2017

Can New York Publish President Trump's State Tax Returns?

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THE YALE LAW JOURNAL FORUM

MAY 22, 2017

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ABSTRACT: Breaking from a decades-old norm of presidential tax transparency, Donald Trump has refused to make his federal income tax returns available for public inspection. Congressional leaders have blocked bipartisan legislation that would compel the President to disclose his returns. New York State, however, has a unique opportunity to ensure that the practice of presidential tax transparency endures. As a longtime New York resident, President Trump files state tax returns that contain most of the information found in his federal filings. A bill pending in the New York State Legislature would direct state tax authorities to release returns filed by the President and statewide elected officials. If the bill becomes state law, it will do much to protect the norm of presidential tax transparency from Trump's attack.

This Essay considers the legal issues surrounding New York's potential disclosure of President Trump's state tax returns. It anticipates and addresses arguments that state disclosure would violate the Bill of Attainder Clause, the constitutional right to privacy, due process limits on retroactivity, restrictions on state interference in national political processes, and the doctrine of intergovernmental immunity. It also examines federal laws protecting taxpayer privacy and considers whether New York's publication of the President's state tax filings would violate the Internal Revenue Code's prohibition on disclosure of returns and return information. The Essay concludes that federal law does not prevent New York from adopting and enacting legislation that would require the release of the President's state tax returns. New York can—and, this Essay argues, should—publish the President's state tax returns if Trump himself and his allies in Congress refuse to act.

INTRODUCTION

For the past forty years, Presidents have made their personal income tax returns available for public inspection. This practice serves an important function in a tax system based on voluntary compliance. Presidential tax transparency bolsters the confidence of individual income taxpayers that their elected leader also pays part of the price "for civilized society."[1] Disclosure dispels the pernicious notion that "only the little people pay taxes,"[2] a notion that undermines tax morale and tax compliance where it takes root.[3]

President Donald Trump has deviated from this longstanding practice of presidential tax transparency. His reasons for doing so are unclear. Trump said during a Republican primary debate: "I will absolutely give my returns, but I'm being audited now for two or three years, so I can't do it until the audit is finished, obviously."[4] Yet President Nixon disclosed his tax returns while under audit,[5] and there is no rule against doing so. Indeed, as *New York Times* columnist Paul Krugman cogently observed, "[T]he fact that he's being audited . . . should make it easier for him to go public—after all, he needn't fear triggering an audit!"[6]

Presidential tax transparency is not an issue where views break down sharply on party lines. An overwhelming majority of Americans—including 64% of self-identified Republicans—say that the President should disclose his returns.[7] A bill in the House of Representatives to require the disclosure of the President's returns has cosponsors from both parties.[8] Nonetheless, House

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1. *Cf.* Compañía General de Tabacos de Filipinas v. Collector of Internal Revenue, 275 U.S. 87, 100 (1927) (Holmes, J., dissenting) ("Taxes are what we pay for civilized society . . . .").
2. *See* Enid Nemy, *Leona Helmsley, Hotel Queen, Dies at 87*, N.Y. TIMES (Aug. 20, 2007), http://www.nytimes.com/2007/08/20/nyregion/20cnd-helmsley.html [http://perma.cc/SV8G-QEF7].
3. On the relationship between taxpayer morale and tax compliance, see Marjorie E. Kornhauser, *A Tax Morale Approach to Compliance: Recommendations for the IRS*, 8 FLA. TAX REV. 599, 606-26 (2006); Erzo F. P. Luttmer & Monica Singhal, *Tax Morale*, 28 J. ECON. PERSP. 149 (2014); Benno Torgle et al., *Causes and Consequences of Tax Morale: An Empirical Investigation*, 38 ECON. ANALYSIS & POL'Y 313 (2008).
4. Gregory Korte, *Trump's Tax Returns Will Be Immediately Under Audit*, USA TODAY (Apr. 12, 2017, 11:35 AM), http://www.usatoday.com/story/news/politics/2017/04/12/trumps-tax-returns-immediately-under-audit/100272688 [http://perma.cc/86XH-K5RB].
5. Joseph J. Thorndike, *Donald Trump Won't Release His Tax Returns While Under Audit. But Richard Nixon Did*, TAX ANALYSTS BLOG (Apr. 4, 2016), http://www.taxanalysts.org/tax-analysts-blog/donald-trump-won-t-release-his-tax-returns-while-under-audit-richard-nixon-did/2016/04/04/193536 [http://perma.cc/L6TL-XVTQ].
6. Paul Krugman, Op-Ed, *Trump and Taxes*, N.Y. TIMES (May 13, 2016), http://www.nytimes.com/2016/05/13/opinion/trump-and-taxes.html [http://perma.cc/5XFD-27X6].
7. *See* Justin Green, *64% of Republicans Want To See Trump's Tax Returns*, AXIOS (Apr. 13, 2017), http://www.axios.com/64-of-republicans-want-to-see-trumps-tax-returns-2359211284.html [http://perma.cc/2HXU-5DUB].
8. Presidential Tax Transparency Act, H.R. 305, 115th Cong. (introduced Jan. 5, 2017), http://www.govtrack.us/congress/bills/115/hr305 [http://perma.cc/8NXS-CVX8]; *see also* Cristina Marcos, *Tax March Protesters Pressure Republicans Who Called for Trump Tax Returns*, HILL (Apr. 11, 2017), http://thehill.com/policy/finance/328340-tax-march-protesters-pressure-republicans-who-called-for-trump-to-release-tax [http://perma.cc/FLV3-2M5L] (noting

leaders have prevented the bill from coming to the floor for a vote. Efforts in the U.S. Senate to force disclosure have been no more successful.[9]

The prospects for presidential tax transparency legislation look brighter at the state level. Following up on a suggestion first put forward by this author,[10] New York State Senator Brad Hoylman and State Assemblyman David Buchwald have introduced legislation requiring the state's Department of Taxation and Finance to release any state tax returns filed by the President and Vice President—along with the state's U.S. Senators, Governor, Lieutenant Governor, Comptroller, and Attorney General—for the five years prior to taking office as well as all state tax returns filed while in office.[11] Trump's New York State tax returns will not contain all of the information that might be found in his federal filings, but they contain much of it. Most significantly, they will reveal the income that he reports from all sources, the deductions that he claims, and the amounts he has paid to New York State and New York City.[12] Disclosure of those returns will reveal whether Trump has been contributing to the cost of state and local services enjoyed by himself, his family, and his businesses.[13] And

that "[m]ore than a dozen Republican members of Congress have said Trump should make his tax returns available to the public, in line with four decades of presidential precedent").

9. One Republican senator has suggested that she might be willing to subpoena Trump's returns as part of an investigation of his ties to Russia. *See* Patrick Whittle, *Maine's Susan Collins: I'm Open to Subpoena of Trump's Taxes*, BOSTON.COM (Feb. 22, 2017), http://www.boston.com/news/politics/2017/02/22/maines-susan-collins-im-open-to-subpoena-of-trumps-taxes [http://perma.cc/Z4GC-M6SM]. Senate Majority Leader Mitch McConnell indicated during the 2016 presidential campaign that he thought Trump should release his returns, *see* Sylvan Lane, *McConnell on Trump Tax Returns: 'Tradition' Is To Release Them*, HILL (May 17, 2016, 3:41 PM), http://thehill.com/policy/finance/280226-mcconnell-on-trump-tax-returns-tradition-is-to-release-them [http://perma.cc/N5L4-Q62N], but McConnell has been silent on the subject since then.

10. Daniel Hemel, Op-Ed, *There's a Quick and Easy Way To See Trump's Tax Returns*, WASH. POST (Apr. 11, 2017), http://www.washingtonpost.com/opinions/theres-a-quick-and-easy-way-to-see-trumps-tax-returns/2017/04/11/2765cd38-1b0a-11e7-bcc2-7d1a0973e7b2_story.html [http://perma.cc/63MA-P55G].

11. N.Y. State Assembly Bill No. A07462, 2017-2018 Legislative Session (introduced Apr. 26, 2017), http://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A07462&term=2017&Summary=Y&Actions=Y&Memo=Y&Text=Y [http://perma.cc/U8ZX-9RTZ]; N.Y. State Senate Bill No. S05572A, 2017-2018 Legislative Session (introduced Apr. 17, 2017).

12. *See Form IT-201: Resident Income Tax Return*, N.Y. STATE DEP'T TAX'N & FIN. (2016), http://www.tax.ny.gov/pdf/current_forms/it/it201.pdf [http://perma.cc/7ZDM-NFWU].

13. In the period between Trump's election on November 8, 2016, and his inauguration on January 20, 2017, New York City spent approximately $25.7 million on security for the President-elect and his family. *See* Jen Kirby, *At $25 Million, Trump's NYC Security Bill Is Cheaper Than First Estimated*, N.Y. MAG.: DAILY INTELLIGENCER (Feb. 23, 2017, 2:32 PM), http://nymag.com/daily/intelligencer/2017/02/trump-security-in-nyc-will-end-up-costing-usd25-million.html [http://perma.cc/5RMB-Z27Z]. This is, of course, a small fraction of the total

because of the close correspondence between federal and state definitions of income, Trump's state tax returns will likely reveal whether he has been using phantom losses to offset federal income tax liability as well.[14]

The proposal for disclosure of the President's state tax returns is distinct from the suggestion that states pass laws requiring presidential candidates to release their federal returns as a condition for appearing on those states' 2020 ballots.[15] The proposals are not mutually exclusive, but disclosure of the President's state tax returns has important advantages over the ballot access approach. First, disclosure of the President's state tax returns could occur immediately, whereas a ballot access law would not require Trump to disclose his returns until 2020. Second, some of the states that might plausibly pass a ballot access law are states that President Trump lost by a landslide in 2016 and stands little chance of winning in 2020. President Trump might decide to keep his name off of those states' ballots rather than disclosing his returns. A state tax return disclosure law, by contrast, could be passed by President Trump's home state of New York and would be effective regardless of where he decides to compete in 2020.

