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## When Soft Law Meets Hard Politics: Taming the Wild West of Nonprofit Political Involvement

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## WHEN SOFT LAW MEETS HARD POLITICS: TAMING THE WILD WEST OF NONPROFIT POLITICAL INVOLVEMENT

*Lloyd Hitoshi Mayer\**

### ABSTRACT

*Beginning in the 1990s and continuing today, many of the legal and psychological barriers to nonprofits becoming involved in electoral politics have fallen. At the same time, political divisions have sharpened, causing candidates, political parties, and their supporters to scramble more aggressively for any possible edge in winner-take-all political contests. In the face of these developments, many nonprofits have violated the remaining legal rules applicable to their political activity with little fear of negative consequences, especially given vague rules and a paucity of enforcement resources. Such violations include underreporting of political activity in government filings, fly-by-night organizations that exist only for one election cycle in order to avoid penalties, and even organized campaigns that encourage nonprofits to break these rules. The increasingly visible disregard of these rules threatens not only to damage the public reputation of the nonprofit sector as a whole, but also to undermine public respect for the rule of law more generally.*

*Many scholars, journalists, and others have documented the increasing involvement of nonprofits in politics, including numerous apparent violations of the remaining rules governing such activity. Commentators have proposed a variety of piecemeal solutions, ranging from overhauling the existing rules to repealing those rules in part or completely, sometimes with a focus on tax laws, sometimes with a focus on election laws, and sometimes with a focus on state nonprofit laws. However, what is needed is a comprehensive approach that considers the various ways nonprofits can be involved in politics, the positive as well as negative effects of such involvement, and the interaction between these different bodies of law at both the federal and state level that relate to such involvement.*

*This Article takes such a comprehensive approach. Drawing on the now extensive information regarding nonprofit political involvement, and where such involvement appears to have repeatedly violated the existing legal rules, this Article*

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\* Professor of Law, University of Notre Dame. I am very grateful for comments on earlier versions of this Article from Ellen Aprill, Roger Colinaux, Nina J. Crimm, Leandra Lederman, Justin Levitt, Patricia O'Hara, Marcus Owens, and participants at the American Political Science Association Annual Meeting, the ARNOVA Annual Conference, the Chicago-Kent Faculty Workshop Series, the Indiana University Maurer School of Law Tax Policy Colloquium, the Law and Society Association Annual Meeting, the Loyola Tax Policy Colloquium, the Notre Dame Faculty Colloquium, and the Valparaiso Law Review Symposium. I am also very grateful for research assistance from Erik Adams, Kyle Chen, and Dehmeh Smith.

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*will first provide a roadmap of such involvement, and the points where political pressures are overwhelming the existing legal rules and the agencies charged with enforcing them. Next, this Article will describe the various solutions proposed by commentators, highlighting the incomplete nature of those solutions but also the insights they provide regarding the strengths and weaknesses of the various legal approaches for addressing such involvement. These insights include those relating to the historical reasons for why the legal rules have developed in the manner they have, as well as ones relating to the relative institutional competencies of the agencies charged with interpreting and enforcing those rules.*

*Finally, this Article will propose an overall approach to modifying the existing legal rules that relieves the identified pressure points without compromising the important public policies underlying the current legal rules, including ensuring the continuing ability of nonprofits to contribute to political debates in the United States. This approach involves revising the federal tax rules for tax-exempt nonprofits to clarify what constitutes prohibited political activity for charities, to loosen the unnecessary (from a tax policy perspective) restrictions on political activity by non-charitable, tax-exempt nonprofits, and, most controversially, to permit churches and other houses of worship to engage in political activity in the context of internal, in-person communications to members. It also involves shifting public disclosure rules relating to political activity from federal tax law to federal and state election law, refocusing such public disclosure on a broader range of such activity, and increasing the donation amounts that trigger such disclosure with respect to donor identities.*

*This comprehensive approach recognizes the importance of maintaining the current tax policy of not subsidizing efforts to support or oppose candidates for elected office, while at the same time not unduly burdening the free speech, free association, and free exercise of religion rights of individuals who collectively engage in political activity through nonprofits. It also recognizes the institutional limitations of the Internal Revenue Service when it comes to enforcing tax rules relating to political activity, particularly given the breakneck pace of electoral politics, by placing greater emphasis on the federal and state laws, and their related agencies that specifically regulate elections. By doing so, this approach recognizes and anticipates the dynamic nature of political involvement by nonprofits and so seeks not to prohibit, but instead to channel that involvement in a manner that furthers overall democratic participation goals.*

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## INTRODUCTION

Nonprofit organizations have a long history of involvement in politics in the United States, including the role of churches in the American Revolution, the abolitionist movement of the nineteenth century, and the civil rights movement of the twentieth century.<sup>1</sup> This is not to mention the role of other charitable organizations in the latter two movements, the role of unions in the New Deal era, and the role of

<sup>1</sup> See generally Steven Rathgeb Smith & Kirsten A. Grønberg, *Scope and Theory of Government-Nonprofit Relations*, in *THE NONPROFIT SECTOR: A RESEARCH HANDBOOK* 221, 222, 229–33 (Walter W. Powell & Richard Steinberg eds., 2006).

business associations in modern times.<sup>2</sup> While much of this involvement has related to general public policy concerns or lobbying with respect to specific legislative proposals, it has also often involved seeking to influence those elected to public office.<sup>3</sup> Yet it is only in the past twenty or so years that the latter involvement has become not only particularly prominent, but also has pushed against and, in a growing number of instances, broken through the applicable legal limits. The dangers flowing from this trend are two-fold. First, it may damage the reputation of the nonprofit sector and particularly the charitable part of that sector in the eyes of the public, as well as undermine respect for the rule of law generally. Second, it may generate an over-reaction that would not only reign in problematic behavior, but also generate new laws that would unnecessarily restrict the ability of nonprofits and their members to contribute to political discussions.

The story of nonprofit political proliferation is a complicated one involving the interaction of federal tax law, federal and state election laws, court decisions relating to both sets of laws, and broader political developments. The first part of this Article addresses those laws, decisions, and developments, as well as the most prominent areas of apparent illegal activity. This trend has also generated many proposals from commentators ranging from sharply increasing the regulation of such political activity by nonprofits to eliminating the now oft-ignored legal limitations. The second part of this Article considers those proposals, the insights they provide into the relevant legal, institutional, and political landscape, and the flaws they contain that often flow from these proposals' piecemeal approach to addressing this trend.

The third and final part of this Article provides a comprehensive approach for addressing the increasingly "Wild West" nature of nonprofit political activities in a way that furthers the legitimate public policy objectives of the existing restrictions without unduly hindering the important and indeed constitutionally protected role of nonprofits in politics. It does so by recognizing the distinct purposes and related institutional competencies associated with federal tax law, federal and state election law, and state charitable nonprofit law, and the need to alter those laws to reflect those purposes and competencies as opposed to working against them. The results are rules designed not to prohibit political involvement by all nonprofits, but instead to use federal tax law to channel such involvement appropriately, given the long-standing and justifiable congressional tax policy decision to not subsidize such activity while consolidating modified public disclosure requirements relating to such activity in election law.

## I. NONPROFITS AND POLITICS

When nonprofits engage in political activity, defined for the purpose of this Article as activity relating to supporting or opposing the election of candidates to public office, they are subject to a complex web of laws at both the federal and

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<sup>2</sup> *Id.*

<sup>3</sup> See generally Roger Colinvaux, *Policing the Border: A History of IRS Regulation of Political Activity*, HISTPHIL (Aug. 24, 2018), <https://histphil.org/2018/08/24/policing-the-border-a-history-of-irs-regulation-of-political-activity/>; Roger Colinvaux, *Nonprofits and Advocacy*, in NONPROFITS AND GOVERNMENT: COLLABORATION AND CONFLICT 185 (Elizabeth T. Boris & C. Eugene Steuerle eds., 2017).

state level with a long and detailed history. This history in turn has resulted in a number of significant developments with respect to such engagement by nonprofits, some of which are legal but troubling for policy reasons and some of which clearly violate existing laws. This part first considers the relevant laws, and then considers what they have led to in terms of actual political activity by nonprofits in recent years.

### A. THE LAW

While nonprofit organizations are formed under state law—with their “nonprofit” nature arising from their lack of owners with a legal right to any profits they realize<sup>4</sup>—the most important nonprofit-specific body of law to them in most instances is not state law but federal tax law. This is because almost all nonprofits seek exemption from federal income taxes, given the broad range of organizations eligible for such exemption. In doing so, nonprofits subject themselves to the conditions Congress has imposed on such exemption, including with respect to political activity.<sup>5</sup> While many nonprofits may also seek exemption from various state and local taxes, those latter exemptions are often dependent on federal exemption and generally do not include conditions relating to political activity.<sup>6</sup> But for nonprofits engaging in political activity, election law at both the federal and state levels is relevant, and recently there have been increasing efforts to alter state nonprofit law to aid in efforts to regulate such political activity.<sup>7</sup> Therefore, this section considers these three bodies of law.

#### 1. TAX LAW

As others have detailed, from the beginnings of the federal income tax, most nonprofits have enjoyed federal tax exemption.<sup>8</sup> The exemption from various state taxes, particularly for charitable nonprofits, has an even longer history.<sup>9</sup> Express conditions relating to political activity are a somewhat later development at the federal level, although that may be in part because many people considered those conditions to be implicit, at least with respect to charitable nonprofits. Such conditions generally do not exist at the state level.

More specifically, in 1934 Congress imposed a limitation on lobbying by

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<sup>4</sup> See Henry Hansmann, *The Rationale for Exempting Nonprofit Organizations from Corporate Income Taxation*, 91 YALE L.J. 54, 56–57 (1981).

<sup>5</sup> See MARION R. FREMONT-SMITH, GOVERNING NONPROFIT ORGANIZATIONS: FEDERAL AND STATE LAW AND REGULATION 238–41 (2004); John Simon et al., *The Federal Tax Treatment of Charitable Organizations*, in THE NONPROFIT SECTOR: A RESEARCH HANDBOOK 267, 268–69 (Walter W. Powell & Richard Steinberg eds., 2d ed. 2006).

<sup>6</sup> See FREMONT-SMITH, *supra* note 5, at 368–70.

<sup>7</sup> See, e.g., Andrew M. Harris, *Koch Linked Group Must Reveal Major Donors to California*, BLOOMBERG (Sept. 11, 2018, 12:10 PM EDT), <https://www.bloomberg.com/news/articles/2018-09-11/koch-brothers-pac-must-reveal-major-donors-to-california>.

<sup>8</sup> See, e.g., John P. Persons et al., *Criteria for Exemption under Section 501(c)(3)*, in IV RESEARCH PAPERS SPONSORED BY THE COMMISSION ON PRIVATE PHILANTHROPY AND PUBLIC NEEDS 1909, 1924–25 (1977); FREMONT-SMITH, *supra* note 5.

<sup>9</sup> See Persons et al., *supra* note 8, at 1923–24.

charitable, tax-exempt nonprofits.<sup>10</sup> In addition to being tax-exempt by virtue of being described in what is now Internal Revenue Code § 501(c)(3), these charities also enjoyed a number of other federal tax benefits, the most well-known of which is the ability to receive charitable contributions that may be tax deductible to the donors. This lobbying limitation was foreshadowed by both Treasury regulations and case law.<sup>11</sup> Congress later created an optional system for imposing this limitation that provided greater clarity regarding what constituted lobbying and how much lobbying is permitted for charities that elect into this system.<sup>12</sup>

In 1954, Congress imposed a prohibition on political activities by § 501(c)(3) organizations that supported candidates for elected public office by enacting an amendment proposed by then Senator Lyndon Johnson.<sup>13</sup> While that provision has recently come to be known as the “Johnson Amendment”<sup>14</sup> and portrayed as driven solely by the political concerns of Senator Johnson,<sup>15</sup> it in fact arose after significant congressional consideration and also grew from the earlier assumption that such a prohibition was implicitly part of being “charitable.”<sup>16</sup> Congress later amended this prohibition to clarify that it also applied to opposing candidates and to the publication or distribution of statements relating to candidates.<sup>17</sup>

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10 Revenue Act of 1934, Pub. L. No. 73-216, § 23(o), 48 Stat. 680, 690 (1934); *see also id.* §§ 101(6), 406, 517, at 700, 755, 760 (including the same restriction on a charity’s tax exemption and eligibility to receive contributions exempted from the estate and gift taxes); Revenue Act of 1935, Pub. L. No. 74-407, § 102(c), 49 Stat. 1014, 1016 (1935) (incorporating the same requirement into the charitable contribution deduction provision for corporations); I.R.C. § 170(c)(2)(D) (2018) (current law).

11 *See* *Slee v. Comm’r*, 42 F.2d 184, 185 (2d Cir. 1930); T.D. 2831, 21 Treas. Dec. Int. Rev. 285 (1919).

12 *See* I.R.C. §§ 501(h) (providing for this election), 4911(c)(2) (providing a sliding scale, beginning at 20%, for permitted lobbying expenditures) (2018).

13 *See* I.R.C. §§ 170(c)(2)(D), 501(c)(3) (2018).

14 *See* Internal Revenue Code of 1954, Pub. L. No. 83-591, 68A Stat. 3 (originally introduced as H.R. 8300); 100 CONG. REC. 9602, 9604 (1954) (agreeing to Senator Johnson’s proposal to include the prohibition as an amendment to H.R. 8300).

15 *See, e.g.*, Oliver A. Houck, *On the Limits of Charity: Lobbying, Litigation, and Electoral Politics by Charitable Organizations Under the Internal Revenue Code and Related Laws*, 69 BROOK. L. REV. 1, 23–29 (2003) (explaining Senator Johnson’s political motivations behind introducing the 1954 amendment to § 501(c)(3)); Patrick L. O’Daniel, *More Honored in the Breach: A Historical Perspective of the Permeable IRS Prohibition on Campaigning by Churches*, 42 B.C. L. REV. 733, 759–65 (2001) (detailing how the IRS’s apparent inability to penalize a charity that had engaged in political activity opposing then Senator Lyndon Johnson’s re-election campaign led, in part, to Senator Johnson’s introduction of the amendment codifying the prohibition in § 501(c)(3)). *But see* Judith E. Kindell & John Francis Reilly, *Election Year Issues*, in INTERNAL REVENUE SERV., EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION TECHNICAL INSTRUCTION PROGRAM FY2002, at 335, 447–51 (2001), <https://www.irs.gov/pub/irs-tege/eotopic02.pdf> (discussing speculation as to why Senator Johnson introduced the amendment and concluding that it is impossible to be sure of his actual motivation).

16 *See* *Slee v. Comm’r*, 42 F.2d at 185 (upholding the denial of deductible contributions under the predecessor to § 170(c)(2)); 9 JACOB MERTENS, JR., THE LAW OF FEDERAL INCOME TAXATION § 34:05, at 22 (rev. vol. 1983) (“[The 1954 codification] merely expressly stated what had always been understood to be the law. Political campaigns did not fit within any of the specified purposes listed in the section.”); Ann M. Murphy, *Campaign Signs and the Collection Plate—Never the Twain Shall Meet?*, 1 PITT. TAX REV. 35, 54, 62 (2003) (arguing that the prohibition arose from a longstanding suspicion of political activities by charities that was strengthened by the McCarthy paranoia of the time, not primarily because of Senator Johnson’s desire to stop his political opponents). For a nuanced consideration of the different explanations for the amendment, see NINA J. CRIMM & LAURENCE H. WINER, POLITICS, TAXES, AND THE PULPIT: PROVOCATIVE FIRST AMENDMENT CONFLICTS 111–16 (2011).

17 *See* Revenue Act of 1987, Pub. L. No. 100-203, § 10711(a), 101 Stat. 382, 464 (codified as amended I.R.C. §§ 170(c)(2)(D), 501(c)(3), 2055(a)(2)–(3), 2106(a)(2)(A)(ii)–(iii), 2522(a)(2), 2522(b)(2)–(3)); H.R. REP. NO. 100-391, at 1621 (1987); H.R. REP. NO. 100-495, at 1018 (1987).

