2022

Disclosures for Equity

Atinuke O. Adediran

ARTICLES

COLUMBIA LAW REVIEW

VOL. 122 MAY 2022 NO. 4

ARTICLES

DISCLOSURES FOR EQUITY

*Atinuke O. Adediran**

This Article addresses how to increase funding to nonprofit organizations that are led by minorities or serve communities of color and how to hold corporations and private foundations who make public commitments to fund these organizations accountable for those commitments. The Article makes two policy recommendations to address these problems, while engaging with Supreme Court jurisprudence on mandatory disclosures to ensure that the proposals are narrowly tailored to institutional donors and include an opt-out provision so as not to chill the constitutional protection of the freedom of association. The first is for charities to publicly disclose their institutional donors in Schedule B of Internal Revenue Service (IRS) Form 990. The second is to modify IRS Form 990 to include information on the race and ethnicity of top managers, boards of directors, and the communities an organization serves. These disclosures are crucial for determining organizations that are minority led or that serve communities of color and the institutional donors who donate to them annually. The Article addresses the benefits and tradeoffs of disclosure and how to use nudges—watchdog organizations, certifications, and the public—to implement disclosures to increase funding to minority-led and minority-serving nonprofit charities.

* Associate Professor of Law, Fordham University School of Law. For comments and suggestions, I'm grateful to Douglas Baird, Jeremy Bearer-Friend, Claire Donohue, Gina-Gail Fletcher, Kent Greenfield, Hiba Hafiz, Daniel Hemel, Steven Koh, Ray Madoff, Lloyd Hitoshi Mayer, Shuyi Qei, Diane Ring, James Ripetti, D. Daniel Sokol, Linda Sugin, India Thusi, Lécia Vicente, Katie Young, and Ben Zipursky. This Article benefited from presentations at the Culp Colloquium, University of Chicago Law School, and faculty workshops at Boston College Law School, Temple University Beasley School of Law, and Seattle University School of Law. Thanks to Olivia Angel and Elizabeth Gudgel for excellent research assistance.

INTRODUCTION

Charitable contributions to nonprofit organizations amount to over $400 billion annually.[1] In recent years, foundations and corporations have made public commitments to advance racial equity through donations to organizations that are led by racial and ethnic minorities or that serve communities of color (minority led and minority serving).[2]

1. Charitable Giving Statistics, Nat'l Philanthropic Tr., https://www.nptrust.org/philanthropic-resources/charitable-giving-statistics/ [https://perma.cc/6RML-DE23] (last visited Jan. 25, 2022) (noting that Americans donated $471.44 billion in charitable contributions during 2020).

2. Corporate public commitments to social goals have increased in recent decades. Lisa M. Fairfax, Easier Said Than Done? A Corporate Law Theory for Actualizing Social Responsibility Rhetoric, 59 Fla. L. Rev. 771, 774 (2007). Since June 2020, at least fifty-five companies, from Walmart to Warby Parker, and dozens of private foundations, including Ford and Mellon, have made commitments to financially support nonprofit organizations addressing racial justice. This is distinct from commitments to support minority-owned businesses. See Alex Daniels, California Endowment Doubles Its Support for Asian American Groups to $100 Million, Chron. of Philanthropy (Apr. 12, 2021), https://www.philanthropy.com/article/california-endowment-doubles-its-support-to-asian-american-groups-to-100-million (on file with the *Columbia Law Review*) (noting that the California Endowment recently doubled its pledge to $100 million to nonprofits led by Asian Americans and Pacific Islanders); Alex Daniels, Foundations Pool $36 Million for

This is an important move, since available research suggests that, in comparison to white-led nonprofit organizations, organizations led by or serving communities of color are chronically underfunded.[3] Increased funding for minority-led or minority-serving organizations can have a profound positive impact on criminal justice, healthcare, environmental justice, housing, labor, and employment.[4] Indeed, it would be difficult to

---

Black-Led Organizing Groups, Chron. of Philanthropy (Sept. 17, 2020), https://www.philanthropy.com/article/foundations-pool-36-million-for-black-led-organizing-groups (on file with the *Columbia Law Review*) (noting that a group of grant makers pledged a total of $36 million to Black-led organizing groups); David Hessekiel, Companies Taking a Public Stand in the Wake of George Floyd's Death, Forbes (June 4, 2020), https://www.forbes.com/sites/davidhessekiel/2020/06/04/companies-taking-a-public-stand-in-the-wake-of-george-floyds-death/ (on file with the *Columbia Law Review*) ("Numerous companies have made public statements against racism and injustice and announced donations and other displays of support since the death of George Floyd unleashed protests across the United States starting on May 26th."); Press Release, MacArthur Found., Five Foundations Commit $1.7+ Billion to Nonprofit Organizations in Wake of Pandemic (June 11, 2020), https://www.macfound.org/press/press-releases/five-foundations-commit-18-billion-nonprofit-organizations-wake-pandemic [https://perma.cc/T27Y-TCX5] (noting five foundations "announced a joint commitment to increase their payouts to nonprofit organizations with more than $1.7 billion within the next three years to help stabilize and sustain a nonprofit sector facing devastating economic effects due to the global pandemic and the epidemic of social injustice"); Reuters, Factbox: Corporations Pledge $1.7 Billion to Address Racism, Injustice, U.S. News & World Rep. (June 9, 2020), https://www.usnews.com/news/top-news/articles/2020-06-09/factbox-corporations-pledge-17-billion-to-address-racism-injustice (on file with the *Columbia Law Review*) (noting that corporations have donated more than $1.7 billion to social justice causes in the wake of George Floyd's murder); 23 Large Brands That Have Pledged More Than $1M to Social Justice Causes, Grant News (June 10, 2020), https://www.grantwatch.com/grantnews/23-large-brands-that-pledge-more-than-1m-to-social-justice-causes/ [https://perma.cc/A5PA-9W7C] (noting an increase in the number of companies donating to social justice causes and organizations); see also Veronica Root Martinez & Gina-Gail S. Fletcher, Equality Metrics, 130 Yale L.J. Forum 869, 873 (2021) ("[C]orporations' willingness to engage with the [Black Lives Matter] movement during the summer of 2020 was unusually swift . . . ."). For a discussion of the nexus between corporate donations and operations, see, e.g., Einer Elhauge, Sacrificing Corporate Profits in the Public Interest, 80 N.Y.U. L. Rev. 733, 843–47 (2005).

3. See, e.g., Cheryl Dorsey, Jeff Bradach & Peter Kim, Echoing Green, Racial Equity and Philanthropy: Disparities in Funding for Leaders of Color Leave Impact on the Table 11 (2020), https://www.bridgespan.org/bridgespan/Images/articles/racial-equity-and-philanthropy/racial-equity-and-philanthropy.pdf [https://perma.cc/C8K3-TRLE] [hereinafter Dorsey et al., Racial Equity and Philanthropy] (presenting research findings that "on average the revenues of the Black-led organizations are [24%] smaller than the revenues of their white-led counterparts"); Cheryl Dorsey, Jeff Bradach & Peter Kim, The Racial Funding Gap Can't Continue in the Pandemic, Chron. of Philanthropy (June 2, 2020), https://www.philanthropy.com/article/the-racial-funding-gap-cant-continue-in-the-pandemic (on file with the *Columbia Law Review*) (noting funding disparities by race); Cheryl Dorsey, Peter Kim, Cora Daniels, Lyell Sakaue & Britt Savage, Overcoming the Racial Bias in Philanthropic Funding, Stan. Soc. Innovation Rev. (May 4, 2020), https://ssir.org/articles/entry/overcoming_the_racial_bias_in_philanthropic_funding [https://perma.cc/Y5XL-GHQJ] (same).

4. Inequalities based on race do not only impact nonprofit organizations; they also extend to individual taxation. The collection and analysis of race-based tax data for

fight mass incarceration without the work of nonprofit charities like Bryan Stevenson's preeminent organization, the Equal Justice Initiative (EJI).[5]

Corporate philanthropists and foundations have been lauded for, and are benefiting from, their responses.[6] A recent survey reveals that people are more likely to use or stop using a brand because of a corporation's response to calls for racial justice.[7] This is a form of racial commodification and capitalism that benefits wealthy corporations.[8] Similar to corporations,

---

individuals is currently a live issue that scholars and policymakers are debating as a way to shine some light on who is disproportionately benefiting from tax breaks or bearing the brunt of IRS enforcement. See, e.g., Dorothy A. Brown, The Whiteness of Wealth: How the Tax Code Impoverishes Black Americans—And How We Can Fix It 202–03 (2021) (proposing the IRS publish race-inclusive tax data to better address wealth inequality); Lydia O'Neal & Allyson Versprille, Tax Code Inequities Fuel Call for IRS to Collect Race-Based Data, Bloomberg Tax (Aug. 18, 2020), https://news.bloombergtax.com/daily-tax-report/tax-code-inequities-fuel-call-for-irs-to-collect-race-based-data (on file with the *Columbia Law Review*) (discussing the absence of race-based tax data from the IRS).

5. See About EJI, Equal Just. Initiative, https://eji.org/about/ [https://perma.cc/E6VX-9X53] [hereinafter About EJI] (last visited Jan. 24, 2022) (describing the Equal Justice Initiative's commitment "to ending mass incarceration and excessive punishment in the United States, to challenging racial and economic injustice, and to protecting basic human rights for the most vulnerable people in American society").

6. See, e.g., Matteo Tonello, Making the Business Case for Corporate Philanthropy, Harv. L. Sch. F. on Corp. Governance (Aug. 20, 2011), https://corpgov.law.harvard.edu/2011/08/20/making-the-business-case-for-corporate-philanthropy/ [https://perma.cc/QR4H-CALP] (footnote omitted) ("Corporate giving programs can provide a competitive advantage when they are well designed and carefully executed. For example, charitable contributions can increase the name recognition and reputation of a brand or company among consumers."); Chuck Robbins (@ChuckRobbins), Twitter (June 1, 2020), https://twitter.com/ChuckRobbins/status/1267570257952043008 [https://perma.cc/2N7H-TECB] (showing the CEO of Cisco publicly announcing a $5 million corporate commitment to various organizations dedicated to racial justice, which was liked and shared by social media users).

7. Edelman, Special Report: Brands and Racial Justice in America 6 (2020), https://www.edelman.com/sites/g/files/aatuss191/files/2020-06/2020%20Edelman%20Trust%20Barometer%20Specl%20Rept%20Brands%20and%20Racial%20Justice%20in%20America.pdf [https://perma.cc/H6AG-K62X] (finding that 60% of the U.S. general population agreed with the statement that how a brand responds to protests against racial injustice will influence their purchase and boycott behaviors); Nat Ives, Consumers Are More Likely to Use or Drop Brands Based on Racial Justice Response, Survey Finds, Wall St. J. (May 6, 2021), https://www.wsj.com/articles/consumers-are-more-likely-to-use-or-drop-brands-based-on-racial-justice-response-survey-finds-11620333257 (on file with the *Columbia Law Review*) (reporting on the results of a survey by the public relations firm Edelman that found "[p]eople have become more likely to use a new brand or stop using one because of its response to calls for racial justice"); see also Geeta Menon & Tina Kiesler, When a Brand Stands Up for Racial Justice, Do People Buy It?, Harv. Bus. Rev. (July 31, 2020), https://hbr.org/2020/07/when-a-brand-stands-up-for-racial-justice-do-people-buy-it [https://perma.cc/HHC7-FSXJ] (discussing how corporations can act authentically to ensure corporate actions that express solidarity with the Black Lives Matter movement resonate with consumers).

8. See Nancy Leong, Racial Capitalism, 126 Harv. L. Rev. 2151, 2153–54 (2013) (identifying racial capitalism as a systemic phenomenon in which white people and predominantly white institutions derive social and economic value from nonwhiteness).

private foundations, which are run by wealthy families or institutions, can benefit from public goodwill.[9]

Yet corporations and private foundations may benefit from public commitments to advance racial justice without supporting minority-led and minority-serving nonprofits. There are two reasons for this. First, there is currently no systematic data to determine whether a nonprofit organization is minority led or minority serving.[10] Not knowing whether a nonprofit is minority led or serving communities of color may prevent financial support from going to underfunded organizations and also may exacerbate existing inequalities, such as when only a few well-known or national organizations receive funding or when some minority groups are unrecognized in philanthropical giving.[11] It can also stymie individual giving because individuals may be less likely to have the resources to find minority-led or minority-serving nonprofits to which they wish to donate.

Second, there is no systematic way to determine whether these corporations and foundations that hold themselves out to fund underserved organizations are following through on their commitments,

---

9. See Steven Heydemann & Stefan Toepler, Foundations and the Challenge of Legitimacy in Comparative Perspective, *in* The Legitimacy of Philanthropic Foundations: United States and European Perspectives 3–4 (Kenneth Prewitt, Mattei Dogan, Steven Heydemann & Stefan Toepler eds., 2006) (explaining the importance of public legitimacy to private foundations); Tanya D. Marsh, A Dubious Distinction: Rethinking Tax Treatment of Private Foundations and Public Charities, 22 Va. Tax Rev. 137, 148 (2002) (noting that private foundations were established by wealthy individuals and families).

10. See infra notes 15–21 and accompanying text.

11. See, e.g., Glenn Gamboa, Billions Pledged for Racial Equity Giving Not Necessarily Adding Up to Systemic Change, Chron. of Philanthropy (June 2, 2021), https://www.philanthropy.com/article/billions-pledged-for-racial-equity-giving-not-necessarily-adding-up-to-systemic-change? (on file with the *Columbia Law Review*) (explaining that many organizations have yet to receive funding pledged to them); Julianne McShane, Beyond Crisis Funding: Black-Led Organizations that Saw a Surge in Donations Look for Lasting Impact, NBC News (Dec. 31, 2020), https://www.nbcnews.com/news/nbcblk/beyond-crisis-funding-black-led-organizations-saw-surge-donations-look-n1252539 [https://perma.cc/RYM4-LPWB] (explaining that even as relatively well-known organizations continue to receive funding, funding for organizations that are not well known has begun to dry up). Projects such as the Backing the Fight Fund were established to reach and support Black and Brown communities during the pandemic and the recent racial justice movement. But efforts are focused only on a single city. See Investing in Bold Actions for Black and Brown Lives, Chi. Beyond, https://chicagobeyond.org/backingthefightfund/ [https://perma.cc/57RY-B7LL] (last visited Jan. 24, 2022); see also Ctr. for Soc. Innovation, State of Philanthropy Among Asian Americans and Pacific Islanders: Findings and Recommendations to Strengthen Visibility and Impact 2 (2020), https://aapidata.com/wp-content/uploads/2020/09/aapi-state-of-philanthropy-2020-report.pdf [https://perma.cc/J3AT-5C8Y] (observing that Asian Americans and Pacific Islanders are calling for more visibility through timely, accurate, and detailed data on grantmaking and staff diversity, equity, and inclusion). For more information on diversity in the nonprofit realm, see generally Atinuke O. Adediran, Racial Allies, 90 Fordham L. Rev. 2151 (2022) [hereinafter Adediran, Racial Allies] (describing the importance of data on race and ethnicity in public interest law as a starting point towards addressing the lack of diversity among CEOs and board directors).

especially over time.[12] For example, the California Endowment has pledged to give $100 million to nonprofits led by Asian Americans and Pacific Islanders over a ten-year period.[13] The Endowment did not specify how it would actually do so, nor would the public know whether it actually does so.[14]

To currently determine whether a nonprofit is minority led or minority serving, or who its contributors are, one must wade through a range of data, including individual private foundations' tax filings;[15] corporate or nonprofit organizations' annual reports that are either selective, unavailable, or not up to date;[16] studies conducted by individual researchers or private institutions focused on organizations in some industries,[17] a

12. There are already early signs that corporations may not be following through on their commitments. See, e.g., Ifeoma Ajunwa, Can We Trust Corporate Commitments to Racial Equity?, Forbes (Feb. 23, 2021), https://www.forbes.com/sites/ifeomaajunwa/2021/02/23/can-we-trust-corporate-commitments-to-racial-equity/?sh=564a32424222/ (on file with the *Columbia Law Review*) (commenting on Google's claim to have distributed almost all of the $12 million pledged to support "racial justice organizations" by October 2020).

13. The California Endowment Commits $100 Million to Asian American and Pacific Islander Communities Across California, The Cal. Endowment, https://www.calendow.org/the-california-endowment-commits-100-million-to-asian-american-and-pacific-islander-communities-across-california/ [https://perma.cc/6NHQ-6NPL] (last visited Jan. 25, 2022).

14. Id. Similarly, Warner Brothers and Sony did not name a single organization they planned to contribute to, and Universal named only a handful. None of them specified when, exactly, the millions of dollars they promised to donate would be awarded. Drew Schwartz, A Year Ago, the 'Big Three' Record Companies Pledged $225 Million to Racial Justice. Where Did It Go?, Vice (May 25, 2021), https://www.vice.com/en/article/88ngp5/what-happened-to-the-money-record-companies-universal-sony-and-warner-pledged-to-racial-justice [https://perma.cc/EEC3-AM5C].

15. Private foundations are required to disclose their grantees or donees on IRS Form 900-PF. In addition, foundations routinely provide grantee lists on their websites and other avenues. See, e.g., Sixteen Major Donors and Foundations Commit Unprecedented $156 Million to Support Black, Latinx, Asian and Indigenous Arts Organizations, Ford Found. (Sept. 24, 2020), https://www.fordfoundation.org/the-latest/news/sixteen-major-donors-and-foundations-commit-unprecedented-156-million-to-support-black-latinx-asian-and-indigenous-arts-organizations/ [https://perma.cc/P8E7-SHAZ] (providing a list of twenty grantee organizations).

16. See, e.g., Financial Disclosures, NAACP, https://naacp.org/resources/financial-disclosures [https://perma.cc/5LWS-2UWG] (last visited Feb. 16, 2022) (listing several reports, none of which disclose donors).

17. See, e.g., BoardSource, Leading With Intent: BoardSource Index of Nonprofit Board Practices 7 (2021), https://leadingwithintent.org/wp-content/uploads/2021/06/2021-Leading-with-Intent-Report.pdf?hsCtaTracking=60281ff7-cadf-4b2f-b5a0-94ebff5a2c25%7C428c6485-37ba-40f0-a939-aeda82c02f38 [https://perma.cc/QCF8-WYNC] (examining the composition, practices, performance, and culture of nonprofit boards across more than twelve industries); Rick Cohen, Data Snapshot on Racial Justice Grantmaking, 5 Critical Issues Forum 38, 38–42 (2014), https://racialequity.org/wp-content/uploads/2018/11/CIF5Data-Snapshot-.pdf [https://perma.cc/MEZ9-CKFE] (reporting on foundation giving to communities of color and to civil rights and social action organizations); Christian González-Rivera, Courtney Donnell, Adam Briones & Sasha Werblin, Greenlining Inst., Funding the New Majority: Philanthropic Investment in Minority-Led Nonprofits 4 (2008), http://greenlining.org/wp-content/uploads/2013/02/FundingtheNewMajority.pdf

particular sector,[18] or a single industry;[19] or information found through social networks[20] or social media.[21]

This patchwork system is both surprising and avoidable because tax-exempt nonprofits, including Internal Revenue Code (IRC) section 501(c)(3) nonprofit organizations, are some of the most regulated entities in the United States.[22] Because of their tax-exempt status, 501(c)(3) organizations are required to disclose a barrage of financial and organizational data to the IRS and to the public annually through IRS Form 990, which is intended to help the IRS detect tax abuse.[23]

Form 990 contains information such as the full names of top managers and board directors and their compensation. However, it does not include information on race or ethnicity.[24] Form 990 also includes a range of attachments called Schedules. Schedule B in particular requires a list of major donors. While Form 990 is made publicly available to the general public, the IRC, motivated by a desire to protect donor privacy,

---

[https://perma.cc/GPG6-U5W6] (studying grants and dollars awarded by the largest foundations to minority-led nonprofit organizations).

