The Limits of Privatization: Privacy in the Context of Tax Collection

Christina N. Smith

Follow this and additional works at: https://scholarlycommons.law.case.edu/caselrev

Part of the Law Commons

Recommended Citation
Available at: https://scholarlycommons.law.case.edu/caselrev/vol47/iss2/16
THE LIMITS OF PRIVATIZATION: PRIVACY IN THE CONTEXT OF TAX COLLECTION

INTRODUCTION

On November 19, 1995, President Clinton signed an appropriations bill establishing a pilot program for private tax collection. The program allocates $13,000,000 for the Internal Revenue Service to hire private law firms and collection agencies to recover overdue taxes. While many Senators praised the bill as an efficient and creative means of raising revenues, Senator Pryor made the following observation:

For over 200 years, when the Federal Government has imposed a tax, it has also assumed the responsibility, and the blame, for collecting them. In fact, we have an obligation to ensure that the privacy and confidentiality of every American taxpayer is protected. Contracting out the tax collection responsibilities of government would be in contradiction of that duty, and would, no doubt put the privacy of all American taxpayers in jeopardy.

This Note analyses whether there is a legal basis to Senator Pryor's fear that privatizing federal tax collection threatens taxpayers' privacy rights. It concludes that there is a basis for

3. See, e.g., 141 Cong. Rec. S17,072 (daily ed. Nov. 15, 1995) (statement of Sen. Grassley) (“I want to commend Senator Shelby for his work. This would not have happened were it not for Senator Shelby’s efforts and his decision to put the interest of the American taxpayer first and not listen to the voices of empire-building bureaucrats at the IRS.”).
apprehension because private tax collection is an impermissible infringement on established statutory, constitutional, and tort law privacy rights. Beyond raising serious questions about the legality of the bill, this conclusion has implications for privatization more generally. It suggests that there is a limit to the push for privatization, and that the limit rests in the realm of privacy rights.

In support of the above conclusions, this Note is divided into five parts. The first section is an overview of existing tax collection measures and the proposed privatization changes. The discussion shows that the IRS has broad collection powers that are only marginally checked by procedural safeguards, and that the privatization proposal significantly increases these powers. The second section reviews the privatization debate, outlines three methods of privatizing public services, and then considers the tax proposal in light of this larger debate. The analysis shows that private tax collection pushes the boundaries of the traditional privatization debate and raises questions about the applicability of the usual privatization policy rationales to tax collection. The third section considers the statutory barriers to private tax collection and concludes that the existing nondisclosure rule is an obstacle that must be overcome before the proposal can proceed. The fourth section looks at the constitutional right to privacy. This section argues that privatization of tax collection is an unconstitutional infringement upon an individual's right to nondisclosure of private facts. The final section is an analysis of tort issues. It argues that private tax collectors will be liable for breaches of privacy unless they are granted qualified immunity by being classified as government actors, but that it is unlikely that they will be classified as state actors because doing so would be contrary to existing policy rationales for granting immunity. The overall conclusion is that the proposal for the privatization of tax collection is contrary to existing statutory, constitutional, and tort law, and should be discarded.

I. TAX COLLECTION

A. Current Methods of Tax Collection

The IRS has several methods of collecting delinquent income taxes. If a taxpayer does not pay or does not officially object to the tax, the IRS can do any of the following: file a Notice of
Federal Tax Lien;\(^5\) serve a Notice of Levy;\(^6\) seize and sell property;\(^7\) or begin backup withholding.\(^8\) As the following analysis indicates, these powers are extensive and only marginally controlled by procedural safeguards.

In assessing a lien, the IRS can attach all property or rights to property, including property that is acquired after the assessment is made.\(^9\) Before doing so, the IRS is required to assess the tax, send a notice and demand for payment, and the taxpayer must neglect or refuse to pay the tax.\(^10\) However, the IRS can bypass these procedural safeguards if it believes that the collection of the tax is threatened and immediate action is required.\(^11\) Beyond these minimal procedural requirements, "nothing more is required to make the lien valid against the taxpayer and to subject property or property rights of the taxpayer to seizure by levy."\(^12\) Once the procedural requirements are met, the IRS gains priority over other creditors when it files a Notice of Federal Tax Lien.\(^13\) The lien is released only when the taxes and fees are paid, otherwise satisfied or become unenforceable,\(^14\) a bond guaranteeing payment is issued and accepted,\(^15\) or when the IRS fails to refile the lien within the ten year statute of limitations.\(^16\) On rare occasions, a taxpayer can successfully file an application for the discharge of the lien to remove the lien against one specific piece of property.\(^17\)

The IRS can also take property through levies.\(^18\) In doing so, the IRS can levy property that the taxpayer holds or that a third
party holds for the taxpayer. The IRS can also place a levy on a taxpayer’s “wages (salary), commissions, the cash value of life insurance, licenses or franchises, securities, contracts, demand notes, accounts receivables, rental income, dividends, [or] retirement accounts.” While most personal and real property can be levied, there are limits. There are minimum weekly exemptions for income, and workmen’s compensation and certain personal property items cannot be subject to levies. The IRS does not need court authorization to place a levy on a taxpayer’s property, but must make the required assessment and demand for payment before sending a final notice of its intent to levy at least thirty days in advance. Like a lien, the levy is released if the tax, plus any interest or penalties, is paid. The IRS also has discretion to release the lien if it creates an economic hardship, if the fair market value of the property exceeds the amount of the lien and releasing part would not hinder the collection of the tax, or if the taxpayer is able to provide documentation showing that releasing the levy would aid in the collection of the tax by, for example, allowing the sale of assets that would provide cash to pay the tax.

The third means of recovering taxes is through seizures and sales. The IRS states that “[i]f you do not pay (or make arrangements to resolve) your tax debt, we may seize and sell any type of real or personal property that you own or have an interest in (including residential and business property) to satisfy your tax bill.” The IRS is required to issue a notice of both the seizure and sale to the taxpayer, but actual receipt of the notice by the taxpayer is not required. Before seizing property, a district or

19. See § 6331(a) (allowing a “levy upon all property and rights to property (except such property as is exempt under section 6334”).
21. See § 6334(g)(1)-(3), (7), (9).
22. See § 6331(d)(1)-(2).
27. See § 6353.
29. See § 6335(a)-(b).
assistant director of the IRS must give approval and a taxpayer has the right to an administrative review if the property at issue is required to maintain the taxpayer's business.\(^{31}\)

Finally, the IRS can use backup withholding to satisfy outstanding taxes.\(^{32}\) Under this system, the IRS notifies all those paying the taxpayer "to begin withholding income tax on these payments."\(^{33}\) If a taxpayer is subject to backup withholding, he or she is required to notify all new payers; failure to do so may result in a penalty or imprisonment for up to one year.\(^{34}\) The IRS will cease backup withholding if the income is properly reported, the tax is paid, and the correct tax identification number is provided.\(^{35}\)

Unlike other creditors, the IRS enjoys relative freedom from court intervention. For example, IRS collection efforts cannot be delayed by court proceedings.\(^{36}\) Under § 7421(a), "no suit for the purpose of restraining . . . collection of any tax shall be maintained in any court by any person."\(^{37}\) This section therefore specifically prohibits a taxpayer from bringing a court action for the purpose of restraining or delaying tax collection. Beyond the statutory prohibition, the Supreme Court also recognized the need for broad government collection powers in *Bull v. United States*,\(^{38}\) when it upheld a section of the Revenue Code under the rationale that "taxes are the life-blood of government, and their prompt and certain availability an imperious need."\(^{39}\)

---

1967) (holding that actual notice is not required to be given to third parties who have an interest in the property), aff'd 391 F.2d 934 (2d. Cir. 1968).

31. See id.

32. See § 6331(a), (c).

33. UNDERSTANDING THE COLLECTION PROCESS, supra note 20, at 8.

34. See id.

35. See id.

36. Generally, the taxpayer can only appeal the deficiency finding before the collections process begins. The taxpayer is first encouraged to pursue administrative remedies, and in fact, damages may be assessed against the taxpayer for not doing so. See § 6673(a)(1)(c). If not satisfied by the administrative outcome, the taxpayer has a limited number of options. However, the taxpayer can only bring a suit in a federal district court or the Court of Federal Claims if he or she pays the tax and then demands a refund. See § 7422(a). Therefore, the only recourse for a taxpayer who has not paid and who is not yet subject to the collection procedures of the IRS is to bring a suit in the Tax Court. If the taxpayer wins on appeal, he or she may receive reasonable litigation costs, including attorney's fees, if it is found that the position of the government was not substantially justified. See § 7430(a)(2), (c)(4)(A)(i). But see § 7430(c)(1)(B)(iii) (limiting the hourly rate for attorney fees); § 7430(b)(4) (denying costs where prevailing party has unreasonably protracted the court proceedings).

37. § 7421(a).


39. Id. at 259. Although § 7421(a) was not the subject of *Bull*, this case shows the
There are also limited exceptions to the general rule that a taxpayer cannot use the courts to restrain tax collection procedures. An injunction is permitted when the deficiency notice requirements of § 6212(a) have not been met; this includes the situation when a prohibited notice is issued.\textsuperscript{40} Although a notice must be issued, the other administrative procedures are not always required. Under § 6861, the Commissioner is authorized to make an assessment "prior to the exhaustion of the taxpayer's administrative remedies, and in some instances, may assert the amount of the taxpayer's liability against a transferee of property from the taxpayer under section 6901."\textsuperscript{4}\textsuperscript{2} An injunction may also be granted to the taxpayer to stop collection procedures "if it is clear that under no circumstances could the government ultimately prevail,"\textsuperscript{41} extraordinary circumstances cause irreparable harm, and there is no adequate remedy at law.\textsuperscript{43}

\textbf{B. Privatization of Tax Collection}

The proposed reforms to the tax collection process would add another weapon to the IRS arsenal. The pilot project gives the IRS thirteen million dollars to "test whether private bill collectors could do a better job than the agency's own employees."\textsuperscript{44} The details of the program have not been finalized with regard to protecting confidentiality. As it stands, the law states that "[t]he Internal Revenue Service shall institute policies and procedures which will safeguard the confidentiality of taxpayer information."\textsuperscript{45} What is known, however, is that the private collectors will be either collection agencies or private law firms who are granted the authority to contact delinquent taxpayers.\textsuperscript{46} They will not have the authority to

---

\textsuperscript{40} See ROSE & CHOMMIE, supra note 12, § 13.18, at 803 (noting also that these exceptions "preserve the taxpayer's right to litigate in the Tax Court").

\textsuperscript{41} Id. § 13.17, at 802.

\textsuperscript{42} See \textit{id.} § 13.18, at 803 (citing Enochs v. Williams Packing & Navigation Co., 370 U.S. 1 (1962)).

\textsuperscript{43} See Conforte v. United States, 125 B.R. 287, 291 (D. Nev. 1991) (discussing this exception to § 7421 as a two part test: "there must be clear evidence that the government cannot prevail; and . . . the court must be satisfied that the threat of irreparable injury for which there is no adequate legal remedy is substantial").


\textsuperscript{46} See 109 Stat. at 473.
seize or levy property, but they will be able to use the collection methods currently employed by the private sector in collecting private debts. The Senate debates reveal that the authors of the bill understood that private collectors would be given limited information: the name, address, social security number, and amount owed to the government, and that private tax collectors would be required to abide by the Fair Debt Collection Practices Act.

The idea of private tax collection was first put forward by the Clinton Administration in early 1993, but it received little attention. After the 1994 election, the idea gained significant support; the current law was authored by Representative Jim Lightfoot of Iowa and backed by Senator Richard C. Shelby of Alabama. Supporters of the law point to General Accounting Office statistics that show that IRS collections have declined eight percent since 1990. They also point to the success of existing private collection systems in such states as Pennsylvania, South Carolina, Minnesota, and Nevada.

While there appears to be considerable political support among Republicans for the privatization of tax collection, the IRS has expressed its opposition to the proposal. The Commissioner of the IRS, Margaret Milner-Richardson, stated that she has "grave reservations about starting down the path of using private contractors to contact taxpayers regarding their delinquent tax debts." Thus, it appears that some individuals at the IRS recognize the additional responsibilities and problems associated with the new weapon.

