UNIVERSITY OF MISSOURI SCHOOL OF LAW

LAW OF TAX-EXEMPT ORGANIZATIONS

Spring 2017

Douglas K. Anning

Fridays 9-10:40 am

Hulston Hall Room 4

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Course Description

During this semester, we will explore the dimensions of nonprofit law from basic principles to current developments. As to the former, this is largely a federal tax law subject. Therefore, much of the law underlying this course is in, or based on, the Internal Revenue Code (IRC), which is the statutory body of law governing all federal tax law questions. In addition, throughout the course, there will be consideration of tax regulations, IRS revenue rulings and revenue procedures, IRS private letter rulings and technical advice memoranda, court opinions, IRS Forms (especially 1023 and 990), and other Treasury and IRS writings.

Some aspects of nonprofit law, however, are largely the subject of state law, such as entity formation, principles of fiduciary responsibility, governance, fundraising regulation, and organization and directors’ liability. One of the major trends in nonprofit law is the importation of these state law subjects into the federal tax law, which we will examine.

We will study the law concerning entity formation (including selection of entity type), concepts of nonprofit and tax-exempt organizations, eligibility for and acquisition of recognition of tax-exempt status, the primary purpose rule, categories of exempt organizations, organizational and operational tests, the commensurate test, the doctrines of private inurement and private benefit, the intermediate sanctions rules, the employee benefit rules applicable to tax-exempt organizations, public charities and private foundations, legislative activities rules, political campaign activities rules, reporting and disclosure rules, unrelated business rules, use of for-profit
and nonprofit subsidiaries, involvement of exempt organizations in partnerships and other joint ventures, charitable giving rules, fundraising regulation, and IRS audits of exempt organizations. Interwoven through much of this is the extent to which a nonprofit organization can be tax-exempt if all or most of its activities are conducted entirely online.

Our semester together this spring consists of 13 classes, beginning on January 20, 2017. There will be no class on February 17, 2017. There will also be no class on March 31, 2017 which is Spring Recess.

Each class will focus on one or more discrete topics (assuming the schedule holds). Nearly all of these topics are discussed in the textbook for the course. Some classes list additional materials (a case, an IRS form, statute or regulations, all of which are available online), and you should bring copies of these (electronic or hard) as well as the course book to class with you. I will also post online an outline of current developments in nonprofit law. This will provide you with a perspective on important changes in this area of the law and will supplement the course book and many of the class lectures. You will also be provided a copy of the principal application for recognition of tax-exempt status (Form 1023), a copy of the principal annual information return (Form 990), copies of your professor’s monthly newsletter, and photocopies of other materials, including pertinent IRC sections.

Each class will commence on Fridays at 9:00 a.m. and conclude at 10:40 a.m. We will meet in Hulston Hall, Room 4.

**Required Reading**

- Additional materials (statutes, regulations, cases, forms, etc.) listed for each class

**Optional Reading**


**Absences**

A student is allowed no more than two absences during the semester. Any more than six will result in the student receiving a grade of F for the course. While an attendance sheet will be distributed in each class session, students are responsible for monitoring their own attendance. Failure by the professor to give warnings or other advance notice of attendance problems will not be taken into account in determining whether the student who violates the attendance policy receives an F.

**Grading Policy**

Grades for the course are largely based on a final exam. The exam will be a take home test that can generally be complete in approximately two hours, but you will be provided four hours to complete the exam. The exam can be taken at any time during the finals period. More details will be provided during the semester.
Students are responsible for obtaining a copy of the Spring 2017 examination schedule and determining whether the scheduled examination time for this course conflicts with the examination in any other course they are taking, though this should be a rare occurrence since you will allowed to take the exam at any time during the finals period. Students who have a conflict with the scheduled examination time should consult with the professor within the first week of class. Only in those cases where the scheduled examination time for this course conflicts with another will an examination be rescheduled.

Accommodations

If you anticipate barriers related to the format or requirements of this course, if you have emergency medical information to share with me, or if you need to make arrangements in case the building must be evacuated, please let me know as soon as possible. If disability related accommodations are necessary (for example, a note taker, extended time on exams, captioning), please register with the Office of Disability Services (http://disabilityservices.missouri.edu), S5 Memorial Union, 573- 882-4696, and then notify me of your eligibility for reasonable accommodations. For other MU resources for students with disabilities, click on "Disability Resources" on the MU homepage.