For non-charitable, tax-exempt nonprofits, the rules vary. For many types of such nonprofits, regulations and other guidance provide that they may engage in unlimited lobbying as long as the lobbying furthers their exempt purposes and may also engage in political activity as long as their other activity (including lobbying) that furthers their exempt purposes remains their primary activity.<sup>18</sup> Nonprofits covered by these rules include social welfare organizations that are tax-exempt under Internal Revenue Code § 501(c)(4), unions that are tax-exempt under § 501(c)(5), and trade associations that are tax-exempt under § 501(c)(6).<sup>19</sup> Such nonprofits are not eligible to receive tax-deductible charitable contributions. Donors to such nonprofits are, however, sometimes able to deduct their contributions as business expenses, but Congress has provided that, to the extent such organizations spend money on political activity (or lobbying), the organizations must either notify their donors that the relevant proportion of their contributions are not deductible or pay tax on the amounts so spent (thereby offsetting the cost to the Treasury of such a deduction); these provisions are commonly referred to as a notice/proxy tax requirement.<sup>20</sup> For some other types of non-charitable, tax-exempt nonprofits, it appears that no political activity is permitted, because their activities must be exclusively dedicated to their particular exempt purposes and political activities are not consistent with that requirement; an example of this type of nonprofit is § 501(c)(13) cemetery companies.<sup>21</sup>

Two other types of tax-exempt nonprofits are worth mentioning because of the unique rules that apply to them. Congress enacted § 527 to clarify that political organizations—including, but not limited to, candidate committees and political parties—are exempt from tax on funds they receive that are dedicated to their “exempt function.”<sup>22</sup> This function includes both supporting or opposing the election of candidates and supporting or opposing the selection, nomination, or appointment of any individual to a public office.<sup>23</sup> Such “527” organizations are not exempt from tax on other income, such as investment income.<sup>24</sup> They also are not eligible to receive tax-deductible contributions. In 2000, after it became clear that not all 527s were subject to election law disclosure rules, Congress modified § 527 to require such organizations to file detailed, publicly available reports—including with respect to the identities of significant donors—that mirrored the kinds of reports required by

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18 See I.R.S. Gen. Couns. Mem. 34, 233 (Dec. 30, 1969) (reviewing the shifting positions of the IRS and the IRS Chief Counsel’s office before ultimately reaching this conclusion); T.D. 6391, 1959-2 C.B. 139, 145–46 (explaining that comments had been considered and reaching the conclusion that social welfare organizations under § 501(c)(4) were tax-exempt as long as they were not primarily engaged in political activity).

19 See John Francis Reilly & Barbara A. Braig Allen, *Political Campaign and Lobbying Activities of IRC 501(c)(4), (c)(5), and (c)(6) Organizations*, in INTERNAL REVENUE SERV., EXEMPT ORGANIZATIONS: TECHNICAL INSTRUCTION PROGRAM FY 2003, at L-1 to L-3 (2002), <https://www.irs.gov/pub/irs-tege/eotopic103.pdf>.

20 See I.R.C. §§ 162(e)(3), 6033(e) (2018); Reilly & Allen, *supra* note 19, at L-20.

21 See I.R.C. § 501(c)(13) (2018); 26 C.F.R. § 1.501(c)(13)–1(b) (2018).

22 See Act of Jan. 3, 1975, Pub. L. No. 93-625, § 10, 88 Stat. 2108, 2116–19 (codified as amended at I.R.C. § 527 (2018)); S. REP. NO. 93-1357, at 30 (1974); H.R. REP. NO. 93-1502, at 108 (1974); William P. Steng, *The Federal Tax Treatment of Political Contributions and Political Organizations*, 29 TAX LAW. 139, 140 (1975).

23 *Id.*

24 See I.R.C. § 527(a), (b), (c)(1), (c)(3), (e)(1)–(2), (f) (2018).



political committees under federal selection law.<sup>25</sup> While almost all tax-exempt nonprofits other than churches and church-related entities must file publicly available annual returns, with the exception of a subset of charities known as private foundations, any required reporting of donors' identities is not subject to public disclosure.<sup>26</sup> In fact, the Treasury Department recently ended the requirement that non-charitable, tax-exempt organizations disclose even to the IRS the identities of their significant donors (although the statutory requirement that all charities disclose their significant donors to the IRS remains in place).<sup>27</sup> Finally, § 501(c)(19) veterans organizations are both eligible to receive tax deductible charitable contributions and are not subject to any limitations on political activity (or lobbying), except that such activity must further their veterans-related exempt purposes.<sup>28</sup>

These provisions are consistent with the general policy that amounts spent on political activity are not deductible for federal income tax purposes (with the exception of the rules for § 501(c)(19) veterans organizations).<sup>29</sup> So if an individual or taxable, for-profit business makes a contribution to a charity (that therefore may qualify as a tax deductible charitable contribution), that amount cannot be spent on political activity because of the prohibition on political activity applicable to charities. Similarly, if an individual or taxable business makes a contribution to a non-charitable nonprofit that might be deductible to the individual or business as a business expense, the notice/proxy tax requirement essentially eliminates that deduction. This policy reflects a decision by Congress that such expenses should not be deductible, even if they arguably further a charitable or business purpose. The reasons for this policy are not completely clear, but it appears that Congress views permitting a deduction for political activity as subsidizing that activity, and that such a subsidy (to the detriment of the Treasury and so other taxpayers) is not warranted.<sup>30</sup>

Despite attempts to challenge this policy on constitutional grounds—both general and specific (pertaining to charitable, tax-exempt nonprofit organizations)—all of these attempts have failed. In 1959, the Supreme Court rejected a challenge on First Amendment grounds to Congress' decision to deny a business expense deduction for lobbying expenses even when those expenses were closely related to

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25 See Act of July 1, 2000, Pub. L. No. 106-230, 114 Stat. 477 (codified in scattered sections of I.R.C.); *Disclosure of Political Activities of Tax-Exempt Organizations: Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways & Means*, 106th Cong. 4 (2000) (statement of Rep. Amo Houghton, Chairman, Subcomm. on Oversight of H. Comm. on Ways & Means); David S. Karp, Note, *Taxing Issues: Reexamining the Regulation of Issue Advocacy by Tax-Exempt Organizations Through the Internal Revenue Code*, 77 N.Y.U. L. REV. 1805, 1828–29 (2002); Lloyd Hitoshi Mayer, *The Much Maligned 527 and Institutional Choice*, 87 B.U. L. REV. 625, 646 n.103; Michael Trister, *The Rise and Reform of Stealth PACs*, THE AM. PROSPECT, (Dec. 19, 2001), <http://prospect.org/article/rise-and-reform-stealth-pacs> (“During the last week of June [2000] . . . the House and Senate abruptly acted to close the newest loophole in the federal election laws.”). As later amended, there are exceptions for 527s that already provide similar disclosures under federal or state election law. See I.R.C. § 527(j)(5) (2018).

26 See I.R.C. § 6104(b), (d)(1), (3)(A) (2018).

27 See Rev. Proc. 2018-38, 2018–31 I.R.B. 280.

28 See I.R.C. §§ 170(a), (c)(3), 501(c)(19) (2018).

29 See I.R.C. § 162(e) (2000). See generally Gregg D. Polsky, *A Tax Lawyer's Perspective on Section 527 Organizations*, 28 CARDOZO L. REV. 1773 (2007) (providing a detailed description of this rule). The Treasury Department issued the first version of this rule in 1915. See T.D. 2137, 17 Treas. Dec. Int. Rev. 57–58 (1915).

30 See *infra* section III.A.1.

the business of the taxpayer.<sup>31</sup> The Court concluded that such a deduction would be a subsidy that Congress was not constitutionally required to provide. In reaching this conclusion, the Court noted that businesses involved remained free to engage in the speech at issue; they just would not receive the benefit of a tax deduction when doing so.<sup>32</sup> The same reasoning presumably would apply to the denial of a deduction for political activity by a business. In 1983, the Supreme Court rejected a First Amendment challenge to Congress' decision to limit lobbying by charitable, tax-exempt organizations, relying on the same reasoning.<sup>33</sup> Again, the same reasoning presumably would apply to the prohibition on political activity by charitable, tax-exempt organizations.<sup>34</sup> In fact, in 2000, the U.S. Court of Appeals for the District of Columbia Circuit reached this conclusion in rejecting a First Amendment challenge to the prohibition by a church.<sup>35</sup> The 527 disclosure provisions survived a challenge on essentially the same grounds, with the Court of Appeals for the Eleventh Circuit concluding that to avoid these requirements, an organization only had to forgo claiming tax-exempt status under § 527.<sup>36</sup>

## 2. ELECTION LAW

While federal law has, in theory, limited the flow of funds relating to the election of candidates to federal office for more than a century, in reality, those limits were largely ineffective before post-Watergate amendments to the Federal Election Campaign Act (FECA).<sup>37</sup> Congress initially tried to limit both contributions to candidates, political parties, and political committees (entities with a “major purpose” of influencing federal elections),<sup>38</sup> and expenditures by candidates, political parties, political committees, and individuals relating to federal elections. In the landmark 1976 case *Buckley v. Valeo*, however, the Supreme Court struck down limits on expenditures as unconstitutional under the First Amendment, while leaving limits on

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31 *Cammarano v. United States*, 358 U.S. 498, 512–13 (1959).

32 *Id.* at 533.

33 *See generally* *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540 (1983); *see also* *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 399–400 (1984).

34 *See, e.g.*, Miriam Galston, *When Statutory Regimes Collide: Will Citizens United and Wisconsin Right to Life Make Federal Tax Regulation of Campaign Activity Unconstitutional?*, 13 U. PA. J. CONST. L. 867, 929 (2011); Lloyd Hitoshi Mayer, *Charities and Lobbying: Institutional Rights in the Wake of Citizens United*, 10 ELECTION L.J. 407, 423–24 (2011).

35 *Branch Ministries v. Rossotti*, 211 F.3d 137, 143–44 (D.C. Cir. 2000).

36 *Mobile Republican Assembly v. United States*, 353 F.3d 1357, 1361–62 (11th Cir. 2003).

37 *See* ROBERT E. MUTCH, *CAMPAIGNS, CONGRESS, AND COURTS: THE MAKING OF FEDERAL CAMPAIGN FINANCE LAW* (1988).

38 More specifically, the definition of a political committee under FECA, as interpreted by the Supreme Court in *Buckley*, is an organization that is either under the control of a candidate or has a “major purpose” to nominate or elect a (federal) candidate, *and* which either receives \$1000 in contributions or makes \$1000 in expenditures during a single calendar year. 52 U.S.C. § 30101(4) (2018); *Buckley v. Valeo*, 424 U.S. 1 (1976); *see also* Gregg D. Polsky & Guy-Uriel E. Charles, *Regulating Section 527 Organizations*, 73 GEO. WASH. L. REV. 1000, 1004 (2005) (describing the *Buckley* Court’s “redefinition of political committee”). This definition is narrower than it first appears because the FEC, in the wake of *Buckley*, interpreted “expenditures” in this context as being limited to expenditures for campaign contributions and express advocacy; the FEC applied this limited definition both to the \$1000 threshold and the major purpose test, making that test whether the major purpose of the committee is to make campaign contributions and/or engage in express advocacy. *See* Richard Briffault, *The 527 Problem . . . and the Buckley Problem*, 73 GEO. WASH. L. REV. 949, 957–58 (2005).

contributions in place.<sup>39</sup> While it is often criticized and also blamed for creating a dialing-for-dollars culture for candidates—because they can spend unlimited amounts, but can only raise a limited amount of funds from any given donor—the basic *Buckley* framework remains in place today.<sup>40</sup>

That said, there have been several significant developments within that framework in the intervening decades, three of which are worth noting. First, political parties eventually developed a way of mostly avoiding the contribution limits to which they were subject, only to have Congress end that work around in 2002 with the passage of the Bipartisan Campaign Reform Act (BCRA).<sup>41</sup> The Supreme Court upheld this portion of BCRA in 2003, and it has survived challenge since then.<sup>42</sup> Second, another provision of BCRA made a knowing violation of any federal campaign finance laws a felony subject to a sentence of up to ten years, which significantly raised the stakes for individuals who violate these laws.<sup>43</sup> Third, the Supreme Court initially upheld the pre-1970s prohibition on the ability of corporations to spend treasury funds on certain communications and other activities relating to the election of candidates to federal office.<sup>44</sup> But in 2010, the Supreme Court overrode that decision in *Citizens United v. FEC* with respect to communications not coordinated with candidates or political parties.<sup>45</sup> While *Citizens United* did not explicitly address a similar prohibition on union spending, it is generally assumed that its reasoning also applies to that prohibition.<sup>46</sup>

With respect to disclosure, the Supreme Court has consistently held the federal government may require public disclosure of even relatively modest contributors to (and recipients of expenditures by) candidate committees, political parties, political committees, and other groups that make certain election-related communications.<sup>47</sup>

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39 *Buckley v. Valeo*, 424 U.S. 1 (1976).

40 See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 393–485 (2010) (Stevens, J., concurring in part and dissenting in part, joined by three other Justices) (criticizing *Buckley*); *Buckley*, 424 U.S. at 235–94 (partial dissents by five Justices); Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581 (2011); J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001 (1976).

41 See Bipartisan Campaign Reform Act § 101, Pub. L. No. 107-155, 116 Stat. 81, 82–86 (now codified at 52 U.S.C. §§ 30101, 30125 (2018)).

42 See *McConnell v. FEC*, 540 U.S. 93 (2003).

43 Bipartisan Campaign Reform Act § 312, Pub. L. No. 107-155, 116 Stat. 81, 106 (now codified at 52 U.S.C. § 30109(d)(1)(A) (2018)).

44 *Austin v. Mich. Chamber of Comm.*, 494 U.S. 652 (1990).

45 *Citizens United v. FEC*, 558 U.S. 310 (2010).

46 See, e.g., *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 469 (7th Cir. 2012); *In re: Anh Cao v. FEC*, 619 F.3d 410, 422–23 (5th Cir. 2010).

47 See *Doe v. Reed*, 561 U.S. 186, 197–202 (2010); *Citizens United*, 558 U.S. at 366–67; *Buckley v. Valeo*, 424 U.S. 1, 65–68 (1976); Ellen P. Aprill, *Regulating the Political Speech of Noncharitable Exempt Organizations After Citizens United*, 10 ELECTION L.J. 363, 400 (2011); Justin Levitt, *Confronting the Impact of Citizens United*, 29 YALE L. & POL'Y REV. 217, 221 (2010); Trevor Potter & Bryson B. Morgan, *The History of Undisclosed Spending in U.S. Elections & How 2012 Became the "Dark Money" Election*, 27 NOTRE DAME J.L. ETHICS & PUB. POL'Y 383, 389 (2013); Katherine Shaw, *Reorienting Disclosure Debates in a Post-Citizens United World*, in DEMOCRACY BY THE PEOPLE: REFORMING CAMPAIGN FINANCE IN AMERICA 153, 154–58 (Eugene D. Mazo & Timothy K. Kuhner eds., 2018); see also *Delaware Strong Families v. Att'y Gen.*, 703 F.3d 304, 309–13 (3d Cir. 2015) (state election law requiring public disclosure of significant donors to entities that en-gaged in certain election-related communications found to be constitutional). Some recent commentators have cautioned that the constitutional law relating to disclosure needs significantly more development, however. See Jessica Levinson, *Full Disclosure: The Next Frontier in Campaign Finance Law*, 93 DEN. L. REV. 431 (2016); Katherine Shaw, *Taking Disclosure Seriously*, YALE L. & POL'Y REV. INTER ALIA (Apr. 3, 2016, 4:30 PM), [http://ylpr.yale.edu/inter\\_alia/taking-disclosure-seriously](http://ylpr.yale.edu/inter_alia/taking-disclosure-seriously).

Current federal election law imposes such public disclosure requirements.<sup>48</sup> For disclosure purposes, covered election-related communications include (a) “express advocacy”, messages that explicitly tell the listener or viewer to support or oppose a clearly identified candidate,<sup>49</sup> and (b) “electioneering communications”, broadcast, cable, or satellite communications that refer to a clearly identified candidate, reach a sufficient number of the relevant electorate, and are aired within a certain time window before the relevant primary or general election.<sup>50</sup>

States are generally bound by the same constitutional restrictions as the federal government, but the actual state election laws for political activity spending with respect to state and local candidates varies significantly from state-to-state.<sup>51</sup> Some states have laws that mirror the federal laws, although often with lower contribution limits. Other states permit activities prohibited under federal law, such as allowing unlimited contributions to candidate committees, political parties, and political committees by individuals and sometimes even by corporations and unions. All states require some level of public disclosure of contributors’ identities and the identities of expenditure recipients, however, the details vary.<sup>52</sup>

### 3. NONPROFIT LAW

For the most part, state laws governing nonprofit organizations—generally nonprofit corporations, nonprofit unincorporated associations, and charitable trusts—do not address political activity. Instead those laws tend to focus on organizational and governance details of such entities.<sup>53</sup> While, on occasion, a state agency has read the federal tax rules relating to political activity into state nonprofit laws, state courts have generally rejected such interpretations absent explicit statutory language.<sup>54</sup>

#### B. THE FACTS

There have always been some nonprofits that pushed against the legal restrictions on political activity. For example, in the 1950s and 1960s the virulently anti-Communist ministry of Dr. Billy James Hargis sought to influence the election of candidates to public office (as well as to influence legislation), eventually leading to IRS revocation of its tax-exempt, charitable status.<sup>55</sup> But until recently, documented instances of political activity that violated the applicable federal tax laws have been relatively sparse and indicated that the violations that did occur were usually minor

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48 See 52 U.S.C. § 30104(a)(4), (b)(3)(A), (b)(5)(A) (2018).