47. See § 104, 109 Stat. at 476 (stating that "the conduct of . . . any private sector employees under contract . . . [must comply] with subsection (a) of section 805 (relating to communications in connection with debt collection) and section 806 (relating to harassment or abuse) of the Fair Debt Collections Practice Act") (citation omitted).
49. See § 104, 109 Stat. at 476.
50. See Hershey, supra note 44, at D8.
51. See id.
52. See id.
53. See id. (noting also that 10 other states utilize private agencies to make telephone calls to delinquent taxpayers).
54. 141 CONG. REC. S17,074 (daily ed. Nov. 15, 1995) (Senator Pryor quoting Margaret Milner-Richardson).
II. PRIVATIZATION

A. Overview of the Privatization Debate

The privatization of public services is not new, but it is enjoying unprecedented support at all levels of government. On the international level, recent privatization in Eastern Europe and South America is attributed to the decline of socialism and the subsequent acceptance of the free market system. In Europe, privatization is touted as a means of divesting government of money-losing facilities. In the United States, federal politicians and administrators encourage privatization as a panacea for political and economic ills. At both the state and local level, privatization is used as a means of reducing costs and abiding by unfunded mandates created by Congress. In fact, “[c]ontracting out in the United States has been employed most widely at the state and local levels.”

The most frequently cited argument in favor of privatization is efficiency. This belief is articulated in the report of the President’s Commission on Privatization, when it states that “new arrangements...
between the government and the private sector might improve efficiency while offering new opportunities and greater satisfaction for the people served.\textsuperscript{62} As this quote suggests, the efficiency argument is twofold. First, it is believed that the money used to employ services will be used more efficiently than if the government delivered the service. In other words, private parties will compete for the contract and the party offering the most competitive price will be awarded the contract. The second part of the argument is that the ultimate delivery of the service will also be more efficient. This outcome-efficiency argument is based on the belief that private actors are not subject to the red tape or bureaucracy of the public sector. Advocates of privatization argue that it is easier for private parties to hire, transfer, promote, or reward employees, purchase new equipment, and obtain approval for innovations from fewer layers of management.\textsuperscript{63}

Despite the overwhelming support for privatization based on an efficiency rationale, there is actually very little data to support this widely-held belief.\textsuperscript{64} In a study of private sector delivery of state services, the Council of State Governments concluded that “[m]ost agencies that tested the use of private sector assistance did not have adequate evidence on how costs or quality changed after they implemented the new approach.”\textsuperscript{65} At least one critic is not convinced that “based on the evidence thus far available . . . privatization lowers costs in most instances.”\textsuperscript{66} In fact, recent figures show that the federal government is increasing spending on private contractors but not decreasing its spending on government employees by a comparable rate.\textsuperscript{67} The obvious conclu-

\textsuperscript{62} Id. at 1.
\textsuperscript{63} See ALLEN ET AL., supra note 60, at 4.
\textsuperscript{65} ALLEN, ET AL., supra note 60, at 164.
\textsuperscript{66} Harry P. Hatry, Privatization Presents Problems, 77 NAT'L CIVIC REV. 112, 113 (1988).
\textsuperscript{67} The federal government spent $114 billion on private contractors in 1995, which was approximately $4 billion more than in 1994. See Jeff Gerth, As Payroll Shrinks, Government's Costs For Contracts Rise, N.Y. TIMES, Mar. 18, 1996, at A1. The federal government has increased its spending on private contractors by 3.5% a year since 1993. See id. This figure is significantly higher than the decline in payments to government employees who were replaced by private contractors: the Government spent $103 billion in salaries and expenses for its employees in 1995, which was a $1 billion payroll cut from 1994. See id. This fact led Senator David Pryor to criticize federal contracting poli-
sion, then, is that privatization's efficiency rationale is not a practical reality.

Beyond questions of efficiency, privatization is an outgrowth of political and economic theory. Much of the current thought arose out of Progressive political theory, which was popular in the United States at the turn of the century. Progressivism is sometimes characterized as the "gospel of efficiency" because it believed that efficiency would be achieved through consistent application of science to social decisions. Today privatization is often associated with the Reagan Revolution and Liberal economics. The Reagan Revolution promoted privatization and attacked "government as the great impediment to the wisdom of the free market." Similarly, privatization embraces Liberal economic theory because it claims that "the idea is to stimulate competition, unleash enterprise, and bring the notion of profit fruitfully to bear on 'public' services such as education and health no less than on 'private' ones."

Support for privatization is also ideological. Many advocates of privatization believe that less government is better. For example, "In the 1980s, free marketers, like Reagan-appointee Emanuel..."
Savas, were clearly motivated by ideology to support privatization.\textsuperscript{71} They were "ideologically attracted to privatization as a way to shrink government."\textsuperscript{72} Therefore, ideological support is based on understanding privatization not only as a means towards an end, but also an end in and of itself.

Opposing these arguments are those people who do not subscribe to the efficiency rationale, the political theories, or the ideological support for privatization. Failing to accept these explanations, they see little reason for privatizing.\textsuperscript{73} When considering the efficiency argument, for example, some critics argue that the costs associated with monitoring private contractors are an additional cost that negates any relative gain from privatization.\textsuperscript{74} Moreover, critics fear that additional problems may arise from privatization. Some of these problems are the increased potential for corruption, the incentive to reduce service quality, the increased chance of service interruption, and the possibility of reduced access to services for the disadvantaged.\textsuperscript{75} This Note suggests that in addition to the often-cited practical and policy criticisms of privatization, there also exists a legal limit to privatization.

\textbf{B. Methods of Privatization}

While privatization is on the rise because of changes in political and economic climates, the means of privatization remain constant. There are essentially three methods of privatizing public services: selling government assets, using vouchers, or contracting out.\textsuperscript{76} All three involve assigning what was a governmental func-

\textsuperscript{71} Vecoli, \textit{supra} note 55, at 243. Emanuel S. Savas places the reasons in favor of privatization into four categories: pragmatic, ideological, commercial, and populist. According to the pragmatic framework, privatization is necessary in order to achieve more effective public services. Although similar to the pragmatic argument, the ideological framework favors privatization because of an inherent belief that less government is better. Part of this belief is based on the efficiency argument, but it is also based on other factors and considerations. The commercial argument holds that government should support and encourage business by directing its resources to the private rather than public sector. The populist framework focuses less on the outcome benefits of privatization, and more on the choices and power that privatization would give to the public in selecting services. \textit{See Savas, supra} note 59, at 5.

\textsuperscript{72} Vecoli, \textit{supra} note 55, at 243.

\textsuperscript{73} \textit{See generally} Cass, \textit{supra} note 68 (describing rationales opposing privatization).


\textsuperscript{75} \textit{See} ALLEN \textit{et al.}, \textit{supra} note 60, at 5-6.

\textsuperscript{76} \textit{See} PRESIDENT'S \textit{COMMISSION, supra} note 61, at 1-2. User fees are sometimes
tion to the private sector; but the three methods differ in the degree to which they assign a government function to a private actor.

Selling government assets is an example of the most authority that the government can give to the private sector. Selling assets relinquishes complete control to a private party. The federal government's sale of Conrail in 1987 is an example of a complete divestiture through a public stock offering.\textsuperscript{77} Government can also maintain a degree of control by deciding not to sell the entire unit, but rather to sell in a "piecemeal fashion;" this decision was made in 1982 when the "federal government privatized the National Consumer Cooperative Bank by relinquishing the asset value of government-purchased stock and the associated right to name directors to the bank's board."\textsuperscript{78}

The second method of privatizing is through the voucher system. Through this system, the government gives purchasing power to the consumers, allowing the consumers to choose public service providers. This system is a method of privatization because it relieves the government of the responsibility of providing a public service. Although the government is not forced to provide the service, it can simultaneously retain control by outlining the parameters for issuance and acceptance of the vouchers. Examples of the voucher system are food stamps, housing vouchers, and higher education vouchers for veterans after World War II.\textsuperscript{79}

The third method of privatization is contracting out. Under this system, the government enters into contracts with private parties to provide specific public services. Contracting out was first encouraged during President Eisenhower's presidency; the Eisenhower administration stated that "the Federal government will not start or carry on any commercial activity to provide a service or product for its own use if such product or service can be procured from private enterprise through ordinary business channels."\textsuperscript{80} The government can contract out by either accepting the most competitive

\textsuperscript{77} See id.
\textsuperscript{78} Id.
\textsuperscript{79} See id. at 2.
\textsuperscript{80} Id. at 1.
bid and then paying the contractor, or by awarding the contract to a private party who will then be paid by the consuming public. While contracting out can lead to considerable power and authority being granted to a private party, governmental control is retained because the government can decide not to renew the contract.

The decision to use one method of privatization over another is dependent upon a number of factors. The most critical factor is whether the government perceives the function as one that must be either provided or produced by the government.\(^8\) If a providing function is at issue, then all three forms of privatization are possible. On the other hand, if the function is one that must be produced by the government, then the privatization options narrow.\(^2\) Production functions will more than likely take the form of contracts rather than sales or vouchers, because contracts allow a government to maintain a greater degree of control.

**C. Privatization of Tax Collection within the Larger Debate**

The privatization of tax collection pushes the boundaries of the existing privatization debate in a number of important and interesting ways. Perhaps the most significant difference is that tax collection is inherently and traditionally a governmental function. Private individuals or companies do not levy or collect taxes—only governments do. Tax collection is therefore unlike the existing programs and proposals that allow private companies to perform such functions as garbage collection, education, public housing, postal service, and public transportation.\(^8\)

---


82. See Henig, supra note 81, at 664 (“In drawing parallels among such diverse techniques as asset sales, users’ fees, vouchers, contracting out, and deregulation, privatization theory . . . opened the field for subsequent shortcomings with specific initiatives to be generalized to other privatization proposals.”).

83. Senator Pryor made this distinction in his criticism of the proposal when he said:

We are about to privatize the collection of debts by the Internal Revenue Service. There is some form of privatizing that may be all right. . . . But, Mr. President, privatizing a cafeteria and privatizing the confidential information to be dispensed to the general public and to lawyers and debt collectors are two different things. This is one area of privatizing that . . . I beg them to reconsider, to look at the potential for conflict, for harassment, for bounty hunters, and for undue influence being used against unsuspecting and unprotected taxpayers.
While tax collection is an inherent governmental function, it is unclear what sub-type of governmental function it is. Private tax collection is an interesting proposal precisely because it is neither a producing nor a providing function. Tax collection does not provide a direct service comparable to garbage collection or fire protection; nor does it produce a specific good such as food or shelter for the needy. At the same time, it can be argued that tax collection does provide a service to everyone, since everyone must pay taxes. It can also be argued that tax collection also produces a good since it is the business of collecting money that will then be distributed to the public.

Despite the difficulty of neatly fitting tax collection into either category, it is not difficult to determine which type of privatization option is best suited to the function. It is impossible to sell off the tax collecting function of the government, since the government must be able to collect taxes in order to survive. Similarly, it is impossible to give people vouchers when the aim is to collect taxes not to give money away. Therefore, the only option is to contract out and to pay private parties to perform collection services.

The privatization of tax collection also pushes the boundaries of the privatization debate because it grants a degree of power to private parties that other programs have not previously done. Shifting tax-collecting authority to private parties grants them the coercive power of the federal government. Other programs have generally granted only the power to provide services, and often only at a state level. Moreover, the potential effect of this movement is larger than any other proposal: every citizen or person having an income in the United States must pay federal taxes and must provide the IRS with detailed financial information. Because the reach and scope of the IRS is extensive, the potential reach of the private tax collectors is as well.

The applicability of the efficiency rationale to tax collection is particularly hard to assess for a number of reasons. For example, assessing the efficiency of the privatization effort requires knowing

141 CONG. REC. S17,076 (daily ed. Nov. 15, 1995).
84. Garbage collection is not the same type of service as tax collection: while both are "collecting," the goal of garbage collection is to help the public by keeping the towns and cities clean, while the goal of tax collection is to take from the people in order to fund the government. In other words, garbage collection is a direct benefit to the public while tax collection is an indirect benefit to society through the government.
the efficiency of the IRS. While there are estimates as to the cost of collecting delinquent taxes, the exact costs are unknown and remain very difficult to assess. Moreover, since the federal government has not yet privatized its collections processes, there are only speculative costs to compare to the existing (but inadequate) IRS figures. Monitoring costs may also be particularly high with private tax collection compared to other government functions. Therefore, the costs to the government may in fact be higher after privatization.\(^{85}\)

While private tax collection pushes the boundaries of the traditional privatization debate in a number of critical ways, the uniqueness of the proposal does not mean that it cannot or should not be pursued. However, the following analysis illustrates that there are legal and policy impediments to private tax collection that render the proposal untenable.