This Essay addresses legal issues related to disclosure of the President's state tax returns. I do not consider the constitutionality of ballot access laws discussed in the previous paragraph.[16] Part I articulates the case for presidential tax transparency legislation at the state level. Part II provides an overview of the pending legislation in the New York legislature that would require disclo-

value of services that Trump, his family, and his ventures have received from New York State and New York City over the course of decades.

14. *See* Nicholas Confessore & Binyamin Appelbaum, *How a Simple Tax Rule Let Donald Trump Turn a $916 Million Loss Into a Plus*, N.Y. TIMES (Oct. 3, 2016), http://www.nytimes.com/2016/10/04/us/politics/donald-trump-taxes.html [http://perma.cc/Z7W9-FF9A]. Reports during the 2016 presidential campaign that Trump had claimed $916 million in net operating losses in 1995 were based on disclosure of state—not federal—returns. *See id.*

15. Lawmakers in twenty-six states had introduced bills along these lines as of April 15, 2017. *See* Paul Blumenthal, *State Lawmakers Are Trying To Force Trump To Disclose His Tax Returns*, HUFF. POST (Apr. 15, 2017, 8:01 AM), http://www.huffingtonpost.com/entry/trump-tax-returns-states_us_58f134c7e4b0b9e9848bfc57 [http://perma.cc/V38N-HERU]; *see also* Presidential Tax Returns & Candidate Qualifications, NAT'L CONF. STATE LEGISLATURES (2017), http://src.bna.com/mYa [http://perma.cc/B5TK-9M7Q] (listing twenty-three states as of March 2017 that have introduced such legislation).

16. For analyses of the federal constitutional issues related to state ballot access laws, see Vikram David Amar, *Can and Should States Mandate Tax Return Disclosure as a Condition for Presidential Candidates to Appear on the Ballot?*, VERDICT (Dec. 30, 2016), http://verdict.justia.com/2016/12/30/can-states-mandate-tax-return-disclosure-condition-presidential-candidates-appear-ballot [http://perma.cc/E5U6-CMRP]; Danielle Lang, *States Can Require Financial Disclosure by Presidential Candidates to Safeguard Electoral Transparency*, TAKE CARE (Apr. 6, 2017), http://takecareblog.com/blog/states-can-require-financial-disclosure-by-presidential-candidates-to-safeguard-electoral-transparency [http://perma.cc/KJ4C-8584].

sure of state tax returns filed by the President, Vice President, and statewide elected officials. Part III considers federal constitutional questions posed by the proposed law. Part IV focuses on federal statutory law, and specifically § 6103 of the Internal Revenue Code, concerning confidentiality and disclosure of returns and return information. I conclude that on the best reading of existing precedents and statutes, federal law does not prevent New York from enacting state tax transparency legislation along the lines of the proposed bill.

I. THE CASE FOR PRESIDENTIAL TAX TRANSPARENCY

Every President for the past forty years—from Jimmy Carter through Barack Obama—has released his federal income tax returns for public inspection.[17] Yet presidential tax transparency is an even more longstanding practice than the above statement might suggest. Carter's predecessor, Gerald Ford, disclosed a decade's worth of data revealing his gross income, his taxable income, his deductions for medical expenses, charitable contributions, state and local taxes, and interest, his federal tax liability, and his federal tax as a percentage of gross income.[18] President Nixon disclosed his returns for the years 1969 through 1972 as well. President Trump's decision not to disclose his returns or any of the information therein thus marks a break from nearly a half century of presidential practice.[19]

Presidential tax transparency serves four specific functions. The first is bolstering taxpayer morale. Disclosure of the President's returns gives ordinary taxpayers greater confidence that their elected leaders are paying taxes too. To be sure, this makes disclosure something of a double-edged sword: disclosure can have the unintended consequence of lowering taxpayer morale if it reveals

17. *See* George K. Yin, *Congressional Authority to Obtain and Release Tax Returns*, 154 TAX NOTES 1013 (2017).

18. Tax History Project, *Income and Tax Information for the President and Mrs. Ford - 1966/1974 Deductions*, TAXANALYSTS, http://www.taxhistory.org/www/website.nsf/Web/FordTaxInformation [http://perma.cc/D2ED-W6TD].

19. Not only have all Presidents since Nixon disclosed tax information for the years they were in office, but presidential candidates in recent years have disclosed returns dating much further back. Former President Obama released his returns dating back to 2000. Former Vice President Biden released his returns dating back to 1998. Vice President Pence has released his returns dating back to 2006. Hillary Clinton released her returns dating back to 2000 (and her husband released the couple's returns for the prior eight years in which he served as President). Tim Kaine released his returns back to 2006. And during his failed bid for the White House, Jeb Bush released his returns dating all the way back to 1981. A full library of returns released by Presidents, Vice Presidents, and past candidates for those positions is available through the Tax History Project. *See* Tax History Project, *Presidential Tax Returns*, http://www.taxhistory.org/www/website.nsf/web/presidentialtaxreturns [http://perma.cc/YPV7-T3KF].

that leaders are not paying their fair share of taxes (however "fair share" might be defined). Yet if a norm of presidential tax transparency is established, aspirants for high office will know that their returns will be released and so will be less likely to evade taxes in the first place.[20] Beyond the immediate effect that disclosure of President Trump's returns might have, entrenchment of a presidential tax transparency norm would yield positive consequences for morale and compliance over the long term.

Moreover, even when disclosure of a President's tax returns would reveal payments at a very low effective rate, nondisclosure does little for taxpayer morale. If Presidents and presidential candidates who pay taxes at high rates disclose their returns and those who pay at low rates do not, then rational observers will assume the nondisclosers have something to hide. Of course, disclosure of Trump's tax returns might do further harm to morale if we find out that the President is paying less in taxes than even his nondisclosure would suggest. But to reiterate, a practice of presidential tax transparency can bolster morale over the course of years and decades even if the immediate morale effects of disclosing President Trump's tax returns are ambiguous.

A second function of presidential tax transparency is to aid voters and their representatives in evaluating whether tax reforms proposed by the President serve his personal interest or the general interest. For example, the leak of President Trump's 2005 federal income tax returns revealed that he would have paid no federal income taxes that year if not for the existence of the alternative minimum tax—a tax he has vowed to abolish.[21] Disclosure of the President's state tax returns might reveal how much he benefits from specific itemized deductions and the preferential rate for qualified dividends and long-term capital gains—elements of the Internal Revenue Code that might be affected by a comprehensive tax reform package. Of course, the fact that the President personally benefits from a specific reform does not mean that the reform is bad idea or that the President's only purpose in supporting the measure is self-interest. This is one factor in assessing the President's tax reform ideas—not the only factor.

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20. Consider the example of then-presidential candidate Mitt Romney's surprising decision to claim a smaller charitable contribution deduction than he would have been allowed to on his 2011 return so as to raise his effective tax rate. *See* Jacob Weisberg, *Why Did Mitt Romney Overpay His Taxes?*, SLATE (Sept. 21, 2012, 4:30 PM), http://www.slate.com/articles/news_and_politics/the_big_idea/2012/09/romney_s_taxes_the_gop_candidate_s_preposterous_explanation_for_overpaying_them_.html [http://perma.cc/V5NR-EYV3].

21. *See* Lynnley Browning, *The 'Very Strange' Item on Trump's 1040: Alternative Minimum Tax*, BLOOMBERG POLITICS (Mar. 16, 2017, 5:00 AM), http://www.bloomberg.com/politics/articles/2017-03-16/the-very-strange-item-on-trump-s-1040-alternative-minimum-tax [http://perma.cc/RK5T-3ZXS].

Third, disclosure of the President's tax returns might reveal other conflicts of interest potentially affecting his performance in office. Norman Eisen and Richard Painter, each of whom previously served as the chief White House ethics lawyer (Eisen under a Democratic President, Painter under a Republican), have suggested that Trump's tax returns might reveal the extent of his ties to Russia and other foreign powers.[22] To be sure, even if Trump were receiving payments from the Russian government, there is no line on his returns—federal or state—where he would report: "$*X* received from Vladimir Putin for services rendered." But while President Trump's tax returns are unlikely to contain smoking-gun evidence of ties to Russia, his returns might shed some light on his sources of income and potential foreign entanglements.[23]

Fourth and finally, presidential tax transparency serves as a check on improper presidential influence over the Internal Revenue Service (IRS).[24] The President appoints the Commissioner of Internal Revenue (the leader of the IRS) and can remove her at will.[25] We might worry that this arrangement incentivizes the IRS to show lenience in its audit of the President's personal income tax returns.[26] As George Yin notes, "[t]his would not be an idle concern": before the era of presidential tax transparency began, the IRS audited President Nixon's returns and overlooked (intentionally or unintentionally) deficiencies exceeding $400,000.[27] In response to this episode, calls for presidential tax

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22. Norman Eisen & Richard W. Painter, *What Trump's Tax Returns Could Tell Us About His Dealings with Russia*, POLITICO MAG. (Oct. 31, 2016), http://www.politico.com/magazine/story/2016/10/donald-trump-taxes-russia-214405 [http://perma.cc/8A64-U2XG].