49 See *Buckley v. Valeo*, 424 U.S. 1, 44 & n.52 (1976). The specific disclosure requirements are provided by 52 U.S.C. § 30104(c), (g) (2018).

50 See 52 U.S.C. § 30104 (2018).

51 See generally NAT’L CONF. OF STATE LEGISLATURES, NCSL’S CAMPAIGN FINANCE WEBPAGES, <http://www.ncsl.org/research/elections-and-campaigns/ncsl-s-campaign-finance-webpages.aspx> (last visited Oct. 30, 2018).

52 See generally *id.*

53 See generally FREMONT-SMITH, *supra* note 5.

54 See, e.g., *Holy Spirit Ass’n v. Tax Comm’n*, 435 N.E.2d 662, 667–68 (N.Y. 1982) (rejecting an attempt to read into state law the I.R.C. § 501(c)(3) limitations on lobbying and political activity).

55 See *Christian Echoes Nat’l Ministry v. United States*, 470 F.2d 849 (10th Cir. 1972).

and inadvertent.<sup>56</sup> There is evidence that this has significantly changed in recent years, however.

### 1. “DARK MONEY” AND UNDERREPORTING

The first extensively reported use of tax-exempt nonprofits for political activity did not actually violate any tax laws, but did create pressures that influenced both later behavior and legal developments. In the 1990s, political actors realized that the tax-exempt “political organizations” category—that is, Internal Revenue Code § 527—was defined broadly enough that it included not only entities subject to federal and state election law public disclosure requirements, but also other politically active organizations, even if they avoided the types of communications that triggered such requirements.<sup>57</sup> These “stealth PACs,” as one critic labelled them, therefore had the ability to operate without any public disclosures of either their contributors or their expenditures, escaping all reporting obligations to either election agencies or tax agencies.<sup>58</sup> The former was because of the First Amendment driven limitations on the reach of federal and state election laws (as exemplified by the limited scope of election-related communications covered by election law<sup>59</sup>), and the latter was because Congress apparently did not realize when it enacted § 527 that there could be 527s that were not subject to election law disclosure requirements.<sup>60</sup>

The influence of these organizations arguably peaked in the 2000 primary elections, when 527 organization Republicans for Clean Air funded ads that undermined the candidacy of Senator John McCain for the Republican presidential nomination without having to reveal its sources of funding. Only after Senator McCain lost several critical primary elections did it become known that the group had been funded by a couple of staunch supporters of then-Governor George W. Bush.<sup>61</sup> Senator McCain, a long-time supporter of strong campaign finance laws, then pushed through a modification of § 527 to require all 527s to file detailed public disclosure reports with the IRS, as detailed previously.<sup>62</sup>

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56 See Lloyd Hitoshi Mayer, *Grasping Smoke: Enforcing the Ban on Political Activity by Charities*, 6 FIRST AMEND. L. REV. 1, 7–17 (2007).

57 See, e.g., I.R.S. Priv. Ltr. Rul. 96-52-026 (Oct. 1, 1996) (concluding that an organization qualified for tax-exempt status under § 527 even though it designed its election-related activities specifically to avoid falling within the reach of federal or state election laws); I.R.S. Priv. Ltr. Rul. 97-25-036 (Mar. 24, 1997) (same); I.R.S. Priv. Ltr. Rul. 98-08-037 (Nov. 21, 1997) (same). See generally Frances R. Hill, *Probing the Limits of Section 527 To Design a New Campaign Finance Vehicle*, 86 TAX NOTES 387 (reviewing these rulings).

58 See COMMON CAUSE, UNDER THE RADAR: THE ATTACK OF THE “STEALTH PACS” ON OUR NATION’S ELECTIONS (2000) (on file with author).

59 See *supra* notes 47–48 and accompanying text.

60 See Frances R. Hill, *Probing the Limits of Section 527 To Design a New Campaign Finance Vehicle*, 86 TAX NOTES 387, 390 & n.20 (2000) (“there appears to have been at least an implicit assumption that section 527 organizations would be subject to the FECA,” but also acknowledging that “[l]ittle thought was given to the relation between section 527 and the new FECA”).

61 See David Folkenflik, *Political Donors Find New Loophole: Tax-Exempt Groups Can Spend Unlimited Sums, Hide the Givers*, BALT. SUN, at 1A (Apr. 24, 2000) (describing activities of various 527s in the 2000 elections, including Republicans for Clean Air).

62 See 146 CONG. REC. S4607, 4656–58 (daily ed. June 7, 2000) (statement of Sen. McCain) (offering 527 disclosure provisions as an amendment to the National Defense Authorization Act for Fiscal Year 2001, S. 2549, 106th Cong. (2000)). The amendment almost certainly would have been fatal to the bill because the

This change had an apparently unintended consequence, however. Donors seeking to be anonymous, and groups seeking to avoid detailed public disclosure of their contributors and expenditures, did not abandon political activity. Instead, they shifted that activity to non-charitable, tax-exempt organizations, such as § 501(c)(4) social welfare organizations and § 501(c)(6) trade associations. This shift was facilitated by the relatively vague definition of political activity for federal tax purposes, as well as the relatively vague limit on how much political activity such groups could engage in.<sup>63</sup> The money that flowed in and out of such groups is now labelled “dark money” by critics, since generally the ultimate sources of their funds are not subject to public disclosure under either election law or tax law. While still a relatively small proportion of total spending on elections, because of the ability of these groups to concentrate their spending on relatively few races, in critical races their spending can have a disproportionate effect.<sup>64</sup>

Many critics have attempted to change laws at both the federal and state level to expose the sources of these funds, but they generally have only had limited success. For example, federal disclosure legislation has failed to advance in Congress.<sup>65</sup> Only a few states have enacted relatively comprehensive disclosure requirements under their election laws applicable to groups engaged in political activity within their boundaries, although these requirements have withstood constitutional challenge under the Supreme Court precedents mentioned previously.<sup>66</sup> A few states have also sought access to schedules of donors submitted by tax-exempt organizations to the IRS under their charitable nonprofit laws that are usually broad enough to encompass § 501(c)(4) social welfare organizations as well as § 501(c)(3) charities.<sup>67</sup> Such attempts have, to date, also generally survived constitutional challenge. These efforts

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Constitution requires that revenue-generating provisions originate in the House. U.S. CONST. art. I, § 7. The Senate’s addition of a tax provision to the reauthorization bill would therefore have exposed that bill to being “blue-slipped” as a revenue bill that failed to meet this constitutional requirement, which gave supporters of the amendment leverage to push for a floor consideration of the proposal that led to its enactment. *See* 146 CONG. REC. S4721, 4785 (daily ed. June 8, 2000) (statement of Sen. Sessions) (calling attention to the risk that this amendment posed to the bill).

63 *See* Ellen P. Aprill, *The Section 527 Obstacle to Effective Section 501(c)(4) Regulations*, 13 PITT. TAX REV. 43, 76–78 (2015) (limits of tax law disclosure requirements); Kristy Eagan, Note, *Dark Money Rises: Federal and State Attempts to Rein in Undisclosed Campaign-Related Spending*, 40 FORDHAM URB. L.J. 801, 825–29 (2012) (limits of election law disclosure requirements).

64 *See* CAMPAIGN FIN. INST., NON-PARTY INDEPENDENT EXPENDITURES IN HOUSE AND SENATE ELECTIONS, 1978-2016, [http://www.cfinst.org/pdf/vital/VitalStats\\_t14.pdf](http://www.cfinst.org/pdf/vital/VitalStats_t14.pdf) (independent expenditures reported for congressional elections); *Outside Spending*, CTR. FOR RESPONSIVE POLITICS, <https://www.opensecrets.org/outsidespending/> (last visited Feb. 7, 2018) (non-candidate, non-political party political spending reported for federal elections); Michael M. Franz, *Interest Groups in Electoral Politics: 2012 in Context*, 10 THE FORUM: J. APPLIED RES. CONTEMP. POL. 62, 62 (2013); Chisun Lee et al., *Secret Spending in the States*, BRENNAN CTR. FOR JUST. (2016) (spending in state elections by groups for which the original sources of funds were either not disclosed or were difficult to identify); Michael J. Malbin et al., *Independent Spending in State Elections, 2006-2016* (Campaign Fin. Inst., Working Paper, 2017) [http://www.cfinst.org/pdf/state/Malbin-et-al\\_APSA2018\\_Paper\\_IE-State-2006-2016\\_working-paper.pdf](http://www.cfinst.org/pdf/state/Malbin-et-al_APSA2018_Paper_IE-State-2006-2016_working-paper.pdf) (political spending done independently of candidates in the states for which data are available).

65 *See, e.g.*, For the People Act of 2019, H.R. 1, 116th Cong. §§ 4100-4801 (2019); Democracy is Strengthened by Casting Light on Spending in Elections Act of 2018, H.R. 6239, 115th Cong. (2018); Democracy is Strengthened by Casting Light on Spending in Elections Act of 2017, S. 1585, 115th Cong. (2017).

66 *See, e.g.*, *Delaware Strong Families v. Att’y Gen.*, 703 F.3d 304, 309–13 (3d Cir. 2015).

67 *See, e.g.*, *Am. for Prosperity Found. v. Becerra*, 903 F.3d 1000 (9th Cir. 2018).

may have more limited effect in the future, however, because of the federal government's decision to forgo this schedule for non-501(c)(3)s for taxable years ending on or after December 31, 2018.<sup>68</sup> So, at least for now, funds from undisclosed sources that are used for political activity continue to flow through non-charitable, non-527 tax-exempt nonprofits in most states.

One other perhaps unintended consequence of these developments is that they drew scrutiny to the amount of political activity spending reported by non-charitable, non-527 tax-exempt nonprofits on the publicly available annual information returns (Form 990 series) that they file with the IRS. This scrutiny applied to both long-existing such organizations, as well as newly created ones, and in at least a number of instances revealed apparent significant underreporting of such spending.<sup>69</sup> Critics have also maintained that a number of the organizations have pushed against or even through the requirement that political activity remain a "secondary" activity for them, while concealing the fact they were doing so through aggressive underreporting of their political activity spending.<sup>70</sup> Not all such organizations have engaged in such deceptive reporting, of course, but even for admitted 527s, it is unclear how accurate their filings and disclosures to the IRS have been.<sup>71</sup> Unlike the duties of the FEC and its state counterparts with respect to election law required disclosures, policing the accuracy and completeness of such disclosures is a very small part of the IRS' responsibilities. This may be why the IRS appears to have done very little policing in this area, including with respect to criminal referrals for blatant violations of disclosure obligations.<sup>72</sup>

Nevertheless, the combination of money flowing through non-charitable, tax-exempt nonprofits for political activity and the vague, but real, limit on how much those nonprofits are allowed to spend on such activity—all while maintaining their

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68 See *supra* note 26 and accompanying text.

69 See, e.g., Craig Holman, *The Bipartisan Campaign Reform Act: Limits and Opportunities for Non-Profit Groups in Federal Elections*, 31 N. KY. L. REV. 243, 281–82 (2004) (commenting on the apparent paucity of IRS enforcement actions and minimal penalties for tax-exempt organization reporting failures); Stephen R. Weissman & Kara D. Ryan, *Nonprofit Interest Groups' Election Activities and Federal Campaign Finance Policy*, 54 EXEMPT ORG. TAX REV. 21, 26–27 (2006) (reporting that of the non-527 tax-exempt organizations studied, some were failing to report some or all of their political activity in part because of inadequate IRS oversight).

70 See, e.g., Donald B. Tobin, *The Internal Revenue Service and a Crisis of Confidence: A New Regulatory Approach for a New Era*, 16 FLA. TAX REV. 429, 458–60, 466–67 (2014); Lee Fang, *Five 501(c)(4) Groups That Might Have Broken the Law*, THE NATION (May 21, 2013), <https://www.thenation.com/article/five-501c4-groups-might-have-broken-law/>.

71 See PUB. CITIZEN, OFF TO THE RACES: FIRST QUARTER REPORTS SHOW THAT 50 TOP "527" ORGANIZATIONS COLLECTED ALMOST \$11 MILLION IN SOFT MONEY; DISCLOSURE PROBLEMS CONTINUE 4-6 (2002), [https://www.citizen.org/sites/default/files/1stq2002\\_527report.pdf](https://www.citizen.org/sites/default/files/1stq2002_527report.pdf) (reporting on problems with the IRS's website for tracking 527 organizations); INSPECTOR GEN. FOR TAX ADMIN., REF. NO. 2005-10-125, ADDITIONAL ACTIONS ARE NEEDED TO ENSURE SECTION 527 POLITICAL ORGANIZATIONS PUBLICLY DISCLOSE THEIR ACTIVITIES TIMELY AND COMPLETELY 5-6 (2005) (concluding, based on a statistically valid sample of the 527 filings and without independently verifying any of the submitted information, that 7% of 527s failed to file a timely initial report, 13% failed to file one or more required periodic reports, and of those that did file the required period reports, 22% did not include all of the required information); U.S. GEN. ACCOUNTABILITY OFFICE, NO. GAO-02-444, POLITICAL ORGANIZATIONS: DATA DISCLOSURE AND IRS'S OVERSIGHT OF ORGANIZATIONS SHOULD BE IMPROVED 8-14 (2002) (detailing concerns about difficulties with using the IRS website and flaws with planned IRS efforts to address these concerns).

72 See Tobin, *supra* note 70, at 459, 460.

tax-exempt status—created political pressure to scrutinize the claimed tax status of such groups. This pressure existed in part because there was an argument that if such a group failed to qualify under § 501(c) for tax exemption, they would be subject to § 527 and its public disclosure requirements, perhaps even retroactively. One apparent consequence of this pressure was an IRS attempt to carefully scrutinize new groups voluntarily seeking IRS recognition of such tax exemption for excessive political activity, an attempt that resulted in the well-known “Tea Party scandal” that cost several IRS officials their careers and made the IRS the target of ferocious congressional criticism for a number of years.<sup>73</sup> While the election of President Donald J. Trump and the subsequent resolution of all of the lawsuits arising out of the Tea Party controversy appears to have ended that scandal, the IRS is likely to be wary of strongly policing the tax rules relating to political activity for many years to come as a result.

## 2. FLY-BY-NIGHT ORGANIZATIONS

One result of the federal tax laws and their related enforcement procedures is a long delay between individuals or organizations engaging in illegal behavior and the investigation and punishment of such behavior. While there are exceptions—notably for newly emerging, lucrative tax evasion schemes, to which the IRS sometimes responds with quickly issued notices,<sup>74</sup> and also during the 2008-2009 financial crisis<sup>75</sup>—for the most part, the IRS can afford this relatively slow pace of enforcement because, at the end of the day, it is all about money. That means that to the extent a taxpayer owes the federal government money, the delay means that an appropriate amount of interest must be added to the amount owed to make the federal government whole.

This slow approach to enforcement applies with respect to tax-exempt organizations in several ways. First, while most organizations claiming tax exemption under § 501(c)(3) (and so also the related ability to receive tax deductible charitable organizations) are required to file an application for recognition of that status with the IRS, that application is not due until twenty-seven months after the formation of the organization.<sup>76</sup> While Congress recently required newly formed § 501(c)(4) social welfare organizations to notify the IRS of their existence within sixty days of formation, only a relatively small amount of information is required on that notice (and the notice is *not* an application for recognition of exemption, which is a

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<sup>73</sup> See S. REP. NO. 114-119 (2015) (report on the Tea Party controversy); Philip Hackney, *Should the IRS Never “Target” Taxpayers? An Examination of the IRS Tea Party Affair*, 49 VAL. L. REV. 453, 478–80 (2015) (describing this controversy); Lily Kahng, *The IRS Tea Party Controversy and Administrative Discretion*, 42 CORNELL L. REV. ONLINE 41, 42–44, 49–51 (2013) (same); George K. Yin, *Reforming (and Saving) the IRS by Respecting the Public’s Right to Know*, 100 VA. L. REV. 1115, 1116 (2014) (same); Paul Caron, *The IRS Scandal*, TAXPROF BLOG, [http://taxprof.typepad.com/taxprof\\_blog/irs-scandal](http://taxprof.typepad.com/taxprof_blog/irs-scandal) (last visited Oct. 30, 2018) (gathering information regarding this controversy).

