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Nonprofits, Politics, and Privacy

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NONPROFITS, POLITICS, AND PRIVACY

Lloyd Hitoshi Mayer[†]

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INTRODUCTION

I am both honored and saddened to have this opportunity to remember Laura Chisolm and her pioneering work on advocacy by tax-exempt, nonprofit organizations. What set Laura's work apart was her identification of the fundamental policy concerns driving the federal tax law's restrictions on advocacy and her exposure of how

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those restrictions were not always consistent with such concerns.¹ With this Article, I plan to take a similar approach to the much more modest topic of disclosure obligations for tax-exempt nonprofits engaged in political activity.

The political involvement of tax-exempt nonprofit organizations, which often do not disclose their financial supporters, has become a topic of national interest.² While such involvement is nothing new, the Supreme Court's recent *Citizens United* decision and the resulting focus on the flows of corporate, union, and wealthy individuals' funds into election-related activities has brought this involvement to the fore of the public's consciousness.³ This increased attention has led to growing calls to publicly expose the financial dealings of politically involved nonprofit organizations, including the identities of their donors.⁴

¹ See, e.g., Laura B. Chisolm, *Exempt Organization Advocacy: Matching the Rules to the Rationales*, 63 IND. L.J. 201, 207 (1987) ("The underlying principles can and should be identified; the law can and should be designed to reflect them."); Laura Brown Chisolm, *Politics and Charity: A Proposal for Peaceful Coexistence*, 58 GEO. WASH. L. REV. 308, 315 (1990) ("[A]s currently formulated and applied, the section 501(c)(3) absolute prohibition on campaign intervention is constitutionally questionable, incongruent with campaign finance regulation, inconsistent with the premises underlying the charitable tax exemption, and contrary to free speech values.").

² See, e.g., Dave Helling, *Campaign Maneuver Lets Donors Stay Secret*, KANSAS CITY STAR, Apr. 24, 2010, at A1 (observing that "[a] maneuver not uncommon in other parts of the nation—using a nonprofit group to influence elections while keeping its donors secret—has landed in Missouri's judicial battle with a good-sized splash"); Mike McIntire, *Under Tax-Exempt Cloak, Political Dollars Flow*, N.Y. TIMES, Sept. 24, 2010, at A1 (covering political nonprofit's funding of attack ads without disclosure of financing or close ties to a Republican consulting operation); Paul Blumenthal, *Super PACs And Secret Money: The Unregulated Shadow Campaign*, HUFFINGTON POST (Sept. 26, 2011, 10:40 AM, updated Sept. 27, 2011, 12:49 AM), http://www.huffingtonpost.com/2011/09/26/super-pacs-secret-money-campaign-finance_n_977699.html (recounting rise of independent campaign organizations receiving unlimited and undisclosed contributions as part of a "sea change" in the federal campaign finance system following the Supreme Court of the United States' Decision in *Citizens United v. FEC*, 130 S. Ct. 876 (2010)). See generally ERIKA LUNDER, CONG. RESEARCH SERV., RL33377, TAX-EXEMPT ORGANIZATIONS: POLITICAL ACTIVITY RESTRICTIONS AND DISCLOSURE REQUIREMENTS 25–27 (2007) (summarizing the current disclosure rules applicable to such organizations).

³ See *Citizens United v. FEC*, 130 S. Ct. 876, 886 (2010) ("The Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether."). See generally Richard Briffault, *Nonprofits and Disclosure in the Wake of Citizens United*, 10 ELECTION L.J. 337 (2011); *Outside Spending*, OPENSECRETS.ORG, <http://www.opensecrets.org/outsidespending/index.php> (last visited Jan. 11, 2012) (providing outside spending data for elections since 1990 broken down by political affiliation, type of expenditure, degree of disclosure, organization, and electoral race).

⁴ See, e.g., Democracy is Strengthened by Casting Light on Spending in Elections Act, H.R. 5175, 111th Cong. §§ 211, 301 (2010) [hereinafter House DISCLOSE Act] (as passed by House on June 24, 2010) (amending Federal Election Campaign Act of 1971 to add additional disclosure requirements); Democracy is Strengthened by Casting Light on Spending in Elections Act, S. 3295, 111th Cong. §§ 211, 301 (2010) [hereinafter Senate DISCLOSE Act] (as introduced in Senate on Apr. 30, 2010) (same); Ellen P. Aprill, *Regulating the Political Speech of Noncharitable Exempt Organizations After Citizens United*, 10 ELECTION L.J. 363, 401–05

The time is therefore ripe for a deeper consideration of the policy concerns that underlie such public disclosure requirements and the related issue of privacy. To clarify the discussion, one aspect for deeper consideration is recognizing that this particular area is at the intersection of three significantly different disclosure regimes. Those three regimes are (1) federal tax law generally, (2) federal tax law as it applies to tax-exempt nonprofit organizations, and (3) federal election law.⁵ These regimes are a study in contrasts. Federal tax law strongly protects taxpayer information from public disclosure. And while federal tax exemption law strongly favors public disclosure of institutional information, it is more ambivalent about public disclosure of information relating to individuals. In contrast, federal election law strongly favors public disclosure of all relevant financial information, including information relating to individuals. Understanding the reasons for these differences is important to determine whether disclosures at the intersection of the three regimes are appropriate and desirable.

The other, related aspect of this deeper consideration is privacy. The concept of privacy is one that is instantly recognizable and yet theoretically, much less legally, hard to define.⁶ This difficulty stems in part from the many possible applications of the privacy concept. Fortunately for the purposes of this Article, the context here is fairly clear and narrow: the public disclosure of information relating to nonprofit organizations involved in politics and their supporters. Even in this narrow context, however, there are at least two competing approaches with respect to privacy. One takes a cost-benefit approach. It judges disclosure requirements based on their

(2011) (proposing, among other things, disclosure of contributors and taxing politicking by non-charitable tax-exempt organizations whether or not they have net investment income); Donald B. Tobin, *Campaign Disclosure and Tax-Exempt Entities: A Quick Repair to the Regulatory Plumbing*, 10 ELECTION L.J. 427, 439–47 (2011) (proposing that the Treasury issue regulations to quickly reduce the manipulation of tax-exempt status, but preferring legislative action); Ciara Torres-Spelliscy, *Hiding Behind the Tax Code, the Dark Election of 2010 and Why Tax-Exempt Entities Should be Subject to Robust Federal Campaign Finance Disclosure Laws*, 16 NEXUS CHAP. J.L. & PUB. POL'Y 59, 89–91 (2010) (arguing that the absence of disclosure requirements for contributions to section 501(c)(6) trade associations potentially damages corporate shareholder value and opens the door to foreign-owned corporation campaign expenditures); David Callahan, Op-Ed., *Bring Donors Out of the Shadows*, N.Y. TIMES, Apr. 4, 2011, at A21 (arguing for public disclosure of contributions to political nonprofits).

⁵ Similar regimes exist at the state level, but discussion of the state tax and election laws governing disclosure is beyond the scope of this article. See THE CAMPAIGN DISCLOSURE PROJECT, <http://www.campaigndisclosure.org> (last updated Sept. 20, 2008) (providing overview of state election laws relating to disclosure).

⁶ See *infra* notes 69–72 and accompanying text (discussing the concept of privacy in the law).

quantifiable costs and benefits, including among those costs the harm to privacy, however measured. The other, less frequently used, is a right-to-privacy approach that considers privacy a fundamental right that can only be abridged if there is a relatively strong interest for doing so and then only to the extent required to further that interest.

The first Part of this Article briefly reviews and contrasts the history and current rules governing disclosure and privacy in the federal tax, federal tax exemption, and federal election law contexts. This review reveals that both the cost-benefit approach and the right-to-privacy approach can be found in this history, but to a greater or lesser extent depending on the context. The second Part explores these two different approaches and the extent to which the existing disclosure rules reflect those approaches. This Part shows that the rules are sometimes but not always based both on the cost-benefit approach to disclosure, in which privacy harms are but one possible cost, and on the right-to-privacy approach. The third Part considers recent proposals for disclosure rules relating to nonprofit organizations engaged in political activity using both the cost-benefit approach and the right-to-privacy approach. This consideration reveals that certain proposals, which relate to disclosure of financial information primarily about the organizations themselves, generally are justifiable under either approach. Certain other proposals that would require disclosure of financial information primarily relating to individuals, however, are more difficult to justify under a right-to-privacy approach. I conclude by discussing why this difference exists and what it means for the desirability of disclosure in this area.

I. THREE DIFFERENT DISCLOSURE REGIMES

A tax-exempt nonprofit organization that engages in political activities is potentially at the intersection of three significantly different federal law disclosure regimes. Each of the regimes requires the organization to disclose detailed financial information to the government, including to a lesser or greater extent information about other parties with which the organization has financial dealings. While the exact financial information that must be disclosed varies, the primary difference between them is whether the financial information that is disclosed to the government is also revealed to the public. This Part explores that aspect of each disclosure regime and the apparent reasons why public disclosure is not always required.

First, however, a brief explanation is needed regarding how this intersection came to be. As I have detailed elsewhere, federal election law requires public disclosure of financial information by entities

engaged in certain types of political (i.e., candidate supporting or opposing) activity; these entities include candidate committees, political parties, and political committees (i.e., PACs), and the publicly disclosed information includes identifying information for donors of any significant size.⁷ To accommodate these entities in the federal income tax system, Congress also created a separate exemption category for organizations engaged in “political activities” under Internal Revenue Code section 527 that have as their primary activity supporting or opposing candidates.⁸ Because “political activity” as defined by federal tax law is broader than the “political activity” regulated by federal election law, it proved possible to create “527 organizations” that were not covered by election law’s disclosure rules, which subsequently became known as “stealth PACs.”⁹ To correct this gap in required public disclosures, Congress amended federal tax law in 2000 to impose disclosure requirements on these stealth organizations that essentially paralleled the election law disclosure rules, including the public disclosure of information identifying donors of any significant size.¹⁰

Under existing federal tax law, however, it is also possible for other types of tax-exempt organizations to engage in many types of political activity without becoming subject to either set of disclosure rules as long as that political activity does not become the primary activity of the organization.¹¹ These tax-exempt organizations include section 501(c)(4) social welfare organizations, section 501(c)(5) labor unions, and section 501(c)(6) trade associations and chambers of commerce. While this ability has existed for many years, the Supreme Court’s decision in *Citizens United* appears to have triggered both a new attention to it and a new flow of funds into these politically active tax-exempt nonprofit organizations, with the sources of those funds generally not subject to public disclosure.¹² This new attention and new funds have led commentators and politicians to call for

⁷ Lloyd H. Mayer, *The Much Maligned 527 and Institutional Choice*, 87 B.U. L. REV. 625, 633–34 (2007) (discussing the limits that federal election law places on contributions to certain entities); *id.* at 636–37 (discussing the disclosure rules).

⁸ *Id.* at 639–40.

⁹ *Id.* at 645.

¹⁰ *Id.* at 646.

¹¹ See Aprill, *supra* note 4, at 381–87 (discussing which nonprofit organizations are able to engage in political activity as long as it does not become their primary activity); Tobin, *supra* note 4, at 429–31 (same). In contrast to these non-charitable, tax-exempt nonprofit organizations, charitable nonprofit organizations that are tax-exempt under section 501(c)(3) are not permitted to engage in any political activity (i.e., any support or opposition of candidates). See I.R.C. § 501(c)(3) (2006) (“[A]nd which does not participate in, or intervene in . . . any political campaign on behalf of (or in opposition to) any candidate for public office.”).

¹² See *supra* notes 2–4 and accompanying text (discussing the effect of the *Citizens United* decision).

increased disclosure of information, including information relating to donors, about these organizations that sit at the intersection of the disclosure rules found in federal tax law, federal tax exemption law, and federal election law.¹³

A. Federal Tax Law Generally

The Treasury Department has broad authority to require taxpayers to provide detailed financial information that would help the government collect tax revenues.¹⁴ The primary vehicle for providing this information is the myriad of forms and schedules prepared by the IRS and completed by taxpayers, a universe of paperwork that continues to grow both as Treasury identifies additional information that would aid in tax collection and as Congress enacts additional reporting laws.¹⁵ The Treasury Department also has the ability to require taxpayers to keep extensive records that the IRS may demand on audit, as well as to ask for relevant information from third parties.¹⁶

At the same time, however, the Internal Revenue Code sharply limits the extent to which the IRS can share the information it receives from taxpayers with not only the public, but even with other governments and other federal government agencies. More specifically, Internal Revenue Code section 6103 provides a general rule that “[r]eturns and return information shall be confidential.”¹⁷ A

¹³ See *supra* note 4 and accompanying text (citing proposed bills and other commentary that would require greater disclosure).

¹⁴ See I.R.C. § 6001 (“Every person liable for any tax imposed by this title . . . shall . . . render such statements [and] make such returns” as the Treasury Department may prescribe); I.R.C. § 6011(a) (requiring any person liable for tax to provide whatever information may be required by forms or regulations prescribed by the Treasury Department).

¹⁵ See Boris I. Bittker, *Federal Income Tax Returns—Confidentiality vs. Public Disclosure*, 20 WASHBURN L.J. 479, 482 (1981) (“The history of the federal income tax indicates the list of items [taxpayers must disclose to the IRS] will not shrink in the foreseeable future; but, if anything, will grow longer.”); see also *Forms and Instructions (PDF)*, INTERNAL REVENUE SERVICE, <http://www.irs.gov/app/picklist/list/formsInstructions.html> (last visited Jan. 11, 2012) (listing 1,183 IRS forms and instructions for forms).