23. Two of President Trump's lawyers wrote a memorandum to their client dated March 8, 2017, stating that the President's tax returns for the prior ten years reveal no income from Russian sources, debt to Russian lenders, equity investments by Russian investors in Trump entities, or debt or equity investments by President Trump in Russian entities, "[w]ith a few exceptions." *See* Mark Landler & Eric Lipton, *Trump Lawyers Say He Had No Russian Income or Debt, With Some Exceptions*, N.Y. TIMES (May 12, 2017), http://www.nytimes.com/2017/05/12/us/politics/trump-russia-tax-returns.html [http://perma.cc/7B6H-7DN3]. The "exceptions" include the 2008 sale of a Florida estate to a Russian billionaire for $95 million, income of up to $12 million from a Miss Universe pageant in Moscow in 2013, and "immaterial" amounts from the sale of goods and services to Russian individuals and entities. *Id.* Significantly, the lawyers' letter is dated prior to the likely filing of President Trump's returns for tax year 2016, and so might not reflect more recent transactions involving Russia.

24. Yin, *supra* note 17, at 1015.

25. 26 U.S.C. § 7803(a) (2012).

26. The IRS audits the returns of the President and Vice President each year as a matter of course. *See Internal Revenue Manual § 4.8.4.2 (2017)*, INTERNAL REVENUE SERV., http://www.irs.gov/irm/part4/irm_04-008-004.html#d0e88 [http://perma.cc/Z5SG-9UY3].

27. Yin, *supra* note 17, at 1015.

transparency led President Nixon to become the first White House occupant to disclose his returns.[28]

One might ask why these interests—bolstering taxpayer morale, revealing the President's personal stake in tax reform, bringing other potential conflicts of interest to light, and erecting a safeguard against presidential meddling with IRS audits—are interests unique to New York State, such that it should take the lead on legislation that protects the norm of presidential tax transparency from Trump's attack. The short answer is that these are not New York-specific concerns: they are shared by voters and taxpayers in all fifty states and the District of Columbia. Ideally, then, Congress would pass legislation requiring release of the President's returns, rather than leaving the matter to the states. But congressional inaction is not a reason for the states to sit on their hands. As James Madison wrote in *The Federalist No. 51*, the allocation of power across federal and state levels in "the compound republic of America" allows each government to serve as a check on the other: "Hence a double security arises to the rights of the people."[29] If one adopts this "polyphonic" view of federalism, then congressional inaction is all the more reason for states to get into the game.[30]

While no aspect of this argument depends on New Yorkers having a distinct interest in presidential tax transparency, there is one way in which New Yorkers' interest in release of President Trump's tax information is uniquely strong. The New York City Police Department and Fire Department spent a combined $25.7 million to protect Trump Tower and the Trump family during the interregnum between Trump's election and his inauguration; the Police Department will spend an additional $127,000 to $146,000 per day to protect

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28. Joseph J. Thorndike, *JCT Investigation of Nixon's Tax Returns*, 151 TAX NOTES 1527 (2016).

One might add to this list that presidential tax transparency reveals information about a President's (or presidential candidate's) moral character. As David Herzig writes:

> Tax returns can be a window to understanding how someone truly thinks and behaves; what you do when you think the public isn't looking . . . shows the more authentic self. (Hillary Clinton's tax return is arguably less revealing, since she has long known her returns would be made public.) Trump's tax filings might provide some additional insight into how he would run the country. Does he follow rules? Stake out very aggressive positions? Take unnecessary risks?

David J. Herzig, *What If Trump Becomes President While His Tax Returns Are Under IRS Audit?*, FORBES (May 11, 2016), http://www.forbes.com/sites/janetnovack/2016/05/11/what-if-trump-becomes-president-while-his-tax-returns-are-under-irs-audit/#52a3c9c552a3 [http://perma.cc/UV67-WJWA].

29. THE FEDERALIST No. 51 (James Madison), *in* THE FEDERALIST PAPERS 320, 321-23 (Clinton Rossiter ed., 1961).

30. *See generally* ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS (2009); Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243 (2005).

the First Lady and her son while they remain in Trump Tower ($46.4 million to $53.3 million per year); and the Fire Department will spend another $4.5 million a year to protect the Trump family.[31] New Yorkers who each pay part of the cost of protecting the President's family deserve to know that the President himself is paying part of the cost too. I include this observation not to suggest that there is anything wrong with New York City spending millions to protect the Trump family. Indeed, it is entirely normal for the President's hometown to spend extra on security when a native son is elected to the White House.[32] But other past Presidents have given assurance that they are sharing in the costs of government—federal, state, and local. New Yorkers have an especially strong argument that President Trump should do the same.

II. PENDING LEGISLATION IN THE NEW YORK STATE SENATE

On April 26, 2017, State Assemblyman David Buchwald and New York State Senator Brad Hoylman introduced legislation that would require the release of state tax returns filed by the President and certain other elected officials. The bill, labeled A07642 in the Assembly and S05572 in the Senate, amends section 697 of the New York Tax Law, which currently requires state officials to keep tax returns secret.[33] The bill includes five key provisions:

> (1) The bill would require the state Department of Taxation and Finance to post on its website a statement disclosing whether the President, Vice President, U.S. Senators from New York, Governor, Lieutenant Governor, Comptroller, and Attorney General have filed state income tax returns in any of the five tax years before taking office. If so, the Department also must put in its statement certain information as recorded on the covered officials' returns, including each official's "New York adjusted gross income" (i.e., adjusted gross income from the official's federal return plus certain state-specific adjustments), amount of

31. Letter from James P. O'Neill, Police Comm'r, City of New York, to Sen. Charles Schumer et al. (Feb. 21, 2017), http://maloney.house.gov/sites/maloney.house.gov/files/NYC%20Letter%20RE%20Trump%20Tower%20Reimbursement.pdf [http://perma.cc/623L-N95S].

32. The cost to the Chicago Police Department of protecting President Obama's home in the city's quiet Kenwood neighborhood was comparatively modest: in the range of $6,500 per day. *See* Annie Sweeney, *President Barack Obama's Chicago Home: City Spends At Least $2.2 Million To Protect It*, CHI. TRIB. (July 21, 2009), http://articles.chicagotribune.com/2009-07-21/news/0907200504_1_darrin-blackford-chicago-home-obama-home [http://perma.cc/FLW2-8D9A].

33. *See* N.Y. TAX LAW § 697(e) (McKinney 2016).

deductions, taxable income, total New York state and New York City taxes due, withholdings, refunds, and penalties.[34]

(2) The bill would require the state Department of Taxation and Finance to post copies of the actual state returns filed by the covered officials for the prior five years, but instructs the Department to redact social security numbers, account numbers, and addresses listed on the return as well as "any additional information if the commissioner determines that the disclosure of such information will violate federal law.[35]

(3) For each year that a covered official files a return while in office, the bill would require the Department of Taxation and Finance to post a statement with the above-listed information as well as a copy of the return with the above-mentioned redactions.[36] (New York's U.S. Senators, Governor, Attorney General, and Comptroller already make their returns available for public inspection.[37])

(4) If the Commissioner of the Department determines that any information must be redacted because disclosure would violate federal law, the Commissioner must post on the Department's website a description of the information and a "detailed explanation" as to why disclosure would violate federal law.[38]

(5) The bill includes a severability clause so that if any portion is struck down by a court, the rest of the bill remains in operation.[39]

The bill would take effect immediately upon passage, and the first set of disclosures would occur within thirty days. When a new individual enters one of the covered offices, the Department would have thirty days to make the required disclosures regarding the new officeholder's last five years of filings. Re-

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34. N.Y. State Assembly Bill No. A07462, § 1, 2017-2018 Legislative Session (introduced Apr. 26, 2017), http://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A07462&term=2017&Summary=Y&Actions=Y&Memo=Y&Text=Y [http://perma.cc/U8ZX-9RTZ].

35. *Id.*

36. *Id.*

37. See Matthew Hamilton, *As Trump Releases Tax Plan, NY Pols Push Tax Return Disclosure Bill*, ALBANY TIMES UNION (Apr. 26, 2017, 2:36 PM), http://www.timesunion.com/allwcm/article/Awaiting-Trump-tax-plan-NY-lawmakers-push-tax-11100305.php [http://perma.cc/2C3L-H4CY].

38. N.Y. State Assembly Bill No. A07462, § 1, 2017-2018 Legislative Session (introduced Apr. 26, 2017), http://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A07462&term=2017&Summary=Y&Actions=Y&Memo=Y&Text=Y [http://perma.cc/U8ZX-9RTZ].

39. *Id.*

turns filed while in office would be posted on May 15 of each year (or thirty days after the filing of a late return).[40]

The language is, for the most part, impressively specific, but the bill is arguably ambiguous on one score: it requires disclosure of "all income tax returns" filed by covered officials but does not specify the scope of the term "return." New York's "Resident Income Tax Return" is a four-page document requiring taxpayers to disclose their wages, interest income, dividends, gains (or losses), business income, and rental real estate income for the prior year, among other sources of income, as well as the sum of itemized deductions they claim (or the standard deduction, if they choose not to itemize) and their ultimate tax liability and tax payments.[41] Some, though not all, of this information is copied directly from the taxpayer's federal Form 1040 filed with the IRS. Much additional information is contained on other tax forms filed with the state. For example, New York's "Resident Itemized Deduction Schedule," typically attached to the Resident Income Tax Return by taxpayers claiming itemized deductions, shows the sum of the taxpayer's gifts to charity, the amount of deductible medical and dental expenses, and the amount of mortgage interest for which the taxpayer claims a deduction, among other items.[42] Taxpayers carrying on business inside and outside of New York State also will file a Form IT-203-A, disclosing all places where they carry on business, the value of real and personal property owned and rented inside and outside New York State, and various other items.[43] It is not clear whether the Buchwald-Hoylman bill requires disclosure of these schedules as well.

