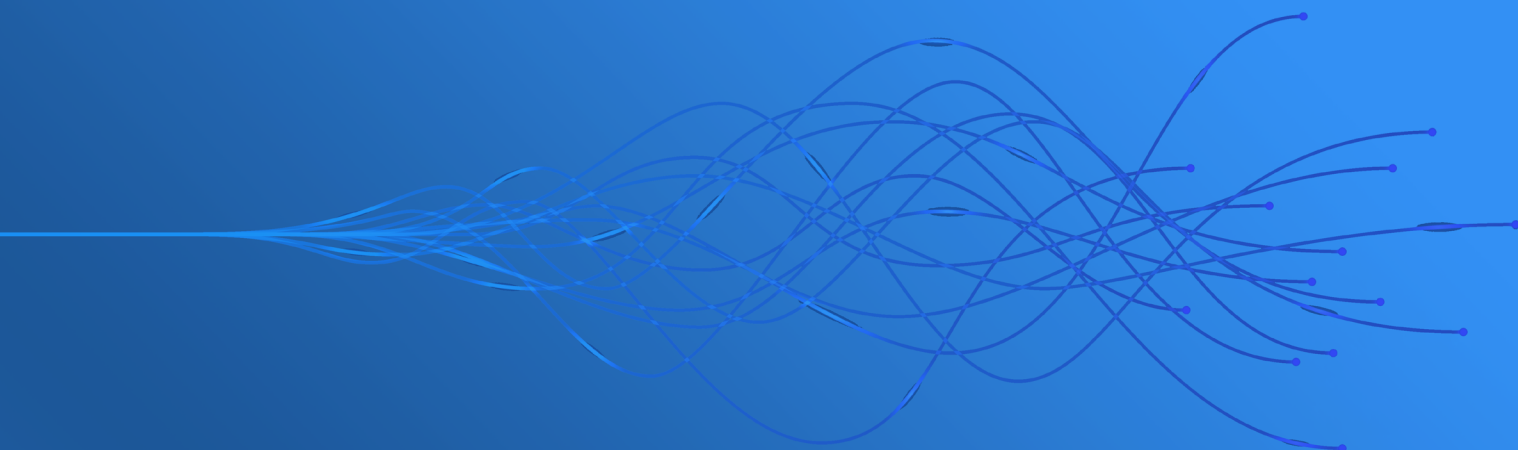


DONOR PRIVACY: A CONSTITUTIONAL RIGHT FOR AMERICAN GIVERS

BY ELIZABETH MCGUIGAN

EXECUTIVE SUMMARY

- ◆ A VIBRANT CIVIL SOCIETY RELIES ON CHARITIES AND THEIR DONORS.
- ◆ THE ABILITY TO RETAIN ONE'S PRIVACY IN THEIR GIVING IS A CONSTITUTIONALLY PROTECTED RIGHT.
- ◆ DONORS MAY CHOOSE TO REMAIN PRIVATE FOR NUMEROUS REASONS, INCLUDING RELIGIOUS TRADITION, MODESTY OR FEAR OF REPRISAL IN OUR DIVIDED SOCIETY.
- ◆ THIS PRIVACY IS KEY TO FOSTERING GIVING IN A TIME WHEN DONORS ACROSS THE IDEOLOGICAL SPECTRUM MAY FACE THREATS FOR THEIR SUPPORT OF CAUSES OR ORGANIZATIONS.
- ◆ WHEN CONSIDERING DISCLOSURE RULES, CLEAR DISTINCTIONS MUST BE MADE BETWEEN CHARITABLE ASSOCIATION AND POLITICAL ACTIVITY.



INTRODUCTION

The Philanthropy Roundtable supports the right of Americans to give and associate anonymously. This freedom is a pillar of our vibrant civil society. Our nation's vast network of charitable organizations and individual givers encompasses poverty-relief groups, cultural and educational institutions, faith communities, business and labor organizations and other formal and informal entities that support a wide range of causes important to individuals and communities. This diverse network allows Americans to address societal challenges that government cannot, will not or should not solve.