III. STATUTORY PRIVACY\(^ {86}\)

A. Background

When successfully enacted, statutes “provide evidence of majoritarian sentiment regarding the legitimacy and importance of particular facets of the rights of personhood and privacy.”\(^ {87}\) However, the following brief historical analysis illustrates that majority opinion, as evidenced by statutes governing the privacy of tax return information, has not been consistent. In fact, these statutes have vacillated between preferring disclosure and demanding non-disclosure of tax return information.

Public access to private tax return information has been a controversial issue in the United States since the Civil War. In 1862, the Civil War Income Tax Act allowed the government to print individuals’ names and liabilities on posted notices; these notices were open to public inspection for a fifteen day period.\(^ {88}\) This system was designed to “give the tax payer time to collect his

---

85. See Prager, supra note 74, at 100.
86. It should be noted that statutes are easily changed. As a result, the problems inherent in privacy statutes do not necessarily render the privatization proposal unworkable. However, the statutory problems must be recognized before they can be changed. This section aims to identify the problems and to suggest the necessary changes.
87. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1311 (2nd ed. 1988).
money in order to be ready when the collector arrives," but it quickly became a lightening rod for debate between those interested in public access and those championing individual privacy. In 1863, the Commissioner granted permission to newspapers to print tax returns, and the New York Tribune promptly published a list of names and incomes. The Commissioner defended the policy reversal by arguing that publication would prevent the filing of fraudulent returns. As a result, publication of private tax returns by newspapers became commonplace by the end of the Civil War.

The trend favoring disclosure reversed after the Civil War. In 1870, Congress decided that income tax return information should not be published. The 1894 Income Tax Act stated that "it shall be unlawful for any person to print or publish in any manner whatever not provided by law, any income return or any part thereof." The 1913 Income Tax Act stated that tax returns could be inspected by the public "[o]nly upon the order of the President, under rules and regulations to be prescribed by the Secretary of the Treasury and approved by the President." Although the President had discretionary power to allow for public access to private reports, it was Congress that debated and decided the issue.

Disclosure once again became the norm with the Revenue Act of 1924, which required posting of the names and liabilities of individuals and corporations filing reports. While the official position favored disclosure, it was not without its critics. In his 1924 annual message to Congress, President Coolidge stated that disclosure of tax payer liability was "detrimental to the public welfare and bound to decrease public revenues so that it ought to be repealed." Due to the opposition of President Coolidge and

89. Id.
90. See HARRY E. SMITH, THE UNITED STATES FEDERAL INTERNAL TAX HISTORY FROM 1861 TO 1871, 66 (1914).
91. See id. at 67.
92. See id.
93. See id. at 382.
95. Pomp, supra note 88, at 384.
96. Id. at 389.
98. Pomp, supra note 88, at 395.
others, the law was changed to require the posting of taxpayers' names and addresses, but not their liabilities.99

The "Pink Slip Rebellion" epitomized the division between those favoring disclosure and those favoring privacy. As a result of an income tax scandal in 1934, Congressional efforts focused on full disclosure of tax return information. Although they were not successful in obtaining full disclosure, they were able to pass the "pink slip requirements." Under this system, each taxpayer filled out a pink slip with his or her "name and address, total gross income, total deductions, net income, total credits, and tax liability."100 These slips were to be made available to the public. The response to the pink slip requirements was a highly organized and effective taxpayer protest. The protest was successful, the pink slip requirements were repealed, and no further attempts were made to amend the law.101 With the repeal of the pink slip requirements, the 1924 law remained in effect and continued to allow the release of tax return information.

The pendulum of public opinion changed direction once again in the 1970s. Federal tax returns were public records in the 1970s: indeed, Senator Weicker referred to the "lending library of confidential tax information," from which "a myriad of government agencies have gained access to tax information of the IRS."102 However, concerns about privacy gained momentum, and in 1974 Congress enacted the Privacy Act and created the Privacy Protection Study Commission.103 With the passage of the Tax Reform Act of 1976104 Congress announced a general rule of non-disclosure of tax information.

A number of factors explain the adoption of the non-disclosure rule in 1976. In part, the adoption of this rule reflected the growing majoritarian interest in privacy, as is evidenced by the enactment of the Privacy Act of 1974. The Privacy Act explicitly stated that Congress found that "the right to privacy is a personal and

99. See id.
100. Id. at 399.
101. Id. at 402.
102. Stokwitz v. United States, 831 F.2d 893, 894 (9th Cir. 1987) (quoting Senator Weicker in 122 Cong. Rec. 24,013 (1976)).
Another reason for the adoption of a non-disclosure rule was to prevent other government agencies from obtaining IRS information. Congress wanted to prevent this when "Congress had not specifically considered whether the agencies which had access to tax information should have had that access." Furthermore, the Treasury Department released findings that publication and disclosure of individual tax returns were "of slight benefit to the Treasury in the prevention of tax evasion, which is the main argument advanced for such publicity." The Tax Reform Act of 1976, which is still in effect, states that "returns and return information shall be confidential" except as otherwise authorized.

B. Privacy under § 6103 and Freedom of Information Act

Despite this general rule of nondisclosure incorporated with the Tax Reform Act of 1976, the tax code allows for disclosure to people who have material interests in the specific returns or the return information at issue. Included in this category are people whose tax information is at issue: partners of a partnership; directors, officers, and shareholders of a corporation; an administrator, executor, or trustee of an estate. However, § 6103(e)(7) limits disclosure to those disclosures that "would not seriously impair the Federal tax administration." Thus, there are significant exceptions to the general nondisclosure rule, but there are also limitations to the exceptions.

This web of limitations and exceptions is further complicated by the existence of the Freedom of Information Act ("FOIA"). The FOIA was enacted to give individuals access to information

108. § 6103(a).
109. See id. § 6103(e).
110. See § 6103(e)(1)(A)(i).
111. See § 6103(e)(1)(C).
112. See § 6103(e)(1)(D).
113. See § 6103(e)(1)(E).
114. See § 6103(e)(1)(E).
possessed by the government and to help prevent government abuse. However, the government also recognized that it needed to protect certain information from disclosure. The result is an exception to the FOIA through § 6103 of the tax code that protects from disclosure certain tax information. Despite the explicit exception to the FOIA, the tension between the FOIA and § 6103 continues because some types of tax information may be disclosed.

In order to obtain tax information under the FOIA, the interested party must satisfy a two part test. The party must have a material interest in the information and the information requested must not be “return information.” The following provision of § 6103 generally defines “return information” as:

[A] taxpayer’s identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, over assessments, or tax payments, whether the taxpayer’s return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense.

Not included within this definition of return information is “data in the form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer.”

Much of the FOIA litigation has centered on the question of whether the information sought to be released constitutes “return information” that will identify a particular taxpayer. This definitional problem was at issue in Long v. IRS, in which the plaintiffs requested that the IRS release data relating to the Taxpayer Compliance Measurement Program. The IRS released statistical...
information, but refused to release check sheets containing taxpayers’ name, address, social security number, and financial data, or the data tapes that included taxpayers’ social security number and all financial information reported in a tax return. The IRS argued that the information contained on the check sheets and data tapes constituted return information, and that the only information it could release was statistical information. The Ninth Circuit Court of Appeals rejected the IRS’ arguments and held that the information did not constitute return information. The court reasoned that return information was information that identified a particular taxpayer, but that information did not necessarily have to be in statistical form in order to be released.

The Supreme Court’s holding in Church of Scientology of Cal. v. IRS calls the Ninth Circuit’s ruling into question. In Church of Scientology, the Supreme Court acknowledged that “[o]ne of the major purposes in revising § 6103 was to tighten the restrictions on the use of return information by entities other than [the IRS].” The Court affirmed the circuit court’s reasoning that the return information must be reformulated before disclosure, and that it was not enough that the return information does not directly identify the taxpayer.

Also contrary to the holding of Long is the Seventh Circuit’s formulation of “return information.” In King v. IRS, the court refused to adopt the identity test outlined in Long and instead ruled that all information must be in amalgamated form in order to ensure that it would not “directly or indirectly identify a specific taxpayer.” The Court feared that “extrinsic information” would allow the taxpayer to be identified if individual returns were reviewed.

In interpreting the breadth of § 6103, the courts have not expanded the exceptions to the general rule of nondisclosure. For example, in Aronson v. IRS, the District Court of Massachusetts

122. See id. at 364.
123. See id. at 365.
124. See id. at 368.
125. See id.
127. Id. at 16.
128. See id.
129. 688 F.2d 488 (7th Cir. 1982).
130. Id. at 491.
131. See id.
considered whether there existed an exception to nondisclosure when the purpose of disclosure was to notify taxpayers of their refunds. Aronson described himself as an attorney who "locates and identifies unclaimed and apparently abandoned money and other property held by state and federal governments" and then "attempts to locate the individuals entitled to such property and offers his services . . . to help them recover."\(^{133}\) He sought under the FOIA, the names, addresses, and social security numbers of those taxpayers who had not received their refunds. The court recognized the general policy in favor of disclosure under the FOIA, but also noted that § 6103(b)(2) was an exception to the FOIA disclosure rule.\(^{134}\) Aronson acknowledged that return information was generally not available to the public, but argued instead that § 6103(m)(1) "provides otherwise in the case of disclosures concerning unclaimed tax refunds."\(^{135}\)

In trying to decide which information could be released, the court went beyond mere statutory interpretation and engaged in a balancing test.\(^{136}\) The court noted that "Congress was concerned not only with protecting the privacy of citizens in general, but, specifically—as to information gathered for tax purposes—with the effect which abuse of such information would have on public confidence in the confidentiality of tax information and on the self-reporting income tax system."\(^{137}\) The court reasoned that while there was a public interest in assuring that taxpayers received their refunds, there was an equally strong interest in protecting taxpayers' confidentiality.\(^{138}\) The court held that releasing the names and last known mailing addresses of the taxpayers owed a refund was permissible, but that Aronson was not entitled to disclosure of the taxpayers' social security numbers or the amounts of

---

133. Id. at 380.
134. See id. at 382.
135. Id. at 382 (noting that § 6103(m)(1) states that the "Secretary may disclose taxpayer identity information to the press and other media for purposes of notifying persons entitled to tax refunds when the Secretary, after reasonable effort and lapse of time, has been unable to locate such persons").
136. The court likened this case to one brought under Exemption 6 of the FOIA, which establishes a two part test for determining when the disclosure of personnel or medical records would be an unwarranted invasion of personal privacy. The test "consider[s] both the nature of the files and the warrant for the disclosure." Id. at 387 (referring to United States Dep't of State v. Washington Post Co., 456 U.S. 595 (1982)).
137. Id. at 384.
138. See id. at 392.
their refunds. The court concluded that disclosure of social security numbers “would provide linkage to the vast amount of personal information already in data banks.” Thus, the court limited disclosure based on its fear that the disclosure of some information could lead to the disclosure of other information that would constitute an invasion of privacy.

Similarly, in *Barrett v. United States* the IRS argued that there was a necessity exception to the nondisclosure rule. Dr. Barrett brought suit after the IRS sent a letter to his patients in an attempt to gain additional financial information. The letter stated that Dr. Barrett was “currently under investigation by the Criminal Investigation Division of the Internal Revenue Service.” The court of appeals rejected the government’s argument that it was necessary to inform the patients of the criminal investigation in order to “obtain meaningful responses from third parties.” The court reasoned that the government presented no evidence to support this contention, that in fact its testimony at trial contradicted this proposition, and that criminal procedures encouraged third parties to participate despite the additional information. After rejecting the government’s reasoning, the court ultimately granted relief to Barrett because it concluded that the IRS agent was not acting in good faith when he revealed the information. Therefore, the Fifth Circuit rejected the IRS’ arguments of necessity and good faith; however, in doing so, the court recognized that an objective, good faith standard may allow disclosure of tax records.

