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DARK MONEY DARKER? IRS SHUTTERS COLLECTION OF DONOR DATA

Philip Hackney[*]

ABSTRACT

The IRS ended a long-time practice of requiring most nonprofits to disclose substantial donor names and addresses on the nonprofit annual tax return. It is largely seen as a battle over campaign finance rather than tax enforcement. Two of the nonprofits involved, social welfare organizations and business leagues, are referred to as "dark money" organizations because they allow individuals to influence elections while maintaining donor anonymity. Many in the campaign finance community are concerned that this change means wealthy donors can avoid campaign finance laws and have no reason to fear being discovered. In this Article, I focus on whether the information is needed for the enforcement of the tax law and/or to support ancillary legal goals. I contend the IRS ought to collect this substantial donor information as it did for over 79 years. Though the collection of donor information may not be essential for groups such as social clubs, fraternities and sororities, and mutual ditch companies, the collection of this information non-publicly by the IRS is important in both enforcing tax-exempt requirements and in enforcing the tax law generally. Tax law prohibits the distribution of earnings from a nonprofit to those who control the organization. Substantial donors are classic suspects for seeking such improper receipts through their control. Thus, the information is key to IRS auditors. Considering the deficient budget of the IRS to ensure a properly enforced Code, the failure to collect that information puts the IRS in a disadvantaged position. While as a democratic matter, there may be some modest benefit from alleviating donors from the worry that the government will know about their political contributions, the harm to those who are not able to make use of these structures, the harm to those who are deprived of information regarding the biases associated with particular political activity, and the harm to the belief that the tax, campaign finance, and nonprofit law will be enforced equally upon all, is more significant. With these considerations in mind, the IRS and Treasury ought to rescind its most recent guidance on this matter. If not, Congress ought to require this information be disclosed by law.

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[*] Associate Professor of Law, University of Pittsburgh School of Law. I thank Harvey Dale, Jill Manny, Sean Delany, Dana Brakman Reiser, Lloyd Hitoshi Mayer, and the participants in the Nonprofit Forum who provided comments to an earlier draft of this Article. I also thank the participants in the Law & Society 2020 virtual tax panel including the comments of Ariel Jurow Kleiman, Neil Buchanan, and Henry Ordower. I very much appreciated the fabulous assistance provided by my research assistants Teasan Back and Michaela Quinlan, and the support that the University of Pittsburgh School of Law provided.

I. INTRODUCTION

On July 16, 2020, an FBI Agent in the Southern District of Ohio filed a criminal complaint against Larry Householder, the Speaker of the House of Representatives of the state of Ohio, along with several other defendants, including a social welfare organization claiming to be exempt under section 501(c)(4) of the Internal Revenue Code ("Code") for a $60 million bribery scheme related to state energy policy.[1] One of the defendants is specifically quoted as saying that their bribery scheme was not likely to be discovered because of the use of a social welfare organization.

> Clark discussed with Householder, the use of a 501(c)(4), controlled by Householder, to receive payments: "what's interesting is that there's a newer solution that didn't occur in, 13 years ago, is that they can give as much or more to the (c)(4) and nobody would ever know. So you don't have to be afraid of anyone because there's a mechanism to change it.[2]

Clark was likely referring to the fact that in 2020, the IRS ended a long-time practice[3] of requiring most nonprofit tax-exempt organizations to disclose substantial donor names and addresses on Schedule B to the Form 990, the annual tax information return of nonprofits.[4] This

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[1] Criminal Complaint, U.S. v. Matthew Borges, Case No. 1:20-MJ-00526 (July 16, 2020).
[2] *Id*. at 15, par. 45.
[3] The IRS issued the first Form 990 for the 1941 tax year in 1942. Cheryl Chasin, Debra Kawecki & David Jones, Form 990 in IRS EO CPE text 2002. https://www.irs.gov/pub/irs-tege/eotopicg02.pdf; T.D. 5125, 1942-1 C.B. 101. *See also* 20 TAXES 303 (1942) (describing the new Form 990 requiring substantial donors to be disclosed). Paul Arnsberger et al., *A History of the Tax-Exempt Sector: An SOI Perspective*, I.R.S. SOI BULLETIN (2007-2008) (Congress first required a return for exempt organizations in 1942). In a blog post on The Surly Subgroup, I posted an I.R.S. Form 990 from the 1940s. Philip Hackney, *Dark Days: Blindfolding Nonprofit Regulators*, May 2, 2016. See post here: https://surlysubgroup.com/2016/05/02/dark-days-blindfolding-nonprofit-regulators/
[4] US Department of the Treasury, *Treasury Department, and IRS Announce Significant Reform to Protect Personal Donor Information to Certain Tax-Exempt Organizations*, July 16, 2018. See announcement here: https://home.treasury.gov/news/press-releases/sm426 This is the announcement for Rev. Proc. 2018-38. See Schedule B to the Form 990 here: https://www.irs.gov/pub/irs-pdf/f990ezb.pdf. A US District Court struck down the IRS's first effort to change this rule because the IRS failed to follow the Administrative Procedure Act; Bullock v. IRS, 401 F.Supp.3d 1144 (2019). The IRS and Treasury Department proposed the same rule in regulations pursuant to notice and comment in late 2019. Notice of Proposed Rulemaking [REG–102508–16] RIN 1545–BN28,

is a hotly contested partisan issue. Republicans tend to support the end of the collection of this donor information, while Democrats tend to support its maintenance. It is largely seen as a battle over campaign finance rather than tax enforcement.[5] In this Article, I try to avoid the partisan battle and ask broadly whether the change is wise. I focus on whether the information is needed for the enforcement of the tax law and/or to support ancillary legal goals. Ancillary legal goals might include the transparent operation of nonprofits in a national sense, and as back up support for legal regimes such as federal and state campaign finance and state law enforcement associated with nonprofit organizations.[6]

I argue that the IRS ought to collect this substantial donor information as it did for over 78 years.[7] Though the collection of donor information may not be essential for groups such as social clubs,[8] fraternities and sororities,[9] and mutual ditch companies,[10] the collection of this information from so-called "dark money" organizations, such as social welfare organizations[11] and business leagues[12] likely has a real impact on the enforcement of the tax law as to tax-exempt organizations and as to the individuals who contribute to them.[13] Additionally, though Larry Householder and his co-defendants may have been caught secretly bribing officials through a social welfare organization there are likely many more individuals using these vehicles fraudulently who will never be caught. The collection of that information is an easy way to stymie such illegal activity. I argue the IRS can and ought to consider the potential harm to ancillary laws such as campaign finance and fraud in evaluating whether to require the collection of this information. Fundamentally though, the tax law enforcement role alone makes this information worth continuing to collect. Considering the deficient budget of the IRS to ensure a properly enforced Code,[14] the failure to collect that information puts the IRS in a disadvantaged position it need not put itself in with respect to auditing wealthy taxpayers.[15]

Most nonprofits meet their primary tax compliance requirement with the IRS by filing an annual information return called the Form 990.[16] In addition to letting the IRS know the organization is complying with the tax law, it discloses to the public the organization's activities.

Guidance Under Section 6033 Regarding the Reporting Requirements of Exempt Organizations, Published in the Federal Register September 10, 2019.

[5] *See* Roger Colinvaux, *Social Welfare and Political Organizations: Ending the Plague of Inconsistency*, 21 N.Y.U. J. LEGIS. & PUB. POL'Y 481 (2018) [hereinafter Plague of Inconsistency]. See also J. Breyer asking the U.S. Solicitor General in oral argument for Ams. for Prosperity Found. v. Becerra, 903 F.3d 1000 (2018), *cert. granted*, 141 S. Ct. 973 (2021) whether the challenge in that case to the California Law requiring charitable organizations to file a Schedule B with the state attorney general "is really a stalking horse for [bringing down] campaign finance disclosure laws." https://www.supremecourt.gov/oral_arguments/argument_transcripts/2020/19-251_h3ci.pdf

[6] Though Treasury has issued a final regulation, this project is still worthwhile because Treasury could write another rule and Congress could mandate the disclosure of this information.

[7] *See infra* Part III(A).

[8] 26 U.S.C. § 501(c)(7).

[9] 26 U.S.C. § 501(c)(8).

[10] 26 U.S.C. § 501(c)(12).

[11] 26 U.S.C. § 501(c)(4).

[12] 26 U.S.C. § 501(c)(6).

[13] Though I left out labor unions, that is purposeful as there is already a robust donor disclosure regime associated with these organizations.

[14] *See infra* Part III(C).

[15] The U.S. Supreme Court is currently considering whether a similar California law that requires charitable organizations to submit this major donor information to the state's attorney general is Constitutional under the First Amendment in Americans For Prosperity, *supra* note 5.

[16] 26 U.S.C. § 6033.

Thus, the Form 990 broadly serves both a tax enforcement role and a democratic role (in a "sunshine is said to be the best disinfectant" model)[17] and it has long served those dual purposes.[18]

The requirement to disclose substantial donor names and addresses is a small part of the information gathered on the Form 990, an information return that broadly informs the IRS and the public about what the nonprofit did during the taxable year. Though most of the Form is publicly disclosed, this donor information was and is generally not.[19] The most common argument for not requiring a nonprofit to disclose donor information to the IRS is that it is not relevant to the IRS tax collection function, and thus should be eliminated. This argument is made up of two parts. The first is that that the IRS has only one function, collecting tax. The second is that this information does not help the IRS in its primary role of tax collection. The IRS itself made a pragmatic rather than legal argument. It said the information is administratively burdensome to the IRS and to those who must file the form, and it just does not use the information that much.[20] While those contentions may be true, they ignore the larger regulatory impact of ending the requirement.

Wealthy contributors have never liked the fact that their names were turned over to the IRS.[21] Congress even moved to eliminate the entire Schedule B back in 2016.[22] Arguably, this battle is over wealthy interests fighting to keep their ability to keep their political activity anonymous, even to (maybe especially to) the IRS. Though the IRS has eliminated the requirement for tax-exempt organizations, this Article still has relevance because of the possibility that Congress might move to eliminate this requirement as to charities as well. Additionally, the IRS could regulatorily renew the requirement, or alternatively Congress could mandate the IRS to require this disclosure.

Fortunately, and rightly, the IRS did not eliminate the requirement for charitable organizations, which Congress had proposed back in 2016. Donor information is key to charitable organization oversight from a tax exemption perspective. It allows the IRS to see to whom an organization might be distributing earnings violating the absolute prohibition on inurement placed on charitable organizations.[23] The recent college admissions scandal perhaps highlights the usefulness of requiring an organization to provide that information to the IRS.[24] Of course, as the IRS acknowledges, this information as to charitable organizations is legislatively required.[25]

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[17] *See* LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (1914) ("Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman. And publicity has already played an important part in the struggle against the Money Trust."). Also consider Immanuel Kant's formula of public right, "[a]ll actions affecting the rights of other human beings are wrong if their maxim is not compatible with their being made public". Immanuel Kant, *Perpetual Peace A Philosophical Sketch*, in KANT: POLITICAL WRITINGS 126 (translated Nisbet 1971).

[18] *See Infra* Part III.

[19] Charitable organizations and political organizations must still furnish this information on the Form 990. It is publicized for charitable organizations that are private foundations and political organizations.

[20] US Department of the Treasury, *Treasury Department and IRS Announce Significant Reform to Protect Personal Donor Information to Certain Tax-Exempt Organizations*, July 16, 2018. See announcement here: https://home.treasury.gov/news/press-releases/sm426.

[21] https://www.ntu.org/publications/detail/coalition-of-more-than-50-organizations-and-individuals-to-congress-protect-donor-privacy-from-government-abuse-eliminate-schedule-b

[22] H.R. 5053.

[23] 26 U.S.C. § 501(c)(3).

[24] Kelly Phillips Erb, *Tax Fraud a Key Role in College Admissions* Scandal, FORBES (March 12, 2019).

[25] 26 U.S.C. § 6033.

The most intensely fought political battle associated over disclosure of donor names and addresses is fought regarding section 501(c)(4) and (6) organizations. Many refer to section 501(c)(4) social welfare organizations as "dark money organizations" because they need not publicly disclose their donors, yet many of these organizations actively attempt to influence our political campaigns and legislators. This strongly suggests that the reason this issue of disclosure resonates at such a high frequency in our political system is that it is perceived as a battle over justice in a democratic sense.

In the political battle, Democrats argue that this system provides an end run around campaign finance disclosure law by allowing individuals and corporations to engage in politics anonymously by contributing to social welfare organizations and business leagues. This corrupts our democracy because the regime allows individuals and corporations to influence politics anonymously. Key to this notion is that access to information is a liberal right that must accompany a well working democracy or polyarchy.[26] Of course, the former system was only quasi-disclosure because donor names and addresses are not under the current system disclosed to the public but only disclosed to the IRS. The IRS would then share that information with many state governments so there was a check on particularly underhanded political activity.[27] Opponents of disclosure worry about the harmful influence disclosing has on the equally important liberal right of freedom of association and freedom of speech by dissuading people from contributing to the causes they hold dear. Disclosure may harm full and free participation in our democratic sphere. Additionally, there is a potential harm to the IRS as a governing agency in overseeing political-related activity.[28] Each of these are real concerns and this article will consider each to provide a recommendation regarding what path the IRS should take.

All of this sits within a context of a lack of IRS enforcement of the tax law that we should not overlook. A Pro-Publica investigation in 2019 showed that the IRS audits the working-poor at the same rate it audits the wealthiest one percent.[29] In that investigation, the reporter noted that in response to a query from a senator the IRS replied that it wanted to audit the wealthy at a greater rate, but it could not and would not until it received more resources from Congress. In 2020, the IRS began talking of interest in auditing wealthy interests.[30] This effort was described as similar to an earlier IRS effort called the "Wealth Squad." In addition to increasing the audits of the wealthy, the IRS announced plans in 2020 to audit over 1,000 private foundations

[26] Thomas I. Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. L. Q. 1 (1976). See Lloyd Hitoshi Mayer, *Politics and the Public's Right to Know*, 13 ELECT. L. J. 138 (2014) (examining the right to know in the context of political campaigns and lobbying).

[27] For instance, it is illegal for a foreign individual to seek to influence a political campaign in the US. Although the IRS does not enforce this rule, an organization that sought out such foreign donations would at least have to disclose under penalties of perjury a violation of the law to the IRS.

[28] Philip Hackney, *Political Justice and Tax Policy: The Social Welfare Organization Case*, 18 TEX. A&M L. REV. 271 (2021).

[29] Paul Kiel, *IRS: Sorry, but It's Just Easier and Cheaper to Audit the Poor*, PROPUBLICA, Oct. 2, 2019, https://www.propublica.org/article/irs-sorry-but-its-just-easier-and-cheaper-to-audit-the-poor#:~:text=Gutting%20the%20IRS-,IRS%3A%20Sorry%2C%20but%20It's%20Just%20Easier%20and%20Cheaper%20to%20Audit,So%20it's%20not%20going%20to.

[30] Guinevere *Moore, High Income Households And Private Foundations: Time To Gear Up For An IRS Exam*, FORBES, June 22, 2020, https://www.forbes.com/sites/irswatch/2020/06/22/high-income-households-and-private-foundations-time-to-gear-up-for-an-irs-exam/#26c938c518b4

connected to wealthy interests.[31] The choice to eliminate basic information about wealthy transfers of money to corporate entities seems to run counter to the idea that the IRS cares or intends to exercise oversight of wealthy individuals.

The U.S. Supreme Court is currently considering the Constitutionality of a California requirement that charities operating in or soliciting money in the state of California must file the Schedule B to the Form 990 with the California Attorney General's office.[32] In the case, Americans for Prosperity argues that the California donor information requirement harms First Amendment association rights by subjecting donors to controversial causes to harassment.[33] They further argue that the state's interest in preventing charitable fraud could be met through the narrower means of only seeking this information in an investigation rather than making this banket demand. Were the Court to uphold a facial challenge to the California law, it is possible that the IRS's ability to similarly demand that information could be considered to violate First Amendment Standards as well. The question of the Constitutionality of this provision is beyond the scope of this Article. The focus of the Article is on the government interest involved in providing this information. I hope to show why the collection of the information is a critical piece of regulating nonprofits.

Part II examines the legal regimes of social welfare organizations, business leagues, and related tax-exempt organization requirements. Part III discusses the role of information returns, information reporting, the current tax enforcement environment, and the relationship of political justice and democracy to these matters. Part IV discusses the ancillary legal regimes like campaign finance and state law enforcement of nonprofit organization rules. Part V analyzes this information and considers its implication for donor disclosure. Part VI concludes.

II. TAX-EXEMPT LAW REQUIREMENTS

This section describes (1) the organizations and legal elements necessary to establish for federal income tax purposes that an organization is (a) a social welfare organization, or (b) a business league, and (2) considers the individual income tax issues that are necessarily related to the operation of these organizations. That information logically should highlight what type of information would be useful for disclosure purposes on a nonprofit's information return filed with the IRS. Specifically, this part focuses upon whether the legal questions raised by this activity raises a need for the disclosure of donor names and addresses.