18. See, e.g., Adediran, Racial Allies, supra note 11, at 2155–58 (studying the public interest law sector). In contrast to research on specific industries, BoardSource has examined a range of industries. See BoardSource, supra note 17, at 7 (examining more than twenty industries).

19. See, e.g., Shena Ashley & Claire Boyd, Addressing Racial Funding Gaps in the Nonprofit Sector Requires New Data Approaches, Urb. Inst.: Urb. Wire (Mar. 11, 2021), https://www.urban.org/urban-wire/addressing-racial-funding-gaps-nonprofit-sector-requires-new-data-approaches [https://perma.cc/ZW4P-NXJ9] (focusing on arts organizations of color).

20. See, e.g., Alex Daniels, How One Family Foundation Is Evolving to Refocus on Racial Equity, Chron. of Philanthropy (Mar. 15, 2021), https://www.philanthropy.com/article/the-perils-and-promise-of-transforming-a-family-foundation-to-focus-on-racial-equity (on file with the *Columbia Law Review*) (noting that the Satterberg Foundation gives its staff members discretion on organizations to fund); Starbucks Coffee (@Starbucks), Twitter (June 4, 2020), https://twitter.com/Starbucks/status/1268513794172411905 [https://perma.cc/5PRG-KSAP] (stating that Starbucks's partners would nominate organizations for funding as part of its support for Black Lives Matter); Mark Zuckerberg, Facebook (May 31, 2020), https://www.facebook.com/zuck/posts/10111969612272851 (on file with the *Columbia Law Review*) (claiming that Mark Zuckerberg and Facebook worked with "civil rights advisors and [Facebook] employees to identify organizations locally and nationally that could most effectively use" Facebook's financial support for organizations that serve communities of color).

21. See, e.g., Kalhan Rosenblatt, On Social Media, Donation Matching Raises Millions for George Floyd Protesters, NBC News (June 1, 2020), https://www.nbcnews.com/news/us-news/social-media-donation-matching-raises-millions-george-floyd-protesters-n1221301 [https://perma.cc/97UW-Y8CD] (discussing the $1.8 million dollars raised by individual donors on Twitter for the Brooklyn Community Bail Fund).

22. See Daniel J. Hemel, Tangled Up in Tax: The Nonprofit Sector and the Federal Tax System, *in* The Nonprofit Sector: A Research Handbook 144, 144 (Walter W. Powell & Patricia Bromley eds., 3d ed. 2020).

23. See infra notes 124–131 and accompanying text.

24. Hemel, supra note 22, at 156–57.

prohibits public disclosure of Schedule B. This prohibition makes donor information unknown.[25]

The lack of information on donors and on the race and ethnicity of top executives and board members is a major flaw that calls for an overhaul in order to address racial disparities in philanthropy and charitable contributions.[26]

Scholars have been enthusiastic about mandatory disclosures in areas ranging from corporate to employment law.[27] There is also extensive scholarship on government regulation of tax-exempt nonprofit organizations.[28] In the context of nonprofit disclosures, scholars have called for greater publicity and transparency in IRS filings to improve public knowledge and transparency, to monitor nonprofit organizations and the government, to protect the integrity of the electoral process, to help donors make better informed philanthropic choices, and to

---

25. For further discussion about Supreme Court precedent prohibiting the disclosure of donor information to protect their privacy, see infra Part III. The exception to this protection is for private foundations that are required to publicly identify their significant donors on Schedule B to Form 990-PF. About Schedule B (Form 990, 990-EZ, 990-PF), Schedule of Contributors, IRS, https://www.irs.gov/forms-pubs/about-schedule-b-form-990-990-ez-or-990-pf [https://perma.cc/9BG3-EQUV] [hereinafter IRS, About Schedule B] (last updated June 17, 2021).

26. To address existing wealth inequality among households across racial lines, Professor Dorothy Brown has proposed publishing tax data by race as the IRS already does for gender and age. Brown, supra note 4, at 202–03. Others have argued for mandatory disclosures of philanthropical donations in other contexts. See, e.g., Faith Stevelman Kahn, Pandora's Box: Managerial Discretion and the Problem of Corporate Philanthropy, 44 UCLA L. Rev. 579, 675–76 (1997) (arguing for disclosures of corporate charitable contributions for the benefit of shareholders); Note, The Political Activity of Think Tanks: The Case for Mandatory Contributor Disclosure, 115 Harv. L. Rev. 1502, 1515–24 (2002) (arguing for mandatory disclosure of contributors for think tanks).

27. See infra note 96; see also Cynthia Estlund, Just the Facts: The Case for Workplace Transparency, 63 Stan. L. Rev. 351, 355 (2011) (arguing that mandatory disclosures can improve labor markets by better informing employees' bargaining choices); Merritt B. Fox, Civil Liability and Mandatory Disclosure, 109 Colum. L. Rev. 237, 273–79 (2009) (proposing a civil liability design for mandatory securities disclosures violations); Merritt B. Fox, Randall Morck, Bernard Yeung & Artyom Durnev, Law, Share Price Accuracy, and Economic Performance: The New Evidence, 102 Mich. L. Rev. 331, 368–80 (2003) (examining mandatory disclosures' impact on the real economy and price share accuracy).

28. See, e.g. Eric C. Chaffee, Collaboration Theory: A Theory of the Charitable Tax-Exempt Nonprofit Corporation, 49 U.C. Davis L. Rev. 1719, 1734 (2016); Developments in the Law: Nonprofit Corporations, 105 Harv. L. Rev. 1578, 1612–13 (1992); Henry Hansmann, The Rationale for Exempting Nonprofit Organizations From Corporate Income Taxation, 91 Yale L.J. 54, 55 (1981); Henry B. Hansmann, Unfair Competition and the Unrelated Business Income Tax, 75 Va. L. Rev. 605, 606–07 (1989); Richard L. Hasen, The Surprisingly Complex Case for Disclosure of Contributions and Expenditures Funding Sham Issue Advocacy, 48 UCLA L. Rev. 265, 268–69 (2000); Jill R. Horwitz, Why We Need the Independent Sector: The Behavior, Law, and Ethics of Not-for-Profit Hospitals, 50 UCLA L. Rev. 1345, 1347–48 (2003); Oliver A. Houck, With Charity for All, 93 Yale L.J. 1415, 1419–20 (1984); Donald B. Tobin, Political Campaigning by Churches and Charities: Hazardous for 501(c)(3)s, Dangerous for Democracy, 95 Geo. L.J. 1313, 1319 (2007).

strengthen innovation in nonprofit charities.[29] Scholars have also called for the disclosure of race data in individual tax filings.[30] It is surprising then that scholars have yet to propose the mandatory disclosure of race and donor data for carefully articulated purposes, such as for social or racial justice purposes in nonprofit law. Supreme Court jurisprudence permits the public disclosure of donor information—against the constitutional protection of the freedom to associate—when the interests served by the disclosure are especially significant, such as to advance transparency and accountability.[31]

This Article argues for expanding the use of mandatory disclosures in nonprofit law. The mandatory disclosure of donor and race data can play a significant role in increasing funding to underfunded minority-led and minority-serving nonprofit charities. The Article makes two specific proposals. The first is for the IRS to require charities to disclose their institutional donors in Schedule B of IRS Form 990 and make the information publicly available. To prevent a violation of the First Amendment's right to freedom of association as defined by Supreme Court precedent, particularly the *Americans for Prosperity Foundation v. Bonta*[32] case, the donor disclosure requirement would be narrowly tailored to apply only to institutional donors—corporations, foundations, and the government—rather than individuals. As seen from public disclosures of pledges to donate, corporations and foundations already publicly announce their donees, so it is hardly the case that disclosing these donors on Schedule B would chill the freedom to associate, unless donations are made to organizations that are considered controversial. For organizations that consider themselves to be controversial and believe public disclosure would prevent institutional donors from donating to them, there should be an opt-out option from public disclosure of their Schedule Bs after a showing that disclosure can result in reprimand. Disclosing government donors is like disclosing other institutional donors since government

---

29. See, e.g., Lloyd Hitoshi Mayer, Nonprofits, Politics, and Privacy, 62 Case W. Rsrv. L. Rev. 801, 805 (2012) (arguing for mandatory disclosure of donors in organizations that engage in political activities but are not political organizations already subject to mandatory donor disclosures); David M. Schizer, Enhancing Efficiency at Nonprofits With Analysis and Disclosure, 11 Colum. J. Tax L. 76, 122 (2020) (arguing for nonprofits to disclose a program analysis to the public in order to improve oversight monitoring); George K. Yin, Reforming (and Saving) the IRS by Respecting the Public's Right to Know, 100 Va. L. Rev. 1115, 1119 (2014) (urging increased publicity for the public to monitor the government).

30. Brown, supra note 4, at 202–03 (discussing the need for race-coded tax data to improve understandings of the code's impact). See generally Jeremy Bearer-Friend, Should the IRS Know Your Race? The Challenge of Colorblind Tax Data, 73 Tax L. Rev. 1 (2019) (arguing that tax data should include race and ethnicity to meet goals of transparency).

31. See, e.g., McCutcheon v. Fed. Election Comm'n, 572 U.S. 185, 205 (2014) (holding that aggregate limits on political contributions restricted an individual's right to participate in the political process); Doe v. Reed, 561 U.S. 186, 195 (2010) (holding that disclosure of referendum petitions does not violate the First Amendment).

32. 141 S. Ct. 2373, 2383 (2021).

agencies similarly publicly disclose their grantees.[33] These proposals ensure that the law, while being protective of the freedom of association, does not impede disclosure for donors that want publicity, such as the many foundations and corporations that already announce or want to announce their contributions and commitments.

The second proposal is a modification of IRS Form 990 to include data on race and ethnicity. Form 990 already requires charities to provide the names of top managers and board directors. This proposal would add the race and ethnicity of each listed top executive or board member as well as information on the race and ethnicity of communities served.

Nevertheless, disclosure alone is not enough to increase funding to minority-led and minority-serving nonprofit charities. The government, through the IRS, can require disclosure but cannot ultimately require donors to fund certain organizations. Private enforcement mechanisms can be created to nudge—preserving freedom of choice but also steering donors—towards funding and sustaining funding to minority-led and minority-serving charities.[34]

The Article proceeds as follows. Part I defines the scope of the problem; that is, how the lack of donor and race data exacerbates inequalities. It also addresses why the IRS is the favored entity for collecting this information. Part II discusses the literature on mandatory disclosures, the history and purpose of IRS Form 990, and 501(c) regulations. Part III discusses Supreme Court jurisprudence on mandatory disclosures to show how current law would not impede the disclosure mandates proposed in Part IV. Part IV makes proposals to modify Schedule B to disclose institutional donors and Form 990 to disclose race and ethnicity data. It also addresses the costs and benefits of disclosure, enforcement concerns, and the role of nudges to increase funding through watchdog organizations, certifications, and the general public.

I. Scope of the Problem

The history of American philanthropy dates back to the arrival of Christopher Columbus in America and the philanthropical largesse of the Indigenous Americans who received him and other white Europeans and helped them adjust to the new world.[35] Over the course of American

---

33. See, e.g., Ryan Tarinelli, NY Court System Details Funding to Civil Legal Service Providers, N.Y. L.J. (Sept. 8, 2021), https://www.law.com/newyorklawjournal/2021/09/08/ny-court-system-details-funding-to-civil-legal-service-providers/?slreturn=20211015143206 (on file with the *Columbia Law Review*) (outlining state funding to dozens of civil legal services nonprofit organizations).

34. See Cass R. Sunstein & Lucia A. Reisch, Trusting Nudges: Toward a Bill of Rights for Nudging 1 (2019) (defining nudges as "interventions that steer people in particular directions but that also allow them to go their own way").

35. Robert H. Bremner, American Philanthropy: The Chicago History of American Civilization 5 (Daniel J. Boorstin ed., 2d ed. 1988).

history, individual and institutional philanthropy have grown in number and influence.[36] Philanthropic largesse has played a powerful role in shaping civil life and political affairs and has contributed immensely to social advancement.[37]

For a long time, however, philanthropists have been heavily criticized by academics, the press, and the public.[38] Despite the criticisms, nonprofit charities rely on private sources of funding to carry out their missions. This reliance on private sources of funding has consequences not only for board and organizational diversity but also for nonprofit priorities.[39] Private contributions are highly coveted because private funding often has few restrictions on how organizations can use funds compared to government grants.[40] In contrast, government grants often come with an extensive list of compliance and reporting requirements. It can be difficult for nonprofits to allocate staff time and resources to manage these obligations, and the attached strings reduce their flexibility in programming.[41] Private funding can come with donor priorities or restrictions but less

36. Aaron Horvath & Walter W. Powell, Seeing Like a Philanthropist: From the Business of Benevolence to the Benevolence of Business, *in* The Nonprofit Sector: A Research Handbook 81, 81–83 (Walter W. Powell & Patricia Bromley eds., 3d ed. 2020) (describing the growing influence of American philanthropy, beginning in the late nineteenth century).

37. Id. at 81 (examining the reciprocal dynamic between philanthropy and political systems); Bremner, supra note 35, at 1, 2 (describing American philanthropy as one of the "principal methods of social advance").

38. See, e.g., Atinuke O. Adediran, The Relational Costs of Free Legal Services, 55 Harv. C.R.-C.L. L. Rev. 357, 378 (2020) [hereinafter Adediran, Relational Costs] (arguing that lawyer pro bono work sometimes neglects the needs of poor people); Kate Andrias & Benjamin I. Sachs, Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality, 130 Yale L.J. 546, 599–600 (2021) (noting that, when organizations that serve low-income people receive most of their funding from elite donors, the democratic character of such organizations can be undermined). See generally Anand Giridharadas, Winners Take All: The Elite Charade of Changing the World 24 (2018) (criticizing philanthropists for their rhetoric of wanting to "change the world," despite preserving the status quo and obscuring their role in causing the problems they later seek to solve); Zoë Beery, The Rich Kids Who Want to Tear Down Capitalism, N.Y. Times (Nov. 27, 2020), https://www.nytimes.com/2020/11/27/style/trust-fund-activism-resouce-generation.html (on file with the *Columbia Law Review*) (critiquing traditional forms of charity and discussing the growing movement towards wealth redistribution as a form of philanthropy).

39. Atinuke O. Adediran, Nonprofit Board Composition, 83 Ohio St. L.J. (forthcoming 2022) (manuscript at 29–56), https://ssrn.com/abstract=3755034 [https://perma.cc/VD64-DNYM] [hereinafter Adediran, Nonprofit Board] (examining data on racial and gender compositions of nonprofit boards and discussing its impact on nonprofit decision making); Adediran, Racial Allies, supra note 11, at 2171–87 (describing the importance of data on race and ethnicity in public interest law as a starting point towards addressing the lack of diversity among CEOs and board directors).

40. Adediran, Nonprofit Board, supra note 39 (manuscript at 22).

41. Hee Soun Jang & Richard C. Feiock, Public Versus Private Funding of Nonprofit Organizations: Implications for Collaboration, 31 Pub. Performance & Mgmt. Rev. 174, 177 (2007).

frequently includes the extensive obligations of government funding.[42] Foundations and corporations are important sources of funding for charities, accounting for about 22% of funding in 2019.[43]

There is no comprehensive or national data on funding for nonprofit organizations in general, which limits the available data on funding for minority-led and minority-serving organizations.

Publicly available government data is crucial to not only understanding racial and ethnic disparities but also to establishing laws and policies to address these disparities head-on. In January 2021, President Biden signed the "Executive Order on Advancing Racial Equity and Support for Underserved Communities Through the Federal Government."[44] Section 9 of the executive order established an "Equitable Data Working Group,"[45] co-chaired by the chief statistician of the United States. The administration created the working group because "[m]any [f]ederal datasets are not disaggregated by race, ethnicity, . . . or other key demographic variables."[46] "This lack of data has cascading effects and impedes efforts to measure and advance equity."[47] The administration recognized that the first step to promoting equity was to gather the data necessary to inform that effort.[48]

There is also no clear definition of a minority-led or minority-serving organization. Advocacy groups have attempted to define a minority-led nonprofit organization as one whose board of directors comprises at least 50% racial or ethnic minorities[49] or one with a CEO who is a racial or ethnic minority.[50] A nonprofit that serves communities of color has been defined as one whose mission statement and charitable programs aim to serve and empower minority communities.[51]

Compare this to minority-serving colleges and universities. There is a federal standard for designation as a minority-serving institution,[52] and the

---

42. See, e.g., ChiaKo Hung & Jessica Berrett, Service Delivery Under Pressure: The Effect of Donor-Imposed Financial Restrictions, 44 Pub. Performance & Mgmt. Rev. 580, 582–83 (2021).

43. Nat'l Philanthropic Tr., supra note 1.

44. Exec. Order No. 13,985, 86 Fed. Reg. 7009, 7009–13 (Jan. 20, 2021).

45. Id. at 7011.

46. Id.

47. Id.

48. Id.

49. González-Rivera et al., supra note 17, at 5.

50. Phila. Afr. Am. Leadership F., How African American-Led Organizations Differ From White-Led Organizations: Research Report on African American Non-Profit Organizations in Philadelphia 7 (2015), https://issuu.com/urbanaffairscoalition/docs/paalf-executive-summary-web [https://perma.cc/W4XB-PWVV].

51. See González-Rivera et al., supra note 17, at 5.

52. Institutions are classified as minority-serving based on either one of two separate criteria: legislation or the percentage of minority student enrollment. In terms of legislation, in Title III of the Higher Education Act of 1965, Congress identified a specific set of accredited institutions that had been founded prior to 1964 and whose primary mission was

U.S. Department of Education provides lists of postsecondary institutions enrolling significant percentages of minority students.[53] Michael Bloomberg recently made a $150 million gift to Johns Hopkins University to facilitate targeted recruitment from historically Black colleges and other minority-serving institutions to diversify their doctorate programs.[54] With the gift, Johns Hopkins "plans to create about 100 new slots for students who earned bachelor's degrees from historically Black colleges and universities and hundreds of other schools that meet a federal standard for designation as minority-serving institutions" in order to improve the lack of racial and ethnic minorities at the doctorate level.[55] There is a federal standard making both the giving and the monitoring of the Bloomberg gift a possibility. This is not the case for certain nonprofit charities, particularly those that serve low-income people.

Corporate commitments have largely focused on minority-serving nonprofits, while commitments made by private foundations have generally—although not exclusively—focused on minority-led organizations.[56] Corporations and private foundations are distinct, and the benefits that accrue to them in making public commitments are also distinct. Corporations are publicly held, for-profit entities whose primary purpose is profit maximization.[57] Private foundations are nonprofit organizations

---

the education of African Americans as Historically Black Colleges and Universities (HBCUs). Tribal Colleges and Universities (TCUs) are also designated by law as minority-serving institutions. Enrollment-based criteria were used to identify institutions that served substantial proportions of minority students but did not have legal status as an HBCU or TCU. Institutions that enroll at least 25% of a specific minority group are designated as "minority-serving" for that group. As enrollment patterns change over time, and as the population of minority students grows overall, the number of minority-serving institutions that are identified through enrollment-based criteria also changes. Nat'l Ctr. for Educ. Stat., Characteristics of Minority-Serving Institutions and Minority Undergraduates Enrolled in These Institutions: Postsecondary Education Descriptive Analysis Report 6–8 (2007), https://nces.ed.gov/pubs2008/2008156.pdf [https://perma.cc/YP35-MX8S].