III. FEDERAL CONSTITUTIONAL QUESTIONS

This Part addresses federal constitutional questions raised by the Buchwald-Hoylman bill. I first consider the argument that the proposed legislation is a bill of attainder. I go on to consider concerns related to the right to privacy, retroactivity, and state intrusion upon a nationwide presidential selection process. Finally, I consider whether the Buchwald-Hoylman bill might be barred by the doctrine of intergovernmental immunity. I conclude that the federal

40. An earlier draft of the legislation was introduced in the State Senate on April 17. The April 26 version amends that placeholder draft. As of May 8, the draft had eighteen co-sponsors in the State Senate and more than forty in the State Assembly.

41. *Form IT-201: Resident Income Tax Return*, N.Y. STATE DEP'T TAX'N & FIN. (2016), http://www.tax.ny.gov/pdf/current_forms/it/it201.pdf [http://perma.cc/DD3M-T64Q].

42. *Form IT-201-D: Resident Itemized Deduction* Schedule, N.Y. STATE DEP'T TAX'N & FIN. (2016), http://www.tax.ny.gov/pdf/current_forms/it/it201d.pdf [http://perma.cc/33HK-3JAX].

43. *Form IT-203-A: Business Allocation Schedule*, N.Y. STATE DEP'T TAX'N & FIN. (2016), http://www.tax.ny.gov/pdf/current_forms/it/it203a_fill_in.pdf [http://perma.cc/A54Q-4VVF].

Constitution and the precedents construing it do not pose a serious barrier to implementation of the Buchwald-Hoylman bill or similar state legislation.

A. *Bill of Attainder*

One commentator has suggested that if a law were passed directing the disclosure of a presidential candidate's tax returns, "Trump, no doubt, would try and challenge it as a bill of attainder," i.e., a legislative act that unconstitutionally imposes punishment upon a specific person or group of persons.[44] While Trump might level the same bill of attainder charge against the Buchwald-Hoylman legislation, the new proposal will almost certainly survive such a challenge, at least insofar as a reviewing court hews to the Supreme Court's existing bill of attainder jurisprudence.

Article I, Section 10 of the Constitution provides that "[n]o State shall . . . pass any Bill of Attainder."[45] A similar prohibition on bills of attainder applies to Congress under Article I, Section 9.[46] The most relevant precedent regarding the bill of attainder prohibition comes from *Nixon v. Administrator of General Services*,[47] a 1977 case in which the Supreme Court upheld the Presidential Recordings and Materials Preservation Act. That law was passed after former President Nixon, following his resignation from office, sought to assert ownership over forty-two million pages of documents and eight hundred tape recordings produced during his presidency.[48] Section 101(a) of the Act instructed the Administrator of General Services to seize tape recordings that "involve former President Richard M. Nixon or other individuals who, at the time of the conversation, were employed by the Federal Government" and that were recorded during the years Nixon was in the White House.[49]

Section 101(a) of the Presidential Recordings and Materials Preservation Act is remarkable in that it applied exclusively to one named President, not his predecessors or successors, and not to other elected officials. The law's specificity made it much more vulnerable to a bill of attainder challenge than would be the Buchwald-Hoylman proposal, which applies to a broader set of officials.

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44. David Cay Johnston, *There is "Incredibly Strong Evidence" Donald Trump Has Committed Tax Fraud*, DEMOCRACY NOW! (June 16, 2016), http://www.democracynow.org/2016/6/16/david_cay_johnston_there_is_incredibly [http://perma.cc/7EDE-EYBG].

45. U.S. CONST. art. I, § 10, cl. 1.

46. U.S. CONST. art. I, § 9, cl. 3. The Supreme Court has never suggested that the bill of attainder analysis differs depending on whether the law in question is a federal law or a state law.

47. 433 U.S. 425 (1977).

48. *See id.* at 430-433.

49. Presidential Recordings and Materials Preservation Act, Pub. L. No. 93-526, § 101(a), 88 Stat. 1695 (1974).

Yet as noted above, the Supreme Court *upheld* the Presidential Recordings and Materials Preservation Act. The Court recognized that a prohibited bill of attainder has two elements: specificity and the infliction of punishment.[50] With regard to the specificity element, the Court said "the fact that [the law] refers to [Nixon] by name . . . does not automatically offend the Bill of Attainder Clause."[51] The relevant question instead is whether Nixon "constituted a legitimate class of one."[52] The Court concluded that he did, since "at the time of the Act's passage, only his materials demanded immediate attention."[53] The presidential papers of every former President from Herbert Hoover to Nixon's immediate predecessor, Lyndon Johnson, had already been deposited in presidential libraries.[54]

Measured against this standard, the Buchwald-Hoylman proposal would not meet the specificity element of the bill of attainder definition. First, Trump would not be a class of one: the proposed legislation would apply to every President from Trump thereafter and to other elected officials. Moreover, as in *Nixon*, the narrow scope of the statute would be justified by legitimate governmental purposes: bolstering taxpayer morale, allowing voters and their representatives to evaluate their leaders' personal interest in tax reform, and potentially revealing other conflicts of interest that might affect these officials' performance in office. We can of course debate whether these objectives are better fulfilled through broader disclosure (e.g., a law applying to the President and Vice President, statewide elected officials, *and members of the House of Representatives*). Yet as the Court in *Nixon* made clear, a law does not fall on bill of attainder grounds simply because some "individual or group that is made the subject of adverse legislation can complain that the lawmakers could and should have defined the relevant affected class at a greater level of generality."[55]

The Buchwald-Hoylman proposal would not be a bill of attainder for a further reason: it does not inflict punishment. The sorts of punishments prohibited by the bill of attainder clause include "imprisonment," "banishment," "punitive confiscation of property by the sovereign," and "a legislative enactment barring designated individuals or groups from participation in specified employments or vocations."[56] The proposed legislation would do none of these things; it would simply force elected officials to do what past Presidents have

50. 433 U.S. at 472-73.

51. *Id.* at 472.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at 470.

56. See *id.* at 474.

done on their own volition. More generally, the *Nixon* Court held that a law would not satisfy the punishment element of the bill of attainder definition—and so could not be struck down on those grounds—if the law, "viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes."[57] As emphasized above, the proposed legislation would serve several specific nonpunitive purposes and so would not be considered a bill of attainder under existing case law.

B. *Right to Privacy*

A second concern that has been raised regarding tax transparency legislation is taxpayer privacy. In explaining why he voted against an amendment to require release of President Trump's federal returns, House Ways and Means Committee Chair Kevin Brady said: "Privacy and civil liberties are still important rights in this country, and the Ways and Means Committee is not going to start to weaken them."[58] The first part of Brady's statement is difficult to disagree with: the right to privacy is indeed important (even if its constitutional basis is somewhat uncertain). But the constitutional right to privacy has never extended so far as to protect an individual's tax returns from disclosure.

Individual income tax returns have been public information at several times in American history. When the first income tax took effect in 1862, Congress made the names and liabilities of individual taxpayers available for public inspection.[59] The Revenue Act of 1924 likewise required the Commissioner of Internal Revenue to make available for public inspection a list with each individual taxpayer's name, address, and amount of income tax paid.[60] This provision was repealed two years later,[61] but not before the Supreme Court had an opportunity to consider the measure in the 1925 case *United States v. Dickey*.[62] While neither party in *Dickey* disputed whether Congress had the authority to mandate disclosure, the Court did "assume" that the legislature has "the pow-

57. *Id.* at 475-76.

58. Conor Friedersdorf, *These 23 Republicans Passed on a Chance to Get Trump's Tax Returns*, ATLANTIC (Feb. 15, 2017), http://www.theatlantic.com/politics/archive/2017/02/these-23-republicans-passed-on-a-chance-to-get-trumps-tax-returns/516768 [http://perma.cc/5EX7-PZ9D].

59. Act of July 1, 1862, ch. 119, §§ 15, 19, 12 Stat. 432, 437, 439 (repealed 1870).

60. Revenue Act of 1924, ch. 234, § 257, 43 Stat. 293.

61. Revenue Act of 1926, ch. 27, § 257, 44 Stat. 52.

62. 268 U.S. 378 (1925).

er . . . to forbid or to allow such publication, as in the judgment of that body the public interest may require."[63]

The *Dickey* decision precedes the line of Supreme Court cases starting with *Griswold v. Connecticut* that recognized a fundamental right to privacy under the federal Constitution.[64] Yet insofar as those later decisions draw from "history and tradition,"[65] it is hard to identify a history and tradition of taxpayer privacy given the publicity of individual income tax returns at previous historical junctures. At the very least, we can say that the Supreme Court has never suggested that there is any constitutional limitation on tax return disclosure.

Federal courts of appeals that have considered similar questions have reached a similar conclusion. In *Plante v. Gonzalez*, the Fifth Circuit examined a "Sunshine Amendment" to the Florida Constitution requiring certain state officials to file financial disclosures available for public inspection.[66] Florida officials can comply with the Sunshine Amendment either by (a) filing a copy of their most recent federal income tax return or (b) filing a sworn statement disclosing "each separate source and amount of income which exceeds $1,000."[67] Five state senators challenged the amendment on right to privacy grounds.