¹⁶ See I.R.C. § 6001 (requiring the keeping of records); I.R.C. § 7602(a) (authorizing the examination of any records and the taking of any testimony relevant to determining liability for federal tax).

¹⁷ I.R.C. § 6103(a). While prior to amendment of this statute in 1976 tax records were in theory public records, in practice executive orders and other executive branch rules generally protected tax information from public but not intra-government disclosure. See I STAFF OF JOINT COMM. ON TAXATION, 106TH CONG., STUDY OF PRESENT-LAW TAXPAYER CONFIDENTIALITY AND DISCLOSURE PROVISIONS AS REQUIRED BY SECTION 3802 OF THE INTERNAL REVENUE SERVICE RESTRUCTURING AND REFORM ACT OF 1998, at 127 (2000) [hereinafter JCT REPORT vol. I] (arguing need for tax return confidentiality is demonstrated by privacy breaches during the Watergate era); S. REP. NO. 94-938, at 315-16 (1976) (outlining public record status of income tax returns law prior to Tax Reform Act of 1976); 1 OFFICE OF TAX POLICY, DEP’T OF THE TREASURY, SCOPE AND USE OF TAXPAYER CONFIDENTIALITY PROVISIONS 20-21 (2000)

“return” is defined broadly as “any tax or information return, declaration of estimated tax, or claim for refund”¹⁸ Similarly, “return information” includes essentially all financial information relating to a taxpayer.¹⁹ This confidentiality provision is backed by both civil and criminal penalties not only on government employees who make unauthorized disclosures, but also on other persons who republish information received through an unauthorized disclosure.²⁰

There are a variety of exceptions to this general rule, primarily with respect to sharing information with certain other federal government agencies, such as the Social Security Administration, and with state tax agencies.²¹ Public disclosure of returns or return information, other than in an aggregate form, is generally prohibited except for a narrow exception relating to obtaining needed information from third parties and for when a taxpayer chooses to contest a tax liability in court.²² IRS materials confirm the importance of maintaining the confidentiality of this information. For example, one publication states that the Internal Revenue Code “makes the

[hereinafter TREASURY REPORT] (detailing relationship between two executive orders issued by President Nixon and Congressional concern over tax privacy); T. Keith Fogg, *Transparency in Private Collection of Federal Taxes*, 10 FLA. TAX REV. 763, 770–71 (2011) (describing history of federal tax disclosure); David Lenter, Douglas Shackelford & Joel Slemrod, *Public Disclosure of Corporate Tax Return Information: Accounting, Economics, and Legal Perspectives*, 56 NAT’L TAX J. 803, 813 (2003) (reviewing development of confidentiality rules); Paul Schwartz, *The Future of Tax Privacy*, 61 NAT’L TAX J. 883, 885–86 (2008) (describing judicial, executive, and legislative roles in defining historical extent of tax privacy).

¹⁸ I.R.C. § 6103(b)(1).

¹⁹ I.R.C. § 6103(b)(2).

²⁰ See I.R.C. § 7213 (making unauthorized disclosure of return or return information, including republication of such information by any person when the disclosure was not permitted, a felony); I.R.C. § 7431 (imposing civil liability on the United States for prohibited disclosures or, if the prohibited disclosure is by a person who is not an employee of the United States, the person making the disclosure); see generally JCT REPORT vol. I, *supra* note 17, at 56–58 (discussing the imposition of criminal and civil liability for unauthorized disclosure); TREASURY REPORT, *supra* note 17, at 25–26 (same).

²¹ I.R.C. § 6103(d)–(l) (2006 & Supp. III 2009 & Supp. IV 2010); see also JCT REPORT vol. I, *supra* note 17, at 27–55 (discussing permissible disclosures by IRS); TREASURY REPORT, *supra* note 17, at 42–66 (same); James N. Benedict & Leslie A. Lupert, *Federal Income Tax Returns: The Tension Between Government Access and Confidentiality*, 64 CORNELL L. REV. 940, 964–982 (1979) (discussing various government officials’ access to confidential tax return information).

²² I.R.C. § 6103(h)(4) (providing for disclosures in judicial proceedings); *id.* at (k)(6) (providing for disclosures for investigative purposes); see also Bittker, *supra* note 15, at 490–91 (noting that while “taxpayers who wish to litigate their tax liabilities must open the relevant facts to judicial, and hence to public, inspection,” disclosure of taxpayer information to members of the general public is generally not permitted). For a discussion of some of the emerging disclosure issues relating to tax information, see Christopher S. Rizek, *Taxpayer Privacy and Disclosure Issues Will Continue to Touch Us All*, in TAX NOTES: 30TH ANNIVERSARY EDITION 81 (2002).

confidential relationship between the taxpayer and the IRS quite clear.”²³

A 2000 Joint Committee on Taxation staff report that comprehensively reviewed the disclosure provisions in the federal tax laws summarized the policy reasons for these rules: “This confidentiality is based on persons’ right to privacy, as well as the view that voluntary compliance will be increased if taxpayers know that the information they provide to the government will not become public.”²⁴ That is, these rules exist both to protect privacy as a right enjoyed by taxpayers and for pragmatic reasons relating to maximizing the collection of tax revenues owed. The report goes on to detail reasons why the narrow exceptions summarized above exist.²⁵ In fact, the Joint Committee on Taxation staff strongly recommended against granting any additional access to returns or return information absent a “compelling need for the disclosure that clearly outweighs the privacy interests of the taxpayer.”²⁶

B. Federal Tax Law for Tax-Exempt Organizations

Federal tax law also governs the disclosure of financial and other information provided to the IRS by organizations exempt from federal income tax.²⁷ In contrast to the general disclosure rules, the rules for tax-exempt organizations’ information strongly favor public disclosure, except in relatively limited circumstances. While tax-exempt organizations have not always had to disclose financial information—and some are still not required to do so—once they were forced to provide it to the IRS, the information also became subject to mandatory public disclosure.²⁸

²³ INTERNAL REVENUE SERV., TAX INFORMATION SECURITY GUIDELINES FOR FEDERAL, STATE AND LOCAL AGENCIES (PUB. 1075), at 12 (2010).

²⁴ JCT REPORT vol. I, *supra* note 17, at 5; *see also id.* at 127–28 (noting that a degree of confidentiality is necessary for effective tax law); TREASURY REPORT, *supra* note 17, at 33 (explaining how reasonable and continuing expectation of privacy is central to taxpayer concerns).

²⁵ *See* JCT REPORT vol. I, *supra* note 17, at 129–32 (detailing certain exceptions to general rule of confidentiality); *supra* note 22 and accompanying text (noting that public disclosure of returns or return information is not permitted except in relatively narrow circumstances).

²⁶ JCT REPORT vol. I, *supra* note 17, at 6; *see also id.* at 196–97 (discussing the Joint Committee on Taxation staff’s recommendation regarding disclosure of returns or return information).

²⁷ *See generally* Susan L. Paul & Bill Brockner, *Disclosure, FOIA and the Privacy Act, in* EXEMPT ORGANIZATIONS-TECHNICAL INSTRUCTION PROGRAM FOR FY 2003 (2002), available at <http://www.irs.gov/pub/irs-tege/eotopic03.pdf> (discussing application of privacy laws to the IRS by governmental agencies).

²⁸ *See* II JOINT COMM. ON TAXATION, 106th Cong., STUDY OF PRESENT-LAW TAXPAYER CONFIDENTIALITY AND DISCLOSURE PROVISIONS AS REQUIRED BY SECTION 3802 OF THE

Tax-exempt organizations provide information to the IRS primarily through two channels. First, some organizations provide information when seeking IRS recognition of their tax-exempt status—a requirement for most charitable organizations other than churches and certain church-related entities, but an option for other types of tax-exempt organizations.²⁹ The information on those organizations' application forms and related submissions are available to the public.³⁰ Initially that availability was only through the IRS, but more recently Congress chose to require the organizations themselves to provide access to these documents upon request.³¹

The other channel is the annual information return that almost all tax-exempt organizations—the major exception again being churches and certain church-related entities—have to file with the IRS.³² The amount of information that organizations need to provide on some version of the IRS Form 990 varies depending on the financial size of the organization, but in general the information on whatever return is filed is available to the public.³³ As with the application, the return initially was only available from the IRS, but more recently Congress chose to require organizations themselves to provide copies of recent returns upon request.³⁴ This information is also now widely available because of a private organization that made arrangements with the IRS to obtain electronic copies of all annual information returns and post them on the Internet.³⁵ Congress has even extended public disclosure to the annual form tax-exempt organizations use to report taxable income from trades or business conducted but that are unrelated to the purpose that provides the basis for the organizations' tax-exempt status.³⁶

INTERNAL REVENUE SERVICE RESTRUCTURING AND REFORM ACT OF 1998, at 124 (2000) [hereinafter JCT REPORT vol. II] (discussing the historical context of the reporting requirements and obligations of tax-exempt organizations); Fogg, *supra* note 17, at 799–800 (explaining the basis for requiring reporting by tax-exempt organizations).

²⁹ See I.R.C. § 508(a), (c) (2006) (requiring new organizations to notify the Secretary of tax-exempt registration unless they are a church).

³⁰ See I.R.C. § 6104(a)(1)(A), (d)(1)(A)(iii) (2006) (making applications for tax-exempt organizations available to public inspection at the IRS).

³¹ See I.R.C. § 6104(d)(1)(A)(iii), (d)(1)(B) (outlining the classes of organizations that must make tax-exemption documents available upon request).

³² I.R.C. § 6033(a)(1), (a)(3).

³³ See I.R.C. § 6104(b), (d)(1)(A)(i) (providing for inspection of the annual returns).

³⁴ I.R.C. § 6104(d)(1)(A)(i).

³⁵ See GUIDESTAR, <http://www2.guidestar.org> (last visited Jan. 11, 2012) (providing information about tax-exempt organizations including annual reports).

³⁶ See I.R.C. § 6104(d)(1)(A)(ii) (requiring disclosure of all returns filed under section 6011 by 501(c)(3) organization).

While the information provided by tax-exempt organizations to the IRS is generally subject to public disclosure, there are some exceptions. Probably the most significant exception relates to information that identifies an organization's donors. The Internal Revenue Code requires most tax-exempt organizations to disclose some identifying information regarding contributors to the IRS, but the IRS is not authorized to disclose that information to the public nor are the organizations themselves required to provide that information to the public; the only organizations for which this limitation on public disclosure does not apply are private foundations and political organizations.³⁷ Private foundations are generally charitable organizations that initially are funded by a single donor or a small group of often related donors and are usually controlled by that donor or the donor's family members.³⁸ The public disclosure of the donors' identities is one part of a larger set of provisions designed to limit the influence of donors to private foundations based on Congress's perception that these entities were particularly susceptible to abuse through misuse of their charitable assets by their financial supporters.³⁹ Political organizations are groups that primarily seek to influence the election of candidates.⁴⁰ Requiring disclosure of their even relatively modest contributors is based on the reasons discussed in Part I.C that support public disclosure of contributors to candidates, political parties, and political committees.⁴¹

Three other more limited exceptions to the public disclosure of information provided to the IRS on an application or annual information return also exist. One is an exception for identifying information for individual—but not organizational or government—grant recipients.⁴² Another is an exception for information that would

³⁷ I.R.C. § 6104(b), (d)(3)(A).

³⁸ See I.R.C. § 509(a) (defining a private foundation).

³⁹ See I.R.C. §§ 4940–4946 (2006 & Supp. I) (imposing various taxes on private foundations for actions that are inconsistent with the foundations charitable purpose). See generally Thomas A. Troyer, *The 1969 Private Foundation Law: Historical Perspective on Its Origins and Underpinnings*, 27 EXEMPT ORG. TAX REV. 52 (2000) (recounting the history of abuse of charitable and other tax-exempt organizations).

⁴⁰ See I.R.C. § 527(e)(1)–(2) (defining a political organization and an exempt function); see also *supra* notes 7–10 and accompanying text (discussing “political” organizations).

⁴¹ See Fogg, *supra* note 17, at 803 (information disclosure with respect to political organizations is “more to benefit campaign finance law than to promote tax disclosure”); see generally Mayer, *supra* note 7, at 637–48 (explaining the justification for and treatment of political activity by tax-exempt organizations).

⁴² See INTERNAL REVENUE SERV., FORM 990 SCHEDULE I GRANTS AND OTHER ASSISTANCE TO ORGANIZATIONS, GOVERNMENTS, AND INDIVIDUALS IN THE UNITED STATES (2010), available at <http://www.irs.gov/pub/irs-pdf/f990si.pdf> (showing Part II as relating to organization and government grant recipients requires identifying information, while Part III relating to individual grant recipients does not).

reveal trade secrets or information which could adversely affect the national defense.⁴³ Finally, an organization can refuse to provide copies of information upon request if the organization can demonstrate it is the subject of a harassment campaign and that compliance with the request is not in the public interest.⁴⁴ This exception does not, however, prevent the party seeking the information from obtaining it through other means, including through public inspection of documents at the organization's offices.⁴⁵ Outside of these narrow exceptions, and the broader exception for identifying information for donors, the information provided by tax-exempt organizations on these forms is otherwise accessible to the public.