53. Lists of Postsecondary Institutions Enrolling Populations With Significant Percentages of Undergraduate Minority Students, U.S. Dep't of Educ., https://www2.ed.gov/about/offices/list/ocr/edlite-minorityinst.html#ftn1 [https://perma.cc/4J9J-MR7Q] (last visited Jan. 25, 2022).

54. Nick Anderson, Bloomberg Is Giving Johns Hopkins $150 Million to Diversify Science PhD Programs, Wash. Post (May 11, 2021), https://www.washingtonpost.com/education/2021/05/11/bloomberg-john-hopkins-phd-diversity/ (on file with the *Columbia Law Review*).

55. Id.

56. See supra note 2 and accompanying text.

57. See Kenneth E. Scott, Corporation Law and the American Law Institute Corporate Governance Project, 35 Stan. L. Rev. 927, 927 (1983). A growing area of corporate law emphasizes corporate purpose beyond profit maximization to include protecting the interests of a broad range of stakeholders—including employees, suppliers, and communities. See, e.g., Ofer Eldar, Designing Business Forms to Pursue Social Goals, 106 Va. L. Rev. 937, 939 (2020); Stavros Gadinis & Amelia Miazad, Corporate Law and Social Risk, 73 Vand. L. Rev. 1401, 1404 (2020); Oliver Hart & Luigi Zingales, Companies Should Maximize Shareholder Welfare Not Market Value, 2017 J.L. Fin. & Acct. 247, 248; David Benoit, Move Over, Shareholders: Top CEOs Say Companies Have Obligations to Society,

controlled by wealthy entities with privately controlled endowments whose assets are held for the benefit of current and future public charities.[58] Private foundations act as a conduit to transfer private wealth to charitable beneficiaries "in a way that generates current charitable contribution deductions . . . and future virtually tax-exempt investment returns."[59]

But corporations and private foundations are similar in that they are controlled by wealthy families and institutions and have much to gain from making public commitments to support racial justice. Corporations gain profits from the increased purchase of their goods or services and public goodwill from being seen as do-gooders in the eyes of the public, while private foundations gain overall legitimacy and public goodwill.[60] This Article therefore treats corporations and foundations similarly in their support for minority-led or minority-serving organizations.

Limited available research reveals that minority-led and minority-serving nonprofit organizations are underfunded, smaller in terms of staff and volunteers, disproportionately likely to have higher amounts of restricted assets from government grants,[61] more dependent on government grants, and more likely to be impacted by economic downturns in comparison to organizations with white individuals at the helm.[62] Minority-

---

Wall St. J., https://www.wsj.com/articles/business-roundtable-steps-back-from-milton-friedman-theory-11566205200 (on file with the *Columbia Law Review*) (last updated Aug. 19, 2019).

58. Richard Sansing & Robert Yetman, Governing Private Foundations Using the Tax Law, 41 J. Acct. & Econ. 363, 364 (2006) (delineating the differences between private foundations and public charities).

59. Id.; see also David C. Hammack, American Debates on the Legitimacy of Foundations, *in* The Legitimacy of Philanthropic Foundations: United States and European Perspectives, supra note 9, at 49 (defining philanthropic foundations as large stocks of wealth controlled by independent boards of trustees committed to general charitable purposes).

60. See Heydemann & Toepler, supra note 9, at 4 (discussing the challenges of legitimacy for foundations).

61. Unrestricted funds allow nonprofit organizations the flexibility to cover unexpected costs, plan for the longer term, or pay for operational expenses that may not be covered by government funding or other sources. See Gina Lobaco, Going Hollywood, Daily J. (May 2, 2007), https://www.dailyjournal.com/articles/258318-going-hollywood [https://perma.cc/3XS5-R33L] (explaining the advantages of unrestricted funding for legal services and advocacy organizations).

62. The definition of minority-led and minority-serving organizations varies, but the conclusions are the same in terms of relative disadvantage to white-led organizations. See, e.g., Marla Cornelius, Rick Moyers & Jeanne Bell, Daring to Lead 2011: A National Study of Nonprofit Executive Leadership 8 (2011), http://daringtolead.org/wp-content/uploads/Daring-to-Lead-2011-Main-Report-online.pdf [https://perma.cc/3D9M-BY8C] (noting that more minority-led nonprofits than white-led nonprofits were severely impacted by the 2008 recession); Dorsey et al., Racial Equity and Philanthropy, supra note 3, at 11, 13 (showing that average revenues of Black-led organizations are 24% smaller than those of their white-led counterparts); Phila. Afr. Am. Leadership F., supra note 50, at 10 (finding organizations led by Black individuals are smaller, have fewer cash reserves, are more likely to rely on government grants, and are more vulnerable to recessions than their white-led counterparts); Sean Thomas-Breitfeld & Frances Kunreuther, Bldg. Movement Project,

led and minority-serving organizations are therefore more vulnerable to recessions and changes in government policies and more financially precarious than white-led organizations.[63] Research also suggests that minority-led and minority-serving organizations often struggle to raise funds in comparison to their white counterparts because of limited access to institutions and other networks that can provide financial support.[64] These disparities exist despite the fact that minority and white leaders often have similar educational backgrounds and fundraising skills.[65]

In July 2007, the U.S. House Committee on Ways and Means, Subcommittee on Oversight held hearings to examine whether private foundations serve the needs of diverse communities.[66] At the time, over one-third of the nation was from a minority group, and more than half of the poor, particularly the underserved poor, were minorities.[67] Experts testified that support for minority communities was small and not growing in pace with overall charitable giving.[68] Greenlining, a policy institute, testified that the top fifty foundations invested only about 3% of charitable giving in minority-led organizations.[69]

The Foundation Center conducted a longitudinal study from 1994 to 2001 based on 747 foundations and estimates of giving to communities of

---

Nonprofit Executives and the Racial Leadership Gap: A Race to Lead Brief 3 (2019), https://racetolead.org/wp-content/uploads/2019/05/ED.CEO-Race-to-Lead-Brief.pdf [https://perma.cc/7E95-6EKU] (showing smaller budget sizes for minority-led nonprofits as compared to white-led nonprofits); Paul Sullivan, In Philanthropy, Race Is Still a Factor in Who Gets What, Study Shows, N.Y. Times (May 1, 2020), https://www.nytimes.com/2020/05/01/your-money/philanthropy-race.html (on file with the *Columbia Law Review*) (last updated May 5, 2020) (discussing a report showing that nonprofit groups led by Black and Latinx directors lag behind organizations with white leaders in funding).

63. See supra note 62.

64. See Thomas-Breitfeld & Kunreuther, supra note 62, at 7.

65. See id. at 3, 7 ("[D]ifferences between people of color and white respondents in traditional measures of readiness for senior positions were generally small and not significant.").

66. Tax-Exempt Charitable Organizations: Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways & Means, 110th Cong. 172 (2007) [hereinafter Tax-Exempt Charitable Organizations Hearing].

67. See Suzanne Macartney, Alemayehu Bishaw & Kayla Fontenot, U.S. Census Bureau, Poverty Rates for Selected Detailed Race and Hispanic Groups by State and Place: 2007–2011, at 13 (2013), https://www2.census.gov/library/publications/2013/acs/acsbr11-17.pdf [https://perma.cc/F6GT-XG5F] (estimating minorities to account for roughly 36% of the total U.S. population but roughly 56% of those living in poverty in the country); Karen R. Humes, Nicholas A. Jones & Roberto R. Ramirez, Race and Hispanic Origin and the 2010 Census, U.S. Census Bureau (Mar. 24, 2011), https://www.census.gov/newsroom/blogs/random-samplings/2011/03/race-and-hispanic-origin-and-the-2010-census.html [https://perma.cc/V5EJ-GL8U] (noting that minorities make up the fastest growing demographic in the United States).

68. See, e.g., Tax-Exempt Charitable Organizations Hearing, supra note 66, at 171–73 (statement of Greenlining Institute) (reporting statistics indicating that, "[e]ven though grant giving as a whole has increased, grants to minority communities have decreased").

69. Id. at 172.

color, defined as "groups that could be identified as serving specific populations or grants whose descriptions specified a benefit for a specific population."[70] Despite the shortcomings in estimating giving data based on a definition that probably under- or overestimates funding to communities of color, the study's findings revealed that foundation giving to communities of color had not kept pace with overall increases in philanthropic support.[71]

In 2020, the National Committee for Responsive Philanthropy, an advocacy and watchdog organization that monitors charitable spending in the United States, examined the latest available data on twenty-five community foundations from 2016 to 2018.[72] It found that only 1% of the funding by the twenty-five foundations it studied was specifically designated for Black communities, even though 15% of the populations in the twenty-five cities studied were Black.[73]

Comprehensive data would show the prevalence of this funding disparity on an annual basis. Therefore, the first problem that this Article attempts to address is the lack of a clear definition of what a minority-led or minority-serving nonprofit is. This Article defines a minority-led public charity as one in which a substantial percentage of its board of directors includes racial or ethnic minorities or the CEO is a racial or ethnic minority.[74] This Article defines a minority-serving organization as one with a substantial percentage of clients who are racial or ethnic minorities or one that focuses on issues that disproportionately impact communities of color.[75]

---

70. Will Pittz & Rinku Sen, Applied Rsch. Ctr., Short Changed: Foundation Giving and Communities of Color 3 (2004), https://www.raceforward.org/sites/default/files/pdf/273bpdf.pdf [https://perma.cc/E2MB-NFK8]. The Foundation Center is now Candid, a nonprofit organization that gathers data and conducts research on the nonprofit sector. Candid, https://candid.org/ [https://perma.cc/C8V9-4DX6] (last visited Jan. 26, 2022).

71. See id. at 7.

72. Ben Barge, Brandi Collins-Calhoun, Elbert Garcia, Jeanné Lewis, Janay Richmond, Ryan Schlegel, Spencer Ozer & Stephanie Peng, Black Funding Denied: Community Foundation Support for Black Communities, Nat'l Comm. for Responsive Philanthropy (Aug. 26, 2020), https://www.ncrp.org/2020/08/black-funding-denied.html [https://perma.cc/ABK8-EVFB].

73. Id. Corporate giving is often combined with foundation giving in analysis. Before 2020, 6% of grants awarded for racial equity came from foundations or corporate giving. See Anna Koob, What Does Candid's Grants Data Say About Funding for Racial Equity in the United States?, Candid (July 24, 2020), https://blog.candid.org/post/what-does-candids-grants-data-say-about-funding-for-racial-equity-in-the-united-states/ [https://perma.cc/W6UU-A2KE] (tracking corporate and foundation pledges for racial equity since 2020).

74. See supra note 50 and accompanying text.

75. This Article does not provide a specific percentage of what would constitute minority led or minority serving because it would vary across public charities and localities. Others have, however, defined a minority-led or minority-serving nonprofit around the 50% range. A substantial percentage should not be less than 30% of the board population. See supra note 52 and accompanying text.

The current lack of clarity on minority-led and minority-serving organizations can mean that only a few well-known, often national, organizations receive philanthropical support, leaving relatively unknown nonprofit organizations underfunded.[76] It can also reduce individual giving—which constitutes a significant portion of philanthropical giving—to nonprofits that serve communities of color.[77]

To illustrate the gravity of this problem with real examples, take the nonprofit organization, EJI, which is one of the most well-known criminal justice organizations in the United States. EJI challenges the death penalty and excessive punishment and provides reentry assistance to formerly incarcerated people.[78] In its Form 990, it describes itself as working to "expose and correct racial bias in the criminal justice system for nearly 30 years" and providing "firsthand exposure to racially-biased mass incarceration as a major institutional system of racial inequality."[79]

In June 2020, Amazon announced a $10 million donation to EJI and nine other organizations, including the ACLU Foundation, Black Lives Matter, and the NAACP.[80] Amazon then decided to match its employees' donations, adding an additional $17 million for a total of $27 million to the ten organizations selected by Amazon's Black Employee Network.[81] Indeed, Amazon's selection of large, national organizations appears to mirror those of other similar corporations who have recently made pledges to fund racial equity, including multiple other pledges to EJI.[82]

76. See supra note 11 and accompanying text.

77. See supra note 12 and accompanying text. In the United States, individuals generally give substantially more—70% of all giving—than corporations and foundations. See Giving Statistics, Charity Navigator, https://www.charitynavigator.org/index.cfm?bay=content.view&cpid=42 [https://perma.cc/Y488-PRX5] (last visited Jan. 25, 2022).

78. About EJI, supra note 5.

79. Equal Just. Initiative, Schedule O: Supplemental Information to Form 990 or 990-EZ (Jan. 22, 2020), https://projects.propublica.org/nonprofits/display_990/631135091/10_2020_prefixes_61-68%2F631135091_201909_990_2020101917388143 [https://perma.cc/JPN9-8DE9] [hereinafter EJI, Form 990].

80. Amazon Donates $10 Million to Organizations Supporting Justice and Equity, Amazon, https://www.aboutamazon.com/news/policy-news-views/amazon-donates-10-million-to-organizations-supporting-justice-and-equity [https://perma.cc/EMW3-RJQD] (last updated July 14, 2020).

81. Id.

82. For example, Cisco also made a pledge of $5 million to EJI, Black Lives Matter, and the NAACP LDF. See Janice Bitters, San Jose-Based Cisco Promises $5M for Charities Fighting Racism, Discrimination, San José Spotlight (June 2, 2020), https://sanjosespotlight.com/san-jose-based-cisco-promises-5m-for-charities-fighting-racism-discrimination/ [https://perma.cc/G9AW-J8U3]. Coca-Cola also made a pledge of $2.5 million to EJI, the NAACP LDF, and the Center for Civil and Human Rights. See James Quincey, Where We Stand on Social Justice, Coca-Cola Co. (June 4, 2020), https://www.coca-colacompany.com/news/where-we-stand-on-social-justice [https://perma.cc/VE8C-QCH9].

Corporate internal and social networks are more likely to be familiar with organizations that are large, prestigious, or have a national reach.[83]

Now, take a nonprofit organization such as Coalition for the Homeless, a 501(c)(3) public charity in New York City. Its Form 990 indicates that it "provides crises services to over 14,000 households—both homeless and at imminent risk of homelessness—annually."[84] The organization provides food, clothing, diapers, school supplies, and assistance with obtaining documentation, government benefits, housing applications, and mental health and substance abuse treatment.[85] It also provides one-time emergency grants for individuals who have significant rent arrears, which allows families and individuals on the edge of homelessness to remain stably housed.[86] There is nothing in its Form 990 that indicates that Coalition for the Homeless is a minority-serving organization dedicated to addressing the current eviction crises. Its Form 990 does not include any mention of the race of the communities served, even in its description of its mission and history.

However, Coalition for the Homeless is rightfully an organization that serves communities of color. In April 2021, it issued a report titled "State of the Homeless 2021."[87] The report notes that the majority of homeless single adults in its service areas are people of color and people living with disabilities.[88] Indeed, in 2021, the percentage of homeless adults and households who are racial or ethnic minorities in New York City is at least 89%, up to a maximum of 93%.[89] These individuals frequently cycle through "the criminal justice system, hospitals, nursing homes, the streets, and shelters."[90] In providing these individuals with a variety of essential goods and services, Coalition for the Homeless rightfully should be considered a minority-serving organization.

But the fact that Coalition for the Homeless is a minority-serving organization is hidden in this annual report on the state of homelessness.

---

83. See Marc Gunther, Rich Charities Keep Getting Richer. That Means Your Money Isn't Doing as Much Good as It Could., Vox (Apr. 24, 2017), https://www.vox.com/the-big-idea/2017/4/24/15377056/big-charities-best-charities-evaluation-nonprofit [https://perma.cc/AX2S-3GG3] (explaining that well-resourced nonprofit organizations are more likely to be funded than smaller ones with fewer resources).

84. Coal. for the Homeless Inc, Return of Organization Exempt From Income Tax (Form 990) (May 14, 2019), https://projects.propublica.org/nonprofits/display_990/133072967/06_2019_prefixes_06-16%2F133072967_201806_990_2019061516417862 [https://perma.cc/4T3Y-AVRE].

85. Id.

86. Id.

87. Coal. for the Homeless, State of the Homeless 2021 (2021), https://www.coalitionforthehomeless.org/wp-content/uploads/2021/04/StateOfTheHomeless2021.pdf [https://perma.cc/V9WL-XU97].

88. Id. at 19.

89. See id. at 27 (showing the race and ethnicity of adults and family households sleeping in New York City homeless shelters).

90. Id. at 19.

Because the annual report only looks at a single year and the website does not provide reports from previous years, the public would not be able to track changes in its client communities.

The second problem this Article addresses is the lack of any measure of accountability for corporations and foundations who hold themselves out as supporters of minority-led or minority-serving organizations, especially over time.[91]

Accountability is complicated by the way in which the media—including Forbes and U.S. News & World Report—have blurred several distinctions in reporting corporate commitments, including (1) whether support is to minority-owned, for-profit businesses or minority-led nonprofit organizations; and (2) whether the commitment is to specific organizations, such as EJI, or particular goals, such as racial justice.[92] Foundation commitments to minority-led nonprofits have been much clearer, although there can still be a blurring of the identified causes and foundation funds.[93]

The results of a lack of accountability are already evident. In June 2020, Warner Music Group, Sony Music Group, and Universal Music Group announced they would donate $225 million to racial and social justice organizations.[94] Since then, it has not been clear which nonprofit organizations have received funding from any of these organizations or how much funding they've received.[95]

This information would require a year-by-year analysis, which can be obtained reliably from disclosure modifications that this Article proposes in Part IV. Donor and race-related data would not only raise the chance of increasing funding to minority-led and minority-serving public charities but also create an avenue of accountability for private funders who benefit from public commitments to support minority organizations.

II. MANDATORY DISCLOSURES AND TAX-EXEMPT REGULATIONS

This Part provides an overview of the posture of mandatory disclosures, the history and purpose of IRS tax-exempt disclosures, and disclosure benefits to 501(c)(3) charities, which is important for an understanding of why the disclosure of race and donor data through the IRS is a viable approach for increasing corporate and foundation funding to minority-led and minority-serving nonprofits.

---

91. See supra note 12 and accompanying text.
92. See supra note 2 and accompanying text.
93. See supra note 2 and accompanying text.
94. Schwartz, supra note 14.
95. Id.

A. *Mandatory Disclosures*

The literature on government-mandated disclosures in both the for-profit and nonprofit sectors generally favors disclosure.[96]

For tax-exempt charities, scholars have argued for mandatory disclosures to improve public knowledge, accountability, and transparency; to monitor nonprofit organizations and the government; to protect the integrity of the electoral process; to help donors make better informed philanthropic choices; to strengthen innovation in nonprofit charities; and to assist the IRS in its regulatory role.[97]

Major scandals have raised public skepticism about the methods, motives, and performance of nonprofit organizations, which has called for more stringent regulation and detailed information disclosure.[98] Professor Daniel Hemel has argued, for example, that the disclosure of compensation of top managers on Form 990 relieves some of the pressure on the IRS to enforce excess benefit rules.[99] Since the data is public, the IRS can focus on ensuring that organizations accurately disclose the executive director's compensation and can then rely on donors, the media, and others to judge whether compensation was excessive.[100]

---

96. See, e.g., Caroline Mala Corbin, Compelled Disclosures, 65 Ala. L. Rev. 1277, 1308–39 (2014) (discussing disclosures in the contexts of tobacco warnings, abortion, and crisis pregnancy centers); Estlund, supra note 27, at 355 (arguing that mandatory disclosures can improve labor markets by better informing employee's bargaining choices); Fox et al., supra note 27, at 355 (discussing mandatory disclosures in the context of securities laws); Geoffrey A. Manne, The Hydraulic Theory of Disclosure Regulation and Other Costs of Disclosure, 58 Ala. L. Rev. 473, 508 (2007) (criticizing expansive disclosure regulations); Christopher J. Morten & Amy Kapczynski, The Big Data Regulator, Rebooted: Why and How the FDA Can and Should Disclose Confidential Data on Prescription Drugs and Vaccines, 109 Calif. L. Rev. 493, 541 (2021) (urging the FDA to proactively disclose all safety and efficacy data for vaccines); Thomas J. Schoenbaum, The Relationship Between Corporate Disclosure and Corporate Responsibility, 40 Fordham L. Rev. 565, 587 (1972) (suggesting certain categories of corporate disclosure requirements under the federal securities laws); Cynthia A. Williams, The Securities and Exchange Commission and Corporate Social Transparency, 112 Harv. L. Rev. 1197, 1207 (1999) (arguing for SEC mandates of social disclosures). But see Joshua D. Blank, The Timing of Tax Transparency, 90 S. Cal. L. Rev. 449, 455–57 (2017) (advocating for public disclosure of ex ante individual tax disclosure while noting some reservations to ex post tax disclosure).

