

More Groups Want 501(c)(4) Status

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There is a discernible trend in the current political climate by liberal organizations away from the traditionally favored 501(c)(3) public-charity, tax-exempt status. More than a few academics and observers have noticed an anecdotal shift to the less beneficial – but also less restrictive – 501(c)(4) social-welfare category.

Indeed, in January 2018, FPLG pal [Gene Takagi, Esq.](#) [predicted](#) that 2018 will be the year of the “rise of the 501(c)(4) organizations” for two reasons. First, the 2017 tax changes in the standard deduction mean fewer taxpayers will be eligible to itemize deductions and claim charitable deductions. Second, unlike a 501(c)(3) organization, a social welfare organization may engage in unlimited lobbying if it furthers the group’s social welfare purposes; a 501(c)(4) may also support or oppose political candidates.

Historical Preference for 501(c)(3)

Columbia law professor David Pozen offers a useful historical perspective in [The Tax-Code Shift That’s Changing Liberal Activism](#). Writing in late November 2018 in *The Atlantic*, Professor Pozen observes that “nonprofit groups that used to focus their energies on litigation and education are structuring themselves to be political players” especially in the aftermath of the 2016 presidential election. “The late 20th-century model of liberal activism,” he explains, “revolved around two institutions: labor unions and ‘public charities.’”

For a variety of reasons, labor unions – traditionally allied with the Democratic Party – have suffered many setbacks in recent years, diluting their membership numbers and power. For many years, public charities, entitled to hefty benefits under 501(c)(3), had considerable success with a “[constant stream of lawsuits in the public interest.](#)” These groups have traditionally been “favored by wealthy foundation funders” despite the lobbying and political-activity restrictions imposed under the tax code. “The 501(c)(3) form fit snugly into the postwar theory of legal liberalism, in which the federal courts were seen as the key agents of social reform and professionally managed nonprofits

as their partners in that effort.”

During these years, of course, a number of 501(c)(3) organizations created affiliated 501(c)(4) entities to have their cake and eat it, too: spinning off the prohibited activities from the (c)(3) to the (c)(4), albeit with an important trade-off, the loss of tax-deductible donations to fund the social-welfare activities. The reverse was also true; certain organizations formed as 501(c)(4) groups, and then established an “educational” affiliate qualifying under (c)(3) and eligible to receive tax-deductible contributions. In ***Choosing between Financial Viability and a Political Voice: A History of the NAACP’s Tax Status***, Professor Maribel Morey writes for *HistPhil* (for which she is co-editor), providing interesting historical background that is relevant to the NAACP’s 2017 decision to convert entirely to 501(c)(4) status.

Post Election: The 501(c)(4) Gains Traction

According to Professor Pozen, “the model” (of the 501(c)(3) public charity as the favored vehicle for liberal activism) **had been fraying** long before the Trump presidency” but accelerated rapidly in the wake of the 2016 election. As “partisan polarization crept up and up, many on the left began to question whether a court-centric approach was capable of producing lasting social change.” Also, with the new likelihood that the Supreme Court would have a solid 5-4 conservative tilt for the near future, “whatever remained of the left’s faith in the Supreme Court as an engine of justice has crumbled.”

Another factor is that, in the last decade or so, conservative activist groups have used the 501(c)(4) model successfully along with affiliated political-action committees, spending huge amounts of money in several elections. “Liberals initially responded with alarm at the ‘politicization’ of the 501(c)(4) category. **Now they are following suit.**” Many of the high-profile groups that emerged in the wake of the 2016 election, including Indivisible Project, Onward Together, Our Revolution, Sixteen Thirty Fund, Stand Up America, and Women’s March, chose to incorporate as 501(c)(4) social welfare organizations.

This trend is referenced by The Nonprofit Quarterly in ***If You Can’t Beat ‘Em, Join ‘Em? –The Rise of the 501c4 on the Left***, discussing with approval Professor Pozen’s comments in The Atlantic but noting that he is “hardly the first to notice this.”

Indeed, at NPQ, we wrote about this trend back in August 2017, calling attention to the presence of 501c4s at such organizations as American Association of Retired Persons, the National Organization for Women, the American Civil Liberties Union (ACLU), the Center for Community Change, and the Sierra Club. In October 2017, we covered the shift of the NAACP from being a 501c3 to 501c4 so that it could engage directly in electoral activity.

“These developments should not be surprising,” according to **The Nonprofit Quarterly**, because “...anyone who seeks to achieve progressive social change through litigation or education today faces exceedingly slim odds.”

Conclusion

Notwithstanding this discussion of the trend away from litigation to more direct political action, there has been a subset of lawsuits brought in the Trump era that have been highly successful and critical

to directly resisting many of the most flagrant abuses including, for example, the controversial Muslim ban as well as numerous voter-suppression laws around the nation.