The Fifth Circuit identified two "branches" in the Supreme Court's privacy jurisprudence: an autonomy branch and a confidentiality branch.[68] The autonomy branch applies to "'matters relating to marriage, procreation, contraception, family relationships, and child rearing and education.'"[69] Where a law implicates autonomy so defined, according to the Fifth Circuit, the law must be "the least restrictive means to reach a compelling goal."[70] The Fifth Circuit concluded that the Sunshine Amendment did not tread on individual autonomy and so did not trigger the application of the "least restrictive means" test. The court explained:

> Financial privacy does not fall within the autonomy right on its own. The essence of that right is the interest in independence in making cer-

63. *Id*. at 386.

64. *See* Griswold v. Connecticut, 381 U.S. 479 (1965).

65. *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2589 (2015); *cf*. Washington v. Glucksberg, 521 U.S. 702, 727 (1997) (referring to "those personal activities and decisions that this Court has identified as so deeply rooted in our history and traditions, or so fundamental to our concept of constitutionally ordered liberty, that they are protected by the Fourteenth Amendment").

66. 575 F.2d 1119 (5th Cir. 1978).

67. FLA. CONST. art. II, § 8(i)(1).

68. 575 F.2d at 1128.

69. *Id*. (quoting Paul v. Davis, 424 U.S. 693, 713 (1976)).

70. *Id*.

> tain kinds of important decisions. Disclosure laws, unlike laws banning contraception, miscegenation, or abortion, do not remove any alternatives from the decision-making process . . . . More basically, however, disclosure laws do not involve decisions as important as those in the earlier decided cases.
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> . . .
>
> Nor can [financial information] be protected as incident to protection of the family. The appropriate question is: What impact will financial disclosure have upon the way intimate family and personal decisions are made? Will it affect the decision whether to marry? Will it determine when or if children are born? There is no doubt that financial disclosure may affect a family, but the same can be said of any government action. While disclosure may have some influence on intimate decision-making, we conclude that any influence does not rise to the level of a constitutional problem.[71]

As for the confidentiality branch, the Fifth Circuit acknowledged that state senators have a "substantial" interest in the confidentiality of personal financial information.[72] According to the court: "Financial privacy is important not only [due to] the threat of kidnapping, the irritation of solicitations, the embarrassment of poverty. When a legitimate expectation of privacy exists, violation of privacy is harmful without any concrete consequential damages."[73] But the court added that "[t]he extent of the interest is not independent of circumstances." In financial and other matters, "public officials usually have less privacy than their private counterparts."[74]

The court weighed the public officials' confidentiality interests against the state concerns advanced by the Sunshine Amendment. It focused on three interests in particular. First, disclosure "makes voters better able to judge their elected officials and candidates for those positions" because it reveals financial interests that might affect performance in office.[75] Second, "the existence of the reporting requirement will discourage corruption" by "mak[ing] detection more likely."[76] Third, disclosure "should help" to increase "public confidence in Florida's government."[77] While acknowledging that "[f]inancial privacy is a

71. *Id.* at 1130-31 (citation and internal quotation marks omitted).

72. *Id.* at 1135.

73. *Id.*

74. *Id.* at 1135-36.

75. *Id.* at 1135.

76. *Id.*

77. *Id.*

matter of serious concern, deserving strong protection," the court concluded that "[t]he public interests supporting disclosure for these elected officials are even stronger."[78]

The Fifth Circuit's analysis of the Sunshine Amendment in *Plante* would seem to apply with equal force to the Buchwald-Hoylman proposal. The privacy interests of the President, Vice President, and statewide elected officials are no stronger than the privacy interests of the Florida state senators who brought the *Plante* challenge. And the state interests advanced by the proposed legislation are just as strong as the interests advanced by the Sunshine Amendment. Disclosure of the President's state tax returns—and the state tax returns filed by other officials covered by the proposal—will shed light on financial interests that might affect their performance in office, particularly with regard to tax matters. Moreover, the same concerns related to exposing corruption and enhancing public confidence identified by the *Plante* court would seem to apply here as well.

As a Fifth Circuit decision, *Plante* is persuasive but not binding precedent in New York.[79] By contrast, the Second Circuit's decision in *Barry v. City of New York* is binding on federal courts in New York State.[80] *Barry* involved a law passed by the New York City Council requiring all public employees with an annual salary of $30,000 or more, as well as their spouses, to disclose sources of income, capital gains, gifts, investments, and debts exceeding certain monetary thresholds. The law also allowed covered employees to seek an exemption from the City's Board of Ethics when disclosure would constitute an "unwarranted invasion of . . . privacy."[81] The law instructed the Board of Ethics to consider—when deciding whether to grant such an exemption—"whether the item is of a highly personal nature," "whether the item in any way relates to the duties of the positions held by such person," and "whether the item involves an actual or potential conflict of interest."[82]

The Second Circuit upheld the city law against a right to privacy challenge. It balanced the employees' interest in privacy against the city's interest in disclosure. With respect to the former, the court said: "We do not think that the right to privacy protects public employees from the release of financial infor-

78. *Id.* at 1136.

79. The Fifth Circuit now covers only Louisiana, Mississippi, and Texas. At the time of *Plante*, Alabama, Florida, and Georgia were within the Fifth Circuit as well, but in 1981 those states were split off to form a new Eleventh Circuit.

80. Barry v. City of New York, 712 F.2d 1554 (2d Cir. 1983).

81. *Id.* at 1556-57.

82. *Id.* at 1557.

mation that is related to their employment or indicative of a possible conflict of interest."[83] As for the latter, it added:

> We think the statute as a whole plainly furthers a substantial, possibly even a compelling, state interest. The purpose of the statute is to deter corruption and conflicts of interest among City officers and employees, and to enhance public confidence in the integrity of its government. In addition . . . , financial disclosure laws also derive considerable strength from the benefits widely felt to be derived from openness and from an informed public . . . . Whatever one may think of the intrusiveness of financial disclosure laws, they are widespread, and reflect the not unreasonable judgment of many legislatures that disclosure will help reveal and deter corruption and conflicts of interest.[84]

The local law in *Barry* is potentially distinguishable from the Buchwald-Hoylman bill in two ways. On the one hand, the law in *Barry* allowed exemptions in exceptional cases whereas the Buchwald-Hoylman bill does not. Yet one ought not make too much of this distinction, for even if the Buchwald-Hoylman bill included a similar exemption mechanism, it is doubtful that the President would qualify. (What item would *not* "in any way relate[] to the duties" of the President"?) On the other hand, the law in *Barry* applied to a much broader swath of individuals. The public interest in disclosure of financial information related to the President, Vice President, and statewide elected officials seems much stronger than the public interest in disclosure of financial information related to a schoolteacher or firefighter making slightly more than $30,000 a year.

Arguably, the party best positioned to bring a privacy claim here is not the President but the First Lady. Melania Trump might argue that notwithstanding the diminished privacy interest (and enhanced public interest) with respect to disclosure of the President's tax returns, she retains all the rights of a private citizen. Assuming that she and her husband have filed joint tax returns for the past five years, disclosure of his returns would reveal information about her finances as well. Note, though, that the *Barry* court considered—and rejected—the same claim with respect to the local law at issue in that case. In its view, "the filing of information regarding spouses was necessary to make [the law at issue in that case] effective."[85] The same reasoning would seem to apply to the First Lady or any other spouse of a covered official. Most married taxpayers file joint returns; if the public has a strong interest in seeing the tax returns filed by

83. *Id*. at 1562.

84. *Id*. at 1560 (citations and internal quotation marks omitted).

85. *Id*.

elected officials, then there is no practical way to vindicate that interest without disclosing information with respect to those officials' spouses as well. At least for future years, the First Lady and other political spouses have the option of filing separate returns and thereby shielding their personal financial information from public disclosure.

Any challenge to the New York law filed by the President or the First Lady would likely cite the Supreme Court's 1997 decision in *Chandler v. Miller*,[86] which struck down a Georgia law requiring candidates for certain state offices to certify that they had taken a drug test and that the results were negative. *Chandler* might be read as recognizing a robust right to informational privacy that even politicians enjoy. But *Chandler* is not fatal to the Buchwald-Hoylman bill. The Supreme Court's decision in *Chandler*—like the Fifth Circuit's in *Plante* and the Second Circuit's in *Barry*—involved the application of a balancing test.[87] The Court in *Chandler* concluded that the interests served by the Georgia law were quite weak: the statute "was not enacted . . . in response to any fear or suspicion of drug use by state officials";[88] it was "not well designed to identify candidates who violate antidrug laws" or "to deter illicit drug users from seeking election to state office";[89] and the state had "offered no reason why ordinary law enforcement methods would not suffice to apprehend such addicted individuals, should they appear in the limelight of a public stage."[90] The Buchwald-Hoylman bill, by contrast, is tailored to specific objectives: demonstrating to taxpayers in a system based on voluntary compliance that their leaders are paying taxes too, revealing officials' personal stakes in tax reform, shedding light on potential conflicts of interest that might affect performance in office, and checking against favoritism by tax authorities. These are not purely hypothetical concerns: indeed, the Nixon experience offers concrete evidence that favoritism presents a real risk.[91]

And if that were not enough, the *Chandler* Court went out of its way to clarify that its decision did not call into question the constitutionality of laws requiring public officials to disclose personal financial information. In the final section of the majority opinion, Justice Ginsburg wrote:

> We note, finally, matters this opinion does not treat. Georgia's singular drug test for candidates is not part of a medical examination designed

86. 520 U.S. 305 (1997).

87. *See id*. at 318.

88. *Id*. at 319.

89. *Id*.

90. *Id*. at 320.

91. *See supra* notes 24-28 and accompanying text.