97. See, e.g., supra notes 27–29 and accompanying text; see also Hemel, supra note 22, at 158 (arguing that mandatory disclosure requirements for tax-exempt organizations assist the IRS in enforcement). See generally 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 (2005) (evaluating disclosure requirements as a method to increase nonprofit accountability).

98. See, e.g., Karen A. Froelich, The 990 Return: Beyond the Internal Revenue Service, 8 Nonprofit Mgmt. & Leadership 141, 144 (1997).

99. Hemel, supra note 22, at 158.

100. Id.

Despite the general scholarly enthusiasm for mandatory disclosures, some scholars have questioned their efficacy in a range of contexts.[101] Yet most of these criticisms have been limited to disclosures made by individuals rather than entities or when disclosures are seen as an end rather than a means to make meaningful change.[102]

However, none of the academic scholarship in support of or criticizing mandatory disclosures has been in the context of the disclosure of donor or race data in nonprofit law. This is the first scholarly article addressing both claims. Though this is not the first article to argue for the disclosure of race data in tax law, scholarship on the disclosure of race data in tax law has primarily been about individual tax law. Professors Dorothy A. Brown and Jeremy Bearer-Friend have been major advocates for the mandatory disclosure of race and ethnicity data to address racial bias in individual taxation.[103] They too, however, have limited their arguments to the individual tax context.

The only exception is outside of the academic context. The Urban Institute has advocated for imputing racial identifiers in Form 990 to analyze racial gaps in financial outcomes for nonprofit organizations.[104] Yet the Urban Institute stops short of proposing ways to go about obtaining race data in Form 990, nor does it address the disclosure of donor data.[105] More importantly, the Urban Institute does not address how to get from disclosure to increased funding for nonprofit charities.

Therefore, neither scholars nor advocates have addressed the disclosure of donor or race and ethnicity data in nonprofit organizations to serve as a catalyst to increase funding for nonprofit organizations led by or serving communities of color. Importantly, the disclosures proposed here—which are generally favorable to the institutional parties being

---

101. See, e.g., Omri Ben-Shahar & Carl E. Schneider, The Failure of Mandated Disclosure, 159 U. Pa. L. Rev. 647, 651 (2011) (criticizing the efficacy of disclosures made by businesses, governments, and regulators to help individuals make well-reasoned decisions); Frank H. Easterbrook & Daniel R. Fischel, Mandatory Disclosure and the Protection of Investors, 70 Va. L. Rev. 669, 681 (1984) (arguing that mandatory disclosures may not bar fraud); David Hess, The Transparency Trap: Non-Financial Disclosure and the Responsibility of Business to Respect Human Rights, 56 Am. Bus. L.J. 5, 9 (2019) (arguing disclosures in their current form do not encourage positive organizational change).

102. See supra note 101.

103. Brown, supra note 4, at 202–03 (proposing the IRS publish tax data by race to better address wealth inequality); Bearer-Friend, supra note 30, at 37 (arguing that tax data should include race and ethnicity in order to meet transparency goals). In another context, Professors Veronica Root Martinez and Gina-Gail Fletcher recently argued for the disclosure of race data in securities law to provide institutional investors with information on race diversity and to serve as an avenue to measure corporate racial equity goals. See Martinez & Fletcher, supra note 2, at 905.

104. Ashley & Boyd, supra note 19.

105. See id. (concluding that "political and administrative challenges" would make it unlikely to find a solution to the lack of race data in Form 990).

compelled to disclose and will likely be supported rather than opposed—differ from disclosures that parties may generally oppose.[106]

B. *History and Purpose of Tax-Exempt Disclosures in IRS Form 990*

1. *History*. — Filing requirements for tax-exempt organizations are set forth in IRC 6033(a)(1). Unless specifically excused, all 501(c) tax-exempt organizations must file an annual Form 990.[107] Form 990 was the first comprehensive effort of the government to gather statistical data on tax-exempt organizations through the Revenue Act of 1943, which required filings with the IRS.[108] The primary purpose of the 1943 Act was to provide Congress with sufficient data to determine the need for restrictions on charitable organizations through annual tax filings.[109] The legislature was concerned that many tax-exempt nonprofit organizations were engaging in for-profit ventures, such as operating apartments, office buildings, and other businesses in direct competition with individuals and corporations that had to pay taxes, which was a loophole for tax evasion.[110] Requiring tax-exempt organizations to file returns "stating specifically the items of gross income, receipts, and disbursements and such other information, and [to] keep such records" was the first step toward "closing this existing loophole and requiring the payment of tax, and the protection of legitimate companies against this unfair competitive situation."[111] The organizations that were mostly concerning to the legislature at the time were private foundations.[112]

The 1943 Act excluded religious, educational, and charitable organizations and organizations for the prevention of cruelty to children or animals from the filings requirement.[113] For those organizations required to file Form 990, returns were subject to the same disclosure rules

106. See, e.g., Cydney Posner, SEC Approves Nasdaq "Comply-or-Explain" Proposal for Board Diversity, Harv. L. Sch. F. on Corp. Governance (Aug. 26, 2021), https://corpgov.law.harvard.edu/2021/08/26/sec-approves-nasdaq-comply-or-explain-proposal-for-board-diversity/ [https://perma.cc/W78E-V73G] (describing opposition to a disclosure mandate for public companies to report board diversity information).

107. IRS, Instructions for Form 990 Return of Organization Exempt From Income Tax 2 (2021), https://www.irs.gov/pub/irs-pdf/i990.pdf [https://perma.cc/54TV-G3SD] [hereinafter IRS, Form 990 Instructions]. Organizations with gross receipts less than $200,000 and totals less than $500,000 can file Form 990-EZ, Short Form Return of Organization Exempt From Income Tax, and are excluded from the proposals in this Article. Id. at 3.

108. Paul Arnsberger, Melissa Ludlum, Margaret Riley & Mark Stanton, A History of the Tax-Exempt Sector: An SOI Perspective, Stat. Income Bull. 105, 106 (2008), https://www.irs.gov/pub/irs-soi/tehistory.pdf [https://perma.cc/JQ23-Z953].

109. H.R. Rep. No. 78-871, at 24 (1943).

110. Id. (stating concerns that large numbers of exempt organizations are avoiding tax payments).

111. Id. at 24–25.

112. Id. at 24.

113. Revenue Act of 1943, Pub. L. No. 78-235, § 117, 58 Stat. 21, 36–37 (1944).

applicable to all taxpayers at the time and treated as public records accessible by those authorized by order of the President.[114] The Form 990 at the time was only two pages long and included only three questions, an income statement, and a balance sheet.[115] It also included attached Schedules for the names and addresses of individuals paid a salary of $4,000 or more and donors who contributed more than $4,000.[116]

By December 1944, a total of 102,155 Form 990 returns had been filed.[117] The U.S. Treasury Department put together a detailed report of the activities and resources of these nonprofits and determined that despite the exemptions from filing, a considerable number—8,901—of charitable, scientific, educational, and similar organizations nevertheless filed Form 990s.[118] The report concluded that further studies were needed to decide whether the exemption provisions were a "loophole for tax evasion and avoidance."[119]

In 1950, President Harry S. Truman noted the need for reform of tax-exempt organizations in his address to Congress.[120] His remarks made clear that the problems in the pre-1943 Act were still an issue because "[t]here are also instances where the exemption accorded charitable trust funds has been used as a cloak for speculative business ventures, and the funds intended for charitable purposes, buttressed by tax exemption, have been used to acquire or retain control over a wide variety of industrial enterprises."[121] Following President Truman's message, the House Committee on Ways and Means conducted extensive hearings on various abuses involving tax-exempt organizations, focusing on abuses by private foundations.[122] Several witnesses supported the expansion of reporting and disclosure requirements for tax-exempt organizations.[123]

The 1950 Act added the first public disclosure requirement of Form 990, but it had to be done through written request to the IRS.[124] The Act

---

114. See I.R.C. § 55(a)(1) (1940).

115. Cheryl Chasin, Debra Kawecki & David Jones, G. Form 990, at 1, https://www.irs.gov/pub/irs-tege/eotopicg02.pdf [https://perma.cc/T8XM-8FA5] (last visited Jan. 26, 2022).

116. Id.

117. The Tech. Staffs of the Joint Comm., the Treasury & the Bureau of Internal Revenue, 79th Cong., Preliminary Rep. on Tax-Exempt Organizations, at iii (1945).

118. Id. at 17.

119. Id. at iii.

120. Harry S. Truman, President, Special Message to the Congress on Tax Policy. (Jan. 23, 1950), https://www.presidency.ucsb.edu/documents/special-message-the-congress-tax-policy [https://perma.cc/W7LF-ULXG].

121. Id.

122. Thomas A. Troyer, The 1969 Private Foundation Law: Historical Perspective on Its Origins and Underpinnings, 27 Exempt Org. Tax Rev. 52, 53 (2000) ("The present law permits the transfer of business investments to tax-exempt trusts and foundations for these purposes without payment of estate or gift taxes.").

123. Id.

124. Revenue Act of 1950, Pub. L. No. 81-814, sec. 341, § 153, 64 Stat. 906, 960.

also expanded what needed to be disclosed to address abusive transactions, requiring extensive financial information, including annual furnishing of gross income, expenses, accumulated income within the year, accumulated income as of the beginning of the year, disbursements from principal in the current and prior years for exempt-purpose activities, and a balance sheet.[125] The 1950 Act continued to exclude religious, scientific, and charitable organizations from Form 990 filing requirements.[126] The rules designed to prevent abuses, expand reporting, and require disclosure focused largely on private foundations because of the belief that such entities were more likely to be involved in prohibited transactions since they were often controlled by a single family or donor.[127] Public charities possessed "inherent checks" against abuses flowing from being controlled by boards of directors who were independent of any one donor and who would review and take possible action against abuse if necessary.[128]

That changed in 1958 when Congress passed the Technical Amendments, which expanded the disclosure rules.[129] The Amendments expanded the requirement of public inspection to organizations described in section 501(c) and (d), which included public charities.[130] It also amended section 6104, relating to the publicity of information required from exempt organizations, by making an organization's Form 990 and other documents "open to public inspection at the national office of the Internal Revenue Service" or "at the appropriate field office of the Internal Revenue Service."[131] Anything that would reveal trade secrets or information that could adversely affect national defense were withheld from public inspection.[132]

The Tax Reform Act of 1969 expanded the reach and types of disclosures required in Form 990.[133] With limited exceptions, the 1969 Act required all tax-exempt organizations to file Form 990.[134] The only organizations that did not need to file were churches and church-related entities, organizations with gross receipts of $5,000 or less, and organizations exempted from filing requirements by the Secretary of the

---

125. Id.

126. Id. sec. 331, § 3813(a), 64 Stat. at 957.

127. S. Rep. No. 81-2375, at 38 (1950); Marsh, supra note 9, at 148 (stating that initial nonprofit regulations were intended to address concerns about individual family-controlled foundations).

128. Troyer, supra note 122, at 63–64.

129. Technical Amendments Act of 1958, Pub. L. No. 85-866, § 75, 72 Stat. 1606, 1660–61.

130. Id.

131. Id.

132. Id.

133. Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 487.

134. Id. § 508, 83 Stat. at 494–95.

Treasury.[135] The 1969 Act also provided that returns filed by tax-exempt organizations must be provided to appropriate state officials, that annual Form 990s filed by private foundations must be made available at the foundation's office for at least 180 days, and that the foundation was required to publicize their availability.[136]

The 1969 Act also added a key provision that the names and addresses of top managers must be disclosed.[137] Notably, it included a provision barring the public disclosure of the names and addresses of donors—except for contributors to private foundations, which must be disclosed.[138] The purpose of the additional disclosure requirements was to provide the IRS with information needed to enforce tax laws.[139] The 1969 Finance Committee Report to Congress revealed that Congress included the nondisclosure of donor information because "some donors prefer to give anonymously" and "[t]o require public disclosure . . . might prevent the gifts."[140]

The Omnibus Budget Reconciliation Act of 1987 created more public transparency—although it did not outright require public distribution—by requiring tax-exempt organizations to make copies of their three most recent Forms 990 available for public inspection at the organization's offices, rather than submitting a request to the IRS.[141] The rationale behind additional public transparency was to enforce tax laws so that only eligible organizations took advantage of tax exemptions and for public accountability "because most such charities regularly solicit contributions or receive other support from the public" and "the public should have ready access to current information about the activities of these organizations."[142]

Transparency continued into the 1990s. In 1996, the Taxpayer Bill of Rights 2 added the requirement that any tax-exempt organization (other than a private foundation) that files a Form 990 is required to make copies of its Form 990 available in person or in writing or otherwise make copies "widely available."[143] Before the legislation was passed, the House Committee on Ways and Means Report explained that part of the legislative intent was to enhance the oversight and public accountability of nonprofit organizations and increase public access to documents filed by

---

135. Id.

136. Id. § 6056, 83 Stat. at 523–24.

137. Id. § 6684, 83 Stat. at 521.

138. Id. § 6056, 83 Stat. at 523.

139. S. Rep. No. 91-552, at 53 (1969).

140. Id.

141. See Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, § 10702, 101 Stat. 1330, 1330-459 to -460.

142. H.R. Rep. No. 100-391, at 1612 (1987).

143. Taxpayer Bill of Rights 2, Pub. L. No. 104-168, § 1313, 110 Stat. 1452, 1479-80 (1996).

such organizations.[144] In 2007, the IRS revised Form 990 for the first time in about twenty-five years. One of the central goals of the revisions was to enhance transparency to both the IRS and the public.[145]

2. *Purpose.* — IRS Form 990 is the primary document that presents a financial portrait of a charity to interested members of the public, including prospective donors. It is not a mere information return filed with the IRS but one of the most important financial reporting, marketing, and public relations documents for tax-exempt organizations.[146] Form 990 is the most readily available data source for potential donors, state regulators, the media, and researchers, as well as a charity's governing board, staff, and volunteers.[147] Form 990 data is used by institutional and individual donors, grant makers, watchdog agencies, the media, and sector advocates.[148] The IRS, state attorneys general (AGs), and local taxing authorities use Form 990 to determine whether tax-exempt organizations comply with applicable laws and regulations.[149]

Form 990 has five key purposes. First, nonprofit organizations that wish to retain their tax-exempt status must file Form 990.[150] Second, Form 990 serves as the basic annual report to about forty states and the District of Columbia's charities offices.[151] Third, Form 990 serves as the fundamental data source for nonprofit sector research, and it provides data in a relatively uniform, consistent format.[152] Fourth, Form 990 provides information not found in audited financial statements of non-profit organizations. It covers both qualitative and quantitative data and, when prepared accurately, completely, and truthfully, is a treasure trove

---

144. H.R. Rep. No. 104-506, at 55 (1996).

145. I.R.S. News Release IR-2007-117 (June 14, 2007), https://www.irs.gov/pub/irs-news/ir-07-117.pdf [https://perma.cc/83PZ-ZMNC].

146. Teresa Gordon, Saleha B. Khumawala, Marla A. Kraut & Janet A. Meade, The Quality and Reliability of Form 990 Data: Are Users Being Misled, 11 Acad. Acct. & Fin. Stud. J. (Special Issue) 27, 27 (2007) (describing the IRS Form 990 as the primary instrument for public accountability).

147. Evelyn Brody, Sunshine and Shadows on Charity Governance: Public Disclosure as a Regulatory Tool, 12 Fla. Tax Rev. 183, 185 (2012) [hereinafter Brody, Sunshine] (describing IRS Form 990 as a critical data source to understand nonprofit governing staff and structure).

148. Karen A. Froelich, Terry W. Knoepfle & Thomas H. Pollak, Financial Measures in Nonprofit Organization Research: Comparing IRS 990 Return and Audited Financial Statement Data, 29 Nonprofit & Voluntary Sector Q. 232, 233 (2000); Gordon et al., supra note 146, at 28.

149. Gordon et al., supra note 146, at 28.

150. Id.

151. See State by State Nonprofit Agencies and Associations, Charity Compliance Sols., https://www.charitycompliancesolutions.com/resources/state-state-nonprofit-agencies-and-associations [https://perma.cc/9G84-RYM4] (last visited Feb. 27, 2022).

152. Froelich et al., supra note 148, at 233; Froelich, supra note 98, at 142; Gordon et al., supra note 146, at 28; Peter Molk & D. Daniel Sokol, The Challenges of Nonprofit Governance, 62 B.C. L. Rev. 1497, 1517–18 (2021).

of information.[153] It contains a wide array of information, including statements of an organization's mission, service accomplishments, information on its governance structure, the names and compensation amount of officers and boards of directors, a balance sheet, and a breakdown of expenses into charitable program expenses, administrative costs, and fundraising expenses.[154] Finally, Form 990 is a public report and potentially a powerful means of ensuring and demonstrating accountability.[155] Nonprofit organizations must not only file this report with the IRS but also make the report publicly available.

C. *IRS Regulation of 501(c) Charities*

Section 501(c) of the IRC includes a broad range of institutions, including civic organizations, labor or agricultural organizations, pension plans, chambers of commerce, fraternal beneficiary societies, churches, hospitals, veterans' organizations, labor unions, animal shelters, and benevolent life insurance associations.[156] What these organizations have in common is working for something other than their own financial gain. In return, they receive an assortment of tax advantages, including exemption from federal income taxes and tax deduction by donors. Tax-exempt organizations are not permitted to distribute their profits to those who control them, such as boards of directors and managers.[157] To do so would be to violate the prohibition against private inurement to which nearly all tax-exempt organizations are subject.[158]

This Article is primarily concerned with charitable organizations codified under section 3 of 501(c), which are "organized and operated exclusively for [a] [*c*]*haritable*" purpose.[159] For a 501(c)(3) organization to

153. Gordon et al., supra note 146, at 28 (describing the information contained in Form 990).

154. Form 990 Resources and Tools, IRS, https://www.irs.gov/charities-non-profits/form-990-resources-and-tools [https://perma.cc/QL2S-D3G2] (last updated Sept. 7, 2021).

155. Gordon et al., supra note 146, at 28 (describing the public availability requirements of Form 990). For further discussion, see infra section IV.C.3 (discussing the Aunt Jemima example).

156. I.R.C. § 501(c) (2018).

157. Bruce R. Hopkins & Virginia C. Gross, The Legal Framework of the Nonprofit Sector in the United States, *in* The Jossey-Bass Handbook of Nonprofit Leadership and Management 43, 44 (David O. Renz ed., 4th ed. 2016).