Tardiness

Arriving late to class is disruptive for other students and disrespectful to the professor. Within the sole discretion of the professor, a student’s grade may be reduced for excessive tardiness.

Cell Phone Usage

Cell phone usage curing class is prohibited.

Honor Code

Academic integrity is fundamental to the activities and principles of the School of Law. All members of the law school community must be confident that each person's work has been responsibly and honorably acquired, developed, and presented. Any effort to gain an advantage not given to all students is dishonest whether or not the effort is successful. The law school community regards breaches of the School of Law’s Honor Code as extremely serious matters. Sanctions for such a violation may include academic sanctions such as failing the course, and disciplinary sanctions ranging from probation to expulsion. Please consult me when in doubt about plagiarism, paraphrasing, quoting, collaboration, or any other form of cheating.

Class Participation

Thorough preparation and thoughtful class participation is expected. Questions are encouraged. Students should read the assigned material prior to class. Class discussion will focus primarily on this material. Students who, within the sole discretion of the professor, exhibit outstanding class performance may have their final grade increased. Conversely, students who exhibit anemic class performance may have their final grade decreased. Any student who fails to participation meaningfully during at least one class session may have their final grade reduced.
Syllabus

Unless otherwise noted, students are responsible for all material in an assigned chapter and other additional materials noted in the syllabus. The estimated class periods devoted to each topic represent just that -- estimates. Depending on the speed with which assignments are completed, the syllabus may be altered throughout the semester.
UNIVERSITY OF MISSOURI SCHOOL OF LAW
THE LAW OF TAX-EXEMPT ORGANIZATIONS

Douglas K. Anning

SYLLABUS

COURSE SEQUENCE AND READINGS

SPRING 2017
Reading Assignment:

- Textbook, Chapters 1-3
- Sample articles of incorporation
- Internal Revenue Code sections 501(a), (b), (c); 170

Class Focus

To open this class, we will discuss the sources of nonprofit law. The legal concept of a nonprofit organization is largely based on state law, so we will start there. The legal concept of a tax-exempt organization is mostly a matter of the federal tax law, which will be the emphasis throughout the course. Thus, we will review the sources of the federal tax law that pertain to exempt organizations law. We will also consider the structure of the Internal Revenue Service, from the standpoint of exempt organizations regulation.

As to the matter of IRS structure, things are in great flux. Partially as a consequence of the IRS scandal/brouhaha/imbroglio that has enveloped the agency since May 2013 (and which we will discuss further into the semester), the Tax Exempt/Government Entities Division has endured a major reorganization. This is hard to believe but it is true: Nearly everyone in leadership/top management positions in the IRS exempt organizations function is (1) new and (2) has little or no exempt organizations law background. This includes the Commissioner of the TE/GE Division and the Director of the Exempt Organizations Division.

Most of the processing of applications for recognition of tax exemption has been moved to Cincinnati. The few lawyers that are remaining in the exempt area in Washington (about 45) have been transferred to the office of the Chief Counsel. That is raising the question as to what is remaining in the Division in Washington. (The exempt organizations examination function is based in Dallas.)
We will look at the law definition of a nonprofit organization (it may not be what you think), and in doing so will briefly explore the history of nonprofit law in the U.S. and the nature of the contemporary *nonprofit sector* in our nation.

Then we will look at the law definition of a tax-exempt organization (which, if the term is taken literally, does not exist). We will briefly assess the political philosophic bases underlying the concept of tax exemption for nonprofit organizations and the corresponding tax law policies.

We will consider criticisms of tax exemption for nonprofit organizations, including its impact on tax bases. Tax reform in the immediate future is not likely but there are many proposals in the exempt organizations and charitable deduction areas, and we will discuss some of them.

We will conclude with an introduction to the charitable deduction and considerations in connection with starting a nonprofit organization, including types of them.
Basic Tests and Charitable Organizations

Reading Assignment:

- Textbook, Chapter 4
- Sample articles of incorporation
  

- IRC §§ 501(c)(3), 170

Class Focus

In this session, we will delve into some of the fundamental federal law tests in the law of tax-exempt organizations. We will start with the primary purpose test, because that test initially determines (1) whether an organization qualifies for tax exemption and (2) if so, what type of tax-exempt organization. Related to this test is the organizational test (which imposes requirements as to what must be in an entity’s organizational documents) and the operational test (which looks at organization’s actual activities) (see p. 170 of the book).