> to provide certification of a candidate's general health, and we express no opinion on such examinations. Nor do we touch on financial disclosure requirements, which implicate different concerns and procedures. See, *e.g.*, *Barry* v. *City of New York,* 712 F. 2d 1554 (CA2 1983) (upholding city's financial disclosure law for elected and appointed officials, candidates for city office, and certain city employees); *Plante* v. *Gonzalez,* 575 F. 2d 1119 (CA5 1978) (upholding Florida's financial disclosure requirements for certain public officers, candidates, and employees).[92]

While the Supreme Court's favorable citations to *Barry* and *Plante* do not amount to adoption of those decisions, the citations serve to underscore that the *Chandler* was not intended by its author as a threat to financial disclosure laws.[93] Perhaps one might argue that the constitutional right to privacy has evolved since the time of *Plante*, *Barry*, and *Chandler* to protect the tax returns of a public official (or his or her spouse) from disclosure, but that argument finds scant support in precedent. At the very least, we can say that existing case law regarding financial disclosure requirements for public officials and employees gives us little reason to believe that the Buchwald-Hoylman bill would falter on right to privacy grounds.[94]

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92. *Chandler*, 520 U.S. at 323.

93. A further distinction between the Georgia drug testing law and the Buchwald-Hoylman bill is that the former implicated Fourth Amendment concerns. Indeed, Justice Ginsburg's opinion begins: "The Fourth Amendment requires government to respect the right of the people to be secure in their persons against unreasonable searches and seizures." *Id*. at 308 (alterations and internal quotation marks omitted). It is harder to see how the Fourth Amendment framework applies to the release of documents already in the government's possession.

94. The analysis here has focused on federal precedents regarding the right to privacy. New York state courts also have upheld financial disclosure requirements for public officials against right to privacy challenges. *See* Evans v. Carey, 53 A.D.2d 109 (N.Y. App. Div. 1976), aff'd, 359 N.E.2d 983 (N.Y. 1976); Watkins v. New York State Ethics Comm'n, 147 Misc. 2d 350 (N.Y. App. Div. 1990). At issue in *Watkins* was a New York law requiring state employees earning over $30,000 a year to file financial disclosures revealing their assets, liabilities, and sources of income. The law allows an employee to seek an exception from the State Ethics Commission "upon a showing that the public interest does not require disclosure and the applicant's duties do not involve the negotiation, authorization, or approval of . . . contracts . . . or . . . the adoption or repeal of any rule or regulation having the force and effect of law." *Watkins*, 147 Misc. 2d at 358. The court in *Watkins* concluded that this privacy mechanism "adequately safeguards" the constitutional interests of public employees. *Id*. at 357; *cf*. Hunter v. City of New York, 58 A.D. 2d 136, 141 (N.Y. App. Div. 1977) (finding that a financial disclosure requirement violates constitutional right to privacy when it requires any city employee with salary above $25,000 to disclose "details that have no bearing whatsoever upon the performance of the employee's duties"). Since the Buchwald-Hoylman bill applies only to officials with policymaking responsibilities, it would seem to satisfy the standard set forth by New York state courts.

C. Retroactivity

A third concern potentially relevant to the Buchwald-Hoylman bill is retroactivity: the law would require the release of returns that elected officials might have believed would be kept confidential at the time they filed those returns. This is not technically an ex post facto issue because the Ex Post Facto Clause applies only to criminal statutes.[95] However, the Supreme Court has held that retroactive legislation might violate due process under certain circumstances even if the legislation is not penal.[96]

The leading Supreme Court case on the retroactivity of non-penal legislation is *Eastern Enterprises v. Apfel*, in which the Court struck down a federal law requiring certain coal mining companies to pay into pension plans for former employees. There, a plurality of the Court said that "legislation might be unconstitutional if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience."[97] The *Eastern Enterprises* plurality identified three factors relevant to the constitutionality of retroactive laws: (1) the "economic impact" of the law on the affected party; (2) the extent to which the law interferes with "reasonable investment-backed expectations"; and (3) "the nature of the governmental action."[98]

As an initial matter, it is not clear whether a court would treat the Buchwald-Hoylman bill as a retroactive law at all. The bill applies prospectively to any official who occupies a covered office *after it takes effect*. Any official who does not want to be covered by the law has the option of resigning. In this respect, the Buchwald-Hoylman bill is quite unlike the typical "retroactive" law that punishes individuals or entities purely on the basis of *past* actions.

But even if a court did apply the *Eastern Enterprises* plurality's test to the Buchwald-Hoylman bill, the bill would seem to fare quite well. First, there is no reason to believe that disclosure would have any economic impact on the affected officials. (If disclosure would reveal trade secrets related to an official's businesses, then an as-applied challenge would potentially be appropriate.) Second, it is not clear what investment President Trump or any other official might have made based on an expectation of tax return confidentiality. If President Trump is to be taken at his word, he in fact expected to release his tax returns once the IRS completed its audit.[99] As for the nature of the governmental

95. *See* Calder v. Bull, 3 U.S. 386 (1798).

96. *See* Eastern Enterprises v. Apfel, 524 U.S. 498, 528-29 (1998) (plurality opinion).

97. *Id.* at 528-29.

98. *Id.* at 529-37.

99. *See* Korte, *supra* note 4.

action, the *Eastern Enterprises* plurality said that the law invalidated there "single[d] out certain employers to bear a burden that is substantial in amount, based on the employers' conduct far in the past, and unrelated to any commitment that the employers made or to any injury they caused."[100] By contrast, the Buchwald-Hoylman bill—even as applied to returns filed five years ago—is more closely related to the commitment that Trump has made to "faithfully execute the Office of President."[101] For voters to assess whether the President is being faithful to his country or whether he is advancing his own self-interest, they need a comprehensive understanding of his financial positions, which requires access not just to his most recent tax filings but also to filings further in the past.[102]

One cannot definitively rule out the possibility that a retroactivity-based argument would sway Supreme Court justices or lower court judges. As noted above in the discussion of privacy, new doctrines can be fashioned for new circumstances. My own view is that, given the lack of precedential support for such a position, any holding to this effect would appear to be politically motivated. But note that even if the application of the Buchwald-Hoylman bill to past years' tax returns were held invalid on retroactivity grounds, the bill's severability clause would ensure that the disclosure requirement still applies to returns filed after the bill's effective date.

D. Reverse Federalism

A fourth argument against the Buchwald-Hoylman bill's constitutionality is that the bill intrudes upon the national political process. This argument might draw some support from *Anderson v. Celebrezze*, in which the Supreme Court struck down an Ohio law limiting third-party candidates' access to the state's presidential ballot. There, the Court emphasized that the Ohio law "places a significant state-imposed restriction on a nationwide electoral process."[103] Somewhat similarly, the Court in *US Term Limits, Inc. v. Thornton* struck down

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100. *Eastern Enterprises*, 524 U.S. at 537.

101. *Cf.* U.S. CONST. art. II, § 1, cl. 8.

102. Justice Kennedy's partial concurrence in *Eastern Enterprises* suggests a similar conclusion. In Justice Kennedy's words, "due process requires an inquiry into whether in enacting the retroactive law the legislature acted in an arbitrary and irrational way." 524 U.S. at 539, 547 (Kennedy, J., concurring in the judgment and dissenting in part). So framed, the question in this case would be whether New York's decision to release returns filed in the five years before a person took office is "arbitrary" or "irrational." The state would have a very strong argument that release of returns from the recent past is essential to provide a more complete picture of the official's financial interests and taxpaying practices.

103. 460 U.S. 780, 795 (1983).

an Arkansas law restricting the state's U.S. Representatives to three terms and its U.S. Senators to two terms because "[a]llowing individual States to adopt their own qualifications for congressional service would be inconsistent with the Framers' vision of a uniform National Legislature representing the people of the United States."[104] The argument here would be that with the Buchwald-Hoylman bill, New York has in effect required that only candidates who are willing to have their New York state tax returns released can serve as President or Vice President. In this respect, the law amounts to a "state-imposed restriction on a nationwide electoral process" and places a new qualification on who can occupy those positions.[105]

Of course, the Buchwald-Hoylman bill does not directly prevent anyone from serving as President or Vice President; it simply requires the occupants of those positions (among others) to adhere to a longstanding norm of tax transparency. It is quite unlike the ballot access requirement invalidated in *Anderson*, which "totally exclude[d] any candidate who ma[de] the decision to run for President as an independent after the March deadline."[106] It is likewise distinguishable from the law in *Thornton* that made it impossible for a House member to run for a fourth term or for a Senator to run for a third.

Moreover, the ballot access cases do not hold that any state-imposed restriction on a nationwide electoral process is unconstitutional. According to the *Anderson* court:

> Constitutional challenges to specific provisions of a State's election laws . . . cannot be resolved by any "litmus-paper test" that will separate valid from invalid restrictions. Instead, a court must resolve such a challenge by an analytical process that parallels its work in ordinary litigation. It must first consider the character and magnitude of the asserted injury to the rights . . . that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide

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104. 514 U.S. 779, 783 (1995).

105. This argument assumes that *Thornton* applies to presidential elections. *But see* Richard L. Hasen, *How States Could Force Trump to Release His Tax Returns*, POLITICO MAG. (Mar. 30, 2017), http://www.politico.com/magazine/story/2017/03/donald-trump-tax-returns-release-214950 [http://perma.cc/T2GC-FBUP] (arguing on the basis of *Bush v. Gore* that *Thornton* may not apply to the presidential selection process).

106. *Anderson*, 460 U.S. at 809.