A. Social Welfare Organization Requirements

It is hard to describe social welfare organizations succinctly. It includes health maintenance organizations, civic-minded social clubs like the Kiwanis and Rotary clubs, homeowners' associations, kid's sports clubs, and a bevy of advocacy organizations.[34] The

[31] *Id*.
[32] Ams. for Prosperity Found. v. Becerra, 903 F.3d 1000 (2018), *cert. granted,* 141 S. Ct. 973 (2021).
[33] Brief for Petitioner, Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 973 (2021).
[34] JEREMY KHOULISH, FROM CAMPS TO CAMPAIGN FUNDS: THE HISTORY, ANATOMY AND ACTIVITY OF 501(C)(4) ORGANIZATIONS, URBAN INSTITUTE, 6 (2016) [hereinafter FROM CAMPS TO CAMPAIGN FUNDS].

section exempts from the income tax: "Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare . . . and no part of the net earnings of such entity inures to the benefit of any private shareholder or individual."[35] Based on those organizations who report to the IRS on Form 990, in 2016 social welfare organizations as an aggregate held over $140 billion in assets, $62 billion in liabilities and earned $115 billion in revenue.[36] Of that revenue, $7 billion came through contributions.

There are two primary tax benefits to contributing money to a social welfare organization. First, any earnings of the nonprofit are exempt from the income tax as long as not derived from an unrelated business.[37] Second, contributions of appreciated property are not taxed to the contributor as they would be if contributed to a political organization.[38] There are others as well. The gift tax does not apply to contributions to social welfare organizations.[39]

To qualify for these tax benefits, the Code section requires the organization to operate exclusively to promote social welfare and prohibits inurement to any "private shareholder or individual."[40] Although the Code states that a social welfare organization must operate "exclusively" for social welfare purposes the Treasury regulations interpret that term to mean "**primarily** engaged in promoting in some way the common good and general welfare of the people of the community." Another way of stating the quantitative part of test is the "presence of a single substantial non-exempt purpose precludes exempt status regardless of the number or importance of the exempt purposes that the existence of a single substantial."[41]

Though a search turns up no court cases challenging a social welfare organization's tax status because of inurement, there are related charitable organization cases under section 501(c)(3) looking at the question.[42] The term "private shareholder or individual" refers to persons who have a "personal and private interest in the payor organization,"[43] and "does not refer to unrelated third parties."[44] The focus of private shareholders is on "founders or controlling members [who] have a personal stake in that organization's receipts."[45] Substantial contributors to nonprofits are often the founders of the organization and typically have some 'controlling stake' in the organization.

In addition to primary requirements to qualify as a social welfare organization, Congress in effect penalizes social welfare organizations that provide "excess benefits" to individuals who

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[35] 26 U.S.C. § 501(c)(4). Treas. Reg. 26 U.S.C. § 1.501(c)(4)-1(a)(1) makes clear that either type of organization must be organized and operated not for profit and exclusively for the promotion of social welfare.
[36] IRS Statistics of Income on Charitable and Tax-Exempt Organizations. https://www.irs.gov/statistics/soi-tax-stats-charities-and-other-tax-exempt-organizations-statistics
[37] *See* 26 U.S.C. §§ 501(c)(4), 511, 512.
[38] 26 U.S.C. § 84.
[39] 26 U.S.C. § 2501(a)(6).
[40] Congress added 26 U.S.C. §501(c)(4)(B) to include this provision in P.L. 104-168, 110 Stat. 1452 (1996) (Taxpayer Bill of Rights 2) § 1311(a).
[41] Contracting Plumbers Cooperative Restoration Corporation v. United States, 488 F.2d 684 (1973). *See also* Better Business Bureau of Washington, D.C., Inc. v. United States, 326 U.S. 279, 283 (1945).
[42] American Campaign Academy v. Commissioner, 92 T.C. 1053, 1068-69 (1989) (*citing* to Aid to Artisans, Inc. v. Commissioner, 71 T.C. at 215; Retired Teachers Legal Fund v. Commissioner, 78 T.C. 280, 287 (1982)).
[43] People of God Community v. Commissioner, 75 T.C. 127, 133 (1980) (citing Treas. Reg. § 1.501(a)-1(c); Gemological Institute of America v. Commissioner).
[44] *Id.* (*citing* Broadway Theatre League of Lynchburg, Va. v. United States 293 F. Supp. 346 (WD Va. 1968)).
[45] *Id.* (*citing* Founding Church of Scientology v. United State*s* 823 F.2d 1310 (1987)).

have substantial influence over the organization.[46] Excess benefit transactions only arise from transfers to individuals who are considered disqualified persons under section 4958 of the Code. A disqualified person includes those who are "in a position to exercise substantial influence over the affairs of the organization."[47] One of the factors that show someone is a person of substantial influence is when a "person is a substantial contributor to the organization."[48] Thus, in policing this section, the IRS needs to know substantial contributors to the organization.[49]

The regulations tell us that to further a social welfare purpose an organization must bring "about civic betterments and social improvements."[50] Some activities that do not qualify as social welfare include intervening in a political campaign and operating a social club. Also, a social welfare organization may not operate a type of business like one operated for profit.[51] Largely, the type of activity that seems to be prohibited is activity that provides private benefits for some individual(s) rather than collective ones that help a larger community.[52] While an organization formed to clean up spills in a city port was found to be exempt,[53] an organization formed by a group of plumbers to fulfill an obligation they individually held under New York Law was not found exempt from tax.[54] The organization engaged in cleaning up spills made their services available to everyone in the port, while in *Contracting Plumbers,* the group only fixed the potholes members had the duty to repair.

This theme of community benefit is seen again and again in the law. Because the endowment in Erie Endowment appeared to be the effort of one man who simply accumulated money and did not do much good, the court found his organization was not acting as a community movement.[55] The court thus stated that a social welfare organization "must be a community movement designed to accomplish community ends."[56] Similarly, the IRS denied social welfare status to an organization where residents paid money for beautification or security related to their property.[57] Nevertheless, a neighborhood association in which anyone could become a member, and members and nonmembers alike had access to major community goods and services provided by the organization qualified for exempt status.[58]

[46] 26 U.S.C. § 4958.
[47] 26 U.S.C. § 4958(f)(1)(A).
[48] 26 U.S.C. § 53.4958-3(e)(2)(ii).
[49] Section 4958 is at once an operative section that influences what information we think is needed to properly judge a social welfare organization's compliance with the Code and gives support for the idea of who might be a controlling member of the nonprofit for purposes of inurement discussed above.
[50] Treas. Reg. § 1.501(c)(4)-1.
[51] *Id.*
[52] Contracting Plumbers Cooperative Restoration Corporation v. United States, 488 F.2d 684 (1973) (Organization formed to repair potholes caused by member plumbers of the corporation served a private member's interests much more than the public and thus served a substantial non-exempt purpose).
[53] Rev. Rul. 79-316, 1979-2 C.B. 228.
[54] Contracting Plumbers.
[55] *Id.*
[56] Erie Endowment v. United States, 316 F.2d 151 (1963).
[57] Rev. Rul. 77-273, 1977-2 C.B. 194. See also, Rev. Rul. 75-286, 1975-2 C.B. 210 (group formed to improve the surroundings for the businesses and residents of one city block was found to not promote social welfare).
[58] Rev. Rul. 75-386, 1975-2 C. B. 211. *Cf.* 1980-1 C.B. 116, Rev. Rul. 80-63 (1980); Rev. Rul. 74-99, 1974-1 CB 131 (discussing factors necessary for a homeowner's association to qualify and finding that where that organization provides benefits primarily to its members is not exempt); see also PLR 200934045 (May 29, 2009) (finding that a

Notably, a social welfare organization that carries out its purpose by breaking the law is not considered a social welfare organization.[59] "Illegal activities, which violate the minimum standards of acceptable conduct necessary to the preservation of an orderly society, are contrary to the common good and the general welfare of the people in a community and thus are not permissible."[60]

Many social welfare organizations are created in order to advocate in a political sense. A social welfare organization may engage in lobbying activities as a social welfare purpose. Lobbying refers to the activity of trying to get some representative body to vote for or against a decision that is before that body. In Revenue Ruling 68-656, the IRS approved of an organization that informed the public on controversial subjects and tried to influence legislation as legitimate social welfare activity.[61] The IRS has found that advocating in a legislative sense for animal rights qualifies as social welfare activity[62] as does advocating for the rights of the unborn.[63]

Though lobbying can further a social welfare purpose, intervening in political activity does not.[64] To intervene in a campaign means the act of encouraging people to vote for or against candidates for public office. Intervening can be direct or indirect. An organization who ranked candidates as its primary activity failed to show it was operated for social welfare purposes because the ranking was provided to intervene in a campaign.[65] However, a social welfare organization can intervene in a political campaign and still qualify as a social welfare organization as long as it otherwise operates primarily for social welfare purposes.[66] One challenge in this space that relates directly to the matter of campaign finance regulation discussed in Part IV is organizations that engage in what is often called issue advocacy. Issue advocacy happens when, rather than directly advocating for a candidate, an organization instead educates its followers about policies that closely identify a candidate the organization intends to support. This activity can be considered non-social welfare activity if determined to be intervention in a political campaign but can also be educational activity that furthers a social welfare purpose.[67]

Where an organization primarily engages in political campaign activity, it is then considered for tax purposes as an organization described in section 527.[68] Specifically, section 527 applies to organizations considered political organizations.[69] Political organizations are organizations that are organized and operated primarily for what is called an "exempt

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common driveway agreement that benefitted only the members of the organization was not organized for social welfare purposes because it provided too much private benefit).

59 Rev. Rul. 75-384, 1975-2 C.B. 204.

60 *Id.*

61 Rev. Rul. 68-656, 1968-2 C.B. 216.

62 Rev. Rul. 67-293, 1967-2 C.B. 185.

63 Rev. Rul. 76-81, 1976-1 C.B. 156.

64 Treas. Reg. §1.501(c)(4)-1(a)(2)(ii).

65 Rev. Rul. 67-368, 1967-2 C.B. 194.

66 Rev. Rul. 81-95, 1981-1 C.B. 332.

67 *See, e.g.,* Fed. Election Com. v. Mass. Citizens for Life, Inc., 479 U.S. 238 (1986) (nonprofit that educated its members and the public about issues related to abortion issued a voting guide that let the public know how different candidates had voted on matters of importance to the group).

68 26 U.S.C. § 527.

69 26 U.S.C. § 527(a) and (e)(1).

function."[70] An exempt function includes the "function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization."[71] A section 527 organization still maintains a tax exempt status, but is subject to a tax on investment income.[72]

A section 527 organization that anticipates generating gross receipts in excess of $25,000 a year generally must give notice to the IRS within 24 hours of its establishment.[73] Unlike social welfare organizations, Section 527 organizations must disclose substantial information about their receipts of contributions and expenditures.[74] At the time Congress amended section 527 to include these disclosure requirements Congress also considered extending these disclosure obligations to social welfare organizations as well.[75] But it did not. The IRS has provided guidance as to when certain activity is considered an exempt function activity under section 527 for social welfare organizations as well as business leagues and labor unions.[76] The analysis is quite similar to the assessment of when a section 501(c)(3) organization has engaged in political campaign intervention. If categorized as exempt function activity, the organization is subject to the tax under section 527(f). An organization described in section 501(c) could alternatively create a segregated fund to operate as a political organization under 527.[77]

B. Business League Requirements

Section 501(c)(6) exempts from income tax "business leagues, chambers of commerce, real-estate boards, boards of trade, or professional football leagues."[78] To form one, individuals contribute money to a nonprofit corporation set up with a mission to further the business interests of the people who make up the field. These organizations are made up of national or state industry or professional groups that operate to advertise and to advocate the general interests of those in the business along with chambers of commerce who broadly advocate for business interests.[79] They also tend to provide networking opportunities for their members.[80] Under the Treasury regulations an organization must be formed to promote a common business interest and must direct its activities towards the improvement of business conditions in one or more lines of

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[70] *Id.*
[71] *Id.* at (e)(2).
[72] 26 U.S.C. § 527(f).
[73] 26 U.S.C. § 527(i).
[74] 26 U.S.C. § 527(j). Note that Political Committees that already have the obligation to file with the FEC do not have to comply with the section 527(j) disclosure requirements. *See also* Form 990, Return for Organization Exempt from Income Tax, Schedule B Schedule of Contributors Instructions.
[75] *See, e.g.,* Donald Tobin, *Campaign Disclosure and Tax-Exempt Entities: A Quick Repair to the Regulatory Plumbing*, 10 ELECTION L.J. 427, 430 & FN 21 (2011) (*citing* H. Rep. No. 106-702, at 9–11 and H. Rep. No. 106-702, at 40–41).
[76] Rev. Rul. 2004-6
[77] 26 U.S.C. § 527(f)(3).
[78] 26 U.S.C. §501(c)(6).
[79] Philip T. Hackney, *Taxing the Unheavenly Chorus: Why Section 501(C)(6) Trade Associations are Undeserving of Tax Exemption*, 92 DENV. U. L. REV. 265 (2015).
[80] *Id.*

business as distinguished from the performance of particular services for individual persons.[81] A business league fails to further a proper purpose where it pursues for profit type activity or services for particular members.[82]

Just like a social welfare organization, a business league may not allow its earnings to inure to the benefit of any private shareholder or individual.[83] Also, like social welfare organizations, while lobbying is permitted as legitimate business league activity,[84] intervening in a campaign is not considered an activity that furthers a business league purpose. The discussion in Part II(A) above regarding section 527 organizations applies equally to business leagues. A business league that intervenes in a campaign too much becomes a political organization and must then disclose information regarding contributions and expenditures.[85]

What qualifies as a business purpose is broad. The tax court has stated that business "embraces everything about which a person can be employed."[86] In addition to manufacturing, retail, and professions, even students of a particular profession can form an organization devoted to promoting business.[87] Similarly, what "promotes" business is interpreted broadly. While neither providing a facility for members for lunch nor networking solely to exchange business prospect information promotes business interests,[88] hosting lunch meetings to discuss business issues, publishing a newspaper, and holding semi-annual meetings to discuss technical problems with information data sharing all qualify.[89] Other typical activities include "seals of acceptance,"[90] a model building and construction code,[91] and negotiating with labor.[92]

Again, not unlike social welfare organizations, a business league must not be operated to benefit private interests. While not all benefits to members are problematic, benefits provided solely to members clearly are forbidden. For instance, the American Automobile Association, an association of individual car owners, was not described in section 501(c)(6) because provided services solely to members.[93] Also, providing rebates to members alone is not considered a benefit to a larger community that proves a collective purpose.[94] The IRS often denies status as a section 501(c)(6) organization on the basis that the applicant is allowing earnings to inure to the benefit of a member or members.[95] In one revenue ruling, the IRS held "a business league which

[81] Treas. Reg. § 1.501(c)(6)–1
[82] Treas. Reg. § 1.501(c)(6)–1
[83] 26 U.S.C. § 501(c)(6).
[84] Rev. Rul. 61-177, 1961-2 C.B. 117.
[85] 26 U.S.C. § 527(j).
[86] Associated Indus. of Cleveland v. Comm'r, 7 T.C. 1449, 1465 (1946).
[87] Rev. Rul. 77-112, 1977-1 C.B. 149.
[88] Rev. Rul. 70-244, 1970-1 C.B. 132; Rev. Rul. 59-391, 1959-2 C.B. 151.
[89] Rev. Rul. 67-295, 1967-2 C.B. 197.
[90] Rev. Rul. 70-187, 1970-1 C.B. 131.
[91] I.R.S. Tech. Adv. Mem. 81-17-004 (Jan. 1, 1981).
[92] Associated Indus. of Cleveland v. Comm'r, 7 T.C. 1449, 1465 (1946), acq. 1947-1 C.B. 1.
[93] Am. Auto. Ass'n v. Comm'r, 19 T.C. 1146, 1157–61 (1953).
[94] Mich. Mobile Home & Recreational Vehicle Inst. v. Comm'r, 66 T.C. 770, 777–78 (1976).
[95] Priv. Ltr. Rul. 201018015 (Dec. 15, 2009); Priv. Ltr. Rul. 201237021 (June 19, 2012). Priv. Ltr. Rul. 201242016 (July 27, 2012). Guide Int'l Corp. v. United States 90-2441 KANNE 19910000 CA7 68 AFTR 2d 91-5907, 948 F2d 360, 91-2 USTC ¶50573 Guide Int'l Corp. v. United States, 948 F2d 360, 362 (7th Cir. 1991). "the primary benefit inures to IBM [International Business Machines, Inc.], which is only a segment (70 percent to 75 percent) of the mainframe computer business, not a line of business." Priv. Ltr. Rul. 201420021 (Feb. 19, 2014). In Priv. Ltr.

extends financial aid and welfare services to its members does not qualify for exemption under section 501(c)(6)."[96]

The IRS has said that inurement in the business league context involves "an expenditure of organizational funds resulting in a benefit which is beyond the scope of the benefits which logically flow from the organization's performance of its exempt functions."[97] Intriguingly, there is not a prohibition on returning assets to members upon the closing of a business league.[98]

As an additional protection against using a tax-exempt entity to support a private business, the regulations require business leagues to promote a line of business rather than some particular brand.[99] In *National Muffler Dealer Association, Inc. v. United States*, the Supreme Court provided an extensive legislative and regulatory history of the Code section.[100] The Court suggests Congress took into consideration comments from the Chamber of Commerce and others that Congress should exempt organizations of business associations who promote business "not in the narrow sense of advantage to the individual, but in the broad sense of building up the trade and commerce of the community as a whole . . . ."[101] A line of business involves "either an entire industry or all components of an industry within a geographic area."[102] As an example of a line of business case, in the 2000s, the IRS successfully denied exemption to an organization formed to promote Bluetooth the brand itself rather than the product in general.[103] Bluetooth technology was found by the court to not be a line of business.[104]

Engaging in a business for profit does not qualify as promoting a line of business. Although a business league can advertise the line of business, it cannot advertise for specific members.[105] The IRS has stated that the legal question is whether the activity or service "relieves the member of the necessity of securing the service commercially (or performing the service on an individual basis) in order to properly conduct the member's business, resulting in a convenience or economy to the member."[106]

Finally, like social welfare organizations, business leagues are also prohibited from engaging in illegal activity. Though there are no cases or direct IRS guidance documents on

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Rul. 201820019 (July 19, 2017) IRS determined that "two members of your governing body receive a percentage of your scheduling revenue as compensation with no stated limit, which inures to their benefit,"
In a PLR denial for an ambulance company it was found that "substantially all of the organization's funds were through fundraising activities. The organization hired a private, for-profit company, CO-1 to operate and solicit non-deductible contributions on behalf of the organization – and in that PLR the nonprofit was paying the expenses of a taxable corporation of the President - Priv. Ltr. Rul. 201218018 (Nov. 22, 2011).

