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NONPROFIT LAW AS THE TOOL TO KILL WHAT REMAINS OF CAMPAIGN FINANCE LAW:  
RELUCTANT LESSONS FROM ELLEN APRILL

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# NONPROFIT LAW AS THE TOOL TO KILL WHAT REMAINS OF CAMPAIGN FINANCE LAW: RELUCTANT LESSONS FROM ELLEN APRILL

*Richard L. Hasen\**

## INTRODUCTION

Throughout her exemplary career as a law professor, Prof. Ellen Aprill regularly ignored the admonition, apocryphally attributed to Mark Twain, to “never discuss politics or religion in polite company.”<sup>1</sup> And we are better off for it. Although Professor Aprill’s scholarship spans myriad issues from the intricacies of the Internal Revenue Code<sup>2</sup> to the role of dictionaries in aiding judges in statutory interpretation,<sup>3</sup> some of her most important work comes at the intersection of the law of nonprofit organizations, including religious institutions such as

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1. Although many attribute this quotation to Twain, I have been unable to find any evidence he made the statement. He did say he was willing to talk about religion and politics privately and in ways he would not put in print:

I said I was in the common habit, in private conversation with friends, of revealing every private opinion I possessed relating to religion, politics, and men but that I should never dream of *printing* one of them, because they are individually and collectively at war with almost everybody’s public opinion, while at the same time they are in happy agreement with almost everybody’s private opinion. As an instance, I asked her if she had ever encountered an intelligent person who privately believed in the Immaculate Conception—which of course she hadn’t; and I also asked her if she had ever seen an intelligent person who was daring enough to publicly deny his belief in that fable and print the denial. Of course she hadn’t encountered any such person.

3 MARK TWAIN, *AUTOBIOGRAPHY OF MARK TWAIN 197* (Benjamin Griffin et al. eds., 2015). The sentiment about not mixing religion and politics predates Twain to at least 1840. See THOMAS CHANDLER HALIBURTON, *THE LETTER-BAG OF THE GREAT WESTERN; OR, LIFE IN A STEAMER 184* (1840) (“Never discuss religion or politics with those who hold opinions opposite yours; they are subjects that heat in handling, until they burn your fingers.”).

2. See, e.g., Ellen P. Aprill, *The Private Foundation Excise Tax on Self-Dealing: Contours, Comparisons, and Character*, 17 *PITT. TAX REV.* 297 (2020).

3. Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 *ARIZ. ST. L.J.* 277 (1998).

churches and synagogues,<sup>4</sup> and election law, the set of rules regulating participation in the political process. As with the rest of her scholarship, her work is meticulously researched, crisply written (as one might expect of a former college instructor of Freshman Composition), and persuasively argued. One cannot come away from an article by Professor Aprill in this field without a deeper appreciation of the intricacies and contradictions in the treatment of the law at this intersection.

In this brief Essay, I explain how Professor Aprill's deep knowledge of nonprofit and tax law and her relentless intellectual honesty leads her (and us) to an unhappy place: a world in which many of the remaining regulations of money in politics could well be struck down as unconstitutional or rendered wholly ineffective by a Supreme Court increasingly hostile to the goals of campaign finance law and extremely solicitous of religious freedom. Just as the Supreme Court's 2010 decision in *Citizens United v. Federal Election Commission*<sup>5</sup> used the First Amendment rights of nonprofit corporations to open up direct political spending by large, for-profit corporations<sup>6</sup>, additional arguments about the rights of charitable institutions and other nonprofits will be used to push further judicial deregulation of the political process for all.

Professor Aprill, in her most recent writings at the intersection of nonprofit law and election law, reluctantly shows the way: a path toward getting churches, synagogues, and other charitable institutions directly in the business of politics; a means of striking down or rendering ineffective what remains of our campaign disclosure laws; and a self-reinforcing bootstrapping that relies upon legislative and agency inertia coupled with judicially-created loopholes to argue for the ineffectiveness of the system as a whole, triggering its demise through constitutional litigation. It is a sad but expertly told story of regulatory collapse.

Too few scholars write with Professor Aprill's clarity, attention to detail, and sense of the public good. None can match her combination of grace, intellectual curiosity, and generosity of spirit. She is, to

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4. See, e.g., Ellen P. Aprill & Lloyd Hitoshi Mayer, *21st Century Churches and Federal Tax Law*, U. ILL. L. REV. (forthcoming 2023), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4346286](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4346286) [<https://perma.cc/RHC2-U5F6>]; Ellen P. Aprill, *The Ballot, the Bimah, and the Tax Code*, CCAR J. REFORM JEWISH Q., Summer 2010, at 58.

5. 558 U.S. 310 (2010).

6. *Id.* at 327–29.

use a technical legal term, a *mensch*. Those of us whom she has taught owe her gratitude. And we must heed her understated warnings of threats to the goals of both nonprofit law and election law.

I. THE POLITICAL ACTIVITY OF NONPROFITS  
AS THE WEDGE TO FURTHER DEREGULATE POLITICS

A. *The Path to Citizens United*

Nonprofits have long been a wedge used to loosen campaign finance restrictions, in part because they often use an organizational form similar to for-profit corporations, but they can be far more sympathetic litigants as religious or ideological institutions protected by the First Amendment. As Professor Aprill has shown, recent controversy over limits on the campaign activities of churches and other nonprofit organizations could provide the seeds for a radical further deregulation of the campaign finance system and ultimately taxpayer subsidization of anonymous political activity.

To understand this path toward further deregulation, consider first the 1986 Supreme Court case, *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*<sup>7</sup> Massachusetts Citizens for Life (MCFL), an antiabortion group, was formed in 1973 as a nonprofit, nonstock corporation in Massachusetts.<sup>8</sup> It did not take contributions from business corporations or unions, relying instead upon voluntary donations from individuals.<sup>9</sup> Its corporate purpose, according to its charter, was to “foster respect for human life and to defend the right to life of all human beings, born and unborn, through educational, political and other forms of activities and in addition to engage in any other lawful act or activity for which corporations may be organized.”<sup>10</sup>

MCFL engaged in numerous political activities related to opposing abortion, and it regularly published a small-circulation newsletter distributed to its contributors and other supporters.<sup>11</sup> The group ran

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7. 479 U.S. 238 (1986).

8. *Id.* at 241–42.

9. *Id.* at 242.

10. *Id.* at 241–42.

11. *Id.* at 242–43 (“MCFL began publishing a newsletter in January 1973. It was distributed as a matter of course to contributors, and, when funds permitted, to noncontributors who had expressed support for the organization. The total distribution of any one issue has never exceeded 6,000. The newsletter was published irregularly from 1973 through 1978: three times in 1973, five times in 1974, eight times in 1975, eight times in 1976, five times in 1977, and four times in 1978.”)

into legal trouble, however, when it created and widely distributed a “Special Edition” of its newsletter prior to the September 1978 congressional primaries in Massachusetts.<sup>12</sup> The newsletter was political in nature and oriented toward helping potential voters choose an anti-abortion congressional candidate:

The front page of the publication was headlined “EVERYTHING YOU NEED TO KNOW TO VOTE PRO-LIFE,” and readers were admonished that “[n]o pro-life candidate can win in November without your vote in September.” “VOTE PRO-LIFE” was printed in large bold-faced letters on the back page, and a coupon was provided to be clipped and taken to the polls to remind voters of the name of the “pro-life” candidates. Next to the exhortation to vote “pro-life” was a disclaimer: “This special election edition does not represent an endorsement of any particular candidate.”

