The Legal and Political Landscape of Donor Privacy

The Peachtree-Pine homeless shelter in Atlanta, Georgia, would not seem at first glance to be a controversial cause. Located in the city’s business district and housing an average of between 500 and 700 men, women, and children each night, the charity provides a wide range of services to those in need, including finding more permanent shelter for homeless individuals and families.

But city officials have long targeted the shelter for closure and sought to claim the land it sits on via eminent domain in order to build a combined fire and police station on the site. In 2014, with the shelter behind on its water bill by nearly $580,000, several anonymous donors stepped forward to pay off its debt. The shelter’s director explained to local media the reason the donors wished to remain anonymous: “Anytime a donor appears and is public with us, that donor gets attacked.”

The desire of Peachtree-Pine’s benefactors to remain anonymous is illustrative not only of the longstanding freedom for philanthropists to choose whether or not to keep their giving private, but also of the need today to preserve and even expand vital protections for anonymous charitable giving.

The freedom to keep philanthropic contributions anonymous isn’t just about the religious, cultural, and practical reasons that motivate many donors’ desire to keep their giving private. The rights to associate privately and contribute to organizations anonymously are also intrinsic to effective exercise of the First Amendment. With this in mind, the U.S. Supreme Court has long recognized that compelled disclosure of the identities of people who give to charity as well as many other organizations and causes is unconstitutional.

In 1956, the attorney general of Alabama targeted the National Association for the Advancement of Colored People because, among other complaints, it had “given financial support and furnished legal assistance to Negro students seeking admission to the state university, and had supported a Negro boycott of the bus lines in Montgomery to compel the seating of passengers without regard to race.” He demanded that the charity turn over a roster of its members, which the NAACP argued was an attempt to scare away supporters, violating their freedom of speech and association. In the 1958 case NAACP v. Alabama, the U.S. Supreme Court unanimously rejected this demand, ruling that state action to identify members could leave them vulnerable to “economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility.” Anonymity “may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissenting beliefs.” The fundamental American right to promote contrary ideas in association with others would be violated by “state scrutiny of... membership lists.”

Several years later in Buckley v. Valeo (1976) the court carved out an exception to the principles upheld in NAACP, ruling that forced disclosure of donors giving in connection with campaigns for public office is constitutional. Even this exception only went so far, however, with the court ruling a few years later in Brown v. Socialist Workers ’74 Campaign Committee that candidates and political parties with little likelihood of electoral success and a high probability that their members and donors would face retribution could not be compelled to reveal their donors.” The Constitution protects against the compelled disclosure of political associations and beliefs,” said the court’s majority led by Thurgood Marshall in that 1982 decision.

Later court decisions reinforced this principle, striking down laws requiring advocates to publicly register before going door-to-door (Watchtower Society v. Village of Stratton, 2002), or banning anonymous political pamphlets (McIntyre v. Ohio Elections Commission, 1995), repeatedly rebuffing authorities demanding the names of inconvenient activists. “Anonymity is a shield from the tyranny of the majority,” warned the Supreme Court in McIntyre. It protects “individuals from retaliation, and their ideas from suppression…. The interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure.”

Despite all of this history, some continue to press for mandatory disclosure of donors to 501c3 charities that are not engaged in election-related speech. Once again today, the freedom of philanthropists to decide whether they will remain anonymous in their giving is under assault.

One line of attack is to mandate wide sharing of Schedule B of the 990 tax form that nonprofits have to file with the IRS. This document lists the name, address, and amount given by each major donor to a charity. The IRS considers that confidential tax information, and has stiff penalties for unauthorized release. Though there have occasionally been damaging illegal disclosures of sensitive donor information from the IRS (such as the leaking of National Organization for Marriage donors in 2012), these have been rare.

In 2006, New York attorney general Eric Schneiderman began demanding that charities registered in his state annually submit the names, addresses, and total contributions of their major donors as listed on Schedule B. Charities that continued the established practice of dropping or redacting Schedule B when making their state filings began to be issued citations.