[96] Rev. Rul. 67-251, 1967-2 C.B. 196.

[97] Gen. Couns. Mem. 38559 (Nov. 7, 1980).

[98] Crooks v. Kansas Cty Hay Dealers Ass'n 8595 19290000 CA8 8 AFTR 9961, 37 F2d 83 Crooks v. Kansas City Hay Dealers Ass'n, 37 F2d 83 (8th Cir. 1929); Washington State Apples, Inc. v. Comm'r 100723 HILL 19420000 BTA 46 BTA 64 Washington State Apples, Inc. v. Comm'r, 46 BTA 64, 70 (1942), acq. 1942-1 CB 17.

[99] Nat'l Muffler Dealers Ass'n v. United States, 440 U.S. 472, 477, 483–84, 488–89 (1979).

[100] *Id.*

[101] *Id.* at 478 quoting Briefs and statements on H.R. 3321 filed with the Senate Committee on Finance, 63d Cong., 1st Sess., **1308 2002 (1913).

[102] *Id.* at 482–83

[103] Bluetooth Sig, Inc. v. United States, 611 F.3d 617 (9th Cir. 2010).

[104] *Id.*

[105] *See* Auto. Elec. Ass'n v. Comm'r, 168 F.2d 366, 367–68 (6th Cir. 1948); Rev. Rul. 65-14, 1965-1 C.B. 236; Rev. Rul. 64-315, 1964-2 C.B. 147.

[106] I.R.S. Gen. Couns. Mem. 39,411 (Sept. 18, 1985).

point, the Office of the Chief Counsel in a General Counsel Memorandum opined that the illegality doctrine applied.[107] The Counsel reasoned that it ought to apply particularly given that the doctrine applies to the similar section 501(c)(5) labor organizations.[108] The most typical situation where illegality might be involved occurs where the business league engages in illegal anti-trust activity.[109] The IRS has denied exemption to a section 501(c)(16) farmers' cooperative on the grounds of illegality because it was engaged in distributing marijuana.[110] Also, the IRS has placed the question of whether a business league can distribute marijuana and obtain a tax exemption on the no-rule list, meaning the IRS is not providing taxpayers guidance on that issue at this time.

Thus, substantial contributor information is particularly relevant for business leagues as to the question of inurement. It additionally has significant relevance in providing the IRS information about whether the business league is providing some significant private benefit to substantial contributors. Finally, it likely provides probative evidence as to whether there are some improper business league activities whether that be running a business for profit or carrying out illegal activities.

C. Other Tax Law Considerations

The IRS oversight of tax-exempt organizations is not solely about the nonprofit organizations themselves. The rules regarding tax-exemption are written presumably to shape a well-functioning nonprofit sector, that is deserving of the subsidy from an exemption from income tax.[111] However, and naturally, in allowing certain activities to escape a tax, there is potential for abuse of the tax system by individuals and entities. Thus, the tax-exempt rules are established to keep improper activity out of the sector and to root out those who are earning income that should be taxable. Private business activity that allows an individual to support their livelihood, their personal consumption, should presumably not get the benefit of an exemption from tax. Many typically think of the abuse of the charitable contribution deduction[112] as the most likely way individuals might take advantage of the tax-exempt arena, but the exemption from income tax is quite a powerful benefit as well if the organization is designed to supply the consumption needs of private individuals. This section thus focuses briefly on the fact that tax regulation of nonprofits is not just about nonprofits, but also about ensuring federal individual taxes are collected and not avoided.

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[107] I.R.S. Gen Couns. Mem. 37111 (May 4, 1977).
[108] *Id.*
[109] I.R.S. EO CPE Text, Jean Wright & Jay H. Rotz, *Illegality and Public Policy Considerations*, (1994) https://www.irs.gov/pub/irs-tege/eotopicl94.pdf.
[110] Priv. Ltr. Rul. 20133014 (
[111] There is an important boundary setting role as well. John Simon, Harvey Dale, and Laura Chisolm referred to this as the border control function; John Simon, Harvey Dale, & Laura Chisolm, *The Federal Tax Treatment of Charitable Organizations*, in THE NONPROFIT SECTOR: A RESEARCH HANDBOOK, ed. WALTER POWELL & RICHARD STEINBERG 256 (2nd Ed. 2006); Ellen Aprill suggests the rules play a "boundary protecting" role for the charitable organization space; Ellen P. Aprill, *Examining the Landscape of Section 501(c)(4) Social Welfare Organizations*, 21 N.Y.U. J. LEGIS. & PUB. POL'Y 345, 348 (2018).
[112] 26 U.S.C. § 170.

Tax exempt organizations are given a significant benefit in that any retained earnings are not subject to the income tax in the way such earnings are subject to tax in any other business entity, corporate or pass-through. This is typically considered a subsidy equal to the rate of tax times the annual profit of the tax-exempt entity.[113] An individual who can find a way to earn money in a tax-exempt entity, not pay tax on those earnings, and later distribute money to themselves has designed a means of avoiding taxation, even if just by making use of the time value of money. This would function like a traditional retirement account with exemption on contributions and earnings but taxation upon withdrawal. The retirement plan holder receives significant tax savings as a result. A nonprofit could also be designed to deliver its services and goods directly to its members. For instance, an organization that maintains a lake primarily for private residents and not the public would be providing consumption benefits to its members without taxation of the activity. The point to be made here is that nonprofit oversight is not just about ensuring that a nonprofit is operated properly but that individuals associated with the nonprofit are not avoiding the individual income tax through the tax-exempt organization.

Income tax is not the only tax involved. Social welfare organizations and business leagues can receive gifts during the lifetime of a taxpayer that are not subject to the gift tax.[114] Under these circumstances, if the organization is not operating as a legitimate social welfare organization or business league, the IRS ought to be able to set aside an untaxed gift to such organizations. Knowledge of substantial contributors to social welfare organizations and business leagues can allow the IRS to properly regulate the gift tax.

In understanding the law in the advocacy and political activity space it is useful to also consider the treatment of lobbying and political activity for deduction purposes. Section 162 of the Code prohibits taxpayers from deducting either lobbying or political campaign related expenses.[115] Up until 1962, Treasury regulations prohibited the deduction of any lobbying expenses. The Supreme Court upheld this position in *Cammarano v. Commissioner*.[116] In 1962, Congress modestly changed that result and allowed the deduction of expenses that directly lobbied on issues germane to the taxpayer. Nevertheless, in 1993, the Clinton administration was successful in passing a new law to again prohibit the deduction of these expenses.[117] A donor can donate appreciated assets to a social welfare organization and a business league without incurring a tax on the gain. If the social welfare organization or business league uses those appreciated assets to carry out lobbying or intervention in a political campaign, the donor has found a way of deducting a significant amount of gain.

To conclude, it is clear that the IRS's role in overseeing tax-exempt organizations is not just about the operation of these organizations where who contributed what does not matter. It is about ensuring the fairness of the entirety of the Code. Thus, even if there was no use for donor names and addresses for assessment of tax exemption requirements, there would still be reason to properly enforce the Code and collect the revenue. The information can allow the IRS to look for and better spot when wealthy individuals are connected to a nonprofit and may be using it to

[113] Philip T. Hackney, *What We Talk About When We Talk About Tax Exemption*, 33 VA. TAX REV. 115 (2013).
[114] 26 U.S.C. § 2501(a)(6).
[115] 26 U.S.C. §162(e).
[116] 358 U.S. 49 (1959).
[117] § 13222 of OBRA 1993, 107, Stat. 477.

direct goods and services that substantial contributor's way. Of course, this in turn can tell whether the nonprofit qualifies for its particular tax-exempt status.

III. INFORMATION RETURN & REPORTING MATTERS

As discussed in the Introduction there are a couple of functions the nonprofit information tax return the Form 990 serves: (1) it provides broad disclosure to the public and other constituencies to hold nonprofits publicly accountable, and (2) it serves an information reporting role to help the IRS to enforce the tax law both against the nonprofit organization and the people with whom the nonprofit organization transacts business. Function (1), is not a significant part of the role of donor disclosure because donor names and addresses were not generally publicly disclosed; they were only provided to the IRS. However, because function (1) is such an important role of the Form 990 today, I discuss it in section A. I return to that function again in section D to consider the implications of political justice for the reporting of substantial donor information. Section B considers that the Form 990 is not just an information return but also serves an information reporting function as well. Section C turns to the current enforcement environment and evaluates the implications that has for the necessity of methods of enforcement other than human resource intensive audits.

A. Information Return Requirements

Congress directs all organizations exempt from income tax under section 501(a) of the Code to file an annual information return "stating specifically the items of gross income, receipts, and disbursements, and such other information for the purpose of carrying out the internal revenue laws" as the Secretary may prescribe.[118] Both social welfare organizations and business leagues are exempt from tax under that section so they must file the Form 990 implemented by the IRS.[119] In the regulations under section 6033, the IRS and the Treasury Department prescribe certain requirements that must be a part of the return.[120] For instance, the regulations require the disclosure of gross income, dues, expenses, disbursements, the balance sheet as of the beginning and end of the year, the names of officers and directors, and more.[121]

The IRS and the Treasury Department enacted a regulation in 1942 requiring tax-exempt organizations to file a Form 990 for tax years beginning in 1941.[122] It required charitable organizations (with the exception of religious organizations), social welfare organizations, and business leagues among others to file the new return.[123] In 1944, Congress implemented a tax-exempt organization information return legislatively, but excepted from the requirement many

[118] 26 U.S.C. § 6033.
[119] I.R.S., FORM 990, RETURN OF ORGANIZATION EXEMPT FROM INCOME TAX, https://www.irs.gov/pub/irs-pdf/f990.pdf.
[120] 26 U.S.C. Treas. Reg. § 1.6033-2.
[121] *Id*. at -2(a)(2)(ii).
[122] T.D. 5125 (IRS TD), 1942-1 C.B. 101, 1942. See also 20 Taxes 303 (1942) (describing the new Form 990 requiring substantial donors to be disclosed).
[123] 20 Taxes 303 (1942) https://drive.google.com/file/d/1Xq9LCS_7JCbv3ennLXSWPsJP0_rk2pAz/view

types of charitable organizations such as religious organizations and publicly supported charities.[124] Rather than seeing these returns as a matter of compliance with tax-exemption, the legislative history suggests Congress was concerned that tax-exempt charities had an unfair advantage over for-profit businesses in carrying out business activities and thought it important to collect information to inform Congress and the public about the extent of this problem.[125] There was no publicity requirement at that time.

In the initial Form 990 in 1942 for the 1941 tax year, the IRS required the donor information from tax-exempt organizations.[126] Congress later statutorily required this donor information from charitable organizations in the 1969 Tax Act.[127] Though Congress has decided to require tax exempt organizations to make a lot of information public, Congress prohibits the public disclosure of the names and addresses of contributors of all but private foundations and political organizations.[128] On the Form 990, the organization must list the amount of "contributions" made to the organization in Part VIII line 1 of the Form. The Instructions state that contributions include gifts, grants, or other similar amounts. It does not include fees for services.[129]

The Treasury Department and the IRS gave the Commissioner the authority in the regulations to relieve any organization in whole or in part from the requirements to file a return.[130] Over the years, the IRS exercised this relief authority provided to the Commissioner through revenue procedures.[131] In 2018, the IRS moved to relieve all exempt organizations

[124] The Revenue Act of 1943, Pub. L. No. 78-235, 58 Stat. 28 implementing then § 54.

[125] *See* STAFF OF THE JOINT COMM. ON TAXATION, 106th Cong., STUDY OF DISCLOSURE PROVISIONS RELATING TO TAX-EXEMPT ORGANIZATIONS, at 122, FN 269 (2000) (*citing* H.R. Rep. No. 78-841, at 24-25 (1943)); John Montague, *The Law and Financial Transparency in Churches: Reconsidering the Form 990 Exemption*, 35 CARDOZO L. REV. 203, 210-212 (2013).

[126] See Form 990 EO CPE Text describing how the 1941 Form 990 required substantial donors (those donating $4,000 or more) be disclosed on Form 990. Done initially in 1943 to develop the information needed to determine whether the organizations at hand ought to be exempt from taxation. See Senate Finance Committee Report in the Revenue Bill of 1943, p. 21. https://www.finance.senate.gov/imo/media/doc/SRpt78-627.pdf The Revenue Act of 1943 was not enacted until February 1944 because of a Presidential Veto. https://www.loc.gov/law/help/statutes-at-large/78th-congress/session-2/c78s2ch63.pdf Pub. L. No. 235, 78th Cong., 2d Sess. (Feb. 25, 1944). Section 117 of the Act amended Section 54 of the Internal Revenue [Laws]. Section 54 had not required exempt organizations to file returns by statute before this date.

[127] Tax reform act of 1969, Pub. L. No. 91-172, 83 Stat. 487. "Section 101(d)(2) Additional Information. - Section 6033(b) (relating to certain organizations described in section 501(c)(3)) is amended ... (C) by adding after paragraph (4) (as redesignated) the following new paragraphs: "(5) the total of the contributions and gifts received by it during the year, and the names and addresses of all substantial contributors, ..." Tax reform act of 1969, Pub. L. No. 91-172, 83 Stat. 487 at 520. (https://drive.google.com/open?id=16G2Fhtjw0y0jI2DPujmvbzM904EwbPvy). The IRS and the Treasury Department implemented this requirement in T.D. 7122 with Treas. Reg. § 1.6033-2. "(5) The total of the contributions and gifts received by it during the year, and the names and addresses of all substantial contributors, …" T.D. 7122, 1971-2 C.B. 393 (1971).

[128] 26 U.S.C. § 6104(b).

[129] Where an organization has a membership model, the membership contribution may be in part disclosable and in part fees for services. This depends upon whether the amount paid is for services or just some loose conception of membership. https://www.irs.gov/instructions/i990#idm140229394418464

[130] 26 U.S.C. § 1.6033-2(g).