That said, certain other information relating to tax-exempt nonprofit organizations is not subject to public disclosure. While private letter rulings, technical advice memoranda, and other tax documents relating to specific organizations are publicly available, identifying information is redacted from the public copies of such documents, as is the case for all taxpayers.⁴⁶ Similarly, the progress and results of examinations with respect to specific tax-exempt nonprofit organizations is not publicly available or even available to an individual or organization that filed a complaint with the IRS that may have triggered the examination.⁴⁷ The one exception is if the examination results in revocation of the organization's tax-exempt status, in which case the fact of the revocation is publicly announced.⁴⁸ These limits on public disclosure appear, however, to represent simply an application of the general bias toward confidentiality in the federal tax laws as opposed to a conscious decision by Congress or the Treasury to protect the confidentiality of such information for tax-exempt nonprofits.⁴⁹

⁴³ I.R.C. § 6104(a)(1)(D), (d)(3)(B).

⁴⁴ I.R.C. § 6104(d)(4).

⁴⁵ See *id.* (applying only to the provision of copies upon request).

⁴⁶ See I.R.C. § 6110(c) (detailing the personal information that must be deleted before the Treasury Secretary makes a disclosure); JCT REPORT vol. II, *supra* note 28, at 37–41 (explaining the disclosure and privacy protections codified in section 6110(c)); TREASURY REPORT, *supra* note 17, at 27 (explaining section 6110 redaction policies and how to challenge the redactions); Fogg, *supra* note 17, at 775–76 (explaining the history of the disclosure provision).

⁴⁷ See JCT REPORT vol. II, *supra* note 28, at 84–85 (“Present law does not provide for the disclosure of information relating to the audit of a tax-exempt organization.”).

⁴⁸ See Rev. Proc. 82–39, 1982–2 C.B. 759, § 3.01 (providing that if “the Service subsequently revokes a ruling or a determination letter previously issued to it, contributions made to the organization by persons unaware of the change in the status of the organization generally will be considered allowable if made on or before the date of an appropriate public announcement”).

⁴⁹ See JCT REPORT vol. II, *supra* note 28, at 40–41, 83–85 (noting several exceptions to

The Joint Committee on Taxation staff's 2000 report mentioned previously also discussed the disclosure rules applicable to tax-exempt organizations.⁵⁰ The report recognized that tax-exempt organizations have a right to privacy.⁵¹ The committee's staff concluded, however, that the public's interests in ensuring that organizations receiving significant tax benefits in fact qualified for those benefits and in having access to information about potential recipients of their donations generally outweighed this right.⁵² Consistent with that conclusion, the Joint Committee on Taxation's staff recommended greater public disclosure of information about tax-exempt organizations, including information relating to all written determinations and closing agreements that resolve audits.⁵³ The report's conclusion regarding disclosure in this context is striking in its contrast to the Joint Committee on Taxation staff's above-quoted statement relating to taxpayer information more generally: "The Joint Committee staff believes that disclosure of information regarding tax-exempt organizations is appropriate unless there are compelling reasons for nondisclosure that clearly outweigh the public interest in disclosure."⁵⁴

C. Federal Election Law

Money has been an essential element in politics since time immemorial. At the same time, the possibility of money granting improper influence over government decisions and particularly over who governs has also been a perennial concern. One of the primary tools for addressing this concern in the United States has been required disclosure of the financial supporters of candidates, parties, and other political organizations to both the government and the public. The effect of such disclosure on those supporters is to reveal information about both their finances—at least with respect to how much they can afford to spend on political contributions—and their political views.

Current law requires disclosure of detailed identifying information regarding those who provide financial support to others that engage in

the section 6110 framework that prevent disclosure but recommending that the present law be revised with respect to tax-exempt organizations to provide for more disclosure).

⁵⁰ *Id.*

⁵¹ *Id.* at 5, 62.

⁵² *Id.* at 5–6, 63.

⁵³ *Id.* at 7, 83–86.

⁵⁴ *Id.* at 80. For the committee's more general view on taxpayer information, see *supra* note 24 and accompanying text.

politics, such others including candidates, entities, and individuals that engage in politics themselves.⁵⁵ Relatively small contributions or expenditures trigger such disclosure, even at the federal level—amounts as low as \$201 in some situations.⁵⁶ Thanks to technological advances, it is now relatively easy to access this information, whether through the Federal Election Commission’s database⁵⁷ or through private databases that provide access to the same information.⁵⁸

The reasons for this disclosure are commonly stated in pure cost-benefit terms—whether the benefits of such knowledge to the political process and to the public outweigh the costs to those whose information is disclosed.⁵⁹ This may be in part because that is how the constitutional debate over such provisions is framed. The Supreme Court has stated that the constitutional standard is “exacting scrutiny,” which requires a “sufficiently important governmental interest” with which the disclosure requirement has a “substantial relation.”⁶⁰ Once one or more particular governmental interests have been identified as sufficiently important, however, the Court appears to have essentially weighed the benefits from that interest or interests being furthered against the costs of disclosure to the affected parties.⁶¹ Even Justice Thomas, who is the most skeptical member of the Court with respect to the constitutional viability of disclosure requirements, based his argument on what he believes is a more accurate view of the costs of disclosure than the other Justices acknowledge, rather than on a fundamental right to privacy.⁶²

⁵⁵ See, e.g., 2 U.S.C. § 434 (2006) (providing reporting requirements for political committees).

⁵⁶ 2 U.S.C. § 434(a)(4), (b)(3)(A), (b)(5)(A), (c)(2)(C), (f)(2)(C) (requiring the disclosure of names and addresses of all individuals who donate over \$200 in certain situations).

⁵⁷ *Disclosure Data Search*, FED. ELECTION COMMISSION, http://www.fec.gov/finance/disclosure/disclosure_data_search.shtml (last visited Jan. 3, 2012).

⁵⁸ E.g., *Huffpost Fundrace*, HUFFINGTON POST, <http://fundrace.huffingtonpost.com> (last visited Jan. 11, 2012).

⁵⁹ See *infra* note 61 and accompanying text (providing examples of this balancing done by the Supreme Court).

⁶⁰ *Citizens United v. FEC*, 130 S. Ct. 876, 914 (2010) (internal quotation marks and citation omitted); see also *Doe v. Reed*, 130 S. Ct. 2811, 2818 (2010) (collecting cases); *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (laying out the constitutional standard affirmed in *Citizens United*).

⁶¹ See, e.g., *Citizens United*, 130 S. Ct. at 914–17 (discussing and rejecting the arguments offered by *Citizens United*, which argued that the disclosure rules were unconstitutional as applied to it); *McConnell v. FEC*, 540 U.S. 93, 196–98 (2003) (citing the district court’s opinion weighing the competing First Amendment interests); *Buckley*, 424 U.S. at 67–68, 71–72 (noting that the Court must look to the “extent of the burden that [disclosure requirements] place on individual rights”); see also *infra* notes 106–107 and accompanying text (further developing this point).

⁶² *Citizens United*, 130 S. Ct. at 980–82 (Thomas, J., concurring in part and dissenting in part).

In most instances that weighing has tilted toward disclosure, even though the evidence of both benefits and costs is relatively thin.⁶³ In some specific instances, however, the costs to a particular group have been well enough established, or the benefits to the public are so ephemeral, that the courts conclude disclosure is constitutionally barred. For example, the Socialist Workers Party successfully litigated and then renewed an exemption from disclosure based on documented harassment of its members and supporters—i.e., significant costs.⁶⁴ Margaret McIntyre, who distributed anonymous leaflets that opposed a local tax, successfully defended her anonymity in part because the benefits in terms of increased information to voters were minimal given her relative obscurity.⁶⁵

Even critics of most campaign finance restrictions, who primarily rely on a relatively strong and absolutist reading of the First Amendment's free speech clause, have usually been willing to support disclosure as the preferable (and constitutional) means of combating corruption and the appearance of corruption in elections based on essentially a cost-benefit analysis.⁶⁶ Moreover, there is an argument that because the effect of disclosure is in large part to publicly identify the political leanings of the persons subject to disclosure, there is no real privacy interest to protect since revealing a contributor's leanings is simply "civic courage." And so presumably the individual involved does not have a reasonable expectation of privacy.⁶⁷ But some commentators have flagged the fact that the extensive disclosure requirements in this area of law are inconsistent with a right to privacy that would require more than a balancing of measurable costs and benefits to justify disclosure.⁶⁸ Nevertheless,

⁶³ See Lloyd Hitoshi Mayer, *Disclosures About Disclosure*, 44 IND. L. REV. 255, 270, 280 (2010) (arguing neither the voter information benefits nor the retaliation and fear of retaliation costs have strong evidentiary support).

⁶⁴ See *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 88 (1982) (finding a reasonable probability that the disclosure provisions of an Ohio law would subject the taxpayer to harassment); FED. ELECTION COMMISSION, ADVISORY OPINION 2009-01, at 1, 10-11 (2009), available at <http://saos.nictusa.com/saos/searchao> (renewing the Socialist Worker's Party's exemption from disclosure rules based on the probability of harassment).

⁶⁵ *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 348-49 (1995).

⁶⁶ See, e.g., STEPHANIE D. MOUSSALLI, *CAMPAIGN FINANCE REFORM: THE CASE FOR DEREGULATION* 20-21 (1990) (arguing disclosure laws can be justified by the benefits of greater voter information); Kathleen M. Sullivan, *Against Campaign Finance Reform*, 1998 UTAH L. REV. 311, 326-27 (arguing that mandatory disclosure of contributors to political campaigns supported by democratic accountability benefits outweigh any inhibition of speech or other costs).

⁶⁷ See Transcript of Oral Argument at 12, *Doe v. Reed*, 130 S. Ct. 2811 (2010) (No. 09-559) (Scalia, J.) (commenting on disclosure in the context of ballot initiative petition signers).

⁶⁸ See, e.g., William McGeveran, *Mrs. McIntyre's Checkbook: Privacy Costs of Political Contribution Disclosure*, 6 U. PA. J. CONST. L. 1, 19-20 (2003) [hereinafter McGeveran, *Checkbook*] (arguing that "[f]orced revelations are intrusions into a sphere of personal liberty");

both the constitutional and policy discussions have been dominated to date by such a balancing approach.

The different bases and underlying policy reasons for the disclosure rules in these three contexts intersect at one question: to what extent should politically active, tax-exempt nonprofit organizations be required to disclose both their political activities and the identities of their financial supporters. How to answer this question depends, therefore, to a large extent on whether this context is viewed more as one that is election-related, where disclosure is strongly favored; tax-related, where disclosure is strongly disfavored; or nonprofit-related, where disclosure relating to the nonprofit itself is strongly favored but disclosure relating to other parties, particularly individuals, is viewed with more ambivalence.

More fundamentally, the above analysis of the reasons for these different disclosure rules reveals two distinct approaches to disclosure and privacy. One approach, dominant in the general tax law context and almost invisible in the election law context, is that privacy is an intrinsic right that can only be infringed upon by public disclosure of otherwise private information in the most compelling of situations. The other approach, found in all three contexts but especially dominant in the election law context, is that what matters is a balancing of concrete costs and benefits in which privacy harm is only one cost (and a difficult to measure and generally minimized one at that). Part II examines these two different approaches more carefully, drawing on the broader privacy scholarship.

II. TWO DIFFERENT APPROACHES TO PRIVACY

The issue of privacy has caused significant confusion in legal scholarship.⁶⁹ On one hand, scholars for the most part agree with the general intuition that there is a right to privacy distinct from other

William McGeeveran, *Mrs. McIntyre's Persona: Bringing Privacy Theory to Election Law*, 19 WM. & MARY BILL RTS. J. 859, 861 (2011) [hereinafter McGeeveran, *Persona*] (arguing that "the interest in anonymous political participation should not be anchored only in effects-oriented reasoning that demands a danger of imminent physical or financial harm"); Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049, 1071 n.139 (1996) (noting that disclosure laws raise "serious First Amendment questions").

⁶⁹ See, e.g., HILARY DELANY & EOIN CAROLAN, *THE RIGHT TO PRIVACY: A DOCTRINAL AND COMPARATIVE ANALYSIS* ix (2008) (acknowledging "the essential elusiveness of the right to privacy"); DANIEL J. SOLOVE, *UNDERSTANDING PRIVACY* 1 (2008) ("Privacy, however, is a concept in disarray. Nobody can articulate what it means."); David Lindsay, *An Exploration of the Conceptual Basis of Privacy and the Implications for the Future of Australian Privacy Law*, 29 MELB. U. L. REV. 131, 135 (2005) ("The concept of privacy . . . is an 'elusive' concept that is difficult to define in a satisfactory manner.").

legal rights, a right which the law should recognize and protect.⁷⁰ On the other hand, scholars have struggled to develop a coherent theory regarding the extent of this right and how strongly the law should protect it.⁷¹ In large part, this struggle can be traced to the fact that the idea of “privacy” applies in many different contexts and in many different ways.⁷²

But there are some universal privacy concepts. One set of such concepts is the difference between a cost-benefit approach and a right-to-privacy approach.⁷³ As this Part details, the former approach is characterized by an attempt to compare the resulting costs and benefits from infringing privacy. The latter perspective is characterized by privacy as a right that is fundamental to individuals and so can only be infringed upon if there are sufficiently important reasons for doing so.