To aid the reader in selecting candidates, the flyer listed the candidates for each state and federal office in every voting district in Massachusetts, and identified each one as either supporting or opposing what MCFL regarded as the correct position on three issues. A “y” indicated that a candidate supported the MCFL view on a particular issue and an “n” indicated that the candidate opposed it. An asterisk was placed next to the names of those incumbents who had made a “special contribution to the unborn in maintaining a 100% pro-life voting record in the state house by actively supporting MCFL legislation.” While some 400 candidates were running for office in the primary, the “Special Edition” featured the photographs of only 13. These 13 had received a triple “y” rating, or were identified either as having a 100% favorable voting record or as having stated a position

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Each of the newsletters bore a masthead identifying it as the ‘Massachusetts Citizens for Life Newsletter,’ as well as a volume and issue number. The publication typically contained appeals for volunteers and contributions and information on MCFL activities, as well as on matters such as the results of hearings on bills and constitutional amendments, the status of particular legislation, and the outcome of referenda, court decisions, and administrative hearings. Newsletter recipients were usually urged to contact the relevant decisionmakers and express their opinion.” (citation omitted).

12. “While the May 1978 newsletter had been mailed to 2,109 people and the October 1978 newsletter to 3,119 people, more than 100,000 copies of the ‘Special Edition’ were printed for distribution.” *Id.* at 243.

consistent with that of MCFL. No candidate whose photograph was featured had received even one “n” rating.<sup>13</sup>

This “Special Edition” of the newsletter garnered a complaint to the Federal Election Commission (FEC) from someone who found a stack of 200 copies of the newsletter, ironically available at the statewide conference of the National Organization for Women,<sup>14</sup> an organization supporting abortion rights. Federal law at the time (then codified in 2 U.S.C. § 441b) prohibited corporations, including nonprofit corporations, from using their treasury funds to make expenditures “in connection with” a federal election.<sup>15</sup> Corporations could set up and control a “separate segregated fund” (commonly referred to as a “political action committee,” or PAC) to engage in federal election activity. The corporation could pay the PAC’s administrative expenses, but it could not put any corporate treasury funds into it, and the corporation was limited in whom it could solicit for contributions.<sup>16</sup>

MCFL used treasury funds rather than PAC funds to produce its newsletters, including the widely distributed “Special Edition” newsletter that was essentially a voter guide highlighting the views of anti-abortion congressional candidates. The FEC brought an enforcement proceeding against MCFL for violating the corporate spending prohibition.<sup>17</sup>

MCFL raised a number of fascinating arguments beyond the scope of this Essay as to why it should not be liable for its corporate spending on its newsletter, including arguments that it was not engaged in “express advocacy” covered by the statute because it avoided telling voters directly who to vote for or against, and that it was engaged in a press function much like a corporate-owned newspaper and therefore exempt from the law.<sup>18</sup> After the Court rejected those arguments, it turned to the constitutional questions, and it concluded that even if a general ban on corporate independent expenditures from treasury funds would be constitutional as to “commercial

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13. *Id.* at 243–44 (citation omitted).

14. *Id.* at 244 n.2

15. That prohibition appeared in 2 U.S.C. § 441b, later transferred to 52 U.S.C. § 30118, and later held unconstitutional as to corporate independent expenditures in the *Citizens United* case. See *infra* notes 39–50 and accompanying text.

16. 52 U.S.C. § 30118(4)–(5).

17. *Mass. Citizens for Life, Inc.*, 479 U.S. at 244–45.

18. *Id.* at 248–51. For analysis of these issues, see DANIEL HAYS LOWENSTEIN ET AL., *ELECTION LAW: CASES AND MATERIALS* 943–48 (2022).

enterprises,”<sup>19</sup> it would be unconstitutional under the First Amendment to ban general treasury fund spending from nonprofit corporations such as MCFL: “Some corporations have features more akin to voluntary political associations than business firms, and therefore should not have to bear burdens on independent spending solely because of their incorporated status.”<sup>20</sup>

The Court held that MCFL had “three features essential to our holding that it may not constitutionally be bound by § 441b’s restriction on independent spending.”<sup>21</sup> First, “it was formed for the express purpose of promoting political ideas, and cannot engage in business activities.”<sup>22</sup> Events could not be considered business activities if they were “political fundraising events . . . expressly denominated as requests for contributions that will be used for political purposes, including direct expenditures. . . . This ensures that political resources reflect political support.”<sup>23</sup> Second, “it has no shareholders or other persons affiliated so as to have a claim on its assets or earnings. This ensures that persons connected with the organization will have no economic disincentive for disassociating with it if they disagree with its political activity.”<sup>24</sup> Third, “MCFL was not established by a business corporation or a labor union, and it is its policy not to accept contributions from such entities. This prevents such corporations from serving as conduits for the type of direct spending that creates a threat to the political marketplace.”<sup>25</sup>

This exemption (the “MCFL exemption”) for certain nonprofit corporations (“MCFL corporations”) that the Supreme Court created significantly limited the reach of the requirement that corporations participate in candidate elections only through separate PACs. The case ultimately provided the path for striking all corporate limits nearly twenty-five years later in *Citizens United*.

The years between *Massachusetts Citizens for Life* and *Citizens United* were momentous for campaign finance law in both the

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19. *Mass. Citizens for Life, Inc.*, 479 U.S. at 263.

20. *Id.*

21. *Id.* at 263–64.

22. *Id.* at 264.

23. *Id.*

24. *Id.*

25. *Id.*



Supreme Court and Congress.<sup>26</sup> First, in 1990, the Supreme Court upheld the corporate PAC requirement as applied to *for-profit* corporations in *Austin v. Michigan Chamber of Commerce*.<sup>27</sup> That case involved the actions of the Michigan Chamber of Commerce in supporting candidates in state elections with its general treasury funds, in violation of a Michigan law similar to the federal corporate PAC requirement.<sup>28</sup> In *Austin*, the Court held that the Chamber of Commerce, although a nonprofit corporation (organized as a tax-exempt trade association under § 501(c)(6)), was not entitled to a constitutional exemption under *Massachusetts Citizens for Life* because the Chamber relied upon contributions from for-profit corporations, violating the third prong of the *MCFL* exemption test.<sup>29</sup> The Court further held that the ban on spending from for-profit corporate treasury funds was justified by the government’s compelling interest in stopping “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.”<sup>30</sup>

In 2002, Congress passed the Bipartisan Campaign Reform Act (BCRA),<sup>31</sup> expanding the type of campaign spending subject to the corporate PAC requirement to cover certain television and radio ads run close to the election and featuring a candidate but lacking words of express advocacy. The law referred to these advertisements as “electioneering communications,” and it permitted only *MCFL* corporations, and not other corporations, to spend general treasury funds on such communications.<sup>32</sup>

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26. See generally LOWENSTEIN ET AL., *supra* note 18, at 948–60; RICHARD L. HASEN, PLU-TOCRATS UNITED: CAMPAIGN MONEY, THE SUPREME COURT, AND THE DISTORTION OF AMERICAN ELECTIONS 26–29 (2016).

27. 494 U.S. 652 (1990).

28. *Id.* at 654–55.

29. *Id.* at 661–62.

30. *Id.* at 660.

31. Bipartisan Campaign Reform Act, Pub. L. No. 107–155, 116 Stat. 81 (codified as amended in scattered sections of 52 U.S.C.).

32. 52 U.S.C. § 30104(f)(3) (defining “electioneering communications”); *id.* § 30118(b)(2) (defining prohibited corporate expenditures to include “applicable electioneering communications”); *id.* § 30118(c) (defining “applicable electioneering communications” and excluding spending by certain 501(c)(4) and other organizations entitled to the *MCFL* exemption). The history of how the *MCFL* exemption was built into the BCRA is convoluted, including an amendment proposed by Senator Paul Wellstone and a further amendment proposed by Senators Susan Collins and Jim Jeffords if that provision was found unconstitutional. For the history, see *McConnell v. Federal Election Commission*, 540 U.S. 93, 209–11 (2003); *Citizens United v. Federal Election Commission*, 558 U.S. 310, 327–29 (2010). Those details do not affect the analysis offered here.