158. Id.

159. Treas. Reg. § 1.501(c)(3)-1(a)(1) (as amended in 1990) (emphasis added). Some 501(c)(3) organizations have 501(c)(4) advocacy organization carveouts to engage in lobbying, such as the American Civil Liberties Union. The disclosures advocated in this Article may also apply to them. A 501(c)(4) tax-exempt organization is different from a 501(c)(3) organization because a 501(c)(4) can engage in lobbying and election campaign interventions, so long as such activity is not its primary activity. Id. § 1.501(c)(4)-1(a)(2). In other words, 501(c)(4)s can participate in political (or campaign intervention) activities but must operate "primarily for the purpose of bringing about civic betterments and social improvements." Id. The IRS has, however, never officially provided the meaning of "primary activity." This has left the upper limits on the amount of permitted campaign intervention

be regarded as "*operated exclusively*," it must "engage[] primarily in activities which accomplish one or more of such exempt purposes specified in section 501(c)(3)."[160] Activities outside of an exempt purpose are permissible if not "more than an insubstantial part of its activities [are] not in furtherance of an exempt purpose."[161]

The term charitable "includes . . . [r]elief of the poor and distressed or of the underprivileged; advancement of religion; advancement of education or science; erection or maintenance of public buildings, monuments, or works; lessening of the burdens of Government; and promotion of social welfare."[162] Promoting social welfare includes lessening neighborhood tensions, working to eliminate prejudice and discrimination, defending human and civil rights, or combating community deterioration and juvenile delinquency.[163]

It is clear from the statutory definition that *charitable* groups include a wide variety of organizations—from social welfare to educational institutions.[164] Philanthropic giving to these organizations is varied. Therefore, this Article focuses primarily on human services organizations that serve the underprivileged and vulnerable and broadly defend human and civil rights.[165] These sets of organizations command the third-largest charitable giving effort in terms of dollar amounts after religious and educational institutions. Human services organizations received $55.99 billion in charitable giving in 2019.[166]

Like other 501(c)(3) nonprofit organizations, 501(c)(3) charitable organizations are exempt from paying federal income tax, and their donors are eligible to claim deductions for their gifts.[167] Exemption comes

---

unclear; some have resorted to 49% as the upper limit. Ellen P. Aprill, Examining the Landscape of § 501(c)(4) Social Welfare Organizations, 21 N.Y.U. J. Legis. & Pub. Pol'y 345, 346 (2018).

160. Treas. Reg. § 1.501(c)(3)-1(c)(1).

161. Id.

162. Id. § 1.501(c)(3)-1(d)(2).

163. Id.

164. See id.

165. Giving USA 2020: Charitable Giving Showed Solid Growth, Climbing to $449.64 Billion in 2019, One of the Highest Years for Giving on Record, Giving USA Found. (June 16, 2020), https://givingusa.org/giving-usa-2020-charitable-giving-showed-solid-growth-climbing-to-449-64-billion-in-2019-one-of-the-highest-years-for-giving-on-record/ [https://perma.cc/5858-Y2MB]. Human services organizations—part of public charities—include children's and family services, youth development shelter and crises services, homeless services, food banks, social services, legal services, multipurpose human services organizations, and similar organizations.

166. Id. (comparing human services giving in 2019 to religious giving that totaled $128.17 billion and educational giving that totaled $64.11 billion).

167. Bruce R. Hopkins, The Law of Tax-Exempt Organizations 6 (10th ed. 2011); Hemel, supra note 22, at 151.

with a heavy dose of disclosure obligations and other requirements that dictate how tax-exempt organizations must operate.[168]

These disclosure requirements are rewarded as 501(c)(3) organizations receive the most generous tax treatment. Not only are they exempt from paying federal taxes, contributions to public charities are deductible up to 60% of adjusted gross income.[169] Public charities are also exempt from a 2% tax on investment income and payout mandates.[170]

Churches, schools, hospitals, and medical research institutions are automatically considered public charities.[171] Other 501(c)(3) organizations, including the charities that are the subject of this Article—homeless shelters, food banks, legal services organizations, and advocacy groups—enjoy these benefits only after a showing to the IRS that they receive sufficient public support.[172]

A 501(c)(3) charity can show it receives sufficient public support in three ways. The first way is for an organization to receive 33.3% of its support from the government or from direct or indirect contributions, donations, or grants from the general public.[173] The second is the facts and circumstances test, which requires that an organization receive at least 10% of its support from the government and the general public and for the organization's governing body to "represent[] the broad interests of the public."[174] A third method requires that the organization receive at least one third of its support from contributions from the general public, government grants, and gross receipts from activities related to its exempt purpose and no more than one third of its support from investments and unrelated business income.[175] A charitable organization that satisfies none of these requirements would be considered a private foundation, which enjoys a more limited deduction and has heightened disclosure requirements.[176]

---

168. Hemel, supra note 22, at 144 (describing intensive disclosure requirements for tax-exempt organizations).

169. Id. at 159.

170. Id.

171. Id.

172. Id.

173. See Treas. Reg. § 1.509(a)-3 (2021); see also Hopkins, supra note 167, at 321–22. Donors who provide more than 2% of an organization's revenue are excluded from the definition of the general public. IRS, Instructions for Schedule A (Form 990) 5 (2021), https://www.irs.gov/pub/irs-pdf/i990sa.pdf [https://perma.cc/N9VD-TQEX].

174. Hemel, supra note 22, at 159.

175. Id. at 160.

176. Id. Unlike public charities, private foundations, like section 527 political organizations, must publicly disclose their donors in Schedule B of Form 990-PF. IRS, About Schedule B, supra note 25.

In addition to Form 990, public charities must file Form 990 attachments, called Schedules, with the IRS.[177] Particularly, charities file Schedule B, or the Schedule of Contributors, to disclose the names and addresses of donors who contribute the greater of $5,000 or 2% of an organization's annual charitable receipts within a year.[178] The purpose of Schedule B is to provide information on contributions the organization reported on Form 990.[179] "A *contributor* (person) includes individuals, fiduciaries, partnerships, corporations, associations, trusts, and exempt organizations."[180] The IRC, however, prohibits the IRS from disclosing donor information on Schedule B to the public to protect donor privacy. Schedule B is therefore not available for public disclosure or inspection.[181]

In an increasingly digital age, anyone can find a charity's Form 990 online and use it to make determinations about whether to donate to the organization, which has consequences for both its tax-exempt status and how much funding it can generate. However, the current Form 990 and the lack of disclosure mandates for Schedule B prevent the disclosure of donor and race data that can address racial equity in philanthropic support for charities.

III. SUPREME COURT JURISPRUDENCE ON MANDATORY DISCLOSURES

This Part provides both descriptive and normative analyses of Supreme Court jurisprudence on disclosure mandates for nonprofit organizations. There are two considerations in analyzing disclosure claims based in privacy. The first is that the Supreme Court has adopted "exacting scrutiny" as the proper framework for analyzing disclosure claims to ensure that there is an actual burden on First Amendment rights produced

---

177. Schedules for Form 990, IRS, https://www.irs.gov/forms-pubs/about-form-990-schedules [https://perma.cc/U7QY-LDBK] (last updated Mar. 3, 2021) (including Schedules A–O and R).

178. IRS, Schedule B (Form 990): Schedule of Contributors 1 (2021), https://www.irs.gov/pub/irs-pdf/f990ezb.pdf [https://perma.cc/3E9U-AXWB] [hereinafter IRS, Schedule B].

179. Id.

180. Id. at 5. Section 527 political organizations must publicly disclose their donors.

181. Despite the prohibition on the disclosure of Schedule B donor information, there have been concerns about inadvertent disclosures of Schedule B and the impact on donor privacy in some contexts. See, e.g., Ams. for Prosperity Found. v. Harris, 182 F. Supp. 3d 1049, 1057 (C.D. Cal. 2016) (critiquing a pattern of inadvertent disclosures of confidential Schedule B information, including donor names and addresses). Thus, in 2020, the Treasury Department and the IRS decided that trade associations, labor unions, and 501(c)(4) social welfare organizations—those that don't primarily receive tax-deductible contributions—will be among the organizations that will no longer have to file Schedule B. Under the new provision, public charities (and private foundations) must continue to disclose their donors on Schedule B. Treas. Reg. § 1.6033-2 (as amended in 2020).

by a disclosure requirement.[182] With exacting scrutiny, the means and ends must be narrowly tailored to a relevant government interest.[183]

The second is that a claim to bar disclosure can be brought on either facial or as-applied grounds.[184] A facial basis makes the argument that disclosure chills the freedom of association for charities in general or a substantial number of charities.[185] A charity can, however, take a narrower as-applied view to prove harassment, economic or other reprisals, threats of physical harm, or similar special circumstances that justify an exception to disclosure as applied to that particular charity.[186]

The Court's precedent on mandatory disclosures can be divided into two loose categories: protecting racial minorities and "controversial" organizations from disclosures that would chill the freedom of association and disclosures in the arena of campaign finance and electioneering. For the first category, *Americans for Prosperity Foundation v. Bonta* is the most recent example.[187] *Americans for Prosperity* involves the constitutionality of a California law that requires 501(c)(3) nonprofit organizations to disclose their Schedule B donor information.[188] *Americans for Prosperity* is specifically related to the proposals made in Part IV. Section III.A discusses a line of cases involving racial minorities and controversial, often conservative-leaning, organizations such as in the *Americans for Prosperity* case. Section III.B discusses campaign finance cases involving donor disclosure requirements.

A. *Protecting Racial Minorities and "Controversial" Organizations*

The Court has been quick and consistent in invalidating disclosure requirements that chill the freedom of association of racial and ethnic minorities. This was particularly true during the Civil Rights era. In *NAACP v. Alabama ex rel. Patterson*, a landmark Supreme Court case, the state of Alabama compelled the NAACP to reveal the names and addresses of all

182. See, e.g., Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 366 (2010) (reiterating the adoption of the exacting scrutiny standard); Buckley v. Valeo, 424 U.S. 1, 66 (1976) (explaining the necessity of applying exacting scrutiny to mandatory disclosure laws).

183. *Citizens United*, 558 U.S. at 366 (explaining that the Court subjects government disclosure requirements to "exacting scrutiny" because of the burden upon speech); *Buckley*, 424 U.S. at 66 (describing why strict scrutiny is applied to compelled disclosure requirements); Transcript of Oral Argument at 6, Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373 (2021) (Nos. 19-251, 19-255), 2021 WL 1612035 [hereinafter AFPF, Oral Argument] (statement of Derek Shaffer) (critiquing the lack of narrowly tailored governmental interest in charitable disclosure requirements).

184. *Citizens United*, 558 U.S. at 376 (stating that challenges to disclosure statutes may be brought facially or as applied).

185. Id. at 370.

186. See id. (stating that the Court recognizes that disclosure requirements as applied would be unconstitutional if an organization can reasonably prove its members would face threats, harassment, or reprisals).

187. 141 S. Ct. 2373 (2021).

188. Id. at 2379.

its Alabama rank-and-file members and agents to the state's AG without regard to their positions or functions in the association.[189] The NAACP provided uncontroverted evidence that, on past occasions, revelation of the identities of its rank-and-file members exposed them to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility.[190] Alabama's stated interest in the information was to determine whether the NAACP was conducting business in violation of the Alabama Foreign Corporation Registration Statute, and the membership lists were expected to help resolve the issue.[191] The Court rejected Alabama's reason on the basis that compelled disclosure of affiliation with advocacy groups may restrain the freedom of association.[192]

In addressing the disclosure issue, the Supreme Court recognized the relationship between the freedom to associate and privacy in one's associations, noting that "[i]nviolability of privacy in group association may . . . be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs."[193] The Court did not find a substantial relationship between the government's interest to determine the applicability of the statute to the NAACP and the decision on the ouster of the NAACP from the state.

Similarly, in *Bates v. City of Little Rock*, the Court found no relevant correlation between Arkansas's imposition of occupational license taxes and the compulsory disclosure and publication of the membership lists of the local branches of the NAACP.[194]

Shelton v. Tucker was a similar case brought under the Fourteenth Amendment to challenge an Arkansas statute requiring every teacher to file an annual affidavit listing every organization to which the teacher belonged or regularly contributed within the preceding five years as a condition of employment in a state-supported school or college.[195] The Arkansas statute did not require school boards to keep the information confidential.[196] Each school board was left to deal with the information as it deemed fit.[197] Arkansas's stated purpose in enacting the statute was to "provide assistance in the administration and financing of the public schools," and the Court validated a state's right to investigate teachers' competence and fitness.[198] There was evidence, however, that the Citizens' Council, or white Citizens' Council, an organization established to oppose racial integration, sponsored the legislation and blatantly announced that

189. 357 U.S. 449, 451 (1958).
190. Id. at 462.
191. Id. at 464.
192. Id. at 462.
193. Id.
194. 361 U.S. 516, 525 (1960).
195. 364 U.S. 479, 480–81 (1960).
196. Id. at 486.
197. Id.
198. Id. at 485 n.5.

it would use it to rid public schools of employees who belonged to the NAACP, the Urban Institute, or any other group that the council deemed threatening to white supremacy.[199] The Court reasoned that public exposure of membership information brought the possibility of pressures on school boards to discharge teachers who belong to unpopular or minority organizations.[200] The Court therefore held that the statute interfered with the freedom of association.[201]

In January 2021, the Supreme Court granted a petition for writ of certiorari in *Thomas More Law Society v. Becerra*, consolidating the case with *Americans for Prosperity Foundation v. Becerra* to become *Americans for Prosperity Foundation v. Bonta*, which involves the constitutionality of a California charitable registration requirement for 501(c)(3) nonprofit organizations.[202]

The case asked the Supreme Court to determine whether California's requirement that charitable organizations in the state disclose their Schedule B donor information infringed on donors' and charitable organizations' freedom of speech and association.[203] The law required the disclosure of Form 990 Schedule B, which contains the names and addresses of any person, corporation, or other organizational donor that contributes $5,000 or more in cash or property to the nonprofit within a calendar year.[204] 501(c)(3) organizations that meet the 33.3%-of-support test of the regulations under the IRC[205] are required to provide the names and addresses of donors contributing $5,000 or more only if the donated amount is in excess of 2% of the total contributions the organization within a year.[206] An organization with $10 million in contributions, for example, is required to disclose only donors with contributions of at least $200,000.[207]

The California AG used the information solely to prevent charitable fraud, and the information was not made public.[208] Two conservative nonprofit organizations whose missions include the restoration and defense of "America's Judeo-Christian heritage" and "further[ing] free enterprise[] [and] free society-type issues"[209] argued that the state's disclosure requirement impermissibly burdened their First Amendment right to free association by deterring individuals from making

199. Id. at 486 n.7.
200. Id.
201. Id. at 488–90.
202. Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2379 (2021).
203. Id.
204. Id. at 2380.
205. I.R.C. §§ 170(b)(1)(A)(vi), 509(a)(1) (2018).
206. Treas. Reg. § 1.6033-2 (as amended in 2020).
207. Ams. for Prosperity Found. v. Becerra, 903 F.3d 1000, 1005 (9th Cir. 2018).
208. *Bonta*, 141 S. Ct. at 2381.
209. *Becerra*, 903 F.3d at 1005 (first alteration in original).

contributions.[210] If donors have to fear exposure, retaliation, or other reprisal, the argument went, they will be inhibited from expressing their support for certain causes.[211] The plaintiffs likened their experience to that of the *NAACP v. Alabama* plaintiffs.[212]

The Ninth Circuit held that the Schedule B requirement, which obligates charities to submit information they already file each year with the IRS, survives exacting scrutiny as applied to the plaintiffs because it is substantially related to an important state interest in policing charitable fraud.[213] The Ninth Circuit reasoned that "the information is collected solely for nonpublic use, and the risk of inadvertent public disclosure is slight."[214]

The Supreme Court heard oral arguments in April 2021. The state of California argued that its law is a nonpublic disclosure requirement because it keeps nonprofits' Schedule Bs confidential and it had worked to prevent inadvertent public disclosures, which had occurred in the past.[215]

In a 6-3 ruling in July 2021, the Court struck down California's requirement that charities and nonprofits operating in the state provide the state AG's office with the names and addresses of their largest donors.[216] The Court's main concern with the disclosure requirement seemed to be the lack of narrow tailoring. The Court explained:

> Given the amount and sensitivity of this information . . . , one would expect Schedule B collection to form an integral part of California's fraud detection efforts. It does not. To the contrary, the record amply supports the District Court's finding that there was not "a single, concrete instance in which pre-investigation collection of a Schedule B did anything to advance the Attorney General's investigative, regulatory or enforcement efforts."[217]

The Court noted that California does not rely on Schedule Bs to initiate investigations.[218]

The Court said it is irrelevant that some donors might not mind—or might even prefer—the disclosure of their identities to the state since the petitioners introduced evidence that they and their supporters have been subjected to bomb threats, protests, stalking, and physical violence.[219]

---

210. *Bonta*, 141 S. Ct. at 2380; *Becerra*, 903 F.3d at 1005.

211. *Bonta*, 141 S. Ct. at 2380.

212. Id. at 2382.

213. *Becerra*, 903 F.3d at 1004.

214. Id.

215. *Bonta*, 141 S. Ct. at 2400.

216. Id. at 2389.

217. Id. at 2385–86 (quoting Ams. for Prosperity Found. v. Harris, 182 F. Supp. 3d 1049, 1055 (C.D. Cal. 2016)).

218. Id. at 2387.

219. Id. at 2388.

However, the majority's opinion did not specifically differentiate between classes of donors—individual vs. institutional, for example. Based on the Court's discussion about the kinds of threats and harassment that are of concern, such as "stalking," "physical violence," or the fact that "'anyone with access to a computer [can] compile a wealth of information about' anyone else, including such sensitive details as a person's home address or the school attended by his children,"[220] it seems plausible that the Court's concern is primarily related to individual donors.

Justice Sonia Sotomayor's dissenting opinion rejected the Court's defense of the petitioner's challenge on facial grounds.[221] The dissent centered around the breadth of the Court's opinion invalidating all donor disclosures. She states,

> [T]he Court abandons the requirement that plaintiffs demonstrate that they are chilled . . . . Instead, it presumes (contrary to the evidence, precedent, and common sense) that all disclosure requirements impose associational burdens. For example, the Court explains that there is a risk of chill in this suit because the government requires disclosure of the identity of any donor "with reason to remain anonymous."[222]

Justice Sotomayor goes on to say,

> If the Court had simply granted as-applied relief to petitioners . . . I would be sympathetic . . . . But the Court's decision is not nearly so narrow or modest. Instead, the Court jettisons completely the longstanding requirement that plaintiffs demonstrate an actual First Amendment burden before the Court will subject government action to close scrutiny.[223]

The dissent's analysis is correct, although Justice Sotomayor could have gone further in her analysis by distinguishing between individual and institutional donors. She had a few opportunities to make this important distinction to free the burden of the freedom of association from situations where it is required and those where it may not be entirely necessary. For example, she explains that "[p]rivacy 'may' be indispensable to the preservation of freedom of association, but it need not be. It depends on whether publicity will lead to reprisal."[224] For instance, "[f]or groups that promote mainstream goals and ideas . . . privacy may not be all that important. Not only might their supporters feel agnostic about disclosing their association, they might actively seek to do so."[225]

With this declaration, Justice Sotomayor could have noted that institutional donors in particular actively seek out disclosure opportunities

220. Id. (alteration in original) (quoting Doe v. Reed, 561 U.S. 186, 208 (2010) (Alito, J., concurring)).

221. Id. at 2392 (Sotomayor, J., dissenting).

222. Id. at 2395 (quoting id. at 2388 (majority opinion)).

223. Id. at 2405 (Sotomayor, J., dissenting).

224. Id. at 2393–94.

225. Id. at 2394.

especially in support of particular causes. Justice Elena Kagan made a similar argument to Justice Sotomayor's during oral arguments, explaining that, while "some donors to some charities . . . are genuinely concerned about public disclosure for fear of harassment or threats, . . . a very substantial majority of donors in a very substantial majority of charities are not concerned about that. In fact, they rather like public disclosure of their generosity."[226] Justice Kagan further noted that donor disclosure is a strategic decision made by some donors and nonprofits because, at times, disclosure can increase association and fundraising.[227] Under the dissent and Justice Kagan's interpretations, the law should permit donors who would benefit from public disclosure to do so. Conservative nonprofit organizations would need to bring as-applied challenges, which require a showing of threat, harassment, or other forms of reprimand that arise or can arise from disclosure and chill the freedom to associate. It also recognizes that there are indeed different classes of donors and that a "one size fits all"[228] approach will not suffice.