Full consideration of these two different approaches would be a mammoth task. Fortunately, the context to which these approaches apply is relatively limited, and so the discussion of them can be

⁷⁰ See, e.g., BEATE RÖSSLER, *THE VALUE OF PRIVACY* 67–68 (R.D.V. Glasgow trans., Polity Press 2005) (2001) (rejecting reductionist approaches to privacy); Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 423 (1980) (arguing that “privacy is indeed a distinct and coherent concept”); Tom Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233, 236 (1977) (relying on “two purportedly shared intuitions—one normative and the other descriptive: first, that we have some common commitment to the *value* of what is private in our lives; and, second, that we have some common conception of what in our lives in fact *is* private”); Lindsay, *supra* note 69, at 144–45 (rejecting reductionist approaches to privacy). *But see* Judith Jarvis Thomson, *The Right to Privacy*, 4 PHIL. & PUB. AFF. 295, 312–13 (1975) (arguing that privacy is a cluster of other rights as opposed to a coherent right in itself). Historically, the legal right to privacy is generally traced to an 1890 law review article by Samuel D. Warren and Louis D. Brandeis. See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). For examples of scholars tracing the right to privacy to Warren and Brandeis’s article, see SOLOVE, *supra* note 69, at 15; Irwin R. Kramer, *The Birth of Privacy Law: A Century Since Warren and Brandeis*, 39 CATH. U. L. REV. 703 (1990); Lindsay, *supra* note 69, at 140.

⁷¹ See SOLOVE, *supra* note 69, at 1 (“Philosophers, legal theorists, and jurists have frequently lamented the great difficulty in reaching a satisfying conception of privacy.”); Jonathan Kahn, *Privacy as a Legal Principle of Identity Maintenance*, 33 SETON HALL L. REV. 371, 371 (2003) (“The meaning of privacy . . . has proven elusive.”).

⁷² See, e.g., ANITA L. ALLEN, *PRIVACY LAW AND SOCIETY* 4–5 (2d ed. 2011) (listing six different senses in which privacy is discussed legally); RÖSSLER, *supra* note 70, at 6–7 (describing three uses of privacy; relating to action and conduct, to certain knowledge, and to spaces, as well as five groups of definitions of the word “privacy”); Kahn, *supra* note 71, at 409 (“Attempts to classify and define the right to privacy are . . . defeated by the underlying needs to diversity [sic] and split the concept so as to make it less broad.”); see generally SOLOVE, *supra* note 69, at 8–11 (proposing a “taxonomy of privacy,” which consists of four principal groups).

⁷³ See generally DELANY & CAROLAN, *supra* note 69, at 12–16 (contrasting consequentialist and deontological theories of privacy); Ronald A. Cass, *Privacy and Legal Rights*, 41 CASE W. RES. L. REV. 867, 868–69, 871–72 (1991) (contrasting a deontological approach to privacy with a case-by-case intuitive approach that tends to draw on a cost-benefits analysis); Lindsay, *supra* note 69, at 144 (arguing that if privacy is accepted as a coherent concept, there is then a distinction between consequentialist and deontological approaches to privacy).

similarly limited.⁷⁴ More specifically in the context here, what is private is financial information, and particularly financial information that tends to reveal (imperfectly) both the financial status of certain entities and individuals and their political leanings.⁷⁵ Furthermore, the infringement on privacy is with respect to disclosure to the public, as disclosure to the government is already a given in this context.

A. A Cost-Benefit Approach to Privacy

One common approach to privacy is the well-known practice of comparing the measurable benefits of the relevant action against the measurable costs of that action. In the privacy context, the baseline or neutral state is when privacy is maintained while the action or change at issue is infringing on that privacy through disclosure. Difficulties with quantifying the benefits and costs of disclosure, however, often complicate the use of this approach.

1. In Theory

Turning to the baseline first, in the privacy context the baseline is generally the state of affairs absent legally compelled disclosure. Relevant, therefore, is whether the information at stake is already known to more people than the individual or entity making the privacy claim, including whether that information is already in some sense public.⁷⁶ The baseline can, however, instead be a particular level of compelled disclosure that is taken as a given, with the infringing action being a broader level of disclosure whether with respect to what is disclosed or to whom disclosure is made.⁷⁷

Benefits can vary from the highly concrete to the highly speculative. Common benefits cited from compelled disclosure include more informed decision making by those receiving the otherwise private information, prevention or deterrence of specific harms, and enhanced enforcement of other laws.⁷⁸ In many

⁷⁴ This Article, therefore, ignores the many privacy applications and issues that arise in other contexts. See generally SOLOVE, *supra* note 69, at 101–70 (discussing privacy issues in the context of four different conceptions of privacy).

⁷⁵ See ALLEN, *supra* note 72, at 4 (discussing “informational” intrusions as one form of privacy invasion); RÖSSLER, *supra* note 70, at 9 (same).

⁷⁶ See SOLOVE, *supra* note 69, at 22 (noting that if privacy is viewed, as it is in a variety of legal contexts, as secrecy, that “often leads to the conclusion that once a fact is publicly divulged . . . it can no longer remain private”).

⁷⁷ See DELANY & CAROLAN, *supra* note 699, at 24–25 (arguing that an all-or-nothing approach to the right to privacy is an “analytical mis-step”); SOLOVE, *supra* note 69, at 23 (“The privacy-as-secrecy conception fails to recognize that individuals want to keep things private from some people but not others.”).

⁷⁸ See ARCHON FUNG ET AL., FULL DISCLOSURE: THE PERILS AND PROMISE OF

circumstances there are limited data quantifying such benefits, thereby requiring reliance on educated guesses and intuition to determine a sense of the benefits' magnitude.⁷⁹

As for costs, these can also vary significantly. A common cost of compelled disclosure includes actions by those to whom information was disclosed, such as retaliation or harassment, which negatively impact the individual or entity subject to disclosure. Other costs are the related "chilling" effect on the activities or choices of the individual or entity subject to disclosure and reduced transparency or honesty in the disclosure, both of which harm the individual, entity, or society more generally.⁸⁰ As with benefits, quantifying such costs is often quite challenging.⁸¹

Because both benefits and costs can be difficult to quantify, the final, balancing step of the analysis can in many cases be suspect as a "garbage in, garbage out" situation. Yet sometimes a clear result—favoring or disfavoring disclosure—can be reached because even given some uncertainty the overall balance is clear. In many other situations, however, the result is less clear. And the question arises of whether privacy or disclosure should be the default result in the face of such uncertainty.

2. In Practice

In all three of the contexts at issue here the disclosure decision has been based at least in part on a cost-benefit approach. But that approach has resulted in three very different results. In the general tax context, it has tended to reinforce a right-to-privacy conclusion that privacy should be favored over disclosure. In the tax-exempt nonprofit context, it is the second step of analysis after the conclusion has been reached, based on more fundamental concerns, that disclosure should be favored over privacy. That second step becomes the basis for the limited exceptions from otherwise required disclosure. Finally, in the election law context the cost-benefit approach has been the primary and indeed usually the only approach

TRANSPARENCY 6 (2007) (describing the informed decision making and reducing risks benefits of disclosure).

⁷⁹ See, e.g., SOLOVE, *supra* note 69, at 87–88 (discussing how the benefits and costs of privacy can be difficult to quantify); Mayer, *supra* note 633, at 256–57 (finding such flaws in the election law disclosure context).

⁸⁰ See SOLOVE, *supra* note 699, at 79–80, 88 (listing the benefits of privacy that could be harmed by disclosure).

⁸¹ See *supra* note 79 (citing commentators who argue that the costs and benefits of privacy are hard to quantify).

taken, leading to a strong bias toward disclosure because the benefits have generally been considered significantly greater than the costs except in very limited situations.

With respect to the general tax rules, the baseline for consideration of costs and benefits has in recent times been disclosure to the IRS but not beyond (even to other government agencies).⁸² The reason for accepting this baseline is relatively clear—without disclosure of taxpayer financial information to the IRS, whether from taxpayers directly or from third parties, underpayment of taxes owed would almost certainly be rampant and substantial. This assumption is supported not only by common sense, but by the fact that such underpayment is still a significant problem where third-party verification of taxpayer submitted information is not available.⁸³ Absent general IRS access to taxpayer financial information, underpayment would almost certainly become an enormous problem. So given the existence of a federal income tax system, disclosure of taxpayer financial information to the government is necessary for that system to function.

Working from that baseline, consideration of benefits and costs of disclosing taxpayer information publicly has generally been limited to the effect of disclosure on the primary goal of the federal tax system—raising revenues for the federal government consistent with the existing tax laws.⁸⁴ Focusing on this goal, the only cost-benefit question that Congress and commentators have tended to ask is whether such disclosure would enhance or inhibit the collection of the correct amount of revenues.⁸⁵

⁸² See JCT REPORT vol. I, *supra* note 17, at 256 (providing the historical backdrop to the Tax Reform Act of 1976, which made tax return information confidential); Marc Linder, *Tax Glasnost' for Millionaires: Peeking Behind the Veil of Ignorance Along the Publicity-Privacy Continuum*, 18 N.Y.U. REV. OF L. & SOC. CHANGE 951, 966 (1991) (noting that the Tax Reform Act of 1976 codified the prohibition of disclosure to the general public, but did not reverse the trend toward intragovernmental disclosure); Robert P. Strauss, *State Disclosure of Tax Return Information: Taxpayer Privacy Versus the Public's Right to Know*, 5 ST. TAX NOTES 24, 26 (1993) (discussing the considerations that influenced Congress' decision in the Tax Reform Act of 1976).

⁸³ See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-208T, TAX GAP: MULTIPLE STRATEGIES, BETTER COMPLIANCE DATA, AND LONG-TERM GOALS ARE NEEDED TO IMPROVE TAXPAYER COMPLIANCE 6 (2005) (showing that the misreporting of income is greatest in areas with little or no third party reporting).

⁸⁴ See, e.g., Strauss, *supra* note 822, at 28 (discussing the efficacy of state disclosure laws in terms of their propensity to encourage compliance with the tax laws).

⁸⁵ See, e.g., S. REP. NO. 94-938, at 318 (1976) (regarding disclosure to other government agencies, the Senate Finance Committee "tried to balance the particular office or agency's need for the information involved with the citizen's right to privacy and the related impact of disclosure upon the continuation of compliance with our country's voluntary assessment system"); Joshua D. Blank, *What's Wrong with Shaming Corporate Tax Abuse*, 62 TAX L. REV. 539, 590 (2009) (concluding that disclosure of corporate involvement in abusive tax shelters is

Their conclusion has generally been that such disclosure would inhibit the collection of the correct amount of revenues because the tax system is dependent on taxpayers accurately reporting their financial information on their tax returns, and such accuracy can only be partially verified through third-party information reporting and IRS audits.⁸⁶ The reasoning is that if taxpayers knew the information they reported would be publicly available and so could be used by others—family members, employers, business partners, vendors, scam artists, etc.—in a manner that would disadvantage the taxpayers, they would be much less likely to report truthful information on their returns.⁸⁷ There also may be a risk that such disclosure would actually reveal widespread noncompliance, with the perverse effect that compliance would decrease as taxpayers realize the ineffectiveness of government enforcement.⁸⁸

So while the reason for this conclusion can be traced to possible harm to taxpayers, it ultimately is based primarily not on the magnitude of that harm itself. Rather, the conclusion is instead rooted in the perceived magnitude of that harm's effect on the collection of the correct amount of revenue. Similarly, proposals to publicly disclose tax information for corporations depend at least in part on whether doing so will enhance or inhibit the collection of the correct amount of revenue.⁸⁹ While this issue is not the only one that is relevant to such proposals, it is a critical one.⁹⁰

not advisable because it would not deter such involvement and would potentially adversely affect other aspects of tax compliance).

⁸⁶ See S. REP. NO. 94–938, at 317 (asking “the question of whether the public’s reaction to possible abuse of privacy would seriously impair the effectiveness of our country’s very successful voluntary assessment system which is the mainstay of the Federal tax system”); JCT REPORT vol. I, *supra* note 17, at 128 (noting that the degree of compliance is related to the degree of confidentiality of information provided to the IRS).

⁸⁷ See TREASURY REPORT, *supra* note 17, at 34 (providing examples of how disclosure of return information could result in under- and over-reporting of income).

⁸⁸ See Joshua D. Blank, *In Defense of Tax Privacy*, 61 EMORY L.J. (forthcoming 2011) (manuscript at 22) (noting that tax privacy allows the government to selectively release information about tax enforcement resulting in an inflated public perception of the government’s ability to ensure compliance with the tax laws, thereby increasing actual compliance); Schwartz, *supra* note 17, at 889–90 (presenting Italy as an example of when the government released information over the internet to support tax compliance but the opposite happened as people realized the government’s inability to enforce tax collection).

⁸⁹ See Lenter, Shackelford, & Slemrod, *supra* note 17, at 820–21, 827 (discussing proposals that would require the disclosure of corporate tax return information).

⁹⁰ *Id.* at 827; see also Fogg, *supra* note 17, at 809–10 (proposing public disclosure of information about taxes collected by private entities and held in trust for the government because such funds are held in public trust and because disclosure would improve tax collection).

In the tax-exempt nonprofit context the baseline is instead disclosure to both the IRS and the public. The reasons for the disclosure to the IRS aspect of the baseline are fairly obvious—absent detailed financial and activity reporting to the IRS, there would be a strong incentive to create purportedly tax-exempt nonprofits that did not in fact qualify for the exemption because the misclassification would only be exposed in the relatively rare event of an IRS audit. Interestingly, however, for many years nonprofits claiming exemption did not have to apply for such status (and non-charitable nonprofits still are not required to apply) or file annual returns documenting their continued eligibility for such status.⁹¹ Starting in the middle of the twentieth century, however, Congress realized the potential for abuse that this lack of filings created and gradually expanded the required disclosure to the IRS.⁹² Now most charities have to file such applications and most nonprofits claiming exemption have to file an annual information return, although the amount of information they are required to provide on the annual return varies depending on their financial size.⁹³ The only major exception to both requirements is for churches and certain church-related entities.⁹⁴ This exception presumably arises not from generic privacy concerns, but instead from concerns relating to First Amendment free exercise of religion and entanglement issues.