The Supreme Court upheld this expansion of the corporate spending limit in the 2003 case *McConnell v. Federal Election Commission*,<sup>33</sup> reaffirming its holding in *Austin*.<sup>34</sup> The same year, the Court in *Federal Election Commission v. Beaumont*<sup>35</sup> upheld the constitutionality of the ban on direct contributions by MCFL corporations. Among other things, the Court relied upon “anticircumvention” grounds: without a ban on corporate contributions, a person whose individual contributions to candidates were limited by law could circumvent those limits by creating numerous corporations to make additional contributions to support the individual’s preferred candidates.<sup>36</sup>

As is well known, the Supreme Court began an about-face in the campaign finance cases in 2007, when Justice Samuel Alito replaced Justice Sandra Day O’Connor on the Supreme Court.<sup>37</sup> Since then, the Court has struck down or limited most campaign finance laws in the many cases it has considered.<sup>38</sup>

Most notable among these more recent cases is the *Citizens United* case, which again showed the use of nonprofits as a wedge against campaign finance regulation. *Citizens United* is a nonprofit corporation with “an annual budget of about \$12 million. Most of its funds are from donations by individuals; but, in addition, it accepts a small portion of its funds from for-profit corporations.”<sup>39</sup> The organization produced a ninety-minute documentary film, called *Hillary: The Movie*, about then-Senator and Democratic Party presidential primary candidate Hillary Clinton. As the Supreme Court explained: “*Hillary* mentions Senator Clinton by name and depicts interviews with political commentators and other persons, most of them quite

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33. 540 U.S. 93 (2003).

34. *Id.* at 203–09.

35. 539 U.S. 146 (2003).

36. *Id.* at 155.

37. Compare *Wis. Right to Life, Inc. v. Fed. Election Comm’n*, 546 U.S. 410 (2006) (punting on a First Amendment question while Justice O’Connor remained on the Court), with *Fed. Election Comm’n v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007) (creating a narrow interpretation of the electioneering communications limitations on First Amendment grounds after Justice Alito joined the Court). See HASEN, *supra* note 26, at 29 (“In *Citizens United*, the Supreme Court decided that what had been constitutional under the First Amendment one day was unconstitutional the next. No one formally amended the Constitution. One justice, Sandra Day O’Connor, retired, and her replacement, Samuel Alito, had a different view about what the government could do under the First Amendment.”); Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581 (2011).

38. LOWENSTEIN ET AL., *supra* note 18, at 957–90 (spending limits); *id.* at 1032–73 (contribution limits); *id.* at 1104–33 (public financing); *id.* at 1164–94 (campaign finance disclosure).

39. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 319 (2010).

critical of Senator Clinton. *Hillary* was released in theaters and on DVD, but Citizens United wanted to increase distribution by making it available through video-on-demand.<sup>40</sup> Citizens United also created three video advertisements for the film: “Each ad includes a short (and, in our view, pejorative) statement about Senator Clinton, followed by the name of the movie and the movie’s Web site address. Citizens United desired to promote the video-on-demand offering by running advertisements on broadcast and cable television.”<sup>41</sup>

Citizens United sued. The FEC took the position that disseminating both the movie through video-on-demand via a cable television company and the advertisements through broadcast or cable television using Citizens United’s general treasury funds would violate the BCRA’s prohibition on corporate-funded electioneering communications.<sup>42</sup>

As in *Massachusetts Citizens for Life*, the Supreme Court considered a number of side issues before turning to the core constitutional question. Among other things, the Court rejected the argument that content available from a cable television company through video-on-demand did not qualify as an “electioneering communication” and could therefore be run without violating the statute.<sup>43</sup> It also rejected the argument that Citizens United was not engaged in the “functional equivalent of express advocacy,” a limit that the Supreme Court a few years earlier had put on the definition of “electioneering communications” for First Amendment reasons.<sup>44</sup> “Under this test, *Hillary* is equivalent to express advocacy. The movie, in essence, is a feature-length negative advertisement that urges viewers to vote against Senator Clinton for President.”<sup>45</sup> The Court also declined to expand the

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40. *Id.* at 319–20. The Court further explained:

Video-on-demand allows digital cable subscribers to select programming from various menus, including movies, television shows, sports, news, and music. The viewer can watch the program at any time and can elect to rewind or pause the program. In December 2007, a cable company offered, for a payment of \$1.2 million, to make *Hillary* available on a video-on-demand channel called ‘Elections ‘08.’ Some video-on-demand services require viewers to pay a small fee to view a selected program, but here the proposal was to make *Hillary* available to viewers free of charge.

*Id.* at 320 (citation omitted).

41. *Id.* at 320 (citation omitted).

42. *See id.* at 319–22.

43. *Id.* at 322–24, 326–27.

44. *Id.* at 324–25 (citing *Fed. Election Comm’n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 481 (2007)).

45. *Id.* at 325.

MCFL exemption for those corporations that took some, but not a lot, of money from nonprofit corporations.<sup>46</sup>

Ultimately, the Court in *Citizens United* overturned both the 1990 *Austin* case and the relevant portion of the 2003 *McConnell* case upholding the corporate PAC requirement for spending on candidate elections.<sup>47</sup> The Court rejected what it termed the “antidistortion” rationale for corporate spending limits from *Austin* on grounds that it was essentially an equality argument incompatible with the First Amendment.<sup>48</sup> After lengthy analysis, the Court concluded: “*Austin* should be and now is overruled. We return to the principle established in *Buckley v. Valeo* and [*First National Bank of Boston v.*] *Bellotti* that the Government may not suppress political speech on the basis of the speaker’s corporate identity.”<sup>49</sup> The Court found that “[n]o sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.”<sup>50</sup>

Unlike *MCFL*, the Court in *Citizens United* did not limit its holding to nonprofit corporations; behemoths such as General Motors or Google could just as easily take advantage of the holding as could smaller ideological corporations.

*Citizens United* set off an earthquake in campaign funding, less with its actual holding that freed corporations to spend money on independent expenditures and electioneering communications supporting or opposing candidates for office, and more with its legal analysis of corruption. That analysis paved the way for further campaign finance deregulation, especially the creation of “super PACs,” political committees that could accept unlimited sums from individuals, corporations, and other entities so long as the funds were not contributed to candidates or spent in coordination with candidates.<sup>51</sup> Now, each major presidential candidate has a shadow super PAC supporting her

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46. *Id.* at 328 (“If the Court decided to create a *de minimis* exception to *MCFL* . . . the result would be to allow for-profit corporate general treasury funds to be spent for independent expenditures that support candidates. There is no principled basis for doing this without rewriting *Austin*’s holding that the Government can restrict corporate independent expenditures for political speech.”). On how the Court could have used arguments such as this one to avoid deciding the constitutional questions, see Richard L. Hasen, *Constitutional Avoidance and Anti-Avoidance at the Roberts Court*, 2009 SUP. CT. REV. 181, 213–14 (2010).

47. *Citizens United*, 558 U.S. at 365–66.

48. *Id.* at 342–65.

49. *Id.* at 365 (citation omitted).

50. *Id.*

51. LOWENSTEIN ET AL., *supra* note 18, at 1032–40; see also *SpeechNow.org v. Fed. Election Comm’n*, 599 F.3d 686 (D.C. Cir. 2010) (en banc).

operations, and super PACs are the conduit for a great deal of funding in federal elections.<sup>52</sup> Super PACs and other outside entities have deregulated much of campaign finance, rendering individual contribution limits on money given to candidates much less meaningful.