### C. Implications for Private Tax Collection

The above analysis has implications for the privatization of tax collection. The first and most obvious implication is that under the current statutory system privatization will be contrary to the general rule of non-disclosure of § 6103. The type of information that collection agencies will need is precisely the type of information that is prohibited as “return information”—names, addresses, liabili-

---

139. *See id.* at 388. On appeal, however, the First Circuit reversed the decision compelling the IRS to disclose the mailing addresses. *See Aronson v. IRS*, 973 F.2d 962, 968 (1st Cir. 1992).

140. *Id.*

141. 51 F.3d 475, 478 (5th Cir. 1995).

142. *Id.*

143. *Id.*

144. *See id.* at 478-79.

145. *See id.* at 480.
ties, and social security numbers. It will be impossible to collect taxes if private agencies are only given statistical or amalgamated information, as required by Church of Scientology and King. Moreover, the more liberal interpretation outlined by the Aronson court is inapplicable because it applied to tax refunds and not to tax collection; the Code does not have an exception for tax collection as it does for tax refunds.146

Another implication of privatizing tax collection is that members of the public147 may be able to bypass the general non-disclosure rule by riding on the coat-tails of the private tax collectors. This is possible because once confidential information is made available to the media or to an individual, it becomes widely available; under the FOIA “information available to anyone is information available to everyone.”148 Section 6103(m)(1) allows for limited disclosure to the media in order to alert those taxpayers who are entitled to a refund,149 and once it is made available to the media, it is available to everyone. Therefore, an unintended consequence of the web of statutory provisions is that it may be possible for an individual to gain access to confidential information after it is released to a collection agency or private tax collector.150

It is relatively easy for Congress to change the statutory language to allow for disclosure to private agencies, and to add a section that stipulates that disclosure to an agency does not constitute disclosure to the public. It is not easy, however, to simultaneously maintain the original policy rationales for nondisclosure. The nondisclosure rule was originally implemented because finan-

146. It can also be assumed that individuals who are contacted because they are entitled to a refund will more than likely react more favorably than those contacted because they owe money.
147. The term “public” can refer to the media or other interested but non-essential parties.
149. See § 6013(m)(1).
150. A further impediment to the general non-disclosure rule is the new discovery rules. Because “the discovery provisions of the Federal Rules are to be read liberally and in favor of broad pretrial discovery . . . [d]iscovery of federal income tax returns . . . involves a conflict between the taxpayer’s privacy expectations and the policy favoring broad civil discovery.” William A. Edmundson, Discovery of Federal Income Tax Returns and the New “Qualified” Privileges, 1984 DUKE L.J. 938, 938-39 (footnote omitted). While many courts have adopted a qualified privilege for income tax returns, it is not specifically listed as a privilege in the Rules. See id. at 939-40. Therefore, the prospect for abuse remains.
cial tax information was thought sufficiently personal to warrant protection.\textsuperscript{151} Expanding disclosure to private tax collectors implies that the government no longer considers tax information to be highly sensitive or confidential. If it is no longer considered highly confidential, then there is a greater likelihood that it will be disclosed to other government agencies or private individuals. Nondisclosure was implemented to prevent agencies other than the IRS from obtaining information that Congress had not authorized them to have, and to protect tax payers from needless public inquiry into their private affairs.\textsuperscript{152} In sum, allowing disclosure to private tax collectors essentially undermines the policy rationale behind the nondisclosure rule.

IV. CONSTITUTIONAL CONSTRAINTS

A. Background

The constitutional right to privacy is a difficult and vigorously debated issue.\textsuperscript{153} While there is no explicit right to privacy in the Constitution,\textsuperscript{154} the judicially defined right is now widely recognized.\textsuperscript{155} Warren and Brandeis first developed the concept in 1890 when they argued that copyright law should be developed under a privacy right doctrine rather than under a property right doc-

\begin{footnotesize}
\begin{enumerate}
\item See supra notes 105-08 and accompanying text.
\item See id.
\item See Tribe, supra note 87, at 1302 (stating that "[m]uch judicial and scholarly ink has been splashed in the task of expounding this paradoxical right").
\item See id. at 1308. Tribe envisioned that: The Constitution was consecrated to the blessings of liberty for ourselves and our posterity—yet it contains no discussion of the right to be a human being; no definition of a person; and, indeed, no express provisions guaranteeing to persons the right to carry on their lives protected from the "vicissitudes of the political process" by a zone of privacy or a right of personhood.
\item Id. (footnote omitted).
\item See Iqbal v. Moore, 898 F.2d 870, 873 (2nd Cir. 1990) (recognizing that the "constitutional right to privacy, although difficult to articulate precisely, has been firmly established"); Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia, 812 F.2d 105, 109 (3rd Cir. 1987) (stating that "[i]t is now established that the United States Constitution provides some protection of an individual's privacy"); see also Tribe, supra note 87, at 1308 (stating that the "judiciary has thus reached into the Constitution's spirit and structure, and has elaborated from the spare text an idea of the 'human' and a conception of 'being' not merely contemplated but required").
\end{enumerate}
\end{footnotesize}
trine. They defined privacy as the “right to be let alone” and as “the more general right to the immunity of the person—the right to one’s personality.” While the Warren and Brandeis article is generally cited as the precursor to the tort of invasion of privacy, it is also considered the precursor to the constitutional right to privacy.

The constitutional right to privacy is most often cited for its protection of an individual’s right to make decisions about family and procreation issues. It is not, however, limited to these issues. Warren and Brandeis’ definition suggests a wider area of protection: not only did Warren and Brandeis refer to the right of privacy very generally as the “right to be let alone,” but approximately forty years later Brandeis again referred to privacy as “the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.”

B. The Right to Nondisclosure of Private Facts

In 1976, the Supreme Court indirectly broadened the scope of privacy to include control over personal information. In Whalen v. Roe, physicians and patients challenged the constitutionality of a New York statute that required the state to maintain “in a central-

---

157. Id. at 193.
158. Id. at 207.
161. See Paul v. Davis, 424 U.S. 693, 713 (1976) (characterizing the majority of the privacy decisions as “matters relating to marriage, procreation, contraception, family relationships, and child rearing and education. In these areas it has been held that there are limitations on the States’ power to substantively regulate conduct”).
163. Olmstead, 277 U.S. at 478 (Brandeis, J., dissenting).
164. See Whalen v. Roe, 429 U.S. 589, 599 (1977) (denying that any invasion of a privacy right occurred, but nonetheless recognizing that a right to privacy existed in certain circumstances); Tribe, supra note 87, at 1389-90 (explaining that control over information “must be understood as a basic part of the right to shape the ‘self’ that one presents to the world, and on the basis of which the world in turn shapes one’s existence”).
ized computer file, the names and addresses of all persons who have obtained, pursuant to a doctor’s prescription, certain drugs for which there is both a lawful and an unlawful market.” 165 Although the Court ultimately held that there was no invasion of privacy, in considering the constitutionality of this statute, the Court stated that there were two possible privacy interests: “the individual interest in avoiding disclosure of personal matters and ... the interest in independence in making certain kinds of important decisions.” 166

The Court established that the right to nondisclosure of private information was a judicially created doctrine emanating from the “undefined penumbra” of Constitutional protections. 167 The Court stated that “[l]anguage in prior opinions of the Court or its individual Justices provides support for the view that some personal rights . . . are so ‘fundamental’ that an undefined penumbra may provide them with an independent source of constitutional protection.” 168 In support of this statement, the Court quoted Justice Brandeis’ reference to “the right to be let alone,” 169 and the Court’s statement in Griswold v. Connecticut that the “First Amendment has a penumbra where privacy is protected from governmental intrusion.” 170

After acknowledging that there existed a privacy right to nondisclosure of information, the Court engaged in a balancing test to determine whether in fact there had been an invasion. The Court ultimately decided that the patients’ privacy rights had not been invaded and that the threat of disclosure of private facts was not sufficiently great to require a remedy. In reaching this conclusion, the Court noted that an independent investigation of the filing systems “failed to reveal a single case of invasion of a patient’s privacy.” 171 Failing to find factual data supporting the petitioners’ fears, the Court declined to accept the assumption that the computerized filing system would be used improperly. 172 The Court also

165. Whalen, 429 U.S. at 591.
166. Id. at 599-600.
167. Id. at 598-99 n.23.
168. Id.
169. Id. at 599 n.25 (quoting Olmstead v. United States, 277 U.S. 438, 478 (Brandeis, J., dissenting)).
170. Whalen, 429 U.S. at 599 n.25 (quoting Griswold v. Connecticut, 381 U.S. 479, 483 (1965)).
171. Id. at 601 n.27.
172. See id. at 601.
reasoned that the disclosure of personal information to authorized employees of the New York Department of Health was not significantly different from disclosures made under the prior law, nor "meaningfully distinguishable from a host of other unpleasant invasions of privacy that are associated with many facets of health care." However, in holding that the privacy rights were not violated, the Court's focus was on the state's regulatory purpose in overseeing the dissemination of drugs. Absent this clearly justified regulatory purpose, the question remains whether goals or purposes not related to public health would justify an invasion of privacy.

While Whalen recognized that there existed a Constitutional right to privacy concerning the nondisclosure of private facts, it did not clearly establish the parameters of this right. Unclear from this decision is whether the Court considers the right fundamental; the Court does not make a specific statement either way. In citing Roe v. Wade, the implication is that the Court viewed the right to nondisclosure of private facts to be fundamental since the Court classifies decisions concerning procreation as fundamental. This implication is bolstered by the fact that the Court does not do a rational basis test, which would be appropriate if the right were nonfundamental. Instead, the Court engages in a balancing test, which is only used in intermediate or higher level scrutiny cases involving fundamental rights.

The Court's later decision in United States Department of Justice v. Reporters Committee for Freedom of the Press is also evasive as to the level of scrutiny to apply to privacy invasions. In this case, the Court considered whether a CBS reporter and a media rights advocacy group could gain access to the FBI rap sheets of Charles Medico under the FOIA. In deciding not to allow disclosure of the records, the Court appeared to apply a more stringent standard than it had in Whalen. The Court stated that:

[W]e hold as a categorical matter that a third party's request for law enforcement records or information about a private citizen can reasonably be expected to invade that

173. Id. at 602.
174. See id. at 600.
175. See Whalen, 429 U.S. at 598-600 nn.23, 26.
176. See id. at 600 (finding that the "New York program does not, on its face, pose a sufficiently grievous threat" to patient interests).
citizen's privacy, and that when the request seeks no "official information"... but merely records that the Government happens to be storing, the invasion of privacy is "unwarranted." 178

The use of the word "categorical" suggests a more stringent test than the "balancing" alluded to in Whalen. This more stringent test can be explained by the presence of the FOIA, which was not a factor in Whalen. Moreover, Justice Blackmun's concurrence suggests that the Court employed a higher standard; he refused to join the Court's opinion because he did not like the "Court's bright-line approach but would leave the door open for the disclosure of rap-sheet information in some circumstances." 179 Justice Brennan signed on to Justice Blackmun's concurrence, thereby distinguishing between Whalen (in which Justice Brennan stated that a compelling state interest may have been required if there had been a broad dissemination of information 180) and Reporters Committee (in which he agreed that a more flexible balancing approach was necessary 181). 182

An analysis of lower court decisions reveals that several courts classify the right to nondisclosure of information as a nonfundamental right that requires intermediate level scrutiny. The Third Circuit, noting that "[m]ost circuits appear to apply an 'intermediate standard of review' for the majority of confidentiality violations," 183 applied a medium level of scrutiny to the city of Philadelphia's release of medical and financial information. 184 Likewise, the Fifth Circuit weighed the "government's interest in disclosure against the individual's privacy interest," 185 and the

178. Id. at 780.
179. Id. at 781 (Blackmun, J., concurring).
180. See Whalen, 429 U.S. at 606-07.
181. See Reporters Committee, 489 U.S. at 780-81 (Blackmun, J., concurring).
182. This distinction by Justice Brennan is curious, considering that the dissemination of information in Reporters Committee was potentially more broad than it was in Whalen. In Reporters Committee, it was a reporter and an association of journalists who sought to have private information disclosed. See id. at 757. In Whalen, the information was not actually disclosed to anyone; the threat of disclosure was only to the State, not to the media. Whalen, 429 U.S. at 600-01.
184. See id. at 111; see also Doe v. Southeastern Pa. Transp. Auth., 72 F.3d 1133, 1139 (3rd Cir. 1995) (applying an intermediate level of scrutiny to disclosure of pharmaceutical drug information to employer of employee suffering from AIDS).
185. National Treasury Employees v. United States Dep't of the Treasury, 25 F.3d 237,
Second Circuit assessed privacy challenges "under an intermediate scrutiny, or balancing, analysis."