[131] See Rev. Proc. 2011-15, 2011-3 I.R.B. 322, and Rev. Proc. 2003-21, 2003-1 C.B. 448.

except charitable ones from the donor disclosure requirements in a revenue procedure.[132] After a federal district court in *Bullock* found the IRS had violated the Administrative Procedure Act by changing its rule without going through the notice and comment process,[133] Treasury and the IRS instead enacted the elimination of this donor information through regulations.[134]

In the final regulations, the IRS simply says that it does not believe it needs the donor name and address information in order to police private benefit rules discussed above in Part I.[135] It argued that it needed the information primarily on examination and that it could easily obtain that information at that stage. In considering the matter the IRS accepted that disclosure of this particular donor information was sensitive and should remain private in part because such disclosure could lead to harassment of donors. It concluded that not requiring the information would cut down on inadvertent disclosure.[136] Finally, the IRS concluded that the compliance burden could be reduced by not having to report information that is not needed. Though it admits that it at times has a duty to coordinate with other agencies on matters of campaign finance, the IRS roundly rejects the idea that its job includes enforcing campaign finance laws.[137] It stakes out a similar position with respect to the request that it maintain this information for purposes of aiding state enforcement: state enforcement is not in the job description of the IRS.[138] In the end though, the IRS requires these organizations to maintain this information for purposes of a later examination.[139]

Congress decided in 1950 to make Form 990's accessible to the public,[140] and in 1958, Congress amended section 6104 of the Code to require disclosure of applications for exemption and Forms 990 to interested parties who sought those in person at IRS offices, where those returns were available for inspection.[141] In 1969, witnesses testifying to Congress suggested that nonprofits be required to provide extensive information to be publicized for the purpose of public

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[132] US Department of the Treasury, *Treasury Department and IRS Announce Significant Reform to Protect Personal Donor Information to Certain Tax-Exempt Organizations*, July 16, 2018. See announcement here: https://home.treasury.gov/news/press-releases/sm426 Announcement for Rev. Proc. 2018-38.
[133] Bullock v. IRS, 401 F.Supp.3d 1144 (2019).
[134] Guidance Under Section 6033 Regarding the Reporting Requirements of Exempt Organizations, 85 Fed. Reg. 31959 (May 28, 2020) (codified at 26 CFR 56) T.D. 9898 https://www.federalregister.gov/documents/2020/05/28/2020-11465/guidance-under-section-6033-regarding-the-reporting-requirements-of-exempt-organizations (hereinafter Donor Regulations)
[135] *Id.* at 31963.
[136] *Id.*
[137] *Id.* at 31965.
[138] *Id.*
[139] As a side note, it is not clear what recourse the IRS might have had against an organization that failed to comply with the requirement to disclose donor names and addresses. Section 6652 penalizes either a failure to file an information return or to file a complete return. 26 U.S.C. § 6652. The latter issue, whether a return is complete, might provide some guidance as to what ought to be in a return. Since Congress penalizes a failure to file a complete return, understanding what constitutes a complete return can give a sense of what types of things ought to be in the return. The IRS has stated that a return that leaves out material information is an incomplete return that can be penalized. I.R.S. Office of Chief Counsel, PMTA 01357, Memorandum from James Brokaw to David Fish, Nov. 2, 2007. https://www.irs.gov/pub/lanoa/pmta01357_7359.pdf. Rev. Rul. 77-162. The IRS has suggested that "materiality depends upon what the Service requires to administer the tax laws." PMTA 01357 supra note __. It is not clear that a court would find a failure to disclose donors a material matter to the return.
[140] Revenue Act of 1950, H.R. 8920, 81st Cong. §341 (1950).
[141] Pub. L. 85-866, Title I, § 75(a), Sept. 2, 1958, 72 Stat. 1660.

accountability and ease of IRS review and audit of these organizations.[142] Thus, by 1969 there is recognition that the role of the Form 990 is both for purposes of IRS audit and for ensuring a greater public accountability through public disclosure. Congress made Form 990s even more available to the public in the Omnibus Budget Reconciliation Act of 1987 (OBRA '87).[143] Prior to 1987 a party interested in these returns had to formally request these documents from the IRS.[144]

The public disclosure of the returns arguably brings "some measure of organizational accountability to various constituencies, including current and prospective donors, organization employees and patrons, other exempt entities, and the citizenry at large."[145] As Professor Evelyn Brody notes, the disclosure of the Form 990 acts as a tool for nonprofit directors to have access to information they should receive but otherwise might not have gotten.[146] The Joint Committee on Taxation has suggested "[d]isclosure of information regarding tax-exempt organizations also allows the public to determine whether the organizations should be supported - either through continued tax benefits and contributions of donors - and whether changes in the laws regarding such organizations are needed."[147] The Independent Sector offers another reason: the unique role of nonprofits in our society as voluntary organizations necessitates a higher level of public disclosure of these organizations' activities.[148] Within the for-profit corporate context there is a movement for public disclosure of their tax returns as well. The proponents there argue it helps "detect questionable tax positions, deter the managers of a corporation from pursuing aggressive tax strategies for fear of public shaming and educate the public regarding the corporate tax law."[149]

There is evidence that an information return requirement is no panacea on its own without significant IRS oversight to ensure its being carried out properly. The U.S. General Accounting Office ("GAO") considered private foundation reporting in 1983 and found that IRS oversight was lacking.[150] The study found that private foundations often left off important public

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[142] *Id.* at 214.
[143] Pub. L. 100-203, Title X, § 10702(a), 101 Stat. 1330-459 (Dec. 22, 1987).
[144] Lloyd H. Mayer, Minimizing Risks and Maximizing Benefits Under the Final Disclosure Regs. For Exempt Organizations, 91 J. Tax'n 45 (1999).
[145] Caroline K. Craig, *The Internet Brings 'Cyber-Accountability' to the Nonprofit Sector*, 13 J. TAX'N EX. ORG. 82 (2001).
[146] Evelyn Brody, *Sunshine and Shadows on Charity Governance: Public Disclosure as a Regulatory Tool*, 12 FLA. TAX REV. 183, 194 (2012).
[147] Staff of the Joint Comm. on Taxation, 106th Cong., STUDY OF DISCLOSURE PROVISIONS RELATING TO TAX-EXEMPT ORGANIZATIONS, at 5 (2000) (hereinafter STUDY OF DISCLOSURE PROVISIONS). See also Lloyd Hitoshi Mayer, *The Promises and Perils of Using Big Data to Regulate Nonprofits*, 94 WASH. L. REV. 1281, 1297-98 (2019).
[148] Evelyn Brody, *Sunshine and Shadows on Charity Governance: Public Disclosure as a Regulatory Tool*, 12 FLA. TAX REV. 183, 212 (2012).
[149] Joshua D. Blank, *Reconsidering Corporate Tax Privacy*, 11 N.Y.U. J.L. & BUS. 31, 48–49 (2014). The initial corporate income tax required public disclosure of corporate tax returns. Tariff Act of August 5, 1909, ch. 6, § 38, 36 Stat. 11, 116.; *see* Marjorie E. Kornhauser, *Corporate Regulation and the Origins of the Corporate Income Tax,* 66 IND. L.J. 53, 57 (1991).
[150] GENERAL ACCOUNTING OFFICE, REPORT TO THE CHAIRMAN, SUBCOMMITTEE ON COMMERCE, CONSUMER, AND MONETARY AFFAIRS COMMITTEE ON GOVERNMENT OPERATIONS: PUBLIC INFORMATION REPORTING BY TAX-EXEMPT PRIVATE FOUNDATIONS NEEDS MORE ATTENTION BY IRS (Sept. 26, 1983).

information on their filed returns that could better ensure public accountability.[151] In discussing the importance of the Form 990PF in public accountability of private foundations, the GAO stated:

> In addition to using private foundation information to research grants, the public also needs the data to evaluate foundation activities. The Congress, when considering the public reporting requirements established by the Tax Reform Act of 1969, reasoned that foundations would be more likely to act in the public's interest if they were required to fully disclose their activities.[152]

The Joint Committee on Taxation ("JCT") considered the question of when information should be publicly disclosable.[153] A key piece of this report is that the JCT analysis focuses on public disclosure regarding charitable organizations, and not return information provided solely to government officials. The JCT expressed the opinion that publicly disclosed information supported both organizations operating within their dedicated exempt purpose and the proper administration of Federal tax laws.[154] However, it thought there was a need to assess whether certain types of information should be disclosable. For instance, there were compelling reasons to maintain the secrecy of private information about donors.[155] To them: "donors have legitimate privacy concerns, and that disclosure of donor identity may reduce charitable giving. Such information generally is not relevant in determining whether the organization is complying with the law, or in determining whether the organization is accomplishing its exempt purposes."[156] I obviously question the final two premises in this article but acknowledge the potential privacy concerns of donors and the potential of public disclosure impacting charitable giving and turn to that concern in Part III(C) and (D).

B. Information Reporting.

It is a bit odd to think of information provided on a tax information return such as the Form 990 as part of the idea of *information reporting*. What do I mean by that? An information return on the one hand, discussed above in this Part III(A), is an actual return that relates directly to the party filing the tax return. In the case of a tax-exempt organization, the Form 990 is an information return that provides information about the nonprofit organization itself directly to the government to ensure the organization is fulfilling its particular exempt purpose. Information reporting, on the other hand, is the idea that the government can make some third-party that has access to information about a transaction report that transaction to the government. For example, Congress requires employers to report wages paid to employees on a Form W-2, and financial institutions to report dividends, interest, capital gains and other passive investment income paid to investors on a Form 1099. This reporting arguably provides greater integrity to the tax

[151] *Id*.
[152] *Id*. at 5.
[153] STUDY OF DISCLOSURE PROVISIONS, *supra* note __ at 80.
[154] *Id*.
[155] Id. at 81.
[156] *Id*.

collection system by making the tax system harder to evade,[157] and also can provide the IRS information that will help the IRS better target noncompliance in the future.[158] Form 990 fulfills both functions. It provides important information about transfers of money and transactions the nonprofit entered into with insiders and outsiders. This section C considers the potential value of information reporting and how that might relate to the Form 990 and donor disclosure.

There is a robust literature on the importance of information reporting to tax collection.[159] "It is widely known . . . that tax enforcement is excellent whenever such third-party reporting is in place, and that enforcement is weak even in the most advanced economies when such third-party reporting is not in place, as in the case of small family businesses."[160] The theoretical basis of why taxpayers comply is for the most part based in an expected utility model.[161] Taxpayers consider the benefit from avoidance and the likelihood of detection. When a third-party reports a transaction the likelihood of detection is high.[162]

Some authors detail problems with what they refer to as "overdisclosure". For instance, in the tax shelter arena the IRS has asked for enormous amounts of information that some label as a problem of overdisclosure.[163] In these instances, risk-averse taxpayers spend too much time disclosing every transaction, as do aggressive taxpayers looking to paper over their tax shelter activity, leading the IRS to proceed down audit trails that are far from targeted.[164] Other critics such as Professor Wei Cui suggest that there is a lack of causation between information reporting

[157] Dave Rifkin, *A Primer on the "Tax Gap" and Methodologies for Reducing It*, 27 QUINNIPIAC L. REV. 375, 410 (2009) (discussing how information reporting ought to be used along with other methods to reduce the "tax gap").
[158] Edward A. Morse, *Whistleblowers and Tax Enforcement: Using Inside Information to Close the "Tax Gap"*, 24 AKRON TAX J. 1, 3 (2009) (citing DEP'T OF THE TREASURY BUDGET IN BRIEF 60 (2008), https://www.treasury.gov/about/budget-performance/budget-in-brief/Documents/FY2008_bib.pdf) .
[159] Henrik J. Kleven et al., *Why Can Modern Governments Tax So Much? An Agency Model of Firms as Fiscal Intermediaries*, 83 Economica 219 (2016). Leandra Lederman, *Essay: Reducing Information Gaps to Reduce the Tax Gap: When is Information Reporting Warranted?*, 78 FORDHAM L. REV. 1733 (2010) (hereinafter *Information Reporting Warranted)*; Dave Rifkin, *A Primer on the "Tax Gap" and Methodologies for Reducing It*, 27 QUINNIPIAC L. REV. 375, 410 (2009) ("Information reporting promotes tax compliance"); James Alm, Jay A. Soled, *W(h)ither The Tax Gap?*, 92 WASH. L. REV. 521, 535 (2017) ("In light of technological advancements, the expansion of third-party tax information reporting shows no signs of abating. Congress has a powerful device at hand to monitor taxpayers' income far more accurately . . . [and due to its benefits Congress] will no doubt continue to expand third-party tax information reporting."); Jay A. Soled, *Homage to Information Returns*, 27 VA. TAX REV. 371, 371–72 (2007) ("Most studies indicate that such returns are pivotal in causing taxpayers to be forthright in their reporting practices. These same studies indicate that in the absence of such returns, taxpayer compliance plummets.").
[160] Kleven, *supra* note __, at 1. *Cf.* Wei Cui, *Taxation Without Information: The Institutional Foundations of Modern Tax Collection*, 20 U. PA. J. BUS. L. 93 (2017) (questioning the role third party information reporting really plays in ensuring compliance with tax law, while acknowledging its role in an income tax).
[161] James Alm, *A Perspective on the Experimental Analysis of Taxpayer Reporting*, 66 THE ACCOUNTING REV. 577 (1991).
[162] *Id*. at 577. *See also* Nipoli Kamdar, *Information reporting and tax compliance: an investigation using individual TCMP data*, 23 ATLANTIC ECON. J. 278, 290 (1995) ("The results show third-party information reporting to be an effective deterrent to noncompliance but cast doubt on the presumption that lower marginal tax rates led to greater compliance.").
[163] Joshua D. Blank, *Overcoming Overdisclosure: Toward Tax Shelter Detection*, 56 UCLA L. REV. 1629 (2009).
[164] Blank, *Overcoming Overdisclosure* at 1644.

and compliance.[165] However, Professor Cui still believes information reporting plays a real role in compliance in an income tax regime.[166]

In the United States, information reporting's perhaps most palpable role is in reducing the tax gap, i.e., the amount of income tax actually owed by the public but not voluntarily paid. The tax gap is estimated to be between 15-18% of tax owed.[167] In the 2008-2010 period, the IRS failed to collect $458 billion in tax. After some compliance efforts by the IRS that amount was later narrowed to $406 billion. The Treasury Department in a study of tax compliance notes that tax noncompliance is the highest where there is no third-party reporting.[168] The Treasury Department highlights the need to "strengthen reporting requirements,"[169] and notes that enforcement activity itself is not a driver of reducing the tax gap.[170] In its 2001 study, the IRS found that 45% of compliance has to do with information reporting.[171]

The difficulty the IRS faces is asymmetric information. The taxpayer has information that the IRS does not. The reason reporting can be so effective is that it does not require the IRS to do all or even much of the work. As Professor Leandra Lederman notes, like a red light camera, simply the fact that an individual is being watched can generate compliant behavior.[172] Lederman suggests there are six factors to consider in any information reporting arrangement: (1) arm's-length parties, (2) bookkeeping infrastructure, (3) centralization, (4) complete reporting, (5) few alternative arrangements, and (6) contributor to tax gap.[173] Lederman considers a proposal by Professors Soled and Gans to require reporting of gifts for gift tax purposes. She rejects this proposal because the parties typically are unsophisticated such that reporting would be a burden and the gift tax does not contribute much to the tax gap.[174]

Where transaction parties are engaging at arm's-length, the IRS has reason to believe that there is little reason for the parties to collude in reporting.[175] Thus, information reporting in these circumstances is highly reliable. Congress has recognized, though, that where parties are related, it is hard to have faith in the reporting and in the tax positions taken.[176] Congress often adopts anti-abuse provisions to stop people from taking advantage of these situations. Professor Lederman notes that the IRS needs to look particularly closely at situations where there is a tax

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165 Wei Cui, *Taxation without Information: The Institutional Foundations of Modern Tax Collection*, 20 U. PA. J. BUS. L. 93 (2018); however, *Cf.*, Nadia Dwenger, Henrik Kleven, Imran Rasul, and Johannes Rincke, *Extrinsic and Intrinsic Motivations for Tax Compliance: Evidence from a Field Experiment in Germany*, 8 AM. ECON. J. ECONOMIC POL'Y 203 (2016) (finding in a natural experiment that with zero deterrence a tax policy depending on only intrinsic motivations resulted in only 20% paying the full tax due).

166 *Id.* at 145.

167 See Tax Policy Center, What is the Tax Gap, https://www.taxpolicycenter.org/briefing-book/what-tax-gap

168 *See* OFFICE OF TAX POLICY, U.S. DEP'T OF TREASURY, A COMPREHENSIVE STRATEGY FOR REDUCING THE TAX GAP 8 (2006), available at https://www.irs.gov/pub/irs-news/comprehensive_strategy.pdf (hereinafter COMPREHENSIVE STRATEGY)

169 COMPREHENSIVE STRATEGY, *supra* note, at 9.

170 COMPREHENSIVE STRATEGY, *supra* note, at 13.

171 *See Information Reporting Warranted* at 1738.

172 Leandra Lederman, *Statutory Speed Bumps: The Roles Third Parties Play in Tax Compliance*, 60 STAN. L. REV. 695, 696 (2007) (hereinafter *Statutory Speed Bumps*).

173 *Information Reporting Warranted* at 1739-41.

174 *Information Reporting Warranted* at 1757-58.

175 *Statutory Speed Bumps, supra* note __ at 724.

176 *Id.* at 724-26.

indifferent party who can take much of the income and allow others a deduction.[177] Tax-exempt organizations are just such parties. Lederman suggests that in these types of situations information reporting might not be all that useful as the third party has reason to provide improper information.

Lederman's factors 2 and 3 are strongly encouraging of information reporting regarding donor names and addresses. In the context of nonprofit organizations who are already required to file a substantial tax return and keep the additional information, the bookkeeping costs of including substantial donor names and addresses would seem to be very small. There are likely some gains in centralization of reporting at the nonprofit level rather than asking each donor to provide such reporting. Factor 5 certainly does not weigh against information reporting as tax exempt organizations by definition need a contributory relationship with its members rather than a transactional one.

Finally, factors 4 and 6 cut against information reporting in this donor information context. Professor Lederman notes the importance of complete reporting in factor 4, which she says means that the IRS is provided all the information needed and that information easily aligns with traceable information on a taxpayer's return.[178] In general, adding donor addresses and names does not easily align with information that the IRS can make simple use of in tracing whether amounts were correctly deducted or included in income. It is information that the IRS has to work to use to understand a complex relationship between the taxpayer and the nonprofit. But substantial donors are often at the heart of a (non)compliant tax-exempt organization. So, it tells the IRS about critical information. It is almost surely correct that this information plays little role in solving factor 6, the tax gap. Given that the IRS declares it rarely uses the information, it seems to follow that the information has rarely played a part in closing the tax gap. Perhaps we should not give this factor much power in this context since no tax-exempt entity plays a significant role in collecting tax in the first place.