<sup>74</sup> See *Abusive Tax Shelters and Transactions*, INTERNAL REVENUE SERV. <https://www.irs.gov/businesses/corporations/abusive-tax-shelters-and-transactions> (last visited Feb. 7, 2019).

<sup>75</sup> See Andrew Blair-Stanek, *Crises and Tax*, 67 DUKE L.J. 1155, 1174–1202 (2018).

<sup>76</sup> See I.R.C. § 508 (2018); 26 C.F.R. § 1.508-1 (2018); IRS, APPLYING FOR 501(C)(3) TAX-EXEMPT STATUS 9 (2018), <https://www.irs.gov/pub/irs-pdf/p4220.pdf>.



separate, optional filing for such groups, so the notice does not trigger IRS review of the organization's qualification for tax exemption).<sup>77</sup> Second, the publicly available annual information return for tax-exempt organizations is not due until four-and-a-half-months after the end of each fiscal year, and an automatic six-month extension is available with the filing of a simple form.<sup>78</sup> This means that if a new entity is formed on the first day of the first month of its initial fiscal year, it can delay filing its first annual information return until twenty-two and a-half months after formation.

These timeframes contrast sharply with the requirements imposed on entities required to make public disclosures under federal and state election laws and, since 2000, the tax law disclosures required of 527s that are not subject to election law disclosure requirements. Those other legal regimes require prompt notice to the relevant agency of the formation of a new entity and detailed reporting of contributions and expenditures, which reporting becomes more frequent and has increasingly tight deadlines as elections approach.<sup>79</sup> The purpose and effect of these regimes is to provide the public with increasing information, including about sources of financial support, as each election cycle approaches its finale.

One consequence of these timing differences is that it is possible to create “fly-by-night” tax-exempt organizations that exist only for a single election cycle and then disappear before any required IRS filings, much less IRS scrutiny. For example, the Center for Responsive Politics documented the creation and then disappearance of a cluster of § 501(c)(4) organizations involved in political activities.<sup>80</sup> While such organizations may—or may not—eventually make the required filings, by that point the relevant elections are over, and as a result, any penalties short of imprisonment are likely to be considered trivial by the individuals who create such groups. Identifying such organizations is understandably difficult, but there have been reports of a number classified both as non-charitable, tax-exempt nonprofits and as charities in recent years.<sup>81</sup> It is not known whether those reports capture most such entities, in which case there appear to have been relatively few of them, or are only the tip of the iceberg.

### 3. CHURCHES AND “PULPIT FREEDOM SUNDAY”

As mentioned in the introduction, churches have a long history of political involvement in the United States. The enactment of the Johnson Amendment in 1954, while not targeted at churches, bars them along with other tax-exempt charities from supporting or opposing candidates for elected public office as a condition of that exemption and other benefits, such as the ability to receive tax deductible

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<sup>77</sup> See I.R.C. § 506 (2018); *Electronically Submit Your Form 8976, Notice of Intent to Operate Under Section 501(c)(4)*, INTERNAL REVENUE SERV. <https://www.irs.gov/charities-non-profits/electronically-submit-your-form-8976-notice-of-intent-to-operate-under-section-501c4> (last visited Oct. 30, 2018).

<sup>78</sup> See I.R.C. § 6033 (2018); 26 C.F.R. §§ 1.6033-2, 1.6033-2T(e) (2018); *Exempt Organization Annual Filing Requirements Overview*, INTERNAL REVENUE SERV. <https://www.irs.gov/charities-non-profits/exempt-organization-annual-filing-requirements-overview> (last visited Oct. 30, 2018).

<sup>79</sup> See I.R.C. § 527(i), (j) (2018); 52 U.S.C. § 30104(a)(4), (b)(3)(A), (b)(5)(A) (2018).

<sup>80</sup> Robert Maguire & Viveca Novak, *American Commitment's Missing Millions*, OPENSECRETS NEWS (Apr. 26, 2013), <https://www.opensecrets.org/news/2013/04/american-commitments-missing-millions/>.

<sup>81</sup> See, e.g., *id.*

charitable contributions, that come along with that status. Many churches and their supporters have argued against this prohibition as both bad policy and an unconstitutional restriction on their free exercise of religion, although many churches and others have also supported the prohibition.<sup>82</sup>

While today the common perception is that it is white, evangelical Protestant churches that are most likely to violate this prohibition, historically violators were often predominantly African-American churches.<sup>83</sup> This is understandable, given the long-standing political role of such churches within black communities.<sup>84</sup> The IRS appears, however, to have mostly either been ignorant of, or to have turned a blind eye to, such activity. This may be in part because most violations—whether at predominantly African-American churches or at churches of other denominations or faiths—involved messages delivered during worship gatherings, so the religious leader communicating support or opposition of a candidate or political party was literally preaching to the choir (who were unlikely to report the violation to the IRS, and who probably already knew and often agreed with the leader’s political views).

In the mid-2000s, the IRS launched a focused enforcement effort aimed at prohibited political activity by charities, including churches. That effort identified hundreds of violations over several years, including campaign contributions by some charities (likely in states that permit corporate contributions to state and local candidates). But almost all such violations appear to have been relatively minor and probably inadvertent, at least based on the IRS’ decision to only issue warning letters in the vast majority of cases.<sup>85</sup> The relatively weak response by the IRS contrasts with the potential criminal penalties that apply to violations of campaign finance laws, penalties that the federal government appears to be more willing to apply than any applicable criminal penalties relating to tax violations.<sup>86</sup> Included among the

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82 See, e.g., Letter from ACCES et al. to Charles Grassley, Chairman, Senate Fin. Comm. & Richard Neal, Chairman, House Ways & Means Comm. (Feb. 6, 2019) (opposing weakening or repealing the prohibition on political activity by Internal Revenue Code section 501(c)(3) organizations, including churches), [https://interfaithalliance.org/cms/assets/uploads/2019/02/2019-02-06-Johnson-Amendment-Sign-On-Letter\\_FI-NAL.pdf](https://interfaithalliance.org/cms/assets/uploads/2019/02/2019-02-06-Johnson-Amendment-Sign-On-Letter_FI-NAL.pdf).

83 See Greg Smith et al., *Religious Groups React to the 2006 Election*, PEW RES. CTR. (Nov. 27, 2006) (reporting on candidate endorsements by clergy in two predominantly African-American denominations), <https://www.pewresearch.org/2006/11/27/religious-groups-react-to-the-2006-election/>.

84 See Vaughn E. James, *The African-American Church, Political Activity, and Tax Exemption*, 37 SETON HALL L. REV. 371, 391–96 (2007).

85 During the 2004 election year, the IRS initiated either examinations or, in the case of churches and other houses of worship, inquiries of 132 organizations. See INTERNAL REVENUE SERV., FINAL REPORT: PROJECT 302: POLITICAL ACTIVITIES COMPLIANCE INITIATIVE 5, 20–21 (2005) [hereinafter FINAL REPORT], [https://www.irs.gov/pub/irs-tege/final\\_paci\\_report.pdf](https://www.irs.gov/pub/irs-tege/final_paci_report.pdf). This compares to the approximately 250,000 charities that filed annual information returns for 2002; the IRS also estimates there are 500,000 additional charities that are active but are not required to file such returns either because they are houses of worship and church-related organizations or because they have a relatively low level of financial activity. Paul Arnsberger, *Charities and Other Tax-Exempt Organizations, 2003*, in 26 STATISTICS OF INCOME BULLETIN 231(2006), <http://www.irs.gov/pub/irs-soi/06fallbul.pdf>. Of the eighty-two closed cases, no political activity was found in eighteen cases, and fifty-six led to findings of minor or isolated incidences of political activity. Of the remaining eight cases, five led to the filing of corrected or delinquent returns and three to proposed revocation. INTERNAL REVENUE SERV., 2004 POLITICAL ACTIVITY COMPLIANCE INITIATIVE (PACI) SUMMARY OF RESULTS (2006) [hereinafter 2004 PACI SUMMARY], [https://www.irs.gov/pub/irs-tege/one\\_page\\_statistics.pdf](https://www.irs.gov/pub/irs-tege/one_page_statistics.pdf).

86 See, e.g., Geoffrey Lou Guray, *How Michael Cohen Broke Campaign Finance Law*, PBS NEWS HOUR (Dec. 12, 2018, 12:53 PM EST), <https://www.pbs.org/newshour/politics/how-michael-cohen-broke-campaign->

violating charities were a number of churches, but in common with the other violating charities almost all of the churches appear to have quietly accepted the IRS warnings.<sup>87</sup>

In 2008, however, the legal organization now known as the Alliance Defending Freedom (ADF) launched “Pulpit Freedom Sunday,” publicly calling on pastors to deliver political messages from the pulpit that would then be communicated to the IRS, with ADF promising to defend the church in any subsequent IRS examination.<sup>88</sup> While initially involving only a few dozen congregations, the effort has now grown to several thousand congregations each year, with no apparent IRS pushback.<sup>89</sup> This may be explained by a reluctance of the IRS to either engage on this politically sensitive topic or to test in court the constitutionality of the Johnson Amendment when applied to messages delivered by religious leaders during worship services (or both). Interestingly, there also appears to be a reluctance on the part of ADF to bring this issue to the courts, as ADF could force a court resolution by causing a new church to be created and to file (voluntarily, since churches are exempt from the application requirement) for § 501(c)(3) tax-exempt status while revealing its plans to support or oppose candidates from the pulpit. ADF could then bring a declaratory judgment action on behalf of the church if the IRS rejected the application or refused to rule on it.<sup>90</sup> But regardless of the motivations on either side of this issue for not going to court, the public campaign by ADF encouraging blatant violations of the prohibition continues.<sup>91</sup>

#### 4. THE NON-POLITICAL MAJORITY

Lastly, it should not be lost in this description that it appears that the vast majority of tax-exempt nonprofits, both charitable and non-charitable, do not engage in political activity and therefore do not violate the tax law limitations on such activity. For example, even if several thousand churches are violating the Johnson Amendment annually, they represent only approximately one percent of congregations, and the proportion of the other million or so charities engaging in such activity is likely even less.<sup>92</sup> Similarly, while hundreds of 501(c)(4)s may be engaged

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finance-law; Press Release, U.S. Atty’s Office, S.D.N.Y., *Dinesh D’Souza Sentenced in Manhattan Federal Court to Five Years of Probation for Campaign Finance Fraud* (Sept. 23, 2014), <https://www.fbi.gov/contact-us/field-offices/newyork/news/press-releases/dinesh-dsouza-sentenced-in-manhattan-federal-court-to-five-years-of-probation-for-campaign-finance-fraud>. See generally U.S. DEP’T JUSTICE, FEDERAL PROSECUTION OF ELECTION OFFENSES (Richard C. Pilger et al. eds., 8th ed. 2017), <https://www.justice.gov/criminal/file/1029066/download>.

<sup>87</sup> See FINAL REPORT, *supra* note 85, at 18–19; 2004 PACI SUMMARY, *supra* note 85.

<sup>88</sup> See Suzanne Sataline et al., *Partisan Sunday Sermons Test Federal Tax Laws*, WALL ST. J., at A12, Sept. 29, 2008.

<sup>89</sup> See Eugene Scott, *Pastors Take to Pulpit to Protest IRS Limits on Political Endorsements*, CNN (Oct. 1, 2016), <https://www.cnn.com/2016/10/01/politics/pulpit-freedom-sunday-johnson-amendment/index.html> (last visited Oct. 30, 2018); Sataline et al., *supra* note 88.

<sup>90</sup> See I.R.C. § 7428 (2018); *Charitable Organizations Exemption Applications: Declaratory Judgments*, INTERNAL REVENUE SERV., <https://www.irs.gov/charities-non-profits/charitable-organizations/charitable-or-ganizations-exemption-applications-declaratory-judgments> (updated Nov. 18, 2018); CRIMM & WINER, *supra* note 16, at 85 n.83 (2011).

<sup>91</sup> See Press Release, Alliance Defending Freedom, Additional Resources: Pulpit Initiative | Pulpit Free-dom Sunday (Dec. 13, 2017), <http://www.adfmedia.org/News/PRDetail/4360>.

<sup>92</sup> See INTERNAL REVENUE SERV., 2017 DATA BOOK 57 (2018), <https://www.irs.gov/pub/irs->

in political activity (most of which likely are complying with the primary activity test), there are over 80,000 such organizations, most of which are focused on activities well removed from political activity;<sup>93</sup> even if there are a high proportion of unions and trade associations engaged in political activity, given the extent of their non-political activities it seems highly likely that most, perhaps almost all, of them are also in compliance with the primary activity test.<sup>94</sup> So from a tax perspective, the above violations appear to involve a relatively small proportion of the tax-exempt organization universe. That fact raises the issue of whether it is wise to change the tax laws to better address such a relatively small group. Such violations receive significant media and public attention, however, presumably both because of how flagrant some of them are and because of the high-profile nature of political involvement, and so can still have serious negative effects on the reputation of the nonprofit sector and respect for the rule of law.

## II. PROPOSALS TO ADDRESS NONPROFITS AND POLITICS

Given these recent developments and the increasingly polarized partisan environment, many commentators have put forward proposals to address the three pressures identified above: dark money and related underreporting of political activity by tax-exempt nonprofits; fly-by-night nonprofits with short existences designed to avoid meaningful IRS scrutiny; and highly visible political activity by a significant number of churches in violation of the Johnson Amendment. While most commentators are careful to acknowledge the multiple bodies of law involved with politically active, tax-exempt nonprofits, the proposals tend to focus on a single body of law and its related agency(ies): tax law and the IRS; election law and the FEC (and its state counterparts); and nonprofit law and its state enforcement bodies. But while a more comprehensive approach is desirable for reasons detailed in Part III of this Article, looking at these more piecemeal proposals provides useful insights for developing that approach.

### A. FIXING TAX LAW AND THE IRS

There are essentially three sets of proposals related to fixing federal tax law to address the above pressures. One set of proposals would weaken or eliminate the Johnson Amendment, as illustrated by a series of legislative proposals in Congress and statements from President Trump and others in his administration. A second set of proposals would retain the existing limits on political activity but clarify what constitutes political activity. A third set of proposals would modify the limit on

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soi/17databk.pdf.

<sup>93</sup> See Jeremy Koulish, *There Are a Lot of 501(c)(4) Nonprofit Organizations. Most Are Not Political.*, URBAN WIRE: NONPROFITS & PHILANTHROPY (May 24, 2013), <https://www.urban.org/urban-wire/there-are-lot-501c4-nonprofit-organizations-most-are-not-political>.

