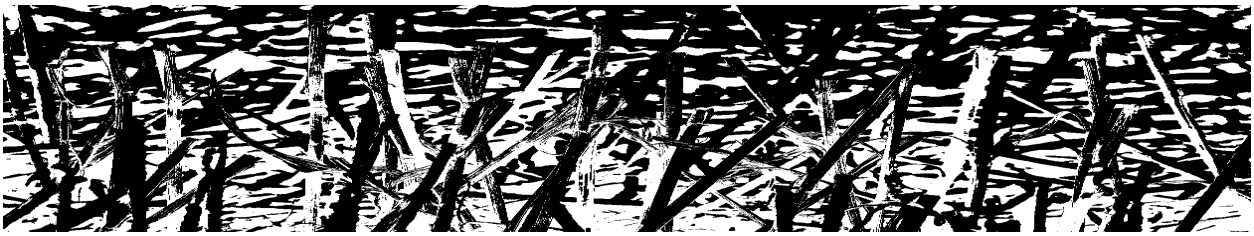

Jack Straw Fortnightly*

scare quotes

First things first. We promised a few column inches on *Americans for Prosperity*, so.

Perhaps predictably, the majority determined that a policy of the California state attorney general requiring the two plaintiff (c)(3) orgs to include with their state filings copies of the schedules B attached to their federal 990s was **unconstitutional "as applied"** to them, on the theory that this "compelled disclosure" threatened their contributors' freedom of association.[1]

Less predictably, the opinion, authored by Chief Justice Roberts, went further and determined that the policy was **unconstitutional on its face** -- not only "as applied" to these two orgs, which advocate controversial views, but as applied to any org --,

regardless whether there was any objective evidence that disclosure would in fact "chill" protected activity.[2]

We mentioned this case very briefly back in September 2019, shortly after AFP had filed its petition for cert, but only as a sort of footnote to a rant against the then recently proposed regs, since finalized, relieving exempt orgs **other than** (c)(3)s of the obligation to disclose the identities of substantial contributors on schedule B their federal 990s.

The Greystocke Project submitted comments opposing the proposed regs, but these were not so much rejected as ignored.

standards and practices

Anyway. Ostensibly the AFP decision **leaves in place** a standard of judicial review called "exacting" scrutiny[3] for cases in which a mandatory disclosure regime burdens a party's First Amendment right to free association.

But Jack says the decision threatens **to render that standard meaningless**. Logically, he says, you cannot have facial invalidity under an "exacting" scrutiny standard. Follow.

Until a couple weeks ago, at least, "exacting" scrutiny has required that a disclosure requirement be "substantially related" to a state interest that is "sufficiently

important" to justify an "actual burden" on the exercise of a First Amendment right.

The heavier the "actual burden," the more important must be the state interest to justify it. But you need an "actual burden."

Which of necessity is an "as applied" question.[4]

And then we have the problem of "narrow tailoring," which is arguably somewhat short of the "least restrictive means" component of the "strict" scrutiny standard, see footnote [3]. But in the particular case the two are difficult to distinguish.

The state's argument was that the information disclosed on schedule B, identities of substantial contributors, was instrumental in identifying possible instances of self-dealing and abuses of the org's exempt status.

What the majority opinion in effect says is that you somehow identify your investigative targets first, and then seek this information through formal processes, subpoenas and whatnot.

but wait a second

The problem with all of this is that the case had been **tried and argued on appeal on an "as applied" theory**. So the question of facial invalidity **should not have been before the Court**.[5]

The Court **did have an opportunity several years ago** to take a case in which facial invalidity was properly raised, but as described in footnote [4], **on that occasion they passed**. Of course, we had a rather different lineup on the bench back then.

So now, belatedly, they take a case from which they can somehow salvage facial invalidity, and they rewrite the "exacting" scrutiny standard so that the plaintiff no longer has to show an "actual burden."[6]

But all of this is metaphysics, and somewhat outside our usual scope here at the Straw, constitutional law and whatnot.

Where Jack anticipates seeing difficulties going forward is in policing the relationships between these (c)(3) advocacy orgs and their related (c)(4) action orgs, which is the typical arrangement.

The state attorney general now has one less tool to work with. We will see how that shakes out.

first out of the gate

Briefing is now complete in two separate appeals, one to the 6th Circuit and another to the 11th, from decisions of the Tax Court disallowing claimed deductions for contributions of conservation easements because of **what might be called "boilerplate"** language in the extinguishment clause.

At issue in each case is the validity of a regulation requiring that the donee of a conservation or facade easement participate "proportionately" in the proceeds of any extinguishment,[7] and an agency interpretation of that reg **forbidding compensation** to the transferor for **post-contribution improvements**.

No dates yet announced for oral argument in either case.

We had discussed one of these at some length in Jack Straw three comma five. At the time, we observed that the reviewed decision in *Oakbrook Land Holdings*, 154 T.C. No. 10 (05/12/20), was probably not the best vehicle for seeking appellate review of the validity of the reg, nor of IRS' reading of the reg,

because in the particular case the extinguishment clause **also froze the donee's share** at its value on the date of contribution.[8]

The other, a memorandum decision in *Hewitt*, T.C.Memo. 2020-89, presents the issue more squarely.