C. Enforcement Environment

In considering whether to include an item for purposes of an information return or for information reporting, it is worth assessing the enforcement environment. By that I mean what resources does the IRS have at its disposal to ensure taxpayers are complying with the law. If the IRS has limited resources, it arguably ought to put a higher priority on devices that enforce the law without resort to human resources, i.e., agents on the ground, to enforce that law. A review of the trend over the past 10 years suggests the IRS does not have the resources, human or capital, needed to enforce the current tax law.[179]

The IRS budget has shrunk over the past decade. The Congressional Budget Office ("CBO") reports that between 2010 and 2018 the IRS budget fell by 20% in real (inflation adjusted) dollars.[180] As that CBO report detailed, this budget cut to the IRS resulted in a 22%

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[177] *Id*. at 734-35.
[178] *Information Reporting Warranted*, *supra* note __, at 1740.
[179] *See*, *e.g.*, Paul Keil & Jesse Eisinger, *How the IRS was Gutted*, PROPUBLICA (Dec. 11, 2018). *See also* Leandra Lederman, *The IRS, Politics, and Income Inequality*, TAX NOTES, 1329 (March 14, 2016).
[180] CONGRESSIONAL BUDGET OFFICE, TRENDS IN THE INTERNAL REVENUE SERVICE'S FUNDING AND ENFORCEMENT, 1 (2020).

decrease in employees working at the agency, but alarmingly a 30% decline in enforcement employees.[181] IRS Data Books show the IRS went from over 94,000 full time equivalent ("FTEs") employees in FY 2010 to 73,554 FTEs in FY 2019.[182] Furthermore, some of the most specialized employees in the enforcement sphere saw declines of 35% for revenue agents and 48% for revenue officers.[183] The CBO details the impact this had on taxpayer examinations. Individual examinations fell by 46% in that period with only 0.6% of individuals facing an examination by the end of that period.[184] While high income individuals were generally audited at a rate higher than other individuals, the audits of high-income individuals fell at a greater rate than all other individuals.[185] Corporate examinations fell by 37%.[186]

As discussed above, the tax gap is large. In the period from 2011-2013 the IRS estimates the annual tax gap was approximately $441 billion.[187] It also expects that collection activity by the IRS will return about $60 billion lost dollars bringing the tax gap down to $381 billion. Though the IRS has not yet estimated the tax gap for later years, one group, Shrink the Tax Gap, estimates the tax gap in 2019 increased to $574 billion.[188]

What does this shrinking enforcement environment look like in the tax-exempt organization sector? The group that oversees this sector in the IRS is referred to as Tax-Exempt & Government Entities and within that division, the exempt organizations group focuses on this tax-exempt sector. The Government Accountability Office ("GAO") in 2014 recognized that the budget cuts at the IRS led to less enforcement in the tax-exempt sector.[189] The IRS workforce on exempt organization matters shrank about 5% from 2010 (889 FTEs) to 2013 (842 FTEs).[190] That workforce then shrank significantly to around 550 FTEs by FY 2019.[191] There was a change in the exempt organizations group at the IRS after the Tea Party controversy of 2013 where many employees of exempt organizations moved over to the Chief Counsel to manage guidance projects from that office. In 2014, it was reported that around 45 employees from the IRS were being moved over to the Office of Chief Counsel of the IRS in a realignment.[192] However, even if 45 moved over, that does not explain the precipitous drop.

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[181] *Id.*
[182] INTERNAL REVENUE SERVICE, DATA BOOK, 74 Table 31 (2019); INTERNAL REVENUE SERVICE, DATA BOOK, 66 Table 29 (2010).
[183] *Id.*
[184] *Id.* at 2.
[185] *Id.*
[186] *Id.*
[187] INTERNAL REVENUE SERVICE, FEDERAL TAX COMPLIANCE RESEARCH: TAX GAP ESTIMATES FOR TAX YEARS 2011-2013, 1 (2019).
[188] Shrink the Tax Gap, Exhibit 2, Tax Gap Projection to 2019, https://shrinkthetaxgap.com/exhibit-2-tax-gap-projection-to-2019/.
[189] GAO, BETTER COMPLIANCE INDICATORS AND DATA, AND MORE COLLABORATION WITH STATE REGULATORS WOULD STRENGTHEN OVERSIGHT OF CHARITABLE ORGANIZATIONS, 19 (2014).
[190] *Id.*
[191] IRS, TEGE, FISCAL YEAR 2019 ACCOMPLISHMENTS, Pub. 5329 (2020).
[192] Diane Freda, *Move of 45 IRS TE/GE Employees to Chief Counsel's Office Slated for FY 2015*, BLOOMBERG LAW NEWS (May 14, 2014). Some of those 45 came from employee plans. One article from the time suggests it was only 22 employees from the exempt organizations group that moved over. Lauren Simpson, *IRS Controversy and Restructuring*, NONPROFIT LAW BLOG (May 29, 2014) https://www.pbwt.com/exempt-org-resource-blog/nonprofit-law-blogirs-controversy-changes-tege.

The exempt organizations group at the IRS carries on several functions but the main two are running an application system called the determinations process, and an examination program. The predominate group of the 550 employees are divided into those two functions. In determinations, as annual applications have increased annual rejections from the IRS have significantly decreased.[193] In FY 2019, the IRS reviewed over 101,000 applications for exempt status, it rejected only 66 of those applications.[194] Comparatively, in FY 2010, the IRS reviewed over 65,000 such applications and rejected 517.[195] When looking at examinations, it is impossible to have a perfect figure given the way the data is reported in the IRS Data Book, but of all the returns filed and all the returns examined, which likely includes some double counting of organizations (and includes sizable employment tax returns), the IRS had about a 1.5% examination rate. In 2019, comparatively, even with the double counting problem, the examination rate shrinks to 0.05% at best.[196]

This drastic shrinkage of the IRS happened while the tax-exempt sector grew significantly. It is a large sector. Though the comparison between 2010 and 2019 suggests that the tax-exempt organization groups shrunk from a little more than 1.9 million to a little less than 1.9 million tax-exempt organizations according to IRS Data Books,[197] the sector has grown in size of assets. It is difficult to get good current statistics on nonprofits. There are many problems with the data from the IRS including the fact that not all organizations file returns (churches for instance) and we have no reason to believe all organizations file their returns accurately. Nevertheless, a look at the raw file of data from the IRS of information reported on Forms 990 suggests assets and revenue have increased significantly in the sector over the decade.[198] In 2010, with just the charitable sector, with a little over 186,000 Form 990s filed, the sector held over $2.9 trillion in assets (though 1.17 trillion in liabilities) and almost $1.6 trillion in revenue.[199] In comparison, in 2017 that same charitable sector filed over 217,000 Form 990s reporting over $4.3 trillion in assets (over $1.5 trillion in liabilities) and almost $2.3 trillion in revenue.[200] Using that same data, again from reporting on Forms 990, for exempt organizations including 501(c)(4)-(9) in 2010 there were approximately $547 billion in assets and $360 billion in revenue.[201] In 2017, those amounts grew to approximately $767 billion in assets and $387 billion in revenue.[202]

Thus, the enforcement environment for the IRS is poor both at the IRS in general and at the division that oversees tax-exempt organizations in particular. When compared to the size of the sector the IRS is reviewing, the idea that the IRS might be able to use human resource heavy examinations to ensure compliance is simply laughable. It is not going to work. As will be discussed in Part (IV)(C), state enforcement is even more anemic. Efforts, such as those

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193 Philip Hackney, *The Real IRS Scandal has more to do with Budget Cuts than Bias*, THE CONVERSATION (April 15, 2018).
194 IRS, DATA BOOK, 27, Table 12 (2019).
195 IRS, DATA BOOK, 56, Table 24 (2010).
196 IRS, DATA BOOK, 4, Table 2, & 54 Table 21 (2019).
197 IRS, DATA BOOK, Table (2010); IRS, DATA BOOK, Table (2019).
198 IRS, Statistics of Income.
199 IRS, Statistics of Income.
200 IRS, Statistics of Income.
201 IRS, Statistics of Income.
202 IRS, Statistics of Income.

recommended by GAO, for the IRS to make better use of data available is going to be the only way the IRS in this current environment can make headway against tax abuse. Robust information reporting thus needs to be the norm.

D. Democratic Function of Disclosure

I previously argued that political justice as democracy is a key piece in constructing tax policy.[203] The importance of the value of political justice as a matter of tax policy is not just a matter of the choice of tax instrument, the progressive nature of the tax structure, nor of ensuring such justice at the substantive level of the Code,[204] but a matter of equitable enforcement as well. Political justice should be a value that guides required tax reporting. There are two matters associated with this donor disclosure that are relevant to political justice: (1) it is important to a democratic order that information necessary to make collective decisions be publicly available, and (2) it is important to a democratic order that citizens see justice in the sense that alike situations are treated in a like manner. In this section, I will very briefly discuss the principles of democracy, then focus on the case for public disclosure and the need for justice to be seen. There are some complications in the end to this second factor, which I discuss at the end of this Part III(D).

The two democratic values implicate different policy aspects of donor disclosure. First, to the extent a nonprofit engages in lobbying and political campaign activity there may be reason for the public to know who is funding those initiatives from a political justice perspective. In order to make collective governmental decisions in a democracy it is important that each citizen have the information relevant to making those collective decisions. Knowing who is supporting lobbying and political campaign activity can be important information in that regard. Extending the import of this first informational value, the public may also have an interest in disclosure that is broader than that which we call government. I suggest here that it should extend to those organizations that provide collective goods or services. Obviously, as discussed in Part III(A), many including Congress have considered nonprofit activity to be important enough to require these organizations to broadly disclose their activities on the Form 990.

Secondly, the disclosure of this information allows individuals to see justice being carried out or not carried out in the very organizations that are allowed to operate as tax-exempt entities. Are these organizations worthy of the government subsidy we bestow upon them? Did the IRS operate in an unbiased manner in picking these organizations? This second value then resonates strongly in ensuring a well-enforced tax code where the wealthy are bearing their real burden.

The case for democracy is based on the principle of intrinsic equality.[205] That potent idea supports the notion that all individuals ought to have an equal say in what a relevant group

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[203] Philip Hackney, *Political Justice and Tax Policy: The Social Welfare Organization Case*, 18 TEX. A&M L. REV. 271 (2021) [hereinafter *Political Justice*].

[204] *Id.*

[205] I spent significant time in two different articles discussing the principles of democracy: *Political Justice, supra* note __, and in Philip T. Hackney, *Prop up the Heavenly Chorus? Labor Unions, Tax Policy, and Political Voice Equality*, 91 ST. JOHN'S L. REV. 315 (2017). In sketching that account of democracy, I relied heavily upon the work of Robert Dahl and thus repeat those references here. In particular, I relied upon: ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS (1989); ROBERT A. DAHL, ON DEMOCRACY (2015 2nd Ed.); ROBERT A. DAHL, HOW DEMOCRATIC IS

decides to do, and strongly suggests democracy as a governing principle. As Professor Christiano explains, "[a] person's right to participate in the shaping of the world she shares in common with others, which characterizes a well-functioning democracy, is grounded in her fundamental interests as a member of political society."[206] This fundamental principle is central to both the case for public disclosure and the need for justice to be seen.[207]

Under democracy, each member of the relevant group must have an equal and real opportunity to have a say in the agenda of the group and in final decisions of the group. This means individuals must be provided the right to ask questions and provide relevant information and arguments such that all individuals have an opportunity to understand the consequences of a decision at issue. Additionally, everyone must have a vote in any final decision of the group. An important additional element to the principles of democracy is that equality must be seen, it must be publicly realized.[208] Institutions "must be able to display the fact of their justice to ordinary persons."[209] In Part III (A) and (B) above I explored disclosure to the public and disclosure to the government itself. I try to explore those two themes within their political justice context in this Part III(D).

Immanuel Kant notes a major problem in organizing a state is to "organize a group of rational beings who together require universal laws for their survival, but of who each separate individual is secretly inclined to exempt himself from them."[210] In her book looking at the role of secrets in society and the ethics associated therewith, Sissela Bok notes: "Secrecy, when available, is peculiarly likely to increase the temptation not to cooperate with others to reduce shared burdens."[211] Thus, the choice to allow secrecy not only comes with the potential that wealthy donors might misuse that secrecy, might choose to not cooperate with the body politic, but that it is also possible that this move is seen as a move to not do equal justice.

The only way we can each know that we are getting equal respect in our polity is if that equality is public. The Supreme Court in effect recognized this value in campaign finance rules in *Buckley v. Valeo* as an informational benefit that "allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches" and "alerts the voter to the interest of which a candidate is most likely to be responsive."[212] It also is though in the campaign finance case to protect against public corruption.

That said, there are democratic theorists who argue against public disclosure in this campaign finance context. Ian Ayres argues that rather than the Brandeis statement "Sunlight is said to be the best of disinfectants; electric light the most efficient policeman," the right

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THE AMERICAN CONSTITUTION (2003 2nd Ed.); ROBERT A. DAHL, ON POLITICAL EQUALITY (2006) (hereafter ON POLITICAL EQUALITY). It also relies on the work of THOMAS CHRISTIANO, THE CONSTITUTION OF EQUALITY (2008).

[206] THOMAS CHRISTIANO, THE CONSTITUTION OF EQUALITY, 12 (2008).

[207] *Id.*

[208] CONSTITUTION OF EQUALITY at 46; *see also* Lloyd Hitoshi Mayer, *Politics and the Public's Right to Know,* 13 ELECTION L. J. 138, 140 (2014) (noting "in the United States it is now assumed the right is an important part of the fabric of democracy").

[209] CONSTITUTION OF EQUALITY at 51.

[210] IMMANUEL KANT, *Perpetual Peace,* in KANT POLITICAL WRITINGS 112-13 (Hans Reiss ed., 1970).

[211] SISSELA BOK, SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION, 107 (1989).

[212] Buckley v. Valeo, 424 U.S. 1, 67 (1976) (overturning the FECA provisions on some campaign finance limits); however, *Cf,* Abby K. Wood, *Campaign Finance Disclosure*, 14 ANNUAL REV. L & SOC. SCI. 16 (2018) (noting that because of failures to require complete disclosure voters are never given a real picture of the political terrain).

metaphor for thinking about disclosure for campaign finance is the secrecy of the voting booth.[213] The catch is that he considers whether we would be better off with mandated anonymity. In other words, no candidate would know who supported them such that there would be no particular promises to keep. To Ayres, there is no difference between a public disclosure system and a laissez-faire system of disclosure.[214] This leads him to a conclusion that a system more protective from public corruption would be one of mandated anonymity. The Supreme Court in Buckley though thought the sunlight was likely to make corruption less likely.[215] That said, the Court has at times recognized limits on disclosure where it might legitimately be said to harm the donor.[216]

A natural question might arise as to why we might need this publicity role in the case of organizations that are not explicitly governmental. Though some reasons are discussed above in Part III(A), it is worth reflecting on the specific democratic function of this disclosure. First, nonprofits are the easiest identifiable embodiment of civil society. By civil society, I mean organizations, public spaces, modes of communication that exist outside of either the political system or the economic system where people have the ability to generate information and opinions about collective action of society in a way that they might influence the direction of both economic and political society.[217] In that civil society function they often interact with the political system to influence that system through lobbying of public officials or to support candidates for office through political contributions or independent expenditures. Thus, to the extent we find it important that our politics be subject to transparency, we ought to expect some similar level of transparency from our nonprofits as they substantially interact with and influence the political.

If we stopped there though, thinking about the role of nonprofits explicitly carrying out direct roles in forming our governmental system, we might think disclosure could be limited to those directly engaged in lobbying and/or political campaign activity. Clearly though we have chosen as a country to conceive of general disclosure as important for almost the entirety of the nonprofit sector. This choice fits well within a broad democratically based system that recognizes that there are many collectively based decisions that are carried on outside of government. Because these nonprofits necessarily carry out collective services and provide collective goods, with a subsidy from the federal government through the tax system,[218] I submit they are more public in nature and thus ought to be subject to some public disclosure regarding their activities for proper democratic functioning. As an additional matter, because they lack owners who can pursue corrective actions for misuse, it becomes important for the public to be

[213] Ian Ayres, *Disclosure versus Anonymity in Campaign Finance*, 20 in DESIGNING DEMOCRATIC INSTITUTIONS, (Ian Shapiro & Stephen Macedo eds., 2000).
[214] *Id*. at 21.
[215] Buckley at 67.
[216] NAACP v. Alabama, 357 U.S. 449 (1958); Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87 (1982). The Court is currently poised to reconsider that question in the context of the provision of this information to the state attorney general in California in Americans for Prosperity, *supra* note 5.
[217] Jurgen Habermas, *Three Normative Models of Democracy*, 1 CONSTELLATIONS 1, 8 (1994) [hereinafter *Three Normative Models*].
[218] Philip T. Hackney, *What we Talk About When We Talk about Tax Exemption*, 33 VA. TAX REV. 115 (2013).

aware of their activities. Generally, it is primarily the attorney general who can protect the interests of nonprofit beneficiaries.[219]

Without taking on the Constitutional law question, it is important to recognize that as the organizations are a foundation of civil society, these nonprofits engage in important free speech and free association activity that is critical to the health of our democracy.[220] We should be careful in how that system is administered such that it does not destroy or hinder such free speech or association. Nevertheless, at the same time, democracy must be open to the sharing of information.