In the aftermath of *Citizens United*, money to support or oppose candidates also began flowing into noncharitable, but tax-exempt, social welfare organizations that are organized under section 501(c)(4) of the tax code.<sup>53</sup> As we will see below,<sup>54</sup> these organizations are now capable of taking money for supporting or opposing candidates without public disclosure of contributions funding them, and they may engage in significant campaign-related activity so long as political activities did not become the organization's primary purpose.

These groups, and other noncharitable tax-exempt organizations such as 501(c)(6) trade associations, are allowed to engage in much more political activity than 501(c)(3) charitable organizations. 501(c)(3) charities cannot take positions in candidate elections at all, but contributions to these charities are tax-deductible for the contributor.<sup>55</sup>

### *B. Future Deregulation After Citizens United, as Foreseen by Professor Aprill*

The line in *Citizens United* stating that the government may not “suppress political speech on the basis of the speaker’s corporate identity” or impose “limits on the political speech of *nonprofit* or for-profit corporations”<sup>56</sup> was not lost on Professor Aprill. Writing one of the first major analyses of the potential effects of *Citizens United* on limits on nonprofit political activity,<sup>57</sup> Professor Aprill carefully considered the constitutionality under the First Amendment of the limits on activities of certain noncharitable tax-exempt organizations, such as 501(c)(4) social welfare organizations.

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52. Zachary Morrison, Note, *Facing the Coordination Reality: Removing Individual and Party Limits on Contributions to Presidential Campaigns*, 52 COLUM. J.L. & SOC. PROBS. 473 (2019); Richard L. Hasen, *Super PAC Contributions, Corruption, and the Proxy War over Coordination*, 9 DUKE J. CONST. L. & PUB. POL’Y 1, 2 (2014).

53. *Dark Money Basics*, OPEN SECRETS, <https://www.opensecrets.org/dark-money/basics> [<https://perma.cc/34FJ-3WYG>].

54. See *infra* notes 100–103 and accompanying text.

55. *Dark Money Basics*, *supra* note 53.

56. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 365 (2010) (emphasis added).

57. Ellen P. Aprill, *Regulating the Political Speech of Noncharitable Exempt Organizations After Citizens United*, 10 ELECTION L.J. 363 (2011).

In a detailed and scholarly analysis in the *Election Law Journal*, Professor Aprill concluded that the government likely could continue to constitutionally limit the political activity of these groups because of their tax-exempt status despite *Citizens United*.<sup>58</sup> Her analysis relied heavily on *Regan v. Taxation With Representation of Washington*,<sup>59</sup> a 1983 case in which the Supreme Court held that although groups generally had the right to engage in political activities under the First Amendment, the government had no obligation to subsidize political speech.

*Taxation With Representation* upheld against First Amendment challenge a ban on certain lobbying activities by 501(c)(3) charitable tax-exempt nonprofits.<sup>60</sup> The Court ruled that it did not violate the First Amendment for the government to refuse to subsidize political activity, given the tax advantages enjoyed by 501(c)(3) charities; “Congress has merely refused to pay for the lobbying out of public moneys.”<sup>61</sup> The majority opinion explained that the limits on the political activities of a 501(c)(3) charity did not violate the First Amendment and count as an unconstitutional condition because the charity could set up an affiliated 501(c)(4) social welfare organization to engage in lobbying; that associated group would be tax-exempt but donations to fund it would not be deductible.<sup>62</sup> Justice Blackmun’s concurrence stressed this point, agreeing that the rules limiting 501(c)(3) lobbying activities were permissible so long as the First Amendment burdens on an affiliated 501(c)(4) organization’s lobbying activities would be small.<sup>63</sup>

Analogizing to the situation in *Taxation With Representation*, Professor Aprill concluded that government limits on the political activities of 501(c)(4) organizations continued to be constitutional despite the Court’s statement in *Citizens United* that the government may not suppress the speech of nonprofit corporations. She reasoned that: (1) the tax exemption that 501(c)(4) groups enjoyed was a form of government subsidy, and therefore limits on these groups’ political activities remained constitutional under *Taxation With Representation*; and (2) these groups could set up wholly political (but not tax-exempt)

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58. *Id.* at 393–401.

59. 461 U.S. 540 (1983).

60. *Id.* at 540.

61. *Id.* at 545.

62. *Id.* at 544–45, 544 n.6.

63. *Id.* at 553–54 (Blackmun, J., concurring).

political groups under section 527 of the Internal Revenue Code to engage in more political activities, and so the First Amendment burdens on the affiliated 527's political activities would be small.<sup>64</sup>

Although Professor Aprill's conclusion in *Election Law Journal*, written soon after *Citizens United*, was optimistic about the continued constitutionality of limits on the political activities of nonprofits, by 2018 things in both law and politics had changed. Indeed, in the context of discussing potential repeal of the Johnson Amendment that limits campaign activities of charitable tax-exempt 501(c)(3) organizations such as churches, Professor Aprill offered an analysis containing the seeds for the potential unwinding of much of what remains of campaign finance law.

In her 2018 law review article, *Amending the Johnson Amendment in the Age of Cheap Speech*,<sup>65</sup> Professor Aprill discussed how 501(c)(3) charitable organizations are not permitted to engage in campaign intervention, such as endorsing or opposing candidates for office.<sup>66</sup> A 501(c)(3) organization that does so risks losing its tax-exempt status, and loss of that status would make contributions to the organization no longer tax deductible.

The origins of the prohibition on campaign intervention by 501(c)(3) organizations date to an amendment that then-Senator (and later President) Lyndon Johnson offered on the floor of the Senate during consideration of a bill creating the 1954 Internal Revenue Code.<sup>67</sup> Scholars have debated Johnson's motivations for offering the amendment, but regardless of its origins, Congress repeatedly ratified it over time as it amended different aspects of the Internal Revenue Code.<sup>68</sup>

In more recent years, some Republicans, including former President Donald Trump, argued against the Johnson Amendment, claiming that it discriminated against churches and other nonprofits wishing to engage in political activity.<sup>69</sup> They asked, why should churches have to stay out of politics when others are free under the First Amendment to endorse or oppose candidates at will?

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64. Aprill, *supra* note 57, at 396–401. As discussed below, unlike contributions to the 501(c)(4) itself, contributions to 527s are publicly disclosed. *See id.*

65. Ellen P. Aprill, *Amending the Johnson Amendment in the Age of Cheap Speech*, U. ILL. L. REV. ONLINE, Spring 2018, at 1.

66. *Id.*

67. *Id.* at 2–3.

68. *Id.*

69. *Id.* at 4–5.

Supporters of the prohibition on campaign intervention by charities such as churches have defended it under *Taxation With Representation*, on grounds that the government need not subsidize political activity; lobbying, at issue in *Taxation With Representation*, is no different than endorsing candidates in that regard. If tax-exempt organizations were allowed to engage in campaign intervention through tax-deductible contributions from donors, the government effectively would be subsidizing such activity.<sup>70</sup>

In 2017, Congressional Republicans offered a bill that would have partially overturned the Johnson Amendment.<sup>71</sup> It would have allowed churches and other 501(c)(3) charitable organizations the ability to engage in certain campaign interventions, such as endorsing or opposing candidates, if “the preparation and presentation of such content . . . is in the ordinary course of the organization’s regular and customary activities in carrying out its exempt purpose and . . . results in the organization incurring not more than *de minimis* incremental expenses.”<sup>72</sup> The rationale supporters offered for this *de minimis* exception is that it would allow some intervention by churches and other charities while still ensuring “that the organization’s primary function remains charitable or religious in nature.”<sup>73</sup>

In her characteristically straightforward but understated way, Professor Aprill disagreed. She explained that the consequences of adopting this partial overturning of the Johnson Amendment “are not so benign. A *de minimis* exception would surely be gamed.”<sup>74</sup> Ultimately, she concluded, adoption of this legislation will undermine both charities and the purposes of campaign finance laws.<sup>75</sup>

Professor Aprill explained that in our current era of “cheap speech,” it is remarkably inexpensive for churches or other charities to widely share endorsements of, or opposition to, candidates.<sup>76</sup>

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70. Ellen P. Aprill, *Churches, Politics, and the Charitable Contribution Deduction*, 42 B.C. L. REV. 843, 844 (2001) (“Congress did not wish tax-deductible contribution to be used for electioneering activities.”).