However, not all courts treat the disclosure of private information as a nonfundamental right. The Tenth Circuit, for example, applies a compelling state interest test for invasions of privacy. In Mangels v. Pena, the Tenth Circuit considered an invasion of privacy claim when the Denver Police Department released to the media a report alleging that two firefighters used drugs. In analyzing the claim, the court stated that there is "an assurance of confidentiality with respect to certain forms of personal information possessed by the state," and that "[d]isclosure of such information must advance a compelling state interest which ... must be accomplished in the least intrusive manner." Likewise, in Sheets v. Salt Lake County, the Tenth Circuit again stated that it found "no compelling state interest in ... [the] disclosure of the diary excerpts."

Beyond questions of classifying the right and deciding which level of scrutiny to apply, the Whalen decision is also elusive as to what types of information are considered sufficiently personal to trigger the right. The difference in types of information and the way in which the information is presented may in fact make a significant difference in the outcome of the case. The decision in Whalen is factually limited to the consideration of medical records, as opposed to Reporters Committee, where the issue was the disclosure of FBI rap-sheet information. While the Whalen Court did not recognize the release of medical information as a sufficient threat to privacy based on the facts presented, the Reporters Committee Court did consider the release of rap sheet information to be a substantial intrusion.

The Court in Reporters Committee further differentiated between consolidated and unconsolidated information. The Court specifically noted that information available in public court records

242 (5th Cir. 1994).
187. 789 F.2d 836 (10th Cir. 1986).
188. See id. at 837.
189. Id. at 839.
191. Id. at 1388-89 (involving a husband's privacy interest in the contents of his wife's diary, which he had turned over to police to aid their investigation).
192. United States Dep't of Justice v. Reporters Comm. For Freedom of the Press, 489 U.S. 749, 771 (1989) (stating that the "privacy interest in a rap sheet is substantial").
was significantly different from information available in a rap sheet, which consolidates a variety of information that may not be otherwise available. This distinction led one commentator to conclude that: "What the court found in Reporters Committee is that there is an expectation of privacy in a computerized, comprehensive record of all of an individual's activities—but not necessarily an expectation of privacy in a single criminal event." Thus, the strength of the privacy interest appears to be affected not only by the type of information but also by the presentation of the information.

The individual’s expectation of privacy is cited by several courts as being critical to the assessment of the privacy interest. The Court in Whalen denied relief in part because the individuals did not have a high privacy expectation since the medical field is one in which there are continuous and expected invasions of privacy by doctors, insurance agents, and public health officials. Several courts require a showing of an expectation of privacy to sustain a Constitutional challenge. In Nilson v. Layton City, for example, the Tenth Circuit required that the "party asserting the right [have] a legitimate expectation of privacy." In order to establish a legitimate expectation of privacy, the information must be highly personal or intimate and not readily available to the public. The Tenth Circuit later clarified this requirement when it stated that "information need not be embarrassing to be personal and whether it is sufficiently personal to be protected is... a legitimate question for the jury."

Also important is the question of who is requesting the information and for what purpose. The Court emphasized this point in Reporters Committee when it based its holding largely on the fact that a private person sought the information for the purpose of investigating an individual rather than the state. The Court noted

---

193. See id. at 764 (noting that "[p]lainly there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information").

194. Flaherty, supra note 159, at 841.


196. 45 F.3d 369 (10th Cir. 1995).

197. Id. at 371.

198. See id. at 372.

that the "FOIA's central purpose is to ensure that the Government's activities be opened to the sharp eye of public scrutiny, not that information about private citizens that happens to be in the warehouse of the Government be so disclosed."\(^{200}\) The Court stated that disclosing the information would "not shed any light on the conduct of any Government agency or official."\(^{201}\) Therefore, it appears to be dispositive in certain situations that there will be a constitutional invasion of privacy if the information is being disseminated to a private person rather than to the state, and if the information will not shed light on the government but only on the individual.

C. Implications for Private Tax Collection

The constitutional right to nondisclosure of private facts has implications for the privatization of tax collection. The existence of the right raises questions as to whether disseminating information to private tax collectors is an infringement on the individual's right to prevent disclosure of personal financial information. The following analysis illustrates that the IRS' plan to disseminate financial information to private tax collectors violates the constitutional right to privacy.

1. Personal Information

The first question that must be addressed in considering the private tax collection scheme is whether financial information is sufficiently personal to raise a constitutional privacy challenge. In *Nixon v. Administrator of General Services*,\(^ {202}\) the Supreme Court recognized that President Nixon had a "legitimate expectation of privacy" in "matters concerned with family or personal finances."\(^ {203}\) Although the Court ultimately denied Nixon's privacy challenge,\(^ {204}\) the Court acknowledged the President's legitimate

---

201. *Id.* at 773.
203. *Id.* at 457-58.
204. The court made the following observation about President Nixon's privacy interests in protecting the tapes and documents collected during his presidency:

In sum, appellant has a legitimate expectation of privacy in his personal communications. But the constitutionality of the Act must be viewed in the context of the limited intrusion of the screening process, of appellant's status as a public figure, of his lack of any expectation of privacy in the overwhelming majority of the materials, of the important public interest in preservation of the
privacy expectation for personal and financial information because of the "pattern of de facto Presidential control and congressional acquiescence" over such matters.\textsuperscript{205} While the Nixon case raised unique questions because it involved separation of powers issues intertwined with privacy issues, the Court's statement that Nixon had a legitimate expectation of privacy was based on the subject matter of the disclosure (family and personal finances), not on his relationship with Congress.\textsuperscript{206} Moreover, several circuits that have considered the issue without the separation of powers concerns have held that financial information is personal in nature and requires constitutional protection.\textsuperscript{207}

Not all circuits, however, have reached this conclusion. In \textit{O'Brien v. DiGrazia},\textsuperscript{208} the First Circuit refused to grant privacy protection to financial information.\textsuperscript{209} In this case, police officers were suspended for failing to complete a financial questionnaire; they then brought a civil rights action against the police commissioner. The court held that the commissioner had not invaded the officers' privacy because "[p]rivacy in the sense of freedom to withhold personal financial information from the government or the materials, and of the virtual impossibility of segregating the small quantity of private materials without comprehensive screening.

\textit{Id.} at 465.

\textsuperscript{205} \textit{Id.} at 458.

\textsuperscript{206} \textit{See id.} at 457-58 (noting the "constitutionally protected privacy rights in matters of personal life unrelated to any acts done . . . in their public capacity").

\textsuperscript{207} In \textit{Barry v. City of New York}, the Second Circuit stated that "public disclosure of financial information may be personally embarrassing and highly intrusive." 712 F.2d 1554, 1561 (2d Cir. 1983) (considering whether the city's financial disclosure law was an invasion of privacy). Although the court ultimately decided that there had not been an invasion of privacy because there were sufficient safeguards to protect against an invasion, it did recognize that the plaintiffs had a legitimate interest in protecting such information. \textit{See id.} The Third Circuit agreed in \textit{Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia} that financial information is entitled to privacy protection, despite the fact that it is less intimate than medical information. Although the court ultimately decided that there had not been an invasion of privacy because there were sufficient safeguards to protect against an invasion, it did recognize that the plaintiffs had a legitimate interest in protecting such information. \textit{See Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia, 812 F.2d 105, 115 (3rd Cir. 1987)}. Similarly, the Fifth Circuit recognized that individuals have a legitimate expectation of privacy concerning financial matters because money concerns are an "essential element of . . . peace of mind." \textit{Plante v. Gonzalez, 575 F.2d 1119, 1130 (5th Cir. 1978)} (quoting City of Carmel-by-the-Sea v. Young, 466 P.2d 225, 231-32 (Cal. 1970)). The \textit{Plante} court also noted that financial privacy is a substantial interest because of "the threat of kidnapping, the irritation of solicitations, [and] the embarrassment of poverty." \textit{Id.} at 1135.

\textsuperscript{208} 544 F.2d 543 (1st Cir. 1976).

\textsuperscript{209} \textit{See id.} at 545-46.
public has received little constitutional protection." The First Circuit's rationale, in *O'Brien*, for denying protection for financial information can be distinguished because there was no threat of disclosure; the police officers did not claim that the commissioner would disclose their finances to the public or government agencies.

Because the Supreme Court and the majority of federal circuits recognize that financial information is sufficiently personal to raise privacy concerns, and because the *O'Brien* case can be distinguished on its facts, it is likely that tax information will achieve constitutional protection. Releasing information concerning past-due taxes is clearly a personal, financial matter since it discloses not only that taxes are past due but also allows parties to assess the individuals' net income and tax bracket. Moreover, it is not merely financial information that will be disclosed to private tax collectors; the bill, as it currently stands, will also allow the IRS to disclose social security numbers.

2. Type of Information Requests

The second question that the private tax collection bill raises is whether the purpose and direction of disclosure are valid. As discussed in *Reporters Committee*, the Court is less willing to allow a disclosure of private financial information when the person seeking the information uses it to assess the financial records of an individual rather than to assess the workings of the agency generally. This purpose analysis is not particularly applicable to private tax collection because, although private tax collectors are acquiring information about specific individuals, they are not seeking or requesting the information for their own purposes. Rather they are given private financial information in order to collect money for the government. Thus, there is little concern for an illegal purpose.

On the other hand, the Court in *Reporters Committee* also alluded to the fact that it is less willing to allow disclosure when a private individual rather than a government employee or agency requests the information. Likewise, several courts have held

---

210. Id. at 545-46.
211. See id. at 546.
212. See supra note 48 and accompanying text.
214. See id. at 765.
that companies hired by the government are in fact independent contractors and not agents of the government.\textsuperscript{215} This factor obviously raises questions about the role of the private tax collectors and whether they are classified as private or public actors. Under the constitutional privacy analysis (as opposed to the tort privacy analysis discussed in the following Part of this Note\textsuperscript{216}), disclosure of private financial information to a private individual is more likely to transgress constitutional privacy protection. Therefore, disclosure to private tax collectors could conceivably be a violation of individuals' privacy rights merely because the tax collectors are private actors. And yet, as the qualified immunity discussion under the torts analysis illustrates,\textsuperscript{217} it is possible to argue that private tax collectors are state actors. If private tax collectors are indeed state actors, then the likelihood of constitutional violations of privacy are lessened. In an attempt to underscore the potential problems associated with the current tax collection proposal, this section will assume that the collection agency is a private and not a state actor.

3. Expectation of Privacy

The third preliminary question that must be answered before engaging in a balancing test concerns expectations; whether the individual taxpayer has a constitutionally-based expectation of privacy for financial and tax return information. This question is answered in the affirmative based on a complicated web of administrative, historical, and legal factors. The most obvious factor contributing to the taxpayers' expectation of privacy is that the current administrative system for collecting federal taxes does not include private tax collectors. In other words, taxpayers are accustomed to a system of tax collection in which government officials review their financial information and private parties, generally, do not have access to it. The tax situation is different from the medical environment where numerous outside individuals must have private information in order to treat patients, pay for services, and gather data about diseases and medical conditions. In the case of tax collection, the only people who must know about the taxpayer's financial situation are the individual taxpayer and the

\textsuperscript{215} See infra Part V.D.1.
\textsuperscript{216} See infra Part V.
\textsuperscript{217} See infra part V.D.
government. Administrative custom and history have therefore created a privacy expectation.218

Another factor contributing to the taxpayers’ expectations of privacy is the growing trend in statutory and tort law to broaden the protected area of privacy rights. As discussed earlier, the Privacy Act of 1974 and the exceptions to the FOIA provide taxpayers with clear privacy rights concerning their personal tax information.219 These statutory rights create expectations for individuals. The Supreme Court used the expansion of statutory protections rationale in Reporters Committee to support its finding that disclosure of FBI rap-sheets was unconstitutional. The Court reasoned that an expectation of privacy was “supported by the web of federal statutory and regulatory provisions that limits the disclosure of rap-sheet information,” and then proceeded to summarize several federal regulations and statutes that limited the disclosure of rap-sheet information.220 The Court also pointed to portions of the FOIA and the Privacy Act to illustrate the “level of federal concern over centralized data bases.”221 Based on the Court’s use of this reasoning in Reporters Committee, it is arguable that taxpayers have an expectation of privacy based on existing statutory law.