For those who are curious, we have retrieved the briefs in both these appeals from behind a paywall and posted them to the Jack Straw landing page. There are some *amicus* briefs in the mix.[9]

Also, at least some of our prior coverage of this issue can be accessed from the landing page by hitting Ctrl+F, and searching "improvements".

reading between

And finally, we have a heavily redacted memo from a lawyer in LB&I division of the Chief Counsel's office to an agent in the field concerning what appears maybe[10] to be an instance of the "LLC into DAF" scheme we tore apart in Jack Straw two comma fourteen.

The memo includes an interesting take on economic substance, arguing that "the purported donation" should literally be treated as though it had not occurred at all. Passthroughs still taxed to the transferor (itself a partnership) even though the exempt org is at least nominally holding nonvoting units.

Again, it is difficult to say because so much is redacted, but it appears there may have been no actual distributions to the exempt org, which would put the case squarely within Notice 2004-30. Whether that Notice is mentioned in the field advice memo is also unclear, but it seems not.

The entire "hazards of litigation" section at the close of the memo is also redacted, in black rather than white, but this is typical.

In any event, it appears this will be a losing case for the taxpayer regardless, because

(a) they did not even attempt to adhere to the formalities of the transaction as set forth in what the memo describes as "cookie cutter" documents,

(b) the recipient org did not even go through the motions of performing "due diligence" on its acceptance of the units,

(c) the person who wrote the appraisal was one of the promoters of the transaction and therefore disqualified, and

(d) the taxpayer did not attach a copy of the appraisal to the return, as required where a deduction is claimed for a noncash gift in excess of $500k -- a rookie error.

In any event, the memo was written in January, so by now the field agent may have made a final partnership administrative adjustment, and if there will be any pushback from the taxpayer we might expect to see a petition in the Tax Court soon.[11]

scribbles

[1]

Scare quotes throughout are terms of art in this area of constitutional law.

[2]

Justice Thomas withheld his concurrence from this aspect of the opinion, saying in effect **he does not believe in facial invalidity**, only "as applied."

The attentive reader will note that Jack is saying something similar in the main text, at least in the context of "exacting" scrutiny in its conventional formulation.

Even a broken clock.

On the other hand, Justice Thomas also withheld concurrence from that portion of the opinion that said the level of scrutiny to be applied here was "exacting" to begin with. He would have held out for "strict."

But he did accept the majority's analysis that if the standard were "exacting," the state would be required to "narrowly tailor" its regulation to a "sufficiently important" state interest to which the disclosure requirement was "substantially related,"

which would lead in this case, he said, to the same result.

[3]

This is somewhere between "intermediate" scrutiny, which requires that the challenged regulation be "substantially related" to an "important" governmental objective, and "strict" scrutiny, which requires that the regulation be the "least restrictive" means to achieving a "compelling" state interest.

And way down there we have "rational basis," which throws the burden onto the challenger to show either that the government has no legitimate interest in the matter or that the regulation bears no rational relation to achieving a legitimate interest.

You now have a fraction of a credit hour in con law.

[4]

A somewhat similar argument is made in much greater detail and with more eloquence in the dissent authored by Justice Sotomayor, in which Justices Breyer and Kagan joined.

[5]

"But wait," a reader objects, "didn't the underlying complaint argue the policy was invalid not only 'as applied,' but on its face?"

Why, yes, says Jack, good catch. But then what happened was this.

At about the same time, there was another case pending in a different California district court, called the *Center for Competitive Politics*, which did raise what was in effect a facial challenge to the same policy.

The trial court in that case, which was more sympathetic to the attorney general's arguments, denied the Center's motion for a preliminary injunction, and the 9th Circuit affirmed, saying

> the Center could not show that the disclosure requirement would fail "exacting" scrutiny in a "substantial" number of cases, "judged in relation to its plainly legitimate sweep."

Any future challenge would therefore have to be "as applied."

Footnote within a footnote, the Center did petition for certiorari to the Supreme Court, but this was denied.

It was against this backdrop that the trial court in AFP granted a preliminary injunction, on what was now of necessity limited to an "as applied" challenge.

You now have a fraction of a credit hour in appellate procedure.

[6]

The majority opinion also disparages the state's argument that the policy is "substantially related" to its purpose to police the charitable space for self-dealing,

> noting that [under one reading of the evidence] the attorney general has seldom if ever in the past initiated an investigation on the strength of the information provided on the schedule B.

Jack says this logic precludes the possibility that the attorney general might alter (or improve?) its investigative methods over time.

[7]

Typically a judicial extinguishment in connection with a condemnation pursuant to eminent domain.

[8]

See Judge Toro's concurring opinion.

[9]

The same lawyers represent the taxpayers in both these cases. Also, *amicus* briefs submitted on behalf of regional land trusts in each case are written by the same lawyers and are essentially identical.

The agency's response brief in *Oakbrook* appends an article by Utah Quinney law professor Nancy McLaughlin, pending publication in the ABA Real Property and Probate law journal, which defends the regulation on policy grounds.

[10]

Jack says the redactions here are overkill. Surely we can see at least a sketch of the underlying facts without disclosing "return info."

and finally,

[11]

The memo mentions a couple of other issues that were not present in the transaction we wrote up a year and a half ago.

One, apparently the transfer here was literally subject to defeasance by the transferor "reclaiming" the transferred units, whatever that even means.

And two, the transferor sought to amortize the expense of purchasing this scheme, which seems like a pretty obvious nonstarter.

Jack says we seem to be dealing with amateurs here.

Jack says,
people shuffling their feet, people sleeping in their shoes