<sup>94</sup> See *SOI Tax Stats - Charities & Other Tax-Exempt Organizations Statistics*, INTERNAL REVENUE SERV., <https://www.irs.gov/statistics/soi-tax-stats-charities-and-other-tax-exempt-organizations-statistics> (under “501(c)(3) through 501(c)(9) Organizations: Form 990 –Balance Sheet and Income Statement Items” follow “2015” hyperlink; then search field for “Total Expenses”)(reporting over \$23 billion and over \$43 billion in such expenses for Internal Revenue Code § 501(c)(5) and 501(c)(6) organizations, respectively).

political activity by charitable, tax-exempt nonprofits, although commentators differ on whether to tighten or loosen that limit.<sup>95</sup>

### 1. CHANGING THE LIMIT FOR CHARITIES

The proposals that arguably have received the most attention are ones to either significantly modify or remove the Johnson Amendment, whether only for churches or for all charities. President Trump has repeatedly stated his intention to “destroy” the Johnson Amendment, and others in his administration have stated that the IRS will not enforce it (ignoring both its statutory origin and the protections the IRS enjoys from political interference in specific examination decisions).<sup>96</sup> Members of Congress for many years have introduced bills to repeal or modify the Johnson Amendment, and they renewed those efforts in the wake of the 2016 election (although with no greater success, and with the results of the 2018 election such efforts are even less likely to advance).<sup>97</sup>

The way these proposals have developed show the difficulty of this approach, however. Even with the presidency and control of both chambers of Congress, Republicans have been unable to coalesce around a single proposal, in part because of the strident opposition to any change from not only many charities, but even many churches.<sup>98</sup> This opposition stems in part from fears that charities would quickly become the political vehicle of choice given that they would combine relative anonymity (unless subject to election law disclosure requirements) and, for those donors who itemize, deductibility of contributions, a combination not otherwise generally available.<sup>99</sup> If that were to occur, it could lead to an acceleration in the decline of the charitable sector’s public reputation, harming not only politically active charities, but also the vast majority of charities that do not engage in political activity. This may be why Republican leaders in Congress moved quickly away from complete repeal of the Johnson Amendment to modifications of it, whether by exempting presentations by religious institutions during religious services or by allowing all charities—not just churches—to engage in political activity, but only to the extent it was done in the ordinary course of their regular and customary activities

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<sup>95</sup> It should be noted that there have been numerous proposals over the years to improve the enforcement capabilities of the IRS with respect to tax-exempt organizations more generally, but none of these proposals has had any significant traction and they usually do not relate specifically to political activity, so I do not consider them here. See generally Lloyd Hitoshi Mayer, “*The Better Part of Valour is Discretion*”: *Should the IRS Change or Surrender Its Oversight of Tax-Exempt Organizations*, 7 COLUM. J. TAX L. 80, 97–99 (2016).

<sup>96</sup> See, e.g., Julie Zauzmer & Sarah Pulliam Bailey, *Trump Wants to End the Johnson Amendment Today. Here’s What You Need to Know*, WASH. POST (Feb. 2, 2017), <https://www.washingtonpost.com/news/acts-of-faith/wp/2017/02/02/trump-said-hell-totally-destroy-the-johnson-amendment-what-is-it-and-why-do-people-care/>.

<sup>97</sup> See, e.g., Tom Gjelten, *Another Effort to Get Rid of the “Johnson Amendment” Fails*, NPR (Mar. 22, 2018), <https://www.npr.org/2018/03/22/596158332/another-effort-to-get-rid-of-the-johnson-amendment-fails>.

<sup>98</sup> See Letter from African American Ministers in Action et al. to Paul Ryan, Speaker, U.S. House of Representatives, et al., (Nov. 13, 2017) (106 religious and denominational organizations opposing weakening or eliminating the Johnson amendment), <https://static1.squarespace.com/static/568e979c40667a5cc6a4eaf1/t/5b05bdf7575d1f67cf96cb6e/1527102968178/Faith+Org+Letter+106+signers.pdf>.

<sup>99</sup> See *id.* at 2.

and if it only involved no more than *de minimis* incremental expenses.<sup>100</sup> The administrative difficulties such modifications create are obvious, however, and may have contributed to the eventual decision by Republicans to remove any change from the 2017 tax legislation.<sup>101</sup> Whatever its flaws, one advantage of the Johnson Amendment in its current form is it provides a bright line by prohibiting any political activity by tax-exempt charities, although it leaves the definition of such activity relatively vague. The next set of proposals attempt to address this latter issue.

## 2. CLARIFYING THE DEFINITION OF POLITICAL ACTIVITY

Another set of proposals aim to clarify the definition of political activity. Perhaps the most developed of these proposals with respect to the definition of political activity is the Bright Lines project, which would refine the definition of political activity for all types of tax-exempt nonprofits.<sup>102</sup> The advantages of such clarifications is that they reduce both the compliance burden on tax-exempt organizations and the enforcement burden on the IRS, with the latter having the additional advantage of lessening IRS discretion and so hopefully its vulnerability to the partisan bias charges such as those leveled at the IRS during the Tea Party controversy. Such clarifications could therefore also provide the IRS with enough cover to go after misreporting by politically active nonprofits (since claims of misunderstanding the rules would be more difficult to credibly make), fly-by-night entities (although these clarifications do not address how to speed up enforcement with respect to such entities), and politically active churches. At the same time, if the definition of political activity is significantly narrowed, it might create the situation already present under the election law where a lot of activity intended to, and which in fact does, support or oppose candidates, escapes regulation because it is outside the relatively narrow, although also relatively clear, definition of covered communications and other activities. The proposals also do not address the dark money issue more generally.

## 3. CHANGING THE LIMIT FOR NON-CHARITIES

Proposals relating to the amount of permitted political activity for non-charitable, tax-exempt nonprofits range from completely eliminating any limitation to sharply reducing the permitted amount.<sup>103</sup> Such proposals only address the dark money

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<sup>100</sup> Compare H.R. 781, 115th Cong. (2017) (proposing amendment of I.R.C. § 501(c)(3) and other sections to modify the political activity prohibition to permit statements “made in the ordinary course of the organization’s regular and customary activities in carrying out its exempt purpose” and “resulting” in the organization incurring no more than *de minimis* incremental expenses”) with H.R. 172, 115th Cong. (2017) (proposing amendment of I.R.C. § 501(c)(3) to repeal the political activity prohibition in its entirety).

<sup>101</sup> See *supra* note 95.

<sup>102</sup> See Letter from Gregory L. Colvin, Chair, Drafting Comm. of the Bright Lines Project, & Lisa Gilbert, Director, Cong. Watch & Bright Lines Project, to Amy F. Giuliano, Office of the Assoc. Chief Counsel (Tax Exempt and Gov. Entities) (Nov. 15, 2014), <https://www.brightlinesproject.org/wp-content/uploads/2018/03/2014-11-15-draft-Regs-and-Cover-FINAL.pdf>.

<sup>103</sup> See, e.g., Aprill, *supra* note 47, at 402–04; Donald B. Tobin, *Campaign Disclosure and Tax-Exempt Entities: A Quick Repair to the Regulatory Plumbing*, 10 ELECTION L.J. 427, 440–44 (2011); Letter from Lawrence Norden, Deputy Dir., Democracy Program, Brennan Ctr. for Justice, et al. to John A. Koskinen, Comm’r,

concern, however, if they sharply reduce the amount of permitted political activity by non-charitable, tax-exempt nonprofits, while they only (partially) eliminate the fly-by-night concern if they go the other direction by eliminating the limitation (and so eliminate the need to create fly-by-night non-charitable, tax-exempt nonprofits). They also of course do not address the issue of churches, since they do not relate to § 501(c)(3) charities.

And even those proposals that sharply reduce the amount of political activity likely do not fully resolve dark money concerns or underreporting concerns for two reasons. First, reduced limits (or even an absolute prohibition) could lead to more underreporting of such activity. And second, if the reduced limit was sufficiently enforced, it is likely that anonymous political spending would simply move to taxable entities for which the IRS lacks a tax exemption hook for limiting political activity.<sup>104</sup> That hook is important, because the court decisions noted earlier that have upheld tax limits on political activity in the face of constitutional attacks were based on those limits being conditions on a discretionary tax benefit.<sup>105</sup> It is less clear that such a hook is necessary for tax law disclosure provisions, but those disclosure requirements would both run counter to the taxpayer privacy rules that generally apply to taxable entities and might not be very well enforced by the IRS, as appears to have been the case with the existing 527 disclosure requirements.<sup>106</sup> While there have been proposals to make 527 status mandatory for all organizations primarily engaged in political activity, including for-profit entities, it is unclear whether doing so would be constitutional.<sup>107</sup> A related proposal would require public disclosure of information regarding both donors to and expenditures by tax-exempt organizations engaged in political activity, which tax law already requires for 527s, but does not generally require for other types of tax-exempt organizations.<sup>108</sup> However, this

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Internal Revenue Serv. (Feb. 27, 2014), <http://www.brennancenter.org/analysis/comments-irs-proposal-can-limit-secret-election-spending>; Letter from Brian Galle, Assoc. Professor, Boston Coll. Law Sch. & Donald Tobin, John C. Elam/Vorys Sater Professor of Law, Ohio State University Moritz Coll. of Law to John A. Koskinen, Comm'r, Internal Revenue Serv. (Feb. 24, 2014) 2-3, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2399315](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2399315); Darrell M. West, *The Need for Improved Transparency*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Sept. 22, 2014), <https://corpgov.law.harvard.edu/2014/09/22/the-need-for-improved-transparency/>.

<sup>104</sup> See generally Donald B. Tobin, *Political Advocacy and Taxable Entities: Are They the Next "Loophole"?*, 6 FIRST AMEND. L. REV. 41 (2007).

<sup>105</sup> See *supra* notes 32–34 and accompanying text.

<sup>106</sup> See *supra* note 69 and accompanying text.

<sup>107</sup> See, e.g., Aprill, *supra* note 47, at 404–05 (suggesting encouraging tax-exempt organizations to move political spending into 527s by taxing such spending if it occurs outside a 527); Letter from Lawrence Norden et. al., to John A. Koskinen, *supra* note 103, at 2 (limiting political activity by 501(c) organizations); Letter from Brian Galle & Donald Tobin to John A. Koskinen, *supra* note 103, at 2–3 (same plus rules to limit the use of for-profit entities to evade section 527). See also Aprill, *supra* note 47, at 402–03 (suggesting creation of a new category of tax-exempt organizations that engage primarily in political activities, including lobbying). The government appears to permit political organizations to choose to forgo section 527 tax-exempt status, as it conceded that this was an option when it defended the section 527 disclosure provisions against a constitutional challenge. See Brief of United States of America in Support of Its Motion to Dismiss at 5 & n.4, *Nat'l Fed'n of Republican Assemblies v. U.S.*, 148 F. Supp. 2d 1273 (S.D. Ala. 2001) (No. 00-759-RV-C).

<sup>108</sup> See, e.g., Aprill, *supra* note 47, at 403–04; Tobin, *supra* note 70, at 440–41. The one other exception is the tax law requirement of public disclosure of donors by private foundations, a subset of charitable nonprofit organizations that are primarily funded by a single donor or small group of donors and otherwise deemed by Congress not to be sufficiently accountable to the public without such disclosure. See I.R.C. § 6104(b) (second

proposal is vulnerable to the limited ability of the IRS to facilitate and police such disclosure requirements, as already noted.

### B. FIXING ELECTION LAW AND THE FEC

Since the activity of concern here relates to candidates for elected public office, it makes sense to consider instead modifications to election law at both the federal and state level, as well as possibly to the FEC and its state counterparts, to address the above concerns. Proposals in this area tend to cluster around expanding the entities and/or activities that trigger election law disclosure and disclaimer requirements, depoliticizing the FEC and its state counterparts to prevent both partisan gridlock and capture, and reducing the disclosure requirements relating to relatively small donors.

#### 1. EXPENDING DISCLOSURES AND DISCLAIMERS

These proposals are aimed squarely at the dark money and underreporting concern.<sup>109</sup> Either by expanding the universe of entities required to publicly disclose their sources of funds both in reports and through disclaimers on their communications or by expanding the election-related activities that trigger such disclosures and disclaimers, these proposals aim to eliminate dark money entirely.<sup>110</sup> While it might be thought that the constitutional barriers that drove the relatively narrow express advocacy definition would prevent such expansion, that likely is not true. For example, while the Supreme Court pre-*Citizens United* narrowed the definition of electioneering communications by requiring that they be the “functional equivalent” of express advocacy, this was only for purposes of the (now defunct) prohibition on corporations and unions funding such communications.<sup>111</sup> The Supreme Court has since made clear that for purposes of disclosure no such equivalence is required.<sup>112</sup> This at least suggests that Congress and state legislatures could go even further by, for example, requiring public disclosure and disclaimers for *any* communications that clearly refer to a candidate and are made relatively close in time to an election, without running afoul of the First Amendment. As for underreporting, the greater efficiency of the FEC even in its current form with respect to identifying at least inadequate disclosure as compared to the IRS, and the ability of the federal government to bring criminal charges against individuals who intentionally fail to meet their disclosure and disclaimer obligations, would at least

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sentence), (d)(3)(A) (2012). See generally Thomas A. Troyer, *The 1969 Private Foundation Law: Historical Perspective on Its Origins and Underpinnings*, 27 EXEMPT ORG. TAX REV. 52 (2000).

109 See, e.g., For the People Act of 2019, H.R. 1, 116th Cong. §§ 4100-4801 (2019); Democracy is Strengthened by Casting Light on Spending in Elections Act of 2018, H.R. 6239, 115th Cong. (2018); Democracy is Strengthened by Casting Light on Spending in Elections Act (DISCLOSE) Act of 2015, H.R. 430, 114th Cong. (2015); Democracy is Strengthened by Casting Light on Spending in Elections Act (DISCLOSE) Act of 2015, S. 229, 114th Cong. (2015); Van Hollen v. FEC, 74 F. Supp. 3d 407 (D.D.C. 2014) (successful challenge of FEC disclosure regulation reducing required public disclosures), *rev'd*, No. 15-5016, 2016 WL 2678200 (D.C. Cir. 2016).

110 See, e.g., Levitt, *supra* note 47; Shaw, *supra* note 47, at 167–68.

111 See *FEC v. Wis. Right to Life*, 551 U.S. 449, 482 (2007) (opinion of Roberts, C.J.).

112 See *Citizens United v. FEC*, 558 U.S. 310, 369 (2010).



partially address this concern.

There is still a risk of fly-by-night entities, but the FEC has a much more rapid enforcement capability than the IRS generally does, plus again the credible threat of criminal penalties makes the creation of such entities to intentionally violate the applicable laws significantly riskier for the individuals involved. As for churches, the imposition of enhanced disclosure and disclaimer requirements on even religiously based messages, if communicated through mass media channels, could provide a (limited) backstop to the Johnson Amendment.

## 2. RESTRUCTURING THE FEC

Of course, the above proposals require a relatively effective FEC. Many commentators have criticized the performance of the FEC over the years, however, in large part because the even, party-line split of the commissioners can and increasingly has led to deadlocks on enforcement actions and guidance.<sup>113</sup> At least according to these critics, these deadlocks have both prevented enforcement of the existing rules in many instances and also prevented the issuance of needed guidance for implementing those rules in a manner consistent with congressional intent.<sup>114</sup>

<sup>113</sup> See, e.g., R. SAM GARRETT, CONG. RESEARCH SERV. R40779, DEADLOCKED VOTES AMONG MEMBERS OF THE FEDERAL ELECTION COMMISSION (FEC): OVERVIEW AND POTENTIAL CONSIDERATIONS FOR CONGRESS 8 (2009) (for the period July 2008 through June 2009 all substantive deadlocks involved party-line votes); Michael M. Franz, *The Federal Election Commission as Regulator: The Changing Evaluations of Advisory Opinions*, 3 U.C. IRVINE L. REV. 735, 753, 755 (2013); (“the FEC after 2006 is best characterized as conflicted and increasingly unable to offer clear and unidirectional advice”); Daniel P. Tokaji, *Beyond Repair: FEC Reform and Deadlock Deference*, in DEMOCRACY BY THE PEOPLE: REFORMING CAMPAIGN FINANCE IN AMERICA 172, 179–84 (Eugene D. Mazo & Timothy K. Kuhner eds., 2018); Nicholas Confessore, *Election Panel Enacts Policies by Not Acting*, N.Y. TIMES at A1 (Aug. 26, 2014); Alec MacGillis, *Open Mic Disaster: The FEC Held a Hearing. It Revealed Almost Everything That’s Wrong With American Democracy*, SLATE (Feb. 11, 2015), <https://slate.com/news-and-politics/2015/02/fec-hearing-on-campaign-finance-rules-the-agency-appears-pow-erless-to-do-its-job.html>; Campaign Legal Center Staff, *Fix the FEC: Background Memorandum on New Bi-partisan Legislation to Address a Dysfunctional Agency*, CAMPAIGN LEGAL CTR. (Sept. 17, 2015), <http://www.campaignlegalcenter.org/news/publications-speeches/fix-fec-background-memorandum-new-bi-partisan-legislation-address-0>; Press Release, Pub. Citizen, *Roiled in Partisan Deadlock, Federal Election Commission is Failing*, (2015), <https://www.citizen.org/sites/default/files/fec-deadlock-update-april-2015.pdf>. See generally BROOKS JACKSON, *BROKEN PROMISE: WHY THE FEDERAL ELECTION COMMISSION FAILED* (1990). But see Bradley A. Smith & Stephen M. Hoersting, *A Toothless Anaconda: Innovation, Impotence and Over-enforcement at the Federal Election Commission*, 1 ELECTION L.J. 145, 145 (2002) (finding overenforcement may be a greater problem than underenforcement); Scott Blackburn, *Delusions About “Dysfunction”: Understanding the Federal Election Commission* (Oct. 5, 2015), <http://www.campaignfreedom.org/2015/10/05/delusions-about-dysfunction-understanding-the-federal-election-commission/> (supporting existing FEC structure).