The vitality of our civil society depends on preserving the tradition of private giving for charitable and civic purposes. Individual givers may wish to remain private for numerous reasons, including religious tradition, modesty or a desire to avoid unwanted solicitations. In today's divided society, givers may also wish to avoid potential threats and retaliation for giving to causes that are, or may become, controversial or unpopular with individuals in positions of power.

Such motivations are not new. The ability to give privately has played a critical role throughout American history, from abolitionism¹ and women's suffrage² to the civil rights³ and LGBTQ rights movements.⁴ Privacy in association fundamentally protects the voice of those with minority views. Yet, regulators and lawmakers in states throughout the country and in Congress are considering imposing restrictions on private giving, at a time when technology and social media make forced disclosure even more dangerous to givers, their loved ones and their livelihoods.

A HISTORY OF CONSTITUTIONAL PROTECTION

The right to private giving is robustly protected under the Constitution and multiple U.S. Supreme Court precedents. This is illustrated most vividly by the Supreme Court case *Americans for Prosperity Foundation v. Bonta*. In its June 2021 decision, the court upheld donor privacy and concluded that California's bulk collection of donor information was unconstitutional.⁵ The majority opinion characterized California's interest as "less in investigating fraud and more in ease of administration" and found that "Mere administrative convenience does not remotely 'reflect the seriousness of the actual burden' that the demand for Schedule Bs imposes on donors' association rights."

The decision further represented a crucial confirmation by the court that the right to associate must include the right to associate privately, stating "This court has 'long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others.' Protected association furthers 'a wide variety of political, social, economic, educational, religious and cultural ends,' and 'is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority.'"

The justices highlighted the threats that the petitioners, their donors and their families faced due to their association and noted that, "Such risks are heightened in the 21st century and seem to grow with each passing year, as 'anyone with access to a computer [can] compile a wealth of information about' anyone else, including such

sensitive details as a person's home address or the school attended by his children." However, a key part of California's argument was that the requirement was not problematic because it was not a public disclosure. The majority opinion disagreed and found, "that disclosure requirements can chill association '[e]ven if there [is] no disclosure to the general public.'"

There are other precedents throughout recent history. In 1958, the Supreme Court ruled unanimously that the state of Alabama could not force the NAACP to reveal its members and donors because doing so would infringe on core First Amendment rights by exposing those individuals to "economic reprisal, loss of employment, threat of physical coercion and other manifestations of public hostility..."⁶

As the Supreme Court explained then, "[I]t is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as [other] forms of governmental



action.”⁷ While the intensity of these threats during the civil rights era is not comparable to the still serious concerns faced by Americans today, our current hyperpolarized culture, coupled with the ubiquity of the internet and the permanency of disclosure information posted online, poses significant threats to givers that emphasize the need to protect the freedom to give privately.

While NAACP v. Alabama is the most prominent historical precedent protecting private association, it was by no means an outlier. The Supreme Court also shielded the privacy rights of union members (Thomas v. Collins⁸), funders of anonymous leafletting campaigns (Talley v. California⁹), and public school teachers (Shelton v. Tucker¹⁰). By the 1970s, the right to join and support groups privately was clearly established.

DONORS HAVE VALID REASONS FOR PRIVACY

Religious traditions around the world and philosophers throughout history call for and support private giving. Nearly 2,000 years ago, the Roman senator and philosopher Seneca the Younger wrote in his treatise on gifts and favors, “How sweet, how precious is a gift, when he who gives does not permit himself to be thanked.”¹¹ He continued, “All writers on ethical philosophy tell us that some benefits ought to be given in secret. ...”¹²

In Christianity, the Gospel of Matthew in the Bible quotes Jesus telling his followers to “Take heed that you do not do your charitable deeds before men.”¹³ Many Jewish philanthropists follow the teachings of the 12th-Century rabbi and scholar Maimonides, who wrote that the second and third highest forms of giving (of eight categories) required the donor to give anonymously.¹⁴ In Islam, “The Prophet Mohammad said that one of the seven groups of people that will be granted shade on the Day of Judgment includes the one who gives charity but hides it, so that even his left hand does not know what his right hand has

spent. Islam places a great emphasis and reward on giving charity in secret. It preserves the dignity of those who receive the charity, and also prevents the giver from being boastful or seeking praise.”¹⁵