Professor Hitoshi Mayer explores the right of the public to know and focuses specifically upon what he refers to as private-to-private information.[221] He considers the right to know in the government action context one matter and then any other activities as private to private.[222] By this he means: "interactions that directly involve only private actors but where at least one of the private parties intends the interaction to indirectly influence the actions or selection of government actors ('private-private political interactions')."[223] Hitoshi Mayer considers justifications for why the public might believe it has an interest in certain information including a proprietary justification, an accountability justification, a democracy justification, and a utilitarian justification.[224]

With the proprietary justification, because the public in a democracy is synonymous with the government, the public in effect owns the information held by the public.[225] Hitoshi Mayer is skeptical that we could justify ownership of private-to-private information, as it would obliterate any notion of privacy for an individual. The accountability justification focuses on the need for the public to have access to public information to hold government officials accountable.[226] This justification is strongest, he concludes when used to hinder corruption, but is fairly weak as a mode to increase good faith decision making.[227] The democracy justification is about democratic legitimation – in order for citizens to make informed choices in their role as makers of law, they need critical information. Though he finds much theoretical support for this contention, he finds little empirical support that it makes a difference in the quality of democracy. Furthermore, as a result of its limited empirical support, he finds that it has little application to private-to-private communications.[228] Finally, the utilitarian justification asserts that there are better social and economic outcomes within a society that has greater transparency.[229] Because Hitoshi Mayer concludes the utilitarian justification lacks empirical support, he rejects it as providing strong support as of now. He ultimately concludes that the accountability justification provides fairly robust support for public disclosure of bundling of political contributions and independent

[219] Robert Carlson, *Protection and Regulation of Nonprofits and Charitable Assets*, 215-16 in STATE ATTORNEYS GENERAL POWERS AND RESPONSIBILITIES (Emily Myers ed., 4th ed. 2018).
[220] *See Political Justice supra* note __ at __.
[221] Lloyd Hitoshi Mayer, *Politics and the Public's Right to Know,* 13 ELECTION L. J. 138 (2014).
[222] *Id.* at 139.
[223] *Id.*
[224] *Id.* at 145.
[225] *Id.*
[226] *Id.* at 146.
[227] *Id.* at 147.
[228] *Id*.
[229] *Id.* at 150.

candidate related expenses. But he finds the justifications somewhat weak when we consider grassroots lobbying.[230]

It is hard to know how Hitoshi Mayer's assessment would apply to the field of social welfare organizations or business leagues, but it seems reasonable to surmise that Hitoshi Mayer would see much of the work of these two types of organizations as similar at best to grassroots lobbying and probably of much less public interest nature. Thus, public disclosure of donors in the vast majority of instances of these nonprofits would generally not be disclosable because private to private communications without suggestions of the possibility of corruption.[231] This is not to say the information might not be disclosable to the IRS, or that certain type of communications that were independent expenditures or bundling could be disclosable, but that would be a narrower case than providing public disclosure of substantial donors to nonprofits generally.

Professor Nichalos Stephanopoulos argues we should expand the notion of political activity to include what he calls quasi campaign finance that would capture more of the social welfare and business league activity than would perhaps Hitoshi Mayer.[232] To Stephanopoulos, quasi campaign finance "pays for political communications with voters" but "these communications are nonelectoral yet rely on an electoral link to be effective."[233] This seems similar to what I have previously described as advocacy organizations broadly: "those that lobby, are considered to intervene in a political campaign, and those that broadly advocate for a cause through education or legal processes."[234] Professor Roger Colinvaux goes further by making a broad call for disclosure of all social welfare organization relatively large donors to protect against the issue of political corruption and consequent harm to the tax-exempt sector.[235] To Colinvaux there is a real danger of the corruption of the nonprofit sector through politics that disclosure can protect against.

The informational value for citizens to have the tools they need to make collective decisions is not the only value involved here. There is also the need mentioned above to see justice be done. Requiring these organizations that serve the collective purposes they serve to provide transparency regarding their operations makes good sense. It allows us all to see that a nonprofit organization is indeed fulfilling its exempt purpose and allows the community to hold it to account if it is not. However, we are only talking about the substantial donor information in this Article. To the extent this information crosses directly into the political at the governmental

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[230] *Cf.* Richard L. Hasen, *Chill out: A Qualified Defense of Campaign Finance Disclosure Laws in the Internet Age*, 27 J.L. & POL. 557 (2012) (arguing for campaign finance disclosure laws as long as suitably narrowed by not forcing the reporting of small dollar donors; disclosure "can serve the important interest in deterring corruption and providing valuable information to voters").

[231] *See* Roger Colinvaux, *Social Welfare and Political Organizations: Ending the Plague of Inconsistency*, 21 N.Y.U. J. LEGIS. & PUB. POL'Y 481, 501 (2018) *citing* Terence Dougherty, *Section 501(c)(4) Organizations: Political Candidate-Related and Other Partisan Activities in Furtherance of the Social Welfare*, 36 SEATTLE U. L. REV. 1337, 1410-11 (2013) (discussing the harm that forcing all donors to social welfare organizations might cause to the operations of non-political organizations).

[232] Nicholas O. Stephanopoulos, *Quasi Campaign Finance*, 70 DUKE L.J. 333 (2020).

[233] *Id.* at 336.

[234] Philip Hackney, *Political Justice and Tax Policy: The Social Welfare Organization Case*, 8 TEX. A&M L. REV. 271, 318 (2021).

[235] *Id.*

level, it seems there is good reason to require this information to be public for the reasons discussed above. Nevertheless, it seems that the publicization of this material as we move away from organizations directly engaging in the political is lessened. We begin to tread more into the private. Even if it is necessary for enforcement purposes, perhaps privacy should trump the modest value this additional information would provide the public. Nevertheless, given that there is at least good reason for the information, the failure to collect that information may not be ensuring that justice is seen.

One additional complicating factor to a democratic order, is the potential for the IRS to be perceived as a biased political player.[236] With social welfare organizations the IRS is already involved in making collective choices for our society on whether a particular organizational purpose and activity is a "good" one that deserves tax exempt status and government subsidies.[237] This function of the IRS violates political justice by taking away from the people the ability to make these decisions, and it does it in nontransparent ways because of the prohibition on disclosure of taxpayer information. Further though, where that call is specifically about whether a particular communication or organization fits into a political rubric or not, the IRS must make collective choices for us that resonate at a high level for our polity. Requiring the IRS to mandate disclosure of donors in this environment may make the IRS seem like a politically biased entity.

Nevertheless, Congress would be the entity to mandate disclosure in a public sense in the case of nonprofits generally. That broad disclosure likely adds to political justice in that we can all see the types of organizations that have been approved by the IRS and how they behave and what they do. It makes the system more transparent. Additionally, because it is Congress that mandates this disclosure, some of the political accusations against the IRS might disappear. The same would be true were Congress to mandate disclosure of these donors. Thus, it is possible that disclosure of donors could be seen to promote political justice rather than the other way around.

Focusing in on the narrow information involved here – substantial donors to social welfare organizations and business leagues – and considering the specific question of whether that information ought to be publicized, it seems we might have some consensus that to the extent the information touches the political campaign process, it would be reasonable to expect public disclosure. However, the further we get from the explicitly political, the harder the public disclosure case becomes. Nevertheless, where we can conclude that this donor information should be publicly shared, that provides strong support to the case that the information should be at least disclosed to the IRS. It may also lend greater support to the case for the IRS serving to support ancillary legal regimes in administering the Code discussed in Part IV. Even if the public could not see the donor information, at least the information is being considered in regulating this sector, building up a stronger sense that the second value of equal enforcement mentioned above of is being carried out.

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[236] *See Political Justice and Tax Policy supra* note __ at 326 (highlighting the political justice problem inherent in the IRS appearing to make collective choices for us all about what our society should deem to be good when it decides on a particular social welfare organization activity as meeting tax exempt requirements).
[237] *Political Justice, supra* note __.

IV. IMPORTANCE TO ANCILLARY LEGAL MATTERS

There are legal regimes that are external to tax law that depend at least in part upon the legal regime of tax law associated with tax exempt organizations. This includes campaign finance systems and state law enforcement associated with nonprofit organizations. These different regimes may rely in part upon the IRS's collection of donor names and addresses to oversee these legal regimes. When the Treasury Department sought comments on the new regulations eliminating the donor disclosure requirements, indeed, many commenters noted the importance of this disclosure to the enforcement of federal campaign finance laws. They also noted its importance to state enforcement of laws regarding nonprofit organizations. The IRS summarily rejected those as not part of the mission of IRS. The question of whether to require disclosure of donor information ought to at least consider the impact the failure to collect this information has on those other regimes. A simple statement that those other interests are not part of the IRS's job is an insufficient response. This part will first look at the idea of agency cooperation with other agencies and state and local governments. It will then review federal campaign finance interests in the collection of this information. Finally, it discusses state interests in this information for state nonprofit law purposes.

A. What Role Can Income Tax Administration Play in Enforcing Ancillary Legal Regimes?

The Constitution provides that the President is the chief executive officer who oversees that the laws are enforced.[238] Thus, the President has the ability to oversee all of the laws and try to ensure that the bureaucracy works in tandem. Congress also clearly envisions that agencies can cooperate both within the federal government and outside to state government.[239] Professor Bijal Shah highlights numerous places where Congress has explicitly granted the power and the expectation for agencies to cooperate with another in ensuring external laws to that agency are enforced.[240] For instance, the Federal Bureau of Investigation may "reach into any other agency to augment its own resources to pursue fraud cases." The Consumer Product Safety Commission may "gather any data from any agency it chooses, as long as it deems this information 'necessary' to 'protect public health and safety.'"[241]

Congress has also designed the tax law to consider the need of the IRS to cooperate with many different constituencies including both other federal agencies and states and local governments. Section 6103, for instance, envisions that the IRS might share information to states for local enforcement purposes,[242] to federal officers or employees for administration of federal laws not relating to tax administration,[243] to committees of Congress,[244] among others. In a

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[238] *See, e.g.,* Francis E. Rourke, *The 1993 John Gaus Lecture: Whose Bureaucracy Is This, Anyway?,* 26 POL. SCI. & POL. 687, 687 (1993); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994).
[239] *See, e.g.,* Bijal Shah, *Congress's Agency Coordination*, 103 MINN. L. REV. 1961, (2019).
[240] *Id.* at 1966.
[241] *Id.*
[242] 26 U.S.C. § 6103.
[243] *Id.*
[244] *Id.*

simple sense, within the structure of the IRS, the IRS depends upon the Department of Justice to bring all cases on its behalf before Federal courts. In a more complex and regulatory sense, within oversight of organizations exempt from tax, the IRS works hand in hand with the U.S. Labor Department in order to share joint oversight of employee plans. In other words, Congress recognizes that the tax laws are intricately woven together with the entire federal legal regime. They are inseparable.

Congress has also recognized the deep internal relationship between the IRS and campaign finance.[245] For instance, Congress prohibits persons from deducting contributions to political campaigns.[246] Furthermore, a charitable organization has long been prohibited from intervening in a political campaign.[247] Though it first enacted section 527 of the Code to eliminate confusion of how the IRS should tax (or not tax) political parties,[248] Congress amended section 527 in 2000 to augment the FEC's role in overseeing campaign finance by grabbing up some organizations that did not specifically come within the FEC's jurisdiction.[249] These organizations are exempt from tax generally though have to pay tax on any investment income.[250] Additionally, they are required to disclose their donors.[251]

Beyond the practical description of cooperation, there are strong reasons to work towards arranging these different enforcement domains and legal regimes to work in tandem. For instance, though separate taxing regimes applying to commerce can cause increased inefficiency in an economic sense, there is scholarship demonstrating instances where state and federal taxation authorities can cooperate to decrease that inefficiency.[252] Receiving information from the federal government provides states an incentive to cooperate with the federal government on joint systems that reduce the inefficiencies of two systems. Additionally, within tax legal scholarship, there has been a long recognition that sometimes an enforcement regime works better in one domain if it uses frictions from another.[253]

B. Campaign Finance Law

In addition to tax law, Congress regulates many nonprofit organizations to the extent they are engaged in campaign finance.[254] Nonprofits have long been involved in the electoral system,[255] and the United States has tried to regulate the campaign finance of corporate entities

[245] Lloyd H. Mayer, *The Much Maligned 527 and Institutional Choice*, 87 B.U.L. REV. 625, 626-27 (2007) (noting this choice by Congress in 2000 to grant jurisdiction over some political activity disclosure rules to the IRS instead of the FEC, though also criticizing this Congressional choice).
[246] 26 U.S.C. § 162(e).
[247] 26 U.S.C. § 501(c)(3).
[248] Act of Jan. 3, 1975, Pub. L. No. 93-625, § 10, 88 Stat. 2108, 2116-19 (codified as amended at 26 U.S.C. § 527).
[249] *Id.*
[250] 26 U.S.C. § 527.
[251] 26 U.S.C. § 527(f).
[252] Erin Adele Scharff, *Laboratories of Bureaucracy: Administrative Cooperation Between State and Federal Tax Authorities*, 68 TAX L. REV. 699 (2015).
[253] David M. Schizer, *Frictions as a Constraint on Tax Planning*, 101 COLUM. L. REV. 1312 (2001).
[254] Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (codified as amended at 2 U.S.C. §§ 431-455).
[255] Lloyd Hitoshi Mayer, *When Soft Law Meets Hard Politics: Taming the Wild West of Nonprofit Political Involvement*, 45 J. LEGIS. 194, 196 (2019).

since 1907 when Congress enacted the Tillman Act under President Theodore Roosevelt.[256] This system of law focuses on expenditure limits, contribution limits, and disclosure. Though a series of cases over the years has called into question the constitutionality of this system, it is still in force today.[257] Knowledge of donors to nonprofits is relevant to the enforcement of that law. For instance, the system prohibits foreign actors from contributing to campaigns for public office or making expenditures for political campaigns.[258] To the extent a social welfare organization takes money from foreign operators to influence a campaign, the Federal Election Commission (FEC) cares. Some in fact have argued that Congress ought to require public disclosure of substantial donors to social welfare organization to ensure that nonprofits do not become a disclosure shelter.[259] This part describes some of the relevant highly complex federal campaign finance laws. It also looks briefly at state campaign finance laws.

Campaign finance law puts limits on individuals,' and political committees,' contributions to political committees. For instance, for the period 2020-21, an individual may not contribute more than $2,900 to a Candidate Committee, more than $5000 to a Political Action Committee ("PAC"), $10,000 per year to a party committee whether state, local or district, $36,500 per year to a national party committee, and $109,500 per year to certain other national party committees. [260] As to political committees, for instance, no multicandidate political committee can make contributions to a candidate of more than $5,000 to a candidate, up to $5,000 to other separate PACs, and up to $15,000 per year to a national party committee.[261] A nonmulticandidate political committee is subject to the same limitations as an individual.[262]

Much of the limitations and disclosure depend upon the definition of a political committee.[263] Though initially defined broadly, the Court in *Buckley v. Valeo* narrowed that to "only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate."[264] This limiting led to many committees that might be significantly involved in political campaigns, but that were not under the control of a

[256] Ch. 420, 34 Stat. 864 (1907). *See* Federal Election Commission v. Beaumont, 539 U.S. 146 (2003) (holding that the corporate political contribution ban applied to nonprofit corporations).
[257] Citizens United v. FEC, 558 U.S. 310 (2010); SpeechNow.org v. FEC, 599 F.3d 686 (D.C. Cir. 2010) (en banc), cert. denied, 562 U.S. 1003 (2010)
[258] 52 U.S.C. §30121; 11 C.F.R. § 110.20. See Norman I. Silber, *Foreign Corruption of the Political Process through Social Welfare Organizations*, 114 NW. U. L. REV. ONLINE 104 (2019).
[259] Roger Colinvaux, *Social Welfare and Political Organizations: Ending the Plague of Inconsistency*, 21 N.Y.U. J. LEGIS. & PUB. POL'Y 481 (2018) [hereinafter *Plague of Inconsistency*].
[260] 52 U.S.C. 30116(a); F.E.C. Contribution Limits for 2021-22 Federal Elections https://www.fec.gov/help-candidates-and-committees/candidate-taking-receipts/contribution-limits/#:~:text=%24100%20limit%20on%20cash%20contributions,or%20election%20to%20federal%20office. The Supreme Court has struck down some individual limitations. McCutcheon v. FEC, 572 U.S. 185 (2014) (the Court found 2 U.S.C. 441a(a)(3) (now 52 U.S.C. § 30116(a)(3)) limiting an individual's ability to aggregate contributions in a particular time period to candidates or committees unconstitutional).
[261] 52 U.S.C. § 30116(a)(2); *See also* F.E.C. Contribution Limits for 2021-22 Federal Elections https://www.fec.gov/help-candidates-and-committees/candidate-taking-receipts/contribution-limits/#:~:text=%24100%20limit%20on%20cash%20contributions,or%20election%20to%20federal%20office.
[262] 52 U.S.C. 30116(a); F.E.C. Contribution Limits for 2021-22 Federal Elections https://www.fec.gov/help-candidates-and-committees/candidate-taking-receipts/contribution-limits/#:~:text=%24100%20limit%20on%20cash%20contributions,or%20election%20to%20federal%20office.
[263] 52 U.S.C. § 30101(4).
[264] Buckley v. Valeo, 424 U.S. 1, 79 (1976).

candidate or that was not engaged in a major purpose of electing a candidate, to generally be governed by the disclosure rules of section 527 of the Code and overseen by the IRS instead of the FEC.[265] Today, many organizations engaged in political work may not be primarily engaged in political campaigns and manage to qualify instead as a social welfare organization or business league and avoid any disclosure altogether.

In addition to limitations on contributions, Congress regulates what it refers to as "expenditures." These are defined as "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office."[266] A national committee, a state committee, and subordinate committees to the state committees are limited in their coordinated expenditures on federal campaigns to an amount that is connected to the population of a particular state.[267] Since *Buckley* though, which struck down limits on individual expenditures, the Court has been much more concerned with expenditure limits infringement on speech than with contribution limits or disclosure limits.[268] Thus, the limits here are lesser. After cases like *Citizens United v. FEC*, to the extent a committee or really any person including a corporation is engaging in what is known as "independent expenditures" there are little campaign finance rules limiting such activity.[269] Thus, the only real rules here have to deal with coordinated expenditures of political committees generally.