For nonprofit organizations, the baseline is disclosure to the public because of the public's interest in knowing whether organizations that claim tax benefits are in fact qualified.⁹⁵ While usually not stated explicitly, a related rationale is that by claiming such benefits, nonprofit organizations are voluntarily choosing to allow the information they provide to the IRS to also be revealed to the public.⁹⁶ It could be argued for organizations in existence at the time

⁹¹ See I.R.C. § 6033(a) (2006) (identifying which organizations must file annual returns); JCT REPORT vol. II, *supra* note 28, at 24 (outlining different organizations that do not have to apply for status claiming exemption or file annual returns under Tax Reform Act of 1969).

⁹² See H.R. REP. NO. 91-418, pt. 1, at 36 (1969) (detailing the primary purpose of annual reporting requirements as ensuring enforcement of the tax laws, and finding that “more information is needed, on a more current basis, from more organizations”); *id.* at 38 (noting that the lack of required applications means “Congress and the [IRS] are handicapped in evaluating and administering existing law”); S. REP. NO. 91-552, at 52 (1969) (“[M]ore information is needed on a more current basis for more organizations”); *id.* at 54 (noting that the lack of required applications means “the [IRS] has been handicapped in evaluating and administering existing laws”).

⁹³ See *supra* notes 29–32 and accompanying text for a discussion of the information that is required to be on annual information returns.

⁹⁴ I.R.C. § 6033(a)(3)(A).

⁹⁵ See *supra* note 522, 92 and accompanying text (discussing the reasons that information about nonprofit organizations is disclosed to the public).

⁹⁶ See *Nat'l Fed'n of Republican Assemblies v. United States*, 218 F. Supp. 2d 1300, 1318

the disclosure rules went into effect that this is a false choice, as loss of the previously claimed tax benefits could have, in many cases, been financially devastating. But certainly new organizations are on notice of the now existing disclosure rules before they claim these benefits. The baseline of both IRS and public disclosure, therefore, makes particular sense for new entities, although it can be justified for all organizations claiming tax-exempt status.

Working from this baseline, the primary role of cost-benefit analysis is not to reinforce the conclusion favoring disclosure that more fundamental considerations support, although it may do so.⁹⁷ Rather, the analysis is used primarily to identify situations in which an exception from the public disclosure rules should be granted because the benefits of permitting an exception outweigh its costs. In that role, however, the analysis also sometimes reinforces the support for exceptions that arguably are based on a fundamental right to privacy approach.

For example, the general rule that information identifying donors is not subject to public disclosure reflects both of these strands. The vast majority of donors to tax-exempt nonprofits are individuals and revealing their identities would disclose both information about their financial resources and their charitable preferences that often are not otherwise publicly available.⁹⁸ Doing so would therefore conflict with a fundamental (and individual) right to privacy, as described below. At the same time, this exception is also often justified because it has minimal costs in terms of reduced compliance with the requirements for tax exemption. And, conversely, it promotes the significant

(S.D. Ala. 2002) (relying on this argument to conclude that disclosure requirements relating to contributions to I.R.C. § 527 political organizations were constitutional), *vacated on other grounds sub nom.* *Mobile Republican Assembly v. United States*, 353 F.3d 1357 (11th Cir. 2003).

⁹⁷ See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-561T, TAX-EXEMPT SECTOR: GOVERNANCE, TRANSPARENCY, AND OVERSIGHT ARE CRITICAL FOR MAINTAINING PUBLIC TRUST 12-13 (2005) (stating that "[public disclosure] can both enhance incentives for ethical and effective operations and support public oversight of tax-exempt entities"); Evelyn Brody, *Sunshine and Shadows on Charity Governance: Public Disclosure of Forms 990 and IRS Determinations 3* (May 3, 2010) (unpublished manuscript), available at <http://www.kentlaw.edu/faculty/speakers/docs/brody-disclosure-Sugarman.pdf> (citing statements that public disclosure increases legal compliance). *But see* Dana Brakman Reiser, *There Ought to Be a Law: The Disclosure Focus of Recent Legislative Proposals for Nonprofit Reform*, 80 CHI. KENT L. REV. 559, 601-05 (2005) (expressing skepticism that increased public disclosure of nonprofit organization information will increase enforcement of legal obligations); Robert A. Britton, Note, *Making Disclosure Regulation Work in the Nonprofit Sector*, 2008 U. ILL. L. REV. 437, 448-49 (same with respect to legal compliance generally).

⁹⁸ See KENNARD T. WING ET AL., *THE NONPROFIT ALMANAC 2008*, at 78 (2008) (illustrating that in 2006, \$223 billion of the \$295 billion in private contributions to nonprofit organizations, or 75 percent, came from living individuals).

benefit of encouraging donations, which helps the donee organization and supports the purpose of the charitable contribution deduction, i.e., encouraging donations.⁹⁹ Where the costs of such an exception are viewed as more substantial in terms of inhibiting compliance with the restrictions on tax-exempt organizations, however, such as is arguably the case with donors to private foundations or with respect to information regarding executive compensation, then the analysis tilts the other way and public disclosure applies.¹⁰⁰

Finally, in the election law context the baseline also is generally disclosure to the government (here the Federal Election Commission). Historically, this baseline has been justified by three important governmental interests: (1) knowing about financial contributions to candidates, political parties, and other political players to prevent corruption and the appearance of corruption; (2) knowing about financial contributions to enable the government to enforce the various limits on contributions and other political expenditures; and (3) informing voters.¹⁰¹

The reasoning and result of the *Citizens United* decision, however, weakened the first two interests with respect to independent expenditures. The Court diluted the first interest by concluding that the government only had a compelling interest in preventing corruption via *quid pro quo* arrangements, which the Court further concluded was not a concern with respect to expenditures made independently of candidates and political parties.¹⁰² But as a policy matter the government could still have an interest, albeit a less than compelling one in the Court's view, in monitoring independent expenditures and contributions to entities making such expenditures to prevent more broadly defined corruption.

⁹⁹ See S. REP. NO. 91-552, at 53 (1969) (concluding that the underlying rationale in modifying the law is that publicly disclosing the identity of substantial contributors might prevent some gifts); JCT REPORT vol. II, *supra* note 28, at 81 (same).

¹⁰⁰ See H.R. REP. NO. 91-413, pt. 1, at 36 (1969) (stating that disclosure of information relating to substantial contributors, directors, trustees, other management officials, and highly compensated employees "is intended to facilitate meaningful enforcement of the limitations imposed by the bill, especially when combined with the publicity provisions").

¹⁰¹ *McConnell v. FEC*, 540 U.S. 93, 196 (2003) (noting that state interests for disclosure requirements include "providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restriction"); *Buckley v. Valeo*, 424 U.S. 1, 66-68 (1976); Robert F. Bauer, *Not Just a Private Matter: The Purposes of Disclosure in an Expanded Regulatory System*, 6 ELECTION L.J. 38, 38 (2007); Elizabeth Garrett, *McConnell v. FEC and Disclosure*, 3 ELECTION L.J. 237, 239 (2004); Richard L. Hasen, *The Surprisingly Complex Case for Disclosure of Contributions and Expenditures Funding Sham Issue Advocacy*, 48 UCLA L. REV. 265, 270 (2000).

¹⁰² *Citizens United v. FEC*, 130 S. Ct. 876, 909-10 (2010).

Citizens United also virtually eliminated the second interest because no limits now apply on expenditures made independently of candidates and political parties or contributions to entities making such expenditures (with the possible exception of foreign individuals or entities).¹⁰³ It is, therefore, perhaps not surprising that the Court in *Citizens United* relied solely on the third interest—informing voters.¹⁰⁴ But that single interest still left the pro-disclosure baseline intact.¹⁰⁵

Working from the historic baseline of disclosure to the FEC, a cost-benefit approach appears to usually be controlling and generally favors public disclosure of the financial support provided by identified individuals and entities to candidates, political parties, political committees, and independent expenditures.¹⁰⁶ This may be in large part because the constitutionality of disclosure provisions is determined using the cost-benefit approach. More specifically, the current disclosure regime was unanimously upheld in *Buckley v. Valeo* based on the reasoning that the benefits of disclosure in the form of deterring corruption and the appearance of corruption, facilitating enforcement of other election laws, and informing voters generally outweighed any negative consequences of such disclosure.¹⁰⁷ More recently, in *Citizens United*, the Supreme Court by an eight-to-one vote upheld disclosure rules applicable to various forms of election-related spending engaged in independently of candidates and political parties based solely on the voter information benefits, rejecting as a general matter the arguments that the potential harm—including any chilling effect on speech—from disclosure outweighed those benefits.¹⁰⁸ Only Justice Thomas dissented, but he did not take a different approach than the majority. Rather, he differed with his colleagues because he viewed the likely harm from disclosure as substantially greater than they did.¹⁰⁹

The Court has also recognized that in particular circumstances where the costs of disclosure outweigh the benefits, an exception to the generally applicable disclosure rules exists as a constitutional matter.¹¹⁰ For example, in *Brown v. Socialist Workers '74 Campaign*

¹⁰³ *Id.* at 913.

¹⁰⁴ *Id.* at 914.

¹⁰⁵ *Id.*

¹⁰⁶ See McGeeveran, *Persona*, *supra* note 688, at 862 (detailing how recent Supreme Court cases in this area “represent an almost complete disregard for individual privacy interests”).

¹⁰⁷ *Buckley v. Valeo*, 424 U.S. 1, 68, 81–82 (1976).

¹⁰⁸ *Citizens United*, 130 S. Ct. at 914–16.

¹⁰⁹ *Id.* at 980–82 (Thomas, J., concurring in part and dissenting in part).

¹¹⁰ See *Buckley*, 424 U.S. at 71 (“There could well be a case . . . where the threat to the exercise of First Amendment rights is so serious and the state interest furthered by disclosure so

Committee, the Court found that given the extensive evidence of retaliatory actions taken against members and financial supporters of a socialist political party when their identities became known, the cost of disclosure to those individuals outweighed the benefits to the public, and so the Constitution required an exemption from the normally applicable disclosure rules.¹¹¹ The same political party recently successfully petitioned the FEC for an extension of that exception, but only after producing extensive evidence of continuing retaliatory action against its members and financial supporters when their identities became publicly known.¹¹²

The Supreme Court and lower federal courts have proven less sympathetic to such claims when the retaliatory action is less prevalent or traceable to the public disclosure. For example, reviewing same-sex marriage cases, the courts have generally rejected attempts to keep the identities of supporters of ballot initiatives opposing same-sex marriage private even given evidence of scattered acts of retaliation ranging from boycotts and job terminations to criminal acts.¹¹³ Again, these decisions appear to have been driven by a cost-benefit analysis, with costs found wanting.¹¹⁴

insubstantial that the Act's requirements cannot be constitutionally applied." For examples outside of the election law context, see, e.g., *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539, 554–56 (1963) (holding that a legislative inquiry regarding possible members with Communist affiliations was not constitutional when no relationship is demonstrated between association and subversive or Communist activities); *Bates v. City of Little Rock*, 361 U.S. 516, 523–24 (1960) (holding that the compelled disclosure to the government and public of the NAACP's members was not constitutional when there exists "uncontroverted evidence" that members would then likely face "harassment and threats of bodily harm"); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462–63 (1958) (same for members of local NAACP chapters).

¹¹¹ 459 U.S. 87, 101–02 (1982).

¹¹² See FED. ELECTION COMMISSION, ADVISORY OPINION 2009–01, at 5–9 (2009), available at <http://saos.nictusa.com/saos/searchao> (reviewing the facts presented by the Socialist Workers Party).

¹¹³ See, e.g., *Doe v. Reed*, 130 S. Ct. 2811, 2815 (2010) (holding that disclosure of referendum petitions does not generally violate the First Amendment and remanding for consideration of whether disclosure of a petitions relating to a specific referendum would); *Nat'l Org. for Marriage v. McKee*, 765 F. Supp. 2d 38, 47–48 (D. Me. 2011) (holding that required registration and reporting by ballot initiative committee did not violate the First Amendment); *ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197, 1226 (E.D. Cal. 2009) (concluding that, in the context of a motion for preliminary injunction, the claim that disclosure of donors to ballot committees would violate the First Amendment was almost certain to fail).

¹¹⁴ See, e.g., *Doe*, 130 S. Ct. at 2819–21 (balancing the state's interest in "preserving the integrity of the electoral process," supported by evidence of past referendum petition-related fraud, against the lack of evidence that, in general, public identification of petition signers results in harassment and intimidation); *Nat'l Org. for Marriage*, 765 F. Supp. 2d at 53, 53 n.85 (balancing the state's interest in informing voters against the lack of any evidence of likely harassment); *ProtectMarriage.com*, 599 F. Supp. 2d at 1207–11, 1216–19 (balancing the state's interest in informing voters, which would be seriously burdened if disclosure was not permitted, against the likelihood of threats, harassment, and reprisals resulting from disclosure, which was very low).