Similarly, in 2010 Kamala Harris (then California’s attorney general and now a U.S. senator) required the same information from all charities that solicit in her state.
No new law or regulation was passed to support this mandate. Harris’s office simply insisted on the donor disclosure as a way to help “protect the public against fraud.” Unlike with the IRS, there is no protection in California or New York law against the release of this information.

Several lawsuits have been filed challenging these actions. In 2014, Citizens United brought suit against the New York attorney general’s office on the grounds that mandatory donor disclosure abridges free speech and association and conflicts with federal law ensuring the confidentiality of donor information. The challenge lost at the district court level, and is currently being appealed.

A 2014 lawsuit challenging the California attorney general’s demands, filed by the Center for Competitive Politics, argued that mandatory donor disclosure violates the First Amendment. Several additional 501c3 nonprofit organizations, including The Philanthropy Roundtable, filed amicus briefs in support of CCP’s petition. Though the case lost at the district and appeals courts, and the U.S. Supreme Court declined to hear an appeal, the U.S. Court of Appeals for the Ninth Circuit did allow that a challenge might succeed if a plaintiff could demonstrate concrete harm as a result of the policy.

A subsequent challenge by the Americans for Prosperity Foundation, another 501c3 charity, took just that tack. And in February 2015 U.S. District Court Judge Manuel Real granted a temporary injunction, noting that AFPF had presented clear evidence of donor harassment. The case eventually went to a full bench trial that revealed a much fuller picture of the state attorney general’s cavalier approach to donor privacy. Despite promises that contributor information would remain confidential, lists of donors to more than 1,700 organizations ended up posted on the attorney general’s website. Equally damaging was testimony from the attorney general’s chief auditor that the donor names the office forced charities to hand over had never triggered a single fraud investigation in more than ten years, and that in hundreds of investigations for fraud his team had only consulted a donor list five times, proving such names have little use for their proclaimed purpose.

In April 2016 Judge Real ruled AFPF could not be forced to submit its Schedule B to the attorney general. He granted a permanent injunction against the state collecting the donor data, noting scores of “threats, protests, boycotts, reprisals, and harassment” directed at the complainant. The judge dismissed the idea that the state would maintain the confidentiality of donor identities, citing the large number of improper leaks that had already taken place, stating “once…donor information is disclosed it cannot be clawed back.”

California’s new attorney general is appealing this decision, so this remains unsettled. More crucially, Judge Real’s ruling applies only to AFPF (the Thomas More Law Center, another 501c3 charity, won a similar ruling from Judge Real in December 2016). So California’s donor-list demand, as well as New York’s, still hangs over other nonprofits that can’t prove in advance that their donors would face retribution, or that are just too poor to finance defensive lawsuits of their own.

Federal lawmakers have also targeted the 990 Schedule B for disclosure. In November 2014 Senator Jon Tester of Montana filed legislation that would require the IRS to make available upon request and put online the 990 Schedule B of any organization that “has or plans to spend money attempting to influence the selection, nomination, election, or appointment of any person to a public office.”

On its face, this would seem to exempt charities organized as 501c3 entities, which are not allowed to intervene in campaigns for public office. Unfortunately, the way campaign finance laws are written they often encompass speech by charities related to issues, not candidates or elections. This is exactly what happened to the Independence Institute, a Colorado-based think tank organized under section 501c3 of the federal tax code and thus prohibited from intervening in elections. In 2014 it wanted to pay for radio advertisements encouraging Coloradans to contact their two U.S. senators and urge them to support criminal-justice reforms, something well within the scope of proper activity for a charity.

But because one of the state’s two senators was running for re-election at the time, the Independence Institute would have been forced to reveal its major donors if it had run the ads within 60 days of the election. It decided not to run the ads and sued to challenge the application of campaign finance law to organizations that cannot legally engage in election campaigns. (The Philanthropy Roundtable filed an amicus brief urging the court to protect donor privacy and free speech in this case as well.) But in February 2017, the U.S. Supreme Court upheld a lower-court ruling enforcing the disclosure requirement.