<sup>114</sup> See, e.g., *Oversight of the Federal Election Commission: Hearing Before the S. Comm. on Rules & Admin.*, C-SPAN (July 14, 2004), <https://www.c-span.org/video/?182694-1/federal-election-commission-oversight&showFullAbstract=1> (testimony of Trevor Potter, President and General Counsel, Campaign Legal Center) (declaring that the FEC’s enforcement powers are “cripplingly weak”); R. SAM GARRETT, CONG. RE-SEARCH SERV. R44319, THE FEDERAL ELECTION COMMISSION: ENFORCEMENT PROCESS AND SELECTED ISSUES FOR CONGRESS 1 (2015) (summarizing such concerns); PRICEWATERHOUSECOOPERS LLP, TECHNOLOGY AND PERFORMANCE AUDIT AND MANAGEMENT REVIEW OF THE FEDERAL ELECTION COMMISSION 3–6 to 3–7 (1999) (citing the consensus of eight interviewed legal practitioners that the enforcement process took a long time to resolve alleged violations and reporting that most of them believed that the then current FEC enforcement did not create a strong deterrent effect), <http://www.gao.gov/special.pubs/fecrpt.pdf>; FRANK J. SO-RAUF, MONEY IN AMERICAN ELECTIONS 254–57 (1988) (pronouncing general agreement, at least in 1988, that the FEC’s enforcement efforts were both slow and timid, and attributing these flaws primarily to congressional efforts to keep its enforcement efforts limited); Michael M. Franz, *The Devil We Know? Evaluating the FEC as Enforcer*, 8 ELECTION L.J. 167, 167–68 (2009); Todd Lochner & Bruce E. Cain, *Equity and Efficacy in the Enforcement of Campaign Finance Laws*, 77 TEX. L. REV. 1891, 1893 (“although its critics differ as to the

Therefore, another set of proposals seeks to significantly restructure the FEC, including shifting more decision-making authority to career staff and replacing the six-member Commission with a single, fixed-term executive.<sup>115</sup> Similar concerns and proposals also exist at the state level.

### 3. REDUCING DISCLOSURE OF SMALLER DONORS

Part of the opposition to such reforms—both among commentators and at the FEC—arises from the fact that current election law disclosure requirements have relatively low triggers (usually aggregate contributions of more than \$200 during a two-year election cycle). State election laws also often have similarly low triggers.<sup>116</sup> Besides imposing a significant administrative burden on both political organizations and the enforcing agencies, such low triggers may deter many from either giving or giving above the triggers because it would lead to others knowing about their political preferences. At the same time, disclosure of such relatively modest contributors seems unlikely to provide much information to other voters, to prevent corruption or the appearance of corruption, or to reveal violations of the applicable contribution limits.

For these reasons, a third set of proposals would increase the trigger levels for disclosures and set relatively high limits, such as only requiring the identity of the five largest donors to an organization making a given communication, for disclaimers.<sup>117</sup> The reasoning is that the dark money concern primarily relates to large donors, not ones giving only a few hundred dollars. At the same time, the pressure to create fly by night entities might be modestly relaxed by such increases, although to the extent they are driven by a handful of large donors that pressure would not be relieved. And of course, these proposals would have little effect on churches or other § 501(c)(3) charities intentionally violating the tax law prohibition on political activity.

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causes of the problem, almost all agree that the FEC fails to effectively enforce the law”), 1895–96 (1999).

115 See, e.g., H.R. 5676, 109th Cong. § 101(a) (2006) (amending FECA § 361 to grant the Chair of the new Federal Election Administration new powers); JACKSON, *supra* note 113, at 63–64 (arguing for a new structure for the FEC); John McCain, *Reclaiming Our Democracy: The Way Forward*, 3 ELECTION L.J. 115, 115, 119–20 (2004) (discussing proposed legislation to replace the FEC); see also PROJECT FEC, NO BARK, NO BITE, NO POINT. THE CASE FOR CLOSING THE FEDERAL ELECTION COMMISSION AND ESTABLISHING A NEW SYSTEM FOR ENFORCING THE NATION’S CAMPAIGN FINANCE LAWS 2 (2002) (proposing the creation of new election-law agency with a single administrator); Paul R. Verkuil, *The Purposes and Limits of Independent Agencies*, 1988 DUKE L.J. 257, 275–78 (arguing that independent agencies would, in general, improve their effectiveness by having a single administrator but who, in deference to congressional concerns, could be removed for cause by Congress). *But see* Tokaji, *supra* note 112, at 185–89.

116 See *Disclosure*, CAMPAIGN FIN. INST., <https://cfinst.github.io/#disclosure?question=CandDonorExemption&year=2016> (last visited May 10, 2019) (graphical representation of donor disclosure thresholds in the fifty states, filtered for 2016).

117 See, e.g., Richard Briffault, *Reforming Campaign Finance Reform: A Review of Voting with Dollars*, 91 CAL. L. REV. 643, 655 (2003); William McGeeveran, *Mrs. McIntyre’s Checkbook: Privacy Costs of Political Contribution Disclosure*, 6 U. PA. J. CONST. L. 1, 53–54 (2003); Kathleen M. Sullivan, *Against Campaign Finance Reform*, 1998 UTAH L. REV. 311, 327; Scott M. Noveck, *Campaign Finance Disclosure and the Legislative Process*, 47 HARV. J. ON LEGIS. 75, 107–10 (2010); Shaw, *supra* note 47, at 171; David Lourie, Note, *Rethinking Donor Disclosure After the Proposition 8 Campaign*, 83 S. CAL. L. REV. 133, 154–70 (2009).

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### C. FIXING NONPROFIT LAW AND STATE ENFORCEMENT

Driven in part by a lack of traction for any of the above proposals, some commentators and even states have turned to modifying state nonprofit law. The most prominent example of this approach are the efforts by a few states to require “charitable” organizations (usually defined broadly enough to encompass § 501(c)(4) social welfare organizations) to submit their IRS-required donor lists to the state agency that oversees such organizations, although not for public disclosure.<sup>118</sup> It is unclear, however, what doing that does to address any of the concerns previously identified, unless it would either deter donors from giving to such organizations in the first place (which could impact entities that are not engaged in any political activity as well, particularly if they are involved with controversial causes) or could lead to more easy identification of organizations redirecting charitable funds to perhaps prohibited political activity. At least two states have explored other, non-election law options for regulating money in politics by using their laws governing nonprofit organizations, but both those states ultimately chose to pursue public disclosure of political spending primarily through their election laws.<sup>119</sup> These proposals are also undermined by the relative lack of enforcement resources for state agencies with respect to overseeing charities.

### III. A COMPREHENSIVE APPROACH

The above discussion illustrates the legal, factual, and policy complexity of this area. At the same time, it provides some hints as to how to approach the concerns identified. This part first addresses whether the identified concerns are legitimate and then how best to comprehensively address the ones that are.

#### A. THE LEGITIMACY OF THE IDENTIFIED CONCERNS

There are three policy decisions that underlie the above-identified concerns. The first is the decision by Congress not to “subsidize” political activity by prohibiting direct or indirect tax deductions for such activity, even when such activity furthers a charitable or business purpose. The second is the decision partially adopted by Congress and state legislatures to require public disclosures and disclaimers with respect to the sources of funding for political activity in order to increase voter information, prevent corruption and the appearance of corruption, and backstop the limits on contributions to candidates and political parties. I say partially because Congress (and most states) do not appear to have pushed such disclosures to their

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<sup>118</sup> See *supra* note 63.

<sup>119</sup> See Linda Sugin, *Politics, Disclosure, and State Law Solutions for 501(c)(4) Organizations*, 91 CHL-KENT L. REV. 895 (2016); *Independent Expenditure Reporting*, N.Y. ST. BD. ELECTIONS, <http://www.elections.ny.gov/IndependentExpenditureReporting.html>. (last visited Nov. 8, 2018). Several other states have also recently expanded required disclosures under their election laws. See *Campaign Finance Legislation Database / 2015 Onward*, NAT’L CONF. ST. LEGISLATURES (May 7, 2019) <http://www.ncsl.org/research/elections-and-campaigns/disclosure-and-reporting-requirements/campaign-finance-database-2015-onward.aspx> (search by topic (disclosure), status (enacted), and year (2016) reveals fifty-four enacted bills in twenty-nine states for 2016, many of which appear to have increased disclosure obligations).

constitutional limits. The third is a general concern about the influence of money in politics, particularly when wealthy sources are able to spend unlimited amounts on political activity.

## 1. TAXING POLITICS

Under federal law, the amount of income subject to tax is determined by reducing a taxpayer's gross income by permitted deductions in order to arrive at taxable income. With respect to political activity, this raises the issue of whether expenditures for political activity—whether in the form of contributions to others to support political activity by those third parties or expenses incurred directly to communicate political messages or engage in other candidate and election-related activities—should be deductible.

In general, taxpayers should be permitted to deduct those expenses they incur in order to generate income. This principle arises from the fact that the income tax is a tax on net income, not gross receipts. The most common examples of such expenses are business expenses (expenses incurred to further profit-seeking activities) and investment expenses (expenses incurred to generate investment returns).<sup>120</sup> Other expenses are generally considered “personal” expenses, for which Congress has denied deductibility as a general matter.<sup>121</sup> That said, Congress has chosen to permit the deduction of many personal expenses for non-tax reasons, including, for example, the well-known mortgage interest and charitable contribution deductions (although only if taxpayers itemize their deductions, as opposed to taking the standard deduction).<sup>122</sup> Congress has also, in a few contexts, declined to permit deductions for certain expenses even though incurred in order to generate income—most notably fines, penalties, certain illegal payments, and most expenses for illegal drug businesses.<sup>123</sup> Nevertheless, the general principle is that expenses are only deductible if incurred in order to generate income.

While simple to state, application of this principle can be complicated in practice. Many expenditures result in both income-generating and personal benefits, raising the question of whether, and to what extent, they should be deductible under this principle.<sup>124</sup> Another way of phrasing this issue is how close a connection there must be between a given expenditure and the generation of income for deductibility to apply, in whole or in part.

Current federal tax law generally prohibits the deduction of expenses incurred for political activity, whether directly or through contributions to another entity.<sup>125</sup> This rule is consistent with the general principle with respect to deductions if

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<sup>120</sup> See I.R.C. §§ 162(a) (2012), 212 (2012).

<sup>121</sup> I.R.C. § 262(a) (2012).

<sup>122</sup> See I.R.C. §§ 163(h)(2)(D) (2012), 170 (2012 & Supp. V 2017).

<sup>123</sup> See I.R.C. §§ 162(c), (e), (f), 280E (2018).

<sup>124</sup> See, e.g., Daniel I. Halperin, *Business Deduction for Personal Living Expenses: A Uniform Approach to an Unsolved Problem*, 122 U. PA. L. REV. 859 (1974); Adi Libson, *Taxing Status: Tax Treatment of Mixed Business and Personal Expenses*, 17 U. PA. J. BUS. L. 1139 (2015).

<sup>125</sup> See I.R.C. §§ 162(e), 6033(e) (2018) (also prohibiting a deduction for lobbying expenses), 6033(e) (same) (2018); Polsky, *supra* note 29, at 1775–76.

spending on political activity is viewed as a personal expense. For the vast majority of such spending that is clearly the correct view—individuals usually engage in such spending, whether directly or indirectly through entities, to promote their personal political preferences. Furthermore, candidates and political parties incur such expenses to pursue their political agendas, not in order to seek a profit.

But some individuals, and probably many businesses, make political activity expenditures for income-generating purposes. For example, a business spends money to support the election of candidate X because candidate X is more likely than their opponent(s) to support a policy that will help that business. The problem with this argument is that except in relatively rare situations, supporting candidate X supports the candidate's entire platform, not just the policy position of interest to the spender. Therefore, the connection between the expenses and the desired, income-related outcome is relatively attenuated. As a result, except in rare circumstances—for example, the candidate running for a position with a very narrow range of functions—the connection between the expense and income generation is too remote to support permitting the deduction of the expense. And given that this circumstance is likely to be relatively rare and such expenses will almost always be a very small portion of any individual or business' overall expenses, administrative convenience suggests it is better to have a bright line rule of non-deductibility than to leave a potential area of highly factual disputes in circumstances that are the uncommon exception.

There are three important caveats to this conclusion. First, federal tax law is not without some loopholes in this area, most notably the fact that tax-exempt veterans organizations are both eligible to receive tax-deductible contributions and able to engage in unlimited political activity (if it furthers their required, veteran-supporting purpose).<sup>126</sup> While the Supreme Court has concluded that the differing treatment of veterans organizations as compared to other types of tax-exempt organizations when it comes to permitted types of speech is constitutional, it is inconsistent with the general principles relating to deductibility and should be eliminated.<sup>127</sup> As a practical matter, however, there appear to have been few if any groups that have taken advantage of this loophole.

Second, this conclusion does not apply to businesses for which politics is their business—that is, their profit-making activity. So, for example, political consultants and media firms should be (and are) permitted to deduct expenses relating to political activity, as they engage in such activity primarily to generate income (although some such businesses may also be committed to a particular political ideology).

Third and finally, this conclusion does not address proposals to permit a deduction or tax credit for political contribution not based on general tax policy principles but instead to encourage involvement in political campaigns or to reduce the influence of special interests.<sup>128</sup> Such proposals are beyond the scope of this

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126 See *supra* note 28 and accompanying text.

127 See *Regan v. Taxation with Representation*, 461 U.S. 540, 550–51 (1983).

128 See, e.g., DAVID ROSENBERG, *BROADENING THE BASE: THE CASE FOR A NEW FEDERAL TAX CREDIT FOR POLITICAL CONTRIBUTIONS* (2002); Debra Burke, *Twenty Years After the Federal Election Campaign Act Amendments of 1974: Look Who's Running Now*, 99 DICK. L. REV. 357 (1995); Thomas Cmar, *Toward a Small Donor Democracy: The Past and Future of Incentive Programs for Small Political Contributions*, 32 FORDHAM

Article, as they do not contest the tax policy basis for Congress' decision not to permit a deduction for political activity expenditures. They instead rely on a non-tax policy rationale that would require a separate article (or book) to fully consider.

None of these caveats therefore undermine the soundness of Congress' decision not to permit a deduction, directly or indirectly, for political activity expenditures. And since the denial of such a deduction for purposes of calculating taxable income is squarely within the purview of both the Internal Revenue Code and the IRS, as well as the procedures and enforcement mechanisms developed and deployed by the IRS, there is no institutional reason to abandon this policy or the tax rules that implement it.

## 2. DISCLOSING POLITICS

As spending on political activity has grown, both in absolute amounts and in the proportion coming from a relatively small number of large donors or unknown sources, there is a growing concern that it is distorting the legislative priorities of politicians dependent on this spending and increasingly undermining public confidence in our democratic system.<sup>129</sup> These developments are especially troubling to many because they indicate an increasing level of influence for wealthy business interests and individuals, to the detriment of other interests and individuals, and often without the voting public even being aware of who is funding the communications with which it is bombarded.<sup>130</sup> And while the candidate who attracts the most funding is not guaranteed to win any given election (as demonstrated recently by many of the 2018 contests), it is generally agreed that the amount of money raised is still relevant both for giving a candidate a realistic shot at winning and for increasing a candidate's odds of winning.<sup>131</sup>

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URB. L.J. 443 (2005); John M. de Figueiredo & Elizabeth Garrett, *Paying for Politics*, 78 S. CAL. L. REV. 591 (2005); Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 U. PA. L. REV. 73, 107–18 (2004). Such a tax credit actually existed from 1971 to 1986. See Revenue Act of 1971, Pub. L. No. 92-178, §§ 701-702, 85 Stat. 497, 560-62 (repealed in 1978 (deduction) and 1986 (credit)). Another commentator has proposed using the tax laws to limit political contributions by replacing campaign contribution ceilings with graduated campaign contribution taxes. See David S. Gamage, Note, *Taxing Political Donations: The Case for Corrective Taxes in Campaign Finance*, 113 YALE L.J. 1283 (2004).