71. See Aprill, *supra* note 65 at 5–6 (describing proposal).

72. *Id.* at 1 (quoting H.R. 1, 115th Cong. § 5201 (2017)).

73. James Lankford et al., *U.S. Nonprofits, Including Churches, Should Be Allowed to Take Sides in Politics*, WASH. POST: POSTEVERYTHING (Feb. 5, 2017, 6:00 AM), <https://www.washingtonpost.com/posteverything/wp/2017/02/05/american-nonprofits-including-churches-should-be-allowed-to-take-sides-in-politics/> [<https://perma.cc/7V57-TXWL>].

74. Aprill, *supra* note 65, at 7.

75. *Id.* at 17.

76. *Id.* at 9 (citing Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805 (1995) and Richard L. Hasen, Opinion, *Speech in America Is Fast, Cheap, and Out of Control*, L.A. TIMES (Aug. 18, 2017, 3:00 AM), <https://www.latimes.com/opinion/op-ed/la-oe-hasen-cheap>



Consider a church that posts its weekly sermons on a web page, and then links to the sermon video on social media such as Facebook or Twitter. Every week, part of the sermon may include an admonition to “Vote Trump!” or “Support Democrats!” The same language could be included in a weekly newsletter.<sup>77</sup>

In both of these examples, creating and distributing via social media both sermons and newsletters would encompass content created “in the ordinary course of the organization’s regular and customary activities in carrying out its exempt purpose.” Thanks to cheap speech, the inclusion of these direct political messages would entail only *de minimis* additional expenditures. After all, it really does not cost anything more on top of the ordinary costs of disseminating content for a rabbi to end a sermon with “Shabbat shalom and vote for Joe Biden in November.”

Even more, as Professor Aprill explains, this partial repeal of the Johnson Amendment would not only cause existing charitable organizations to become conduits for political activity; it would also spur the creation of new 501(c)(3) charitable organizations that “create their own norms as to what constitutes regular and customary activities. That is, . . . organizations would [be] formed precisely to take advantage of these new rules.”<sup>78</sup>

Opening up churches and other 501(c)(3) charities to this kind of political activity would drive political money away from candidates, parties, super PACs, and 501(c)(4) organizations and into these 501(c)(3) organizations precisely because only donations to the 501(c)(3) organizations are tax deductible for the contributors. If a donor has \$10,000 that she wishes to donate for political causes, and if she itemizes deductions on her tax returns, she could get thousands of dollars back by giving to a 501(c)(3) organization that could engage in campaign intervention compared to giving to one of these other groups.

Professor Aprill believes that this proposed repeal of the Johnson Amendment would cost the United States Treasury far more than the

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-speech-democracy-20170818-story.html [https://perma.cc/SZ6L-7JRU]. I have since expanded on the costs of inexpensive political speech to election integrity. See RICHARD L. HASEN, *CHEAP SPEECH: HOW DISINFORMATION POISONS OUR POLITICS, AND HOW TO CURE IT* (2022).

77. “Nothing in the proposed legislation forbids sermons or other customary activities of the charities that involve campaign intervention from being streamed, posted on webpages, or tweeted, if using such social media were customary for the charities.” Aprill, *supra* note 65, at 8.

78. *Id.* at 8.

\$2.1 billion in lost taxes over five years that the Joint Committee on Taxation had estimated this proposal would cost if enacted, as political money flows into entities that allow contributors to take a tax deduction. She thinks donors would send much more political money to 501(c)(3) organizations that engage in politics thanks to tax deductibility.<sup>79</sup>

Professor Aprill believes that such developments would undermine the value of charities as well as undermine the purpose of campaign finance law. As to charities, Professor Aprill argues that “over time, permitting charities to engage in partisan politics would reduce the respect long afforded to these entities and thus harm the sector.”<sup>80</sup> As to campaign finance law, a “*de minimis* exception for campaign intervention for charities would undermine [the] basic principle” that “only dollars that have been taxed can be used for political intervention.”<sup>81</sup>

Even though Congress does not appear likely to reverse the Johnson Amendment any time soon, legislative reversal may not be necessary. Indeed, Professor Aprill’s analysis indirectly suggests how a litigation strategy brought by opponents of campaign finance regulation would achieve the same result as legislative repeal. Professor Aprill explained that the Johnson Amendment could well be found to violate the First Amendment, and such a holding could have profound consequences for our campaign finance system.

Recall that the justification for preventing churches and other charitable 501(c)(3) nonprofits from participating in campaign activity is the subsidy argument from *Taxation With Representation*: these entities have tax-exempt status and donations to them are tax deductible, and the government need not subsidize political speech.<sup>82</sup> And yet, in this era of cheap speech, it can cost next to nothing for churches and other nonprofits to engage in political activity in the regular course of their business, as when campaign messages are mixed into a sermon. If those messages do not really cost anything, Professor Aprill posits,

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79. *Id.* at 6, 17.

80. *Id.* at 17.

81. *Id.*

82. Elsewhere Professor Aprill acknowledges that the subsidy question is a difficult one and one that has no definitive answer in every context. *See* Aprill & Mayer, *supra* note 4, at 6 (noting that if contributions to churches were considered subsidies, then allowing tax deductions for donations to churches would appear to violate the Establishment Clause of the First Amendment); Ellen P. Aprill & Lloyd Hitoshi Mayer, *Tax Exemption Is Not a Subsidy—Except for When It Is*, 172 TAX NOTES FED. 1887 (2021).

then perhaps government would not be subsidizing their distribution through tax law.<sup>83</sup> *Taxation With Representation* therefore may no longer justify keeping churches out of the endorsement business, and it is hard to see any other justification for limiting this *de minimis* activity of 501(c)(3) organizations. She asks First Amendment scholars to come to her aid: “I have been unable to identify an alternative compelling governmental interest” to justify the prohibition on political speech by 501(c)(3) organizations.<sup>84</sup>

It is easy to connect the dots from here. Just as conservative political activists brought cases like *Citizens United* using ideological nonprofits as sympathetic plaintiffs,<sup>85</sup> a conservative activist representing a church could bring such a suit, calculated to make 501(c)(3) organizations an open path for campaign speech.

The Supreme Court has become especially protective of claims of the First Amendment rights of religious organizations, essentially requiring them to not be treated less favorably than other groups or organizations in society.<sup>86</sup> Framing the 501(c)(3) campaign limitation as a freedom of religion issue would add to the First Amendment speech and association claims that could convince the Supreme Court’s new conservative supermajority to open up churches and other charities to political messages.

Nor is there reason to think that opening up these groups even to *de minimis* spending (so as to keep the *Taxation With Representation* anti-subsidization rationale in place) would be workable or limiting: judged by the failure of the Internal Revenue Service (IRS) to police the limits on the political activities of 501(c)(4) organizations so that they do not make politics their primary purpose,<sup>87</sup> there is no reason to have confidence that the agency would impose meaningful limits on 501(c)(3) political activities, further deregulating the political marketplace. Never mind, as Professor Aprill warned, that the

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83. Aprill, *supra* note 65, at 9–12.