Meanwhile, politicians, activists, and bureaucrats in other places are trying to force disclosure of the identities of donors to a broad range of organization types, including 501c3 groups, through legislation, ballot measures, or administrative rules. A recently passed state referendum in South Dakota could have forced charities to reveal their donors for such acts as hosting a forum on agricultural issues where elected officials are invited speakers, or notifying supporters that an elected official has introduced legislation.
relevant to their interests. A state judge enjoined the law as unconstitutional shortly after it was passed, however, and in February South Dakota’s governor signed legislation repealing the law.

Other states have also considered efforts to strip away donor privacy for charitable organizations this year. Far-reaching legislation in New Mexico could, for example, require a church to report its donors if its pastor references an elected official in a sermon, even just to ask congregants to pray for the official as he or she carries out official duties, or impose disclosure on a social services charity that acknowledges a public official’s aid in securing state funding in a newsletter that is distributed to clients, vendors, donors, and others. A bill filed in South Carolina at the beginning of the year could likewise force charities to disclose their donors publicly if they were to urge the state’s residents to contact their state legislators on any issue.

Protecting individual American citizens against the dangers of forced disclosure of their charitable giving should be a non-partisan and non-ideological issue—the movement to curtail this vital component of philanthropic freedom has certainly drawn support from both sides of the political divide! For example, it was Republican U.S. Senator John McCain who teamed up with Democrat Russ Feingold to pass the law that muzzled the Independence Institute’s ads calling for criminal-justice reform, and the legislation described earlier in New Mexico and South Carolina have Republican sponsors.

But today’s demands for eviscerating donor privacy come largely from progressives hell-bent to strangle the flow of private money into political campaigns and willing to accept or even hoping for harassment and retribution directed at philanthropists who fund causes they oppose, with diminished charitable giving as collateral damage.

For some, reducing the amount of money flowing into charitable groups that are involved in public policy isn’t an accidental byproduct of disclosure, but a goal to be sought in and of itself. David Callahan, the progressive founder and editor of Inside Philanthropy, is a leading critic of donor privacy for charitable giving and recently wrote the following: “When wealthy donors speak loudly in the public square, using nonprofit proxies, citizens deserve to know who they are, along with what motives they may have—and all the more so when donors are using tax-subsidized dollars. There is a compelling public interest at stake here, one that trumps the ideal of donor privacy. Too often, it has turned out that such privacy is desired for the wrong reasons…. As for disclosure-related fears of donors, I don’t see a clear solution here, except to ask them to live with it on those occasions that arise…. And if the donors can’t, they can choose not to give. A little less philanthropic money flowing into today’s polarized policy and advocacy battles probably wouldn’t be a bad thing.”

But there is no consistent pressure from the left to protect association and the freedom of donors to give anonymously to charity. Instead there is constant sniping from progressives about “millionaires and billionaires” who give to support organizations and causes out of favor on the left.

This is deeply misguided. Even Callahan predicts that with Republicans in power and charities that support liberal advocacy ramping up their “resistance” to President Trump, the many organs of civil society operating from the left may regretfully discover that they too need protection from vindictive backlashes by government or the populace. Let’s hope that by the time they recognize the need for donor privacy and protection of philanthropic freedom, philanthropic freedom still exists.

For all Americans—conservative, progressive, or apolitical—protecting donor privacy is crucial to the health and freedom of our society. In its amicus brief in support of the Americans for Prosperity Foundation, the NAACP declared that “In an increasingly polarized country, where threats and harassment over the Internet and social media have become commonplace, speaking out on contentious issues creates a very real risk of harassment and intimidation by private citizens and by the government itself…. Thus, now, as much as any time in our nation’s history, it is necessary for individuals to be able to express and promote their viewpoints through associational affiliations without personally exposing themselves to a legal, personal, or political firestorm.”

This is exactly right, and philanthropists across the philosophical spectrum should be aware of the threat to philanthropic freedom posed by misguided calls for donor disclosure in the charitable sector.

—Sean Parnell