The one significant exception is found in the *McIntyre* case, where the Court concluded that an individual who personally created flyers relating to a local election issue (but not a candidate) could not be compelled to identify herself on the flyers.¹¹⁵ Though the Court cited to the long history of anonymous political involvement in our country,¹¹⁶ it still relied in large part on a cost-benefit analysis. The Court ultimately concluded that since the election related to an issue, not a candidate, preventing corruption and the appearance of corruption was not at stake, and given the fact that revealing the relatively obscure individual's identity would not help voters interpret the flyer's message, any benefits from disclosure were minimal.¹¹⁷ Mrs. McIntyre's case was also probably aided by the fact that the complaint about her lack of disclosure appeared likely to have been made in retaliation for her political position.¹¹⁸

B. A Right to Privacy

1. In Theory

The concept of privacy as a fundamental right is traceable to the view that a basic right of all individuals is a right to autonomy.¹¹⁹ This view asserts that for individuals to fully be human they must be free to make choices.¹²⁰ Anything that limits choices, therefore, threatens this basic aspect of what it means to be human.

A right to privacy is necessary for autonomy because when otherwise private information regarding an individual's choices is

¹¹⁵ *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995).

¹¹⁶ *Id.* at 343, 343 n.6.

¹¹⁷ *Id.* at 348–49, 356.

¹¹⁸ *See id.* at 338 (noting that the official who reported her supported the opposite position).

¹¹⁹ *See, e.g., DELANY & CAROLAN, supra* note 699, at 16–20 (exploring how privacy enhances autonomy); RÖSSLER, *supra* note 70, at 116 (same with respect to informational privacy); Geoffrey Gomery, *Whose Autonomy Matters? Reconciling the Competing Claims of Privacy and Freedom of Expression*, 27 LEGAL STUD. 404, 408–09 (2007) (same); Kahn, *supra* note 7171, at 378 (explaining how “privacy is an attribute of individuality”); *id.* at 384–86 (summarizing the relationship between privacy and autonomy); Lindsay, *supra* note 699, at 148 (proposing that the moral autonomy of individuals is the basis for the deontological approach to privacy). A right to privacy may also be based on other more fundamental concepts, such as dignity, but in this context the autonomy basis is the most applicable. *See SOLOVE, supra* note 699, at 85–87 (describing nonconsequentialist grounds for a right to privacy, including but not limited to autonomy).

¹²⁰ *See, e.g., RÖSSLER, supra* note 70, at 50 (“Only a life lived autonomously . . . can also be a rewarding life.”). An extension of this view is that privacy deserves protection not so much because autonomy benefits the individual but because individual autonomy ultimately benefits society. *See DANIEL J. SOLOVE, NOTHING TO HIDE: THE FALSE TRADEOFF BETWEEN PRIVACY AND SECURITY* 50 (2011) (“A society without privacy protection would be oppressive. When protecting individual rights, we as a society decide to hold back in order to receive the benefits of creating free zones for individuals to flourish.”).

expected to be revealed to others, an individual may alter his or her choices to conform to the views of others regarding the choices that are best.¹²¹ If this occurs, the disclosure of that individual's otherwise private information reduces that individual's autonomy. Infringement of privacy therefore requires a compelling justification, since such infringement negatively impacts a basis aspect of being human.

There are two important refinements to this approach. First, while this approach supports a stronger legal right to privacy it does not mean that the Constitution contains such a right in all contexts. While the Supreme Court has identified a right to privacy in the Constitution, that right is a limited one.¹²² This constitutional right does not, importantly for our purpose here, reach the required disclosure of financial information in connection with the federal tax or election laws. Instead, the Court considers such disclosure under the exacting scrutiny analysis discussed above.¹²³

Second, because this right to privacy flows from an individual's need for autonomy, it is a right of individuals and not of other entities.¹²⁴ Artificial persons such as nonprofit corporations only enjoy the protection granted by this right to the extent necessary to facilitate protection of individual privacy. In other words, any privacy right of such artificial persons is derivative of the privacy right of individuals.

2. In Practice

This autonomy of the individual right to privacy plays a significant role in the disclosure rules found in the three legal regimes detailed above. In the federal tax regime generally, acknowledgement of that right leads to a strong bias against public disclosure of taxpayer information.¹²⁵ Indeed, the bias is so strong it has been extended to

¹²¹ See RÖSSLER, *supra* note 70, at 73 (“To be able to develop authentic plans, to design or define oneself through one’s dealings . . . , one’s expectations with respect to other people’s knowledge about oneself must not be mistaken.”); Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 532 (2006) (“The risk of disclosure can prevent people from engaging in activities that further their own self-development.”).

¹²² See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (sexual practices between consenting adults); *Roe v. Wade*, 410 U.S. 113, 152–53 (1973) (abortion); *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) (birth control). There also is a version of the right to privacy under the Fourth Amendment. See, e.g., *United States v. Maynard*, 615 F.3d 544, 555–68 (D.C. Cir. 2010) (involving the use of GPS tracking by law enforcement authorities), *cert. granted sub nom.* *United States v. Jones*, 131 S. Ct. 3064 (2011).

¹²³ See *supra* notes 6060–622, 1077–1099 and accompanying text (discussing the exacting scrutiny standard).

¹²⁴ See McGeeveran, *Persona*, *supra* note 688, at 881–82 (noting that “privacy theory focuses on individuals, not collectives”).

¹²⁵ See S. REP. NO. 94–938, at 317 (1976) (asking whether disclosure of federal tax information, even to other government agencies, “breaches a reasonable expectation of privacy

artificial entities such as for-profit corporations, as well as protecting the privacy of the individuals who are the vast majority of taxpayers.¹²⁶ A recent proposal suggests, however, that there should be limited disclosure of tax information relating to corporations in part to improve tax compliance.¹²⁷ While not framed in these terms, a relaxation of the anti-disclosure rules for artificial entities is also consistent with this conceptualization of a right to privacy when doing so does not reveal individual financial information. Such relaxation would be less consistent with this right-to-privacy approach, however, if it extended to situations when entity-level disclosure would be more likely to reveal individual financial information, as would often be the case with closely held corporations and other entities owned by a small group of individuals, which would presumably include many if not most partnerships and limited liability companies.

The disclosure rules for tax-exempt nonprofit organizations also reveal the influence of this right-to-privacy approach in two important ways, even given the general pro-disclosure position of those rules. First, and as detailed previously, the existence of such a right is acknowledged but is deemed to be outweighed—or perhaps waived—by the receipt of tax benefits by such organizations and the resulting need for the public to be assured that such benefits are in fact deserved.¹²⁸ Although not generally justified in this way, disclosure is also consistent with the right being primarily a right for individuals, not artificial legal entities, since disclosure of financial and activity

on the part of the American citizen with respect to such information”); *id.* at 318 (citing the “citizen’s right to privacy” with respect to federal tax information). *But see* Linder, *supra* note 822, at 970, 973–74 (arguing that financial information is inherently public and has little to do with individual autonomy, so no right to privacy should attach to such information). The right to privacy does not, however, prevent the IRS from gathering taxpayer financial information for its own use. Bittker, *supra* note 15, at 489 (citation omitted) (“[T]he power of the IRS to get information about taxpayers . . . is extremely sweeping and . . . the right of privacy plays virtually no role in this information-gathering process.”).

¹²⁶ When the focus is on public disclosure of information relating to entities as opposed to individuals, however, a right to privacy is usually not considered but instead only the cost-benefit concerns relating to the effect of such disclosure on tax compliance. *See, e.g.*, Blank, *supra* note 855, at 590 (discussing potential costs and benefits of “shaming sanctions” to address corporate tax abuse); *see also* Bittker, *supra* note 15, at 480 (“To present the conflict between disclosure and privacy in its sharpest form, I will limit myself to the disclosure of individual income tax returns; since corporate returns contain fewer personal details, disclosure would be less dramatic.”).

¹²⁷ Lenter, Shackelford, & Slemrod, *supra* note 17, at 827; *see also* Strauss, *supra* note 822, at 31 (considering a similar proposal relating to state business tax information).

¹²⁸ *See supra* notes 522, 955–966 and accompanying text (discussing why the baseline for nonprofit organizations is pro-disclosure).

information for tax-exempt nonprofit organizations generally does not reveal financial information for identified individuals.

Second, it is also consistent with a right-to-privacy approach that at least some of the areas where nonprofit organizations are not required to publicly disclose information involve information about individuals—e.g., information about donors and individual grantees.¹²⁹ At the same time, the disclosure of information about private foundation donors and director, officer, and key employee compensation is also consistent with this approach as it is justified by the strong interest in the public being assured that individuals with a high level of influence over tax-exempt nonprofit organizations do not use that influence to improperly enrich themselves.¹³⁰

The right to privacy as described above plays a relatively minimal role in the election law context. But it has not completely escaped notice.¹³¹ Even here, however, the election laws are arguably consistent with this approach in two ways. First, the information disclosed about individuals involved in the political process is relatively limited—the amount and recipients of their contributions, plus the names, addresses, and employers of the contributors—as compared to the much more comprehensive financial information provided by taxpayers to the government.¹³² A reasonable argument can therefore be made that the infringement on the financial privacy of such individuals is relatively limited.

Second, because the individual financial information disclosed is so limited, the primary effect of the existing election law disclosure rules is to reveal, publicly, the political leanings of the individual contributors. Indeed, it is this effect of such disclosures that is most commonly cited as infringing on the right to privacy of individuals.¹³³ There are, however, at least two arguments against the right to privacy either attaching to information about political leanings or controlling whether such information remains private. The first

¹²⁹ See JCT REPORT vol. II, *supra* note 28, at 81 (“[D]onors have legitimate privacy concerns.”); *supra* note 42 and accompanying text (discussing individual grantees).

¹³⁰ See *supra* notes 397–411, 100 and accompanying text (discussing private foundations and officers)100.

¹³¹ See McGeeveran, *Persona*, *supra* note 688, at 860 (“[S]erious attention to political privacy remains relatively invisible compared to areas such as health care or social media”); *supra* note 688 and accompanying text (citing commentators that have argued that the balancing approach, which is currently used in the election law context, is inconsistent with the right-to-privacy approach).

¹³² Compare *supra* note 15 and accompanying text (federal tax law filings), with *supra* note 565 and accompanying text (election law filings).

¹³³ See McGeeveran, *Persona*, *supra* note 688, at 866 (noting but criticizing the focus on retaliation and chilling effects while ignoring other negative effects of disclosure in this context).

argument is that one of the natural consequences of having and acting on political leanings is having to defend such political leanings publicly.¹³⁴ That is, politics is an inherently public activity because it is generally conducted publicly and affects the broader public. Thus, an individual who seeks to influence politics in a direction that they desire has no legitimate expectation of privacy. Any exceptions to this general view, such as those that currently exist with respect to voting, should therefore be limited to situations where the costs of public disclosure clearly exceed the benefits to society.

The second, related argument is that an individual's political views, if acted on, potentially affect matters that will primarily impact others, including possibly the entire public. Given this potential effect, it is the public's business to know about an individual's political actions even if that individual's political views would otherwise be private. In other words, the public has a right to know about such actions, even if they reveal otherwise private political leanings. The public's right to know trumps the contributor's right to privacy similarly to the way that the public's interest in knowing whether nonprofit organizations that receive significant tax benefits qualify for those benefits trumps any right to privacy (derivative or otherwise) such organizations might enjoy. Again, exceptions should only exist for particular situations where the costs of disclosure clearly outweigh the benefits.

There is, however, a reasonable counterargument. The counterargument is that since the right to privacy for individuals has its roots in the fundamental human characteristic of autonomy, including autonomy with respect to political choices, it would be inconsistent with that origin to expose such choices to public scrutiny and therefore influence. That is, if an individual's political action is not inherently public—as would be the case with, for example, making an endorsement or having a yard sign—such action should be protected by a right to privacy because otherwise there is significant risk that the individual's autonomy will be compromised.¹³⁵ This line of

¹³⁴ See Transcript of Oral Argument at 12, *Doe v. Reed*, 130 S. Ct. 2811 (2010) (No. 09–559) (Scalia, J.) (“[T]he fact is that running a democracy takes a certain amount of civic courage. And the First Amendment does not protect you from criticism or even nasty phone calls when you exercise your political rights to legislate, or to take part in the legislative process.”); McGeveran, *Persona*, *supra* note 688, at 867 (“[I]n the election disclosure cases, calls for ‘civic courage,’ characterizations of political activity as ‘lawmaking,’ and references to the ‘public sphere’ all endeavor to define conflict away, simply by placing involvement with elections on the ‘public’ side of a clear and dispositive line.”).

¹³⁵ See McGeveran, *Persona*, *supra* note 688, at 872 (“[D]onations, petition signatures, and party registration generally are not intended as announcements of political views to one’s neighbors.”); *id.* at 877 (“The prospect of disclosure can discourage individuals from taking certain political actions, and it pushes citizens toward conformity with dominant views.”).

reasoning suggests that not all political actions are inherently public and so the right to privacy applies to at least some political actions. And even though private political actions have public effect, that alone should not be sufficient to overcome the right to privacy. Part III considers these arguments further in the specific context of individuals financially supporting politically active, tax-exempt organizations.

Vindicating privacy concerns therefore can be pursued in two strikingly different ways. The different approaches to privacy and disclosure in the general tax, nonprofit tax, and election law contexts reveals that the approach chosen can lead to a large variation in results. The choice made in each context may make sense in that context. But when the contexts intersect—as is the case when discussing expanding disclosure with respect to politically active, tax-exempt nonprofits—a choice about which and to what extent each approach will be applied to determine the appropriate level of disclosure and privacy is required. To the proposals for such expanded disclosure and these choices we now turn.