Developments in tort law also encourage an expectation of privacy for taxpayers.222 As courts recognize an invasion of privacy cause of action for breaches of informational privacy, the indirect effect is to create an expectation of constitutional protection. The Tenth Circuit made a cursory mention of this relationship in Sheets when it commented in a footnote that “[t]hough the common law tort of invasion of privacy does not control the federal constitutional claim, we find that the tort . . . provides some guidance as to what constitutes a reasonable expectation of privacy.”223 Therefore, the expectation of privacy is strengthened as

218. The flip-side of this rationale was used by the Third Circuit when it stated that “[w]hen employees are aware that disclosure of otherwise confidential information has historically been required by those in similar positions, their expectation of privacy in that type of information is reduced.” Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia, 812 F.2d 105, 114 (citing Shoemaker v. Handel, 795 F.2d 1136, 1142 (3rd Cir. 1986) (upholding random drug testing of jockeys because of a reduced expectation of privacy due to the racing commission’s past conduct)).

219. See supra Part III.B.


221. Id. at 767.

222. See generally infra Part V (discussing the history of the privacy tort and concluding that taxpayers have an expectation of privacy).

223. Sheets v. Salt Lake County, 45 F.3d 1383, 1388 n.1 (10th Cir. 1995), cert. denied,
both tort and statutory law expands, which in turn expands the constitutional protections to taxpayers.

4. Level of Scrutiny

Having established that financial information is sufficiently personal to be constitutionally protected, that taxpayers have expectations of privacy, and that disclosing information to private tax collectors is problematic because they are private parties, the question remains whether disclosing information actually constitutes a violation of the privacy right. In order to determine the answer to this question, it is necessary to apply either a strict scrutiny test or an intermediate level scrutiny test. However, if the government's interests fail under an intermediate level test, they necessarily fail under a strict scrutiny test. Therefore, the following analysis considers only the intermediate level scrutiny test, and illustrates that individuals rights triumph.

When engaging in an intermediate level of scrutiny, the balance rests between the governmental interest in the reasons for disclosing the information and the individual interests in protecting the information. Factored into the government's side of the analysis are the procedural safeguards that the government has implemented to prevent disclosure, whether the means employed by the government are reasonable, and a comparison to the existing system for controlling the information. For example, in Whalen, the Court held that the state's regulatory purpose of overseeing the dissemination of drugs outweighed the possible invasion of privacy. In the tax collection situation, on the other hand, the state does not have a similarly persuasive purpose. Ostensibly, the only purpose that the state has for disseminating tax information is for efficiency concerns; that is, the state thinks that privatization would increase revenues or decrease expenditures. It will be hard for the state to argue that the efficiency concerns should outweigh privacy interests because, as was argued in Whalen, efficiency is not as strong a concern as public safety.

As the proposal currently stands, it does not establish safeguards that would prevent disclosure of information to unauthorized individuals. The proposal does not include provisions ensuring that

224. See supra note 174 and accompanying text.
225. See supra notes 171-74 and accompanying text.
the private agents cannot gain more than the necessary information, or provisions that would protect against public disclosure. While the means are reasonable (and the courts will not inquire into the truth of the efficiency arguments because that is essentially a political or legislative question), the comparison to the existing system for controlling information will probably weigh in favor of the individual right. In other words, if the court compares the proposal to the existing tax collection system, they will find that the existing system is sufficient to achieve the desired end. Moreover, the potential for abuse under the private system is too great to warrant change. In light of the individual's expectation of privacy, the right to nondisclosure of private facts, whether classified as a fundamental or nonfundamental right, outweighs the state's interests under either a strict scrutiny or an intermediate level test.

V. PRIVACY TORT

A. Background

Like the constitutional right to privacy, which is embroiled in debate concerning its scope and existence, the right to privacy under tort law is similarly attacked and questioned. In part, this debate is a result of the relatively recent origin of the tort; no English or American court expressly granted relief based on privacy before 1890. Recognition of a privacy tort law emerged only

226. See supra notes 153-63 and accompanying text.
227. See Edward J. Bloustein, Privacy, Tort Law and the Constitution: Is Warren and Brandeis' Tort Petty and Unconstitutional as Well?, 46 TEX. L. REV. 611, 628-29 (1968) (defending Warren and Brandeis's privacy tort because the "Meikeljohn theory permits the mass publication tort to be applied consistently with the mandate of the first amendment"); Harry Kalven, Jr., Privacy in Tort Law—Were Warren And Brandeis Wrong?, 31 LAW & CONTEMP. PROBS. 326, 333 (1966) (arguing that the privacy tort "has no legal profile"); Mary Ann L. Wymore, Modernizing the Law of Privacy, 40 FED. B. NEWS & J. 374 (1993) (challenging the validity of the intrusion tort and arguing for its elimination); Diane L. Zimmerman, Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort, 68 CORNELL L. REV. 291, 294 (1983) (arguing that the "elegant vessel that Warren and Brandeis set afloat some nine decades ago is in fact a leaky ship which should at long last be scuttled"); Russell D. Workman, Balancing the Right to Privacy and the First Amendment, 29 HOUSt. L. REV. 1059 (1992) (arguing that a proper balancing of interests requires the Court to reach a different result in privacy torts than it has traditionally recognized).
228. W. PAGE KEeton ET AL., FrossEr AND KEeton ON THE LAW OF TORTS § 117, at 849 (5th ed. 1984); RESTATEMENT (SECOND) OF TORTS § 652A cmt. a (1989) (noting that prior to 1890 no court expressly recognized the privacy tort, but that "there were decisions that in retrospect appear to have protected it in one manner or another").
after publication of the Warren and Brandeis article in 1890.\textsuperscript{229} Despite the encouragement of Warren and Brandeis, many courts were initially reluctant to recognize the new privacy tort,\textsuperscript{230} and those courts that chose to recognize the tort did not agree on the scope or elements of the right.\textsuperscript{251}

In 1960, Dean Prosser addressed the confusion among the courts by analyzing the cases falling under the broad rubric of privacy.\textsuperscript{252} He categorized the privacy cases into four sub-groups: (1) intrusion upon the plaintiff's seclusion or private affairs;\textsuperscript{233} (2) public disclosure of private facts;\textsuperscript{234} (3) publicity that sheds a false light on the plaintiff;\textsuperscript{235} and (4) appropriation of the plaintiff's name or likeness for another's benefit.\textsuperscript{236} The Restatement of Torts adopted this classification in 1981.\textsuperscript{237} The result of the Restatement's adoption is that the majority of jurisdictions now recognize a right to privacy, but not necessarily all four categories of the tort.\textsuperscript{238}

\textsuperscript{229} The first case recognizing the privacy tort was Pavesich v. New England Life Ins. Co., 50 S.E. 68, 80 (Ga. 1905). In Pavesich, the court argued that:

\begin{quote}
The knowledge that one's features and form are being used . . . and, as long as the advertiser uses him for these purposes, he cannot be otherwise than conscious of the fact that he is for the time being under the control of another, that he is no longer free, and that he is in reality a slave, without hope of freedom, held to service by a merciless master.
\end{quote}

\textit{Id.} at 80.

\textsuperscript{230} See Roberson v. Rochester Folding Box Co., 64 N.E. 442 (N.Y. 1902) (denying relief to a woman whose picture was used to advertise flour because of the lack of precedent to support an invasion of privacy claim).

\textsuperscript{231} See William L. Prosser, Privacy, 48 CAL. L. REV. 383, 389 (1960). Prosser states that:

\begin{quote}
What has emerged from the decisions is no simple matter. It is not one tort, but . . . four. The law of privacy . . . [cases] are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff . . . "to be let alone."
\end{quote}

\textit{Id.}

\textsuperscript{232} See \textit{id.} at 383.

\textsuperscript{233} See \textit{id.} at 389-92.

\textsuperscript{234} See \textit{id.} at 392-98.

\textsuperscript{235} See \textit{id.} at 398-401.

\textsuperscript{236} See Prosser, supra note 231, at 401-07.


\textsuperscript{238} See §§ 652B, C, D, E.
B. Public Disclosure of Private Facts

Public disclosure of private facts is generally thought to include three elements: (1) the disclosure must be public; (2) the facts disclosed must be private; and (3) the disclosure must offend the reasonable person.\(^{239}\) However, the Second Restatement of Torts includes a fourth element requiring that the public not have a legitimate interest in having the facts made available.\(^{240}\)

Much of the confusion surrounding the public disclosure of private facts results from definitional uncertainty.\(^{241}\) Courts differ as to what constitutes a public disclosure and whether public disclosure is actually necessary.\(^{242}\) Public disclosure may or may not require a large audience; disclosure of private information to individuals or small groups may constitute an invasion of privacy in certain situations. In *Beaumont v. Brown*, the court stated that disclosure of information to a neighbor could constitute a breach of privacy.\(^{243}\) And yet, disclosure of information to the news media or other large audience may not constitute a public disclosure, especially if the information is part of the public record.\(^{244}\)

Courts differ as to the nature of the facts that must be disclosed to constitute a breach; all agree, however, that the disclosure must offend a reasonable person. One group of cases addresses the public disclosure of private, life-style facts. In *Melvin v. Reid*, the plaintiff sued for the public disclosure that she had previously been a prostitute.\(^{245}\) The court granted relief because the ordinary, reasonable person would not want such information disclosed.\(^{246}\)

\(^{239}\) See Prosser, supra note 231, at 393-96; RESTATEMENT (SECOND) OF Torts § 652D (1989).

\(^{240}\) See Restatement (Second) of Torts § 652D & cmt d (1989).


\(^{244}\) See Prosser, supra note 231, at 396 (stating that “the existence of a public record is a factor of a good deal of importance, which will normally prevent the matter from being private”).


\(^{246}\) See id. at 93 (stating that defendant’s conduct “was not justified by any standard of morals or ethics known to us”).
Another group of cases considers disclosure of factual information that is not necessarily related to one's lifestyle but has more to do with one's medical or financial condition. This second category has less to do with events or happenings in one's life, and more to do with data, statistics, and numbers. The privacy issues surrounding such facts are frequently grouped under the generic term of "informational privacy." Alan Westin defines informational privacy broadly as the "claim of individuals . . . to determine for themselves when, how, and to what extent information about them is communicated to others." An important feature of informational privacy is that the issues inherent in the tort become more acute with technological advancement. After all, "[p]rivate data banks have mushroomed over the past few decades, generating a spate of dire predictions . . . [because] on average, they trade information on every man, woman and child five times per day." Technological advancement allows more information to be amassed and traded more frequently, thereby increasing the power of those who control the databanks and decreasing individual power and control. As the power dynamics change, so too does the potential for recovery under a privacy tort; the more information that a company has about an individual, the greater the potential for disclosure of private facts that would offend the reasonable person.

247. See, e.g., Brents v. Morgan, 297 S.W. 967, 968 (Ky. 1927) (holding a creditor liable for an invasion of privacy after it placed a five foot by eight foot sign in its window that stated: "Dr. W. R. Morgan owes an account here of $49.67.").

248. ALAN F. WESTIN, PRIVACY AND FREEDOM 7 (1967).


250. See generally Frederick Schauer, Reflections on the Value of Truth, 41 CASE W. RES. L. REV. 699 (1991). Professor Schauer makes this point when he argues that "we should examine privacy law by looking at the class of individuals or institutions empowered by an increase in information brought by a relaxation of the current standard and at whose expense this occurs." Id. at 718.
C. Information Privacy under the IRS

While many commentators are concerned about the ramifications of private databanks on privacy protection, additional issues arise when the information collector is the government. One of the major differences between public collectors and private collectors is the amount of information involved: the government has access to private databanks as well as to huge amounts of information collected by government agencies and departments. The result is that a privacy breach by the government is potentially greater than a breach by a private company.

A second difference between public and private collectors of information is that the government is caught in a paradox with which the private companies do not have to contend. The paradox is that the government is “a logical source of protection from violations of personal privacy, [but] is probably the greatest information collector and does not always vigilantly protect personal privacy.”252 Thus, the government becomes both “collector” and “protector.”253 This tension leads to the question of which interest the government favors; in the case of tax collection, the “collector” interest will more than likely outweigh the “protector” interest since the government must have revenues to operate before it can regulate.