In sum, Supreme Court precedent has protected minority organizations from disclosing their members when it would have a chilling effect on the freedom of association. The Court's *Americans for Prosperity* decision likens the claims of conservative organizations to those of the NAACP to make a broad ruling against disclosure. But neither the majority nor the dissenting opinions in *Americans for Prosperity* distinguish between individual and institutional donors. Part IV addresses this distinction.

B. *Campaign Finance and Electioneering*

While the campaign finance context differs from the context of 501(c)(3) nonprofit charities, the Court has upheld mandatory disclosures where the interest served is especially significant.

In *Buckley v. Valeo*, a case involving a facial challenge to the donor disclosure requirement in the Federal Election Campaign Act of 1971 brought by political figures and a number of politically conservative 501(c)(4) advocacy organizations, the Court held that the government can compel exposure of the identity of a minor party's donors.[229] Using exacting scrutiny, the Court acknowledged that public disclosure of contributions to candidates and political parties may chill donors, that is, deter some individuals who otherwise might contribute, or expose contributors to harassment or retaliation.[230] On the other hand, the privacy interest

226. AFPF, Oral Argument, supra note 183, at 24.

227. Id. at 25.

228. *Bonta*, 141 S. Ct. at 2398 (Sotomayor, J., dissenting).

229. 424 U.S. 1, 69–70 (1976) (affirming that "substantial governmental interests in 'informing the electorate and preventing the corruption of the political process' were furthered by requiring disclosure of minor parties and independent candidates" (quoting Buckley v. Valeo, 519 F.2d 821, 867 (D.C. Cir. 1975))).

230. Id. at 68.

must be weighed against the government's interests, which includes providing information to the public for accountability.[231] The Court found that the government's interest in compelling disclosure overrides the privacy right because disclosure retards corruption and the public has a right to know to whom politicians are beholden.[232] "[D]isclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity."[233] The Court added that "recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations."[234]

McConnell v. Federal Election Commission[235] and *Citizens United v. Federal Election Commission*[236] extended disclosure to "electioneering communications" that reference candidates over broadcast media within close proximity to an election.[237]

In *McConnell*, a case brought by similar groups of 501(c)(4) advocacy nonprofit organizations, the Court again ruled in favor of public disclosure. The Court found that the disclosure provisions of the Bipartisan Campaign Reform Act (BCRA) of 2002 require organizations to reveal the identities of their donors so that the public can identify the source of the funding behind broadcast advertisements influencing certain elections.[238] It noted, however, that rejection of the facial challenge to the requirement to disclose individual donors does not foreclose possible future challenges to particular applications of that requirement.[239] In other words, the Court recognized that the law in question would be unconstitutional as applied to an organization if there was a reasonable probability that the group's

---

231. Id.

232. Id. at 67.

233. Id.

234. Id. at 67–68.

235. 540 U.S. 93 (2003), overruled in part by Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

236. 558 U.S. 310.

237. See Jennifer Mueller, The Unwilling Donor, 90 Wash. L. Rev. 1783, 1799 (2015) (describing the Supreme Court's historical treatment of campaign communication restrictions); Monica Youn, Proposition 8 and the Mormon Church: A Case Study in Donor Disclosure, 81 Geo. Wash. L. Rev. 2108, 2109–10 (2013) (describing the current scholarly debate over campaign finance disclosure); Elizabeth Garrett, Voting With Cues, 37 U. Rich. L. Rev. 1011, 1011 (2003) (discussing the burdens of various disclosures on citizens and organizations); David Lourie, Note, Rethinking Donor Disclosure After the Proposition 8 Campaign, 83 S. Cal. L. Rev. 133, 134 (2009) (describing the California disclosure laws that identified donors behind Proposition 8).

238. 540 U.S. at 156 ("The Government's strong interests in preventing corruption, and in particular the appearance of corruption, are thus sufficient to justify subjecting all donations to national parties to the source, amount, and disclosure limitations of FECA.").

239. Id. at 198.

members would face threats, harassment, or reprisals if their names were disclosed.[240]

The BCRA was again challenged in the *Citizens United* case.[241] In making an as-applied argument, Citizens United, a conservative 501(c)(4) advocacy organization, argued that disclosure requirements "can chill donations to an organization by exposing donors to retaliation."[242] The Court concluded that Citizens United offered no evidence that its members may face threats or reprisals.[243] To the contrary, the facts revealed that Citizens United had been disclosing its donors for years and identified no instance of harassment or retaliation.[244] The Court held that although disclaimer and disclosure requirements may burden the ability to speak, they "'impose no ceiling on campaign-related activities' and 'do not prevent anyone from speaking.'"[245] Disclaimer and disclosure requirements are constitutional as applied to both the broadcast of the film and the ads promoting the film itself, since the ads qualify as electioneering communications. The Court held that disclosure provisions did not violate the First Amendment and that "transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."[246]

Doe v. Reed involved slightly different facts but held that disclosure of signatures on a referendum does not violate the Constitution.[247] *Doe* involved a challenge to a Washington state law, the Washington Public Records Act (PRA), requiring petitions opposing a state law to contain valid signatures of registered Washington voters and the names and addresses of those signers.[248] The PRA further authorized private parties to obtain copies of the documents, including signers' names and addresses.[249] The particular petition in *Doe* being opposed was the expanded rights to same-sex couples.[250] Respondents invoked the PRA to obtain the names and addresses of all signatories of the petition, and the petition signers objected that such public disclosure would violate their First Amendment rights.[251] Names and addresses were initially submitted

240. Id.

241. *Citizens United*, 558 U.S. 318–22. The Court also held that nonprofit organizations and unions could spend unlimited funds on elections. Id. at 365.

242. Id. at 370.

243. Id.

244. Id.

245. Id. at 366 (first quoting Buckley v. Valeo, 424 U.S. 1, 64 (1976); then quoting McConnell v. Fed. Election Comm'n, 540 U.S. 93, 201 (2003)).

246. Id. at 371.

247. 561 U.S. 186, 191 (2010).

248. Id. at 192.

249. Id. at 190–91.

250. Id. at 192.

251. Id. at 193.

to the government for verification and canvassing to ensure that only lawful signatures are counted.[252]

The PRA survived exacting scrutiny because the Court reasoned that the state had a sufficiently important government interest in "preserving electoral integrity."[253] With exacting scrutiny, compelled public disclosure of associational information is often permissible when the interests served by the disclosure are especially significant.[254] The Court noted that the state was not only protecting against fraud but also "simple mistake, such as duplicate signatures or signatures of individuals who are not registered to vote in the [s]tate."[255] Public disclosure can be substantially related to the government's interests in deterring public corruption, identifying violations of substantive campaign finance restrictions, informing the electorate, or curing inadequacies.[256] Public disclosure promotes transparency and accountability in the electoral process to an extent other measures cannot.[257]

The Court, however, left room for a narrow as-applied challenge if there is a showing of a reasonable probability that compelled disclosure of personal information will subject parties to threats, harassment, or reprisals from either government officials or private parties for the organization alone rather than all nonprofits in general.[258]

In *McCutcheon v. Federal Election Commission*, the Court fleshed out its reasoning on public charity donor disclosures in light of technological advancements.[259] The Court explained that, "[w]ith modern technology, disclosure now offers a particularly effective means of arming the voting public with information. . . . [G]iven the internet, disclosure offers much more robust protections against corruption."[260]

In sum, the Court has been much more permissive of public disclosures in the political context because of the integrity of the electoral process and for transparency and accountability in the electoral process. The Court has yet to permit donor disclosure in 501(c)(3) nonprofit organizations. Therefore, the proposals in Part IV are narrowly tailored and deferential to donor privacy concerns.

---

252. Id. at 190–91.

253. Id. at 198.

254. Brief Amici Curiae of the ACLU et al. in Support of Petitioners at 5, Ams. for Prosperity Found. v. Becerra, 141 S. Ct. 2373 (2021) (Nos. 19-251, 19-255), 2021 WL 826687.

255. *Doe*, 561 U.S. at 198.

256. Id. at 194, 197–98.

257. Id. at 199. The "exacting scrutiny" standard applied by the Supreme Court in *Citizens United* and *Doe* was subtly distinct from the one the Court applied in the *Americans for Prosperity* case. The exacting scrutiny in *Americans for Prosperity* requires narrow tailoring to a sufficiently important governmental interest, while the earlier cases required a "substantial relation" to such an interest.

258. Id. at 200.

259. 572 U.S. 185 (2014).

260. Id. at 224.

IV. PROPOSALS, COSTS, AND ENFORCEMENT MECHANISMS

The proposals made in this Part have two central goals. The first is to increase funding to underfunded minority-led and minority-serving organizations that address some of the most pressing issues of our time, including mass incarceration and the eviction crises exacerbated by the COVID-19 pandemic.[261] The second is to address the lack of public data on minority-led and minority-serving organizations to improve public accountability of corporate and foundation donors who benefit from making public commitments of support to racial and ethnic minorities.

The media has been an effective monitor of public charities over the years.[262] And in the age of social media, the public has assumed an even more powerful role in holding organizations accountable. Part of the goal then is to enhance the public's role by harnessing the public with information and data.

The public disclosure of organizational, financial, and member data for public charities is not controversial. Indeed, organizations that solicit charitable contributions have an incentive to disclose some of this information to potential donors regardless of any statutory requirement.[263]

Arguments made in favor of more disclosures have stopped short of requiring the disclosure of donor information for public charities. And no scholar has yet to argue for the disclosure of race data for public charities. In light of Supreme Court jurisprudence on disclosure and the freedom of association, this Article argues that the government's interest in the disclosure of donor and race data in the narrowly tailored context of increasing funding to minority-led or minority-serving public charities outweighs privacy interests. In mandatory disclosure cases, the Supreme Court's goal has been to assess the constitutionality of disclosure requirements that threaten to chill the freedom of association.[264] The proposals here are unlikely to chill the freedom of association.

The Biden Administration's Equitable Data Working Group and other interested parties can use these proposals to make a strong case for donor and race disclosure to address racial inequalities in funding non-profit charities. The proposals here are meant to ensure that minority-led

---

261. One unintended but additional benefit to disclosing race data is the likelihood that nonprofit organizations will begin to increase diversity among their top managers and directors or increasingly serve communities of color to boost access to private funding. For a discussion of the importance of racial and ethnic diversity in nonprofit charities, see generally Adediran, Nonprofit Board, supra note 39 (discussing the influence that board members have on setting the mission and the agenda of the organizations).

262. See Molk & Sokol, supra note 152, at 1532 (stating the media has covered many high-profile instances of nonprofit misconduct).

263. Id. (discussing the need for nonprofits to garner trust and engagement with donors).

264. See, e.g., Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 336 (2010); Buckley v. Valeo, 424 U.S. 1, 10 (1976); Shelton v. Tucker, 364 U.S. 479, 486–87 (1960); Bates v. City of Little Rock, 361 U.S. 516, 523 (1960).

organizations and those that serve communities of color actually receive funding from private foundations and corporations who benefit from public commitments to these organizations. Both the government and the public should know which organizations are minority-led or minority-serving public charities and be able to hold accountable corporations and foundations that benefit from making public statements about supporting these organizations. The goal of these sections is to make two concrete proposals for legislative change to section 6104 of the IRC, although these are by no means the only ways to address these problems.[265]

The first proposal would modify Schedule B and require the disclosure of institutional donors. The second would modify Form 990 to include the race and ethnicity of listed top managers and board directors. It would also permit including race and ethnicity information for populations served.

Supreme Court precedent, particularly the *Americans for Prosperity* decision, is unlikely to preclude the disclosure of institutional donors and the race of top managers and directors under these proposals for three reasons. First, the proposals below are narrowly tailored to require only the disclosure of corporate funders, foundations, and government entities with very little privacy to protect if disclosure is required. Private foundations are already required to disclose the nonprofits they financially support in their Form 990-PF.[266] Some corporations are already publicly touting their financial support to large nonprofits, although the information is inconsistent.[267] The proposals are unlikely to run afoul of Court precedent aimed at protecting individuals—not institutions and companies—from threats or harassment. Second, there is no case law specifically barring the disclosure of top managers and directors of charities. Indeed, Form 990 already provides a public list of the names of board members and top managers for all public charities. Adding race and ethnicity would provide important data to determine whether an organization is minority led for purposes of accountability. Third, there is currently little public information on whether an organization serves communities of color, and Supreme Court precedent does not seem to preclude disclosing that information.

A. *Modify Schedule B to Disclose Donor Information*

Public charities are already required to provide the names and addresses of donors who contribute the greater of $5,000 or 2% of the organizations' annual charitable receipts to the IRS in their Schedule B

---

265. I.R.C. § 6104 (2018).

266. IRS, Form 990-PF: Return of Private Foundation (2021), https://www.irs.gov/pub/irs-pdf/f990pf.pdf [https://perma.cc/VPN9-PS5F]. This means that information on foundation donees is already publicly available. There is no way to determine, however, if donees are minority-led or minority-serving nonprofits.

267. See supra note 2 and accompanying text.

filings.[268] For organizations that receive 33.3% of their support from the government or public—which is most of these charities—they need only report donors who contribute 2% or more of the organizations' annual contributions.[269] This means that donor lists for publicly supported charities would be relatively small. Turning back to EJI, discussed in Part I, its revenue from contributions in 2018 was about $30 million,[270] which means that it needs to only disclose donors who contributed a minimum of $60,000 that year. The list of Schedule B donors will likely be small, especially for charities with sizable revenues.

While Schedule B donor information is kept confidential from public disclosure,[271] all other information on Schedule B, including the amount contributed and the description of noncash contributions, is made available for public inspection unless the information clearly identifies the contributor. Schedule B has three parts, but only parts I and II are applicable to 501(c)(3) public charities.[272] Part I requires a list of the names and addresses of contributors and a designation of the kinds of contributions given as either from a person (defined broadly as individuals, fiduciaries, partnerships, corporations, associations, trusts, and exempt organizations), payroll (employee donations from paycheck), or noncash donations. Part II requires further information about noncash property, including real estate and stocks.

First, the IRS, through its broad disclosure authority, should require, or Congress should authorize the IRS to require, the disclosure of Schedule Bs for charities. To prevent running afoul of the constitutional protection of the freedom of association and concerns about donor privacy and a chilling effect, two provisions should follow. The first is that individuals should be omitted from publicly disclosed Schedule Bs. Only corporations, foundations, and government entities—including state and local government donors—should be listed and disclosed on Schedule Bs. The second is that the provision that requires charities to list only donors that give the greater of $5,000 or 2% of an organization's annual receipts should be removed. In other words, it should not matter whether Amazon is donating $10,000 or $3 million to EJI in 2021. If Amazon, a corporate

---

268. See supra notes 177–178 and accompanying text.

269. See Molly F. Sherlock & Jane G. Gravelle, Cong. Rsch. Serv., R40919, An Overview of the Nonprofit and Charitable Sector 28 (2009), https://sgp.fas.org/crs/misc/R40919.pdf [https://perma.cc/W52U-5JM5] ("[G]overnment grants and payments to charitable organizations were $351 billion, or 29% of charitable organizations' total revenue [in 2005]."); Giving Statistics, supra note 77 (noting that the public is responsible for most annual donations).

270. EJI, Form 990, supra note 79, at 1.

271. Schedule B is publicly available for private foundations who file Form 990-PF, section 527 political organizations, and political action committees (PACs) that file Form 990 or 990-EZ.

272. Part III applies to section 501(c)(7), (8), or (10) organizations that received contributions exclusively for religious, charitable, or other applicable purposes during the tax year. IRS, Schedule B, supra note 178, at 1.

donor, contributes to EJI, that fact should be publicly disclosed. Removing the $5,000 or 2% limit ensures that public commitments to donate certain dollar amounts can be tracked. For example, if Amazon publicly commits to donating $5 million to minority-led organizations, the public can track whether the donated amount yields the promised amount even where dollar amounts are small compared to the organization's annual receipts.

Second, the law should allow an opt-out provision for charities that consider themselves to be "controversial" and can prove that disclosing their corporate or foundation donors would chill the freedom of association and effectively cut them off from much needed private funding. This means that the default would be disclosure, but specific organizations can opt out of disclosure if they believe there can be a chilling effect. To opt out, an organization would need to submit proof of a chilling effect to the IRS to make its disclosure confidential. The standard of proof should not be too stringent. A chilling effect should include any *evidence* of a relationship between an institutional donor's dollars going to an organization and an adverse effect, such as evidence that customers are boycotting a brand because of a company's donations to an organization or where a corporation or private foundation refuses to donate to an organization because it is concerned about publicly associating with the organization.

It is, however, unlikely that the opt-out provision would apply to many organizations if Justice Sotomayor's and Justice Kagan's declarations were true that most donors want to publicly disclose their donations.[273] The opt-out provision would also require actual evidence rather than speculation of a chilling effect. In any event, requiring charities to disclose only institutional donors is more likely to withstand exacting scrutiny under Supreme Court precedent because institutional donors who already provide public information about their donations—as opposed to individual donors—are less likely to have their privacy rights infringed by a narrowly tailored disclosure requirement.

B. *Modify Form 990 to Require Race and Ethnicity Data*

Making Form 990's Schedule B publicly available would not resolve the lack of data on the race of those who run charities or the communities they serve. Therefore, the second proposal is to require the inclusion of race and ethnicity of top managers, board members, and communities served in Form 990. Currently, part VII of Form 990 requires the names and compensation of board members and top management, including the CEO.[274] This information is publicly available. The IRS can either include an additional column in Form 990 to add information on the race and

273. See supra notes 225–227 and accompanying text.

274. IRS, Form 990 Instructions, supra note 107, at 25–42.

ethnicity of each listed individual or create a new Schedule for both the current part VII of Form 990 and race data. Either option would work.

Form 990 should also incorporate qualitative and quantitative data on the race and ethnicity of populations served. As Part I discusses, an organization like EJI currently provides qualitative data on its Form 990 making it clear that its clients are racial and ethnic minorities. Coalition for the Homeless, on the other hand, does not currently include the demographics of its client population on its Form 990. Organizations should track the demographics of their client populations if they do not already do so and be required to report that information on Form 990. Organizations whose client populations are diffuse or not well defined—such as environmental groups advocating for communities of color—should provide general descriptions of beneficiaries of the organizations' advocacy efforts. By requiring data on populations served, Form 990 data can become more uniform across the board, rather than having some charities include race information on clients while others omit the data.

In sum, this Article proposes modifying Schedule B to only require the public disclosure of institutional donors. Form 990 should also be modified to include race and ethnicity data on those who run nonprofit charities and client populations served. These changes are narrowly tailored to achieve the end of increasing funding to underfunded minority-led and minority-serving charities.

C. *Costs, Enforcement, and Funding*

This section considers potential costs of the two proposals calling for publicly disclosing donor and race data. It then addresses enforcement concerns and how to nudge donors to fund minority-led and minority-serving organizations even after disclosures are realized.