Apart from religious or moral traditions, some givers choose to remain private out of a sense of modesty, as was the case with the founder of The Atlantic Philanthropies, Chuck Feeney.¹⁶ Others desire to keep the attention on the important work of the charity itself. The late pop singer George Michael provided generous support for causes, including aid to cancer patients and help for abused children, but kept his giving private, perhaps for this reason.¹⁷ Some wish to avoid unwanted solicitations that may follow a public donation. After being revealed in 1920 as the source of an earlier \$10 million private gift to MIT, The New York Times noted that George Eastman, founder of Eastman Kodak, “had abundant occasion to regret that his identity is no longer a secret. ... He has become quite aware of the perils beset the paths of those pursued by the advocates of endless ‘worthy causes.’”¹⁸

Supporters to social causes have historically relied on the right to private association. For example, one of the first national LGBTQ rights organizations was the Mattachine Society. Named after a medieval secret society that provided anonymity for critics of the French monarchy, the Mattachine Society used private contributions to pay for the legal defense of gay people arrested for public indecency in America, as early as the 1950s.¹⁹

Givers today may choose to donate privately without explaining why. For example, in January 2021, the NAACP announced an individual donation of \$40 million to the NAACP Legal Defense and Education Fund to help develop a new generation of civil rights lawyers in the South.²⁰ Far from an outlier, private gifts are given to a wide variety of causes across the country: from \$3 million to help a theater reopen in Issaquah, Washington,²¹ to nearly \$10,000 in grocery store gift cards purchased for Maine’s first responders and restaurant workers.²²

In our current highly divided political environment, with so-called “cancel culture” increasingly prevalent and reputations destroyed on social media with the click of a button, there are other serious reasons some may wish to keep their giving and associations private. The fear of reprisal, threats, harassment or even violence will chill charitable giving if donors are not allowed to remain private. A summer 2020 poll conducted by the Cato Institute shows that majorities of Americans across the political spectrum genuinely fear being harassed for expressing their opinions or outed for the causes they support.²³

The poll also revealed that many people believe those who support former President Trump or President Biden (depending on their affiliation) should be fired or face other negative consequences. These findings illustrate that Americans’ privacy concerns are legitimate, as respondents, regardless of their political affiliation, admit there should be penalties for others’ expressed opinions with which they disagree. If significant numbers of Americans believe individuals deserve to be fired for financially (and legally) supporting a recent presidential candidate, it’s not difficult to imagine what fate could befall Americans who are publicized for supporting the charities and causes of their choice, even if those causes are mainstream.

Unfortunately, there are ample real-world examples of this problem. Americans for Prosperity Foundation (AFPF) has been forced to disclose donor information in California, and their donors have faced death threats, calls for boycotts at their places of employment and even physical violence. In one harrowing example, protestors blocked the exits to an AFPF event in Washington, D.C. and

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refused to let the attendees leave, even pushing a 78-year-old man down the stairs.²⁴ In another case of harassment, the Heartland Institute, a free-market think tank, lost General Motors and other donors after its list of supporters was stolen and used in a public shaming campaign.²⁵

PRIVACY TRANSCENDS IDEOLOGICAL AFFILIATION

Of course, forced disclosure does not distinguish between causes. In 2015, a man went to a Planned Parenthood clinic in Colorado Springs, shot and killed three people and wounded nine others because of his opposition to Planned Parenthood’s mission.²⁶ This tragedy could have been far worse had Colorado required Planned Parenthood to publish the names and addresses of their supporters on a government list. Such disclosure poses real threats to donors, their children and grandchildren.²⁷ The threat to donors on either end of the ideological spectrum is evident in the organizations that filed amicus briefs with the Supreme Court in the AFPF v. Bonta case. While the petitioners are conservative-



However, the cause does not have to be controversial to spark political retaliation. For example, a homeless shelter in Atlanta, Georgia had been the target of city officials seeking to claim the land it sits on via eminent domain to build a fire and police station in its location. When private donors helped the shelter pay off a water bill of nearly \$580,000 in 2014, the shelter's director explained they wished to remain private because, "Any time a donor appears and is public with us that donor gets attacked."³¹