> whether the challenged provision is unconstitutional. The results of this evaluation will not be automatic; as we have recognized, there is no substitute for the hard judgments that must be made.[107]

Similarly, the Court in *Thornton* emphasized that states remain free to impose election regulations that "serve[] the state interest in protecting the integrity and regularity of the election process, an interest independent of any attempt to evade the constitutional prohibition against the imposition of additional qualifications for service in Congress."[108]

Here, New York can argue that even if *Anderson* and *Thornton* apply in this context, the state's interest in tax transparency outweighs any restriction that the Buchwald-Hoylman bill might impose on the nationwide electoral process. The state's interests are significant: promoting taxpayer morale, revealing the personal stakes that public officials might have in tax reform, and possibly shedding light on other financial conflicts. The restriction on the political process is relatively small: all that New York asks is for the President to do what previous Presidents have done voluntarily (and what the state's U.S. Senators, Governor, Comptroller, and Attorney General already do on their own). Moreover, New York cannot achieve the above-listed interests without disclosing personal income tax information related to the President and other covered officials. Again, the success of this argument will depend on how much weight a court gives to the state's justification for tax transparency legislation. But if the court agrees with the argument above that the state interest in tax transparency is quite strong, then *Anderson* and *Thornton* should not stand in New York's way.[109]

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107. *Id.* at 789-90 (citations and internal quotation marks omitted).

108. *Thornton*, 514 U.S. at 835.

109. One might perhaps argue also that the Buchwald-Hoylman bill intrudes upon some sort of executive privilege. But such an argument finds little doctrinal support. The closest case is *United States v. Nixon*, in which President Nixon invoked executive privilege to avoid compliance with a subpoena requiring him to produce tape recordings and documents. 418 U.S. 683 (1974). The Supreme Court acknowledged "the importance of the general privilege of confidentiality of Presidential communications in performance of the President's responsibilities," but concluded that "the generalized interest in confidentiality . . . cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice." *Id.* at 711-13.

The President's interest in the confidentiality of his personal income tax returns would seem to be much weaker than his interest in the confidentiality of communications with advisers. There is no reason to believe, for instance, that disclosure of the President's tax returns will cause the President's aides "to temper the candor of their remarks." *Id.* at 712. Nor is there any reason to believe that the Buchwald-Hoylman bill will divert the President from fulfilling his constitutional duties. *Cf.* Clinton v. Jones, 520 U.S. 681 (1997). For a court to

E. Intergovernmental Immunity

The doctrine of intergovernmental immunity limits the power of states to impose financial or regulatory burdens on the federal government. The doctrine dates back to the Supreme Court's 1819 decision in *McCulloch v. Maryland*,[110] in which the Court struck down a Maryland tax on bank notes issued by the Second Bank of the United States. The Supreme Court's articulations of the doctrine have softened somewhat in recent decades. In the 1988 case *South Carolina v. Baker*, the Court said:

> [U]nder current intergovernmental tax immunity doctrine the States can never tax the United States directly but can tax any private parties with whom it does business, even though the financial burden falls on the United States, as long as the tax does not discriminate against the United States or those with whom it deals. A tax is considered to be directly on the Federal Government only when the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities.[111]

The Court has applied similar principles outside the tax context: A state regulation is invalid under the intergovernmental immunity doctrine "only if it regulates the United States directly or discriminates against the Federal Government or those with whom it deals."[112]

While President Trump might argue that the Buchwald-Hoylman bill violates the intergovernmental immunity doctrine, that argument would encounter a number of obstacles. First and foremost, the intergovernmental immunity doctrine confers *immunity*, i.e., exemption from an obligation or a penalty. The Buchwald-Hoylman bill imposes no obligation on the President or any other federal official: the only entity to whom it applies is the New York State Department of Taxation and Finance. Second, as discussed in the bill of attainder context above, it is far from clear that disclosure of one's tax returns constitutes a penalty. More generally, there is no precedent for holding that the intergovernmental immunity doctrine prohibits a state from disclosing information in its possession merely because that information pertains to a federal official.

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strike down the Buchwald-Hoylman bill on executive privilege grounds, it would have to cut a new executive privilege doctrine out of whole cloth.

110. 17 U.S. (4 Wheat.) 316 (1819).

111. 485 U.S. 505, 523 (1988) (internal quotation marks omitted).

112. North Dakota v. United States, 495 U.S. 423, 425 (1990).

If a court did construe the Buchwald-Hoylman bill as imposing a penalty on the President for being President, then the bill would indeed implicate the intergovernmental immunity doctrine. The question then would be whether the penalty is discriminatory. New York could argue that the penalty applies to all officials elected on a statewide basis, with no discrimination between federal officials and state officials. But to reiterate: Getting to this point would first require a court to extend the intergovernmental immunity doctrine beyond the traditional conception of immunity, thus creating a brand new doctrine of intergovernmental informational privacy. Again, it is not impossible to imagine a court making this leap, but it is not a leap that existing precedents require.

iv. federal statutory questions

Section 6103 of the Internal Revenue Code is the federal statute most relevant to presidential tax transparency. I first conclude that the Buchwald-Hoylman bill would not violate § 6103. I next consider whether passage of the Buchwald-Hoylman bill would prompt the IRS to take retaliatory action against New York State pursuant to § 6103(p). This is a more complicated question, and it comes down to political prognostication as much as statutory interpretation.

A. *Confidentiality Requirements for Returns and Return Information*

Section 6103, enacted in 1976, provides for information sharing between the IRS and state agencies. It also establishes rules regarding the confidentiality of federal income tax returns. Section 6103(a) provides, in relevant part:

> Returns and return information shall be confidential, and except as authorized by this title . . .
>
>> (2) no officer or employee of any State, any local law enforcement agency receiving information under subsection (i)(1)(C) or (7)(A), any local child support enforcement agency, or any local agency administering a program listed in subsection (*l*)(7)(D) who has or had access to returns or return information under this section or section 6104(c) . . .

> shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section.[113]

Significantly, the nondisclosure requirement applies only to "returns" and "return information." The term "return" is defined as "any tax or information return, declaration of estimated tax, or claim for refund required by, or provided for or permitted under, the provisions of this title which is filed with the Secretary."[114] (Here, "Secretary" refers to the U.S. Secretary of the Treasury and, because it is part of the Treasury Department, the IRS.) A document filed with New York State and not with the IRS is clearly outside § 6103's definition of "return." Meanwhile, the term "return information" is defined to include:

> 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, overassessments, 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 . . . .[115]

Again, information submitted to the state tax authority generally would not fall within the definition of "return information," because it is not "received by, recorded by, prepared by, furnished to, or collected by the Secretary" (i.e., the IRS).

Perhaps one might argue that information filed with the state can qualify as "return information" if the same information is also filed with the IRS. But such information would not be covered by § 6103(a) for a separate reason. Section 6103(a) applies only to an official "who has or had access to returns or return information under this section or section 6104(c)" (i.e., as a result of federal-state information sharing). It would not apply to a state official who has or had access to returns or return information filed directly with the state.[116]

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113. 26 U.S.C. § 6103 (2012).

114. *Id.* § 6103(b)(1).

115. *Id.* § 6103(b)(2).

116. Upon first glance, it might appear ambiguous whether the phrase "who has . . . access to returns or return information under this section or section 6104(c)" applies only to the item that immediately precedes it—"any local agency administering a program listed in subsection (*l*)(7)(D)"—or whether it applies to all items that come before it, including "officer of employee of any State." Further examination reveals that the latter interpretation is the correct one. Subsection (*l*)(7)(D) allows the IRS to share federal tax returns with state and local officials administering the Social Security Act, the Supplemental Nutrition Assistance

Section 7213 goes on to make it "unlawful" for any state official "willfully to disclose . . . any return or return information . . . acquired by him or another person under [specified provisions] of section 6103 or under section 6104(c)."[117] Violations are felonies punishable by a fine of up to $5,000 or imprisonment for up to five years.[118] Note that § 7213 applies only to returns and return information obtained under §§ 6103 or 6104(c). There is no penalty under § 7213 for disclosure of information obtained through other means, further indicating that § 6103(a) does not extend to documents filed directly with the state.

The explanation accompanying § 6103 from the Joint Committee on Taxation reinforces this understanding. According to the Joint Committee, "the copies of the Federal returns or the return information required by a State or local government to be attached to, or included in, the State or local return do not constitute Federal 'returns or return information' subject to the Federal confidentiality rules."[119] If copies of federal returns filed directly with the state are not covered by § 6103(a), then ergo state forms filed with state tax authorities are not covered either.[120]

In sum, a state official would not be in violation of § 6103(a)—and would not be liable under § 7213—for disclosing part or all of an individual's state tax returns. Those returns—and the information therein—do not appear to be "returns" or "return information" as defined by the federal statute, and disclosure of state tax returns does not appear to be prohibited by federal law.

Program ("Food Stamps"), and other specified programs. *Id.* § 6103(*l*)(7). Section 6104(c) allows the IRS to disclose certain information regarding tax-exempt organizations to state officials. 26 U.S.C. § 6104(c) (2012). Section 6104(c) is irrelevant to "any local agency administering a program listed in subsection (*l*)(7)(D)" because disclosure to such agencies is already authorized by subsection (*l*)(7). The only interpretation that gives effect to the phrase "or section 6104(c)" is one that applies "under this section or section 6104(c)" to all the items that come before it.

117. *Id.* § 7213(a)(2).

118. *Id.*

119. *JCS-33-76, General Explanation of the Tax Reform Act of 1976*, STAFF JOINT COMM. TAX'N, 57 (Dec. 29, 1976), http://www.jct.gov/publications.html?func=startdown&id=2401 [http://perma.cc/U9UA-NF5K] [hereinafter *JCS-33-76, General Explanation of the Tax Reform Act of 1976*].