Other tests or standards also warrant our attention, including the public policy doctrine (also book pp. 324-326), the commensurate test (book pp. 289-290), the commerciality doctrine (also book pp. 283-284), and the (sometimes) requirement (in the charitable context) of a charitable class. (Some of these tests will be re-visited later in the semester.) We will briefly consider affirmative action developments in the exempt organizations context.

Then, we will begin the process of exploring the many federal tax law categories of tax-exempt organizations (which will occupy us for much of next week’s class as well). Because the law surrounding exempt charitable organizations is so vast, we will first look at the scope of the term charitable as it is used in the federal tax law, the look at the rules pertaining to exempt charitable, educational, religious, and scientific organizations.
Other Categories of Exempt Organizations; Application Process

Reading Assignment:

- Textbook, Chapters 4, 6
- Form 1023 And Instructions
- IRC §§ 501(c), 508, 527

Class Focus

In this class, we will continue our survey of categories of tax-exempt organizations (which, depending on statute parsings, there are 75). The emphasis will be on social welfare organizations, business leagues (associations), social clubs, fraternal organizations, and political organizations. We will gingerly get into the area of tax-exempt employee benefit funds, not wanting to intrude into the area of employee benefits (separate course).

Next up will be the ways a nonprofit organization becomes a tax-exempt organization. As will be seen, most categories of exempt organizations become exempt by operation of law. That is, there need not be any filing with the IRS. The IRS terms (somewhat derisively) these organizations self-declarers. Other types of organizations are required to seek recognition of tax-exempt status from the IRS. Most organizations can voluntarily seek recognition. We will analyze the concept of recognition and discuss the pros and cons of self-declaring.

We will conclude by reviewing the Application for Recognition of Exemption (Form 1023), which is the application required to be filed by most organizations seeking exempt status by reason of IRC § 501(c)(3). Most other organizations can or must file Form 1024 but the 1023 is much more extensive. We will also discuss the exceptions to this filing requirement, as well as the interactive application (i1023) and the controversial streamlined Form 1023-EZ (IRS humor).
Private Inurement, Private Benefit, and Intermediate Sanctions

Reading Assignment:

- Textbook, Chapter 5
- Form 990, Part VII & Schedules J, L and Instructions
- IRC §§ 501(c)(3), 4941, 4958

Class Focus

We have now come to an area that is a significant part of the law of tax-exempt organizations: The law concerning transactions and arrangements with insiders, including the payment of compensation. The underlying principles are in the private inurement doctrine, a body of law that applies to most categories of exempt organizations, although it is most developed with respect to public charities. This law does not prohibit insider transactions but requires that the terms and conditions be reasonable (not excessive). We will explore the various types of private inurement transactions.

We will also consider the private benefit doctrine, which applies to far fewer types of exempt organizations and is broader in scope than the private inurement doctrine. We will take a look at some of the recent applications of the private benefit doctrine by the IRS. We will also consider the extent to which the private benefit doctrine has subsumed or overshadowed the private inurement doctrine.

Then we will turn to the intermediate sanctions rules, which are in many ways a codification of the private inurement doctrine. The intermediate sanctions rules are filled with traps and nuances, and intriguing subtopics such as the initial contract exception and the rebuttable presumption of reasonableness. The interrelationship between the private inurement and excess benefit rules will be considered.

There is a fourth body of law that we will look at, which is the private foundation self-dealing rules. We will see how these bodies of law interconnect.
Reading Assignment:

- Textbook, Chapters 8, 21, 22, 25
- Form 990, Part VI and Instructions

Class Focus

We now come to what some regard as the major tax-exempt organizations law topic – nonprofit governance. This topic has rocketed to the top (or near the top) of the list in just a few years.

First, we will consider the sources of nonprofit governance principles. Then we will look at the elements of and issues in connection with nonprofit organization governance. For decades, this has been a matter of state law only, with emphasis on principles of fiduciary responsibility, which we will briefly review.