129 See, e.g., RICHARD L. HASEN, PLUTOCRATS UNITED: CAMPAIGN MONEY, THE SUPREME COURT, AND THE DISTORTION OF AMERICAN ELECTIONS 54 (2016) (“[M]oney can influence who is elected to office, which in turn affects legislative outcomes [and] often buys access and cooperation, permitting those with wealth . . . to affect legislative policy.”); Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSP. ON POL. 564, 576 (2014) (the preferences of interest groups and economic elites have a substantial impact on public policy, while the preferences of average citizens have little independent impact); Richard L. Hasen, *Lobbying, Rent-Seeking and the Constitution*, 64 STAN. L. REV. 191 (2012); Frank Pasquale, *First Amendment Freeze Play: Bennett’s Strategy for Entrenching Inequality*, 164 U. PA. L. REV. ONLINE 215 (2016); Jessie Romero, *Money Talks: Legal Changes Have Opened the Door to New Kinds of Political Spending. What Does the Money Buy?*, ECON FOCUS: FOURTH QUARTER 2014, at 16, 19-20 (summarizing research); Nicholas Stephanopoulos, *Aligning Campaign Finance Law*, 101 VA. L. REV. 1425, 1467–68 (2015) (empirical evidence indicates governmental outputs align more with rich and with political campaign donors than with any other group and non-donors, respectively).

130 See Michael D. Gilbert, *Campaign Finance Disclosure and the Information Tradeoff*, 98 IOWA L. REV. 1847, 1849 (2013); Potter & Morgan, *supra* note 47, at 384–85.

131 See HASEN, *supra* note 129, at 58 (“Money does not buy political outcomes, but, along with candidate quality and campaign organization, it is important to winning elections.”); Michael S. Kang, *The Year of the*

There also is a strong argument that disclosure of funding sources likely reduces the risk of corruption (and the appearance of corruption).<sup>132</sup> While the corruption/appearance of corruption rationale is weakened when the funding is for political activity conducted in a manner that is truly independent of the candidates supported, it is still relatively strong, especially given the increasing spending on elections and therefore the reasonable presumption that cash-strapped candidates who benefit from such spending will be particularly grateful.<sup>133</sup> At the same time, disclosure does raise concerns that it could chill participation, a point addressed in the next section.<sup>134</sup>

There also is evidence supporting the voter information rationale found by the Supreme Court to support disclosure in the face of constitutional challenges.<sup>135</sup> This is particularly true when the disclosure comes in the form of disclaimers on the communications paid for by identified funders.<sup>136</sup> This rationale therefore provides a separate basis for disclosure of funding sources for political activity.

While not everyone agrees that changes in the aggregate amount and sources of money in politics are having a negative effect, the perception they are is gaining increasing traction and therefore fueling the push to enhance the regulation of these flows. This in turn strongly suggests that, at a minimum, it would be desirable to know the sources of that money, and particularly the largest such sources (and so likely the most influential and potentially corrupting sources) in order to see whether the claimed negative effects of money in politics actually exist. It may be that, contrary to the research to date, such analysis will reveal only limited, if any, shifting of political positions and preferences of elected politicians, but there is no way to be even reasonably confident this is the case without the data regarding funding sources to consider in the first place.

### 3. PAYING FOR POLITICS

There is longstanding debate regarding how political activity is funded and whether our current system's general reliance on private funding and a lack of limits

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*Super PAC*, 81 GEO. WASH. L. REV. 1902, 1904–06 (2013) (SuperPACs did not provide a decisive partisan edge in 2012, although they did increase the prominence and influence of the very wealthy in national politics); Michael Beckel, *How to Waste a Billion Dollars*, POLITICO (Nov. 18, 2015), <https://www.politico.com/magazine/story/2015/11/money-in-politics-waste-billion-dollars-koch-brothers-213374>; Peter Overby, *Jeb Bush Proves Money Isn't Everything in Politics*, NPR (Nov. 19, 2015), <https://www.npr.org/2015/11/19/456619737/jeb-bush-proves-money-isnt-everything-in-politics>.

132 See Lloyd Hitoshi Mayer, *Politics and the Public's Right to Know*, 13 ELECTION L.J. 138, 146–47 (2014).

133 *Id.* at 155–56; see also *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 884 (2009) (“[T]here is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge’s election campaign when the case was pending or imminent.”).

134 Mayer, *supra* note 132, at 156–57.

135 See *Citizens United v. FEC*, 558 U.S. 310, 369–70 (2010); *McConnell v. FEC*, 540 U.S. 93, 196 (2003); *Buckley v. Valeo*, 424 U.S. 1, 66–68, 80–81 (1976).

136 See Travis N. Ridout et al., *Sponsorship, Disclosure and Donors: Limiting the Impact of Outside Group Ads*, 68 POL. RES. Q. 68 (2015); Conor M. Dowling & Amber Wichowsky, *Does It Matter Who's Behind the Curtain? Anonymity in Political Advertising and the Effects of Campaign Finance Disclosure*, 41 AM. POL. RES. 965 (2013).

on expenditures is detrimental to our democratic form of government. The rules relating to the involvement of nonprofits in political activity do not, however, have much impact on this larger debate for several reasons. First, and as already noted, individuals and entities seeking to fund political activity are not limited to using nonprofit vehicles for doing so and therefore, even if all nonprofits were prohibited from engaging in political activity, that funding would likely find an outlet through other types of entities.<sup>137</sup>

Second, nonprofits that are currently permitted to engage in political activity serve as vehicles for others—individuals and for-profit entities—to act collectively to fund such activity but are not generally themselves the initial sources of funds for such activity. Indeed one aspect of Congress' decision to not allow deductions for political activity is that any tax-exempt organizations that engage in political activity are taxed on their investment income that otherwise would be tax-exempt (and so usually avoid such income).<sup>138</sup> While this taxation does not extend to profits realized from activities related to the nonprofit's exempt purpose, other restrictions on the activities of non-charitable, tax-exempt nonprofits tend to limit such activities.<sup>139</sup> So concerns about the amount money in politics and its sources need to address the ultimate sources of those funds—individuals and for-profit entities—as opposed to nonprofits.

Third and finally, the constitutional concerns highlighted in the next section sharply limit the ability of governments to address this concern, particularly with respect to nonprofits. Long before the *Citizens United* decision, the Supreme Court had recognized a First Amendment-compelled exception from the prohibition on corporate spending on political activity for independent nonprofits that had a clear ideological message and were funded exclusively by individuals.<sup>140</sup> In addition, the Supreme Court found the limits on lobbying by charities to be constitutionally acceptable in part because a charity had the option of setting up a tax-exempt but noncharitable nonprofit affiliate to engage in unlimited lobbying. Therefore, absent a fundamental shift in how the Supreme Court applies the First Amendment in this context, the ability of governments to limit political activity by all non-charitable nonprofits could be constitutionally suspect.

This is not to say that concerns about money in politics do not have merit. But it is to say that attempting to address those concerns through legal rules targeting nonprofits or their activities is likely to be ineffective both because of hydraulic effects—the money will find a way through other channels—and constitutionally fraught. The solution I develop in this part therefore will not attempt to address these larger concerns.

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137 See *supra* note 104 and accompanying text.

138 See I.R.C. § 527(f) (2018).

139 See, e.g., 26 C.F.R. § 1.501(c)(6)-1 (2018) (prohibiting section 501(c)(6) organizations from engaging in "a regular business of a kind ordinarily carried on for profit").

140 See *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986).



#### 4. PROTECTING FREE SPEECH, FREE ASSOCIATION, & FREE EXERCISE

If only the tax policy against allowing the deduction of political activity expenditures and the interests furthered by disclosing sources of political funding were at stake, pursuing these policies would be an easy choice. There are, however, important countervailing concerns. Those concerns are embodied in the First Amendment and relate to free speech, the related right to free association, and, particularly for churches, free exercise of religion.

Turning first to free speech and free association, nonprofits have a long history of involvement in political discussions and serve as vehicles for diverse groups to provide input into political decisions, including with respect to which candidates should be elected. Laws that would unduly limit or prohibit that involvement are therefore undesirable and indeed may be unconstitutional. There also is mixed empirical evidence regarding whether existing public disclosure requirements chill political participation by causing potential donors to either forgo giving or to give at amounts below the disclosure thresholds.<sup>141</sup> Nevertheless, the reasonable possibility that disclosure may chill political participation in this fashion cautions against disclosure that is unnecessary to further the interests that support disclosure. It is for this reason that a number of commentators, with a variety of views on the merits of disclosure more generally, have proposed significantly increasing the threshold amounts that trigger disclosure.<sup>142</sup>

Consideration also has to be given to the burden on free exercise of religion that the application of the Johnson Amendment to churches creates. As a constitutional matter, the Supreme Court has found that the ability of charities to create closely affiliated, but non-charitable entities through which to channel desired political activity provides a sufficient vehicle for engaging in such activity—First Amendment concerns notwithstanding—while still vindicating the congressional choice not to allow tax deductible funds to be used for such activity.<sup>143</sup> This conclusion does not apply as easily to churches and messages from the pulpit, however, because of the special significance of the method of delivery in this context.<sup>144</sup> This consideration suggests that some type of accommodation is required for this situation, whether compelled by the First Amendment (or the federal Religious Freedom Restoration Act<sup>145</sup>) or as a matter of sound policy.

##### B. COMPREHENSIVELY ADDRESSING THESE CONCERNS

Any comprehensive approach to political activity by nonprofits therefore has to address both the need to prevent nonprofits from being used to render funds

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<sup>141</sup> Compare Ray J. La Raja, *Political Participation and Civic Courage: The Negative Effect of Transparency on Making Small Campaign Contributions*, 36 POL. BEHAV. 753 (2014) with Abby Wood & Douglas M. Spencer, *In the Shadows of Sunlight: The Effect of Transparency on State Political Campaigns*, 15 ELECTION L.J. 1 (2016).

<sup>142</sup> See *supra* note 116 and accompanying text.

<sup>143</sup> See *supra* note 33.

<sup>144</sup> See Lloyd Hitoshi Mayer, *Politics at the Pulpit: Tax Benefits, Substantial Burdens, and Institutional Free Exercise*, 89 B.U. L. REV. 1137 (2009). As developed in this earlier article and summarized briefly at the end of section III.B.1.a. *infra*, one way to address this situation would be to allow churches to include political messages in their in-person, internal communications with their members during worship services. *Id.* Nina J. Crimm, Laurence H. Winer, and Edward A. Zelinsky have also developed similar proposals to address the constitutional and policy concerns that the current prohibition raises with respect to churches and other houses of worship. See CRIMM & WINER, *supra* note 16, at 337-52; EDWARD A. ZELINSKY, *TAXING THE CHURCH: RELIGION, EXEMPTIONS, ENTANGLEMENT, AND THE CONSTITUTION* 202-06 (2017).

<sup>145</sup> 42 U.S.C. § 2000bb-1(b) (2018).

contributed or spent for such activity deductible for federal income tax purposes and the need to publicly disclose the sources of such funds as reasonably necessary to inform voters, prevent corruption and the appearance of corruption, and backstop contribution limits, without unduly preventing nonprofits and their supporters from being engaged in the political process. It also has to consider the relative strengths of federal tax law and the IRS as compared to election law and the FEC (and its state counterparts) and as compared to state nonprofit law and the state agencies that implement that law. Finally, it needs to be robust enough to be avoid being undermined even given that the high stakes, winner-take-all field of politics tends to encourage aggressive exploitation of any regulatory arbitrage opportunities.<sup>146</sup>

## 1. REFORMING TAX LAW

There are several issues raised by the above discussion relating to taxing politics and disclosing politics through provisions in federal tax law: (1) to what extent tax-exempt nonprofits should be limited with respect to their political activity; (2) how specifically should political activity and those limits be defined; and (3) to what extent should federal tax law require public disclosure of information relating to such activity and particularly the identities of donors. To consider these three issues, it is helpful to consider separately the political activity rules relating to the three major types of tax-exempt nonprofits: charities; non-charitable but not solely political tax-exempt nonprofits; and political organizations.

### a. CHARITIES

The so-called Johnson Amendment prohibition on charities engaging in political activity is both consistent with the sound policy of not permitting a deduction for contributions to support such activity and provides a clear, bright line limit. At the same time, however, its reliance on an all relevant facts and circumstances “smell test”<sup>147</sup> for defining what is prohibited political activity creates enforcement and compliance difficulties and may raise constitutional concerns because of its

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<sup>146</sup> See, e.g., Richard Briffault, *The 527 Problem . . . and the Buckley Problem*, 73 GEO. WASH. L. REV. 949, 958–59 (2005) (emergence of 527s); Frances R. Hill, *Citizens United and Social Welfare Organizations: The Tangled Relationships Among Guidance, Compliance, and Enforcement*, 43 STETSON L. REV. 539, 552–59 (2014) [hereinafter Hill, *Social Welfare Organizations*] (emergence of other types of tax-exempt organizations); Frances R. Hill, *Probing the Limits of Section 527 to Design a New Campaign Finance Vehicle*, 26 EXEMPT ORG. TAX REV. 205 (1999) (emergence of 527s); Elizabeth Kingsley & John Pomeranz, *A Crash at the Crossroads: Tax and Campaign Finance Laws Collide in Regulation of Political Activities of Tax-Exempt Organizations*, 31 WM. MITCHELL L. REV. 55, 56–59 (2004) (emergence of other types of tax-exempt organizations).

<sup>147</sup> See *EO Committee of ABA Tax Section Offers Commentary on Politicking*, 11 EXEMPT ORG. TAX REV. 854, 856 (1995) (stating that the IRS appears to have been using a “smell test” to determine what constitutes prohibited political activity, without any unifying principle); Elizabeth Kingsley & John Pomeranz, *A Crash at the Crossroads: Tax and Campaign Finance Laws Collide in Regulation of Political Activities of Tax-Exempt Organizations*, 31 WM. MITCHELL L. REV. 55, 64–71, 65 n.39 (2004) (summarizing the existing guidance regarding what exactly constitutes prohibited political activity and concluding that the definition remains frustratingly ambiguous); OMB WATCH, *THE IRS POLITICAL ACTIVITIES ENFORCEMENT PROGRAM FOR CHARITIES AND RELIGIOUS ORGANIZATIONS* 12–13 (2006) (arguing that the IRS continues to use what is essentially a “smell test” when more bright line rules are needed).

vagueness.<sup>148</sup> This suggests that a better rule would more clearly define what is, and what is not, prohibited political activity for charities.

As noted earlier, the Bright Lines Project has attempted to create such a clearer definition.<sup>149</sup> In an attempt to only reach what is clearly political activity, however, that Project has proposed regulations that are lengthy and detailed, including a seven-part definition for “*per se* intervention” and eight detailed safe harbors.<sup>150</sup> While such detail may resolve vagueness concerns from a constitutional perspective, they create a complicated regulatory regime to apply from the perspective of both tax-exempt organizations and IRS agents. The Bright Lines Project proposal also retains the facts and circumstances test for any activities not covered by the detailed rules.<sup>151</sup>

A simpler definition would therefore be preferable for purposes of the prohibition on political activity by charities, so that not only sophisticated charities but also the many relatively unsophisticated charities can readily comply with the law. Furthermore, the simpler definition should err on the side of overbreadth to prevent gaming, given that individuals seeking to avoid the prohibition could either cause the charity with which they are associated to create a non-charitable affiliate or choose instead to create a separate, non-charitable (although still tax-exempt) entity. Especially with the reduced importance of the charitable contribution deduction to many donors who will no longer itemize their deductions for federal income tax purposes, the costs of operating through a non-charitable entity are less significant than they have been in the past.<sup>152</sup> Combined with the proposal below to eliminate the limit on political activity by such entities, it would make coming together to engage in political activity much simpler for federal tax purposes while avoiding any tax-driven subsidy for such activity.

What would such a definition look like? One place to look for inspiration would be the definition of electioneering communications in federal election law, but expanded to cover all communications.<sup>153</sup> Under this expanded definition, any communication (including over the Internet) that clearly referred to a candidate and was made within a specific timeframe before the relevant election would be considered political activity. To prevent “political party” simply replacing “candidate,” the definition should also be expanded to include communications that clearly referred to a political party as well as ones that clearly referred to a candidate. To cover situations involving financial or other support for a candidate or political party not relating to communications, the definition should also include any provision of funds, services, or goods to a candidate or political party. An exception would apply if such provision is done in a manner that is available on the same terms to any

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148 See *Freedom Path, Inc. v. IRS*, 913 F.3d 503 (5th Cir. 2019) (rejecting a challenge on these grounds, but because of standing concerns and so not reaching the merits); Miriam Galston, *When Statutory Regimes Collide: Will Citizens United and Wisconsin Right to Life Make Federal Tax Regulation of Campaign Activity Unconstitutional?* 13 U. PA. J. CONST. L. 867, 918–28 (2011).