Third, there is a difference in how the information is gathered. In the private context, most of the information is gathered through other vendors. That is, the individual does not consent to the com-

251. See Francis S. Chlapowski, Note, The Constitutional Protection of Informational Privacy, 71 B.U. L. REV. 133, 134 (1991) (stating that “individuals need protection from the government itself, from both unnecessary collection of personal information and from illegitimate disclosure of this information”); Harold J. Krent, Of Diaries and Data Banks: Use Restrictions Under the Fourth Amendment, 74 TEX. L. REV. 49 (1995) (addressing the issue of whether government authorities should be able to disseminate information they obtain in legal searches and seizures of databanks); Sandra Byrd Peterson, Your Life as an Open Book: Has Technology Rendered Personal Privacy Virtually Obsolete?, 48 FED. COMM. L.J. 163, 164 (1995) (arguing that privacy tort law has not kept pace with technology); Judith Beth Prowda, Privacy and Security of Data, 64 FORDHAM L. REV. 738, 743 (1995) (stating that existing laws need to be changed in order to ensure privacy in an electronic environment); Jonathan P. Graham, Privacy, Computers, and the Commercial Dissemination of Personal Information, 65 TEX. L. REV. 1395, 1397 (1987) (arguing that the legal right to privacy must protect the “individual’s interest in maintaining autonomy and society’s interest in fostering productive human relations in the face of the encroachments threatened by the information age”).
252. Chlapowski, supra note 251, at 133-34 (citations omitted).
253. See id.
panies having the information. In stark contrast to the private companies, the government collects information through voluntary disclosure. The information that individuals disclose in their tax returns is given voluntarily and with the assurance that the information will remain confidential. Private companies rarely agree to keep their information confidential. This difference suggests that privacy expectations of an individual are greater when dealing with the government than with a private company.

The fourth and perhaps the most significant difference between public and private information collectors concerns the potential liability of the parties. While the doctrine of sovereign immunity usually protects the government from citizens' tort claims under common law, the Federal Tort Claims Act ("FTCA") acts as a partial waiver of the sovereign immunity doctrine. Under the FTCA, individuals can recover damages for torts committed by government agents, officials, or employees acting within the scope of their employment, so long as the injured party brings an action against the government rather than against the individual, and the tort claim is based on state law.

However, the FTCA does not cover most breaches by IRS employees because of two notable exceptions to the sovereign immunity waiver. First, the discretionary exception clause retains sovereign immunity for any claim "based upon the exercise or performance or the failure to perform a discretionary function or duty on the part of the federal agency or an employee of the Gov-

---

254. See Bibas, supra note 249, at 593 ("[C]onsumer credit bureaus hold 400 million credit files and make possible 1.5 million credit decisions each day.").
257. It should be noted that the protection from tort liability does not preclude criminal charges being brought against an IRS agent. In United States v. Richey, the Ninth Circuit held that an IRS agent who disclosed confidential tax information was not protected from prosecution. 924 F.2d 857, 862 (9th Cir. 1991). The IRS agent was indicted for his involvement in a tax shelter scheme and was convicted of conspiracy and aiding in the preparation of false tax returns. See id. at 858. After sentencing, Richey accused the presiding judge of being malicious and disclosed that he had interviewed the judge and assessed additional taxes fifteen years prior. See id. at 858, 864. Because of these statements, Richey was convicted of three felony counts of unauthorized disclosure of tax return information in violation of I.R.C. § 7213. See id. at 864. On appeal, the court affirmed Richey's conviction and denied that his speech required first amendment protection. See id. Richey had argued that his disclosure was entitled to first amendment protection because there was a significant public interest in having the information disclosed. See id. at 860.
ernment, whether or not the discretion involved . . . abuse[].\textsuperscript{258} In interpreting this clause, the Supreme Court defined a "discretionary act" broadly. In turn, the IRS has relied on this broad interpretation to argue that it is exempted from the FTCA for a wide range of "discretionary activities."\textsuperscript{259}

The IRS' arguments based on the discretionary exception are not always successful. In Johnson v. Sawyer,\textsuperscript{260} the Court of Appeals for the Fifth Circuit refused to accept the government's reliance on the discretionary exception. Johnson sued the IRS under the FTCA, alleging that the IRS made an unauthorized disclosure of confidential tax information in a press release. The release stated that: "Johnson, an executive vice president for the American National Insurance Corporation, was charged in a criminal . . . [case] with claiming false business deductions and altering documents involving his 1974 and 1975 tax returns.\textsuperscript{261} In considering this disclosure of tax return information, the court reasoned that there was a limit to the discretionary function exception and that the exception did "not encompass every act of a government employee that involves some element of discretion."\textsuperscript{262} As a result, the court stated that the "sheltering wings of the exception are broad, but not infinite," and refused to allow the IRS' disclosure to fall within the discretionary exception category.\textsuperscript{263}

The FTCA also includes an exception for tax assessment and collection. The exception bars any claims relating to the assessment or collection of any tax. Recognizing the government's interests, "[s]everal courts have broadly interpreted the tax exception to insulate the United States from tort liability."\textsuperscript{264} For example, in Morris v. United States,\textsuperscript{265} the plaintiff sued when the IRS incorrectly informed Morris's creditors that he would become insolvent due to tax liability. The circuit court affirmed the lower court's

\textsuperscript{258} Towe, supra note 255, at 476 (citation omitted).
\textsuperscript{260} 980 F.2d 1490 (5th Cir. 1992), rev'd en banc, 47 F.3d 716 (5th Cir. 1995). Even though Johnson was later reversed, the case still stands for the proposition that the IRS' arguments are not always successful and that the discretionary exception argument may not always work.
\textsuperscript{261} Id. at 1493 n.7.
\textsuperscript{262} Id. at 1502.
\textsuperscript{263} Id. at 1503. Although this case was later reversed, the court did not address this particular issue.
\textsuperscript{264} Towe, supra note 255, at 479.
\textsuperscript{265} 521 F.2d 872 (9th Cir. 1975).
dismissal, stating that the tax exception within the FTCA denied the court subject matter jurisdiction to hear the claim.\(^{266}\)

On the other hand, in \textit{Johnson} the Court of Appeals refused to accept that the tax exception extended to all acts by IRS agents. The court stated that:

A determination that the ambit of the assessment and collection exception is so all-embracing as to cover the news releases about Johnson's conviction would extend the exception to the point that the FTCA's waiver of sovereign immunity vis-a-vis the IRS would be wholly subsumed in that exception. Such an extension would effectively exempt every act of every IRS agent whatsoever. No case law cited to this court supports such a pervasive immunity for the IRS, and we have found none independently. . . . [I]n the instant case, accepting the government's argument would stretch the assessment and collection exception to cover all general deterrent activities of the IRS even though, as here, the taxpayer may have long since paid the tax deficiency as well as penalties and interest.\(^{267}\)

As this quote suggests, taxpayers may be able to recover for invasions of privacy under the FTCA despite the tax exception clause. Notwithstanding the court's argument in \textit{Johnson}, it is highly unlikely that taxpayers' privacy tort claims against the IRS will be successful. This is because the exceptions clause covers a large range of possible invasions. To be successful, the plaintiff must establish that the IRS agent acted in bad faith, and the FTCA requires that the tort be based on state law.\(^{268}\) In fact, Johnson's claims against the IRS were ultimately not successful because the Court of Appeals determined that his claims were not based on state law.\(^{269}\)

\textbf{D. Implications for Private Tax Collectors}

While the above analysis illustrates that the IRS is largely protected from privacy torts due to the doctrine of sovereign immunity and FTCA exceptions, this protection does not necessarily extend to private tax collectors. The following analysis illustrates

\(^{266}\) See id. at 874.
\(^{267}\) \textit{Johnson}, 980 F.2d at 1503-04.
\(^{269}\) See § 1346(b).
that it is unlikely that private tax collectors will be granted immunity from tort liability under the exceptions clauses of the FTCA or under the doctrine of qualified immunity, and that for policy reasons immunity should not be extended.

1. Defining Government Employee

The FTCA’s protection of the IRS against privacy torts may not extend to private tax collectors’ actions because it is not clear that private collectors are government employees. The distinction between government and non-government employees is critical: if private tax collectors are government employees and fall within the scope of the FTCA, neither private companies nor the government can be liable for privacy invasions.\(^\text{270}\) Under the FTCA, individuals cannot be held liable—only the federal government can be held liable.\(^\text{271}\) As a result, if private tax collectors are deemed federal government employees, then the liability rests with the government so long as one of the exceptions does not apply. However, because the private companies are protected from liability under the exceptions clause and the discretionary clause, the government is not liable for the torts of the private tax collectors either. On the other hand, if courts determine that private tax collectors are not government agents, then collectors are liable as private parties.

A review of the statute and the case law interpreting the scope of the statute establishes that private tax collectors do not fall within the statute’s definition of government employee. The FTCA states that individuals can recover damages for torts committed by government agents, officials, or employees acting within the scope of their employment.\(^\text{272}\) In defining “employee,” the statute excludes independent contractors.\(^\text{273}\) Likewise, the case law acknowledges that the statute’s definition of employee was intended to have a broad interpretation,\(^\text{274}\) but does not extend the scope of the FTCA to independent contractors.\(^\text{275}\) In *Flynn v. United

---

270. See § 1346 (describing the liability of the United States as a defendant).
271. See § 1346.
274. See Witt v. United States, 462 F.2d 1261, 1263 (2nd Cir. 1972).
States,276 for example, an employee of an independent contractor brought suit against the United States under the FTCA.277 The court refused to find the United States liable because the United States did not control any of the details of the performance.278 The court stated that in order to be held liable, the “United States must have retained some degree of control over the manner in which the work is to be done,” and that a general right to inspect was not enough.279 Because private collectors are independent contractors, they will not fall within the FTCA’s scope.

The only means by which private collectors can be included within the FTCA’s definition of employee is if the government retains a degree of control over the collectors’ activities. As the proposal currently stands, there appears to be very little supervision or control by the IRS. The bill does not specify how the collections should proceed, and does not provide for close supervision by the IRS. Given this lack of control and supervision the federal government will not be liable, but the private tax collectors will be liable as private parties. If the IRS or Congress promulgates standards establishing exactly how the collections must proceed, then it is possible that the private tax collectors will be deemed federal government employees and neither the federal government nor private tax collectors will be held liable for privacy breaches.

2. Defining State Action and Qualified Immunity

Beyond FTCA classifications is the question of whether private tax collectors’ activities constitute state action. This question is important because if their activities are deemed state actions, then it is possible (but not necessary) that they will enjoy governmental immunity from citizens’ suits.280 In determining the scope of state action, the courts have not been consistent in the tests they apply.281 Essentially three tests have emerged for determining state

276. 631 F.2d 678 (10th Cir. 1980).
277. See id. at 679.
278. See id. at 682.
279. Id. at 680.
280. See Charles W. Thomas, Resolving the Problem of Qualified Immunity for Private Defendants in Section 1983 and Bivens Damage Suits, 53 LA. L. REV. 449, 472 (1992) (discussing the transformation of private parties into state actors). Thomas notes that the state action requirement is necessary under the Fourteenth Amendment, but that the “color of law” requirement is needed under 1983 Bivens actions. The “color of law” requirement does not automatically transfer private parties’ actions into state action. See id.
281. See Daphne Barak-Erez, A State Action Doctrine for an Age of Privatization, 45 SYRACUSE L. REV. 1169, 1173-83 (1995) (outlining five methods courts use to extend the
action: (1) focusing on the government’s authorization; (2) considering the relationship between the private and public entities; and (3) assessing the functions and purposes being served.

The government authorization test is probably the least likely to establish state action by private tax collectors. In *Public Utilities Commission v. Pollak*, the Supreme Court held that when a government entity investigates and explicitly authorizes private action, such explicit authorization “amounts to sufficient Federal Government action to make the First and Fifth Amendments applicable thereto.” Because an implicit authorization is not sufficient, an explicit authorization is the only means by which to extend immunity. Therefore, a private collection company could not be protected from a privacy tort under an assumption of implied authorization of disclosure of private tax information. Instead, the IRS would have to promulgate a general ruling specifically allowing disclosure, or would have to authorize disclosure in particular cases. Not only is it extremely unlikely that the IRS would promulgate a general rule given the existence of the non-disclosure rule of § 6103, it is also highly unlikely that the IRS would give specific authorization for an unlawful disclosure in a particular

---

state action doctrine: (1) coercion and authorization; (2) subsidies; (3) public function theory (state passivity); (4) nexus theory (licensing and regulation); (5) nexus theory (financial support and financial dependency)).