84. *Id.* at 12.

85. On such strategies, see ANN SOUTHWORTH, *BIG MONEY UNLEASHED: THE CAMPAIGN TO DEREGULATE ELECTION SPENDING* (forthcoming 2023).

86. For an overview, see Luray Buckner, Note, *How Favored, Exactly? An Analysis of the Most Favored Nation Theory of Religious Exemptions from Calvary Chapel to Tandon*, 97 NOTRE DAME L. REV. 1643 (2023).

87. On the controversies over IRS policing of the limits on 501(c)(4) political activity, see Ellen P. Aprill, *The Section 527 Obstacle to Meaningful Section 501(c)(4) Regulation*, 13 PITT. TAX. REV. 43, 43–49 (2015) [hereinafter Aprill, *Section 527 Obstacle*]; Ellen P. Aprill, *Legislation vs. Regulation: Defining Campaign Intervention Under Federal Tax Law*, 63 DUKE L.J. 1635, 1636–39 (2014).

politicization of churches and other charities in our polarized society could undermine respect for these institutions and increase social strife.

## II. Nonprofits as a Shield Against Disclosure

At the end of her 2018 article on the Johnson Amendment, Professor Aprill floats a proposal to deal with the potential for 501(c)(3) organizations to become new campaign organizations: require such organizations to disclose all their donors. The only way that a charity could avoid donor disclosure under her proposal is if it agrees not to engage in campaign intervention; alternatively, certain charitable contributions could be shielded if the donor specifies that her contributions could not be used for campaign purposes.<sup>88</sup>

At the time Professor Aprill wrote in 2018, her argument was quite a plausible one. Although the Court had become increasingly hostile to limits on money in politics, it was embracing disclosure as a more narrowly tailored solution. It was nearly unanimous in upholding federal disclosure laws in cases such as *McConnell* and *Citizens United*;<sup>89</sup> only Justice Thomas dissented, viewing compelled disclosure as a violation of the First Amendment.<sup>90</sup> Even the very conservative Justice Scalia regularly embraced disclosure and lamented anonymous campaign spending as cowardly: a world of anonymous political activity, he remarked, “does not resemble the home of the brave.”<sup>91</sup>

Unfortunately, since Professor Aprill wrote her 2018 article, the Supreme Court has expressed greater skepticism of disclosure as chilling political activity, and it is hard to see this Court upholding a law that required churches to reveal their donors unless the church gave up the right to engage in political activity. In the past, the Court had dealt with this potential for chill by requiring individuals or groups claiming that there was chill of their speech or political activities to demonstrate that they would face harassment because of their

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88. Aprill, *supra* note 65, at 17.

89. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 366–71 (2010); *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 194–202 (2003); *id.* at 321–23 (Kennedy, J., concurring in part and dissenting in part).

90. *Citizens United*, 558 U.S. at 480–85 (Thomas, J., dissenting); *McConnell*, 540 U.S. at 275–77 (Thomas J., dissenting).

91. *Doe v. Reed*, 561 U.S. 186, 228 (2010) (Scalia, J., concurring in the judgment).

controversial rules.<sup>92</sup> But that may no longer satisfy the new conservative Justices—Gorsuch, Kavanaugh, and Barrett—who replaced disclosure-supporting Justices Scalia, Kennedy, and Ginsburg.

Even before the newest conservative Justices joined the Court, Justices Alito and Thomas wrote opinions in *Doe v. Reed*,<sup>93</sup> a 2010 Washington case involving the disclosure of the names of petition signers for a referendum against an expansion of rights for same-sex couples.<sup>94</sup> Justice Thomas in particular suggested that the increased availability of information over the internet made disclosure particularly chilling for those with unpopular views.<sup>95</sup>

Professor Aprill recognized this shift against disclosure in a short Letter to the Editor in *Tax Notes Federal* in 2021.<sup>96</sup> Professor Aprill's Letter concerned the Supreme Court's 2021 decision in its most recent disclosure-related case, *Americans for Prosperity Foundation v. Bonta*.<sup>97</sup> *Bonta* considered a requirement that 501(c)(3) charities provide California government officials with information on the identity of their contributors.<sup>98</sup>

To understand *Bonta*, it is important first to explain another post-*Citizens United* development. Recall that the logic of *Citizens United* led to the development of super PACs, which accept unlimited contributions from individuals, corporations, and other entities but spend that money supporting or opposing candidates for office independent of those candidates. (Under the twisted reasoning of *Citizens United*, such spending cannot corrupt because it is done independent of candidates.<sup>99</sup>)

Although contributions to super PACs are unlimited, they are publicly disclosed. Soon after super PACs emerged in the 2010s, political strategist Karl Rove recognized that some people with the

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92. *Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87 (1982). See generally Richard L. Hasen, *Chill Out: A Qualified Defense of Campaign Finance Disclosure Laws in the Internet Age*, 27 J. L. & POL. 557 (2012).

93. 561 U.S. 186 (2010).

94. *Id.* at 202 (Alito, J., concurring); *id.* at 228 (Thomas, J., dissenting).

95. *Id.* at 242–43 (Thomas, J., dissenting).

96. Ellen P. Aprill, Letter to the Editor, *Americans for Prosperity and the Future of Schedule B*, 172 TAX NOTES FED. 279 (2021).

97. 141 S. Ct. 2373 (2021).

98. *Id.*

99. For a critique of the Court's logic, see Hasen, *supra* note 37.

capacity to make large contributions did not want their donations publicly disclosed.<sup>100</sup>

Rove and others pioneered the use of 501(c)(4) social welfare organizations to engage in political activity. These tax-exempt organizations are allowed to engage in politics so long as political activity is not their “primary” purpose,<sup>101</sup> and Rove took the position that so long as an entity spent at least 50 percent of its money on other purposes, it complied with the law.<sup>102</sup> (Recall that contributions to these 501(c)(4) organizations are not deductible as they are with 501(c)(3) organizations.) The primary benefit of using a 501(c)(4) rather than a super PAC, which could spend all of its funds on political activity, is that contributions to 501(c)(4) organizations are not publicly disclosed.

The Rove strategy shielding donor disclosure was remarkably successful, and money flowing into politically active 501(c)(4) organizations for political purposes exploded in the post-*Citizens United* period, although total amounts seem to have leveled off or diminished in more recent years. According to data from Opensecrets.org, total outside spending in the 2000 presidential election by non-disclosing groups was \$11.21 million in 2000, rose to a high of \$312.51 million in 2012, but fell to \$118.97 million in 2020, the most recent presidential election year.<sup>103</sup>

Although 501(c)(4) and other 501(c) contributors are not publicly disclosed, contributors until recently were disclosed to the IRS on “Schedule B” of the organization’s Form 990 tax return. *Bonta* arose because California also required 501(c)(3) charities to submit their “Schedule B” information to state authorities, a requirement California justified as helping it to protect state residents from fraud committed by charities.<sup>104</sup> California law also mandated that the information on the Schedule B forms remain secret, but the record in the case demonstrated that information on these forms in the past had been leaked to the general public.<sup>105</sup>

Two 501(c)(3) charities challenging California’s collection of donor information from Schedule B forms, the Americans for Prosperity

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100. Michael Beckel, *Crossroads Political Machine Funded Mostly by Secret Donors*, CTR. PUB. INTEGRITY (Apr. 20, 2012), <https://publicintegrity.org/politics/crossroads-political-machine-funded-mostly-by-secret-donors/> [https://perma.cc/G38P-7NMM].