CHARITABLE GIVING IS NOT POLITICAL ACTIVITY

leaning organizations, they were joined by many progressive amici including: the American Civil Liberties Union (ACLU), the NAACP Legal Defense and Education Fund, The Knight First Amendment Institute at Columbia University, and the Human Rights Campaign. In total, nearly 300 diverse organizations with wide-ranging views supported AFPP's arguments in favor of privacy in association, albeit with varying opinions on how broadly the case should have been decided.²⁸

THREAT OF GOVERNMENT REPRISAL

The danger to donors from forced disclosure extends beyond threats from the general public. America has a dark history of government abuse of seemingly innocuous information. When Japanese-Americans were forced into internment camps during World War II, the government used Census data to locate these citizens.²⁹ On a narrower level, there are far too many stories about givers and their families and businesses being targeted by corrupt officials for controversial stances on hot button issues such as LGBTQ rights or abortion.³⁰

Today, political officials and activists have a new line of attack on anonymous giving. They slander this venerable tradition as "dark money," painting a nefarious picture of why a giver may choose to remain private when associating with a group designated as a nonprofit by the Internal Revenue Service (IRS). Those seeking to vilify anonymity in giving and association suggest that such individuals or groups are potentially violating campaign finance laws to impact the outcome of an election, without the transparency required by law.³² In response, lawmakers in Congress and states across the country are seeking to expand the reach of campaign finance laws to cover the non-political speech of charitable organizations about issues and force exposure of their supporters in the process.³³ These efforts are inappropriate and unconstitutional. This debate should remain in the public sphere, not be taken by opponents to citizens' home addresses and places of employment. There is ample room for public debate unrelated to the election of a specific candidate, such as a local animal shelter educating state legislators on the impact a bill would have on their treatment of stray animals or an organization speaking with elected officials about a budget provision that promotes their charitable mission. Campaign finance laws, which

are designed to regulate political advocacy, should not be improperly expanded beyond campaigning to govern mission-focused work by the charitable sector. Individuals who choose to give to political candidates, political parties or political action committees are well aware their donations are intended to further a political purpose: to elect or defeat a candidate. Transparency in our political process is necessary to ensure public officials are not being unduly influenced by their financial contributors. This laudable goal does not apply to private citizens supporting non-political nonprofit organizations that align with their beliefs.

When individuals give to nonprofits, which are prohibited by law from engaging in significant political activity, they give to support a cause, a particular mission or an issue they are passionate about. Donor disclosure proposals inappropriately lump those diverse motivations together, taking a sledgehammer to constitutional liberties, rather than targeting specific bad actors breaking existing laws regulating giving to candidates. The Supreme Court agreed in the 1976 *Buckley v. Valeo* case, when it narrowly upheld disclosure for donors to political campaigns, political parties and political action committees. The court noted that such disclosure was a narrow exception to the principles upheld in *NAACP v. Alabama* and made clear that disclosure requirements for political giving must be tied to express advocacy in support of or opposition to a political candidate.³⁴

Conflating political donors with Americans who give to charity, as some officials propose today, will confuse the public, violate Americans' privacy and chill charitable giving with no benefit to society.

CONCLUSION

Lawmakers should not pick winners and losers among causes and legal organizations with charitable status granted by the IRS. Above all, elected officials have an obligation to uphold the Constitution and protect minority viewpoints. When donor disclosure to charities is mandated and supporter lists are made publicly available online, individuals and their private information become public forever. This is the case even if an individual decides not to associate with a group anymore because its mission changes or the individual's opinions evolve. Such disclosure unfairly punishes people for supporting a cause at a moment in time.

To ensure the ongoing health of America's civil society, donor privacy must be robustly protected. History is littered with examples of the dangers inherent in restricting or chilling free speech and association. With the current challenges facing our society, there is no room for mandatory disclosure of donors or supporters to charitable organizations.

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ABOUT PHILANTHROPY ROUNDTABLE

Philanthropy Roundtable is a nonprofit organization dedicated to building and sustaining a vibrant American philanthropic movement that strengthens our free society. To achieve this vision, the Roundtable pursues a mission to foster excellence in philanthropy, protect philanthropic freedom and help donors to advance liberty, opportunity and personal responsibility.



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