1. *Potential Costs of Disclosing Donor and Race Data.* — Most scholarship and commentary on the benefits of donor disclosure have been in the campaign finance context because campaign finance has the most robust legal doctrine on mandatory donor disclosures.[275]

Professors Richard Briffault and Lloyd Hitoshi Mayer have argued that disclosure in the electioneering context is unlikely to deter large donors who have significant interests in government decisionmaking and view campaign contributions as a cost of doing business.[276] Disclosure can, however, chill contributions from individuals who do not want their views or affiliations broadcast over the internet to the rest of the world.[277] This

275. See Richard Briffault, Reforming Campaign Finance Reform: A Review of *Voting With Dollars*, 91 Calif. L. Rev. 643, 652 (2003) (reviewing Ackerman & Ayres, supra note 237) (discussing the extensive legal doctrine on campaign finance disclosure).

276. Id. at 655; Lloyd Hitoshi Mayer, Disclosures About Disclosure, 44 Ind. L. Rev. 255, 281 (2010).

277. Briffault, supra note 275, at 655.

view is consistent with the *NAACP* line of cases, which aim to protect individual members of nonprofit organizations.

Corporate, private foundation, and government disclosures are unlikely to have the chilling effect the Supreme Court is often concerned about when it strikes down disclosure requirements, such as with rank-and-file members of the NAACP or individual teachers. Private foundations already disclose their donees, and corporations already disclose their donations with favorable responses from consumers that benefit them. Including government entities will likely have the same or similar effect as foundation disclosures. The proposals simply systematize disclosures in a way that would allow the public to monitor and hold entities accountable for racial capitalism and benefit organizations that serve communities of color.

Still, mandatory disclosures are not without costs. Even where mandatory disclosures can succeed in the context of corporate accountability and public information, they can be costly in terms of money, effort, and time or have unintended and undesirable consequences, such as driving out better regulation or potentially negatively impacting the people it purports to help.[278] But in this context, voluntary disclosure methods will likely be more flawed because they are less likely to yield robust and systematic data.[279]

It is uncertain that modifying Schedule B and Form 990 to make donor and race data publicly available would be completely beneficial. After all, most government decisions are made under conditions of substantial uncertainty, in which the optimal choice depends on information about consequences that cannot yet be grasped fully even if research and analysis are conducted.[280] There are costs and unintended consequences to consider.

The first is the administrative cost to charities that may be required to provide additional information and potentially submit two Schedule B attachments. The current Schedule B requires the names of all donors who contribute 2% or more of the organization's annual revenue. For organizations with smaller revenues, that list can include individual donors. The Schedule B that this Article proposes would require disclosing all institutional donors to the public—corporations, foundations, and government—regardless of the percentage of their annual donations. This can be burdensome and create additional administrative tasks for some charities. Disclosing institutional donors, however, can also potentially

278. Ben-Shahar & Schneider, supra note 101, at 651 (arguing that the extensive time, costs, and assumptions of disclosures can lead to unwanted consequences).

279. See Estlund, supra note 27, at 405 (describing the limits of voluntary disclosures).

280. See Matthew C. Stephenson, Information Acquisition and Institutional Design, 124 Harv. L. Rev. 1422, 1427 (2011) (stating that most governmental decisions are made under conditions of uncertainty); Cass R. Sunstein, Political Equality and Unintended Consequences, 94 Colum. L. Rev. 1390, 1390 (1994) (stating that many government regulations have unintended consequences that were not considered at the outset).

lead to more funding for a charity, especially if it is a minority-led or minority-serving organization. Disclosing institutional donors will reveal which corporations and foundations actually followed through on their pledges to donate, which watchdog organizations can then use to hold these donors accountable and therefore lead to more funding for the organizations.

The second is the unintended consequence of a negative response from future administrations. Even if Congress makes these changes or the Biden Administration encourages the IRS to collect donor and race data for the socially beneficial purpose of potentially increasing funding to nonprofit organizations, the data can be exploited by a future government with less benign motives.[281] A future president would have the power to sign an executive order stating that minority-led organizations and charities that primarily serve communities of color would receive less government funding. This would significantly impact organizations that are already underfunded and struggling to survive. While this executive order would likely violate the Equal Protection Clause and therefore be unconstitutional, the language can send a signal and have a ripple effect on a range of governmental, nonprofit, and other institutional processes.[282] Despite this potential risk, the benefit of disclosure still outweighs the risk of pronouncements that will likely be found unconstitutional. Congress can also minimize this unintended consequence by including a limit on the use of the data.

The third is the unintended consequence of a chilling effect. While hard to imagine at this point in history, it is possible that an organization that reveals that it disproportionately benefits communities of color could hurt its fundraising. And while it is unlikely, corporations in particular—and potentially also foundations and government entities—can experience backlash for their decisions to donate to certain organizations. Companies can be boycotted, and decisions to donate to certain organizations that are economically favorable today may not be favorable a year from now. The risk is likely limited, however, because a nonprofit can choose to use the opt-out option by showing proof of backlash resulting from donating to a particular organization to the IRS on a yearly basis. Companies and foundations can also simply change course over time.

The fourth is a potential privacy cost from collecting race and ethnicity data. Data on race and ethnicity can be considered sensitive information, particularly for individual board directors and executives. However, since the names of individual board members and executives are

---

281. See ACLU et al., supra note 254, at 6 (explaining the risks of potential misapplication and weaponizing of disclosed race data).

282. See Exec. Order No. 13,950, 85 Fed. Reg. 60,683 (Sept. 28, 2020); see also Fabiola Cineas, Critical Race Theory, and Trump's War on It, Explained, Vox (Sept. 24, 2020), https://www.vox.com/2020/9/24/21451220/critical-race-theory-diversity-training-trump [https://perma.cc/S8FQ-SRAL] (describing the broader effect of the former President's executive order banning racial sensitivity training).

already listed on Form 990, there is less of a privacy concern than if their names were not already public information.[283]

The fifth is that data collection on race and ethnicity in the United States is both complex and has racial origins. The historical motivations and origins of counting the nation's people and the racial undertones in past and present race and ethnicity data have been documented.[284] Government agencies often collect race and ethnicity data in a similar manner as the census to make determinations on a range of political and social factors.[285] For the past generation, the census has been under a lot of scrutiny.[286] Recently, the U.S. Census Bureau has had to defend its ability to count the population accurately.[287] The Hispanic origin category in particular has historically been fraught with inaccuracies.[288] There have also been many discussions about the extension and deepening of

283. Some might consider the public availability of race and ethnicity to be controversial. See, e.g., Brody, supra note 147, at 204 (describing the privacy interests and concerns of charitable donors). A potential alternative to disclosing the race and ethnicity of individual managers and board members is to require aggregate reporting.

284. See, e.g., Christine B. Hickman, The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census, 95 Mich. L. Rev. 1161, 1171 (1997) (tracing the nation's racialized history of categorizing nonwhite individuals to current discussions of a multiracial self-identification category on census forms); Naomi Mezey, Erasure and Recognition: The Census, Race and the National Imagination, 97 Nw. U. L. Rev. 1701, 1702–03 (2003) (discussing the way racial data collection both shapes identities and is influenced by historical conceptions of racial identity).

285. See Margo Anderson & Stephen E. Fienberg, Race and Ethnicity and the Controversy Over the US Census, 48 Current Socio. 87, 87–88 (2000) (discussing the census's methodology for collecting racial and ethnic data for various policy purposes); Madiba Dennie & Thomas Wolf, The State of Census Lawsuits, Brennan Ctr. for Just. (Jan. 12, 2021), https://www.brennancenter.org/our-work/analysis-opinion/state-census-lawsuits [https://perma.cc/VN6A-4GTZ] (examining challenges to the 2020 census by various organizations fueled by social and policy concerns).

286. See, e.g., Felicity Barringer, On Weekend for Counting, Census Itself Is Under Scrutiny as Never Before, N.Y. Times (Apr. 1, 1990), https://timesmachine.nytimes.com/timesmachine/1990/04/01/340690.html?pageNumber=26 (on file with the *Columbia Law Review*) (tracing several decades of scrutiny levied on the census).

287. See Press Release, Statement From U.S. Census Bureau Director Steven Dillingham: Delivering a Complete and Accurate 2020 Census Count, U.S. Census Bureau (Aug. 3, 2020), https://www.census.gov/newsroom/press-releases/2020/delivering-complete-accurate-count.html [https://perma.cc/WGU7-LWJZ] (defending the 2020 census's methodology).

288. See, e.g., John R. Logan, How Race Counts for Hispanic Americans, *in* The Afro-Latin@ Reader: History and Culture in the United States 471, 471–72 (Miriam Jiménez Román & Juan Flores eds., 2010) (assessing the racial differences among Latinx Americans and the lack of identity categories for this population); G. Cristina Mora, Cross-Field Effects and Ethnic Classification: The Institutionalization of Hispanic Panethnicity, 1965 to 1990, 79 Am. Soc. Rev. 183, 183 (2014) (explaining how the Hispanic category emerged on the census).

statistical information on the race and ethnic characteristics of the population and advocacy for more specific classifications.[289]

Prior to the 2000 census, individuals were allowed to choose only one racial category.[290] Beginning in 2000, individuals were allowed to select from among six different Asian groups in addition to "Other Asian," with the option to write in a specific group.[291] Individuals have also had the option to choose more than one race.[292] People who choose two or more races in their answer to the race question are included in the multiple-race population.[293] For the first time, the 2020 census allowed individuals who chose white, Black, or African American for their race to give more information about their origins, such as German, Lebanese, African American, Jamaican, Haitian, Nigerian, Ethiopian, or Somali.[294] These are all welcome changes and can be incorporated in the new Form 990 race data. Ultimately, the realities of the relationship between data collection and race and ethnicity would not impact data collection in Form 990. Still, this history and contemporary issue is worth noting.

Finally, there is the potential, although unlikely, of gaming the system that may initially be detrimental to minority communities but will likely reverse itself. Consider the possibility that, in order to receive additional funding, an organization that does not serve communities of color fills its board with racial and ethnic minorities who are not active members of the organization. This minority-led organization may at first have little positive impact on communities of color. It is probable, however, that because of minority presence on the board, the organization would become more responsive to serving communities of color.[295] Even if it does not, increasing racial and ethnic diversity on nonprofit boards is a positive unintended outcome.[296]

---

289. Anderson & Fienberg, supra note 285, at 92 (discussing scholarly and public debate on the salience of race and ethnicity as social markers).

290. See Kim Parker, Juliana Menasce Horowitz, Rich Morin & Mark Hugo Lopez, Multiracial in America: Proud, Diverse and Growing in Numbers, Pew Rsch. Ctr. (June 11, 2015), https://www.pewresearch.org/social-trends/2015/06/11/multiracial-in-america/ [https://perma.cc/W53Y-47X2] (noting that the Census Bureau first started allowing people to choose more than one racial category in 2000).

291. Anna Brown, The Changing Categories the U.S. Census Has Used to Measure Race, Pew Rsch. Ctr. (Feb. 25, 2020), https://www.pewresearch.org/fact-tank/2020/02/25/the-changing-categories-the-u-s-has-used-to-measure-race/ [https://perma.cc/45CH-YFMF].

292. See Debra Thompson, Making (Mixed-)Race: Census Politics and the Emergence of Multiracial Multiculturalism in the United States, Great Britain and Canada, 35 Ethnic & Racial Stud. 1409, 1413–14 (2012).

293. See generally id. (discussing the movement for allowing respondents to choose more than one racial category).

294. Race/Ethnicity and the 2020 Census, Jason Jurjevich (Mar. 23, 2019), https://www.jasonjurjevich.com/census-2020-faces/raceethnicity-and-the-2020-census [https://perma.cc/2RHN-ZF2H].

295. See Adediran, Racial Allies, supra note 11, at 2162.

296. See id.

To protect individual privacy, the new Form 990 should have an opt-out provision for organizations that can show with some evidence that they or their institutional donors have been or can be harassed by disclosing their donors or the race of their board members and top executives.

2. *Enforcement.* — Once the problem of lack of data is resolved—that is, Congress acts and requires charities to disclose their institutional donors and the race of their top managers—there is the second layer of having mechanisms in place to increase and sustain funding to minority-led and minority-serving nonprofit organizations. There are a few avenues for collecting donor and race data for public charities. One is through the IRS as part of its tax-exempt regulations. A second option is through state AGs, who oversee charities within their states. A third option is through secretaries of states, with whom entities file their articles of incorporation. A fourth option is through a newly created entity. None of these avenues are foolproof, although the IRS remains the best option.

Public charities are established to serve the public, and the public is inherently interested in their dealings. It is not immediately clear, however, who would enforce the proposed changes to Schedule B and Form 990. It is therefore important to consider possible enforcement mechanisms and challenges.

The law generally relies on those with immediate interest in an enterprise administered by a fiduciary to engage in rule enforcement.[297] State corporate law vests enforcement of the fiduciary duties of for-profit corporate directors in its shareholders.[298] Unlike a corporation with shareholders who have clear interests in its dealings, a nonprofit charity generally has no beneficiary who is sufficiently interested in holding the charity accountable.[299]

Consequently, the question of who has standing to enforce a nonprofit charity's fiduciary duty of care in ensuring proper disclosure in its Form 990 and Schedule B can be rather complicated.[300] Four groups can, in theory, serve as potential plaintiffs in actions that charge a public charity's board directors with breaching their fiduciary duties: state AGs, executives of the nonprofit, donors, and those with a "special relationship" to the organization, including beneficiaries of its services.[301] No state has

297. See Kenneth L. Karst, The Efficiency of the Charitable Dollar: An Unfulfilled State Responsibility, 73 Harv. L. Rev. 433, 436 (1960) (stating that the beneficiaries of an organization are typically relied upon to engage enforcement mechanisms when needed).

298. Developments in the Law: Nonprofit Corporations, supra note 28, at 1594.

299. Karst, supra note 297, at 436 (stating that there is typically no beneficiary of a charity who is in the position to call the charitable fiduciary to account).

300. See Lloyd Hitoshi Mayer, Fiduciary Principles in Charities and Other Nonprofits, *in* The Oxford Handbook of Fiduciary Law 103, 118 (Evan J. Criddle, Paul B. Miller & Robert H. Sitkoff eds., 2019) (examining the issue of which individuals can enforce a charitable organization's fiduciary duties).

301. Developments in the Law: Nonprofit Corporations, supra note 28, at 1594–95 (listing the individuals who can be identified as potential plaintiffs in actions that charge

legislatively conferred standing on persons who are not public officials or members of a nonprofit organization.[302] Members of the general public have no right to bring a lawsuit against a nonprofit director for breach of fiduciary duties.[303] The rationale is that, without this limit on who can sue on behalf of a nonprofit organization, charities can be subjected to harassing litigation.[304] The first two groups—state AGs and executives—have played a significant role in enforcing the duties of nonprofit board directors in general, but courts have regularly denied standing to donors and beneficiaries of services.[305]

Based on the current legal landscape, some courts have generally permitted state AGs to bring actions against nonprofit directors.[306] To enforce accurate annual reporting of donor and race data, a state AG's office could monitor Form 990 and Schedule B filings to ensure that charities with majority racial-and-ethnic-minority leaders or charities that service communities of color are not underfunded in relation to white-led organizations or those who do not primarily serve communities of color and that corporations and foundations that publicly claim to financially support these organizations are doing so. It is very unlikely, however, that

nonprofits with breaching their fiduciary duties). Despite this fact, the Revised Model Nonprofit Corporation Act is silent on who might have a "special relationship." For other types of tax-exempt nonprofits, the Revised Model Nonprofit Corporation Act and several state statutes allow the members of a nonprofit organization to bring a derivative action for breach of fiduciary duty against the nonprofit's directors. But derivative suits by members of a nonprofit are relatively rare. See, e.g., Krukas v. AARP, Inc., 458 F. Supp. 3d 1, 10 (D.D.C. 2020) (declining plaintiff's claims of a beneficiary interest in AARP Trust despite the organization holding their insurance policies and premium payments). A member must have "the right to vote for the election of a director or directors." Revised Model Nonprofit Corp. Act § 1.40(21) (1987); see also id. § 6.30(a)(i) (stating that a proceeding may be brought by "any member or members having five percent or more of the voting power or by fifty members"); N.Y. Not-for-Profit Corp. Law § 623(a) (McKinney Supp. 1992) (declaring that an action may be brought by "five percent or more of any class of members"); Cal. Corp. Code § 5142(a)(1) (1979) (allowing members to bring a lawsuit in the name of the organization). Employees of homeowner associations, which are often 501(c)(4), 501(c)(7), or 528 organizations, have brought derivative suits against executives. See, e.g., McMillan v. Ryan Jackson Props., LLC, 753 S.E.2d 373, 375 (N.C. Ct. App. 2014) (describing condo owners suing a nonprofit condo association corporation); Sayyah v. O'Farrell, No. CA2000-06-017, 2001 WL 433789, at *1 (Ohio Ct. App. Apr. 30, 2001) (describing members of a homeowner nonprofit organization that brought suit against its manager for alleged wrongdoing).

302. See O'Donnell v. Sardegna, 646 A.2d 398, 411 (Md. 1994) (stating that, if a nonprofit corporation is the vehicle for a trust, then standing is conferred by statute).

303. Developments in the Law: Nonprofit Corporations, supra note 28, at 1595 (noting that statutes typically vest the power to enforce duties of charitable trusts in state AGs).

304. Karst, supra note 297, at 449 (stating that members of the public at large cannot sue to enforce the duties of a charitable fiduciary because of the risk of harassing litigation).

305. Id. at 446 (explaining that courts have been reluctant to give standing to charitable donors suing a benefactor).

306. See, e.g., Lopez v. Medford Cmty. Ctr., Inc., 424 N.E.2d 229, 232 (Mass. 1981) (holding that the AG has the exclusive role to protect the public interest by bringing proceedings to correct abuses in the administration of a public charity).

any state's AG would bring a derivative lawsuit to enforce donor and race disclosure requirements because enforcement of nonprofit tax rules by state AGs is rare and AGs lack resources and incentives to uncover violations of fiduciary duties.[307]

Outside of the AGs, an organization's executives can also bring a derivative lawsuit against its directors for failing to report race and donor data. Here too, however, it is unclear that nonprofit charity executives would bring such legal actions for a number of reasons. First, the race data that are being collected are directly related to the top executives themselves. It is possible that some nonprofit executives would be inclined to enforce the requirement, especially if the organization's leadership is racially and ethnically diverse and reporting would benefit the organization from a funding perspective. On the other hand, top executives in nonprofit charities that are less racially and ethnically diverse may not want to disclose their race since doing so may not benefit them from a funding standpoint. Some executives may also have privacy concerns as discussed earlier and may prefer not to enforce the disclosure requirements at all.

In theory, other employees and clients of a nonprofit charity can bring a derivative suit—by virtue of their "special relationships" with the organization—against boards of directors for not providing race and donor data on Form 990 or Schedule B in order to ensure that the organization receives much needed funding. It is unclear, however, if a court would recognize staff and clients as potential plaintiffs in a derivative lawsuit on behalf of a nonprofit charity.[308] Even in the unlikely event that a court grants staff and clients standing to sue boards of directors for noncompliance, without strong incentives, it is unlikely that staff members of a charitable nonprofit would bring such a derivative lawsuit. It is even more unlikely that a charity's beneficiaries would come together to sue board directors for noncompliance with disclosure requirements.