101. For a basic explanation, see Aprill, *supra* note 57, at 375.

102. On disputes over the threshold for permissible 501(c)(4) political activity, see *id.* at 382.

103. *Dark Money Basics*, *supra* note 53.

104. *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373, 2379–80 (2021).

105. *Id.* at 2388.

Foundation and the Thomas More Law Center, proved that they faced threats of harassment if their donor information was publicly revealed. “For example, the CEO of the Foundation testified that a technology contractor working at the Foundation’s headquarters had posted online that he was ‘inside the belly of the beast’ and ‘could easily walk into [the CEO’s] office and slit his throat.’”<sup>106</sup> Additionally, the Law Center introduced evidence of “threats, harassing calls, intimidating and obscene emails, and even pornographic letters” that it had received.<sup>107</sup>

Had the Supreme Court ruled in favor of the plaintiffs on grounds that they were entitled to an as-applied exemption because they faced a real threat of harassment, the case would not have been a big deal. Even Justice Sotomayor, in dissent, recognized that these groups faced harassment of their contributors and could well be entitled to an as-applied exemption as to public disclosure of their information.<sup>108</sup>

But the Court used *Bonta* to make disclosure rules much less likely to be upheld against First Amendment challenge. It rejected California’s requirement under a facial challenge, meaning the law was unconstitutional applied to everyone, even to the great majority of charities whose donors do not object to disclosure and would never face harassment for contributing.<sup>109</sup>

Under the “exacting scrutiny” required of disclosure laws, the Court, in an opinion for the conservative Justices authored by Chief Justice Roberts, held that individual proof of threats of harassment was not necessary to avoid compliance with the law. The Court first concluded that, under this standard, the government’s interests in disclosure “must be narrowly tailored to the government’s asserted interest.”<sup>110</sup> The Court then determined that the requirement that all charities disclose contributors on their Schedule B forms was not narrowly tailored to California’s “substantial government interest in protecting the public from fraud.”<sup>111</sup>

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106. *Id.* at 2381.

107. *Id.*

108. *Id.* at 2399–2400 (Sotomayor, J., dissenting) (“Petitioners have unquestionably provided evidence that their donors face a reasonable probability of threats, harassment, and reprisals if their affiliations are made public. California’s Schedule B regulation, however, is a nonpublic reporting requirement, and California has implemented security measures to ensure that Schedule B information remains confidential.” (citation omitted)).

109. *See id.* at 2403 (“[R]esearch shows that the vast majority of donors prefer to publicize their charitable contributions.”).

110. *Id.* at 2383 (majority opinion).

111. *Id.* at 2386 (quoting *Village of Schaumburg v. Citizens for Better Env’t*, 444 U.S. 620, 636 (1980)).

The Court explained: “There is a dramatic mismatch . . . between the interest that the Attorney General seeks to promote and the disclosure regime that he has implemented in service of that end.”<sup>112</sup> Nearly all of the sixty thousand charities that renew their registrations annually are also required to file a Schedule B, which contains “information about a charity’s top donors—a small handful of individuals in some cases, but hundreds in others. This information includes donors’ names and the total contributions they have made to the charity, as well as their addresses.”<sup>113</sup>

The Court then turned to the tailoring: “Given the amount and sensitivity of this information harvested by the State, one would expect Schedule B collection to form an integral part of California’s fraud detection efforts. It does not.”<sup>114</sup> The District Court’s finding that “there was not ‘a single, concrete instance in which pre-investigation collection of a Schedule B did anything to advance the Attorney General’s investigative, regulatory or enforcement efforts’” was clearly supported by the record.<sup>115</sup>

The Court concluded:

California is not free to enforce *any* disclosure regime that furthers its interests. It must instead demonstrate its need for universal production in light of any less intrusive alternatives. . . .

. . . .

The upshot is that California casts a dragnet for sensitive donor information from tens of thousands of charities each year, even though that information will become relevant in only a small number of cases involving filed complaints. California does not rely on Schedule Bs to initiate investigations, and in all events, there are multiple alternative mechanisms through which the Attorney General can obtain Schedule B information after initiating an investigation.<sup>116</sup>

In her *Tax Notes Federal* Letter, Professor Aprill expressed skepticism that the law requiring the federal government to collect contributor information on Schedule B forms would withstand constitutional

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112. *Id.*

113. *Id.* (citation omitted).

114. *Id.*

115. *Id.*

116. *Id.* at 2386–87 (citations omitted)



scrutiny.<sup>117</sup> Although the Court did not decide the constitutionality of the requirement that 501(c) organizations share their Schedule B forms with the IRS—the Court wrote that “revenue collection efforts and conferral of tax-exempt status *may* raise issues not presented by California’s disclosure requirement, which can prevent charities from operating in the state altogether”<sup>118</sup>—Professor Aprill expressed “fear that the [federal disclosure] requirement would not withstand a challenge under the criteria announced in the case.”<sup>119</sup>

First, Professor Aprill explained, the IRS examined very few Forms 990 containing the Schedule B information when they were submitted by organizations.<sup>120</sup> That suggested the information was mostly not being examined for enforcement purposes. Further, the IRS recently published regulations relieving noncharitable 501(c) organizations, such as 501(c)(4) organizations, of the responsibility to report major donors on their Schedule B forms.<sup>121</sup> The IRS issued this regulation in balancing the risk of reprisals that would come with having the information inadvertently disclosed (as had happened in California, as reported in *Bonta*).<sup>122</sup> Professor Aprill commented that “All this language sounds remarkably like that in the *Americans for Prosperity* opinion.”<sup>123</sup>

The IRS has continued to require Schedule B information from 501(c)(3) charities, and Professor Aprill suggested that perhaps this disclosure rule remains justified given that contributions to these organizations are tax deductible. “Schedules B that include names and addresses thus assist the IRS in ensuring that the proper amounts of charitable contributions are deducted.”<sup>124</sup> But she expressed doubt that this rationale would be sufficient in the face of a constitutional

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117. Aprill, *supra* note 96, at 279.

118. *Bonta*, 141 S. Ct. at 2389 (emphasis added).

119. Aprill, *supra* note 96, at 279.

120. *Id.* (“[A]ccording to a February report from the Treasury Inspector General for Tax Administration, the IRS examined only 0.13 percent of Forms 990 in fiscal 2019, compared with 0.64 percent of corporate returns and 0.44 percent of individual returns. The TIGTA report did not discuss what percentage of the 0.13 percent examined involved examining Schedule B and how many examinations of Schedule B triggered an audit. Is an examination of 0.13 percent of all Forms 990 enough use to satisfy the Supreme Court? I fear not.” (footnote omitted)).

121. *Id.* at 280 (“In May 2020, after losing a case challenging use of a revenue procedure to change Schedule B filing requirements, Treasury and the IRS published final regulations eliminating a long-standing regulatory requirement that noncharitable section 501(c) organizations list the names and addresses of major donors on their Schedules B.” (footnote omitted)).

122. *Id.*

123. *Id.*

124. *Id.*

challenge: “Perhaps Schedule B’s utility in ensuring accurate revenue collection is sufficient to shield it from constitutional invalidity. But I doubt it under the reasoning of *Americans for Prosperity*.”<sup>125</sup> She noted that the IRS could pursue the more narrowly tailored alternative of requesting the information from specific 501(c)(3) organizations when necessary to investigate a potential tax violation.<sup>126</sup>

As with her 2018 analysis of the potential implications of Congress partially repealing the Johnson Amendment,<sup>127</sup> Professor Aprill in her 2021 *Tax Notes Federal Letter* feared the implications for the integrity of charities: “Violations will increase, and public confidence in the charitable sector will diminish.”<sup>128</sup>

But also, as with her 2018 piece, the implications of Professor Aprill’s 2021 analysis are more dire than she spells out explicitly. First, those who wish to be spending large dollars on campaigns now have a ready and safe way to funnel their contributions through 501(c)(4) organizations. They can do so comfortable with the knowledge that not only will the IRS allow such political spending; it will also forego collecting information on contributors to such groups, thereby eliminating the risk of indirect disclosure.