Finally, there are the disclosure rules. As the Court recognized in *Buckley*, disclosure rules work to provide information to the public on who is supporting campaigns and how they are spending it, hinder corruption and the appearance of corruption, and help enforce the contribution limits. Some form of disclosure rules has been around since 1910 from the Publicity Act. Today, individuals, groups, corporations, labor unions are required to disclose to the FEC independent expenditures aggregating more than $250 in a year.[270] Those individuals, groups, corporations, labor unions that in the aggregate spend in excess of $10,000 on producing or airing electioneering communications must file a report with the FEC within 24 hours of the public airing of that communication.[271] Federal political committees have disclosure obligations through registration[272] and reporting. Those reports provide the information to the FEC to

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[265] For a good history of the development of 26 U.S.C. § 527 of the Code *see* Lloyd H. Mayer, *The Much Maligned 527 and Institutional Choice*, 87 B.U.L. REV. 625, 639-41 (2007).
[266] 52 U.S.C. §30101(9). The FEC publishes the amounts annually. https://www.fec.gov/help-candidates-and-committees/making-disbursements-political-party/coordinated-party-expenditures/coordinated-party-expenditure-limits/.
[267] 52 U.S.C. § 30116(d).
[268] Buckley at 21.
[269] *See* Citizens United v. FEC, 558 U.S. 310 (2010); SpeechNow.org v. FEC 599 F.3d 686 (2010). The law struck down as to independent expenditures is now found at 52 USC § 30118(a). See also Colorado Republican Federal Campaign Comm. v. Federal Election Comm'n, 518 U.S. 604, 135 L. Ed. 2d 795, 116 S. Ct. 2309 (1996) (independent expenditure limits placed on political committees unconstitutional); FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431 (2001) (constitutional for Congress to regulate coordinated political committee expenditures because the functional equivalent of contributions). The
[270] 52 U.S.C. § 30104(c); https://www.fec.gov/help-candidates-and-committees/making-independent-expenditures/reporting-independent-expenditures-form-5/
[271] 52 U.S.C. § 30104(f); https://www.fec.gov/help-candidates-and-committees/dates-and-deadlines/2020-reporting-dates/electioneering-communications-periods-main-page-2020/
[272] 52 U.S.C. § 30103.

oversee the contribution and expenditure regime. Candidates, national parties, and federal PACs must file quarterly reports identifying donors who have given $200 or more.[273]

Post *Buckley*, the Court has continued to find the disclosure regime Constitutional. In *McConnell v. FEC* and *Citizens United v. FEC* the Court upheld the electioneering communication disclosure provision.[274] The primary place where disclosure provisions have been found problematic is in as applied challenges where disclosure would result in substantial harassment to the individual donations disclosed.[275] The Court has occasionally found a disclosure provision too broad for its intended purpose such as in *McIntyre v. Ohio Elections Commission* where it struck down a law prohibiting the distribution of anonymous campaign literature.[276]

As discussed above in Part II, tax-exempt organizations often play the function of engaging in political influencing communication. Sometimes that communication is clearly regulated by the campaign finance rules such as when a section 527 political organization expressly advocates for a candidate. As noted above as well, in 2000 in response to the fact that many section 527 organizations are not regulated by the FEC, Congress passed a law requiring section 527 organizations not regulated by the FEC to file extensive disclosure with the IRS, rather than the FEC.[277] Academics in the mid-2000s wrote about the problem of the connection of tax exempt organizations engaging in political communications through section 527 organizations in ways that escaped federal campaign finance law and what to do about that problem.[278]

After the Court in *Citizens United* struck down limits on independent expenditures, money moved to other tax-exempt organizations that are at issue here: social welfare organizations and business leagues. In 2010-2012 academics again turned to the problem after Citizens United seemed to spark dark money organization explosion.[279] These organizations need not provide disclosure to the FEC or the IRS in the same way that section 527 organizations must disclose this political related activity. Many tax-exempt organization communications are not regulated and need not be reported. For instance, issue advocacy communications made by social

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[273] 52 U.S.C. § 30104(b).
[274] McConnell v. FEC, 540 U.S. 93 (2003).
[275] *See* NAACP v. Alabama, 357 U.S. 449 (1958); Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87 (1982).
[276] McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995).
[277] 26 U.S.C. § 527(j).
[278] *See, e.g.* Richard Briffault, *The 527 Problem … and the Buckley Problem*, 73 GEO. WASH. L. REV. 949 (2005); Miriam Galston, *Emerging Constitutional Paradigms and Justification for Campaign Finance Regulation: The Case of 527 Groups*, 95 GEO. L.J. 1181 (2007); Gregg D. Polsky & Guy-Uriel E. Charles, *Regulating Section 527 Organizations*, 73 GEO. WASH. L. REV. 1000 (2005); Gregg D. Polsky, *A Tax Lawyer's Perspective on Section 527 Organizations*, 28 CARDOZO L. REV. 1773 (2007); Donald Tobin, *Anonymous Speech and Section 527 of the Internal Revenue Code*, 37 GA. L. REV. 611 (2003) (arguing Congress can Constitutionally require an organization to provide the disclosures demanded in section 527);
[279] *See, e.g.*, Ellen P. Aprill, *Regulating the Political Speech of Noncharitable Exempt Organizations After Citizens United*, 10 ELECTION L.J. 363 (2011); Ellen P. Aprill, *The Section 527 Obstacle to Meaningful Section 501(c)(4) Regulation*, 13 PITT. TAX REV. 43 (2015); Roger Colinvaux, *Political Activity Limits and Tax Exemption: A Gordians Knot*, 34 VA. TAX REV. 1 (2014); Miriam Galston, *When Statutory Regimes Collide: Will Citizens United and Wisconsin Right to Life Make Federal Tax Regulation of Campaign Activity Unconstitutional?* 13 U. PA. J. CONST. L. 867 (2011).

welfare organizations and business leagues will typically not be regulated by the campaign finance system, but directly impact our politics.

Different metaphors have been used over time to describe the challenges of building a complete campaign finance system. Professor Donald Tobin described the challenge as leaky plumbing: "campaign finance laws can be seen as the regulatory plumbing that helps direct the flow of money in a way that promotes democratic ideals."[280] It is an apt metaphor to think about the context of donor disclosure as a part of leaky plumbing. If individuals or organizations have the potential to run their donations outside the regulatory pipes that capture and disclose contributions and expenditures, then the regulatory pipes are leaky and ineffective. They do not accomplish their democratic aims and they fail to prohibit the corruption they are intended to stop.

Using the other common metaphor for campaign finance, the idea of lightness and darkness, many refer to the campaign dollars spent in social welfare organizations and business leagues as "dark money," because those who support those efforts are able to keep their anonymity.[281] Open Secrets at the Center for Responsive Politics estimated in October 2020 that such dark money groups spent more than $750 million in the 2020 campaign.[282] Thus, significant money moves through the tax exempt sector. Requiring disclosure to the IRS could provide something of a backstop to the campaign finance laws. Without them, donors that have an interest in avoiding the campaign finance regime and avoid disclosure have an easy path through.

C. State Nonprofit Law and Consumer Protection

State authorities oversee nonprofit corporations in a few different capacities.[283] Those systems are highly varied and thus this part is provided only at a high level of generality.[284] Some states maintain a tax-exempt system that may exempt a nonprofit from property taxes and/or income taxes.[285] Many states have a state income tax that mirrors the federal income tax system. To the extent a state system employs some form of income tax exemption, the same issues discussed in Part II apply to states. The state would have the same need for this donor information as discussed with regard to the IRS. States also employ campaign finance regulatory systems that are similar to the federal system discussed above. Again, to the extent a state maintains such a system, it has the same need and interest in the donor information. Additionally, states oversee state nonprofit law.[286] Typically, a state attorney general enforces state nonprofit

[280] Donald Tobin, *Campaign Disclosure and Tax-Exempt Entities: A Quick Repair to the Regulatory Plumbing*, 10 ELECTION L.J. 427 (2011).
[281] *See* Ciara Torres-Spelliscy, *Dark Money in the 2020 Election*, BRENNAN CENTER FOR JUSTICE, (Nov. 20, 2020) https://www.brennancenter.org/our-work/analysis-opinion/dark-money-2020-election.
[282] Anna Massagolia, *'Dark money' groups find new ways to hide donors in 2020 election*, OPENSECRETS.ORG (Oct. 30, 2020) https://www.opensecrets.org/news/2020/10/dark-money-2020-new-ways-to-hide-donors/.
[283] Though there may be some non-charitable tax-exempt organizations formed as trusts, I focus here on nonprofit corporations because most of the non-charitable organizations are corporations.
[284] *See* MARILYN E. PHELAN, NONPROFIT ENTERPRISES: LAW & TAXATION, § 1.1 (2nd Ed. 2020) [hereinafter NONPROFIT ENTERPRISES] (discussing some of the variations in state nonprofit law).
[285] Lloyd Hitoshi Mayer, *Fragmented Oversight of Nonprofits in the United States: Does it Work? Can it Work?* 91 CHI. KENT L. REV. 937, 939 (2016) [hereinafter *Fragmented Oversight]*.
[286] *Fragmented Oversight*, *supra* note __ at 938.

law by ensuring directors manage nonprofit corporation assets properly and do not violate their fiduciary duties.[287] Finally, state attorneys general oversee various types of consumer deceptive trade practices with a particular focus on charitable solicitation.[288] Because the tax systems and campaign finance system issues should be quite similar, this section will focus on nonprofit laws protecting charitable assets and imposing fiduciary duties, and consumer deceptive practices.

A key piece of nonprofit law is that there are no owners of a nonprofit organization.[289] Professor Henry Hansmann referred to this as the non-distribution constraint.[290] This does not mean that a nonprofit organization is prohibited from making a profit, only that it is forbidden from distributing that profit.[291] Nonprofit corporations are instead managed by directors and officers to pursue a particular mission of that organization. For this reason, it is not easy for any interest other than the attorney general to gain standing to bring actions against the misuse of these organizations.[292] Some states allow member derivative actions, but that is not the case in most states. Thus, there are no insiders who can ensure that assets dedicated to some purpose are used appropriately. This makes nonprofit oversight a challenge.

That said, nonprofits are typically divided into two types: mutual benefit and public benefit.[293] Charitable organizations are often thought to work for the public benefit because they typically have no particular members to oversee that the organization purpose is carried out. Mutual benefits on the other hand typically have members who have a vested interest in the activity of the organization. For the most part, business leagues fit into the latter category. A business league is often a membership organization that tries to further its member's interest. The American Plywood Association, for instance, has the support of plywood businesses and will try to generally further the plywood industry. Regulators have tended to be much less worried about mutual benefit than public benefit organizations for the obvious reason that mutual benefit organizations are likely to have more individuals who care to ensure the organization is operated properly through their ability to vote on the operation of the organization. The difficulty is social welfare organizations are often not mutual benefit organizations.[294] Though business leagues typically do not fall into the mutual benefit category, and it may seem odd to think of them in a public benefit sense, there is nothing that stops them from forming a more public benefit like operation.

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[287] Evelyn Brody, *The Legal Framework for Nonprofit Organizations*, in THE NONPROFIT SECTOR: A RESEARCH HANDBOOK 243, 249 (Walter W. Powell & Richard Steinberg eds., 2006); NONPROFIT ENTERPRISES, supra note __ at § 1.1 (2nd Ed. 2020).
[288] *See Fragmented Oversight*, *supra* note __ at 939.
[289] NONPROFIT ENTERPRISES at § 1.1.
[290] Henry Hansmann, *The Rationale for Exempting Nonprofit Organizations from Corporate Income Taxation*, 91 Yale L.J. 54, 56 (1981) [hereinafter *The Rationale*].
[291] NONPROFIT ENTERPRISES at § 1.1.
[292] NONPROFIT ENTERPRISES at § 4.15.
[293] John Simon, Harvey Dale, and Laura Chisolm, *The Federal Tax Treatment of Charitable Organizations* in THE NONPROFIT SECTOR: A RESEARCH HANDBOOK 267, 268 (Walter W. Powell & Richard Steinberg eds., 2006); *see also* Boris I. Bittker & George K. Rahdert, *The Exemption of Nonprofit Organizations from Federal Income Taxation*, 85 YALE L.J. 299, 301 (1976)
[294] *Political Justice*, *supra* note __ at 314.

State nonprofit corporation acts typically provide for two main fiduciary duties of officers and directors: a duty of care and a duty of loyalty.[295] The duty of care requires the officers and directors to take the kind of care they would take with their own important matters.[296] Before deciding, the officer or director must inform himself or herself about the options and the consequences associated with a particular decision. The duty of loyalty requires the director to ensure that it operates the nonprofit in the interest of the nonprofit and not of themselves.[297] This is often described as a prohibition on self-dealing. The director or officer cannot take advantage of the nonprofit for themselves. Finally, charitable solicitation laws prevent the fraudulent raising of funds for nonprofits.

What are the circumstances where a state attorney general then might need the use of substantial donor names and addresses? The general suspects for misuse of the organizations' assets are, of course, officers and directors because they have control over the organization. Those individuals are public facing. The other usual suspect is a substantial contributor to the organization. These are individuals who might in effect be the equivalent of shareholders of the corporation. The corporation may be directed in effect to provide prohibited profits to substantial donors. A nonprofit regulator can easily see officers and directors because these are the public facing individuals of a nonprofit organization. Substantial donors, however, are not public facing. Thus, finding them can be exceedingly hard. A nonprofit delivering substantial contracts to a particular business unrelated to the officers or directors may seem perfectly normal without the knowledge that a substantial donor owns that business. It is not much different than corruption in a government entity. Access to the Schedule B can aid the attorney general in their enforcement job. It can help them detect fraud in a nonprofit. It helps them to know the individuals who are most likely to misuse the assets of the nonprofit.

There is no end to a misuse of nonprofit organizations. At the beginning of the Article, I highlighted the Ohio bribery scheme run out of a social welfare organization by Larry Householder that is currently subject to a criminal complaint. Recently, there has been significant allegations against the NRA.[298] In addition to delivering its assets to its officers and directors, there are indications that the NRA may have taken in foreign donations and while we do not have direct evidence yet, it is possible the organization has been operated for substantial donors. No regulator could know the extent of malfeasance without that crucial information. One group recently took advantage of the Wounded Warrior Project name to raise funds as the Wounded Warrior Fund or Foundation.[299] They formed as a social welfare organization that they initially tried to register with the IRS. Because their efforts were not that good, the IRS had revoked their status, but there is no reason to think others have not thought of this possibility to scamming people out of their money.

[295] Marion R. Fremont-Smith, Governing Nonprofit Organizations: Federal and State Law and Regulation 187 (4th ed. 2004) (referring to the duty of care as duty of prudence).
[296] *Id.* at 188-89.
[297] *Id.* at 195.
[298] Will Van Sant, *New York Attorney General Sues to Dissolve the NRA*, THE TRACE (Aug. 6, 2020).
[299] Charity Watch, Don't be Fooled by Name Rip-Off Charity Scams (June 15, 2018) https://www.charitywatch.org/charity-donating-articles/donat-be-fooled-by-name-rip-off-charity-scams.

Though the evidence may be that state attorneys general do not explicitly use donor information often,[300] the information is useful for enforcement purposes and likely acts as a deterrent. As Evelyn Brody noted years ago, "To a large degree, legislatures are coming to view sunshine as the best disinfectant, and Congress and the states are increasing nonprofit or tax-exempt disclosure requirements to allow a better-informed public to provide oversight—although private parties cannot generally enforce nonprofit laws in court."[301]

As we must with the federal level, we ought to consider the enforcement environment at the state level too. If IRS enforcement is lacking, state level enforcement, with the exception of a few states, is in some states almost non-existent.[302] States rarely provide the funds necessary to enforce these laws.[303] Even when they do, the attorney general is such a political position that they often have limited interest in enforcing these laws.[304] It's hard to consider that without considering the odd nature of the IRS decision to eliminate one of its important tools in understanding the people who have a strong interest in misusing these nonprofits who have few public protectors of their interest.

As discussed above in Part III, Congress both makes most of the Form 990 information publicly available in part to ensure public accountability with mission and with general federal, state, and local laws,[305] but also provides states with access to information for state enforcement purposes.[306] As I do research to write this article, it is hard to find an article that does not hone in on this need for accountability, lack of enforcement, and need for the IRS and states to work together in regulating the nonprofit sector. It makes the IRS move in this instance suggesting it acts alone and has no other constituency other than ensuring the tax laws are enforced an odd, out of place, pronouncement.