III. NONPROFITS, POLITICS, AND PRIVACY

The increased attention to and amount of political spending by tax-exempt nonprofits in the wake of *Citizens United* has generated a plethora of proposals for increasing the public disclosure of information about both these entities and their financial supporters. This Part briefly summarizes these proposals and then considers them from first a cost-benefit perspective and then a right-to-privacy perspective. Perhaps not surprisingly, the cost-benefit perspective generally supports such proposals with only the caveat that in some, relatively unusual situations, an exception might be required. The application of the right-to-privacy perspective is, however, more complicated. Because that right primarily applies to individuals, it does not create a barrier to public disclosure of information relating to the entities themselves. But with respect to information relating to financial supporters, many if not most of whom may be individuals or entities closely associated with specific individuals, the right does provide a ground for objecting to such public disclosure. That objection is only valid, however, if the right applies not only to financial information but also to political leanings that otherwise would not be publicly known.

A. Proposals

While commentators and lawmakers have floated many proposals to increase public disclosure of information relating to politically active, tax-exempt nonprofit organizations, these proposals can be grouped into essentially two categories.¹³⁶ The first category is information relating to such organizations themselves, including their finances and activities. Examples of such proposals include requiring such entities to apply to the IRS for recognition of their tax-exempt status, requiring more detailed, and quicker, reporting of political expenditures and activities than currently exists through the generally required annual information return, and requiring such entities to report on their political activities to their members or donors.¹³⁷

The second category is information identifying significant financial supporters of tax-exempt nonprofit organizations.¹³⁸ While tax-exempt nonprofits are already required to report identifying information for relatively large donors to the IRS as part of the annual information return, such information is not disclosed to the public, except if the donations are to a private foundation or a political organization.¹³⁹ Current proposals would generally require that for other types of tax-exempt nonprofits engaged in political activity such information would both be made public and be submitted much more

¹³⁶ See *supra* note 4 and accompanying text (citing proposals by Congress and commentators).

¹³⁷ See, e.g., House DISCLOSE Act, *supra* note 4, at § 301 (disclosure of certain political activities to members and donors); Senate DISCLOSE Act, *supra* note 4, at § 301 (same); Aprill, *supra* note 4, at 401–02 (proposing requiring an application for exemption within a specified period of time); Tobin, *supra* note 4, at 439–40 (same).

¹³⁸ See, e.g., House DISCLOSE Act, *supra* note 4, § 211 (disclosure of identifying information regarding donors to organizations engaged in certain political activities); Senate DISCLOSE Act, *supra* note 4, § 211 (proposing similar requirements); Aprill, *supra* note 4, at 403–404 (disclosure of contributors to noncharitable, tax-exempt organizations); Tobin, *supra* note 4, at 440–44 (disclosure of contributors in excess of \$25,000 annually); Torres-Spelliscy, *supra* note 4, at 90–91 (discussing the secretive trade association problem and proposing more disclosure); Callahan, *supra* note 4, at A21 (proposing that the IRS create a new category of nonprofits engaged in political activity in which entities would be forced to disclose all their donors). A related aspect of such proposals is required public disclosure of the recipients of substantial political expenditures by such organizations. See, e.g., Aprill, *supra* note 4, at 404–05 (proposing to tax political activity of nonprofit, noncharitable organizations regardless of whether the organizations has net investment income); Tobin, *supra* note 4, at 440–44 (disclosure of non-employee expenditures in excess of \$25,000). Such recipients tend to be entities as opposed to individuals and are not generally supporting such organizations financially, but only exchanging goods or services for fair market value payments, so disclosure of their role does not necessarily reveal their political leanings. For these reasons, such disclosure does not raise significant issues under either a cost-benefit approach or a right to privacy approach and is ignored for purposes of this article.

¹³⁹ See *supra* note 37 and accompanying text (discussing which organizations must disclose their major donors to the public).

quickly. And some proposals would also expand the universe of donors subject to disclosure.

Whether such proposals are desirable depends in significant part on the approach one takes with respect to privacy. This Part therefore considers these categories of proposals using each of the two approaches discussed above.

B. *The Cost-Benefit Approach*

1. *Entity Disclosure*

As discussed above, the existing rules requiring public disclosure of applications for recognition of exemption and annual information returns filed by tax-exempt nonprofit organizations are justified for two reasons: (1) the public's interest in knowing whether such organizations qualify for these benefits; and (2) the consent of tax-exempt organizations to disclosure as a condition for receiving tax benefits.¹⁴⁰ Thus, additional or quicker disclosure of information relating to the subset of organizations that engage in political activities should only be rejected under the cost-benefit approach if the costs of disclosure generally outweigh the benefits. Most political activity by a tax-exempt nonprofit organization is a public matter in itself—advertisements, mailings, phone banks, and so on. And financial information relating to tax-exempt nonprofit organizations is also already public given the pro-disclosure baseline. Thus, there does not appear to be generally any significant costs of such additional and faster disclosure.

Furthermore, additional and faster disclosure provides the benefit of enabling the public to better ascertain in a timely fashion whether a given organization in fact qualifies for the tax-exempt status they are claiming.¹⁴¹ Specifically, non-charitable tax-exempt nonprofit organizations that are not Internal Revenue Code section 527 political organizations may only engage in political activity as a secondary activity. Yet there have allegedly been repeated attempts to violate this rule in recent years.¹⁴² Thus, a clear need exists for the public to

¹⁴⁰ See *supra* notes 522, 955–966 and accompanying text (discussing why the baseline for nonprofit organizations is pro-disclosure).

¹⁴¹ See Tobin, *supra* note 4, at 439–40 (discussing the problems with the current application regime).

¹⁴² See Nicholas Confessore, *Watchdogs Call Out 4 Nonprofits as Too Political for Tax Exemption*, THE CAUCUS (Sept. 28, 2011, 5:26 PM), <http://thecaucus.blogs.nytimes.com/2011/09/28/watchdogs-call-out-4-nonprofits-as-too-political-for-tax-exemption/> (discussing how several watchdog groups argue for tighter campaign laws that would take away tax exemptions for nonprofit groups that become too

have a faster way to ensure this rule is satisfied. Finally, it should be noted that while certain charitable nonprofits—primarily churches and church-related entities—are exempt from the existing filing and disclosure rules, those nonprofits would not be affected by these proposals since they are prohibited under current federal tax law from engaging in any activities that would support or oppose a candidate for elected public office.¹⁴³

Thus, under a cost-benefit approach, it appears that there are no plausible general objections to proposals that would require additional and faster disclosure of financial and political activity information for politically active, tax-exempt nonprofit organizations. If such disclosure would be problematic for a particular entity under this approach an exception could be considered to cover such situations. But especially given the public nature of most political activity, it is difficult to imagine a scenario where an exception would be needed.

2. Donor Disclosure

Currently, information regarding financial supporters of tax-exempt nonprofit organizations is not subject to disclosure except with respect to private foundations and political organizations.¹⁴⁴ The private foundation exception arises out of the combination of the control of private foundations by a single donor or small group of donors and deductibility of contributions that donors to private foundations, as section 501(c)(3) organizations, enjoy—a combination that does not exist and so is not relevant for non-501(c)(3)s that are permitted to engage in political activity, albeit as less than a primary activity, but whose donors do not enjoy deductibility for their contributions.¹⁴⁵ The reasons for the section 527 exception are the same reasons as for the current proposals to expand this exception to encompass donors to other types of politically active tax-exempt nonprofit organizations and is considered below.

engaged in politics); Matthew Murray, *IRS Scrutinizing Political Activity*, ROLL CALL, Apr. 14, 2008 (describing how the IRS is reportedly closely examining recent allegations of excessive political activity by section 501(c)(4), tax-exempt social welfare organizations).

¹⁴³ I.R.C. §§ 170(c)(2), 501(c)(3) (2006). While “political activity” could be construed as including activity relating to ballot initiatives and referenda as well as candidates, the proposals have generally focused on candidate-related political activity.

¹⁴⁴ See *supra* note 37–41 and accompanying text (discussing private foundations and political organizations and the reasoning behind the different treatment in the Internal Revenue Code).

¹⁴⁵ See *supra* note 39 and accompanying text (noting the reasoning behind the private foundation exceptions).

In general, public disclosure of donor information is disfavored under a cost-benefit approach. While there is a baseline of complete public disclosure, the benefit from an exception for donors in the form of significantly increased donations is generally seen as substantially outweighing the cost, if any, to ensuring compliance with the requirements for being tax-exempt that the lack of such disclosure would generate (except in the case of private foundations).¹⁴⁶ The key question, for both the proposals at issue here and the existing political organization donor disclosure rules, is therefore whether the calculus is different when the recipient organization is engaged in political activities.

The benefits of donor disclosure commonly cited are some of the same ones that support donor disclosure under election law. They include increased voter information and preventing corruption and the appearance of corruption.¹⁴⁷ For reasons I have developed elsewhere, such interests are generally only served when the amount of contributions by the publicly identified donor are relatively large.¹⁴⁸ For such significant donors, however, there is a plausible argument that knowing who financially supports a particular, politically active organization helps targets of that organization's political communications interpret those communications and deters improper influence (and the appearance of improper influence) of public officials even if, as the Supreme Court held in *Citizens United*, such influence does not rise to a quid pro quo level.

At the same time, the costs of such disclosures to the donors are usually relatively minimal. The financial information disclosed provides only a very partial picture of a donor's financial situation, unlike the much more comprehensive financial information provided on taxpayer's federal income tax return. As for disclosing the donor's political leanings, even if those leanings were not previously known to the public, there is scant evidence of negative repercussions from

¹⁴⁶ See *supra* note 999 and accompanying text (discussing the benefits donor anonymity creates).

¹⁴⁷ See *supra* note 107 and accompanying text (discussing election law). The other oft-cited benefit of ensuring increased compliance with other laws is not a factor here. That is because tax-exempt, nonprofit organizations that are not Internal Revenue Code section 527 political organizations generally only make expenditures independently of candidates and political parties, and under *Citizens United* and a subsequent FEC ruling applying that decision there are no longer limits on the sources or amounts of financial support for such expenditures (with the possible exception of few limited categories of sources). See *Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010) (striking down limits on independent expenditures); FED. ELECTION COMMISSION, ADVISORY OPINION 2010-11, at 2 (2010), available at <http://saos.nictusa.com/saos/searchao> (finding that "soliciting and accepting unlimited contributions from individuals, political committees, corporations, and labor organizations for the purpose of making independent expenditures" was legal).

¹⁴⁸ Mayer, *supra* note 633, at 281-82.

the leanings becoming publicly known except in relative rare circumstances.¹⁴⁹ Such rare circumstances can be accommodated by building in an exception mechanism similar to the one available in the election law context for the supporters of groups such as the Socialist Workers Party.¹⁵⁰

There are also potential costs to the organization involved in the form of reduced contributions because some donors will shy away from having their contributions—and thus their political leanings—revealed publicly. That is a legitimate concern, but the extent to which donors will in fact change their behavior has not been demonstrated in other contexts—such as opposition to same-sex marriage—that have proven to be particularly controversial.¹⁵¹ Thus, the benefits already discussed appear to outweigh what at this point are relatively speculative costs.

A cost-benefit approach therefore does not raise any general barriers to public disclosure of information regarding donors to politically active, tax-exempt nonprofit organizations, at least if the donors are relatively large financial contributors. Indeed, in apparent recognition of the fact that disclosure is generally only beneficial if the donors involved have contributed substantial sums, most commentators who have put forward such proposals are willing to limit their reach to donors who give at or even above the already relatively high trigger amounts for currently required disclosure to the IRS.¹⁵² Subject to this caveat and the need for an exception mechanism in the rare case of demonstrated significant harassment of donors to certain types of groups or causes, the cost-benefit approach supports all of the existing disclosure proposals.

¹⁴⁹ See *supra* note 11313 and accompanying text (citing cases dealing with disclosure of political leanings that found the evidence of harassment insufficient to justify an exception). *But see* McGeveran, *Persona*, *supra* note 688, at 871–79 (discussing additional costs of disclosure). What McGeveran lists as additional costs of disclosure I would instead identify as reasons for supporting the use of the right-to-privacy approach, which, for the reasons I have discussed, is conceptually and practically distinct from the cost-benefit approach. See *supra* note 733 and accompanying text (noting this distinction).

¹⁵⁰ See *supra* note 644 and accompanying text (discussing the Socialist Workers Party situation).

¹⁵¹ See Mayer, *supra* note 633, at 277–78 (discussing the same-sex marriage evidence).

¹⁵² Compare, e.g., Tobin, *supra* note 4, at 440 n.79 (setting a threshold over \$25,000, but expressing a willingness to consider an even higher threshold), with INTERNAL REVENUE SERV., FORM 990 SCHEDULE B SCHEDULE OF CONTRIBUTORS (2010), available at <http://www.irs.gov/pub/irs-pdf/f990ezb.pdf> (requiring, as a general rule, disclosure to the IRS of identifying information for donors who contribute \$5,000 or more annually).

C. The Right-to-Privacy Approach

1. Entity Disclosure

With respect to increased disclosure by entities of their own finances and activities, the right-to-privacy approach does not require rejection of the proposals for two reasons. First, the right to privacy is a right of individuals, not entities.¹⁵³ Second, unlike a family business or a family foundation (for which disclosure of donors is already required for other reasons under any conditions), disclosure of information about politically active, tax-exempt nonprofits does not represent an indirect infringement on the privacy of individuals who financially support such organizations. Even if an organization is supported by a single individual or small group of individuals, neither the organization nor those individuals need to disclose that connection publicly. That in fact is one of the grounds cited for requiring disclosure of donor information, which I address in a moment—it is relatively easy for donors to maintain their anonymity in this context absent government compelled disclosure of their identities.¹⁵⁴

2. Donor Disclosure

The situation is less clear, however, when it comes to disclosure of information about donors to politically active, tax-exempt nonprofit organizations. Many, perhaps most, donors are individuals who under this approach have a fundamental right to privacy. If that right to privacy extends to the information at issue here, then there has to be a relatively strong justification for setting that right aside in whole or in part.