Finally, the IRS itself can attempt to police these disclosures by conditioning continued tax-exempt status on the disclosure of donor and race data or imposing a penalty for nondisclosure. The penalty would be

---

307. See Evelyn Brody, Whose Public? Parochialism and Paternalism in State Charity Law Enforcement, 79 Ind. L.J. 937, 948 (2004) (stating that very few cases involving nonprofit fiduciary issues reach courts because of strong incentives to pursue reform over punishment); Developments in the Law: Nonprofit Corporations, supra note 28, at 1595–96, 1600 (explaining that AGs typically lack the resources and incentives to uncover violations of fiduciary duties); Dana Brakman Reiser, Enron.org: Why Sarbanes-Oxley Will Not Ensure Comprehensive Nonprofit Accountability, 38 U.C. Davis L. Rev. 205, 219 (2004) (contending that, even when AGs enforce, they are focused on financial disclosures above other forms of organizational disclosures).

308. See O'Donnell v. Sardegna, 646 A.2d 398, 405 n.7, 408–09 (Md. 1994) (listing eight decisions from other jurisdictions recognizing derivative suits by members of not-for-profit membership organizations but declining to extend standing to subscribers to nonprofit health plans). While this case involved a membership organization, which is distinct from a public charity, it still illustrates that courts might be unwilling to grant standing to parties such as members, clients, or staff.

akin to the current penalty for nondisclosure of Form 990, which states that an "organization [that] fail[s] to [disclose Form 990] may be subject to a penalty of $20 per day for as long as the failure continues. There is a maximum penalty of $10,000 for each failure to provide a copy of an annual information return."[309] IRS oversight can work well in theory. Academics, however, have written much about the IRS's failings in maintaining oversight of tax-exempt organizations because of shrinking resources and growing responsibilities.[310]

Since underenforcement is generally an issue in tax-exempt nonprofits, these new proposals will likely not be an exception. Still, this Article takes the position that, relative to the other avenues, the IRS is the most efficient and effective option for the mandatory disclosure of donor and race data for public charities for two reasons.

First, the IRS has broad—although not limitless—authority to collect information deemed necessary for the administration of the federal tax law. In 2008, the IRS broadened its disclosure authority for tax-exempt organizations to include governance and management policies that are not required by the IRC.[311] While controversial, this move was meant to "promote standards of good governance, management and accountability" since the IRS "contributes to a compliant, healthy charitable sector by expecting the tax-exempt community to adhere to commonly accepted standards of good governance."[312] Standards of good governance can be interpreted to include the equitable distribution of funds received by tax-exempt organizations. It can also include the goal of increasing racial diversity on nonprofit boards. Even if the IRS is unable to expand its authority to collect donor and race data in this way, Congress can step in to allow donor disclosures and race data for top managers, board members, and communities served in publicly filed IRS tax-exempt forms.

Second, the IRS already collects donor information in Schedule B and the names of top managers and board members in Form 990. No other entity already houses this data. The modifications in Part IV call for publicly disclosing institutional donors that are already reported in

309. Public Disclosure and Availability of Exempt Organizations Returns and Applications: Penalties for Noncompliance, IRS, https://www.irs.gov/charities-non-profits/public-disclosure-and-availability-of-exempt-organizations-returns-and-applications-penalties-for-noncompliance#:~:text=Responsible%20persons%20of%20a%20tax,of%20an%20annual%20information%20return [https://perma.cc/2WUD-682R] (last updated Sept. 7, 2021).

310. See, e.g., Lloyd Hitoshi Mayer, "The Better Part of Valor Is Discretion": Should the IRS Change or Surrender Its Oversight of Tax Exempt Organizations?, 7 Colum. J. Tax L. 80, 80 (2016) (discussing the IRS failing to conduct effective oversight of exempt organizations).

311. IRS, Governance and Related Topics—501(c)(3) Organizations 1 (2008), https://www.irs.gov/pub/irs-tege/governance_practices.pdf [https://perma.cc/JZ6Y-MWFU].

312. Steven T. Miller, Comm'r, Tax Exempt and Gov't Entities, IRS, Remarks Before the Philanthropy Roundtable: The IRS's Role in an Evolving Charitable Sector 4 (Nov. 10, 2007), https://www.irs.gov/pub/irs-tege/philanthoropy_roundtable1107.pdf [https://perma.cc/T2RC-GP8V].

Schedule B and adding race and ethnicity data to already publicly available information.

Below, section IV.C.3 discusses a series of private systems of enforcement that can all work in concert to move the system from disclosure to increasing funding to minority-led and minority-serving charities.

3. *From Disclosure to Funding*. — There are a number of mechanisms that can be put in place to move from merely having data about minority-led or minority-serving organizations and their donors to actually increasing funding to those organizations. The first is the role of private watchdog organizations. The second is establishing a certification program. The third is the role of the public at large.

a. *Private Watchdog Organizations*. — Nonprofit watchdog organizations, such as the Better Business Bureau (through its Wise Giving Alliance),[313] GuideStar (now Candid),[314] CharityWatch,[315] Charity Navigator,[316] and Network for Good,[317] are devoted to monitoring and rating the transparency and performance of nonprofit organizations. In general, these watchdogs are set up to assist donors to determine whom to support among the over one million 501(c)(3) public charities dedicated to addressing similar issues.

But watchdog organizations have extended their roles beyond servicing donors to providing information to the public at large. Notably, Candid has begun working to nudge foundations and corporations to fund racial equity issues by providing updated news, analysis, and perspectives about philanthropical support for racial justice causes.[318]

Watchdog organizations are also repositories of Form 990 for public charities. These organizations have digitized Form 990s, making them available and accessible to all on the internet.[319] With donor and race data made publicly available, watchdog organizations can easily provide an annual analysis of funding to minority-led and minority-serving organizations. Importantly, these organizations can easily monitor

---

313. Give.org: BBB Wise Giving All., https://give.org/ [https://perma.cc/4NKH-XEAC] (last visited Jan. 26, 2022).

314. Candid, https://candid.org/ [https://perma.cc/C8V9-4DX6] (last visited Jan. 26, 2022).

315. CharityWatch, https://www.charitywatch.org/ [https://perma.cc/X64R-Y6AH] (last visited Jan. 26, 2022).

316. Charity Navigator, https://www.charitynavigator.org/ [https://perma.cc/ZR9X-PQSA] (last visited Jan. 26, 2022).

317. Easily Understand Your Fundraising Campaign Results, Network for Good, https://www.networkforgood.com/all-in-one-platform/measurement-and-tracking/ [https://perma.cc/4G8H-3DVT] (last visited Jan. 26, 2022).

318. Funding for Racial Equity, Candid, https://candid.org/explore-issues/racial-equity [https://perma.cc/834B-AZDT] (last visited Jan. 26, 2022).

319. See, e.g., 990 Finder, Candid, https://candid.org/research-and-verify-nonprofits/990-finder [https://perma.cc/F39S-L6JD] (last visited Jan. 26, 2022) (providing a database of Form 990s for private foundations, public charities, and other nonprofits).

foundation and corporate giving to minority-led and minority-serving organizations every year and over time. With the publicly available information provided by watchdog organizations, other constituents, including the media and the public through social media and other means, can call out institutional donors with inconsistencies by conducting a simple search on a watchdog organization's database matching institutional donors with charities.

In addition, it is possible that some organizations would submit Form 990 and Schedule Bs with inaccurate information even if the IRS requires disclosure.[320] Watchdog organizations can provide analysis of inaccuracies in the data. Watchdog organizations can also arm individual donors with data that can help to financially support minority-led or minority-serving organizations if they choose to. In 2020, individual donors comprised 69% of total giving to charitable organizations, so there is a need for this critical information for individual donors.[321]

b. *Certification Program.* — The second enforcement mechanism is to establish a certification program through a nonprofit organization. Certifications are a growing practice that corporations and firms use to signal their commitments to certain social values.[322] Empirical research on

---

320. Even though Form 990 requires the signature of an organization's officer, under penalties of perjury, denoting that the officer has examined the form and that all of the information reported in it is "true, correct, and complete," empirical research has shown that organizations submit Form 990 with errors. See Froelich et al., supra note 148, at 248 (studying a sample of 350 nonprofit organizations' Form 990s and finding errors on the reporting of activities typically not considered a priority for nonprofits, including management expenses and commercial revenue sources, and fewer errors on programs, fundraising, and contributions); Gordon et al., supra note 146, at 30 (finding errors in Form 990 data for thirty-nine environmental organizations by comparing it to financial disclosures in audited statements).

321. Nat'l Philanthropic Tr., supra note 1. One scholar has argued that individual donors seldom use publicly available tax disclosures to make decisions about whether to donate to a nonprofit organization. See Lumen N. Mulligan, What's Good for the Goose Is Not Good for the Gander: Sarbanes-Oxley-Style Nonprofit Reforms, 105 Mich. L. Rev. 1981, 1998 (2007) (arguing that "most donors do not investigate the financial or governance practices of nonprofit organizations before donating" due to the small scale of donations). Data on race and institutional donors, however, may generate a different reaction from individual donors than financial data.

322. See Adediran, Relational Costs, supra note 38, at 395 (discussing particular certifications and how they signal an organization's commitment to social responsibility); Eldar, supra note 57, at 955–58 (discussing private certifications and concerns they may be misleading consumers). Examples include B Corp, Fair Trade, LEED, and Mansfield Diversity certification. About B Corp Certification, B Lab Glob., https://www.bcorporation.net/en-us/certification [https://perma.cc/N5EN-BEYL] (last visited Jan. 26, 2022); Fair Trade Certification, Fair Trade Certified, https://www.fairtradecertified.org/business [https://perma.cc/KDR4-VAEL] (last visited Jan. 26, 2022); LEED Rating System, U.S. Green Bldg. Council, https://www.usgbc.org/leed [https://perma.cc/T578-B4VC] (last visited Jan. 26, 2022); Mansfield Rule 4.0, Diversity Lab, https://www.diversitylab.com/mansfield-rule-4-0/ [https://perma.cc/N2AU-J6U2] (last visited Jan. 26, 2022) (declaring the participation of 118 major law firms to the Mansfield Rule, a measure of whether law firms

the effectiveness of certifications is generally mixed.[323] The certification program proposed here, however, is different from other certification programs because it is a means to obtain external funding, rather than a means to change internal processes within an organization. Its primary goal is to serve as a nudge for corporations and foundations to donate to minority-led and minority-serving organizations.

A nonprofit organization such as Giving Gap, formerly known as Give Blck—a new digital platform launched in September 2020 to connect Black-led nonprofits to funding by raising visibility—can be established as a certification entity.[324] Currently, Giving Gap provides information on not only well-known national organizations but other Black-led nonprofit organizations.[325] It allows members of the public to submit information on a nonprofit that fits the criteria for inclusion.[326] Giving Gap can be expanded to include all minority-led and minority-serving organizations, or similar platforms can be created to encompass a wider range of minority nonprofits.

Taking year-by-year data from the watchdog organizations, the expanded Giving Gap or similar organization would issue certifications to corporations and foundations that are following through on their commitments. These certifications would publicly signal support to minority-led and minority-serving organizations.

Such certifications also have a critical role in addressing inequality even among minority-led and minority-serving organizations because of their media acclaim and reach.[327] By increasing visibility to charities that

---

have "affirmatively considered at least 30 percent women, lawyers of color, LGBTQ+ lawyers, and lawyers with disabilities for leadership and governance roles").

323. See, e.g., Malu Villela, Sergio Bulgacov & Glenn Morgan, B Corp Certification and Its Impact on Organizations Over Time, 170 J. Bus. Ethics 343, 354 (2021) (describing conflicting research on the impact of B Corp certification on socially responsible conduct).

324. Giving Gap, https://www.givinggap.org/ [https://perma.cc/Q6VK-QFZW] (last visited Jan. 26, 2022); Give Blck: New Database Connects Donors to Black Nonprofits, Cision PR Newswire (Sept. 24, 2020), https://www.prnewswire.com/news-releases/give-blck-new-database-connects-donors-to-black-nonprofits-301137438.html [https://perma.cc/T2UM-27YA]. Groundswell Fund is another organization that does this on a limited scale by serving as a funding intermediary for organizations owned by women of color and trans and gender-nonconforming people of color. Groundswell's Approach, Groundswell Fund, https://groundswellfund.org/groundswells-approach/ [https://perma.cc/K5RC-U8VL] (last visited Jan. 26, 2022).

325. Giving Gap, supra note 324.

326. Thank You for Submitting to the Giving Gap Database, Giving Gap, Google Forms, https://forms.gle/5o8i3p3KBdtKYRWt7 (on file with the *Columbia Law Review*) (last visited Jan. 26, 2022).

327. See Paul Sullivan, As Donations Shift in the Pandemic, New Databases Aim to Help, N.Y. Times (Sept. 25, 2020), https://www.nytimes.com/2020/09/25/your-money/donations-social-causes-coronavirus.html (on file with the *Columbia Law Review*) (last updated June 15, 2021) (highlighting Give Blck's launch in September 2020 and reporting an uptick in donations to its featured organizations).

are not well known or national in reach, disparities in funding between such charities and well-known charities can be mitigated.

To be sure, a certification program through Giving Gap or a similar organization is not a panacea: It is applicable largely to institutional and not individual donors. Institutional donors often respond to political, economic, and social pressures that individuals may not have. While certifications may be sufficient to sustain funding from Amazon or Google, individuals are unlikely to find certifications useful. This is where the public's role and social media are crucial to enforcing the nudge for both institutional and individual donors.

c. *The Role of the Public.* — While the public at large cannot bring a derivative lawsuit on behalf of a nonprofit organization, members of the public have a role to play in scrutinizing contributors in relation to public commitments about supporting minority-led and minority-serving organizations and raising awareness about racial inequality in philanthropy.[328]

Recently, the public has held corporations claiming to support racial justice issues accountable when their actions are inconsistent with public statements.[329] Social media has strengthened public accountability and resulted in calls to boycott a number of brands. For example, Prada was forced to stop selling its $550 monkey figurine after social media users called out a strong resemblance to racist caricatures historically used to dehumanize Black people.[330] Similarly, after many decades of Quaker Oats knowing that its Aunt Jemima brand was built on racist imagery and its top executives resisting change, the company announced its decision to rebrand Aunt Jemima days after a TikTok video describing the brand's history was shared widely on social media.[331]

---

328. See, e.g., Angel Hsu, Omar Malik, Laura Johnson & Daniel C. Esty, Comment, Mobilize Citizens to Track Sustainability, 508 Nature 33, 34–35 (2014) (advocating for the public to track sustainability); Jamillah Bowman Williams, Lisa Singh & Naomi Mezey, #MeToo as Catalyst: A Glimpse Into 21st Century Activism, 2019 U. Chi. Legal F. 371, 377 (discussing the proliferation of online social justice movements).

329. See, e.g., Nick Corasaniti & David Gelles, Business Coalitions Speak Out Against Voting Restrictions in Texas, N.Y. Times (May 4, 2021), https://www.nytimes.com/2021/05/04/us/politics/microsoft-hp-patagonia-texas-voting-rights.html (on file with the *Columbia Law Review*) (last updated May 7, 2021) (illustrating how executives and companies have put pressure on Texan legislators to resist proposed restrictions on balloting); Hannah Denham, In Reversal, Starbucks Will Allow Employees to Wear 'Black Lives Matter' T-Shirts, Wash. Post (June 12, 2020), https://www.washingtonpost.com/business/2020/06/12/starbucks-black-lives-matter/ (on file with the *Columbia Law Review*) (discussing public denouncement after Starbucks banned their employees from wearing Black Lives Matter shirts and a subsequent change in corporate policy).

330. Chiara Albanese & Robert Williams, Prada Will Stop Selling $550 Monkey Figure Decried as Racist, Bloomberg (Dec. 14, 2018), https://www.bloomberg.com/news/articles/2018-12-14/prada-will-stop-selling-550-monkey-figure-decried-as-racist (on file with the *Columbia Law Review*).

331. Tiffany Hsu, Aunt Jemima Brand to Change Name and Image Over 'Racial Stereotype', N.Y. Times (June 17, 2020), https://www.nytimes.com/2020/06/17/business/

There are drawbacks to giving the public and social media such an important enforcement role. Public accountability can be unpredictable and inconsistent. Professor Linda Sugin has written against public accountability—particularly the role of the media—in the enforcement of nonprofit fiduciary duties because the press may be too enthusiastic to indict without following through on evidence.[332] However, watchdog organizations can serve as a check on the media's information and reach based on the information they make available.[333]

Particularly for individual donors, there is a possibility of public fatigue over time, in which people follow watchdog analysis for some time and their interest begins to wane as time goes on. However, changes in the current moment of racial reckoning suggests that a large group of individuals will likely maintain interest in funding for minority-led and minority-serving organizations.[334]

In sum, to address inequality in funding for minority-led and minority-serving nonprofit organizations and hold corporations and foundations accountable for racial capitalism, the IRS should use its current authority to collect information related to nonprofit management to require the disclosure of donor and race data. If the IRS is limited in its authority to mandate these disclosures, particularly with regards to donor information, Congress should step in to modify the IRC to permit the IRS to collect and publicly disseminate donor and race data. Assuming that donor and race data become publicly available, private watchdogs, certifications, and the public can work in concert to advance disclosure to improve funding equity for minority-led and minority-serving nonprofit charities. This will begin the process of curing racial capitalism in the nonprofit sector.

CONCLUSION

This Article addresses the racial gap in charitable contributions. It argues that nonprofit charities should disclose their donors and the race

---

aunt-jemima-racial-stereotype.html (on file with the *Columbia Law Review*) (last updated Feb. 10, 2021).

332. Linda Sugin, Strengthening Charity Law: Replacing Media Oversight With Advance Rulings for Nonprofit Fiduciaries, 89 Tul. L. Rev. 869, 890 (2015) (discussing the risk that the press may be too zealous in looking for nonprofit misconduct where none exists or evidence is ambiguous).

333. See id. at 890 ("The media attention to a particular scandal might not reflect the seriousness of any legal violations but might instead reflect the public interest in a celebrity or a well-known institution." (footnote omitted)).

334. See Ashley Quarcoo & Medina Husaković, Carnegie Endowment for Int'l Peace, Racial Reckoning in the United States: Expanding and Innovating on the Global Transitional Justice Experience 7 (2021), https://carnegieendowment.org/files/202110-Quarcoo_Racial_Reckoning_final.pdf [https://perma.cc/H9PG-Q4M2] (noting that current demands for racial justice are fundamentally different from past moments of racial reckoning because there is buy-in from larger cross-sections of American society than in the past).

and ethnicities of their top managers and board directors through the IRS to further two goals. The first is to increase funding to underfunded charities that are minority led or that serve communities of color. The second is to hold corporations and foundations who make public commitments to fund minority-led and minority-serving organizations accountable for their commitments, especially over time. The public disclosure of institutional donors—corporations, foundations, and government entities—in IRS Form 990 Schedule B would facilitate much-needed transparency and accountability. The disclosure of race data in IRS Form 990 would help decipher organizations that are minority led or minority serving and provide an avenue to hold corporations and foundations accountable for claiming and benefiting from financial support of racial justice efforts. These proposals are narrowly tailored so as not to chill the freedom of association and raise privacy concerns because they require only the disclosure of institutional rather than individual donors and permit an opt-out option for organizations that can show evidence of the possibility of harassment or other reprimands.

To facilitate getting from disclosure to actual funding, this Article addresses enforcement mechanisms, drawbacks, and concerns with government enforcement and the costs and benefits of disclosure. Enforcement mechanisms that are more likely to be successful include harnessing the role of watchdog organizations who already monitor public disclosures in IRS Form 990, creating certifications for corporations and foundations that follow through on their commitments to fund minority-led and minority-serving charities, and tapping into the general public's recent enthusiasm for policing companies toward social justice ends.