V. ANALYSIS

The question of this article is whether the IRS should return to requiring social welfare organizations and business leagues to annually disclose the names and addresses of their substantial contributors privately to the IRS on their annual Form 990. The IRS apparently long struggled to ensure that personal information such as social security numbers placed on the Schedule B not be disclosed. It is hard to believe though that this was an insurmountable problem. The IRS may have calculated that ending the collection of this information will mean that a claim that the IRS targeted individuals and groups as in the Tea Party affair could be

[300] *See* Ams. for Prosperity Found. v. Becerra, 903 F.3d 1000, 1010 (2018) (discussing the District Court finding that the California Attorney General did not often use California's Schedule B information) (cert. granted 208 L. Ed. 2d 509 (2021)).
[301] *Legal Framework*, *supra* note __ at 249.
[302] Evelyn Brody, *The Legal Framework for Nonprofit Organizations*, in THE NONPROFIT SECTOR: A RESEARCH HANDBOOK 243, 249-53 (Walter W. Powell & Richard Steinberg eds., 2006) [hereinafter *Legal Framework*].
[303] *See* Garry W. Jenkins, *Incorporation Choice, Uniformity, and the Reform of Nonprofit State Law*, 41 GA. L. REV. 1113, 1124-26 (2007).
[304] *Legal Framework supra* note __ at 249.
[305] *See* STUDY OF DISCLOSURE PROVISIONS, *supra* note __ at 89; Peter Swords, *The Form 990 as an Accountability Tool for 501(c)(3) Nonprofits*, 51 TAX LAWYER 571, 577 (1998) (noting the importance of the Form 990 to both IRS and State attorneys' generals' offices).
[306] 26 U.S.C. § 6104.

lessened if it does not regularly collect donor information.[307] This might be a rational choice from the perspective of the IRS in trying to protect its employees and the institution from claims of political bias and the massive consequent harm therefrom. But the long-term harms to tax collection, the rule of law, and to democracy from no longer collecting this vital information likely outweigh these interests.

This Analysis first returns to the question of whether disclosure of donor names and addresses to the IRS is an important part of the tax law associated with social welfare organizations and business leagues. It also considers whether disclosure matters as to the enforcement of individual income tax matters. This review considers both whether the information is needed to enforce the law, and whether it serves as a deterrent. Secondly, this Part V will look at whether in shaping tax law, the IRS should consider the value the collection of this information provides in serving ancillary legal purposes such as campaign finance and state nonprofit law. Finally, this part evaluates the interests in the rule of law and the interests in democracy including the interest of freedom of speech and association.

As demonstrated above in Part II, both social welfare organizations and business leagues are supposed to carry out collective activity and not operate for private interests.[308] The most prominent tax law way in which this notion is expressed is that social welfare organizations and business leagues are prohibited from (1) allowing earnings to inure to the benefit of private shareholders, and (2) from providing too much private benefit to individuals rather than primarily furthering an exempt purpose.[309] Additionally, with respect to social welfare organizations, they are prohibited from providing "excess benefits" to disqualified persons.[310] As a practical matter, to enforce the basic tax law, that means the IRS must be able to generate a record about organizational activity that shows the IRS where money is coming from and where that money is going. Substantial donors are a significant source of from where an organization is obtaining its money. Congress and the IRS have long recognized that substantial contributors are the most likely persons who may be in the nature of private shareholders for purposes of inurement and private benefit.[311] They are a likely candidate for whom an entity is going to operate for instead of the collective. Congress itself saw substantial contributors as individuals who may use nonprofit social welfare organizations for improper excess benefit transactions.[312]

It is hard to know how the IRS will enforce these laws fundamental to tax-exempt organizations without knowing the substantial contributors. Admittedly, Congress does not apply section 4958 to business leagues suggesting that the case for maintaining donor information for tax reasons is modestly weaker for these organizations. Nevertheless, the same principles hold in analyzing private benefit and inurement, and it seems logical that in order to enforce these basic requirements, the IRS needs to know who the substantial donors are. To eliminate this requirement is for the IRS to fly blind as it tries to enforce the law. The IRS solution to require organizations to maintain this information and provide it if asked seems a pale substitute and

[307] Philip T. Hackney, *Should the IRS Never 'Target' Taxpayers*, 49 VAL. U. L. REV. 453 (2015).
[308] *See* Part II.
[309] *See* Part II(A) & (B).
[310] *See* Part II(A).
[311] *See* 26 U.S.C. § 4958(c)(3)(B)(i) and the regulations thereunder defining "substantial contributor."
[312] *Id*.

unlikely to provide the IRS the ability to actually enforce the tax law regarding these organizations.

Many have argued, including the IRS, that donor names and addresses should not be collected because the IRS does not use the information in an *important* way for purposes of selecting organizations for audit presumably. It is entirely possible that the IRS does not use the donor names a whole lot for purposes of audit. This should not be all that surprising. As discussed in Part III(C), there is a very low rate of audit across the IRS and particularly in the nonprofit sector. The IRS is severely lacking in the resources it needs to enforce the tax law. Nevertheless, the argument that the information is not used often is not entitled to much weight. It is foolish to end collection of information that is necessary to tax enforcement because at this moment in time the tax collector happens to not be able to use that information.

The collection of this information also likely has some deterrent effect as discussed in Part III. This makes the IRS claim that this is information is needed but can be obtained upon an audit for enforcement purposes much less satisfying of a claim. As the Treasury Department notes itself, tax noncompliance is at its worst when there is no third-party reporting.[313] Though the Form 990 serves as an information return, as discussed in Part III, it also has an information reporting aspect to it as well. Any organizational return in effect must also act as an information reporting return because they necessarily relate to the individuals associated with the organization. Given the almost negligible IRS audit rates of nonprofits it seems incumbent upon the IRS to depend upon simple means of obtaining compliance. Requiring information reporting is a smart way of dealing with these challenges.

Professor Lederman's work suggests that information reporting from a nonprofit organization in this context might not be ideal for a few reasons. First, nonprofits are generally tax indifferent parties and may have reason to collude with the party being reported about.

It is acknowledged that sometimes, information requested might be particularly burdensome. Where the information is burdensome and relatively unimportant there can be a good case for the IRS to forgo such information. But no one has ever suggested that having to provide donor names and addresses adds to taxpayer burdens in any substantial way. The main organization complaint is that some donors might not want to donate if they believe they might be subject to harassment. Though this is a valid concern, and I discuss it a bit more below, there is very little likelihood of that happening in the disclosure to the IRS because the donor data is not publicly released. Furthermore, the IRS has a reasonably strong track record of maintaining the secrecy of that information.[314]

This information is not just useful for enforcing the law regarding tax exempt status. It is also useful for enforcing both the individual income tax and the gift and potentially estate tax. The IRS can use the donor data to help build a case that a taxpayer is in a position to utilize the organization in a way to benefit themselves. Admittedly, this is a more tenuous connection. It is a more tenuous connection because the IRS would need to derive from the fact that a particular individual is a substantial contributor for income tax purposes that the IRS might want to see if the individual is deriving some benefits from the organization that they are not reporting. In other words, a taxpayer who is improperly avoiding income tax by utilizing a tax-exempt organization in effect as a tax shelter. Though the IRS might be able to figure this information out without donor information, it makes the IRS's effort much simpler if that information is immediately available on the form. This would apply as well to the enforcement of ensuring that money spent

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313 COMPREHENSIVE STRATEGY *supra* note __.

314 There are instances where the IRS has allowed that information to leak, but those appear to be relatively rare.

on political activity and lobbying is not allowed. Donor names and addresses would help the IRS solve such problems much quicker. Additionally, the information reporting role of the form serving as a deterrent is probably a more satisfying rationale in this realm. If the donor knows that the IRS has this information, they may be less likely to abuse the nonprofit in these types of ways. Finally, knowing the donors to these organizations could help in the enforcement of gift and estate tax rules. Though the gift tax does not apply to a gift to either a social welfare organization or a business league anymore, knowing who the donor is allows the IRS to make assessments as to whether these organizations qualify for those statuses in the first place.

The IRS argues it can just collect the information on audit when it needs it and protect donor privacy better thereby.[315] This argument is worth a little more analysis. First, anytime the IRS must collect information on audit the process becomes much more difficult, particularly from someone who wants to hide that information in the first place. The IRS can request an organization voluntarily turn over information.[316] It will require much more significant effort on the part of the IRS which must use the Department of Justice to issue summons to collect that information. Allowing them to just provide the information on audit is a poor substitute. Secondly, it is interesting that they think the information needs to be maintained for purposes of audit. If the information is not necessary for enforcement purposes, why would it also to be kept for audit purposes. The IRS in effect realizes the importance from a legal perspective in donor information to enforce the tax law. Third, by the position the IRS has taken in the preamble to this regulation, they risk having a tougher time now actually collecting that information on audit because the agency has stated that the information is just not that important. They will thus compound insult on top of injury.

As discussed in Part III(A), the IRS argues in its adoption of the new rule that it has means of overseeing private benefit issues without this particular donor information. They are presumably referring to the Schedule L of the Form 990, which forces nonprofits, depending on type, to disclose certain transactions with interested persons, such as substantial donors.[317] A key piece of information an agent needs to be able to spot a private benefit issue in a substantial donor case is that a particular individual has made a substantial donation to the nonprofit. Though Schedule L may, or should, collect a good bit of the instances in which the IRS might need to enforce the law in the case of violating the rules against private benefit, it does not capture the field. Controlling individuals can direct the use of a nonprofit in their direction without the nonprofit actually carrying out business with the individuals themselves. The Schedule L is not a perfect substitute for knowing all of the substantial donors, rather than just those the organization directly engages in a transaction with that is subject to the disclosure limits of Schedule L.

The primary substantive argument for why disclosure should not be required is that it will chill free association and speech. Though this is not public disclosure, we must accept that this is a possible result of that collection even when only collected for government purposes. Ideally, we would minimize hindrance to formation of associations to express political ideas. Freedom of speech and association are a key piece of a democratic order. However, there are other issues of

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315 *See* Donor Regulations *supra* note __.

316 I.R.S., INTERNAL REVENUE MANUAL 5.17.6.1.1 (Aug. 1, 2019).

317 I.R.S., SCHEDULE L (FORM 990 OR 990-EZ), TRANSACTIONS WITH INTERESTED PERSONS, https://www.irs.gov/forms-pubs/about-schedule-l-form-990.

democracy involved. Those include (1) an interest in full information to society, including information about the potential biases of information we are receiving; (2) an interest in laws being publicly perceived to be enforced equally; and (3) an interest in not providing certain organizations or individuals benefits in their political activities that others are not provided. When these additional considerations are brought into view, it seems that they likely outweigh the value of any modest harm providing the donor information to the IRS might have on a small group of donors to causes. The IRS collects all sundry types of information in enforcing the tax laws in very intrusive ways. As noted in Part III(C) one of the primary tools the IRS has in reducing the tax gap is information reporting. However, here, on a matter that resoundingly is to the benefit of wealthy individuals, the IRS is willing to give up information that it itself admits is important. That choice itself, to protect the privacy of wealthy interests, may be perceived as biased and therefore democratically suspect.

There is one other democratic concern, however, that should not be just waved aside. The IRS ends up in the cross hairs of trying to enforce a law regarding the operation of political activity of our citizens. In a democratic sense it is critical that the IRS be seen to publicly enforce the law equally among all citizens. If that notion is corrupted, there is a genuine harm to our democratic effort. Whether legitimate or not, the Tea Party affair caused real harm to the reputation of the IRS in a democratic sense.[318] Placing the IRS in the position of regulating political activity at all thus causes harm. However, the collection of data alone regarding donor names and addresses does not so implicate the IRS in this space that we should think the benefits of proper tax administration are outweighed. As noted, numerous times above, there is a real public interest in the operations of nonprofit organizations. Congress has taken the position that public disclosure of information regarding these institutions is important enough to require broad public disclosure of their activities. It would be a bizarre choice to decide that one of the most likely abusers of these important public entities can easily hide behind anonymous contributions as they use the nonprofit for their own ends.

What value should we place on the IRS collecting donor information to help enforce laws ancillary to the tax laws such as campaign finance and state nonprofit law? While they should not be a dominant motive, the IRS ought to give the value associated with aiding those regimes some weight as it considers whether to maintain the requirement. The IRS takes the strong position in the regulations eliminating the collection of donor information that the IRS job is to administer the Code, and that it should give little regard to campaign finance or state nonprofit law.[319] Thus, it is neither responsible for the collection of information helpful to the FEC nor to states.

Obviously, the President oversees all of our federal laws and can ensure that our bureaucracy works in tandem. It seems odd for an agency to take a position that it has no responsibility to consider cooperating in these ways. Additionally, as Part IV(A) has shown, it is well within the norm for Congress to allow and often encourage agencies to cooperate. Congress has specifically included the IRS as a partner in enforcing campaign finance limitations.[320] It did this specifically in enacting the donor disclosure regime for section 527 organizations that do not

[318] Leandra Lederman, *IRS Reform: Politics as Usual?* 7 COLUM. J. OF TAX L. 36 (2016).
[319] *See* Donor Regulations *supra* note __ at 31965.
[320] *See* Part IV(B).

need file with the FEC. This begins to develop a legislative record that Congress does consider campaign finance part of the IRS's mission, and that the IRS ought to consider its role more deeply as it evaluates the enforcement choices it makes. Though the IRS obviously should prioritize its mission of collecting revenue, it was incorrect for the IRS to summarily reject any Federal campaign finance interest outside of the collection of revenue.

It is worth making one further point on campaign finance. Though it is a common theme that the Code is not established to punish illegality, an organization cannot qualify as a tax-exempt organization where it engages in illegal activity to accomplish its purpose.[321] An organization that accepts illegal campaign related contributions from foreigners, or others who are prohibited, therefore might be in violation of the requirements of either being a social welfare organization or business league. Thus, the requirement to disclose donors does not even need to be seen as a means to enforce campaign finance, but simply as a means of enforcing the tax laws.

What about state nonprofit law? The IRS has long worked with different agencies and it also works directly with states in enforcing charitable law.[322] Congress established a tax return for charities the Form 990 that it makes public in part at least to aid in the overall oversight of nonprofits, which includes state actors. State charity regulators have long relied upon this relationship.[323] This sudden spurning of state interest in IRS choices in the regulation of nonprofits is a problematic trajectory when we look at the likelihood of anemic enforcement in this area. Like discussed in the opening of this article we can expect more Clarks talking to Larry Householders engaged in bribery schemes saying: "they can give as much or more to the (c)(4) and nobody would ever know. So, you don't have to be afraid of anyone because there's a mechanism to change it."[324] Given the stakes, and the long relationship, established both by Congress and the President through the IRS and Treasury Department, it seemed strange to give so little value to considering the possibility of whether IRS information collection should be maintained for ancillary law purposes. With research showing that it is possible to build a more efficient regulatory regime when state and federal groups cooperate, and the real need for efficient use of resources in overseeing the charitable sector, the IRS should in the future more strongly consider state interests here. If they did, I think they would find the case for maintaining the donor information much stronger.

VI. CONCLUSION

Amid extraordinary political pressure, the IRS and Treasury chose to end a long-time practice of requiring many tax-exempt organizations to disclose donor names and addresses. Though that may have ended a challenging problem for the IRS, that of inadvertently disclosing taxpayer information, this assessment suggests it will cause more harm in the long run.

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[321] *See* Part II(A) & (B).
[322] *See, e.g.*, IRS, FTC AND STATE REGULATORS URGE CARE WHEN SEEKING HELP FROM CREDIT COUNSELING ORGANIZATIONS, IR-2003-120, Oct. 14, 2003 (IRS, the FTC and state authorities worked to protect the public from credit counseling organizations that were taking advantage of desperate debtors).
[323] URBAN INSTITUTE CENTER ON NONPROFITS AND PHILANTHROPY, STATE REGULATION AND ENFORCEMENT IN THE CHARITABLE SECTOR 26 (2016).
[324] Criminal Complaint, U.S. v. Matthew Borges, Case No. 1:20-MJ-00526, 15, par. 45 (July 16, 2020).

It seems there are a couple of sleights of hand going on here. The first is a communal belief that somehow this donor disclosure is simply about enforcing campaign finance. Once that premise is accepted, we think of the collection of this information as a potential affront to earnest donors who might want to speak and are hindered from that action by a dangerous government tax collector. The second is a sense of the term "disclosure" as a public "disclosure" rather than the highly limited disclosure to tax authorities and those that have a reason for access to that information. This makes the matter a charged issue of government overreach, rather than a question of good collective enforcement of our tax laws and other ancillary laws that lead to a better designed community.

The reality is that the disclosure has import to tax collection and tax exemption. It is ironic that in the enforcement environment that we face, where the chance of IRS audit is slim to none, that we would collectively choose to eliminate information about payments from wealthy individuals to groups that engage in providing collective goods and services and engage in influencing our political world. It is ironic too, that we are willing to require intrusive information reporting of all sorts of transfers of value from salaries, contractual payments, to international transfers, but we are simultaneously unwilling to request disclosure that relates to the wealthy and their related tax-exempt organizations. It fails as a matter of political justice by privileging the wealthy, shielding them in their transfers from government oversight. It also fails as a matter of political justice by visibly appearing to not apply the law to wealthy individuals seeking to influence our collective decisions.

We are not talking about the matter of public disclosure of substantial donor data. This is only about providing important information to the IRS to properly carry out their charge to enforce the tax law. The information at once helps the IRS enforce the boundaries on legitimate tax-exempt activity and helps detect abuse of the individual income tax system. It also provides a useful backstop to enforce the gift and tax laws as well. This donor information is efficiently collected at the IRS and helps oversee both campaign finance regimes and state nonprofit law. Those concerns should have been given more weight in the choice to end its collection. Finally, while as a democratic matter, there may be some modest benefit from alleviating donors from the worry that the government will know about certain donations they have made towards free speech activity, the harm to those who are not able to make use of these structures, the harm to those who are deprived of information regarding the biases associated with particular political activity, and the harm to the belief that the law will be enforced equally upon all, is much more weighty. With these considerations in mind, the IRS and Treasury ought to rescind its most recent guidance on this matter. If not, Congress ought to require this substantial donor information be disclosed by law.