149 See *supra* note 102 and accompanying text.

150 See Letter from Gregory L. Colvin & Lisa Gilbert, *supra* note 102.

151 See *id.*

152 See Gene Takagi, *A prediction for nonprofits in 2018: Rise of the 501(c)(4) organizations*, NON-PROFIT LAW BLOG (Jan. 25, 2018), <http://www.nonprofitlawblog.com/a-prediction-for-nonprofits-in-2018-rise-of-the-501c4-organizations/>.

153 See *supra* note 47 and accompanying text.

member of the public.

What about historically nonpartisan activities of charities, such as public officials (who may also be candidates) speaking at events, nonpartisan voter registration and education, or hosting unbiased candidate forums? For the former, it would be simplest to have the same blackout period as for communications. There is usually no particular need to have the fundraising event or other activity close in time to the relevant election. For voter registration and education, there could be a narrow exception for voter registration materials that necessarily mention political parties, but again for the sake of simplicity, education communications that mention candidates—even current public officials—should be required to occur outside of the blackout window. Finally, for candidate forums, there could be a narrow exception for such events. Since only a relatively small number of charities engage in such activities, the increased complexity created by adding such an exception would not burden the vast majority of charities.

What about advocacy on issues? More specifically, and to take such advocacy to its election-related extreme, should charities be permitted to urge the public, for example, to “Vote Pro-Life” or “Vote Pro-Choice” even when candidates are clearly divided on the issue? Currently, the IRS theoretically polices such activity as potentially prohibited political activity. But in practice, there appear to be few if any IRS enforcement actions based on such activity when there is not a clear reference to a specific candidate or political party.<sup>154</sup> Therefore, it appears that such activities should be permitted, particularly since the stances of most charities engaged in public policy issues are obvious, even if such stances are not stated explicitly. For example, consider such politically active charities like Planned Parenthood, the NAACP, and the Heritage Foundation; to the extent they urge the public to vote, their policy-related reasons for doing so are fairly obvious, so little is gained by preventing them from explicitly stating those policy goals (without clearly referring to any candidates or political parties).

The situation of churches and other houses of worship is more complicated, however, because of the free exercise concerns mentioned earlier combined with the unique communication platform that the pulpit provides. Churches should therefore be allowed to include political messages in their in-person, internal communications with their members during worship services. The impact of such messages is likely to be limited given that pastors would be preaching to people who are likely already aware of their pastor’s political leanings. To prevent abuse, however, the prohibition on political activity should extend to other forms of communication in order to avoid opening the door to broader distribution of such messages, including to the general public. This is justifiable in part because unlike in-person sermons from the pulpit, other forms of communications could be done—and paid for—by a non-charitable affiliate using nondeductible funds.

#### b. NON-CHARITABLE, TAX-EXEMPT NONPROFITS

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<sup>154</sup> See JUDITH E. KINDELL & JOHN FRANCIS REILLY, ELECTION YEAR ISSUES 335, 344–46 (2001), <https://www.irs.gov/pub/irs-tege/eotopici02.pdf>.

The situation with non-charitable, tax-exempt nonprofits such as § 501(c)(4) social welfare organizations, § 501(c)(5) labor unions, and § 501(c)(6) trade associations is different, however. Because of the lack of charitable contribution deduction for donations to such organizations, and because of the notice and proxy tax provisions that effectively prevent a business expense deduction for payments to such groups, there is no tax policy reason to limit the amount of political activity by such organizations. At the same time, the uncertainty created by the existing “primary” activity test for the amount of permitted political activity is problematic from an enforcement and compliance perspective, even if the definition of political activity was clarified in the same manner as proposed above for charities.

For all of these reasons and as Roger Colinvaux has persuasively argued, there is no tax policy justification for limiting the political activity of such nonprofits.<sup>155</sup> With respect to disclosure, the only reason to limit such activity—or to tighten that limit—is if it would force such activity toward § 527 organizations that are subject to extensive public disclosure requirements. But, as detailed in the next section, the inclusion of those requirements in federal tax law and “keying off” of tax status is unwise and should be eliminated. With that elimination, there is no justification based on tax policy or disclosure for limiting the political activity of non-charitable, tax-exempt nonprofits. This eliminates the need to consider how to define such a limit, or indeed how to define political activity except for purposes of the notice and proxy tax provisions. For the latter, the same definition proposed for charities should be sufficient to accomplish the tax policy goal of prohibiting deductions for contributions to fund such activity.

### c. SECTION 527 POLITICAL ORGANIZATIONS

Political organizations that are tax-exempt under § 527 are, of course, not limited with respect to their amount of political activity. The breadth and ambiguity of the definition of what constitutes an “exempt function” for such organizations is therefore not problematic from a tax enforcement and compliance perspective.<sup>156</sup> Where it has proven problematic, however, has been where it allowed undoubtedly political organizations that fell outside of election law disclosure requirements to avoid public disclosure of their funding sources and expenditures, at least until Congress modified § 527 to require such disclosure.<sup>157</sup> But in doing so, Congress inadvertently created another problem.

If an organization has disclosed enough of its activities to demonstrate its compliance with the requirements for tax-exempt status as a § 527 organization, that disclosure should be sufficient for tax purposes. Any disclosure beyond this information, including with respect to publicly identifying contributors, is not justified as a tax policy matter. More importantly, requiring such disclosure as a matter of tax law is unwise and indeed dangerous to the primary mission of the tax

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<sup>155</sup> See Roger Colinvaux, *Political Activity Limits and Tax Exemption: A Gordian’s Knot*, 34 VA. TAX REV. 1 (2014).

<sup>156</sup> See I.R.C. § 527(e)(2) (2018).

<sup>157</sup> See *supra* note 25 and accompanying text.

law.<sup>158</sup> Congress therefore erred in incorporating those disclosure requirements in the tax laws, as opposed to modifying the election law disclosure requirements to capture the behavior of 527s that warranted disclosure. In other words, any such public disclosure provisions do not belong in the tax law but instead belong in election law.<sup>159</sup> So it is to election law, and the FEC, that we now turn.

## 2. REFORMING ELECTION LAW (AND THE FEC)

There are two aspects of election law that need consideration. The first is the extent of current public disclosure requirements. The second is the structure of the FEC in light of its alleged decreasing effectiveness.

### a. DISCLOSING POLITICS

As detailed previously, the existing federal law disclosure requirements are extensive when it comes to the entities and activities they cover, but they also have a number of gaps, two of which are particularly significant. The first such gap is that they generally do not reach entities that do not coordinate their activities with candidates or political parties and avoid express advocacy and electioneering communications, even if these entities engage in other communications or activities that are clearly designed to support or oppose the election of candidates. It was in this gap that the “stealth PAC” 527s emerged until Congress in 2000 began requiring disclosures by 527s. However, it is also in this gap that many noncharitable, tax-exempt nonprofits such as § 501(c)(4) social welfare organizations currently operate.<sup>160</sup>

The second gap is for entities that do not coordinate their activities with candidates or political parties and avoid being classified as a political committee but do engage in some express advocacy or electioneering communications (with respect to federal elections). Such entities are required to publicly disclose details about their spending on such communications but are often able to avoid disclosing the identities of the contributors whose donations funded that spending. Until recently, this avoidance was easy because the FEC had interpreted the applicable statutes as only requiring donor disclosure if a donor had earmarked their donation for a specific covered communication.<sup>161</sup> A federal district court has vacated the relevant regulation with respect to express advocacy and in the wake of that decision, the FEC has issued guidance saying that donor disclosure is required if a donor has earmarked their donation for express advocacy generally.<sup>162</sup> But it appears that such an entity

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158 See, e.g., Colinvaux, *supra* note 155, at 48; Kahng, *supra* note 73, at 51–52; Mayer, *supra* note 25; Donald B. Tobin, *The 2013 IRS Crisis: Where Do We Go From Here?*, 142 TAX NOTES 1120, 1121 (2014); *supra* notes 61, 71 and accompanying text.

159 See Colinvaux, *supra* note 155, at 6 (suggesting that administration of the current § 527 disclosure requirements be shifted to the FEC even if those provisions remain in the Internal Revenue Code); Mayer, *supra* note 25 (same).

160 See *supra* notes 56–60 and accompanying text.

161 See 11 C.F.R. § 109.10(e)(1)(vi) (2018).

162 See *CREW v. FEC*, 316 F.Supp. 3d 349 (D.D.C. 2018); Press Release, FEC, FEC provides guidance following U.S. District decision in *CREW v. FEC*, 316 F. Supp. 3d 349 (D.D.C. 2018) (Oct. 4, 2018),

still does not have to publicly disclose the identity of donors as long as those donors do not earmark their contributions at all, and this decision (even if upheld on appeal) does not apply to electioneering communications.

To address these gaps, Congress (and state legislatures, to the extent these gaps also exist within state election laws), should make two changes to the existing disclosure rules. First, the range of activities that trigger disclosure should be expanded to include all communications (not just broadcast, cable, and satellite) that clearly refer to a candidate (or political party) and are made within a certain window before a relevant election. This modification would be similar to the bright line definition of political activity proposed for the purposes of the tax law's prohibition on charities engaging in political activity and has a similar justification: it provides clarity while also likely capturing almost all communications that are intended to influence voters with respect to candidates.

Second, public disclosure of donor identities should reach all donors whose funds could have been used to pay for the covered communications. In other words, only if donors specifically earmark their donations for other activities should they avoid such disclosure. Otherwise, it is too easy for donors to simply give without earmarking (except possibly for hard-to-prove "understandings") and thereby avoid disclosure.

In recognition of the free speech and free association values implicated by such disclosure, however, a third change should also be made. Currently, the aggregate contribution amounts that trigger donor identity disclosure start as low as over \$200 in a calendar year (and sometimes less under state law). Whatever the merits of such low triggers when contribution limits apply—that is, when contributions are made to candidates, political parties, or PACs and so there is a concern that multiple straw donors could be used to funnel contributions that in the aggregate exceed those limits—there is no good justification for such low triggers with respect to independent spending for which there are no contribution limits (except with respect to foreign sources). While it is not settled empirically whether disclosure in fact chills contributions and so effectively speech and association, there is no reason to risk such chilling for relatively small donors because public disclosure of their identities is highly unlikely to prevent corruption or the appearance of corruption (it is hard to imagine a member of Congress changing their vote or legislative agenda because of so modest a contribution to independent election-related spending) or provide any useful information to voters. The third change would therefore be to significantly increase the threshold for trigger disclosure of donor identities, perhaps to \$10,000 (in the aggregate) during a calendar year. Such an increase would also likely reduce the compliance burden on reporting entities and the enforcement burden on the FEC, likely even with an expanded range of communications triggering such disclosure obligations.

#### b. RESTRUCTURING THE FEC

A bright line set of disclosure rules would also reduce the need to restructure the FEC, since the discretion of the commissioners would be limited. That said, almost any statute requires additional guidance to be fully implemented and the current structure of the FEC—particularly the need for a majority vote of the six commissioners to proceed with each major step of an enforcement action—appears to frustrate not only the issuance of reasonable guidance but also enforcement. Therefore, while not as critical as modifying the disclosure requirements, restructuring the FEC is likely also important to ensure an effective disclosure regime.

The existing bipartisan six-commissioner structure is an understandable feature of the FEC given concerns about the agency being used to harass political opponents or otherwise give a partisan advantage. But especially given the FEC's recent track record,<sup>163</sup> a better way to address this concern would be the enactment of clear statutory rules (limiting the need for potentially controversial guidance) and delegation of enforcement decisions to career civil servant staff as opposed to political appointees (as is generally done with other agencies that could be used for partisan ends, such as the IRS).<sup>164</sup> With such changes, the FEC could then have a single executive with a fixed term (following the model of the FBI and IRS) to prevent partisan deadlocks and limit partisan influence.<sup>165</sup>

Alternatively, Congress could maintain the current organizational structure, but, for disclosure purposes, only delegate enforcement decisions to career civil service staff. This is less problematic than doing so for enforcement decisions generally, because disclosure enforcement decisions usually only require forcing recalcitrant reporting entities to provide clearly required disclosures as opposed to pursuing more burdensome investigations (and potentially significant fines) associated with other kinds of election law violations.<sup>166</sup> Assuming a relatively detailed and clear statutory regime, thereby minimizing the need for commissioner-approved guidance, this delegation of enforcement authority might be sufficient to ensure effective implementation of the modified disclosure regime.

### 3. NOT REFORMING STATE NONPROFIT LAWS

Proposals for increasing disclosure of political activity through state nonprofit laws are unwise and, if the suggested modifications to election law occur, unnecessary. But even if those suggested modifications do not occur, in part or in

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<sup>163</sup> See *supra* note 111.

<sup>164</sup> See STAFF OF THE JOINT COMM. ON TAXATION, 106TH CONG., REPORT OF INVESTIGATION OF ALLEGATIONS RELATING TO INTERNAL REVENUE SERVICE HANDLING OF TAX-EXEMPT ORGANIZATION MATTERS 96 (Comm. Print 2000), <http://www.jct.gov/s-3-00.pdf> (describing IRS policy and the role of political appointees).

<sup>165</sup> See I.R.C. § 7803(1)(1)(B) (2018) (detailing the five-year term of the Commissioner of the Internal Revenue); Pub. L. 94-503, Title II, § 203, Oct. 15, 1976, 90 Stat. 2427 (explaining the ten-year term of the Director of the Federal Bureau of Investigation).

<sup>166</sup> Decisions regarding whether to pursue criminal charges for election law violations are made within the Department of Justice; while the FEC is generally consulted and retains jurisdiction over civil enforcement of federal campaign finance laws, it does not control such decisions. See FEDERAL PROSECUTION OF ELECTION OFFENSES, *supra* note 86, at 17–18, 169–70.



whole, the problems that likely would be created by requiring disclosure through state nonprofit law are significant enough that such requirements should not be enacted. More specifically, the state offices charged with enforcing such laws are already under-resourced and so limited in their ability to enforce those laws. Perhaps more importantly, those offices are often under the authority of an elected official—often a state attorney general—which raises the possibility that application and enforcement of the disclosure laws could be driven by partisan motivations.

#### CONCLUSION

The increasingly prominent involvement of nonprofits in efforts to support or oppose candidates for elected public office, including often in violation of existing federal tax limitations on such activity, is of concern because of its potential to undermine the reputation of the nonprofit sector as a whole and perhaps respect for the rule of law more generally. At the same time, such involvement has a positive aspect in that nonprofits are often vehicles for political engagement by individuals and important contributors to discussions about the relative merits of candidates. The question is therefore how to accommodate the legitimate policy concerns relating to such involvement while not unduly undermining this important role in our democracy.

The best way to answer to this question is to consider all of the bodies of law applicable to nonprofit political involvement—federal tax law, election law, and state nonprofit law—and how they can best address those concerns together. More specifically, there are sound policy reasons for both requiring the use of after-tax dollars to fund political activity and for requiring the public disclosure of significant sources of such funds. But while federal tax law is well-suited to furthering the first policy by preventing the direct or indirect deduction of political activity expenditures, it and the IRS are poorly suited to force the detailed and timely disclosure of funding sources. Federal tax law should therefore be modified to clearly and broadly define political activity that is not permitted for charitable nonprofits (and spending which is not eligible to be a deductible business expenses), while permitting noncharitable nonprofits to engage in such activity without limit, and eliminating the tax law disclosure provisions for 527s. The one major caveat is that the special nature of in-person communications by religious leaders during worship services at churches justifies a limited exception to the prohibition on political activity by charities for such communications.

At the same time, election law is well suited to further the disclosure policy goal and so should be modified to also clearly and broadly define the political activity that triggers disclosure. The effectiveness of such disclosure requirements would be enhanced if the FEC and its state counterparts are also restructured to better ensure effective application and enforcement of disclosure requirement. Finally, such requirements should be limited to the disclosure of relatively large sources of funds (for groups not involved in making legally limited contributions to candidates, political parties, and PACs).

Together these reforms could restore law and order to the increasingly law-optional area of nonprofit political activity, while preserving the ability of

(noncharitable) nonprofits to appropriately engage in political activity, furthering important governmental interests both in combatting corruption and the appearance of corruption and informing voters, and sufficiently protecting important First Amendment values.