120. While the Joint Committee's report is not binding law, it is hard to see how a state official who discloses state tax returns could ever be held liable for "willfully" violating federal confidentiality rules given guidance from the Joint Committee indicating that information filed directly with the state is not subject to those rules.

B. IRS Retaliation Against New York State

One other provision in § 6103 potentially applies to disclosure of state tax returns. Section 6103(p)(8)(A) provides:

> Notwithstanding any other provision of this section, no return or return information shall be disclosed after December 31, 1978, to any officer or employee of any State which requires a taxpayer to attach to, or include in, any State tax return a copy of any portion of his Federal return, or information reflected on such Federal return, unless such State adopts provisions of law which protect the confidentiality of the copy of the Federal return (or portion thereof) attached to, or the Federal return information reflected on, such State tax return.[121]

New York is a state that "requires a taxpayer to . . . include in . . . a[] State tax return . . . information reflected on such Federal return." For example, New York's Resident Income Tax Return requires a taxpayer to disclose whether she itemized deductions on her federal return and what she reported as income on her federal return.[122] Section 6103(p)(8)(A) would thus seem to direct the IRS not to share federal returns or return information with New York unless New York adopts provisions of law protecting the confidentiality of federal return information on state tax returns. Arguably, passage of the Buchwald-Hoylman bill would mean that New York has no longer "adopt[ed] provisions of law which protect the confidentiality of . . . Federal return information reflected on [a] State tax return," and so would render New York ineligible to participate in federal-state information sharing under § 6103(p).

There are, however, a number of reasons to resist this conclusion. First, the Joint Committee on Taxation's explanation accompanying § 6103 emphasizes that "it is not intended that States be required to enact confidentiality statutes which are copies of the Federal statutes."[123] The one federal court to opine at any length on § 6103(p)(8) has likewise noted that "[s]ubsection (p)(8) leaves the states free to devise their own form of disclosure protection."[124] New York might still satisfy the permissive confidentiality condition embedded in § 6103(p)(8) if it disclosed returns filed by a limited number of elected officials in service of well-articulated state interests while protecting taxpayer confiden-

121. 26 U.S.C. § 6103(p)(8)(A) (2012).

122. *See Form IT-201*, *supra* note 12; *see also Instructions for Form IT-201*, N.Y. STATE DEP'T TAX'N & FIN. 15 (2016), http://www.tax.ny.gov/pdf/current_forms/it/it201i.pdf [http://perma.cc/5RX9-WJ9X].

123. *See JCS-33-76, General Explanation of the Tax Reform Act of 1976*, *supra* note 118, at 57.

124. *In re* Grand Jury Empanelled January 21, 1981, 535 F. Supp. 537, 542 n.4 (D.N.J. 1982).

tiality more broadly. Second, Massachusetts has for more than two decades required certain corporations doing business in the state to disclose a number of items also included on their federal tax returns, and the IRS has not invoked § 6103(p)(8) to cut off information sharing.[125] It is, of course, conceivable that the IRS would adopt a more aggressive interpretation of § 6103(p)(8) here, but that might open up the Service to accusations of selective and politically motivated application of the statute.

Third, if the IRS did cut off cooperation with New York in retaliation for passage of the Buchwald-Hoylman bill, New York would have a nonfrivolous constitutional claim against the Service. New York could argue that the provision of federal returns and return information to state tax authorities is analogous to the provision of federal grant dollars to states under conditional spending programs. The analogy is a strong one: the Constitution brooks no distinction between federal cash assistance to states and federal assistance to states in kind. The Supreme Court has said that "if Congress desires to condition the States' receipt of federal funds, it must do so unambiguously, enabling the States to exercise their choice knowingly, cognizant of the consequences of their participation."[126] Moreover, when a condition on federal funding goes beyond "relatively mild encouragement" and becomes "a gun to the head," it potentially violates the anti-coercion doctrine articulated in *NFIB v. Sebelius*.[127] New York could argue that § 6103(p)(8) does not make clear that a state will be cut off from all information sharing with the IRS if it discloses tax returns filed by a handful of elected officials, and that if § 6103(p)(8) did provide for such a result, it would be a "gun to the head."

Fourth, the IRS has strong reasons to continue sharing information with New York state tax authorities—and thus strong incentives not to adopt an aggressive interpretation of § 6103(p)(8). As Erin Scharff writes, "[s]haring data between the IRS and the states provides benefits to *both* levels of government."[128] State tax authorities benefit from access to data on taxpayers whose federal returns fail to include income that third parties have reported to the IRS.[129] This information alerts states that the same taxpayers may have failed

125. *See* Robert P. Strauss, *State Disclosure of Tax Return Information: Taxpayer Privacy Versus the Public's Right to Know*, STATE TAX NOTES, July 5, 1993, at 24.

126. South Dakota v. Dole, 483 U.S. 203, 207 (1987) (alterations and internal quotation marks omitted).

127. Nat'l Fed. of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2604 (2012).

128. Erin Adele Scharff, *Laboratories of Bureaucracy: Administrative Cooperation Between State and Federal Tax Authorities*, 68 TAX L. REV. 699, 714 (205) (emphasis added).

129. *See id.* (giving the example of a taxpayer who fails to report interest income on her Form 1040, notwithstanding the fact that her bank reports an interest payment to the IRS on a Form 1099-INT).

to report income on their state returns as well. But as Scharff emphasizes, "[t]he federal government also benefits from its collaborative activities by using state data."[130] For example, states inform the IRS when a death certificate has been filed, which in turn assists federal authorities in fighting Medicare fraud and ferreting out false refund claims.[131] Likewise, state licensing and permitting authorities often have better data on small businesses than the IRS does,[132] and so state data can help the IRS identify small businesses that have failed to file federal returns. If the IRS stopped sharing federal returns with New York, it would likely lose access to a valuable trove of state-generated information. This, in addition to the legal arguments above, would potentially deter the IRS from retaliating against New York for publishing the President's state tax returns.

Fifth and finally, the Buchwald-Hoylman bill includes an escape hatch if it becomes apparent that the IRS will retaliate by cutting off cooperation with New York State. As noted above, the bill allows the Commissioner of the Department of Taxation and Administration to redact information if she determines that disclosure would violate federal law. Much of the information on New York state tax returns—including the state's recalculation of adjusted gross income, taxable income, and state and local taxes—is not copied from the federal return and so should not be affected by § 6103 under any reading of that statute. But if disclosure of other items copied from the federal return would create complications under § 6103(p)(8), the redaction provision in the Buchwald-Hoylman bill might allow the Commissioner to take appropriate steps.[133]

The analysis here only touches the surface of the constitutional and practical questions that might arise if the IRS retaliated against New York for passing the Buchwald-Hoylman bill by cutting off cooperation with the state entire-

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130. *Id.* at 715.

131. *Id.*

132. *See id.* at 717.

133. Arguably, the escape hatch in the Buchwald-Hoylman bill is insufficient to deal with potential § 6103(p)(8) complications in that the bill only allows for redaction where "disclosure of such information will violate federal law." *See* N.Y. State Assembly Bill No. A07462, § 1, 2017-2018 Legislative Session (introduced Apr. 26, 2017), http://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A07462&term=2017&Summary=Y&Actions=Y&Memo=Y&Text=Y [http://perma.cc/U8ZX-9RTZ]. Section 6103(p)(8) does not prohibit a state from disclosing any information; it simply instructs the IRS not to share information with a state that fails to adopt appropriate confidentiality provisions. The Commissioner might conclude that even if disclosure would lead to consequences under § 6103(p)(8), it would not "violate federal law" and so the escape hatch cannot be activated.

ly.[134] Case law on the scope of § 6103(p)(8) is sparse, and anticipating the IRS's reaction to Buchwald-Hoylman bill is ultimately an exercise in speculation. For present purposes, the key points are that (1) § 6103 does not prohibit New York from enacting Buchwald-Hoylman bill; (2) any IRS response to the New York law would not follow automatically from the federal statute; and (3) in the far-from-certain event that the IRS does retaliate, New York would have a strong legal argument against the Service as well as a potentially viable redaction option.

conclusion

As the home state of President Trump, New York has unique access to state tax returns that would reveal much about the President's financial interests and taxpaying past. It has the opportunity to pass legislation that would bolster the longstanding norm of presidential tax transparency—a norm that, when followed, enhances tax morale and allows voters to make more informed choices about the individuals who will lead them. While it is impossible to predict litigation outcomes with 100% certainty, the best reading of existing precedents and statutes suggests that federal law does not stand in New York's way. If President Trump persists in his refusal to release his tax returns, and if the House and Senate leadership continues to block a floor vote on disclosure, New York lawmakers can ensure that the decades-old norm of presidential tax transparency lives another day.

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Preferred Citation: Daniel J. Hemel, *Can New York Publish President Trump's State Tax Returns?*, 127 YALE L.J. F. 62 (2017), http://www.yalelawjournal.org/forum/can-new-york-publish-president-trumps-state-tax-returns.

134. New York might in that instance raise a First Amendment claim as well: arguably, publication of the President's state tax returns is a form of speech, and cutting off cooperation with the state in retaliation for such a disclosure might be seen as the federal government punishing New York for its exercise of First Amendment rights. *See* United States v. American Library Ass'n, Inc., 539 U.S. 194, 210 (2003) ("[T]he government may not deny a benefit to a person on a basis that infringes his constitutionally protected freedom of speech even if he has no entitlement to that benefit.").