Then, about 2007, for reasons we will discuss, the IRS decided to focus on nonprofit governance. There are several manifestations of this decision, some more well-crafted than others. The mainstay of all this is the annual information return (Form 990, Part VI (which part the IRS has often referred to as the “crown jewel” of the 990)). This entry of the IRS into the field has given birth to a plethora of policies, procedures, and protocols.

We will then consider the IRS private letter ruling policy and practices, which focuses on the size and composition of the boards of public charities. This battery of private letter rulings is predicated on the private benefit doctrine.
Public Charities and Private Foundations

Reading Assignment:

- Textbook, Chapters 7, 16
- Form 990, Schedules A, E, H and Instructions
- IRC §§ 170(b)(1)(A), 509, 4940-4948, 4966, 4967

Class Focus

The universe of charitable (IRC § 501(c)(3)) entities is divided into two parts: public charities and private foundations. There are about 75,000 private foundations and millions of public charities.

There is a technical definition of private foundation and a generic one. Understanding the latter is key to understanding the former; we will, of course, discuss both. We will also discuss the various ways to qualify as a public charity – by being (1) an institution (such as a church, school, or hospital), (2) a publicly supported charity (there are two principal types), and (3) a supporting organization (there are four types).

We will explore the formulas used to calculate public support for the donative type of publicly supported charities (IRC § 170(b)(1)(A)(vi), 509(a)(1)) and the service provider type (IRC § 509(a)(2)). There are some similarities, some differences, and some traps.

The matter of supporting organizations (IRC § 509(a)(3) entities) is rather controversial. The statutory law in this area was significantly revised in 2006. Complex tax regulations have been recently revised and more are on the way. We will explore some of this.

Then there is the matter of donor-advised funds. We will look at what these are and how they work, and why they can function as an alternative to a private foundation.

We will survey the private foundation rules, including those pertaining to mandatory payouts, excess business holdings, and taxable expenditures.
Lobbying and Political Campaign Activities

Reading Assignment:

- Textbook, Chapters 14, 15
- Form 990, Schedule C and Instructions
- IRC §§ 501(c)(3) and (4), 527, 4911, 4945, 4955

Class Focus

We are now in another area that is a matter of extensive contemporaneous controversy – the extent to which tax-exempt organizations should be involved in *advocacy*, particularly where that advocacy is in the form of political campaign financing and other forms of participation in political activity.

One form of advocacy is attempts to influence the formulation of legislation (lobbying). Among the bodies of law will we look at are the rules applicable to public charities and private foundations.

The second form of advocacy is participation or intervention in political campaign activities. There is an absolute ban in this regard for charities (one of the most frequently violated of laws). Among the controversies raging in exempt organizations circles is the extent to which social welfare organizations should be allowed to engage in political activity. (This is at the heart of the IRS scandal in 2013-2014 concerning applications for recognition of exemption filed by Tea Party and other groups, and resulting reports and congressional investigations.) We will look at proposed and withdrawn tax regulations on the point, which generated more sets of comments (150,000) than any other tax regulation project in U.S. history, along with any revised regulations that are proposed during the semester.

We will focus once again on the political organization, distinguishing between *political activity* and *political campaign activity*. We will also look at public policy advocacy efforts, and see how they can sometimes be, for tax law purposes, cast as impermissible political campaign activity.
Unrelated Business Rules

Reading Assignment:
- Textbook, Chapter 13
- IRC §§ 511-514

Class Focus

Now we have arrived at one of the true bread-and-butter areas of the law of tax-exempt organizations: The unrelated business rules. For those who practice in this field, hardly a day goes by where this body of law is not considered.

After discussing the rationale for unrelated business rules and the (nearly unanswerable) question as to how much unrelated activity is permissible, we will address (1) the meaning of the term business in this context, (2) when a business is regularly carried on, (3) when a business is a related one, and (4) when a business is a substantially related one.

Once the general rules are understood, our attention will be turned to the myriad of exceptions to them. Two sets of these exceptions exist. One set pertains to types of income; most of these rules are found under a section euphemistically called modifications. A general rule in this setting is that passive income is not taxable as unrelated business income. This general rule thus embraces items such as dividends, interest, royalties, annuities, and capital gain. But, as will be discussed, there are exceptions to the exceptions and exceptions to the exceptions to the exceptions here.