The 501(c)(4) organizations can funnel money to super PACs or other entities, and nothing stops either an initial donor or the 501(c)(4) or other entity from disclosing donor identity in relation to those candidates who benefit from the contributions. This raises the risk of corruption and influence of contributors over candidates and elected officials without the chance for public accountability in the case of undue influence. We can expect those donors who most want to gain influence without accountability to opt for private disclosure and public anonymity.

Professor Aprill’s analysis has even worse implications. The narrow tailoring requirement that led the Supreme Court to kill California’s disclosure regime for 501(c)(3) charities and the IRS to kill the disclosure requirement for 501(c)(4) social welfare organizations and other noncharitable tax-exempt organizations could next lead directly

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125. *Id.*

126. *Id.* at 281.

127. *See supra* note 75 and accompanying text.

128. Aprill, *supra* note 96, at 281. Indeed, the Buckeye Institute recently filed suit alleging that it violates the First Amendment to collect Schedule B information from 501(c)(3) organizations. Complaint at 11, *Buckeye Inst. v. Internal Revenue Serv.*, No. 2:22-cv-04297 (S.D. Ohio Dec. 5, 2022).

to challenges to campaign finance rules enacted by Congress and state and local governments. The Court in *Bonta* recognized that its “exacting scrutiny” requirement appears regularly in campaign finance disclosure cases, and it gave every reason to think that the same narrow tailoring requirement applies to campaign finance disclosure laws too.<sup>129</sup>

Back in 1976, in *Buckley v. Valeo*,<sup>130</sup> the Supreme Court recognized three substantial interests in campaign finance disclosure that could justify such laws against constitutional challenge: stopping corruption, providing voters with valuable information, and helping to enforce other campaign finance laws, such as the ban on foreign contributions and expenditures.<sup>131</sup> The Court in *Buckley* upheld the disclosure of even very small contributions to federal campaigns under these interests, applying a much more complaisant interpretation of the “exacting scrutiny” standard.<sup>132</sup>

But exacting scrutiny in the hands of the new Supreme Court, energized by *Bonta*, poses real risks for campaign finance laws. Take a law requiring the public disclosure of contributions as small as \$200, as federal law currently requires. It is easy to imagine this Court writing an opinion stating that the law is not narrowly tailored because most \$200 contributions do not lead to corrupt deals, they give voters little information about major support for candidates, and such small amounts do not deter significant foreign spending. The same fears that Professor Aprill expressed about Schedule B requirements apply much more broadly to campaign finance disclosure. As Professor Aprill concluded in her 2021 Letter, quoting Justice Sotomayor, the Court’s analysis in *Bonta* “marks reporting and disclosure requirements with a bull’s-eye.”<sup>133</sup>

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129. *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373, 2383 (2021); *see also* Richard L. Hasen, Opinion, *The Supreme Court Is Putting Democracy at Risk*, N.Y. TIMES (July 1, 2021), <https://www.nytimes.com/2021/07/01/opinion/supreme-court-rulings-arizona-california.html> [<https://perma.cc/X8N2-VHDX>] (“The court’s ruling calls into question a number of campaign finance disclosure laws. Perhaps even more significant, it also threatens the constitutionality of campaign contribution laws, which are judged under the ‘exacting scrutiny’ standard, too.”).

130. 424 U.S. 1 (1976).

131. *Id.* at 66–68.

132. *Id.*

133. Aprill, *supra* note 96, at 281 (quoting *Bonta*, 141 S. Ct. at 2392 (Sotomayor, J., dissenting)).

CONCLUSION: HYDRAULICS AND THE FUTURE OF  
CAMPAIGN FINANCE LAW

The story of how nonprofit law has served as a wedge for undermining campaign finance law is a story of “hydraulics.” Although others have observed that money in politics will always find a way to flow,<sup>134</sup> and that cutting off one avenue of spending will simply divert the flow elsewhere, Professor Aprill in her meticulous analyses of these issues gives us a tour of the waterworks. It is not pretty.

She not only points out how money increasingly has flowed into the political system through tax-exempt organizations; she also shows that the channeling can have perverse results and harm the public interest. Part of her concern is about the nature of charitable organizations and the risk of their politicization. And that risk appears to me—as an outsider to the field of nonprofit law—to be a real one. I leave to nonprofit specialists the task of sorting out how best to protect charities from those risks.

But I am an insider to election law, and the story that Professor Aprill tells is one of legislative paralysis and judicial bootstrapping that is undermining the integrity of the U.S. system of campaign finance. No one would rationally regulate our election system through our tax law. Professor Aprill has long supported laws such as the DISCLOSE Act that would require those engaged in certain campaign-related activity—regardless of their tax status—to disclose significant contributions funding political activity and expenditures on such activity to the FEC.<sup>135</sup>

Surely the thresholds for disclosure should be raised to protect the privacy of small dollar donors, but the public’s interest in preventing corruption, providing valuable information to make voting decisions, and enforcing other campaign finance laws justifies disclosing major contributions funding election-related activities, regardless of the entity doing the spending. Congressional inaction to rationalize the campaign finance disclosure system is as lamentable as it is predictable in our current polarized era. Republican leadership, past champions of

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134. See, e.g., *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 224 (2003) (“Money, like water, will always find an outlet.”); Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705 (1999).

135. Aprill, *supra* note 65, at 17; see also Aprill, *supra* note 57, at 403 (discussing the DISCLOSE Act and alternative disclosure rules); Aprill, *Section 527 Obstacle*, *supra* note 87, at 80 (same).

disclosure but not limits, have now backed away from disclosure, leading to legislative stalemate.

Nor have either the IRS or the FEC stepped in to deal with these issues. The IRS became very reluctant to engage in this area after it was accused of unfairly targeting “Tea Party” conservative groups to determine if they were violating rules limiting the political activities of 501(c)(4) organizations.<sup>136</sup> The FEC, made up of three commissioners chosen by Democrats and three by Republicans, has been in an administrative stalemate over meaningful campaign finance regulation.<sup>137</sup>

Nor would it make sense in a rational campaign finance system to allow non-disclosing charities organized under section 501(c)(3) to become major vectors for campaign money. And yet, the logic of the Supreme Court’s decisions would seem to lead in that direction, if litigants craft their cases in just the right way to make it happen.

All of this flux creates the conditions where the Supreme Court can say that the system is so porous and easy to exploit that the remaining rules are no longer narrowly tailored to the purposes of campaign finance law. If so much money is unregulated and undisclosed, it becomes harder to justify the remaining regulations. That is the judicial bootstrapping.

Ultimately, Professor Aprill has ably, though sadly, demonstrated that the current contradictions in our treatment of nonprofit law and election law in the hands of an increasingly deregulatory Supreme Court provide the seeds for the destruction of much of what remains of American campaign finance law. As Professor Aprill wrote at the conclusion of her article on potential repeal of the Johnson Amendment, “Our country would be far poorer for such changes.”<sup>138</sup> Don’t say she didn’t warn us.

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136. See Aprill, *Section 527 Obstacle*, *supra* note 87, at 43–47.

137. Michael M. Franz, *Federal Election Commission Divided: Measuring Conflict in Commission Votes Since 1990*, 20 *ELECTION L.J.* 224 (2021).

138. Aprill, *supra* note 65, at 18.

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