As discussed previously, publicly disclosing the identities of financial supporters reveals two pieces of information. First, it reveals information about the supporters' financial situations, but only in a very partial way—again, much less comprehensive financial information than what is found, for example, on an individual's federal income tax return. Second, it reveals information about the political leanings of those supporters.

If the fundamental right to privacy applies to otherwise private financial information but does not extend to otherwise private political actions, there is a strong argument that it should not apply in

¹⁵³ See *supra* note 1244 and accompanying text (discussing the theory of the right to privacy).

¹⁵⁴ See *supra* note 2 (citing sources that discuss the propensity of tax-exempt nonprofit organizations to keep their donors secret).

this context, or at least not apply very strongly, because of the very limited amount of financial information that is disclosed. Such a lack of application or weak application of the right to privacy would suggest that the cost-benefit analysis conducted above should be controlling, so proposals to increase disclosure of donor information should not be barred by this right. That is, the cost associated with revealing this otherwise private financial information should simply be included in the cost-benefit analysis. And for most donors that cost will be minimal or non-existent since the public can gain information about their general financial situations through other channels such as the neighborhood in which they live, the house they own, the type of car they drive, the job they have, and so on.

If, however, the fundamental right to privacy extends to information about otherwise private political actions, then disclosure of contributions is much more problematic. But there are at least two arguments against such an extension. First, the inherent public nature of politics suggests that no right to privacy should attach to any political actions. And second, the potential public effect of all political actions suggests that even if a right to privacy attaches to some political actions, the public's right to know about actions that could affect it generally outweighs the private political actor's right to privacy. At the same time, however, it could be reasonably argued that because public disclosure of otherwise private political actions may cause individuals to change their choices regarding political actions and thus lose a portion of their autonomy, the right to privacy should extend to such actions.¹⁵⁵

Resolving this debate generally is well beyond the scope of this Article. But, below, I attempt to at least to resolve it as it applies to the specific context of proposals to disclose information about the individual financial supporters of politically active, tax-exempt organizations. In this context, it is plausible to conclude that publicly revealing the identities of financial supporters for politically controversial tax-exempt organizations, such as National Right to Life, the Planned Parenthood Action Council, the Human Rights Campaign, or the National Organization for Marriage, will cause some individuals to shy away from providing financial support that they would otherwise be willing to contribute. Indeed, such financial support seems similar to voting, which is intentionally kept private in order to preserve the ability of individual voters to vote without undue

¹⁵⁵ See *supra* notes 119–121 and accompanying text (discussing the integral relationship between individual autonomy and the right to privacy).

influence from others.¹⁵⁶ Thus, despite the public nature of politics, to say that the right to privacy simply does not attach at all to political actions that the actor could keep private absent government compelled disclosure appears to go too far.¹⁵⁷ Furthermore, because donations to politically active, tax-exempt nonprofit organizations generally do not result in a tax benefit for the donor, it cannot be argued credibly that the donor has consented to disclosure in exchange for receiving a tax benefit.¹⁵⁸

That conclusion, however, only addresses the first argument against extending the right to privacy to financial support of politically active, tax-exempt nonprofit organizations. There is still the issue of whether the right to privacy in this context should generally be overcome by the public's interest in the information because of the potential public effect of the financial support. It is important to emphasize that this comparison is not the same as the cost-benefit analysis conducted previously, where the demonstrable benefits to the public are balanced against the demonstrable costs to the individuals involved. Rather, under a right-to-privacy approach, it is assumed that the individuals involved have a right to privacy that can only be overcome by a similarly weighty right that would be sufficiently vindicated by public disclosure.

There is undoubtedly a right in a liberal democratic framework for the public to know about actions that affect or are likely to affect the operation of government.¹⁵⁹ Numerous government transparency laws are based on this right, including laws that reveal information not

¹⁵⁶ See generally Allison R. Hayward, *Bentham & Ballots: Tradeoffs Between Secrecy and Accountability in How We Vote*, 26 J.L. & POL. 39, 45–55 (2010) (discussing the debates in England and the United States surrounding the eventual adoption of the secret ballot).

¹⁵⁷ See James A. Gardner, *Anonymity and Democratic Citizenship*, 19 WM. & MARY BILL RTS. J. 927, 956 (2011) (considering whether anonymity in politics induces citizens to come closer to consensus norms of ideal democratic behavior and concluding that this determination is “highly variable and context-dependent”); McGeeveran, *Persona*, *supra* note 688, at 872 (arguing that since the flow of information to the public is unintended in many activities that have political connotations, such as giving a donation to an organization, signing petitions, or registering for a political party, such acts are not inherently public).

¹⁵⁸ While donors to charitable organizations may receive a tax benefit in the form of a charitable contribution deduction, such organizations are prohibited from supporting or opposing candidates. See I.R.C. § 170(c)(2) (2006) (defining a “corporation, trust, or community chest, fund, or foundation” to which a donor can donate and take a charitable contribution deduction to exclude any organization that “attempt[s] to . . . participate in, or intervene in . . . , any political campaign on behalf of (or in position to) any candidate for public office”).

¹⁵⁹ See, e.g., JOHN ADAMS, A DISSERTATION ON THE CANON AND FEUDAL LAW (1765) reprinted in THE POLITICAL WRITINGS OF JOHN ADAMS 3, 13 (George W. Carey ed., 2000) (“[T]he people . . . have a right, an indisputable, unalienable, indefeasible, divine right to that most dreaded and envied kind of knowledge, I mean, of the characters and conduct of their rulers.”).

only about government actors but also about those who interact with government actors in a way that might influence their actions, such as lobbyists, contractors, and, of course, campaign contributors.¹⁶⁰ Thus, the key question is not whether such a right exists. Rather, it is whether the public's right to know is sufficiently vindicated by public disclosure of information about the individual financial supporters of politically active, tax-exempt nonprofit organizations to overcome the donors' right to privacy.

Whether the public's right to know is vindicated by disclosure does not depend on whether the knowledge revealed will be used by the public—an issue that is considered under the cost-benefit approach—because that is the public's choice. Instead, the question depends on whether the knowledge revealed actually relates to actions that influence or are likely to influence ultimate government action. Additionally, the scale of the knowledge revealed should at least roughly match the scale at which such influence is likely to occur. Compare, for example, a single individual's action, which is highly unlikely to actually influence government action, and a large group of individual's action, which is likely to have such influence. The public's right to know is vindicated by public disclosure of information relating to the group. But public disclosure of information relating to the single, by themselves inconsequential, individual, does not vindicate any right to know because it will not influence the government in any way.

Most financial supporters of politically active, tax-exempt nonprofit organizations provide only modest support both in absolute terms and relative to the overall finances of the supported organization. Thus, the right-to-privacy approach suggests that the public disclosure of individual information about most financial supporters will not sufficiently vindicate the public's right to know so as to justify overriding the supporters' right to privacy. Of course if they support the organization in other, more influential ways—such as serving on the organization's board of directors or as an officer of the organization—then the public's right to know would appear to trump the right to privacy of those individuals, but such information is generally already publicly disclosed.¹⁶¹ With respect to supporters

¹⁶⁰ See FUNG ET AL., *supra* note 788, at xii (describing “[r]ight-to-know” laws that apply to governments as a “cornerstone of democratic governance”); David A. Anderson, *The Failure of American Privacy Law*, in PROTECTING PRIVACY 139, 140 (Basil S. Markesinis, ed. 1999) (“We expect government to conduct its business publicly, even if that infringes the privacy of those caught up in the matter.”).

¹⁶¹ See INTERNAL REVENUE SERV., FORM 990, at Part VII (2010), available at <http://www.irs.gov/pub/irs-pdf/f990.pdf> (providing a section for an organization to list its current officers, directors, trustees, key employees, and highest compensated employees).

who provide only financial support, however, the public's right to know would only be vindicated when those supporters provide a substantial amount of support in either absolute or relative terms such that the organization's influence—which is what presumably then may influence government action that affects the public—to a significant extent reflects the supporter's influence.

The right-to-privacy approach leads to a similar place as the cost-benefit approach, but arguably for more compelling reasons. Public disclosure of information about individual financial supporters of politically active, tax-exempt organizations is only justified when the financial support provided by a given individual (or perhaps group of closely related individuals) is substantial enough that it effectively gives that individual the ability to influence government actions through the operation of the recipient organization. An example of such a situation would be when a single wealthy individual funds an organization. But other, less extreme examples could exist. For example, the government could set a threshold dollar amount or a threshold percentage of the recipient organization's annual revenues that the contribution would have to exceed. The selection of these thresholds would necessarily be somewhat arbitrary. But the selection of both should recognize that the public's right to know depends on the actual likelihood of influence over government action. And to adequately protect financial supporters' right to privacy, the dollar threshold should be significantly higher than the current disclosure to the IRS threshold of \$5,000.¹⁶² While almost certainly not based on this reasoning, at least some commentators who have proposed disclosure rules have put forward higher thresholds that are consistent with this approach.¹⁶³ Furthermore, because the right to privacy is primarily an individual right and only derivatively of entities, a lower threshold could be adopted for entities that make donations to politically active, tax-exempt nonprofits.¹⁶⁴

That if the cost-benefit approach relied on almost exclusively in the election law context is applied to the current proposals for disclosure of information relating to politically tax-exempt nonprofit

¹⁶² INTERNAL REVENUE SERV., FORM 990 SCHEDULE B SCHEDULE OF CONTRIBUTORS (2010), available at <http://www.irs.gov/pub/irs-pdf/f990ezb.pdf>.

¹⁶³ See, e.g., Tobin, *supra* note 4, at 440 n.79 (proposing a threshold of \$25,000 and noting that there is a possibility that the amount should be set even higher); see also Justin Levitt, *Confronting the Impact of Citizens United*, 29 YALE L. & POL'Y REV. 217, 227 (2010) (proposing a "Democracy Facts' disclaimer" on political communications that would list the five largest contributors to the group paying for the communication).

¹⁶⁴ This would also be desirable from an enforcement perspective. Otherwise multiple entities could be used as conduits by a single individual donor to avoid reaching the disclosure threshold.

organizations, such proposals fair relatively well is not coincidental. After all, that approach has tended to support the existing election law disclosure rules even among otherwise skeptics of campaign finance laws. If, however, the right-to-privacy approach used in the general tax context is extended to this context, the results become somewhat more muddled. While the latter approach does not undermine proposals for disclosure of the finances and activities of the organizations themselves, it at least raises questions about proposals that would reveal the political leanings of individual financial supporters of those organizations. If the right to privacy extends to those political leanings—granted, a debatable point—then a more compelling case for disclosure is required. A case can be made by invoking the public's right to know about individual actions that are likely to influence government actions that affect the public. But even then the case is only valid when the disclosure is limited to individual financial supporters whose level of support in either absolute or relative terms is likely to permit them to influence the supported organization and, as a consequence, the government's actions.

CONCLUSION

Favoring ever-increasing disclosure of information relating to the highly public and influential sphere of activity that is politics is understandably easy. In most instances such favor is justified. Yet at some point that disclosure must have a limit, at least if we accept that disclosure can both have real costs for those whose information is disclosed and that individuals enjoy a fundamental although not unlimited right to privacy.

Exploring these limits in the context of federal tax law generally, federal tax law as it applies to tax-exempt organizations, and federal election law reveals the operation of two significantly different approaches to disclosure and privacy that have long been known to privacy scholars. Consideration of both a cost-benefit approach and a right-to-privacy approach is necessary to ensure that those whose privacy is infringed are sufficiently protected, especially when considering new disclosure rules. The current debate over the extent to which information about the activities and financial supporters of politically active, tax-exempt nonprofit organizations should be disclosed is one example of an area where both approaches should be applied.

Consideration of the disclosure proposals reveals, not surprisingly, that under the cost-benefit approach, which tends to drive the federal election law, the new disclosure provisions are favored, both with

respect to the nonprofit organizations involved and their financial supporters. While the cost-benefit case for disclosure is perhaps less compelling for entities and individuals who provide relatively modest financial support, this approach reveals little ground for objecting to disclosure except in the relatively rare case of demonstrated and significant retaliation or other concrete costs.

The right-to-privacy approach, which has more influence in the tax area, also generally supports the disclosure proposals with one major caveat. When those proposals relate to individual financial supporters, they are only justified if they are limited to the individuals who provide the largest levels of financial support such that their influence over the recipient organization is likely sufficient to cause the organization's attempts to influence government action to significantly reflect the individual supporter's influence. This latter approach, which is generally not considered in the federal election law context, supports greater caution when considering disclosure relating to individual financial supporters than the cost-benefit approach would likely require. If for no other reason, consideration of the right-to-privacy approach is important to ensure that in the zeal to uncover possible undue or improper influence in the political sphere, we as a society do not unnecessarily and improperly infringe on the privacy and therefore the autonomy of individuals.

Laura Chisolm brought to the relatively new area of nonprofit law a commitment to deeper thought and consideration of the reasons for which that law exists and whether that law in its then current form matched those reasons, particularly as it related to political involvement. It is an honor to have had this opportunity to follow in her footsteps with respect to the relatively narrow but important issue of the extent to which the government should compel public disclosure of information relating to politically involved nonprofits. While I know this brief consideration does not match her work either in its thoroughness or insight, I offer it in memory of her many contributions as a scholar, teacher, and friend.