The other set of exceptions is for certain activities. Some types of activities are protected from taxation by the exceptions for convenience businesses, volunteer labor businesses, sales of donated items, conventions and trade shows, bingo games, and more.
Subsidiaries and Joint Ventures

Reading Assignment:

- Textbook, Chapters 17, 18
- Form 990, Schedule R and Instructions

Class Focus

This session will begin with a discussion of the many reasons why a tax-exempt organization would want to establish and utilize a subsidiary, that is, engage in bifurcation (or maybe trifurcation). We will also discuss the several law issues that can arise with use of a subsidiary by an exempt organization, such as capitalization, attribution of functions, income accumulation, and liquidation.

We will then consider use of the three types of subsidiaries: those that are for-profit, taxable nonprofit, or tax-exempt entities. For example, for-profit subsidiaries are frequently used to house extensive unrelated business and tax-exempt subsidiaries are often used for advocacy and fundraising.

We will briefly review the tax law consequences of revenue transfers from subsidiary to parent, because most of this law will have been covered in last week’s class.

We will then quickly look at tax-exempt organizations (usually, public charities) as partners in partnerships (although this is not done much anymore). More common these days, however, is the model where exempt organizations operate as members of limited liability companies. These types of joint ventures are structured either as whole-entity joint ventures (less likely) or ancillary joint ventures (more common).

There are tax law consequences (some adverse) to exempt organizations’ involvement in joint ventures, particularly where one or more of the other venturers are not exempt entities. Most of the troubles that lurk here involve application of the private benefit doctrine. We will explore, in this regard, the participation by exempt organizations in one of the newest types of joint venture – the accountable care organization (which has arisen in the health law context).
UNIVERSITY OF MISSOURI SCHOOL OF LAW
THE LAW OF TAX-EXEMPT ORGANIZATIONS

April 7, 2017

Commerciality, Competition, Commensurateness;

Reporting and Disclosure Requirements

Reading Assignment:

- Textbook, Chapters 9, 10, 23
- Form 990 (note: reading the entirety of the instructions is not required)
- IRC §§ 6033, 6104, 6110

Class Focus

This class will begin with a more detailed analysis of the commerciality doctrine. This body of law, essentially created by the judicial branch, entails a variety of elements that courts have devised. The IRS is enormously fond of the commerciality doctrine; we will take a look at recent examples of the agency’s ruling policy in this area.

We will examine the tax law consequences of a tax-exempt organization, particularly a public charity, having a for-profit counterpart or otherwise being in competition with for-profit entities. We will also briefly re-visit the commensurate test.

We will then take a tour through the most extensive of the exempt organizations’ annual information returns – the Form 990. This return was substantially revised by the IRS a few years ago. This extensive document is much more than an annual report to the IRS. It has evolved into a major regulatory tool for the IRS. It is so comprehensive that wise practitioners almost always consider the reporting consequences when advising and otherwise working with exempt organizations clients in planning and designing their activities, transactions, and other arrangements. Note that references to the Form 990 appear in nearly all of the reading assignments for the course.

Many other reporting requirements for nonprofit organizations are mandated by federal and state law; we will sift through these. We will also take a look at various disclosure obligations imposed on tax-exempt organizations.
Charitable Giving Rules

Reading Assignment:

- Textbook, Chapters 11, 19
- IRC §§ 170, 664

Class Focus

This class is devoted to the charitable giving rules, built largely around the federal income tax charitable contribution deduction (IRC § 170). (There also is an estate tax charitable deduction (IRC § 2055) and a gift tax charitable deduction (IRC § 2522); we will not spend much time on those provisions.)

We will start by exploring the basics – what is a contribution, what persons can be donors, what entities are qualified donees, and other factors affecting the (potential) deductibility of charitable gifts. Also, we will look at the tax law contributions of gifts of property (gifts of money being too easy from a law standpoint to detain us for long).

Then we will look at rules that may limit or eliminate otherwise deductible giving. These come in two varieties: (1) percentage limitations on the amount of deductibility in a year and (2) situations where a deduction may have to be reduced by an element.

We will review instances where there is particular law imposed in special gift situations, such as gifts of partial interests in art, inventory, vehicles, intellectual property, and the biggest issue of all these days – conservation easements.