282. See *Public Utilities Comm’n v. Pollak*, 343 U.S. 451, 462 (1952) (recognizing that the Public Utilities Commission of the District of Columbia explicitly authorized a radio program to continue when it “ordered an investigation of it and, after formal public hearings, ordered its investigation dismissed on the ground that the public safety, comfort and convenience were not impaired”); *American Communications Ass’n v. Douds*, 339 U.S. 382, 401 (1949) (stating that “power is never without responsibility. . . . [and] when authority derives in part from Government’s thumb on the scales, the exercise of that power by private persons becomes closely akin, in some respects, to its exercise by Government itself”).

283. See *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961) (holding that the “State has so far insinuated itself into a position of interdependence . . . that it must be recognized as a joint participant in the challenged activity . . . [that] cannot be considered to have been so ‘purely private’ as to fall without the scope of the Fourteenth Amendment”).

284. See *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352-53 (1974) (stating that the Court has “found state action present in the exercise by a private entity of powers traditionally exclusively reserved to the state,” and where “some power delegated to it by the State . . . is traditionally associated with sovereignty”).


286. Id. at 462-63.

287. See Barak-Erez, supra note 281, at 1174.
case. Given that an explicit authorization would not occur, the state action doctrine would not apply to private tax collectors.

Under the second test, the court determines whether the relationship between the public and private entities is "so substantial that the separation of the two is inappropriate." For example, in Burton v. Wilmington Parking Authority the Court held that a coffee shop that refused to serve the Appellant was not acting in a purely private capacity, but that the act was instead a discriminatory state action that violated the equal protection clause and the fourteenth amendment. In reaching this conclusion, the Court looked to the fact that the building and land were publicly owned, and that the benefits of the relationship were shared by the coffee shop and the government.

The likelihood of establishing state action for private tax collectors under the substantial relationship test is slight. This is because the government is not establishing or incorporating new companies to provide a new service; rather the government is hiring existing corporations and law firms that are more than likely established, independent companies with a long history of debt-collection for non-governmental bodies. Moreover, the private company would probably be located on private land and employ private non-government officials, and therefore the symbiotic relationship recognized in Burton would not exist.

The third test provides the greatest opportunity for extending state action to private tax collectors. Under the functional test, the court considers the function and purpose of the delegation of power. If the function and purpose are sufficiently governmental, then immunity is granted. Tax collection is obviously an inherently governmental function: no one but the government collects taxes. Tax collection also serves an inherently governmental purpose that establishes a basis for the government's sovereignty: the only reason for collecting taxes is to enable the government to function. Therefore, under the functionality test, there is a high

288. Id.
290. See id. at 717.
291. See id. at 723.
292. See id. at 724 (stating that the benefits were "mutually conferred").
293. See id.
294. See Barak-Erez, supra note 281, at 1175.
295. See supra note 280 and accompanying text.
296. One counter-argument is that the activity can be defined as merely "debt collec-
probability that courts will determine that private tax collectors are acting under the guise of state action.

While the majority of the courts analyzing the scope of state action consider one of the three tests outlined above, state action does not necessarily establish governmental immunity. State action is merely a means of determining who is responsible for the alleged wrong; immunity on the other hand determines whether the party will be held responsible. However, qualified immunity extends the doctrine of sovereign immunity to persons or agents who perform government functions. At times the tests for establishing state action can be the same as those allowing for qualified immunity because "[t]he Supreme Court has taken a 'functional' rather than a 'derivative' approach to immunities." When both doctrines use a functional analysis of the defendant's actions, then state action will be protected by qualified immunity. When the state action doctrine uses a test other than the functional one, there is less assurance that the state action will be found or that the action will be immune from suit.

Usually the qualified immunity doctrine is asserted when deciding whether an individual can claim an infringement of a constitutional right, but it is also applicable to tort law. As one commentator states, "[D]ecisions by the Supreme Court during the past quarter of a century have authorized a diverse set of local, state and federal officials to assert qualified immunity from liability for monetary damages where the constitutional right [was] violated." In allowing a spectrum of qualified immunity defenses, the courts have not established a clear demarcation of the limits to immunity in either constitutional or torts cases.

In part the uncertainty is a result of the courts' confusion in dealing with public-private sector relationships not previously encountered. The new relationships render much of the common law analysis obsolete; therefore, those courts that employ a strict com-

---

297. See Thomas, supra note 280, at 483 (noting that "it is settled law that access to qualified immunity is linked to the function a defendant fulfills rather than the position he or she holds") (emphasis omitted).
298. Folsom Inv. Co. v. Moore, 681 F.2d 1032, 1037 (5th Cir. 1982).
299. See Thomas, supra note 280, at 451.
300. Id. at 450-51.
301. See id. at 461. The author notes that "[e]fforts by commentators and courts to define the nature and scope of immunity as it pertains to constitutional torts have confronted a host of problems from the very beginning." Id. at 462.
mon law analysis will not find any historical basis for extending qualified immunity to private parties. In *Duncan v. Peck*, for example, the Sixth Circuit refused to extend immunity because there was no basis at common law for granting qualified immunity to private defendants. Likewise, in *Manis v. Corrections Corporation of America*, the court determined that there was no precedent at common law for extending qualified immunity to a corporation operating a state prison. On the other hand, those courts that are more willing to look beyond the confines of a strict common law analysis will also be more likely to extend qualified immunity.

Part of the uncertainty concerning the scope of the qualified immunity doctrine emerges from the courts' emphasis on policy considerations. Unlike the state action doctrine, which emphasizes the relationships and nexus between the government and the private parties, the qualified immunity doctrine looks more to policy considerations. For example, in *Manis*, a district court in Tennessee stated that the test for immunity was "whether such an immunity was recognized at common law when the statute was enacted and whether public policy would support such an immunity." In considering whether to extend qualified immunity to a private corporation hired by a state to operate a prison, the court concluded that the public policy considerations weighed against extension of immunity. Specifically, the court reasoned that private parties were not concerned with the public at large (as a public official would be), but only with the financial interests of the corporation.

The reasoning in *Manis* suggests that the court is willing to analyze the intent of the actors when considering whether to extend qualified immunity in the future. This willingness was evidenced when the court stated that "qualified immunity protects earnest

303. 844 F.2d 1261, 1267 (6th Cir. 1988).
305. See id. at 303.
306. See, e.g., Folsom Inv. Co. v. Moore, 681 F.2d 1032, 1037 (5th Cir. 1982) (extending immunity to defendants who had invoked an attachment statute).
307. See, e.g., Duncan, 844 F.2d at 1264.
309. See id. at 306.
310. See id. at 305.
public officials who risk running afoul of the law in a genuine effort to serve the public.”

In fact, however, the intent is assumed rather than actually assessed. The court assumes that public officials’ intent is to serve the public to the best of his or her ability, and assumes that private actors have their own interests paramount.

The difficulty with the court’s reasoning is that it does not help to determine the type of private actors who will be granted immunity. By assuming that public officials have the public’s best interest at heart and that private actors do not, the court has essentially created a test in which all private contractors fail to have the requisite intent. Like the private company overseeing the prison in Manis, private tax collectors are in the business of collecting taxes and reaping financial gain; they would never be granted qualified immunity under the reasoning in Manis.

While the court’s reasoning in Manis is not particularly helpful in advancing the inquiry of how far to extend qualified immunity, it does raise an important consideration. Manis suggests that all private actors are different from all public actors, thereby begging the question of whether there are two groups of private actors. In other words, while there may be differences among public and private actors, there may also be differences among private actors.

The fear here is that in granting qualified immunity to a sub-group of private actors (as in the sub-group of debt collectors who are contracted by the government to collect delinquent taxes), different intents and behaviors may emerge. Allowing a sub-group of debt collectors to be free from privacy tort liability may lead to continued tortious behavior in non-tax collection situations or to changes in other collectors’ behaviors. These possible effects suggest that qualified immunity is not a prudent choice.

A related policy inquiry is to determine the purpose of granting immunity to private parties. In Wyatt v. Cole, the Supreme Court stated that the ultimate goal of immunity is to “safeguard government, and thereby to protect the public at large, not to benefit its agents.” This statement suggests that the courts need to consider the larger effects of granting immunity rather than focus

311. Id. at 305.
312. This conception of the public/private intent distinction seems to be a mix of public choice theory and communitarian theory.
314. Id. at 168.
on the individual private tax collectors. If the focus is on the govern-
ment, then granting immunity to private tax collectors does very little to aid the government because public tax collectors continue to collect taxes.

The above quoted statement in Wyatt also suggests that the courts should consider the effect that granting immunity will have on the government as a whole, rather than merely ensuring the success of a particular program. If the focus is on the larger picture, then efficiency concerns become less persuasive. Instead of focusing on efficiency in tax collection, for example, the focus is on whether the government can function properly without the immunity. Because the government can function effectively in tax collection (although not necessarily efficiently), there is little reason to expand immunity to private collectors. Moreover, one of the principle aims of privatization is to minimize government involvement. However, in granting immunity to private actors, a paradox is created in which the effort to reduce government in fact expands it.

The Manis court also argued that “the best policy is not to afford them any immunity from suit” because “the threat of incurring money damages might provide the only incentive for a private corporation and its employees to respect the Constitution.” This reasoning raises the most obvious reason for not extending the qualified immunity status to private tax collectors—that individuals will not have a recourse for breaches of privacy. So long as the privacy tort exists and recognizes the public disclosure of private facts as a viable claim, then all those who suffer from such a breach ought to be able to recover.

In sum, private tax collectors will not be liable under the FTCA, but it is also unlikely that they will be granted qualified immunity. Private tax collectors will not be classified as state actors under either an express authorization test or a substantial relationship test, although they may meet the government function test because tax collection is traditionally and inherently a governmental function.

Despite the fact that private tax collectors fulfill the function test, policy considerations require that they not be granted qualified immunity. Granting immunity would not only create an unequal treatment problem between debt collectors working for the govern-

---

ment who had qualified immunity and those who did not work for
the government and had no such protection, but it could potentially
encourage different collection practices between the two groups.
Differing practices may lead to a lessening of standards. It is also
contrary to the general policy of immunity because the government
is able to function adequately without private tax collectors; grant-
ing immunity serves no substantial government purpose. It serves
only to protect the private tax collectors. Finally, granting immuni-
ty undermines an individual’s ability to be made whole after being
wronged.

CONCLUSION

Justice Holmes stated in Compania General de Tabacos de
Filipinas v. Collector316 that “[t]axes are what we pay for a civi-
lized society.”317 While recognizing that the revenue generated
from taxes may enable a greater good, the same is not necessarily
true of tax collection. In fact, the government’s means of tax col-
lection can undermine the basic tenets of a civilized society if done
improperly and without regard for individual rights.

This Note argues that the private tax collection proposal under-
mines our society’s basic notions of privacy. More specifically, it
is an impermissible infringement on existing statutory, constitution-
al, and tort law privacy rights. Private tax collection violates the
nondisclosure rule of § 6103 and transgresses the exception to the
FOIA for tax returns. The proposal is also a violation of the con-
stitutional right to privacy because financial information is suffi-
ciently private to fall under the rubric of private facts that demand
protection and because the state’s interests in efficiency do not
outweigh the privacy interest. Finally, within tort law, private tax
collection is a breach of privacy that should not be protected by
qualified immunity because doing so would violate the traditional
policy reasons for granting immunity. Thus, the current private tax
collection proposal is legally flawed and should be discarded.

The above discussion also uses private tax collection as a case
study for privatization more generally. The broader conclusion that
this Note reaches is that there is a limit to the push for privatiza-
tion, and that the limit rests within the realm of privacy rights.

316. 275 U.S. 87 (1927).
317. Id. at 100.
This conclusion has implications for other privatization proposals; inherently governmental functions that require disclosures of private information cannot be privatized without jeopardizing citizens' privacy rights. The zealous advocates of privatization must recognize this inherent limit to privatization in order for their proposals to be successful.

CHRISTINA N. SMITH