Next, we will turn to the realm of gifts of partial interests (returning you to your knowledge of the law of property). This is the concept on which planned giving is based. In this setting, we will focus primarily on charitable remainder trusts, briefly touching on other planned gift vehicles, such as the pooled income fund (IRC § 642(c)(5)) and the charitable gift annuity (e.g., IRC § 501(m)(5)). We will also look at gift techniques involving life insurance.

The IRS’s most recent data on planned giving vehicles is for the filing year 2012. This data shows that 93 percent of the split-interest trusts in the U.S. are charitable remainder trusts. These trusts are essentially charitable remainder unitrusts (there are 91,244) and charitable remainder annuity trusts (14,616). There are 6,498 charitable lead trusts and 1,324 pooled income funds.
Reading Assignment:

- Textbook, Chapters 11 (pp. 139-146), 12, 21, 24
- Form 990, Schedules G & M and Instructions
- IRC §§ 170(f)(8), (11), 16), and (17), 6113, 6115, 7428, 7602, 7611

Class Focus

This class is divided into two unrelated topics. One is government regulation of charitable fundraising. We will first take a look at state law regulation, which is largely accomplished by means of charitable solicitation acts; we will survey the basic elements of those laws.

We will then explore the various ways in which the federal government regulates charitable fundraising by means of the tax law: (1) recordkeeping requirements, (2) substantial rules, (3) appraisal rules, (4) disclosure rules, and (5) annual reporting rules (the above-referenced schedules).

Then we will shift over to the matter of IRS examinations (audits) of tax-exempt organizations. We will briefly review the IRS’s audit authority and the organization of the IRS from the standpoint of exempt organizations’ audits. We will look at how a typical IRS exempt organizations audit begins, flows, and ends. Then, we will alter our perspective and consider how an exempt organization can prepare for an examination and some approaches to coping with an audit once it is underway. We will also review the special statutory law concerning IRS examinations of churches.

We will conclude this session with consideration of IRS compliance checks. These are not audits (although they can lead to audits) but reflect the focus of the IRS on types of exempt organizations and specific issues, using questionnaires. As to the former, the IRS has recently conducted compliance checks concerning hospitals, colleges, universities, and community foundations. As to the latter, the IRS started compliance checks as to group exemptions and self-declarers but these have disappeared, due to the Exempt Organization’s recent troubles.

The IRS gets audited also. The principal auditors in this regard (other than Congress) are the Treasury Inspector General for Tax Administration and the Government Accountability Office. We will take a quick look at the results of some of these recent audits.
Reading Assignment:

- Textbook, Chapter 26

Class Focus

In this, our final session, we will survey constitutional law developments and other U.S. Supreme Court decisions that have and are shaping the law of tax-exempt organizations. We will start by reviewing the most relevant provisions of the U.S. Constitution, namely, the First Amendment (from a free speech perspective), the Religion Clauses, and the Commerce Clause.

One area where the Court has been most active, and affecting exempt organizations in the process, is in the field of political campaign financing. Recent court decisions, based largely on free speech jurisprudence, have had the consequence of re-directing the flow of campaign contributions, principally to social welfare organizations and reducing the role of political organizations.

The Court has issued many opinions, grounded in the Religion Clauses, which have had and are having a major impact on tax-exempt churches, religious schools, and the like. The nation’s health care system, including many types of exempt health care institutions, has been reshaped by recent legislation, found constitutional pursuant to Congress’s taxation (but not Commerce Clause) power (principally, National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566 (2012)).

Major Court decisions have shaped state law regulating charitable fundraising. Areas of the law of tax-exempt organizations also developed, to one degree or another, by the Court pertain to the state action doctrine (where constitutional law principles can be made applicable to exempt organizations), affirmative action programs (principally in higher education), charitable giving, scholarship law, association law, unrelated business law, and (as noted earlier) the public policy doctrine. The Court has repeatedly ruled on the question as to whether tax exemption and the charitable deductions are government subsidies.

Other areas where Court decisions have affected or will affect exempt organizations law involve the Anti-Injunction Act, standing requirements, judicial review of and deference to tax regulations, religious rights of closely held corporations (Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014)), governance (King v. Burwell, 135 S. Ct. 2480 (2015)), and the constitutional right to marry (Obergefell v. Hodges, 135 S. Ct. 2584 (2015)).